

New Guardianship Laws & Changes to Court Process



PATRICIA M. GALINDO
SENIOR ATTORNEY

ADMINISTRATIVE OFFICE OF THE COURTS

What is the difference between a Guardian and a Conservator?

The term “Guardianship” generally refers to both Guardianship and Conservatorship cases.

Guardian

Makes personal and healthcare decisions for another adult

- Medical appointments
- Medical decisions
- Living arrangements

Conservator

Manages financial affairs of another adult.

- Checking accounts
- Investments
- Selling of real estate

How Does an Adult Guardianship Case Begin?

Petition Filed

Professionals Appointed

Notice Hearing/Rights

Hearing to Determine Capacity

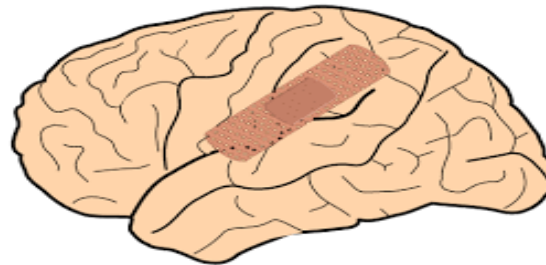
A court may appoint:

- a guardian and a conservator
- only a guardian
- only a conservator

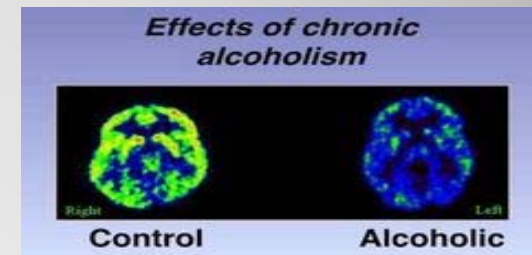
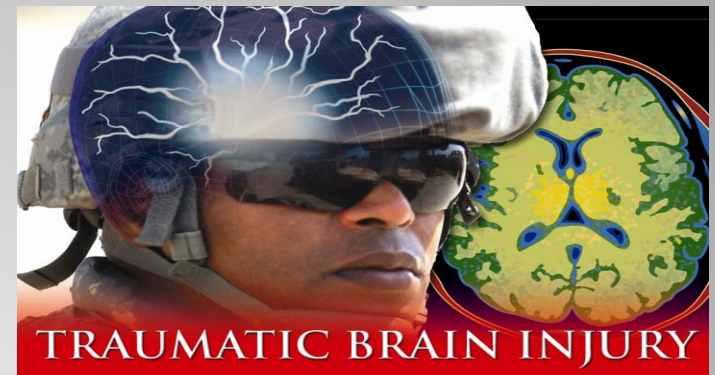
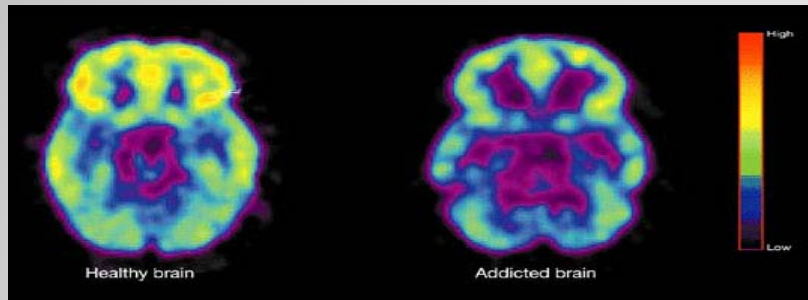
Generally, these cases are referred to as **Adult Guardianship cases** but may actually involve both guardians and conservators.

Adult Guardianship cases should not be confused with a **Kinship Guardianship cases**.

Most common scenarios in an adult guardianship cases

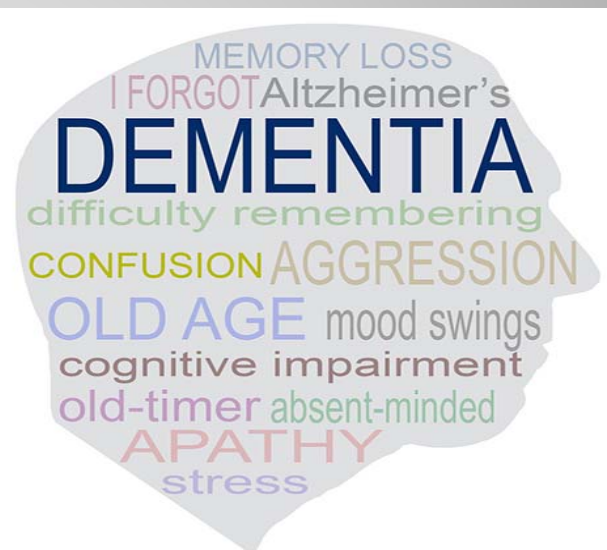


- Adult with severe brain damage from an accident or from long-term drug and/or alcohol abuse.



TBI or Other Brain Damage

- Older adult with cognitive issues. Prognosis that the condition will continue to get worse.



Older Adult

Probate Code



New Mexico Guardianship Statutes

NMSA 1978, Section 45-5-301, et seq. and Section 45-5-401, et seq.

New Mexico statute requires the appointment of three professionals to assist the judge in determining capacity:

- Guardian ad Litem
- Qualified Health Care Professional
- Court Visitor

ARTICLE 5
Protection of
Persons Under
Disability and
Their Property

A. The guardian ad litem shall:

1. interview in person the alleged incapacitated person prior to the hearing;
2. present the alleged incapacitated person's declared position to the court;
3. interview the qualified health care professional, the visitor and the proposed guardian;
4. review both the medical report submitted by the qualified health care professional and the report by the visitor;
5. obtain independent medical or psychological assessments, or both, if necessary; and
6. file a written report with the court prior to the hearing on the petition for appointment.

Guardian ad Litem

Section 45-5-303.1 and Section 45-5-404.1, NMSA 1978

The qualified health care professional shall submit a report in writing to the court. The report shall:

1. describe the nature and degree of the alleged incapacitated person's incapacity, if any, and the level of the alleged incapacitated person's intellectual, developmental and social functioning; and
2. contain observations, with supporting data, regarding the alleged incapacitated person's ability to make health care decisions and manage the activities of daily living.

Qualified Healthcare Professional

Section 45-5-303(E) and 45-5-407(C), NMSA 1978

The report by the court visitor shall include recommendations regarding:

1. those aspects of personal/financial care that the alleged incapacitated person can manage without supervision or assistance;
2. those aspects of personal/financial care that the alleged incapacitated person could manage with the supervision or assistance of support services and benefits; and
3. those aspects of personal/financial care that the alleged incapacitated person is unable to manage without the supervision of a guardian.

Court Visitor

Section 45-5-303(F) and Section 45-5-407(D), NMSA 1978

- Petition is filed with the District Court
- Court appoints GAL, Qualified Healthcare Professional and Court Visitor to evaluate the Alleged Incapacitated Person
- Reports are submitted to the court
- Judge holds a hearing to determine whether the Alleged Incapacitated Person has legal capacity
- Court may appoint Guardian and/or Conservator

Court Process to Determine Capacity of An Adult

- Family Member
- Friend/Acquaintance
- Company/Agency
- Professional Services Company

**Who can serve as a Guardian
or a Conservator?**

A judge will make a determination as to whether an individual lacks the legal capacity to make decisions for themselves and/or handle their finances. A judge should render a decision that gives the Incapacitated Person (IP) the most autonomy and is the least restrictive method to protect the Incapacitated Person.

Types of Guardianship

PLENARY – judge determines the Incapacitated Person is unable to make any decisions for themselves or handle their finances on their own. A Plenary Guardianship gives all rights to make decisions regarding the Incapacitated Person to Guardian.

LIMITED – judge decides that the Incapacitated Person can handle some things on their own. Example – Incapacitated Person receives a small monthly stipend or can decide where to live. A guardian may assist with medical appointments and medications. A conservator may be responsible for managing large assets.

Types of Guardianship

An incapacitated person for whom a guardian has been appointed retains 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.

Rights of the Incapacitated Person



Patricia M. Galindo, JD
Administrative Office of the Courts

aocpmg@nmcourts.gov