



# GUARDIANSHIP 101

Disabilities Concerns Subcommittee

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# Who might be subject to a guardianship?

A guardian may be appointed for an “incapacitated person” – one who can’t take care of self

- Self-care
- Financial matters

Statute defines inability to manage one’s personal care as inability “to meet one’s needs for medical care, nutrition, clothing, shelter, hygiene or safety so that physical injury, illness or disease” has occurred or will occur

Guardian (of the person) vs. conservator (of property)  
(These are New Mexico terms; different terminology in other states)

# When is guardianship appropriate?

- If person able to care for self, no guardianship.
- If person totally incapacitated, or incapacitated in certain areas, court may appoint a full or limited guardian as necessary to provide continuing care and supervision.
- Must find there are no suitable and available alternative resources and guardianship is least restrictive alternative

**“Guardianship shall be used only as is necessary to promote and to protect the well being of the person, shall be designed to encourage the development of maximum self reliance and independence of the person and shall be ordered only to the extent necessitated by the person's actual functional mental and physical limitations.”** (§45-5-301.1, emphasis added)
- Having a disability, even an intellectual disability, doesn't automatically mean an individual lacks ability to care for self or make own decisions

# Differing perspectives on guardianship

- Elders
  - Loss of capacity usually increases, rarely improves
  - Need for protective order often permanent
  - Focus on protection from abuse, exploitation from within family or from outside; potential loss of assets
- Persons with disabilities
  - Stereotypes foster presumption of incapacity
  - Capacity may **improve** with age and experience
  - For some, capacity is cyclical
  - Emphasis should be on:
    - recognizing individual's abilities, not disability
    - promoting independence and self-reliance
  - Importance of periodic review

# Minors

- Parent is natural guardian of minor child, without court intervention.
- After child turns 18 (i.e., reaches adulthood), parent must be appointed by court in order to serve as and have powers of guardian.
- Same for people with disabilities as for everyone else – i.e., child having disability doesn't automatically mean parent's status as guardian continues past age 18

# What's the effect of a guardianship?

- Guardian has powers specified by court. Does NOT automatically have right to make all decisions for protected person.
- Plenary (full) vs. limited guardianship – statutory preference for limited guardianship; may not be honored in practice

The court **“shall appoint a limited guardian if it determines that the protected person is able to manage some but not all aspects of personal care.”**

# Powers and duties of guardians

Guardian generally has following powers/duties (consistent with court order):

- have custody of the protected person
- decide where the person lives
- make health care decisions if no agent designated under Health Care Decisions Act
- provide for the person's care and comfort
- care for the person's belongings

Unless authorized by court order, guardian does NOT have the following powers:

- revoke the person's power of attorney for health care or finances
- override decision of agent designated by the person to make health care or financial decisions
- restrict the person's communications and interactions with others, with limited exceptions

Powers must be exercised in the manner that's least restrictive of the person's freedom, consistent with need for supervision. (§45-5-312(B))

## What rights does the protected person lose when subject to guardianship?

- Loses the rights granted to guardian by court's order.
- “[R]etains all legal and civil rights except those which have been expressly limited by court order or have been specifically granted to the guardian by the court.” (§45-5-301.1)

## Does the protected person have a say in whether a guardian is appointed?

- Has right to participate in guardianship proceedings and to object to appointment of a guardian.
- By state law, cannot consent to appointment of a guardian



# Who can be a guardian?

- Court can appoint any qualified person
- Operator/employee of facility where person resides can't be guardian (except employee related to person)
- Statute sets out order of priority but court can skip over and appoint person of lower priority, based on consideration of individual's preference, location, relationship, ability, potential conflicts of interest
- Individual and professional/corporate guardians
  - Professional guardian must be certified by a recognized certifying organization

## Termination/modification of guardianship

The protected person or any person interested in the person's welfare can petition court to:

- remove guardian and appoint a new one; court may do so if in person's best interest
- end the guardianship on grounds the person is no longer incapacitated; decision made by court after same procedure as for initial appointment of guardian
- Guardian's authority ends upon:
  - death of guardian or protected person
  - determination of incapacity of guardian
  - removal or resignation of guardian

# Conservatorship

- Conservator may be appointed to manage person's estate and financial affairs if management is necessary and the person is incapacitated and unable to do so effectively.
- Conservator is a fiduciary
- The person cannot consent to appointment of a conservator
- Termination of conservatorship
  - Protected person, personal representative, conservator or other interested person can petition court to end conservatorship
  - Same procedure as for appointment
  - If the court finds the person's "disability" has ended, it may end the conservatorship.

# Procedure

- **Petition** – may be filed by any person interested in the welfare of the alleged incapacitated person
- **Notice** to individual and interested parties
- If individual doesn't have **attorney**, court appoints one to represent the individual as **guardian *ad litem***
- **Examination** by health care professional
- **Court visitor** – interviews individual and proposed guardian; visits current and proposed residence; makes recommendation to court
- **Court hearing**
- **Order** – appointing guardian (plenary or limited) or dismissing case
- Statutory preference for limited guardianship (little effect)

## How is all this arranged?

- Petition typically filed by private attorney on behalf of family member(s)
- Guardian is volunteer or paid by family or from person's assets
- For low-income families, or where no other guardian available, Office of Guardianship at DD Planning Council can fill the need; contracts with and pays for:
  - Attorneys to file guardianship petitions, guardians *ad litem*, court visitors
  - Professional guardians/treatment guardians
- DDPC/OoG has no other authority regarding guardianships or conservatorships
- Will be covered in more detail in next presentation
- **All guardians and conservators are appointed and overseen by courts**

## Court oversight

- Reporting by guardian
  - Initial report – within 90 days of appointment
  - Annual reports thereafter - court may require more frequent reporting
  - Forms prescribed by Supreme Court
- Court review at least every 10 years

## Temporary guardianship

- May be appointed in emergency
- Based on finding of “serious and irreparable harm” to individual’s health while petition pending
- Up to 60 days (possible 30-day extension)

# Recent Changes to the Law

\*Spurred by guardianship agency scandals

\*Mostly based on new national model Code

## 2018 (SB 19)

- Court hearings typically open to public
- More notice, better access to records, for friends and relatives
- More extensive reporting requirements for guardians and conservators
- Financial accounts for protected persons must be kept separate
- Voting rights of protected person can't be abridged except in accordance with constitutional provision on voting rights
- Much more difficult for guardian to limit visitation with protected person
- No waiver of liability for conservators

# Recent Changes to the Law (continued)

## 2019 (SB 395)

- Professional guardians must be certified by recognized certifying organization
- Clearer expression of person's rights during hearings
- Courts can use investigators to do site visits for 10-year reviews
- Deleted ambiguous language giving guardians of adults same authority as parents of minors
- Deleted statutory language for reporting forms, leaving this to the courts
- Increased fines for late filing of reports from \$5/day to \$25/day
- Establishes process for complaints to court about guardians, conservators, Representative Payees



# Continuing issues/concerns

- Role of guardian *ad litem*
  - Attorney appointed to “represent” the person, present the person’s position to court
  - In practice, neutral role with “best interest” in mind
- Overuse of plenary rather than limited guardianships despite statutory directives favoring the latter
- Lack of explicit statutory authority for less restrictive arrangements, such as assisted decision-making
- Lack of court authority over Representative Payees

# Alternatives to guardianship

- Power of attorney
- Durable power of attorney for health care
- Advance directive for health care
- Advance directive for mental health care
- Treatment guardian
- Conservatorship
- Representative payee
- Supports and services
- Supported decision-making