The Revised Handbook for Guardians and Conservators

an NGA Standards-Based Approach to Alternatives and Adult Guardianships and Conservatorships Under New Mexico Law

A publication of the New Mexico Guardianship Association

NOTE TO READER AND DISCLAIMER

Information provided in this Handbook reflects laws and rules in effect in New Mexico as of May 2022. This manual is intended as a practical guide for use by the general public. The purpose of the manual is to provide general information concerning guardianship, conservatorship and alternatives to guardianship and conservatorship. The authors of this manual do not through this publication provide legal advice or other professional services. This manual should not be used as a substitute for professional service in a specific situation.

For four years leading up to the Spring of 2022, New Mexico law concerning guardianship and conservatorship has undergone significant and fast-moving change. The reader is encouraged to review subsequent revisions to New Mexico law and this Handbook to ensure he or she is operating from the most up-to-date information.

Users of the manual are urged to seek professional services regarding any specific situation.

NATIONAL GUARDIANSHIP ASSOCIATION ETHICAL PRINCIPLES

1. A guardian treats the person with dignity. NGA Standard 3.
2. A guardian involves the person to the greatest extent possible in all decision-making. NGA Standard 9.
3. A guardian selects the option that places the least restrictions on the person's freedom and rights. NGA Standard 8.
4. A guardian identifies and advocates for the person's goals, needs and preferences. NGA Standard 7.
5. A guardian maximizes the self-reliance and independence of the person. NGA Standard 9.
6. A guardian keeps confidential the affairs of the person. NGA Standard 11.
7. A guardian avoids conflicts of interest and self-dealing. NGA Standard 16.
8. A guardian complies with all laws and court orders. NGA Standard 2.
9. A guardian manages all financial matters carefully. NGA Standard 18.
10. A guardian respects that the money and property being managed belong to the person. NGA Standard 17.

The term "guardian" includes all court-appointed fiduciaries, including for these purposes, conservators.

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Preface

This Handbook is created by the New Mexico Guardianship Association which is an affiliate of the National Guardianship Association (NGA). In 1991, the NGA first developed a standard of practice to be used by guardians as a way of improving ethical guardianship practice across the United States. In 2013, the NGA developed the Fourth Edition of its Standards of Practice (NGA Standards), which you may find at www.guardianship.org.

This Handbook applies the NGA Standards in light of New Mexico law. Effective July 1, 2021, professional guardians are required to follow the NGA Standards as to five specified subjects, namely (a) informed consent; (b) standards for decision making; (c) least restrictive alternatives; (d) self-determination of the person; and (e) the guardian's duties regarding diversity and personal preferences of the person. Prior to the adoption of this statutory requirement, New Mexico required professional guardians and conservators to be certified by a national or state organization recognized by the New Mexico Supreme Court that provides professional certification for guardians and conservators.

While other of the NGA Standards may not have the force of law in New Mexico, they are best practices for guardians and conservators. Accordingly, this Handbook will refer throughout to the NGA Standards as guidance which should, and in some cases must, be observed by guardians and conservators. This Handbook uses the NGA Standards to outline how a guardian and conservator should fulfill his or her responsibilities while also discussing specific New Mexico legal requirements for these roles.

This Handbook is not a substitute for legal advice. Therefore, if a reader has a question about a specific problem in a guardianship or conservatorship, he or she should consult with a qualified attorney to determine the rules which may govern resolution of the particular issue involved.

This Handbook is designed to assist concerned families, friends, and others in evaluating options to assist incapacitated adults in managing their personal and financial affairs. The goal of this Handbook is to employ a person-centered approach to serve as a reference tool and useful resource. This Handbook also addresses alternatives to guardianship and conservatorship and the Court process employed to appoint these individuals if alternatives are not suitable.

Authors' Acknowledgments

This handbook originated with two manuals, the *Alternatives to Guardianship and Conservatorship* and *The Handbook for Guardians and Conservators*. The first editions of these manuals were written by Ellen Leitzer, Merri Rudd, Patricia McEnearney Stelzner and Susan K. Tomita and were edited by Merri Rudd, with assistance from Betty Attwood, Susan Bennett, Marty Brown, the Honorable Susan M. Conway, Judy Hartmann, Becky Jiron, Judith Schrandt, Greta Belling, Kathy Heyman, Tonya LaMonte, Sarah Silverstein and the Guardianship Discussion Group.

The *Handbook for Guardians and Conservators* was subsequently revised in 2007 by the New Mexico Guardianship Association through the efforts of Susan A. Bennett, President, and Lori L. Millet, Vice President. The two manuals were subsequently combined, revised and updated by a committee of the New Mexico Guardianship Association, namely Gaelle D. McConnell, Esq. and Marty Brown, MSW, CMC, NCG, with assistance from Linda Rizzi, NCG, Ellen Leitzer, Esq. and Stormy Ralston, Esq.

This Handbook was substantially revised in 2021 and 2022 by the Education Committee of the New Mexico Guardianship Association. Gregory W. MacKenzie, Esq. was the chairman of that committee, and its members consisted of Gaelle D. McConnell, Esq., Laurie Hedrich, Esq., Mary Galvez, Nancy Oriola, Lisa Millich, Margaret Graham, Esq., Holly Gonzales, and Nathan Gabaldon with contributions by Tim Gardner, Susan Stuart, and Susan Tomita. Colan L. MacKenzie provided editorial assistance and support.

Chapter 1

Alternatives to Guardianship

A. INTRODUCTION

This Handbook discusses the roles and responsibilities of the guardian and conservator in the management of an incapacitated person's personal and financial affairs. Generally, guardianship and conservatorship exist as a legally sanctioned process to provide the ability for one person to make decisions for another who the court has determined is unable to do so.

Specifically, a guardian is a person, persons, or entity appointed by a court to make personal and health care decisions for a person who the Court determines to be an "incapacitated person."

For the purposes of guardianship, under New Mexico law, a person may be adjudicated to be an incapacitated person if that person demonstrates over time either partial or complete inability to manage his or her personal care. That inability must be demonstrated by a recent inability of the person to meet his or her needs for medical care, nutrition, clothing, shelter, hygiene, or safety so that physical injury, illness, or disease has occurred or is likely to occur in the future. Importantly, the inability must be caused by a functional impairment. Functional impairment may be caused by developmental disability, mental illness, dementia, physical illness or disability, or chronic substance abuse.

On the other hand, a conservator is a person, persons, or entity appointed by a court to make financial decisions for a person the court determines to be an "incapacitated person."

For the purposes of conservatorship, under New Mexico law, a person may be adjudicated to be an incapacitated person if that person demonstrates over time the partial or complete inability to manage his or her estate or financial affairs or both. That inability must be demonstrated by recent gross mismanagement of a person's income and resources or a medical inability to manage one's income and resources that has led or in the future may lead to financial vulnerability. Importantly, as the case is in guardianship, the inability must be caused by a functional impairment.

Before a Court will order the appointment of a guardian and/or conservator for a person who is incapacitated, the Court must find that there are no other alternative resources available to provide for the well-being of the protected person or for the management of his or her financial affairs. New Mexico law allows the court to impose a guardianship or conservatorship on a person only if it is the least restrictive alternative to provide for that person's needs. The law requires that the guardianship and conservatorship be tailored to the needs of the protected person and that the powers of the guardian and conservator are limited to meet those needs.

A guardianship shall be designed to encourage the development of maximum self-reliance and independence of the protected person and shall be ordered only to the extent necessitated by the person's actual functional mental and physical limitations.

NMSA 1978 § 45-5-301.1 (1989)

As noted, guardianship and conservatorship provide the ability for a person to make important decisions for another. Guardianship and conservatorship are not the only mechanisms under which decision-making power may be granted to another person, however. For example, a person may execute a power of attorney that grants decision-making power to another person. By signing such an instrument, the person can ensure that the right person is placed in this important role.

What are alternatives to guardianship? This chapter will summarize several alternatives that should be explored and exhausted before a guardianship proceeding is initiated. Conservatorship alternatives will be discussed in other portions of this Handbook.

B. HEALTH CARE POWER OF ATTORNEY/ADVANCED HEALTH CARE DIRECTIVES

Guardianship and conservatorship orders have one basic element in common: both grant some level of decision-making authority to a person over another person who meets the legal definition of an "incapacitated person." The process required to obtain such an order can be expensive and will necessarily result in Court oversight of the person appointed to make decisions.

To avoid the expense and intrusion of the guardianship process, a legally competent adult can plan for a time when he or she may be unable to make sound decisions and, in a written document, appoint a person to make both health care and financial decisions for him or her. Because the effect of these instruments is to appoint a decision-maker for another person, having both instruments in place can avoid the time, expense and intrusion of a guardianship and conservatorship.

For the purpose of this section of the Handbook, a person that signs such an instrument is called the "principal," and the person or entity named to make health care decisions is called "the agent."

In New Mexico, a health care power of attorney may also be known as an advance health care directive. This Handbook refers to health care powers of attorney and advanced health care directives interchangeably.

A health care power of attorney is a documents under which the person signing the document (the principal) authorizes another person (the agent) to make health care decisions for the principal. These documents are specifically valid under New Mexico law.

The Uniform Health-Care Decisions Act states:

> An adult or emancipated minor, while having capacity, may execute a power of attorney for health care, which may authorize the agent to make any health-care decision the principal could have made while having capacity. The power must be in writing and signed by the principal. The power remains in effect notwithstanding the principal's later incapacity under the Uniform Health-Care Decisions Act or Article 5 of the Uniform Probate Code.[1] The power may include individual instructions. Unless related to the principal by blood, marriage or adoption, an agent may not be an owner, operator or employee of a health-care institution at which the principal is receiving care. NMSA 1978, § 24-7A-2 (1995).

A health care power of attorney is valid only when it is signed by a principal who has capacity to understand the nature of the instrument when he or she signs it. To be valid, the health care power of attorney must be in writing and signed by the principal. Although New Mexico law does not require witnesses, having two adult witnesses is recommended. Preferably, the witnesses should not be family, or the person named as agent. Alternatively, the health care power of attorney can be notarized in the absence of witnesses.

Health care powers of attorney can take different forms. The health care power of attorney may grant the agent very specific powers, or it may grant him or her broad powers including end-of-life decisions, such as withholding or withdrawing life support. A principal signing a health care power of attorney must have sufficient mental capacity to understand the content of the document he or she is signing.

Because the health care powers of attorney also often contain very personal decisions about preferences for agents and for future medical care, it is important that such documents be signed after the person has had enough time to consider the matters addressed in the instrument. Not all individuals plan accordingly, however, and there are times when these instruments are signed when a person is suffering a health crisis. The existence of a health crisis does not change the requirement that the principal must have capacity to understand the meaning of the health care power of attorney, the principal must have sufficient mental capacity when this document is signed. Where a person has suffered through a period of incapacity because of an illness, prescription medications, or another cause, he or she could still execute a health care power of attorney during a time when the person is lucid. These periods are called "lucid moments."

If the person has suffered through a recent period of mental confusion, whether due to an acute medical problem or other cause, it is advisable to document that a qualified medical provider has cleared the person to sign a health care power of attorney. Having the opinion of the medical provider documented in the person's medical chart will be helpful if a dispute arises later over whether the person had the ability to understand what he or she signed.

Signing a health care power of attorney will require the person to identify another person to serve as his or her agent for making health care decisions. It is important for the person to select an agent whom the person believes will be able to carry out his or her wishes as to medical treatment when the person is unable to make those decisions. When selecting who might best serve as agent, the person should consider:

a) The nature of the relationship between the person and the proposed agent, including the extent of recent contact;

b) Whether the proposed agent can make the "hard" choices the person might want made;

c) Whether the proposed agent will respect the preferences and cultural, religious or spiritual values of the person;

d) Whether the proposed agent is willing and able to communicate the person's medical condition to other family if the person is unable to communicate and wants this information shared;

e) Whether the proposed agent is responsive;

f) Whether the proposed agent is collaborative in decision-making;

g) The geographical location of the proposed agent; and

h) Whether the proposed agent has a history of making responsible decisions.

Unless otherwise specified in an advance health care directive, an agent who is authorized to make medical decisions for the principal has the same rights as the person to request, receive, examine, copy and consent to the disclosure of medical or any other health care information.

The authority granted to the agent to make health care decisions may begin immediately and remain in effect until revoked or may begin when the person lacks capacity to make such decisions and ceases when the principal has recovered. A properly executed health care power of attorney may also remain in effect even if the person is later found to be incapacitated in a Court proceeding unless the Court rules that the power of attorney should be revoked.

Under New Mexico law, capacity means an individual's ability to understand and appreciate the nature and consequences of proposed health care, including its significant benefits, risks, and alternatives to proposed health care and to make and communicate an informed health care decision. A person is presumed to have capacity to make a health care decision, to give or revoke an advance health care directive and to designate a surrogate decision-maker.

A health care provider should ask the patient first for the patient's health care decisions. Only if the provider feels the patient is incapable of exercising informed consent would the provider be expected to turn to the patient's health care agent under a power of attorney. A person may, at any, challenge a determination that he or she lacks capacity by a signed writing or by personally informing a health care practitioner of the challenge.

While having qualified legal assistance in preparing a health care power of attorney is ideal, it is not necessary. Health Care Powers of Attorney can be prepared and signed without the assistance of an attorney. The forms are available online, through many senior centers, the Senior Citizens' Law Office and the New Mexico Bar Foundations' Lawyer Referral for the Elderly program.

FURTHER READING: NMSA 1978, § 24-7A-4 (1995) CONTAINS AN OPTION FORM FOR PERSONS TO USE.

Meeting with a qualified attorney to discuss the scope and consequences of executing a health care power of attorney, however, could provide a framework for the principal to discuss the issues addressed by the instrument and the authority being given to the agent. If a person has sufficient capacity to execute one, a health care power of attorney is less restrictive than a guardianship because it ensures that the agent the person selects will be the one in charge of health care decision-

making. A properly executed health care power of attorney can also save thousands of dollars in professional fees which might otherwise be incurred in pursuing a guardianship.

Finally, and perhaps most importantly for this section of the Handbook, a health-care decision made by an agent for a principal is effective without Court approval. Thus, a properly executed health care power of attorney does not require the same level of regular Court oversight which is involved in a guardianship matter. For these reasons, the health care power of attorney is often a better vehicle to arrange for decision-making when a person is unable to make decisions for himself or herself.

A person may designate in a health care power of attorney whom he wishes to serve as his guardian in the event it becomes necessary to have one appointed. Such a designation can carry significant legal weight in a guardianship proceeding and should be given careful attention when the health care power of attorney is being drafted. Additionally, a health care power of attorney can include an addendum addressing other issues including stating preferences for where the principal would like to live and preferences regarding health care. These types of instructions are very helpful to the agent and care providers in ensuring that the principal's wishes are carried out.

Another related form of a power of attorney designation is an advance directive for mental health treatment. This mental health advance directive is similar to a health care power of attorney but focuses specifically on mental health treatment options. For the purposes of this Handbook, references to a health care power of attorney may also include the mental health advance directive.

C. SURROGATE HEALTH CARE DECISIONS UNDER THE UNIFORM HEALTH CARE DECISIONS ACT (UHCDA)

When a person has not signed a health care power of attorney, but still has the mental capacity to express his or her wishes as to health care matters, he or she may orally appoint another to be his or her surrogate health care decision-maker. The law that governs these appointments in New Mexico is New Mexico's Uniform Health Care Decisions Act (UHCDA).

Typically, appointments under the UHCDA apply when a person is receiving medical treatment. This surrogate would act on the patient's behalf and tell the doctor or other health care provider what treatment to give or withhold, depending on the wishes of the patient. The patient who orally appoints a surrogate must personally inform his or her primary doctor about the appointment. If the primary doctor is unavailable, the patient must tell the health care provider who has primary responsibility for that individual's health care about the surrogate appointment.

In a case where a person lacks capacity to sign a Health Care Power of Attorney or is unable to name a surrogate decision maker under the UHCDA, the UHCDA states that certain individuals are allowed by law to act as a surrogate health care decision maker for an incapacitated person.

From highest to lowest priority, the following people have priority to act as surrogate decision-makers for an incapacitated person under the UHCDA:

1) the spouse (unless legally separated or unless there is a pending petition for annulment, divorce, dissolution of marriage or legal separation);

2) an individual in a long term relationship of indefinite duration with the patient in which the individual has demonstrated an actual commitment to the patient similar to the commitment of a spouse and in which the individual and the patient consider themselves to be responsible for each other's well-being;

3) an adult child;

4) a parent;

5) an adult brother or sister;

6) a grandparent; or

7) an adult who has exhibited special care and concern for the person, and who is familiar with the patient's personal values and who is reasonably available may act as surrogate.

The UHCDA requires a surrogate to promptly notify the patient, members of the patient's family, and the doctor that he or she is the health care decision maker for the patient. The law also states that the surrogate should make decisions based on the patient's instructions or wishes if those are known. Otherwise, the surrogate should base a health care decision on the best interest of the patient, taking into consideration the personal values of the patient. The surrogate may not be an owner, operator, or employee of a residential long-term care health care institution where the patient resides, unless the surrogate is related by blood, marriage, or adoption.

If more than one person shares priority to serve as a surrogate and they do not agree as to a particular medical decision, the majority decision prevails. For example, if two children favor one treatment and two children favor a different treatment, none of the four children may serve as the surrogate. If there is no one available with higher priority, then a court proceeding will be necessary to resolve the deadlock. At that point, the Court would likely appoint a guardian for the incapacitated patient.

D. RIGHT TO DIE AND UHCDA

In 1977, the legislature passed the New Mexico Right to Die Act. This Act provided that a person could state in writing that maintenance medical treatment (life support) be withdrawn or withheld if that person became terminally ill or in an irreversible coma. Many people signed a Living Will (right to die statement) under the Act. In 1997, the legislature repealed the Right to Die Act and added end-of-life provisions to the newer UHCDA. Health care providers should still honor Living Wills created before July 1, 1995. Those who signed a Living Will under the old Act do not need to make a new form unless they want to make a broader end-of-life statement.

Preparing and executing these instruments in connection with the estate planning process has at least two advantages. First, it provides the person with the ability to consult with legal counsel concerning the content of the form. Second, because the estate planning process often occurs with the aid of qualified counsel, the chances of incapacitated persons signing such a form are minimized.

Similar to the repealed Right to Die Act, the UHCDA allows an individual or the individual's decision-maker to make health care directions "relating to life sustaining treatment, including withholding or withdrawing life-sustaining treatment and the termination of life support" and directions to "provide, withhold or withdraw artificial nutrition and hydration and all other forms of health care." UHCDA defines "life-sustaining treatment" as "any medical treatment or procedure without which the individual is likely to die within a relatively short time, as determined to a reasonable degree of medical certainty by the primary care practitioner."

The UHCDA offers more choices because it covers all health care decisions, including end-of-life decisions. The statutory Advance Health Care Directive authorized by the UHCDA, discussed above, includes a section to express one's wishes about end-of-life decisions. Because the UHCDA statutory Advance Health Care Directive combines a Power of Attorney and a Living Will, it is no longer necessary to sign two separate documents. When a person is reluctant to put their wishes in writing, it is still advisable for that person to discuss their wishes for medical treatment with family members and doctors. If the person is unable to make his or her own medical decisions and if serious medical decisions have to be made, family and doctors may find themselves struggling to determine what decision the person would make if he or she was competent to direct care. Without advance direction from the person needing care, this responsibility can be a heavy burden during a very stressful time.

Decisions that may need to be made for someone at the end of life may include:

1) whether to use a respirator, ventilator, dialysis (kidney) machine, or other life support equipment;

2) whether or not a person wants artificial nutrition or hydration (including food and water);

3) what kind of pain medicine is appropriate and whether it may hasten someone's death;

4) whether to provide antibiotics to someone who is dying; and

5) what kind of medicine, surgery or treatment is best for a person's illness?

If the patient has mental capacity and can communicate with the doctor, the doctor should follow the patient's wishes as they pertain to medical treatment. Otherwise, it may be necessary for family members, doctors, and others to confer and try to determine what the patient's wishes would be and the best course of action to take in light of the facts and circumstances which have developed. In the absence of a Health Care Power of Attorney with express wishes about end-of-life decisions, however, health care providers may be reluctant to withhold life-sustaining treatment. If conflict exists among a patient's family members over whether to withhold such measures, a health care provider is likely to be even more reluctant to take these steps.

Many elderly New Mexicans have both a Living Will and Health Care Power of Attorney. These documents continue to be legal and valid. It is not necessary to execute a new combined form under the UHCDA. Under the UHCDA, doctors are supposed to honor valid instructions given to them under most circumstances. There are two exceptions to this rule: (a) reasons of conscience; and (b) a request for medically ineffective health care treatment.

If a health care provider refuses to comply with a health care decision (such as decision to withhold or withdraw life support) for reasons of conscience, the provider is under a duty to immediately assist in the transfer of the patient to another provider who is willing to comply with the patient's decision. If a health care provider refuses to comply with a health care decision because what is being asked would be medically ineffective, a health care provider can refuse to comply with an instruction to provide treatment. Medically ineffective treatment is any intervention that cannot reasonably be expected to yield the intended clinical benefit or achieve agreed-on goals for care. Respecting patient autonomy does not mean that patients should receive specific interventions simply because they (or their surrogate decision-makers) request them.

Please note that this discussion of the UHCDA, and the earlier Right to Die Act, is separate from and unrelated to the 2021 Elizabeth Whitefield End-of-Life Options Act. The End-of-Life Options Act is intended to allow terminally ill patients to receive treatment to end their lives. But the End-of-Life Options Act explicitly only applies to patients who are determined to have capacity to make the decision for themselves, and this decision to end one's own life cannot be delegated to a guardian or anyone else.

FURTHER READING: THE ELIZABETH WHITEFIELD END-OF-LIFE OPTIONS ACT CAN BE FOUND AT NMSA 1978, § 24-7C-1 (2021).

E. FEDERAL PATIENT SELF-DETERMINATION ACT

In 1990, Congress amended federal Medicare and Medicaid law by adding Patient Self-Determination Act (PSDA) provisions. PSDA provisions require all Medicare and Medicaid provider organizations (such as hospitals, skilled nursing facilities, home health agencies, hospices, and prepaid health care organizations) to:

1) give written information to patients at the time of their admission concerning their right to make decisions about medical care. This includes the right to accept or refuse treatment and the right to make advance directives, such as Powers of Attorney and Living Wills;

2) have written policies and procedures about advance directives and to inform patients of the policies;

3) state in the patient's medical record whether or not the individual has signed an advance directive;

4) comply with state law regarding advance directives (this means the health care provider should honor a valid Living Will, Power of Attorney or other advance health care directive); and

5) educate staff and the community on issues concerning advance directives.

PSDA is intended to make the public more aware of Powers of Attorney and other advance health care directives. A person does not have to sign a Health Care Power of Attorney or other advance directive to be admitted to the hospital or nursing facility. PSDA merely requires facilities to inform patients about their rights and about what documents are available under state law.

F. EMERGENCY MEDICAL SERVICE – "DNR" AND "MOST" FORMS

Health care providers recognize a person's right to refuse medical treatment. While a person may have documented their wishes in an advance directive, emergency medical service (EMS) workers are required to resuscitate unless there is a Do Not Resuscitate (DNR) or New Mexico Medical Orders for Scope of Treatment ("MOST") form in place. These forms must be signed and dated by a physician, advanced practice nurse, or physician assistant and also be signed and dated by the person. DNR and MOST forms are medical orders and do not end (expire) unless they are revoked. Documents can be revoked at any time by destroying them.

If a person is too sick to give consent to such an order, his or her health care decision-maker can agree to one—if that is what the person would have wanted. EMS bracelets are also available to indicate that a person has an EMS DNR Order.

To obtain a MOST form with instructions, one should contact the New Mexico Department of Health EMS Bureau or from New Mexico MOST. The MOST form, along with adjoining cover sheet, can be printed from the website. Once the form is completed, the form should be kept in an envelope, with the cover sheet attached, in sight of a bed or on a refrigerator. A copy of the form should also be placed in the person's medical file. Copies of the form are valid.

G. NEGOTIATION AND MEDIATION

The appointment of a guardian and conservator is not always free of conflict. The person thought to be incapacitated may be extremely resentful over the allegation that he or she is impaired. Family members may also disagree over whether a guardianship and conservatorship are appropriate and who, if anyone, should fill those roles. At times, these disagreements may spark long-standing discord and cause even deeper family division which may take years to heal. Because of this potential, the person considering initiating a guardianship action is wise to anticipate the potential for conflict and take steps to avoid escalating the conflict where possible.

When there is a disagreement among family or interested persons about how to provide for the management of the personal or financial affairs of an incapacitated adult, the first option to explore is negotiation. When a disagreement arises between two or more people, they could attempt to resolve their differences through informal negotiation. In a negotiation the disputing parties might explore the problem and suggest some solutions without the help of a third party such as a lawyer, judge, or mediator.

For example, negotiation may resolve a situation where family members have conflicting views on what is in a parent's best interests. Each family member may have a different opinion regarding the parent's core needs and how they should be met. Furthermore, the parent may have specific preferences regarding whether he or she even needs assistance and, if so, the kind and amount of assistance needed. Family members may be able to negotiate with the parent and each other and reach a mutual decision regarding a plan for the parent's care. Family members could discuss whether the parent's needs might be met by hiring a homemaker to visit the parent's home for a few hours each day to help shop for groceries, prepare meals and clean the home. Those family members could agree on how that housekeeper would be paid and have an understanding that they would revisit that solution periodically to ensure that the level of care being provided continues to meet the parent's needs. Alternatively, family members might agree to rotate certain days when he or she is providing assistance to the elder parent.

If negotiation fails or if the situation is too emotionally charged for direct negotiations, it is becoming increasingly common to ask a neutral person to facilitate a meeting among those concerned where options may be explored, and a solution reached. That neutral person is called a "mediator" or "facilitator." The mediator or facilitator is not a decision-maker. Rather, the mediator's role is to listen to all sides and guide the parties to arrive at an acceptable resolution. Mediators can be a family friend, clergy, counselor, care manager, a trained professional mediator, or an attorney or any other trusted person who can help the parties develop an agreement.

The mediation process, often referred to as Alternative Dispute Resolution (ADR), can be used to resolve concerns that families may have about a family member's behavior, care and placement. For example, a parent may be unwilling to negotiate with family members about her diet and home maintenance. If she feels outnumbered and intimidated, she may be willing to have the dispute resolved with the assistance of a neutral mediator who will make sure that her side is fairly presented, and that the discussion remains friendly and structured.

Ideally, all concerned family members and interested persons should participate in the mediation. The mediator should be sensitive to the particular needs or disabilities of the elderly or disabled person, including loss of eyesight, hearing problems or limited attention span. Some or all participants may wish to have a friend or other supportive person present at the mediation to help communicate their viewpoint.

To be effective, participants must be able to:

1) understand the mediation process;
2) compromise as required by the best interests of the incapacitated person;
3) openly and honestly exchange necessary information among them;
4) fully participate in the negotiation in good faith;
5) agree to be bound by the final agreement; and
6) follow up with and comply with the agreed upon plan.

For individuals with severe cognitive problems, attending mediation can present serious challenges. While the individual may be able to attend the negotiation process, he or she may not understand what is happening or even remember the outcome of the session. In these cases, if the person is represented by an agent under a power of attorney which was executed when the person was competent and the power remains valid and unrevoked, the agent may have the ability to agree to a solution on behalf of the protected person.

Mediation has the benefit of allowing the parties to craft their own solution (as opposed to having a judge do so following a contentious court process). Mediation also promotes family harmony by encouraging family members to work together to find common ground to resolve a family problem. Because it can help to prevent further family division, save considerable court costs and avoid the uncertainty of leaving important decisions to a judge (whose contact with the family will necessarily be of a limited duration), negotiation and mediation are options which must be considered early and often in a guardianship case.

H. SUPPORTED DECISION-MAKING

Another alternative to guardianship is supported decision making. Supported decision-making places the individual with a disability at the center of the decision-making process. There is growing interest in, and commitment to, supported decision-making among courts, legislatures, legal practitioners, academics, and advocacy groups.

What is supported decision making? Simply put, it is a tool that allows people with disabilities to retain their decision-making capacity by choosing supporters to help with them make choices. Such a person would select trusted advisors, such as friends, family members, or professionals, to serve as supporters. They would agree to help the person understand, consider, and communicate decisions.

Implementation of supported decision-making may be informal or formal and may involve crafting an agreement between the beneficiary and supporter(s) that identifies the decision-making areas

in which the beneficiary seeks assistance as well as the kinds of assistance needed and desired. Agreements may include whether the supporter has access to confidential information pertaining to the decision-making and typically outline the terms of revocation or termination.

Supported decision making is different from a Health Care or Financial Power of Attorney. A power of attorney identifies the person who will be the substitute decision-maker. A supported decision-making agreement identifies the person who will act in support of the decision-making process.

As of May 2022, supported decision-making is not formally recognized in New Mexico law. Some practitioners report use of supported decision-making agreements under certain circumstances throughout New Mexico.

Supported decision-making has growing support in many jurisdictions.

Chapter Two.

Alternatives to Conservatorship

A. INTRODUCTION

It is not uncommon for a person to appear to function normally in managing activities of daily living, and yet still suffer difficulty in managing his or her personal finances. Cognitive impairment can begin years before a formal diagnosis is made. During this period a person can become increasingly vulnerable and in need of assistance. Family or friends may notice that the elder has developed different behaviors. For example, an elderly person who has historically been frugal suddenly begins to demonstrate different spending habits. He or she may have unpaid rent, mortgage, utility, or medical bills, while yet possessing funds available to pay those bills. He or she may subscribe to many magazines, apply for multiple credit cards, fall victim to financial scams or frauds or begin to give uncharacteristic gifts.

Financial vulnerability, however, is not limited to elders with dementia. Adults who have other medical or mental health challenges can also be at risk, not just for financial mismanagement, but also exploitation. For some families confronting such mismanagement and vulnerability, a first reaction may be to seek a court-appointed conservatorship to obtain protection for the vulnerable adult. Conservatorship, as is the case with guardianship, is a legal measure that should only be sought when all less restrictive alternatives have been exhausted.

This chapter will describe available alternatives to help a person manage his or her financial affairs without a Court-appointed conservator. All of the alternatives discussed in this chapter can serve two purposes: (1) to allow a trusted family member or friend to assist a person without obtaining a conservatorship; and (2) if necessary, to prevent exploitation of a vulnerable person and the waste of that person's assets.

B. NEGOTIATION AND MEDIATION

As discussed in the prior chapter, concerns over the management of a vulnerable person's financial affairs can lead to conflict. That conflict may be between concerned family over how to implement protection or may be between interested persons and the vulnerable adult over whether any intervention is appropriate. Wherever that conflict may exist, in most cases, the interested persons are wise to attempt to resolve the conflict through a negotiation process before seeking relief from the Court—a process that can be expensive, divisive, and uncertain. If those interested persons are unable to resolve the disagreement between themselves, they can ask a neutral person to facilitate the negotiation. Notably, the facilitator (or mediator) is not a decision-maker. Rather, the mediator's role is to guide the parties by using constructive problem-solving skills to resolve the dispute themselves.

Negotiation or mediation may be helpful in the situation where, for example, a parent who has always been frugal starts to demonstrate some memory problems and, in the process of the progression of his condition, uncharacteristically starts responding to sweepstakes offers which require large amounts of money up front. Involving the concerned family members and the parent in a process to develop a solution with a mediator may be useful in: (1) striking a balance between allowing the parent to be independent, but also financially safe; (2) settling any disputes between the family as to how to address the sweepstake problem; and (3) avoiding the emotional and financial cost of a full-blown conservatorship proceeding. The process of negotiating these cases is discussed in detail in Chapter One.

C. CO-OWNERSHIP OF PROPERTY

The co-ownership of property may serve as an alternative to conservatorship in some cases. As will be explained, this is an alternative which should be approached with caution.

1. Real Property

When more than one owner is listed on a deed to real estate, each owner has specific legal rights to the property. The exact nature of those rights depends on the form of co-ownership. These forms of co-ownership include tenants in common, community property, and joint tenants with right of survivorship. The form of co-ownership should be specified on the deed to the property.

Tenancy in common[1] is a form of co-ownership with no survivorship rights. If no type of co-ownership is specified, the default is tenancy in common. Tenancy in common is a good choice when the parties do not want the surviving owner(s) to inherit a deceased owner's interest. Holding land as tenants in common may not protect an elder's real estate from being sold as each co-tenant may sell, lease, or transfer his or her share of the land.

Community property means property acquired by either or both spouses during marriage. Each spouse owns an undivided one-half interest, and each is entitled to dispose of his or her interest. Community property designation on a deed operates the same as tenancy in common, unless joint tenancy is specifically stated in the deed.

Joint tenancy or a joint tenancy with right of survivorship (sometimes referred to by the acronym JTWROS) includes survivorship rights. This means that, on the death of one of the owners, the property will pass automatically to the surviving owners.

When real property is co-owned by more than one person in joint tenancy, that method may protect an elder's real estate by making it more difficult to sell without the agreement of the other owner.[2] If a parent puts his or her home in joint tenancy with one or more children, he or she will not be able to sell the home or borrow money using the home as collateral, unless the co-owners agree to the transaction in writing or if the joint tenancy is terminated.

2. Personal Property

Similarly, personal property may be owned or titled in such a way that more than one signature is required to sell the property. In the case of financial accounts, a joint owner or co-owner means

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[1] A tenancy in common ensures that each owner's interest passes to his or her heirs or devisees under a will, instead of to the surviving co-owners. But because the deceased owner's interest becomes part of his or her estate, probate is required to transfer the interest to the deceased owner's heirs or devisees.

[2] Joint tenancy means that two or more people own property with the right of survivorship. Upon the death of one joint tenant, the property passes automatically to the surviving joint tenant(s) without a court proceeding. It does not matter what the deceased joint tenant's Will may say about the property; the property goes to the other joint tenant. Both real and personal property can be owned in joint tenancy.

that both owners have the same access to the account. As a co-owner of the account, both co-owners can deposit, withdraw, and close the account. Co-ownership may allow another person the ability to transact business on the account of an elder so that account activity can be supervised, the elder's bills paid, and income deposited and accounted for. [3]

The ownership of other personal property and financial assets, such as stock certificates, whole or universal life insurance (which can often be cashed in for its "cash value"), and motor vehicles may also be changed so that they are co-owned in such a way that more than one signature is required to dispose of the asset.

3. Unintended Consequences

Co-ownership can provide the ability to pay bills, supervise account activity, receive income and safeguard real estate and other assets from exploitation. However, co-ownership can have many unintended consequences and, as a result, this is not an alternative to conservatorship in many cases. Its use must be carefully considered.

First, joint tenancy allows co-owners the right to use all the property subject to that form of ownership. Thus, jointly owned property, such as a bank account, can be accessed and used by a co-owner at any time. For example, if a person is added as a joint tenant on the checking account of a disabled adult, the person added can use the money in that account as he or she sees fit. For this reason, placing an untrustworthy person on another's person's account as a joint tenant can create an opportunity for theft and exploitation.

Second, creditors may be able to access co-owned property to pay a co-owner's debts, even if the other co-owner did not incur the debt. For example, in the case of an elder who places a nephew on her checking account, if the nephew is sued for a debt he owes to a credit card company and that company gets a judgment against the nephew, that credit card company may then attempt to collect the amount of its judgment from the elder's bank account. This process may be referred to as garnishment. A co-owner's creditor may also be able to file a lien on a house that is owned by both owners, with the risk that the house could be sold to pay off the debt of the co-owner.

Third, by adding a joint tenant to the ownership of real or personal property, the original owner does lose some control over that asset. While that loss of control may be advantageous in some situations by ensuring that the asset is not stolen from a vulnerable adult, it can lead to bad outcomes in others. For example, even if it is in a parent's best interest to sell her home so that she can move to a more appropriate setting, such as assisted living, if a joint tenant refuses to agree to the sale, the home cannot be sold absent the Court entering a judgment defining the proper ownership of the property.

Fourth, property placed in joint tenancy is not controlled by the account owner's will when that person dies. As a result, placing property in joint tenancy could defeat the provisions of a person's

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[3] Some banks will allow a person to be an authorized signer on an account to sign checks, make withdrawals, and, in some circumstances, to be privy to other information such as account balance and activity. Authorized signer's privileges are only legitimate while the account owner is alive and if the account owner were to die, those privileges would cease. See D. below.

last will and testament, since joint tenancy property automatically passes to the surviving co-owner(s) upon the death of one of them—regardless of what the person's will might say.

Finally, because joint tenancy (a) allows the owner who is added to the account the ability to access all the funds kept in the account and (b) dictates that the property subject to that designation passes upon the person's death pursuant to the terms of the designation and not the person's estate plan, using joint tenancy can create suspicion among family members. If other members of a vulnerable person's family believe that another is attempting to take advantage of a vulnerable adult by placing his or her name on that person's assets, serious family conflict can result which may actually force the family into Court to resolve the conflict. Accordingly, if co-ownership is being seriously considered as vehicle to provide financial management and supervision, it is important that other family members who are involved in the situation be advised that this option is being considered. Once the joint tenancy designation is made, it is wise to keep other family members advised as to how the assets are being managed or spent. Harmonizing the joint tenancy designation with the terms of the person's last will and testament should be considered to further reduce suspicion. By proceeding in this way, the person who is added to the account of the vulnerable adult provides transparency to other interested persons and can avoid divisive family conflict.

D. BANK ACCOUNT SIGNATORY

A conservatorship would be expected to grant a person the ability to pay the bills of another person. Bill paying authority, however, can also be achieved when the person agrees to add another person as a signatory on his or her bank account. A person considering adding another as a signatory to his or her bank account should be careful to only add a person who is trusted and honest, because the designation of a signatory allows that person to write checks on the account. Being a signatory allows a person to sign checks, but it does not give the signatory ownership rights to the account. This is an important distinction with accounts of the joint tenancy type which are discussed above.

Adding a signatory to one's account allows another person to help the account owner pay bills. Because this approach requires the account owner to have capacity when this modification is made and because it does not grant broader financial authority to the signatory to act in other financial matters for the account owner, it may not provide complete authority to avoid the need for a conservatorship. It is, however, an alternative that should be considered possibly in connection with other tools. If the person does not have the ability to understand the significant of adding another as a signatory to his or her account, this approach is simply not workable.

E. FINANCIAL POWER OF ATTORNEY

As noted above, powers of attorney can serve as effective alternatives to conservatorship. A power of attorney is a preferred method of granting decision-making power to another person because the instrument would, ideally, be created during a time when the principal has time to think about the person who should be appointed and the scope of the authority to grant to that person.

A financial power of attorney is a legal document in which the person signing the document (the principal) authorizes another person (agent or attorney-in-fact) to make financial decisions for the principal. A power of attorney must be signed by (a) the principal or (b) in the principal's "conscious presence" by another individual directed by the principal to sign the principal's name

on the power of attorney. A signature on a power of attorney is valid only when it is signed by a principal who has sufficient mental capacity to understand what is being signed. A signature on a power of attorney is presumed to be genuine if signed before a notary or other individual authorized by law to take acknowledgments.

Financial powers of attorney vary in scope. On one hand, a power of attorney may grant extremely broad powers to the agent. On the other hand, a power of attorney may be limited to specific transactions, such as writing and signing checks on a bank account or collecting rental payments for a piece of property. Additionally, a person may designate who he or she wishes to be appointed as his or her conservator, in the event that one becomes necessary.

An agent's authority to act under a power of attorney terminates when:

1. The principal dies;
2. The principal becomes incapacitated if the power of attorney is not "durable." A durable power of attorney is one that remains in force even though the principal becomes incapacitated. Under New Mexico law, a power of attorney is generally considered to be durable unless it expressly states that it is terminated when the principal becomes incapacitated;
3. The principal revokes the power of attorney. The execution of a subsequent power of attorney does not revoke a previous power of attorney unless the subsequent power of attorney so states;
4. The power of attorney provides that it terminates;
5. The purpose of the power of attorney is accomplished; or
6. The principal revokes the agent's authority, or the agent dies, becomes incapacitated or resigns and the power of attorney does not provide for another agent to act under the power of attorney.

A financial power of attorney can take different forms. New Mexico's Uniform Power of Attorney Act has a statutory form that should be used. That act contains very specific definitions of the terms which are used in the statutory form. Therefore, by using the statutory form, the meaning of the terms used in a power of attorney can be readily understood by reading the statute.

A New Mexico statutory form power of attorney is durable. "Durable" with respect to a power of attorney, means that the power of attorney is not terminated if the principal becomes incapacitated. The agent's authority to act for the principal continues.

Under New Mexico law, a power of attorney is effective when executed, unless the instrument states that it is to become effective upon a future date or the occurrence of a future event. It is common, for example, for a power of attorney to become effective when the principal becomes incapacitated as may be determined and certified by one or more medical professionals.

As noted, the principal must have sufficient mental capacity to understand the instrument he or she signs. It is critical not only that the person understands the instrument, but also that he or she thinks carefully about the person(s) selected as agent. When selecting an agent, the principal should consider the factors listed in the following table:

TOP TEN FACTORS TO CONSIDER WHEN SELECTING AN AGENT

1. the nature of the principal's relationship with the proposed agent and the frequency of current contact with that person;
2. the nature of the relationship of the proposed agent with other members of the principal's family with whom the proposed agent would be expected to communicate;
3. whether the proposed agent has, or will have, the time and ability to serve in that capacity;
4. the geographic location of the proposed agent and the bearing of that location on the agent's ability to serve in that role;
5. the likelihood that the proposed agent will carry out the person's wishes;
6. the financial stability of the proposed agent, including his or her job history, income and debt level, outstanding judgments and tax liens, other present financial circumstances and bankruptcy history;
7. the level of education and experience of the proposed agent and the suitability of that education and experience to the tasks the agent would likely be asked to perform, including the ability of the proposed agent to understand the scope of his or her legal obligations under a power of attorney;
8. whether the proposed agent is responsive, honest and diligent, including whether that person has any history of criminal activity charged with or convicted of crimes of dishonesty;
9. whether the proposed agent is capable of keeping good records, paying bills timely and filing tax returns as may be needed; and
10. the ability of the proposed agent to communicate on behalf of the principal.

The agent under a power of attorney owes fiduciary duties to the principal. The Court will enforce these duties and even may find an agent liable for breaching them. The agent under a power of attorney must:

(1) act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest;

(2) act in good faith; and

(3) act only within the scope of authority granted in the power of attorney.

New Mexico's Uniform Power of Attorney Act states the agent's duties. NMSA 1978 § 45-5B-114.

Unless the power of attorney states otherwise, the agent under a power of attorney has additional duties under New Mexico law to:

(1) act loyally for the principal's benefit;

(2) act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest;

(3) act with the care, competence and diligence ordinarily exercised by agents in similar circumstances;

(4) keep a record of all receipts, disbursements and transactions made on behalf of the principal;

(5) cooperate with a person that has authority to make health care decisions for the principal to carry out the principal's reasonable expectations to the extent actually known by the agent and otherwise act in the principal's best interest; and

(6) attempt to preserve the principal's estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal's best interest.

Assuming the capacity to do so, the principal retains the ability to manage his or her affairs even though he or she executed a power of attorney. Therefore, a power of attorney does not limit the principal from also managing his or her affairs even though an agent is also serving.

The principal could still write checks, invest assets, and do other financial transactions, even if the agent were also acting for the principal. Therefore, there are limits in the ability of a power of attorney to prevent exploitation or stop financial waste. For example, a vulnerable adult may engage in questionable transactions even though an agent is also serving under a power of attorney for him or her. As a result, if the power of attorney is insufficient to stop exploitation or financial waste by a person who is incapacitated, then it may be necessary to seek the appointment of a conservator to provide additional protection for the vulnerable adult. Under those facts, the imposition of a conservatorship would vest complete financial control of the person's assets into the hands of the conservator.

F. REPRESENTATIVE PAYEE ARRANGEMENTS

Some private pensions and governmental agencies authorize a protective arrangement—called a representative payeeship—for those vulnerable adults who receive funds, but are unable to manage them due to a physical or mental disability. Such agencies include:

1) Social Security Administration;

2) Veterans' Administration:

3) Department of Defense;

4) Railroad Retirement Board; and

5) Office of Personnel Management

Any interested person may notify the applicable agencies that the beneficiary lacks the capacity to manage his or her funds. Each agency has its own criteria and regulations for deciding whether a representative payee is necessary. Each will require proof of incapacity and will independently decide whether to appoint a representative payee to receive and manage funds owed to the beneficiary. It is not necessary for a court to first determine that the person lacks capacity to manage his or her funds. In fact, even if a court appoints a conservator, federal agencies still require their procedures to be followed before appointing a representative payee.

Because representative payeeship offers a method to manage certain governmental benefits an incapacitated person might receive, it provides a vehicle of financial management which may serve as an alternative to conservatorship. Typically, the person seeking to be appointed representative payee contacts the appropriate federal agency and fills out forms provided by the agency. The incapacitated person's physician must also complete and submit a form. The agency often appoints a representative payee for a person based on the written documentation without conducting a hearing and without informing the beneficiary, if it determines that the appointment is in the "interest" of the incapacitated person.

Once appointed, the representative payee receives the financial benefits the incapacitated person would otherwise receive. This means that funds must be spent on the incapacitated person's needs such as food, clothing, shelter and medical care. Any remaining funds may be spent on the incapacitated person's legal dependents and past debts. If there are more than sufficient funds to meet the person's obligations, the representative payee may hold the excess funds in an account for the benefit of the incapacitated person. It is improper for the representative payee to mix (or commingle) the incapacitated person's money with the representative payee's own funds. The funds of the incapacitated person must be kept separate from the representative payee's funds.

The federal agency appointing the representative payee may require an annual accounting of its funds. If the agency determines that the representative payee mismanaged federal funds, used the funds for the benefit of someone other than the person, or in any way abused his or her fiduciary duty to the person, then the agency has authority to terminate the representative payee and appoint another representative payee. In cases of gross abuse by the representative payee, the agency may recommend that the payee be criminally prosecuted.

G. TRUSTS

Trust arrangements are staples in estate planning in the United States. Trusts can be used not only by those individuals with large amounts of wealth, but also for those possessing much more modest means. Trust arrangements can be created for the purposes of avoiding probate, minimizing estate tax consequences, and ensuring that certain property can be used for the benefit of one person with the balance being distributed to another person when the first person dies.

Trust arrangements can serve another very important function. When properly drafted, trusts provide for the management of a person's assets in the event that person loses the capacity to handle his or her own financial affairs. For example, assume a person creates a trust and later develops a medical condition that becomes so serious he or she can no longer manage his or her own finances. If that person has titled his or her property into the name of the trust, the trustee (explained below) would have the ability to continue managing trust property even though the person is so ill he or she is unable to. As a result, when properly created and funded, trust arrangements can serve as an important alternative to conservatorship. For a trust agreement to be valid, the person signing it must have sufficient mental capacity to understand the meaning of the document he or she is signing. As a result, the process of creating a trust is best performed before a medical crisis occurs.

Importantly, a trust provides management only when the subject property has been titled into its name. For example, for a trustee of a trust to exercise control over an investment account, the account must be titled in the name of the trust. If the investment account is not titled in the name of the trust, the trustee will not have authority to transact business on that account. On the other hand, if the investment account remains in the name of the incapacitated individual, having never been funded into the trust, a power of attorney could provide a tool for managing the account. Ultimately, the power of attorney itself could be used to transfer the investment account into the trust. This example demonstrates how the elements of a comprehensive estate plan can work together to avoid the need for a costly court proceeding.

The concept of a trust may be foreign to the experiences of many people. It is, however, neither mysterious, nor novel, nor limited to the rich and famous. Because trusts have been in use for a very long time and because they have been increasingly popular in the United States over the last five decades, substantial bodies of law have developed as to how they are created and enforced. These laws provide some predictability and security for those who might have an interest in a trust. Courts in New Mexico will enforce these laws if a problem arises during the administration of a trust.

A trust is simply an agreement between one person and another person or entity (such as a bank's trust department) to hold property for the benefit of a person. Property which may be placed in trust includes real estate, personal property and financial assets.

The person who creates a trust is called the "grantor." The person who holds the property is called a "trustee." The person for whom the property is held is called a "beneficiary." The trust property is managed according to the terms of a written trust agreement. Typically, a trust agreement will provide instructions for the distribution of income and principal while the grantor is living and then instructions as to how the remainder of the trust property should be distributed when he or she dies. Trust agreements often contain provisions which require trustees to render periodic accountings to the trust beneficiaries. If this language is absent from the trust agreement, New Mexico law would require the trustee to generate annual accountings.

Importantly, trusts are typically not subject to Court supervision and, as a result, they are almost always managed without judicial oversight. As a result, a grantor must choose his or her trustee wisely. The same factors to consider when selecting an agent under a power of attorney (stated elsewhere in this Handbook) apply to the selection of a trustee with at least four notable exceptions.

First, New Mexico law imposes upon trustees certain financial reporting requirements. The person selected as trustee must be able to fulfill those obligations which will entail not just tracking all income and expense on a regular basis, but also generating a proper report to the trust beneficiaries. To the contrary, unless a power of attorney states otherwise, during the principal's lifetime the agent under a power of attorney is not required to disclose accounting information unless ordered by a court or requested by the principal; his or her guardian or conservator; another fiduciary acting for the principal; or a government agency with authority to protect the principal's welfare (such as Adult Protective Services). Second, in the case of a trust, the trustee's duties will likely extend to others, whereas under a power of attorney, the agent has a duty to act loyally for the principal's benefit. Third, because a trust may involve more than one beneficiary, unlike a power of attorney which is implemented for the principal's benefit, the person appointed as trustee may have a duty to treat the beneficiaries of the trust impartially. Naming a trustee who has strained relations with these beneficiaries can prove to be problematic. Finally, prudent investor laws can create additional duties for a trustee and selecting an individual who is capable of either understanding those rules or getting qualified investment help could prove vital.

As noted, the terms of a trust are stated in a trust agreement. Can a trust agreement be changed or revoked? The trust agreement will state whether it can be modified or revoked and, if so, that method must be substantially followed. If the instrument is silent on whether the agreement can be modified or revoked and if the trust agreement was executed after July 1, 2003, the settlor may revoke or modify the trust.

A trust may have more than one grantor. There can also be more than one trustee serving at one time, usually referred to as co-trustees. Even if a person is named in a trust agreement to serve as trustee, nothing requires the person to accept that position. That person can easily refuse to serve, without suffering any negative consequences. Once a person accepts the responsibility of trustee, however, he or she cannot abdicate the administration of the trust to another person. A person can only resign the position of trustee by following the terms of the instrument which created the trust or, if that document is silent on the procedure to follow, state law will apply. Unless the trust states otherwise, trustees are entitled for compensation for serving in that position.

Importantly, once a person decides to accept the position of trustee, he or she owes many "fiduciary" duties to the trust beneficiary. That is the case even if the beneficiary was the grantor of the trust and another person serves as trustee. In all cases (unless the trustee is also the grantor), the trustee owes fiduciary duties to the beneficiary.

As to trustees and trusts, fiduciary responsibility imposes obligations upon the trustee. Generally speaking, fiduciary responsibility requires the trustee to follow the trust agreement and manage the trust for the benefit of the trust beneficiaries as the trust agreement provides. While the trust can provide some protections to the trustee, under New Mexico law, it cannot eliminate the duty of the trustee to administer the trust in good faith pursuant to the trust terms.

H. PROTECTIVE ARRANGEMENTS AND SINGLE TRANSACTIONS

New Mexico's Uniform Probate Code contains a section (NMSA 1978 § 45-5-405.1) which allows for judicial approval of protective arrangements and single transactions. This section allows the

Court to enter an order approving a specific transaction instead of ordering a full conservatorship. The section applies to adults and minors.

The type of transactions which may be approved under this section include establishing eligibility for benefits, selling property, approving a contract (including a contract for personal care), establishing a trust, purchasing an annuity or settling a claim. This list is not all inclusive.

This section also contains a provision designed to combat exploitation in a targeted way. This section allows the Court to enter an order restricting access to a protected person or a protected person's property by a specified person who the Court finds by clear and convincing evidence:

(a) through fraud, coercion, duress, or the use of deception and control, caused or attempted to cause an action that would have resulted in financial harm to the protected person or the protected person's property; and

(b) poses a risk of substantial financial harm to the protected person or the protected person's property.

While the protective arrangement mechanism still requires the filing of a court action, if successful, it would avoid the imposition of a full conservatorship and serve to preserve the person's civil rights while also providing for his or her financial protection. During the single transaction process, unless the person already has a lawyer of his or her own choosing, the Court must appoint a lawyer to represent the person at the hearing of the petition. That attorney shall have the duties of a guardian ad litem. Those duties shall be discussed elsewhere in this Handbook.

Finally, for adults for whom protective arrangement petitions have been filed, this section requires the Court to consider the persons' prior or current directions, preferences, opinions, values, and actions to the extent actually known or reasonably ascertainable. For minors, the Court is required to consider the best interests of the minor, the preferences of the parent of the minor and the preferences of the minor if twelve years of age or older. Only after these factors are considered may the Court issue a protective arrangement order.

A protective arrangement is a targeted proceeding which should result in less intrusion upon the rights of the person to be protected. As such, a person petitioning for a conservatorship should first consider whether a protective arrangement might provide the level of protection the person needs. If so, this method will likely be a preferred approach to providing the necessary level of financial protection.

Chapter 3.

Guardian and Conservator: Court Proceeding

A. INTRODUCTION

What if the alternatives discussed in Chapters One and Two do not provide sufficient protection for the person to be protected? In that case, it may be necessary to initiate a guardianship and/or a conservatorship proceeding in the District Court.

A **guardian** is a person, persons, or an entity appointed by the District Court to make personal and/or health care decisions for someone who is functionally impaired for reasons such as intellectual or developmental disability, mental illness, dementia, physical or mental disability, substance abuse, or other cause.

Before a Court may appoint a guardian for a person thought to be incapacitated, it must find based on clear and convincing evidence that the person is not able to manage his or her personal care based on recent behaviors. Inability to manage one's personal care means the 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 is likely to occur in the near future.

A **conservator** is a person, persons, or an entity appointed by the District Court to make financial decisions for someone who is functionally impaired for reasons such as intellectual or developmental disability, mental illness, dementia, physical or mental disability, substance abuse, or other cause.

Before a Court will appoint a conservator, it must find, based on clear and convincing evidence, that a person is not able to manage either his or her estate or financial affairs or both. To reach that finding, there must be clear and convincing evidence, based on recent behavior, of gross mismanagement of one's income and resources or medical inability to manage one's income and resources which has led or is likely in the near future to lead to a person's financial vulnerability.

It is possible that a person may need a conservator, but not a guardian and, as will be discussed elsewhere in this Handbook, it is possible that either or both of these appointments might be limited by the Court. With the very specific exception of guardians appointed by will or other "non-testamentary appointments" -- explained, next section -- to become a guardian or conservator for another requires an independent court proceeding.

B. APPOINTMENT OF GUARDIAN BY WILL OR "NON-TESTAMENTARY APPOINTMENT"

Similarly, New Mexico law allows a spouse or a parent to name a guardian for his or her incapacitated spouse or adult child in (a) his or her last will and testament; or (b) in another "writing" signed by that person and witnessed by two other persons. The "writing" referred to in part (b) of the previous sentence shall be referred to as a "Non-Testamentary Appointment."

When the spouse or parent dies, a legal proceeding will be initiated to probate the will of the deceased spouse or parent or to recognize the Non-Testamentary Appointment he or she signed. Normally, that proceeding would be started either by the person named to serve as the personal representative in the will or the guardian nominated in the Non-Testamentary Appointment.

New Mexico law states specific requirements which must be followed before the guardianship appointment in either a will or Non-Testamentary Appointment will have legal effect. If the person named to serve as guardian in the will or the Non-Testamentary Appointment is willing to accept the appointment, he or she must give written notice of the intention to accept the guardianship appointment. This notice must:

1. state the appointment may be terminated by filing a written objection in "the legal proceeding;" and
2. be given to the incapacitated person and his or her caregiver or closest adult relative seven (7) days before the guardian files the form of acceptance in "the legal proceeding."

For these purposes, "the legal proceeding" is the case where the deceased spouse or parent's will is being probated or where the Non-Testamentary Appointment has been filed.

Once notice has been properly given, the Court will then issue Letters of Guardianship which state the person's authority to serve as guardian. The Letters of Guardianship are proof that the State of New Mexico recognizes the guardianship appointment as valid.

A person who is named by a will or other Non-Testamentary Appointment to serve as a guardian for an adult incapacitated child or spouse of a deceased person is appointed guardian in a legal proceeding. As noted, this proceeding either occurs within a probate or in a proceeding filed to recognize the validity of the Non-Testamentary Appointment.[4]

Because this appointment occurs most often in connection with the probate of a decedent's last will and testament, the attorney representing the personal representative of the deceased person's estate may file the papers needed to obtain official recognition of the guardianship appointment.

The ability to name a guardian in a will or Non-Testamentary Appointment is available only to parents and spouses of incapacitated persons. In New Mexico, it is common that parents of an incapacitated person will name a trusted person to serve as a guardian of their child upon the deaths of both parents. A provision included in a last will and testament is the most common mechanism for making such a designation. As a result, a person who has an incapacitated adult or spouse should consider including such a provision in his or her estate plan.

After the guardian files his or her acceptance of appointment in "the legal proceeding" (defined above) and the Court has issued Letters of Guardianship, the guardianship appointment becomes effective. If another person files a written objection to the appointment of the guardian, however,

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[4] Most courts will decline to make an appointment in the probate proceeding and instead will require that the legal proceeding be initiated in the District Court as a separate proceeding, except in cases where a Court previously decided that the adult child or spouse of a deceased person was incapacitated and that a guardianship and/or conservatorship was necessary, and the will of the deceased spouse or parent or the Non-Testamentary Appointment is for the sole purpose of appointing a successor guardian and/or conservator.

the guardianship appointment terminates. In that case, another Court proceeding that deals specifically with the appointment of a guardian will be necessary.

Nomination of a guardian by will or Non-Testamentary Appointment is specifically provided for in New Mexico law. See NMSA 1978 § 45-5-301 (1995) for the procedural requirements of these devices.

C. APPOINTMENT OF GUARDIAN AND/OR CONSERVATOR FOR AN ADULT IN A DISTRICT COURT PROCEEDING

New Mexico law allows a parent or spouse of an incapacitated person to nominate a guardian for that person in his or her last will and testament or other Non-Testamentary Appointment. The most common method for the appointment of a guardian and/or conservator, however, is through a District Court proceeding brought specifically for these purposes. Both a guardian and a conservator may be appointed in the same court proceeding if it is determined both are necessary, and the same person may be appointed in both roles.

Guardianship and conservatorship proceedings are available to provide protection both for minors or persons over the age of eighteen (18) years who have never had capacity or who may have become incapacitated due to an accident, disability, illness, substance abuse, or other cause. It is important to note that separate statutory proceedings apply for guardianship proceedings for minors and adult incapacitated persons. This Handbook addresses only protective proceedings for adults.

A guardianship or conservatorship appointment may be necessary when the alternatives described in the first two chapters of this Handbook are: (a) in the case of guardianship, not available to manage the protected person's welfare, safety, and rehabilitation; or (b) in the case of conservatorship, not available to provide for the effective management of the protected person's estate and financial affairs.

Because a petition to appoint a guardian and conservator involves many steps, a person wishing to pursue these avenues is wise to seek the advice of a qualified attorney. Before consulting a lawyer, one who is considering filing a guardianship or conservatorship proceeding should carefully consider whether there are other resources available to provide the support and protection the person needs. Those alternatives are discussed in the previous sections of this Handbook.

There are many reasons why available alternatives may not be sufficient to provide for the care and coordination of services for the person for whom protection is sought. For example, the person for whom protection is sought may be reluctant to engage with the person or persons trying to help thereby placing the stability of that person's care at risk; there may be disagreement in the person's family over what care and services should be provided causing a breakdown in the ability to direct proper care; or existing powers of attorney may not be legally sufficient to conduct business or are

frequently revoked or revised by persons who are in conflict over who should manage the person's affairs.

Whatever the reason may be for the breakdown in the available alternative, before initiating a Court proceeding, the person wishing to pursue a guardianship and conservatorship should carefully consider the reasons as to why available alternatives are not workable and explore whether those difficulties can be resolved. Guardianship litigation may result in a loss of a person's civil rights, worsened family conflict, and considerable expense, all of which could be avoided if the person's needs can be met using alternatives to guardianship.

As to the question of expense, the financial resources owned by the protected person may be available to pay for some or all of the costs of the guardianship case subject to the Court's approval. What if the person to be protected does not have financial resources? If the person for whom a guardianship is being sought does not have sufficient financial resources, the person seeking assistance should contact the Office of Guardianship at the New Mexico Developmental Disabilities Council. The services of that office may be available to provide for some relief of the expense of filing a guardianship case. Other legal resources may also charge reduced or no fees to initiate a guardianship proceeding for those who lack sufficient assets, but do not qualify for services through the Office of Guardianship.

If the person seeking to obtain protection for a vulnerable adult has tried alternatives without success and remains concerned about the vulnerability of the person's health or finances, a guardianship or conservatorship proceeding may be necessary. The concerned person should consider hiring a lawyer who is familiar with guardianship and conservatorship proceedings.

The following resources may aid the concerned person in locating a qualified lawyer: the New Mexico State Bar Foundation's Lawyer Referral for the Elderly Program, the New Mexico State Bar General Referral Program, the New Mexico Guardianship Association's website, the websites for the American College of Trust and Estate Counsel and the National Academy of Elder Law Attorneys.

1. What Information Will the Lawyer Need?

When a qualified lawyer is asked to consider whether a guardianship or conservatorship proceeding should be initiated for a person thought to be in need of protection, he or she will need a number of items of information, which should include:

a) the incapacitated person's physical and mental condition, including whether the person suffers from mental illness, intellectual or developmental disability, physical illness or disability, or chronic substance abuse;

b) the existence of any emergency medical issues;

c) the existence of any emergency financial issues;

d) the evidence of recent behavior which prevents the person from meeting his or her needs for medical care, nutrition, clothing, shelter, hygiene or safety, and how that behavior makes it likely to be harmful to the person in the future;

e) the evidence of recent behavior which shows that the person has grossly mismanaged his or her income or resources or is medically unable to manage such resources and how this management makes it likely to lead to the financial vulnerability of that person;

f) the presence or threat of exploitation;

g) items of personal care and financial management that the person can manage *without* assistance;

h) items of personal care and financial management that the person can manage *with* assistance;

i) items of personal care and financial management that the person requires *total* assistance;

j) the living conditions of the person;

k) the identification of the closest family members and whether there is any disagreement in the family about whether a guardianship or conservatorship is needed;

l) The name and qualifications of the person or persons who are thought to be suitable to serve as the person's guardian or conservator;

m) whether alternatives exist to provide personal or financial management. Those alternatives include, but are not limited to, powers of attorney for financial or health matters, representative payee arrangements, and trust agreements. If any of these documents exist, they must be brought to the attention of the attorney evaluating the situation; and

n) the extent to which alternatives to guardianship and conservatorship have been tried but failed.

To the extent that the concerned person is seeking to secure proper financial management for the incapacitated person, the lawyer will need to understand, as thoroughly as possible, the protected person's estate, including assets, sources of income, and liabilities (debts). Finally, the lawyer will need the names and addresses of all persons entitled to notice of a guardianship or conservatorship proceeding, as outlined in Appendix.

2. What Kind of Appointment is Necessary?

After reviewing the important information about the person to be protected, the lawyer should provide a preliminary opinion as to whether a guardianship or conservatorship should be filed, and, if so, who should be identified to serve as the person's guardian or conservator. Deciding on what kind of appointment to seek will partly depend on how the protected person has managed his or her personal or financial affairs to date.

For example, if a person to be protected needs health care management, but has a very limited income (such as only a monthly Social Security payment) and no other significant assets, it may be that only a guardianship is necessary. In such a case, a guardian with limited financial powers may be appointed rather than a conservator. A representative payee, discussed in Chapter Two,

could also be established to manage the Social Security income while the guardian may be appointed to manage the person's health care.

If the decision is made to seek a guardianship and/or conservatorship appointment, a petition must be prepared and filed to initiate the Court process. That petition will request the Court to either appoint a guardian for the person and/or a conservator for the person's assets. The petition must be filed along with a detailed Guardianship and Conservatorship Information Sheet that contains important data about the person to be protected.

The content of the Guardianship and Conservatorship Information Sheet is governed by a form approved by the New Mexico Supreme Court. See, NMRA Form 4-992.

The appointments sought may be full or limited in scope, depending on the needs of the protected person.

New Mexico law requires that a guardianship be ordered only to the extent necessary to promote and protect the well-being of the protected person.

Guardianship and conservatorship proceedings are governed by a very specific set of rules and procedures which are discussed below. In general terms, after hearing the evidence presented at the hearing on the petition, the Court will determine the scope of the guardianship and/or conservatorship to be entered. A "full" appointment grants full decision-making power. A "limited" appointment grants only the power to make certain decisions. The differences between "full" and "limited" appointments are discussed elsewhere in this Handbook. Limited appointments are, and should be, favored in the law. The protected person retains the power to make all decisions not limited by Court order.

In some cases, it may be necessary to seek the appointment of a guardian or conservator on an emergency basis. New Mexico law contains provisions which directly address these contingencies. These appointments are identified as "temporary" appointments under New Mexico law. These temporary appointments should only be sought under emergency circumstances.

New Mexico law states the requirements for temporary guardianships at NMSA 1978 § 45-5-310 (2022) and for temporary conservatorships at NMSA 1978 § 45-5-408 (2022).

After the temporary order is entered, the petition nevertheless proceeds to be heard in a final hearing.

3. Who is Involved in the Court Proceeding?

New Mexico law specifies the requirements for every petition to appoint a guardian or conservator which include what such petitions must state. Of these requirements, New Mexico law mandates that a petition to appoint a guardian or conservator list the names and addresses of many people who may be involved with the protected person. The categories of people who must be listed in the petition are itemized in the Appendix to this Handbook.

A copy of the petition must be personally served on the person to be protected along with a statement of the person's rights at the hearing which, of course, includes his or her right to attend the hearing and:

1) The right to obtain an attorney of the alleged incapacitated person's choice;
2) The right to object to the individuals appointed as visitor, qualified health care professional, and guardian *ad litem*;
3) If the person is unable to be present in court, the Court upon request or its own motion may conduct hearings at the location where the person to be protected is located;
4) The right to present evidence at the hearing and to subpoena witnesses and documents;
5) The right to examine witnesses at the hearing, including the court-appointed guardian *ad litem*, qualified health care professional, and visitor;
6) The right to otherwise participate in the hearing; and
7) The right to be personally served with a copy of the notice and of the petition filed in this proceeding.

The content of the notice of rights is governed by a form approved by the New Mexico Supreme Court. See, NMRA Form 4-999.

The notice must state the nature, purposes, and consequences of granting the guardianship petition. Failure to properly serve the notice to the person to be protected will prevent the Court from proceeding to hear the petition.

In addition, a copy of the petition along with a copy of the notice provided to the alleged incapacitated person must be mailed to each of the individuals named in the petition, and each of these persons must also receive notice of the hearing on the proposed appointment of a guardian and conservator.

In addition to stating the requirements for what a guardianship and conservatorship proceeding must state and how it must be served, New Mexico law also requires that the Court appoint three professionals who have certain duties with respect to guardianship and conservatorship proceedings.

First, the Court must appoint a **qualified health care professional**. The qualified health care professional is a physician, psychologist, physician assistant, nurse practitioner, or other health care practitioner who has training or expertise in assessing whether a person is unable to manage his or her personal or financial affairs due to mental illness, disease, illness or disability, substance abuse, or other cause.

A qualified health care professional must be qualified to express an opinion as to the person's condition based not just on his or her expertise, but also on a sufficient examination of the person to be protected. The qualified health care professional is required to submit a written report regarding the person's incapacity, if any, and the level of the person's intellectual, developmental, and social functioning. The qualified health care professional must submit his or her written report at least fourteen (14) days before the hearing on the proposed guardianship and/or conservatorship appointment.

Second, the Court must appoint a **visitor**. The visitor is a person who is trained or who has expertise to evaluate the needs of the person who is sought to be protected. A visitor may include, but is not limited to, a psychologist, social worker, developmental incapacity professional, a physical or occupational therapist, an educator, and a rehabilitation worker.

The visitor must interview both the person seeking the appointment of a guardian and the person to be protected. The visitor is required to visit the place where the person to be protected lives and the place where it is proposed that the person be moved to, if different. The visitor is required to evaluate the needs of the person to be protected. The visitor will evaluate how the person functions in his or her daily life and the ability of that person to manage his or her own personal care.

The visitor's evaluation may include reviewing the person's ability to initiate, make, and communicate decisions and perform daily living tasks. The relevant daily living tasks considered will depend on the facts and circumstances of each case and may include the ability to obtain groceries, plan meals, and provide for one's shelter on the one hand and the ability to bathe, dress, use the toilet, manage medication, and eat on the other hand. The visitor reports on those aspects of the person's personal care which he or she can manage with and without assistance and those aspects of his or her personal care which he or she cannot manage, even with help. The visitor must prepare his or her findings and recommendations in a written report which must be submitted

at least eleven (11) days before the hearing on the proposed guardianship and/or conservatorship appointment.

Timing of the delivery of the reports of the qualified health care professional, visitor and guardian ad litem is governed by Court rule. See, NMRA Rule 1-143.

In the case of conservatorships, the visitor's report must address what aspects of the person's financial affairs he or she can manage with or without assistance and which aspect of these affairs the person is simply unable to manage. The visitor must interview the person seeking to have a conservator appointed as well as the person to be protected in that proceeding.

Third, the person to be protected must be represented by an attorney. Unless the alleged incapacitated person has an attorney of his or her own choice, the Court must appoint a **guardian ad litem** for the person. New Mexico law specifies the duties of the guardian ad litem, which include: (a) interviewing the person to be protected (in person and prior to the hearing), the qualified health care professional, the visitor and the proposed guardian; (b) presenting the alleged incapacitated person's position to the Court; (c) reviewing the reports provided by the qualified health care professional and visitor; (d) obtaining independent medical or psychological assessments if necessary; and (e) identifying and presenting to the Court all available less restrictive alternatives to guardianship.

In the case of conservatorships, New Mexico law specifically states that the guardian ad litem may interview any other person who may have relevant information concerning the person to be protected. In practice, in both guardianships and conservatorships, guardians ad litem would be expected to review the documentation and interview those individuals necessary for that guardian ad litem to make a complete presentation to the Court as the facts and circumstances of the case may require. The guardian ad litem must file a written report at least seven (7) days before the hearing on the proposed guardianship and/or conservatorship appointment.

The roles of the qualified health professional, visitor and guardian ad litem usually, but not always, terminate when the Court enters its order deciding the petition to appoint a guardian and conservator.

4. Hearing and Court Order

The District Court will hold a hearing on the petition to appoint a guardian or conservator. That hearing should occur after allowing enough time to elapse for the court visitor, qualified health care professional, and guardian ad litem to complete their investigations.

The person to be protected is required to attend the hearing on the appointment of a proposed guardian or conservator, unless excused. A person to be protected may be excused from attending the hearing by an order of the Court. The person may be excused if the Court concludes that it is not in the best interest of the protected person to be present because of a threat to the health or safety of the alleged incapacitated person or others as determined by the Court.

If the person to be protected is unable to attend, the Judge can hold the hearing where the person resides. Usually, however, the hearing takes place in a courtroom or Judge's office. The hearing on whether to appoint a guardian or conservator is open to the public unless the court determines, based on good cause, that the hearing should be closed.

The rules of evidence apply at this hearing and there is a presumption that the person to be protected has capacity. It is the burden of the person who filed the petition to prove with clear and convincing evidence that a guardian or conservator must be appointed for the person who may need protection.

As noted above, prior to the hearing, the qualified health care professional, visitor, and guardian ad litem are required to have filed written reports. It is the responsibility of the Petitioner to provide these reports to the alleged incapacitated person, the visitor, the guardian *ad litem*, any attorney of record, any agent under a power of attorney unless the Court orders otherwise, and any other person the Court determines should receive it. Additionally, the guardian ad litem is required review the contents of the reports with the alleged incapacitated person.

Responsibility for delivery of the reports of the qualified health care professional, visitor and guardian ad litem is governed by Court rule. See, NMRA Rule 1-143.

At the hearing, the court visitor and qualified health care professional report to the Court as to the person's condition and limitations that render him or her unable to manage his or her personal care or financial affairs. The guardian ad litem will report his or her conclusions to the Court. The written reports of these professionals would be expected to summarize their conclusions and stress what the person can do independently, with assistance, and with supervision. The existence of available alternatives to guardianship and conservatorship must also be discussed. At the hearing, the Court may hear testimony from other witnesses and consider relevant written evidence.

New Mexico law specifically grants the alleged incapacitated person the right to present evidence, subpoena witnesses and documents, examine witnesses (including the guardian ad litem, qualified health care professional, and visitor), and otherwise participate in the hearing.

If at the close of the hearing the Court finds that the person who may need protection has capacity to manage his or her personal care or financial affairs, the Court may dismiss the petition.

The Court may, however, find a guardianship and/or conservatorship appointment is necessary. The Court may enter an order appointing a guardian and/or a conservator if the Court finds that:

(a) the person is totally incapacitated or is incapacitated only certain areas;

(b) a guardianship or conservatorship is necessary to provide for continuing management of the person's personal or financial affairs;

(c) there are no available alternative resources suitable to provide for personal or financial management for the person;

(d) a guardianship or conservatorship is the least restrictive form of intervention available to provide for the proper management of the person's personal or financial affairs; and

(e) the proposed guardian or conservator is proper.

The Court's conclusions will be contained in a written order which will be filed in the case file kept in the Court's records. If the Court believes that a guardian and conservator are not necessary, it will dismiss the petition. If, on the other hand, the Court finds that protection is required, it must state its reasons for that decision in its order and the order must be provided to the proposed guardian and conservator, the protected person, and the protected person's counsel. If the Court orders the appointment of a guardian or conservator for the alleged incapacitated person, the affairs of that person become subject to Court supervision to the degree stated in the Court order. At the time the order appointing a guardian or conservator is entered, the Court will enter a separate order identifying who is entitled to notice of subsequent filings and access to the court file.

If the Court decides that the person is incapacitated and that a guardianship and/or conservatorship is necessary, the order will appoint a guardian and/or conservator. The order may also limit the scope of the guardian and/or conservator's authority. The order may state that the guardian's powers override any powers given to an agent previously appointed under a power of attorney.

If a health care power of attorney is in effect and not revoked by Court order, the health care decision of an agent takes precedence over that of a guardian, and the guardian is required to cooperate with the agent to the extent feasible. Under New Mexico's Uniform Power of Attorney Act, a financial power of attorney is not automatically revoked by an order appointing a conservator. Unless the order revokes the financial power of attorney, the agent under a power of attorney is accountable not only to the protected person, but also to the person's conservator.

When the court appoints a guardian and/or conservator, the appointed guardian and/or conservator must sign an acceptance of this appointment and file this acceptance with the District Court Clerk in order for the appointment process to be complete. Once the acceptance is filed, the District Court Clerk will issue "letters" of guardianship and/or conservatorship. The letters are formal recognition issued by the District Court Clerk that a person has been appointed as a guardian or conservator of a protected person. The District Court Clerk will issue both certified and non-certified copies of the letters. The guardian and conservator should always keep at least one certified copy of the letters as some persons or entities may insist on a certified copy before recognizing the authority of the guardian or conservator.

Before a person is appointed to serve as a guardian or conservator, he or she should understand the duties and responsibilities of serving in these roles. These duties are covered elsewhere in this Handbook. Additionally, training videos outlining the responsibilities are available at the website of the New Mexico Supreme Court.

Chapter Four.

The Protected Person's Rights

A guardianship or conservatorship order may be entered only to the extent required by the specific needs of the protected person. "Logic makes a compelling case for limiting the deprivation of rights through a tailored guardianship order that matches the particular disabilities of the individual rather than the wholesale removal of rights through [full] orders."[5] In other words, "Courts should allow the person to keep decision-making responsibility in areas where he or she has the ability to make and communicate informed decisions."[6]

The appointment of a guardian or conservator infringes on the civil liberties of a protected person. Therefore, a guardianship or conservatorship should be viewed as vehicles of last resort. Guardianship and conservatorship should be imposed only when there are no suitable alternatives to take care of a person's personal or financial needs.

Once the Court determines that the person in need of protection is "incapacitated" and enters a guardianship or conservatorship order, the effect of this type of order is to delegate certain of the person's rights to the appointed guardian or conservator. The rights to determine the person's residence, consent to medical treatment, manage property, contract, and file or defend lawsuits are among the rights delegated to the guardian or conservator.

There are certain personal rights that can be taken away, but cannot be not delegated to the guardian or conservator. For example, when the Court enters an order appointing a guardian or conservator for a protected person and finds that the person is totally incapacitated, Federal law prohibits the person from "receiving or possessing" a firearm or ammunition.

Other personal rights which cannot be delegated include the right to marry, vote, and the ability to make a will. As to the right to vote, New Mexico law specifically states that the "voting rights of a protected person shall not be abridged or restricted except pursuant to Article 7, Section 1 of the New Mexico Constitution." That section of the New Mexico Constitution limits the right to vote of citizens who suffer from mental incapacity only where those persons "are unable to mark their ballot and who are concurrently also unable to communicate their voting preference."

New Mexico, however, has long recognized that a guardian has the power to initiate a divorce proceeding for an incapacitated person. That power must be carefully used, as the following language from the New Mexico Court of Appeals makes clear:

> **When exercising the guardian's powers pursuant to the statute, the guardian is frequently required to recognize the primacy of the ward's values... From these provisions, it follows that the ward's values should likewise be primary in determining whether the guardian should file for divorce.**

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[5] Sally Balch Hurme, Current Trends in Guardianship Reform, 7 Md. J. Contemp. Legal Issues 143, 160–61 (1996).

[6] National Guardianship Association, The Fundamentals of Guardianship: What Every Guardian Should Know (ABA 2017).

Nelson v. Nelson, 1994-NMCA-074, ¶ 17, 118 N.M. 17, 22.

As to the ability to make a last will and testament, neither the guardian nor the conservator has the power under New Mexico law to make a will for a protected person. While the right to make a will is one that cannot be delegated to the guardian or conservator, the ability of the protected person to make a will depends on whether that person has legal capacity to do so. The test for legal capacity to make a will is different from the test to determine whether a person has capacity to manage his or her personal care or financial affairs. Under New Mexico law, a person has capacity to make a will if he or she (a) has the ability to understand the act of making a will; (b) knows the extent of his or her estate; and (c) knows the objects of his or her bounty. If the person does not know this information at the time he or she signs a will, that document would likely not be recognized by a Court as valid after the person dies.

Similarly, under New Mexico law, marriage is a civil contract. New Mexico law requires that people who marry be legally capable of contracting. Therefore, as to the right to marry, if a person lacks the ability to understand in a reasonable manner the nature and effect of the marriage contract, the decision to marry would likely not be a valid one.

As these examples show, the ability of a person to validly exercise certain of his or her retained rights can depend on the person's cognitive abilities.

While the Court order appointing a guardian or conservator has the effect of delegating certain of the person's rights to the guardian or conservator, there are certain personal rights that cannot be removed or delegated. Rights that cannot be removed include the right to

1) access records concerning his or her guardianship or conservatorship;

2) appeal the order appointing a guardian or conservator;

3) seek to modify the guardianship or conservatorship;

4) statutory protections if a petition is filed to broaden the scope of the guardianship or conservatorship. Those protections require following the procedures required for appointing a guardian or conservator as was done in the original proceeding leading to the appointment;

5) statutory protections if the guardian seeks to commit the protected person to a mental health facility. In such cases, the guardian must follow New Mexico's procedures for involuntary commitment; and

6) maintain interpersonal relationships; and

7) communicate, visit or interact with others restricted by the guardian or conservator, except in strict accordance with the mandates of New Mexico law.[7]

[7] National Guardianship Association, The Fundamentals of Guardianship: What Every

If the guardianship or conservatorship is limited, the protected person has the right to exercise all control over his or her life which has not been delegated to the guardian or conservator.[8]

The guardian or conservator must treat the protected person with dignity, but their duties do not end there. It is his or her responsibility to understand that the protected person retains many rights even though the Court has appointed a guardian or conservator to make his or her legal decisions. These rights may affect countless numbers of day-to-day decisions, events, and functions. It is essential that the guardian and conservator manage the guardianship or conservatorship in a manner that respects that reality. While listing all the ways in which a guardianship or conservatorship affects the rights of a protected person is not possible, general statements are useful.

To properly satisfy his or her duty, a guardian or conservator must recognize that the protected person's ethnic, cultural, or religious values are important and must be considered when decisions are made for that person. The guardian and conservator must also recognize that the protected person has a right not just to interpersonal communication, but also to sexual expression. The protected person has a right to sexual expression, and it is the guardian's duty to be sure that such relationships are safe, consensual, without victimization, and take place in a private environment.

The guardian and conservator must respect the person's right to privacy. The guardian and conservator must acknowledge that the protected person has a right to receive the level of service that is appropriate to his or her situation, to receive information about his or her medical condition and treatment, and to receive information about his or her financial affairs. The protected person has the right to express concerns, ask questions, and make suggestions about decisions affecting his or her life.

Guardian Should Know (ABA 2017).

[8] Id.

Chapter Five.

Powers and Duties of Guardian

A. INTRODUCTION

A guardian is an individual or entity that has been appointed by a New Mexico District Court to provide for the care and protection of a person the Court finds to be partially or wholly "incapacitated" and without alternative resources to provide for such care. As discussed earlier in this Handbook, a power of attorney for health care is just one alternative that may render a guardianship unnecessary. There are others and, as discussed, their suitability should be considered, and ruled out, before a guardianship is initiated.

The terms "incapacity" or "incapacitated" have special meaning in the law. As to guardianship, a person is "incapacitated" when, as demonstrated by recent behavior, he or she demonstrates the inability to meet his or her needs for medical care, nutrition, clothing, shelter, hygiene, or safety. This inability must (a) be due to mental illness, "mental deficiency," physical illness or disability, chronic substance abuse, or other cause; and (b) have led, or be likely to lead in the near future, to injury or illness.

Accepting an appointment as guardian for another person is to accept a very serious legal obligation. These obligations are defined by New Mexico rules and law. Those rules and law can be found in:

1) Article 5 of the Uniform Probate Code as adopted in New Mexico;
2) Court Rules found in Article 14 of the New Mexico State Court Rules;
3) Official forms found in the New Mexico State Court Rules, Civil Forms; and
4) The judicial decisions of New Mexico's Appellate Courts.

The National Guardianship Association (NGA) Standards of Practice (4th Ed. 2013) provide a series of rules which the New Mexico legislature officially recognized as applicable in New Mexico as to professional guardians effective July 1, 2021.

As a result, New Mexico law now states the following concerning a guardian's duties:

…In particular and without qualifying the foregoing, a guardian or the guardian's replacement has the following powers and duties, except as modified by order of the court:

…the guardian shall exercise the guardian's supervisory powers over the protected person in a manner that is least restrictive of the protected person's personal freedom and consistent with the need for supervision. Professional guardians shall follow the following standards in the national guardianship association standards of practice:

(a) informed consent;

(b) standards for decision making;

(c) least restrictive alternatives;

(d) self-determination of the person; and

(e) the guardian's duties regarding diversity and personal preferences of the person. NMSA 1978 § 45-5-312 (B) (5) (2021).

Specifically applying the NGA Standards to the conduct of professional guardians in New Mexico demonstrates that New Mexico will now look to the NGA Standards for rules governing the performance of a guardian's duties, at least as to the areas described in the above-quoted statute.

Under New Mexico law, (a) a professional guardian and conservator is a person or entity serving in these roles for more than two persons not related to the guardian or conservator by marriage, adoption or third degree of blood or affinity. Professional guardians and professional conservators must be certified by a national or state organization recognized by the State Supreme Court that provides professional certification. NMSA 1978 § 45-5-101 (S)(T); 45-5-311 (D) (2019).

The NGA standards reflect the practice among practitioners across the United States to make guardianship a person-centered practice. In addition, the NGA has developed a short list of ten ethical principles which are summarized on a single page and which can serve as a good decision-making guide for guardians. The NGA ethical principles are repeated in their entirety on page 3 of this Handbook. The guardian must always adhere to New Mexico law and aspire to the best practice contained in the NGA standards.

If a guardian has a question about a course of action he or she should take, consulting the NGA Standards and NGA ethical principles is often a good place to start in trying to determine the answer. This section of the Handbook will attempt to summarize those standards and apply them to guardianships. New Mexico law, however, will always control the conduct of the guardian and the conservator. If a guardian has a specific question, the guardian should consider hiring a qualified attorney to obtain legal advice or asking the Court that appointed him or her to provide clarification.

The NGA standards address the guardian's relationship with the protected person. The following sections will discuss this relationship in detail. Generally, under these standards, the guardian is required to treat the protected person with dignity. Unless the guardian is a family member or friend, the guardian should avoid developing a personal relationship with the protected person. The guardian must not engage in a sexual relationship with the protected person unless the guardian is the protected person's spouse or unless such a relationship existed before the guardian's appointment. The guardian may only continue such a relationship if it is consensual.

FURTHER READING: PLEASE SEE NGA STANDARD 3, FOR GUIDANCE ON THE GUARDIAN'S PROFESSIONAL RELATIONSHIP WITH THE PROTECTED PERSON.

The guardian must respect the dignity and privacy of the protected person. It follows that the guardian should keep the affairs of the protected person confidential. Disclosure of information about the protected person should be permitted only to the extent such disclosure is necessary and relevant to an issue being addressed by the guardian. It follows that the guardian may maintain communication with a protected person's family and friend concerning significant occurrences that affect the protected person when that communication would benefit the protected person and is to persons with whom the protected person would have wanted the information shared. Therefore, unless a disclosure of information will substantially harm the protected person, the guardian may disclose sensitive information to the protected person's family and friends (as defined by the protected person).

The guardian should refrain from disclosing sensitive information about the protected person to other third persons, especially when doing so would be detrimental to the protected person or put his or her estate at risk. If there is ever a question about whether a guardian should provide information about a protected person to another person, the guardian should consider bringing that issue to the attention of the court that appointed him or her.

FURTHER READING: PLEASE SEE NGA STANDARD 11, FOR GUIDANCE ON CONFIDENTIALITY.

The guardian should be very careful when deciding whether to make disclosures about a protected person's private affairs and the amount of disclosure which may be necessary. It is important to note, however, that the guardian should be fully disclosing to the court. As discussed below, the guardian is required to fully report to the court using the forms which have been approved by the New Mexico Supreme Court. The guardian must submit an initial report (due 90 days after appointment), annual reports, and any other reports which the appointing Court has stated to be necessary.

The official forms identify the information which the guardian must provide to the court. The guardian must provide all information required by these forms. The guardian's annual report must be filed and a copy of the report provided to the judge that appointed the guardian (or that judge's successor), the protected person, to the protected person's conservator, and to any other person the court has designated.

B. OVERRIDING CONSIDERATIONS

There are several overriding principles which apply to all guardianships:

- First, a guardianship is only to be used when necessary to promote and protect the well-being of a protected person. In fact, a guardianship may

only be ordered when there are no alternative resources suitable to protect the person's well-being, safety, and rehabilitation;

- Second, a guardianship order should be tailored so that it is the least restrictive form of intervention necessary;
- Third, a guardianship must be designed to encourage the development of maximum self-reliance and independence of the protected person. In practice, this means that the guardian must provide the protected person with every opportunity to exercise his or her individual rights; and
- Fourth, a 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 granted to the guardian by the court.

In addition to these important principles, there are several other considerations which all guardians must keep in mind when making guardianship decisions, regardless of whether the guardianship is temporary or not. Those considerations are discussed below.

1. INFORMED CONSENT

Every health care decision the guardian makes for the protected person should be an informed decision based on the principle of informed consent. Under this principle, the guardian stands in the shoes of the protected person and is entitled to know the same information and exercise the same freedom of choice as the protected person would if he or she were not under guardianship. The principle of informed consent is discussed more below, but requires that the guardian make decisions based on proper investigation and consideration of alternatives. To reach that objective, the guardian must become educated on the nature of the protected person's incapacity.

FURTHER READING: PLEASE SEE NGA STANDARD 6, FOR GUIDANCE ON INFORMED CONSENT.

2. PERSON-CENTERED APPROACH

The guardian should follow a person-centered approach to the guardianship. This approach respects the preferences of the protected person and entails developing a vision of the guardianship which is based on the protected person's strengths and abilities. Each guardianship is different, and each guardian should take an individualized approach when making decisions for the person he or she has been appointed to protect. Using the person-centered approach to guardianship, the guardian may include in the decision-making process those persons who are important in the protected person's life when it comes to making decisions for him or her. The guardian may request and consider family input when making medical decisions for the protected person. When making such decisions, the guardian must be mindful of the priorities of the protected person.

FURTHER READING: PLEASE SEE NGA STANDARD 9, FOR GUIDANCE ON PROMOTING SELF-DETERMINATION.

The guardian should promote social interactions and meaningful relationships between the protected person and others in a manner consistent with the preferences of the protected person. The guardian should also do so while the protected person is away from his or her residence for medical care or for other reasons. The guardian must encourage and support the protected person in maintaining contact with his or her family and friends as those are defined by the protected person.

The guardian should maintain lines of communication with the protected person's friends and family concerning significant events which may affect the protected person, including medical issues—as long as doing so would benefit the protected person. If there is a conservator, trustee, representative payee, VA fiduciary, or other similar fiduciary serving the protected person, the guardian must make a good faith effort to cooperate with those individuals for the benefit of the protected person.

The NGA Standards require a guardian to encourage and support the protected person in maintaining contact with family and friends unless to do so would cause substantial harm to the protected person. It is very important to note, however, that New Mexico law has very strict requirements stating when a guardian can limit contact between a protected person and other persons. If the guardian is concerned about the negative effect certain persons may have on the protected person's welfare, the guardian must comply with New Mexico law when limiting contact. These rules are discussed below.

FURTHER READING: PLEASE SEE NGA STANDARD 4, FOR GUIDANCE ON THE GUARDIAN'S RELATIONSHIP WITH FAMILY MEMBERS AND FRIENDS OF THE PROTECTED PERSON.

The guardian must encourage the protected person to participate to the maximum extent of the person's abilities in all decisions that affect him or her. The guardian must make and implement a plan that seeks to fulfill the person's goals, needs, and preferences.

When making decisions for the protected person, the guardian must determine the extent to which the protected person identifies with ethnic, religious or cultural values, including the protected person's attitudes towards illness, pain, suffering, and dying; quality of life issues; social roles and relationships; and funeral and burial customs.

FURTHER READING: PLEASE SEE NGA STANDARD 10, FOR THE GUARDIAN'S DUTIES REGARDING DIVERSITY AND PERSONAL PREFERENCES OF THE PROTECTED PERSON.

3. SUBSTITUTED JUDGMENT

If the person under guardianship is unable to state his or her preferences as to a particular decision, a guardian should make that decision for the protected person using the principle of **Substituted Judgment**. Substituted judgment should govern the decisions of the guardian unless doing so presents a risk of substantial harm to the protected person. In fact, New Mexico law specifically requires that health care decisions be made in accordance with the values of the protected person, if those values are known to the guardian. Additionally, under legislation effective in New Mexico as of July, 2021, the professional guardian in New Mexico must utilize the "standards for decision-making" set out in the NGA Standards. These standards include the concept of substituted judgment.

Substituted Judgment requires the guardian or other surrogate to learn as much as possible about the lifestyle, behaviors, preferences, and decisions made by the person prior to his or her incapacity. Taking these factors into careful consideration, the guardian makes decisions that would, as closely as possible, reflect what the protected person would have decided, if capable of making the decision. The person's autonomy, values, beliefs, and preferences are best protected when the person's own judgment can be substituted in place of the guardian's judgment.

What if the guardian is unable to determine how the protected person would decide any particular issue, whether because of an inability to communicate or otherwise? If this is the case, then the guardian should make a decision for the protected person, as the guardian determines to be in the best interest of the protected person. A guardian should use the best interest approach, only when: (a) the protected person cannot express a preference; (b) the protected person's preferences cannot be ascertained; or (c) following the protected person's preference presents a risk of substantial harm to him or her. A guardian should obtain information from professionals and other persons who have a demonstrated interest in the protected person's welfare to determine what is in the person's best interests.

FURTHER READING: PLEASE SEE NGA STANDARD 7, FOR GUIDANCE ON SUBSTITUTED JUDGMENT AND BEST INTERESTS.

It is against the backdrop of these important considerations, that the following paragraphs will describe the duties of a guardian, both temporary and regular.

C. TEMPORARY GUARDIANSHIPS

New Mexico law allows a District Court to appoint a temporary guardian for a protected person in cases where a protected person's health would be seriously, immediately, and irreparably harmed unless the Court immediately intervenes. In other words, while a guardianship proceeding may take several weeks to complete from the time the petition is originally filed until the time the Court hears it, a temporary guardianship may be ordered on an immediate basis if serious and irreparable harm to the alleged incapacitated person would result during the pendency of the petition. A temporary guardianship may also be ordered without notice or hearing if the Court is convinced based on facts clearly shown by affidavit or sworn testimony that the protected person may suffer

serious, immediate and irreparable harm before a hearing on the temporary guardianship petition is held. In cases where a temporary guardianship is entered without notice to the alleged incapacitated person, the person must be notified within twenty-four hours of the appointment of the temporary guardian. A temporary guardian may be a different person than the person ultimately named to serve as the guardian after the full judicial process concludes.

The **duration** of a temporary guardianship is limited by New Mexico law. A temporary guardianship appointment lasts for only thirty (30) days unless the court enters an order extending it. New Mexico law allows for a sixty (60) day extension of the thirty (30) day temporary guardianship period.

The process for obtaining a temporary guardianship is summarized below.

The Court may appoint a temporary guardian if it concludes that serious, immediate, and irreparable harm will occur to the protected person if an order appointing a temporary guardian is not immediately entered.

A petitioner may seek the appointment of a temporary guardian by a separate motion. The Court will appoint a guardian ad litem and schedule a hearing within ten (10) business days of the motion. The guardian ad litem shall file his or her report with the Court no later than two (2) days before the hearing on the motion. That report shall indicate that the guardian ad litem met with the person, present the person's declared position to the Court, and identify any alternatives to the proposed guardianship.

A temporary guardianship may be entered if the Court concludes that serious, immediate, and irreparable harm would result to the alleged incapacitated person's health, safety, or welfare before a hearing on the guardianship petition can occur.

If the evidence is clear based on sworn testimony or affidavits that serious, immediate and irreparable harm to the person's health, safety or welfare will occur before a ten-day hearing on the motion to appoint a temporary guardian can be held, the Court may enter the temporary guardianship order without notice to the alleged incapacitated person or the person's attorney.

If the Court enters a temporary guardianship order without notice to the person and the person's attorney, the Court shall hold a hearing no later than ten (10) business days from the date the motion for temporary guardianship is filed to determine whether the temporary guardianship should continue and, if so, to address the continued authority of the temporary guardian. Within twenty-four hours of the issuance of the temporary guardianship order, the petitioner shall have the person and the person's attorney served with copies of the (a) petition; (b) notice of hearing; (c) notice of rights at the hearing; (d) motion for appointment of a temporary guardian; and (e) temporary guardianship order.

The alleged incapacitated person, the person's counsel, or any interested person may file a motion to dissolve or modify the Court's temporary order.

A temporary guardianship appointment has a duration not exceeding thirty (30) days. Upon a hearing in which there is a showing of good cause, the temporary guardianship may be extended another sixty (60) days.

A temporary guardian must file a written report with the Court within fifteen (15) days of appointment by completing the guardian's report as required by the Court-approved form. The temporary guardian must file a final written report using the Court-approved form within fifteen (15) days of termination of the temporary guardianship or as the Court may otherwise require.

There are important limitations on the authority of the temporary guardian. The temporary guardian may not sell or dispose of any property belonging to the alleged incapacitated person or make changes to the housing or placement of the alleged incapacitated person without specific authorization from the Court.

The **scope** of temporary guardianship orders can vary considerably. The temporary guardian must carefully review the order that appointed him or her to understand the scope of authority which has been granted to him or her by the appointing court. In some cases, the scope of a temporary guardianship is limited to managing only a single issue, such as a medical emergency. In others, the scope of a temporary guardian's authority may be the same as that granted to a full guardian.

In either case, the temporary guardian should not exceed the scope of authority granted to him or her by the appointing court. The temporary guardian must exercise his or her power over the protected person in a manner that is the least restrictive necessary to prevent immediate harm to that person while the judicial proceeding is underway.

Duration vs. Scope

"Duration" refers to the length of the guardianship appointment. "Scope" refers to how much power is given to the guardian in the court order.

As discussed above, a guardian is charged with the responsibility of making decisions for the protected person based on the principles of informed consent. These principles require the guardian to make decisions for the protected person based on a full disclosure of facts necessary for decisions to be made intelligently. A temporary guardian, however, is newly appointed and will likely be asked to make immediate decisions for the protected person. A temporary guardian may not have the benefit of time to make a complete assessment of the protected person's situation before being asked to make decisions for him or her.

A temporary guardian must still make decisions for the protected person based on the principle of informed consent given the exigencies of the situation. Because time may be a factor, such decisions should be based on as reasonable an assessment of the available information as the time allotted for the emergency allows. A temporary guardian must still make decisions which are person-centered, and which utilize substituted judgment, as discussed above. Health care decisions must be made in accordance with the values of the protected person if known to the guardian and, if not known, in accordance with the protected person's best interests.

A temporary guardian should meet with the protected person immediately to assess the person's personal and social situation and reasonably provide for their immediate needs. To do this, a

temporary guardian must understand the factual basis for the temporary guardianship appointment. It is the duty of the temporary guardian to promptly report neglect or abuse to the appropriate authorities if the guardian believes the protected person has been mistreated.

The temporary guardian should focus his or her decision-making on addressing the threat of immediate harm that was the reason for the temporary appointment in the first place. Once the threat of immediate harm has been addressed, the guardian should maintain the status quo until the hearing for the appointment of a permanent guardian is held. A temporary guardian is wise to keep the guardian ad litem and Court visitor apprised of significant decisions made using the temporary guardian's authority. These decisions should be reported to the Court before the final hearing is held on the guardianship petition.

Decisions such as moving a protected person from his or her residence should be made using a temporary guardianship order only if that decision is necessary to prevent immediate and irreparable harm to the protected person.

FURTHER READING: PLEASE SEE (A) NGA STANDARD 13, FOR GUIDANCE ON THE INITIAL AND ONGOING DUTIES OF A GUARDIAN; AND (B) NGA STANDARD 14 FOR GUIDANCE ON DECISION-MAKING ABOUT MEDICAL TREATMENT.

If a temporary guardian believes that visitation should be restricted between the alleged incapacitated person and another person, New Mexico law clearly states time limits for such restrictions. Those time restrictions apply to guardians as well as temporary guardians. New Mexico law restricts the ability of a guardian to limit the person's ability to interact with others:

F. A guardian for a protected person shall not restrict the ability of the protected person to communicate, visit or interact with others, including receiving visitors and making or receiving telephone calls, personal mail or electronic communications, including through social media or participating in social activities, unless:

(1) authorized by the court by specific order;

(2) a less restrictive alternative is in effect that limits contact between the protected person and a person; or

(3) the guardian has good cause to believe restriction is necessary because interaction with a specified person poses a risk of significant physical, psychological or financial harm to the protected person and the restriction is:

(a) for a period of not more than seven business days if the person has a family or preexisting social relationship with the protected person; or

(b) for a period of not more than sixty days if the person does not have a family or preexisting social relationship with the protected person. NMSA 1978 § 45-5-312 (F) (2021) (emphasis added).

D. GUARDIANSHIPS

Unlike a temporary guardian, a guardian is appointed after the completion of the judicial process which must include certain levels of investigation required by State statute. A guardian is given authority to make personal care decisions for the protected person by virtue of the order which appointed him. In some situations, these decisions can include limited financial decisions, provided that the court order grants this authority to the guardian.

It is the responsibility of the guardian to read the order that appointed him or her to that position.

The Guardian shall know the extent of the powers and limitations of authority granted by the court, and all decisions and actions shall be consistent with that court order.

NGA Standard 2 (I)

Generally, guardianship orders come in two different forms. A guardianship order may be "limited" or "full." As mentioned above, if the guardianship is limited, the guardian has the power only to make specific decisions for the protected person as outlined in the court's order. The protected person retains all legal and civil rights except those that have been specifically granted to the limited guardian by court order.

A full, or plenary, guardian is entitled to provide for the custody of the protected person and is charged by law to make provision for that person's care and comfort.

A guardian, however, is not required to pay for the protected person's expenses from the guardian's own funds. Generally, a guardian is also not liable (legally responsible) for the protected person's actions. If the guardian is found to have been negligent or careless in performing his or her guardianship duties, however, he or she may be liable to third persons for the actions of the protected person.

While a full guardian has the authority to establish the place of the protected person's residence, the law does not require that the protected person live with the guardian. Instead, unless the order states otherwise, the full guardian is charged with deciding where the protected person will live. Obviously, there are many types of residential options available. In making the decision about the best option, the guardian's job is to take into considerations the protected person's available resources and to see that the protected person is living in a setting that most appropriately addresses the person's goals, needs, and preferences and is the least restrictive setting as possible. NGA

Standard No. 12 provides additional guidance to the guardian when making residential placement decisions for the protected person:

- The guardian should have a strong priority for home or other community-based settings when not inconsistent with a person's goals and preferences;
- The guardian should authorize moving a protected person to a more restrictive setting only after evaluating other medical and health care options and making a determination that the move is the least restrictive alternative, fulfills the person's needs, and serves the person's best interests; and
- The guardian shall consider the proximity of the setting to those people and activities that are important to the protected person.

If the guardian is considering long-term placement of the protected person in an institutional setting, the decision to make such a placement must be based on minimizing the risk of substantial harm to the protected person, obtaining the most appropriate placement possible, and securing the best treatment for the person.

Before the guardian moves a protected person to a more restrictive setting, the guardian should report the move to the Court and explain the reasons for recommending the move.

Once that move is made, the guardian's job is to advocate for the protected person with respect to his or her residential or institutional setting and to seek remedies where it appears that the protected person is not receiving good care.

The guardian has an ongoing responsibility to monitor the setting in which the protected person has been placed to ensure it continues to meet the person's goals, needs, and preferences and is the least restrictive setting as possible.

The Guardian shall monitor the residential setting on an ongoing basis and take any necessary action when the setting does not meet the individual's current goals, needs and preferences…

NGA Standard 13 (G)

It is the guardian's job to provide for support, care, comfort, health, and maintenance of the protected person. To accomplish that, the guardian must become educated on the nature of the protected person's incapacity, condition, and functional limitations. It is the guardian's job to promote, monitor, and maintain the health and well-being of the person under guardianship which includes making proper arrangements for the person's food, clothing, and shelter.

In the case of a full guardianship, it is the job of the guardian to consent to or withhold medical treatment on behalf of the protected person. A limited guardian may also have these duties if the court order gives these decision-making responsibilities to the limited guardian. If the protected person is taking psychotropic medications or has mental health issues, the court may add an

additional provision in the order of appointment that allows the guardian to authorize the administration of such medications or other psychiatric treatment as well as to approve admission to a psychiatric facility for evaluation.

The guardian must ensure that the protected person receives appropriate medical and health care. This requires that the guardian ensure that medical providers develop appropriate treatment plans and that these plans are implemented. The guardian must attend all care conferences and medical appointments for the protected person, stay informed as to the state of the protected person's health, and ensure that prescription medication is managed properly.

FURTHER READING: PLEASE SEE NGA STANDARD 14, FOR GUIDANCE ON THE GUARDIAN'S DECISION-MAKING FOR MEDICAL TREATMENT.

When making medical decisions for the protected person, the guardian shall:

- Maximize the participation of the protected person;
- Acquire a clear understanding of the medical facts, consistent with the principles of informed consent;
- Acquire a clear understanding of the health care options and risks and benefits of each option; and
- Encourage and support the individual in understanding the facts and directing a decision.

The guardian's obligations toward the protected person are not limited to providing for health care management. Consistent with the person-centered approach to guardianship, the guardian must encourage and support the protected person in maintaining contact with family and friends, as defined by the person, unless doing so will substantially harm the person. In that event, the guardian must follow New Mexico law in restricting any contact with the protected person. The ability of the guardian to limit the person's ability to interact with others is discussed above.

The Guardian shall provide the person under guardianship with every opportunity to exercise those individual rights that the person might be capable of exercising as they relate to the personal care and financial needs of the person.

NGA Standard 9 (I)

The guardian must also consider the person's need for appropriate levels of recreational, vocational, educational, and training opportunities which are consistent with the values and preferences of the protected person. It is also the guardian's duty to determine whether the

protected person identifies with ethic, religious, or cultural values and to develop a plan which promotes the involvement of the protected person in activities which further these values.

E. WHAT SHOULD THE GUARDIAN DO AFTER BECOMING APPOINTED?

1. READ THE ORDER

A New Mexico district court appoints a guardian by signing a written order which is filed in the guardianship court file. New Mexico law requires that a copy of the order be provided to the proposed guardian. The proposed guardian should review the proposed order which appoints him or her before it is filed with the court.

It is very important that the guardian carefully read the order which appointed him or her and keep a copy of the endorsed order in his or her file.[9] The guardian has an obligation to stay informed as to what the court requires of guardians. Membership in the New Mexico Guardianship Association is one method a guardian may use to network with other guardians to stay informed as to developments in the law, and membership in the National Guardianship Association is also a mechanism to stay abreast of developments in the field.

The Guardian shall obtain and maintain a current understanding of what is required and expected of the guardian, [including] statutory and local rule requirements and necessary filings and reports.

NGA Standard 13 (VI)

In many cases, the order of appointment will simply appoint a guardian and grant to that person all duties allowed to a guardian under New Mexico law. Under New Mexico law, however, a guardianship appointment should be in a form that is the least restrictive necessary to provide protection to the protected person. Many orders which appoint a guardian may specify certain rights which the protected person retains. The protected person retains all civil rights and liberties unless specifically removed by the court order.

Some orders limit the powers of a guardian. Because there can be a wide variance in what guardianship orders may contain, it is very important that the guardian read the order carefully both before and after being appointed to understand his or her duties. If, after reading the order, the guardian has questions about the meaning of the language contained in the order, the guardian should consult with an attorney or alternatively ask the court to schedule a hearing for the purpose of clarifying the terms of its order before acting on it. In all cases, the guardian is required to comply with the terms of the order which appointed him or her. If the order requires that a guardian

[9] Endorsed orders are stamped in the top right corner to show when they were filed. Certified orders will have a raised seal on the last page to show that it is true, complete, and a real copy of the original order.

obtain a court order before making a particular decision, it is the obligation of the guardian to comply with that requirement.

2. OTHER RESPONSIBILITIES AT THE BEGINNING OF THE GUARDIANSHIP

The duties of a temporary guardian have been discussed earlier in this Handbook. Both in the case of temporary guardians and guardians, it is important that the order of appointment be carefully studied. In addition, the guardian has other very important duties at the inception of the guardianship. Those duties include the following ten important functions:

a) Meeting with the protected person as soon as is feasible after entry of the order appointing the guardian and during that meeting explain the role of the guardian and begin to involve the protected person in developing a plan for the guardianship;

b) Obtaining all advance health care directives which have been signed by the protected person;

c) Assessing the protected person's physical and social situation and the person's educational, vocational, and recreational needs;

d) Assessing the protected person's values, lifestyle preferences, and preferences which include cultural, ethnic, religious or tribal values;

e) Assessing the support systems available to the protected person;

f) Notifying relevant agencies and professionals of the guardian's appointment;

g) Establishing contact with the conservator or other fiduciary managing the financial affairs of the protected person;

h) Developing a list of key contacts, including medical providers;

i) Developing a list of all over-the-counter and prescribed medication the protected person is taking, the dosage, the reason why it is taken, and the name of the doctor prescribing the medication; and

j) Obtaining all relevant assessments of past and present medical, psychological and social functioning.

FURTHER READING: PLEASE SEE NGA STANDARD 13, FOR FURTHER DISCUSSION ON THE GUARDIAN'S INITIAL AND ONGOING RESPONSIBILITIES.

3. OBTAINING ASSISTANCE

Serving as a guardian can present challenges not just because of the time commitment required by that position, but also because the appointment may, and often does, require a person to make important decisions based on expertise which the guardian does not have. In such situations, the guardian should engage the services of professionals as necessary to meet the goals, needs, and

preferences of the protected person. It is not possible to set out in this Handbook all the scenarios in which a guardian may need to consult with experts.

The key to proper decision-making by a guardian is the principle of informed consent. As stated above, informed consent is the guardian's agreement to a course of action based upon the full disclosure of facts. By becoming properly informed on a particular issue, the guardian is able to make an *intelligent decision* for the protected person. The guardian is expected to make fully informed decisions for the protected person. In New Mexico, professional guardians are mandated to follow the informed consent provisions in the NGA Standards.

Therefore, with the decision-making power granted to a guardian by the court comes the responsibility to seek assistance when necessary. A guardian should seek assistance from qualified individuals when: (a) a decision the guardian is being asked to make requires expertise that the guardian does not possess; or (b) when the guardian cannot fulfill his or her duties assigned by the court without obtaining appropriate assistance. NGA standard 5 states that the guardian should hire professionals "as necessary to appropriately meet the goals, needs and preferences of the person."

FURTHER READING: PLEASE SEE NGA STANDARD 2, FOR FURTHER DISCUSSION ON THE GUARDIAN'S RELATIONSHIP WITH THE COURT AND NGA STANDARD 6 FOR FURTHER DISCUSSION ON INFORMED CONSENT.

For example, a guardian may be asked to make a decision for a protected person concerning whether to undergo a medical procedure. In such a case, it is the guardian's responsibility to obtain the appropriate level of input from a medical professional in order to make a fully informed decision on how to proceed. If the situation calls for it, the guardian may even need to obtain a second opinion. The guardian stands in the shoes of the protected person and is entitled to all the same information and freedom of choice as the protected person if he or she were not under guardianship.

By way of further example, a guardian may be unable to fully devote his or her time to serving as a guardian because of other personal commitments which may have arisen since he or she was appointed. In such a case, it is the responsibility of the guardian to seek assistance to be sure that he or she can perform the duties assigned by the Court and, if unable, to return to court to have a different guardian appointed.

4. GIVE NOTICE OF APPOINTMENT AS GUARDIAN

Effective July 1, 2018, New Mexico passed legislation which increased the number of people who must receive notice of the hearing to appoint a guardian. Under these changes, there are now up to fifteen classes of persons who must receive a copy of the petition to appoint a guardian as well as the notice of hearing to appoint the guardian. These classes of individuals are listed in the Appendix to this Handbook. Importantly, before the Court appoints the guardian, the persons listed in this Appendix are also entitled to access documents filed in the Court file.

After the order is entered appointing a guardian the number of persons who can have access to court filings is limited to the protected person (and his or her attorney), the guardian and conservator, and any other person the Court determines. After the guardian is appointed, the Court will enter a separate order identifying the persons who can access Court filings and who must receive notice of future proceedings in the case. The guardian should be aware of these persons so that, as to any future filings the guardian may make, these individuals will receive copies as well as notice of any hearings which might be scheduled.

By the time the guardian assumes his or her duties, it is likely that many interested persons will already know that a protective proceeding has begun for the protected person. Nevertheless, New Mexico law requires that a copy of the order appointing the guardian must be provided to the guardian, the protected person, and the protected person's counsel as anyone else as determined by the Court.

After the guardian is appointed, the guardian must notify all relevant agencies and individuals who are (or should be) involved in providing benefits or services to the protected person. In making these contacts, the guardian should be guided by three basic principles:

a) The guardian shall keep the affairs of the protected person confidential;

b) The guardian shall respect the protected person's privacy and dignity, especially when the disclosure of information is necessary; and

c) When disclosure of information is necessary, such disclosure should be limited to what is necessary and relevant to the issue being addressed.

FURTHER READING: PLEASE SEE NGA STANDARD 11, FOR FURTHER DISCUSSION ON THE GUARDIAN'S DUTY OF CONFIDENTIALITY AND NGA STANDARD 13 FOR FURTHER DISCUSSION ON THE GUARDIAN'S INITIAL AND ONGOING DUTIES.

The agencies or individuals who should receive notice of the guardian's appointment will vary from case to case. The following individuals should be considered:

a) Health care providers such as clinics, dentists, primary care doctors, and all specialists;

b) Mental health providers such as counselors, psychologists, psychiatrists, and therapists;

c) Managers of assisted living, memory care or nursing home facilities;

d) Government programs which may provide benefits to the protected person, including local programs and adult day centers; and

e) Providers of health insurance.

The guardian should not assume that health care providers communicate with each other. Complicated health conditions can involve many medical specialists including medical testing (diagnostic) professionals. The health care system can sometimes be difficult to navigate when there are multiple medical professionals involved for a single patient. The guardian must ensure that he or she is receiving all medical information necessary from all such professionals serving the protected person in order to adequately manage the protected person's affairs. To accomplish that, each health care provider must know of the guardian's involvement for the protected person.

How does the guardian provide notice? The Court Clerk of the Court that appointed the guardian will issue a simple document that is official proof of the guardian's appointment. This document is called "Letters of Guardianship" and must identify the guardian by name, address, and telephone number. This document will state the scope of the guardian's authority. A photocopy of the Letters of Guardianship should be sent to each of the relevant agencies and individuals who are or should be involved with the protected person.

5. WHEN THE GUARDIAN'S AUTHORITY IS NOT RECOGNIZED

What if the person or entity receiving a copy of the letters refuses to acknowledge the authority of the guardian? Occasions may arise when a doctor, nursing home administrator, or family member will not recognize the guardian's authority to make personal care decisions for the protected person.

As discussed in previous sections of this Handbook, orders appointing guardians generally come in two types: "full" (sometimes called "plenary") or "limited." A full guardianship order authorizes the guardian to make all personal care decisions for the protected person. A limited guardianship order authorizes the guardian to make personal care decisions for the protected person only as to the areas identified in the order of appointment.

As a result, if a guardian has been granted full guardianship and a provider of services refuses to acknowledge the authority of the guardian to make decisions for the protected person, the guardian should speak with the provider, provide a copy of his or her letters of guardianship and explain that he or she has been granted full legal authority to make decisions for the protected person. When having these conversations, the guardian should understand that not all providers of services for a protected person understand the nature of a guardianship order and some education may be needed on this issue. In addition, during interactions with such providers, the guardian should treat them with courtesy and respect and attempt to enhance cooperation between such professionals and the guardian in an effort to create the best result possible for the protected person.

At the same time, a guardian must advocate for the protected person to ensure his or her welfare is maintained. As a result, if the provider still fails to acknowledge the guardian's authority to act for the protected person and the order of appointment is one that grants the guardian "full" legal authority, then the guardian should (a) either hire an attorney to resolve the dispute; or (b) bring the matter to the attention of the Court that appointed the guardian.

What is a limited guardian's authority that is not being recognized? Recall that in a limited guardianship, the guardian is granted authority only as to the specific areas identified in the Court order. In these cases, if the dispute is over an area in which the guardian has been granted authority, then the matter should be resolved as suggested above when dealing with these issues in the context

of a full guardianship. If facts develop suggesting that the guardian's authority should be expanded, however, the guardian should promptly bring this matter to the attention of the Court.

The Guardian shall promptly inform the Court of any change in the capacity of the person that warrants an expansion or restriction of the guardian's authority.

NGA Standard 2 (VIII)

There are two important observations as to the question of a guardian's authority. First, in the event there is still a health care power of attorney in place, the decisions of the agent named in the health care power of attorney will take precedence over the decisions of the guardian unless there is a court order to the contrary. The guardian must make a good faith inquiry to determine if the protected person had previously signed a power of attorney for health care. The guardian must make a good faith effort to cooperate with all surrogate decision-makers for the protected person, including an agent under a health care power of attorney.

Second, it is the job of the guardian to know the extent of the powers and limitations contained in the Court order that appointed him or her. The guardian must have a clear understanding as to what issues he or she is managing for the protected person at all times. If there is a dispute over the scope of authority that remains unresolved or if there is any question in the guardian's mind about the extent of the guardian's authority, the guardian must seek clarification from the Court concerning his or her authority.

Finally, it is very important to note that in some situations (especially those involving medical treatment), unresolved questions over "who is in charge" can have extremely serious consequences for the protected person. These consequences could include the failure to manage a medical condition on a timely basis. For this reason, the guardian must be sure that all such questions over the extent of his or her authority must be resolved quickly, whether informally or by seeking clarification from the Court that appointed the guardian.

6. MANAGING CONFLICT OVER THE GUARDIAN'S DECISIONS

Disputes can arise not only over the authority of a guardian to make a decision, but also over the decisions that the guardian is proposing to make or may have already made.

Recall that a guardian is required to encourage and support the protected person in maintaining contact with family and friends as the protected person has defined them, unless it will substantially harm the person. In that case, if the guardian wishes to limit contact with potentially harmful persons, the guardian must follow strict rules set out in New Mexico law including the time limits on such restrictions. The ability of a guardian to limit the person's interactions with others is discussed in a previous section of this Handbook.

For the purposes of this section, however, what is important is that the guardian is generally charged with encouraging and maintaining contact between the protected person and his or her family and friends. To this end, the guardian may request and consider input from those persons

close to the protected person when making decisions for that person. The guardian must keep individuals that are important to the protected person reasonably informed of important health care decisions. Once the information is conveyed, however, disputes may arise.

It is important for the guardian to attempt to resolve these disputes, if possible, in a manner that furthers the protected person's best interests. If the guardian's efforts at resolving the conflict seem to stall and interested persons continue to object to a guardian's decisions, mediation may be a good way to resolve the objections. A mediation is a meeting usually facilitated by a neutral and experienced person who will attempt to help the parties reach an agreement as to a dispute between them. There are many attorneys, retired judges, and social workers who provide such services.

What if the guardian has received objections from more than one person in a family? In this case, having one family member serve as a family spokesperson to communicate concerns to the guardian can help calm an unpleasant situation and contain expenses.

If a guardian cannot resolve the dispute after good faith efforts or if objections by interested persons continue to surface, the guardian should bring the situation to the attention of the Court. In these circumstances the Court likely would order a solution to the conflict which suits the best interests of the protected person.

Conflicts may also arise between the protected person and the guardian. In cases where a protected person had been managing his or her affairs for many years prior to the appointment of a guardian, the person may not fully understand why he or she needs help now. In other cases, the protected person may simply not believe that he or she needs the assistance the guardian has been ordered to provide.

By following the NGA Standards, the guardian may be able to make the situation better. NGA Standard 9 (I) states:

> **The guardian shall provide the person under guardianship with every opportunity to exercise those individual rights that the person might be capable of exercising as they relate to the personal care and financial needs of the person.**

The guardian must, whenever possible, seek to ensure that the protected person leads the planning process. At a minimum, the guardian must ensure that the protected person participates in the decision-making process. These are important steps in person-centered guardianship. By adopting a person-centered approach and involving the protected person in decision-making, the protected person may become less frustrated with the loss of control a guardianship brings.

> The Guardian shall encourage the person to participate, to the maximum extent of the person's abilities, in all decisions that affect him or her, to act on his or her behalf in all matters in which the person is able to do so, and to develop or regain his or her own capacity to the maximum extent possible.
>
> NGA Standard 9 (III)

Helping to choose a caregiver who helps with daily chores, buying groceries, deciding on certain medical treatment, helping to choose a residential care home, and deciding on religious and recreational activities are all areas that a guardian should seek input from the protected person.

In sum, the NGA Standards require the guardian to be actively engaged with the protected person as to all decisions which will affect him or her. The guardian must keep in mind that, when making decisions for the protected person, the guardian must ask the protected person what he wants as it pertains to the matter at issue. If the person has difficulty in expressing these preferences, it is the job of the guardian to do everything possible to help the person make his or her preferences known. Only when the person cannot, even with assistance, make his or her preferences known can the guardian then seek input from others in order to determine the person's preferences on any particular issue. Using these rules, it is ensured that the protected person has a say as to matters which affect him or her. This approach may help prevent and resolve conflicts between the guardian and the protected person.

FURTHER READING: PLEASE SEE NGA STANDARD 9, FOR FURTHER DISCUSSION ON THE SELF-DETERMINATION OF THE PERSON AND NGA STANDARD 7 FOR A REVIEW OF STANDARDS ON DECISION-MAKING.

The guardian can often build trust with the protected person by involving him or her in the decision-making process and keeping the person informed as to developments that may affect him or her. By always including the protected person in the decision-making process, the guardian practices person-centered guardianship and the protected person may become more comfortable about the guardianship.

If conflict between the guardian and the protected person continues, the guardian should consider obtaining advice from other guardians, a care manager, a social worker, or an agency that deals with the condition that has created the protected person's incapacity. For example, the Alzheimer's Association provides a number of resources guardians may use not just to become more informed as to Alzheimer's Disease, but also to connect with other individuals who may have similar difficulties. The New Mexico Guardianship Association also provides the ability to connect with

other guardians. Finally, the guardian can petition the court for instructions regarding major decisions that seem to be causing conflict.

In the end, a person appointed to serve as the guardian has a legal responsibility to perform this function and to provide for the protected person's care, comfort, and maintenance. If conflict with others or with the protected person prevents the guardian from doing his or her job, then the guardian has the duty to seek assistance from the Court or, in the worst case, to ask the Court to approve his or her resignation as guardian. There are some cases where simply changing the guardian could make a guardianship run more smoothly. In the face of unresolving conflict, what is important when deciding how to proceed is for the guardian to focus on what is best for the protected person.

7. PLAN FOR THE PROTECTED PERSON'S NEEDS

Each person is different, and the guardian must make decisions that are suited to the protected person. What might be best for one person under guardianship may not be best for another. It is imperative that the guardian create a plan for running the guardianship that is tailored to the specific goals, needs, and preferences of the protected person. Doing so promotes the self-determination of the person.

In any guardianship there will be short-term and long-term needs. Generally, short-term goals would be addressed in the first year of the guardianship and would include those goals that require attention immediately after the guardian is appointed. Long-term goals are those items to be addressed in the time after the first year.

At the beginning of the guardianship, the guardian must take care of the protected person's most urgent needs first. The guardian identifies those needs by meeting with the protected person as soon after the guardian is appointed as is feasible. In that meeting, the guardian should explain his or her role to the protected person. The guardian should also begin to assess the person's physical and social situation; the person's education, recreational and vocational needs; the person's preferences and the support systems currently in place which serve the protected person. It is the duty of the guardian to promptly report neglect or abuse to the appropriate authorities if the guardian believes the protected person has been mistreated.

The guardian also should meet with those members of the protected person's family and friends who might be able to provide the guardian with relevant information concerning the protected person's situation. Finally, the guardian should notify all agencies and individuals providing services to the protected person that he or she has been appointed as the guardian.

The guardian should schedule evaluations of the protected person as might be needed for the guardian to obtain a current understanding of any condition which the protected person may have.

The Guardian shall become educated about the nature of any incapacity, condition and functional capabilities of the person.

NGA Standard 13 (VII)

Such evaluations could be very useful in assisting the guardian in developing a plan for managing the protected person's future medical care.

When thinking about developing a plan, the guardian must understand two important "must do's" as stated in NGA Standard 14 (II) and (III):

The guardian shall ensure that all medical care for the person is appropriately provided and that the person is treated with dignity.

The guardian shall seek to ensure that the person receives appropriate health care consistent with person-centered health care decision-making.

In order to satisfy these directions, the guardian must have current information about the protected person's condition and general needs.

The types of needs a guardian must familiarize himself or herself with include information about the protected person's:

a) functional abilities, preferences and goals;

b) aspects of personal care he or she can manage on his or her own;

c) living situation;

d) health care, discussed in more detail below;

e) nutritional requirements and meal preferences;

f) clothing and personal property, such as jewelry, cars, and furniture;

g) personal care, such as bathing, haircuts, manicures;

h) housekeeping, including cleaning and arranging for yard work;

i) if the protected person is a pet owner, care of their pet(s), including feeding, grooming, exercising, medical care, medications, and getting yearly shots;

j) transportation to appointments, social events, shopping, church, etc.;

k) recreation and hobbies; and

l) education.

Obtaining an accurate assessment of the protected person's situation is important. The guardian must know the options which are available to provide for the protected person in these areas of his or her life.

Therefore, if the guardian does not know the person well, the protected person is not able to provide useful information or other sources of information are not available, the guardian should consider hiring professional help to assist in making these assessments. There are many geriatric care managers and social workers experienced with working with disabled adults who can assist a guardian in assessing a protected person's situation and developing a plan for identifying and

addressing that person's needs. The guardian must involve the protected person as much as possible when assessing his or her needs.

The following is a checklist for the guardian to consult to help assess a protected person's needs. When developing a plan to address the protected person's short-term and long-term needs, the guardian should consider which of these functions the protected person can handle alone as opposed to ones that the person can handle only with assistance. Making that determination will help the guardian decide what type of assistance the protected person needs. Some or all of the following factors are relevant when inventorying a person's needs, based on the facts and circumstances of each case:

a) walking (does the protected person need a cane, walker or wheelchair?);

b) using the bathroom and bathing (does the protected person need help getting in and out of the shower or bathtub and/or on and off the toilet? Can the protected person bathe without assistance?);

c) managing incontinence care;

d) toileting;

e) grooming tasks, such as hair care, shaving, and nail care;

f) following doctor recommendations;

g) managing medications to ensure taking them on time and in proper amounts;

h) preparing meals (Can the protected person shop, prepare nutritious meals, clean up, properly store food, and remember to eat regularly?);

i) selecting clothes and dressing;

j) performing housekeeping such as cleaning, doing laundry, and yard work;

k) dialing and answering the telephone;

l) handling an emergency at home, including using the phone to call 911 and being able to exit the home independently if needed;

m) managing transportation (taking the bus, arranging for and taking the taxi or other transportation services);

n) paying bills

o) managing investments;

p) managing money for shopping, money, errands and transportation;

q) making shopping decisions for the purchase of groceries, clothes, shoes and other personal items;

r) choose or plan enjoyable activities; and

s) planning and arranging for travel.

Sometimes a protected person may be able to perform these tasks independently but simply needs cueing and reminders. In such cases, the guardian should allow the protected person to handle as many of these functions as possible, while still maintaining his or her safety and well-being.

It is the job of the guardian to continue to monitor the progress of the protected person and to adjust the level of intervention as needed to keep the protected person safe, but also as self-reliant as possible. To strike this balance, the guardian also should consider the protected person's cognitive abilities and limitations, memory problems, opposition to the guardianship, and violent or combative behaviors. Considering these factors will help guide the type and extent of assistance a guardian may obtain for the protected person.

The Guardian shall weigh the risks and benefits and develop a balance between maximizing the independence and self-determination of the person and maintaining the person's dignity, protection and safety.

NGA Standard 8 (II)

Recall that a guardian has a duty to make a good faith effort to cooperate with other surrogate decision makers working for the protected person. Therefore, assuming that the guardian does not also have authority over the protected person's financial affairs, he or she must meet with the conservator or financial power of attorney to:

a) understand what type of services and support the protected person can afford;

b) understand what type of benefits may be available to the protected person, such as government programs, health care insurance and long-term care insurance; and

c) coordinate with the person holding financial power for the payment of services the guardian believes should be implemented for the protected person.

If the protected person's money is spent by the guardian without the approval of the conservator, the guardian may have to repay that money out of his or her own pocket.

In collaboration with the protected person, the guardian should build a plan for the guardianship while considering all of the above factors, allowing the person to lead the planning process wherever possible. That plan must be reviewed every year. Importantly, that plan must also be based on "a multidisciplinary functional assessment." That means that when the guardian is formulating the guardianship plan in collaboration with the protected person, he or she should take into account all of the areas of the protected person's life.

The guardian's plan must be built with collaboration from the protected person who is to lead the planning process wherever possible. The plan must be suited to the particular goals, needs, and preferences of the protected person. Every person's goals, needs, and preferences will be different.

It is the guardian's job to build a plan working with the protected person to allow him or her the ability to realize his or her own goals across all of the areas of that person's life that might be important to him or her, including:

a) Cultural;

b) Educational;

c) Medical;

d) Psychiatric;

e) Recreational;

f) Residential;

g) Social;

h) Spiritual;

i) Training; and

j) Vocational.

FURTHER READING: PLEASE SEE NGA STANDARD 13, FOR FURTHER DISCUSSION ON THE CONTENT OF A GUARDIAN'S PLAN.

8. CARE, COMFORT, AND MAINTENANCE

A. LIVING ARRANGEMENTS

i. Initial considerations

One of the most important decisions a guardian will make is to decide where the protected person will live. It is the duty of the guardian to ascertain and understand all the living options open to the protected person, and to make decisions in this area in a person-centered way. The decision must be made in a fully informed way, involving the protected person whenever possible. Under New Mexico law, professional guardians are required to follow those NGA Standards which promote the self-determination of the person, and lay guardians following the standards should be governed by the same responsibility. The location of living placement is one arena which directly implicates the person's self-determination.

The NGA Standards state that the duty of the guardian is to:

…see that the person is living in the most appropriate environment that addresses the person's goals, needs and preferences. NGA Standard 12 (I)(A).

As this standard indicates, the person's preferences are important when determining the person's place of residence. It is the job of the guardian to do everything possible to help the protected person make his or her preferences known. Only when the protected person, even with assistance, cannot do so can the guardian then seek input from others in order to determine the person's residential preferences. When making residential placement decisions, the guardian must consider not only the person's preferences, but also his or her available resources and the least restrictive living arrangement.

The guardian shall have a strong priority for home or other community-based settings, provided that these settings are not inconsistent with the goals, needs, and preferences of the protected person.

FURTHER READING: PLEASE SEE NGA STANDARD 12, FOR FURTHER DISCUSSION ON THE GUARDIAN'S PLACEMENT DECISIONS.

If the protected person is living at home, he or she should be able to continue doing so as long as his or her needs can be met in that setting. This assumes that the protected person wants to continue living in that setting and can reasonably afford to do so. The following are some suggestions for the guardian to consider when making the decision in collaboration with the protected person to keep him or her in his or her home, keeping in mind the extent of his or her financial resources:

a) consider hiring part-time or full-time help to prepare meals, do laundry and other housekeeping jobs;[10]

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[10] **IMPORTANT NOTE ON IN-HOME CARE:** Hiring help through reputable licensed and bonded agencies is a preferred approach in part because the employees of said agency may be screened, the agency may carry liability insurance and the agency will likely cover the payroll tax and worker's compensation insurance needs of the employee. If the protected person cannot afford to hire such help, the guardian must be careful to screen in-home help completely and that in-home help is covered by insurance in case of accident or injury. The guardian should consult with a qualified attorney if the decision is being made to hire in-home help outside of an agency not just on the insurance issues but also as to the question of whether to hire such help as an employee or independent contractor. This decision may have important legal consequences. In addition, long-term care insurance may not cover the payment of all in-home care not provided by an agency. The guardian, working with the financial decision-maker, must understand whether the in-home care being considered will be covered by the protected person's long-term care insurance.

b) consider organizing volunteers from the protected person's support system to help with caregiving and household tasks;

c) consider the important need to adapt the house where necessary for the protected person's physical needs. If the protected person is renting the home, the guardian should coordinate with the person holding financial powers for the protected person to inquire with the landlord to determine whether the desired changes can be made and, if so, who has financial responsibility to make them;

d) Wheelchair ramps, grab bars, sensor lights, etc. are potential modifications that may make a person's continued residence in his or her home much safer;

e) Consider the benefit of cleaning the house and yard, not just for hygienic reasons, but also because removing debris and clutter may make the home much safer for the protected person to navigate;[11]

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[11] **IMPORTANT NOTE ON MANAGING PERSONAL PROPERTY:** The guardian must be careful when deciding to significantly rearrange the home of a protected person or discard any of his or her possessions. The guardian must consult with the protected person in this process, recognizing that the person may have lived in these conditions for many years and that this manner of living may be that person's preference. Major changes in the residential condition of the protected person's home should be made over a protected person's objection only if substantial harm would result if the change were not made and, even then, the guardian must coordinate the management of this issue with the person holding financial power and is wise to also involve the protected person's family on the issue before big changes are made.

In New Mexico, matters related to the management of a protected person's property are usually the responsibility of the conservator or person holding a financial power of attorney. However, in the decision to keep a person at home or to make a move from home, it is inevitable that the guardian and the financial decision maker may need to address the disposition of certain items of the protected person's personal property.

New Mexico law requires that the guardian take reasonable care of the protected person's clothing, furniture, vehicles and other personal effects. If, after consulting with the protected person, the guardian believes that any significant amount of tangible personal property should be discarded, donated, given away or sold because the person is changing living placements or for any other reason, the guardian must then consult with any financial decision-maker if there is one to determine the best course of action. Any decision to dispose of a protected person's tangible personal property must be Court approved.

With Court approval and subject to the needs and preferences of the protected person, the guardian or financial decision-maker may notify the protected person's family and friends that certain items may be discarded, donated or sold and afford those individuals an opportunity to obtain them, especially if the items have sentimental value. The guardian must know that discarding tangible personal property belonging to a protected person can be the source of considerable upset, especially if the items have sentimental value to him or her or that person's family or friends.

f) consider the importance of buying a fire extinguisher, smoke and carbon monoxide detectors, and instructing home-health care providers as to their location and usage;

g) consider subscribing the protected person to an emergency response medical system (e.g. Lifeline);

h) consider obtaining a safe return bracelet for the protected person;

i) consider changing the locks and/or installing a burglar alarm or other security system;

j) if someone else is living in the home to hear the alarm, consider installing a wander guard system;

k) consider all the community resources like Meals on Wheels, adult day care, home health/homemaker assistance, and the disabled and elderly waiver program administered by the state (see the Appendix for contact information); and

l) assess the home for fall risks such as rugs, electrical cords, or other items that could be a tripping hazard.

In the event that the protected person moves to a house occupied by a family member or friend, the guardian should still take into account the considerations outlined above in light of the conditions of that person's residence.

If the protected person wants to continue living at home, has the resources to pay for continued living in that environment and the guardian determines that living in this setting meets the needs of the person, the guardian must work with the person holding financial power to develop a plan to implement the protected person's desire to live at home.

Such plans can often be costly. Generally speaking, a protected person's funds must be used to care for him or her as well as those who may depend on the protected person for support. The financial needs of those individuals who may later inherit the person's estate, however, should not be relevant in the decision to keep a person living in his or her home. If the expenses incurred by keeping the protected person in his or her home will prove to be substantial, the guardian and the person holding financial power are wise to seek Court approval of the planned expenditure either before that decision is made or as soon thereafter as is reasonably practical. Court approval of

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These decisions must be made in consultation not just with the protected person, but also the financial decision-maker, subject to Court approval. The NGA standards, for example, require that the guardian (and conservator) make reasonable efforts to preserve property designated in the protected person's will or other estate plan. As a result, the guardian should consult with the financial decision-maker who is likely to know what that plan may provide. Therefore, in dealing with the personal property of a protected person, it is essential that the guardian coordinate not only with the protected person but also with the person holding financial authority for the protected person. If the decision is made to dispose of the protected person's personal property, prior Court approval should be obtained.

such a plan can help the guardian and the financial decision-maker if other interested persons later complain that too much money was spent in maintaining the protected person at home.

If the guardian decides that the protected person must move from his or her residence, the NGA Standards state how this decision is to be made:

> **The guardian shall authorize moving a person to a more restrictive environment only after evaluating other medical and health care options and making an independent determination that the move is the least restrictive alternative at the time, fulfills the current needs of the person and serves the overall best interest of the person. NGA Standard 12 (I)(A)(2).**

New Mexico law strongly favors the protected person's ability to freely interact with others. As noted above, under New Mexico law, a guardian may not restrict the ability of the protected person to communicate, visit, or interact with others unless: (a) the guardian obtains a court order specifically authorizing the restriction; or (b) without a court order, the restriction is limited in time as discussed in previous sections of this Handbook. The need of the person to interact with others is directly implicated in the decision as to what living placement is proper.

When considering a new location for the protected person to reside, the guardian must keep in mind that he or she must encourage and facilitate the protected person's maintaining of relationships with the people who the protected person defines as friends and family. The NGA Standards directly address this issue:

> **The guardian shall consider the proximity of the setting to those people and activities that are important to the person when choosing a residential setting.**
>
> **At a minimum the guardian shall report to a court before a move to a more restrictive residential setting, and the justification for the move. NGA Standards 12 (I)(A)(3), (4).**

As these standards state, the ability of the person to interact with those individuals who are important to him or her, is an important factor the guardian must consider when making residential placement decisions. Along those lines, New Mexico also has very specific rules as to making a move for the protected person using mental health commitment procedures. In no event may a guardian initiate the commitment of an adult to a mental health facility without following New Mexico's procedures for involuntary civil commitment.

ii. Living Facility Options

If, after considering the factors stated in the previous section of this Handbook in collaboration with the protected person, the guardian determines that the protected person cannot continue living at home, there are alternative places for the guardian to consider. Before considering these options, the guardian should recall two important duties:

1. **It is the duty of the guardian to ensure that the protected person is living in the most appropriate environment that addresses the person's goals, needs and preferences; and**
2. **It is the duty of the guardian to become familiar with the available options for the protected person's residence.**

FURTHER READING: PLEASE SEE NGA STANDARD 8, FOR FURTHER DISCUSSION ON LEAST RESTRICTIVE MEANS AND NGA STANDARD 12 FOR THE GUARDIAN'S DUTIES AS IT RELATES TO PLACEMENT.

When moving a protected person, the guardian must therefore identify which of the available residential settings is most suitable to the protected person's goals, needs, and preferences, and is the least restrictive living arrangement. To this end, the guardian should consider the services the protected person needs, and the services offered by the available placement options to be sure that the placement ultimately selected is a good fit for the protected person. The guardian should consider consulting with the protected person's doctor, psychiatrist, or other involved professional to determine whether the proposed setting is appropriate given the current and future needs of the protected person.

The guardian should consider hiring a professional who has experience dealing with the protected person's condition in the event the guardian would like more guidance. For example, if the protected person suffers from dementia, the guardian should consider hiring a geriatric care manager to assist the guardian in locating the most suitable residential setting for the protected person. If the protected person suffers from intellectual or developmental disability, the guardian must work closely with those case workers, counselors, psychologists, or social workers who are engaged with the protected person to determine the most suitable living arrangement; knowing that what is good for one person with this condition is not necessarily the right thing for another. Residential placement decisions must be made carefully considering the needs of the particular person involved.

The Guardian shall make individualized decisions. The least restrictive alternative for one person might not be the least restrictive alternative for another person.

NGA Standard 8 (III)

Understandably, the ability of the protected person to pay for his or her residential placement may be a controlling factor in the decision-making process. It is the duty of the guardian to know what resources are available to the protected person to pay for his or her residential placement.

The guardian must know whether the protected person qualifies for Medicaid, has long-term care insurance, or has other assets or income which can be used to pay for his or her residential placement. The guardian must also ascertain which placements will accept Medicaid and long-term care insurance and those which do not. It is essential that the guardian work with the person with financial decision-making power to determine what setting the protected person can afford that best satisfies the goals, needs, and preferences of the protected person.

The following is a list of alternative living arrangements which a guardian may consider:

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a) **Independent Living (Retirement Senior Apartments or Communities).** These facilities offer apartment-style accommodations with the understanding that the person moving in is independent. Most offer partial kitchens, but no additional supportive care. Some may offer home care at an extra cost. Alternatively, outside home care can be arranged to provide extra supportive care. Many of these facilities offer transportation at scheduled times for outings to include grocery shopping, doctors' appointments, etc. Most offer a dining room service for up to three meals a day.

b) **Assisted Living Facilities (ALF).** These vary in size from a large apartment complex to smaller buildings. They are licensed by the state to provide care for 14 residents to upwards of 100 residents depending on the size of the building and the licensure. ALFs come in a wide range of styles. Some have private apartments (studio, 1 bedroom or 2 bedroom) and some have private or shared rooms. Some do not provide any cooking appliances in the apartments, and some offer partial kitchens. Most ALFs, however, do not have cooking facilities in the kitchenettes, but do offer microwaves and small refrigerators, instead providing residents with meal service in a common dining room. ALFs provide activities, housekeeping, and laundry services. Some offer limited transportation. For extra care, an assessment is done to determine what other specific assistance is needed and to develop a care plan, which may include assistance with activities of daily living, such as medication management, bathing, grooming, dressing, toileting, and mobility assistance. Additional assistance may also include reminders and a caregiver to walk with or transport the resident to meals and activities within the building. Private caregivers or family can be scheduled if a person needs a companion or caregiver to remain with them for blocks of time, usually at the expense of the protected person. Some facilities charge for incontinence and additional care needs; others offer an all-inclusive rate. ALF communities often have multi-levels of care with different price levels. Some ALFs are contracted with the state Medicaid programs. A resident can often remain at an ALF until the end of life with extra care being supplied through private homecare, family, and hospice services.

c) **Medicaid Facilities.** Developmental Disabilities Waiver Homes are licensed by the state. These homes are generally private homes that have been modified. They may be licensed for family living or supported living. Intermediate Care Facility

for persons with Developmental Disabilities (ICF DD) homes are an option for those on the central registry for the DD Waiver Program. Another low-income program, called the Program of All Inclusive Care for the Elderly (PACE), InnovAge is another Medicaid option. Finally, there is an additional Medicaid option for those disabled and elderly called the Centennial Waiver Program.

d) **Nursing Facilities.** Within this setting, there are two levels of care: skilled rehabilitation and long-term care. In these facilities, nursing supervision and nurses' aides are available to all residents whether they are recovering from a hospital stay, requiring long-term medical care, or need higher levels of care. A hospital discharge planner may arrange for discharge from the hospital to a rehabilitation facility or to a long-term care facility with a rehabilitation department. Insurance will usually cover skilled nursing care if specific criteria are met. It is important that the guardian learn these criteria. Generally, the protected person first must have been hospitalized for 3 or more consecutive "midnights" before Medicare will pay for nursing home care. Insurance will often pay both for up to 100 days of daily therapies. If, after that time passes, certain criteria are met and progress in therapy demonstrated, Medicare or the primary insurance may pay 80% of the skilled nursing. The remaining 20% would be paid either "out of pocket" by the protected person's funds or through a supplemental insurance policy.

The guardian should come to know these rules and work with the person holding financial authority for the protected person to be sure that the protected person receives the care that he or she needs. At the skilled rehabilitation level of care, most stays are about 2 weeks. Patients are generally expected to participate in therapies which may last a few hours daily. To this end, the guardian must serve as the protected person's advocate to ensure that the person is getting the necessary level of care.

Nursing facilities also offer long-term care for people to live to the end of life. This setting would be expected to have a medical director and physicians performing daily rounds with patients. 24/7 nursing care would also be provided. Qualified staff manages medications.

Medicaid covers long-term care for medically and financially qualified individuals. Most nursing facilities accept Medicaid. Residents may pay privately, and after their assets are spent down and they qualify for Medicaid, the Social Services Director can assist them with applying for Medicaid. Most rooms in nursing facilities are shared rooms. Some facilities do have private rooms available. Nursing facilities generally offer transportation to outside medical appointments.

e) **Dementia Specific Facility (Alzheimer's Unit).** There are some nursing facilities and assisted living facilities that are designed and staffed to meet the unique care needs of people who have dementia. These usually have coded entrances and exits.

f) **Continuing Care Retirement Communities.** These facilities include all levels of care from independent living to assisted living and nursing homes. These are usually "buy in" communities. An initial lump sum is charged and paid before the

resident moves into the community. Generally, a person moves in when they are fully independent, and they may initially live in an independent apartment. As the resident ages, they may move along a continuum of care to assisted living and then to long-term care. This is all offered in the same community setting. In addition to the "buy in" amount, a monthly fee is also charged, which remains the same over time, regardless of the level of care.

B. ARRANGING FOR MEALS

Unless the order appointing the guardian states otherwise, it is the duty of the guardian to: (a) provide for the care, comfort, and maintenance of the protected person; and (b) ensure that the person has adequate nutrition and hydration.

The following are suggestions for helping the protected person eat well:

a) Develop a nutrition plan in collaboration with the protected person and check-in on that plan regularly. Learn what type of food the protected person prefers. There may be cultural, personal, or religious factors to a protected person's food preference. It is the obligation of the guardian to take these factors into consideration when developing a meal plan for him or her and also to communicate these preferences to any person or entity providing meals for the protected person;

b) Learn whether the protected person has any problems in eating, including eating disorders, poor dentures, digestion problems, swallowing problems, or special diet needs; communicate these issues to any person or entity providing meals for the protected person; and be sure that appropriate medical and, where needed, mental health care is arranged for addressing these issues.

c) Understand if certain medications or treatments make the protected person feel ill. Tailor food choices that might be palatable yet still provide nutritional value and communicate these options to any person or entity providing meals for the protected person;

d) If the person is living at home, be sure that old and expired food is routinely removed from the premises;

e) If the person is living at home, consider whether the person may benefit from meals offered by a local senior program, which has the added benefit of providing some stimulation for the protected person as well as socialization opportunities;

f) If the person is living at home, consider whether the person would benefit from Meals on Wheels or a private meal preparation/delivery food service to provide daily meals;

g) Consider the benefit of nutritional shakes (e.g., Ensure, Boost) between meals to add nutritional content, if the person's doctor agrees;

h) If there was a preexisting personal or family relationship with the protected person, consider inviting him or her to dinner or out for a restaurant meal if appropriate; and

i) Consider hiring a qualified and trusted person prepare meals in the protected person's home (this could be in conjunction with other home care duties such as medication reminders, bathing assistance, shopping, errands, and laundry).

Whether the protected person lives at home, in an ALF, residential care home ("RCH") or nursing facility or with the guardian, the guardian has a duty to monitor to monitor the situation and progress of the protected person. The guardian must review the suitability of these plans with the protected person on an ongoing basis. To this point, professional guardians are required to follow those NGA Standards which promote the self-determination of the person.

The Guardian shall regularly examine all services and all charts, notes, logs, evaluations and other documents regarding the person at the place of residence and at any program site to ascertain that the care plan is being properly followed.

NGA Standard 13 (IV) (E).

The guardian should monitor the protected person for signs of problems that could lead to poor nutrition. If these conditions are present, it is the guardian's job to address them with appropriate health care professionals. The guardian should consider the impact of the following conditions on the protected person's nutrition and, if present, bring the condition to the attention of the health care professional attending to the protected person:

a) depression;

b) chronic health problems;

c) eating disorders;

d) stress or agitation;

e) death of someone close;

f) fear that (s)he is running out of money;

g) lack of money;

h) memory problems;

i) dentures that do not fit, gum disease or need for dental care; and

j) drinking or taking drugs or medicines that interfere with appetite.

C. CLOTHING

Unless the order states otherwise, the duty to provide for the care, comfort, and maintenance of the protected person extends to the guardian's duty to arrange for proper clothing for that person—whether in cooperation with the person managing the finances for the person or through the guardian's exercise of his or her limited financial authority as granted by Court order.

New Mexico law requires that the guardian take reasonable care of the protected person's clothing, furniture, vehicles, and other personal effects and commence conservatorship proceedings if other property of the protected person is in need of protection.

NMSA 1978, Sec. 45-5-312 (B) (2) (2021).

Guardians are frequently called upon by virtue of their Court appointments to make very personal decisions for protected persons. These decisions must be made in collaboration with the protected person. Arranging for the clothing of a protected person is another of those decisions. When making these personal decisions, including that of clothing, the guardian must be guided by the person-centered approach to guardianship while also achieving the safety of the person he or she was appointed to protect. The person-centered approach requires the guardian to maximize the person's involvement in the decision-making process. Indeed, under New Mexico law, professional guardians are required to follow those NGA Standards which promote the self-determination of the person.

As such, the guardian should strive to know the clothing preferences of the protected person alongside his or her needs, functional abilities, and health requirements. When arranging for the protected person's clothing, the guardian must: (a) attempt to maximize the self-reliance and independence of the protected person; and (b) encourage the protected person to participate in making clothing decisions. The guardian does this by involving the protected person in the clothes selection process as much as possible.

FURTHER READING: PLEASE SEE NGA STANDARD 9, FOR FURTHER DISCUSSION ON PROMOTING SELF-DETERMINATION OF THE PROTECTED PERSON.

It is important that the guardian both assess the state and suitability of the protected person's clothing and footwear in the initial assessment, but also take stock of the protected person's clothing preferences. The guardian should work with the protected person to ensure that the protected person's clothes are suitable to his or her environment and kept reasonably clean by working with the protected person to develop a plan for handling his or her laundry. It is the guardian's job to monitor the suitability of the protected person's clothing as the guardianship continues.

In the case of persons who may have extended stays in health care or rehabilitation facilities, clothing can become very soiled and worn, and the guardian must be sure that the protected person has adequate clothing on hand as old ones wear out—assuming resources allow. It is also important that the guardian monitor the temperature at such facilities to be sure that the person has a sweater or sweatshirt if the room temperature is cool and uncomfortable for the protected person.

The protected person's funds may be used to buy new or secondhand clothes, depending on the available budget of the person, with an eye toward maintaining the person's dignity. Buying clothes, whether new or second-hand, must be done in collaboration with the protected person. The guardian should allow the protected person to lead these decisions when possible. This means that the protected person must be afforded the opportunity to select his or her own clothing where possible. In collaboration with the person holding financial authority for the protected person, the guardian should consider enlisting the help of trusted friends or family to assist the protected person in obtaining new clothing when needed.

The guardian should:

a) consider making a list of the protected person's clothes and correct sizes;

b) refrain from discarding or donating the protected person's clothes without speaking to him or her first about doing so;

c) engage the protected person in the exercise of selecting clothing as much as possible;

d) make arrangements to be sure the person's clothes are washed and/or dry-cleaned; and

e) if the protected person is in a care facility, make sure clothes and shoes are permanently labeled with his or her name, and that the person receives new clothes as needed.

New Mexico law requires not only that the guardian take reasonable care of the protected person's clothing, but also of his furniture, vehicles and other personal effects.

Assuming limited financial powers have not been granted to the guardian, the person holding financial decision-making authority for the protected person has the duty to manage the protected person's personal property It is the guardian's duty to cooperate with that person as necessary to meet the goals, needs and preferences of the protected person. If there is no person managing the personal property of the protected person and the guardian believes that there is property in need of protection, the guardian is required to commence conservatorship proceedings for the protected person.

D. ARRANGING RECREATION AND EDUCATION AND PROMOTING PERSONAL VALUES

By following a person-centered approach to guardianship, a guardian develops and follows an individualized plan which is tailored to the goals, needs, and preferences of the protected person. That plan is constructed in collaboration with the protected person. This approach is designed to benefit the protected person not just in the realm of health care management, but also in all other

areas of the protected person's life. Following the person-centered approach to guardianship is especially important when it comes to arranging for the recreation and education of a protected person and the promotion of his or her personal value system.

To understand how this works in practice, the guardian should read New Mexico law and the NGA Standards together. In doing so, the guardian can identify the basic principles from which the guardian can build a sound action plan for the benefit of the protected person. New Mexico law states:

> **Guardianship for an incapacitated person 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. 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. NMSA 1978 Sec. 45-5-301.1 (1989).**

As of July 2021, the New Mexico legislature provided additional mandates to professional guardians stressing, among other things, the importance of promoting least restrictive intervention and self-determination. Lay guardians who follow the NGA standards would also respect these rules:

> **Professional guardians shall follow the following standards in the national guardianship association standards of practice:**
>
> **(a) informed consent;**
>
> **(b) standards for decision making;**
>
> **(c) least restrictive alternatives;**
>
> **(d) self-determination of the person; and**
>
> **(e) the guardian's duties regarding diversity and personal preferences of the person. NMSA 1978 § 45-5-312 (B)(5) (2021).**

New Mexico law also states that it is the legal duty of the guardian to exercise the guardian's supervisory powers over the protected person in a manner that is:

a) least restrictive of the protected person's personal freedom, ***but also***

b) consistent with the need for supervision.

The Guardian shall weigh the risks and benefits and develop a balance between maximizing the independence and self-determination of the person and maintaining the protected person's dignity, protection and safety.

NGA Standard 8 (II).

The NGA Standards provide guidance to the guardian to reconcile these seemingly competing duties, especially in the context of the protected person's recreation, education, and personal values.

First, it is the guardian's job to understand the nature of the protected person's limitations which have created the need for the guardianship in the first place. To do this, the guardian must understand the incapacity, condition, and functional capabilities of the protected person. Second, it is the guardian's job to understand the goals and preferences of the protected person. Third, the guardian must understand the resources that are available in the community, not just for the medical treatment of the protected person, but also for the person's vocational training and education. The guardian must stay educated as to these resources and any changes that may be made in available services over time. Fourth, the guardian has an ongoing duty to monitor the protected person and assess the suitability of the services being provided to him or her and to involve the person in the guardianship planning process as much as possible.

The Guardian shall assess the person's physical appearance and condition and assess the appropriateness of the person's current living situation and the continuation of existing services, taking into consideration all aspects of social, psychological, educational, direct services and health and personal care needs as well as the need for additional services.

NGA Standard 13 (IV) (A).

Finally, unless the order appointing the guardian states otherwise, the guardian has the following responsibility:

To make reasonable efforts to secure for the person medical, psychological, therapeutic and social services, training, education and social and vocational

opportunities that are appropriate and that will maximize the person's potential for self-reliance and independence. NGA Standard 12 (C).

The guardian must have a solid understanding of the nature of the protected person's incapacity and functional limitations, his or her personal goals and preferences, and the resources available in the community. The guardian must utilize that understanding and work with the protected person where possible to create an individualized plan for recreation and education that is designed to:

a) allow the protected person to be as self-reliant and independent as possible;

b) to satisfy his personal goals and preferences;

c) reasonably maintain the protected person's established social and support networks; and

d) also maintain the person's dignity, protection and safety.

Every person subject to a guardianship has different needs, goals, and preferences. Each guardianship should be administered to play to the person's particular strengths and preferences, encourage his or her personal growth, and maximize his or her self-reliance where possible and in a safe way.

At the outset of the guardianship and rolling forward the guardian must identify:

a) The educational needs the protected person has which, if met, might allow him or her to better realize his or her strengths and goals. The guardian should request multi-disciplinary functional assessments when financial resources will allow to identify how educational needs might be best satisfied for the protected person. Case workers, psychologists, therapists, and special education workers are just a few of the professionals who may be able to add value in a guardianship plan to suggest pathways for the guardian to follow to provide enriching educational opportunities for the protected person under his or her supervision.

b) The vocational needs the protected person has which would allow him or her to maximize his or her independence and self-reliance. The guardian should consider whether the protected person might safely be employed at a level of employment suitable to his or her functional limitations. Allowing the protected person to earn a wage, even if meager, can be enormously fulfilling for persons with disabilities. That work must be done in a healthy and safe environment.

c) The resources available in the community to meet the above needs. The New Mexico Guardianship Association, developmental disability councils, Alzheimer's associations, aging and disability resource centers, community colleges and community mental health agencies are just a few of the many

national and local resource centers available to the diligent guardian to better understand the resources that are available to meet a person's educational needs. It is the duty of the guardian to know what resources are available to meet the needs of the protected person.

At the outset of the guardianship and rolling forward the guardian must also identify what activities the protected person enjoys which would allow him or her to pursue his or her interests and realize strengths and goals. The guardian must structure the guardianship to safely allow the protected person to engage in these activities. Some questions which may guide this part of the guardianship plan include:

a) Does the protected person enjoy reading?

b) Does the protected person enjoy music?

c) Does the protected person enjoy dancing?

d) Does the protected person enjoy playing games?

e) Does the protected person enjoy exercise?

f) Does the protected person enjoy crafts?

g) Does the protected person enjoy watching television?

h) Does the protected person enjoy having a pet and will his or her living placement allow a pet to be kept?

i) Does the protected person enjoy the outdoors? and

j) Does the protected person enjoy outings with his or her peers?

The guardian's plan should facilitate the protected person in engaging in activities that suit his or her preferences and further his or her personal goals. The guardian should determine whether the living placement of the protected person will allow him or her to engage in the activities he or she enjoys, while also determining how to best arrange for educational and vocational opportunities that cater to his or her preferences and play to his or her strengths. Arranging for outings, whether through a facility or with friends and family, can be a critically important function of the guardian provided that such activities can be conducted safely. Activities may also be offered through adult day care programs, developmental disability organizations, residential placements, senior citizen centers, and vocational centers, among others.

The guardian should also ensure that the personal needs of the protected person are managed so that the person can engage in activities he or she enjoys. For example, participating in arts and crafts or listening to a band can be difficult for elderly persons if there are problems with fine motor skills or hearing or visual impairments not managed with glasses or hearing aids. People with physical limitations or disabilities may need assistance devices to enable them to participate in outings (such as canes, walkers, etc.), and it is the job of the guardian to ensure these devices are available.

The guardian must be sensitive to any values the protected person holds when considering the types of activities and educational and vocational needs of the protected person. The guardian:

"…shall determine the extent to which the person under guardianship identifies with particular ethnic, religious and cultural values…" NGA Standard 10 (I).

It is critically important that the guardian, in administering the guardianship in "a manner that is least restrictive of the protected person's personal freedom," recognize that the protected person may have spiritual practices or belong to a religious community. Religious communities not only provide spiritual support for the protected person, but also many activities that the protected person may enjoy. These include attending church, temple or tribal services, games and social functions. The guardian must encourage the protected person to engage in these activities if they are consistent with his or her personal preferences and are safe for him or her.

9. THE GUARDIAN AND PROPERTY-RELATED DECISIONS

In most cases, the guardian is not legally obligated to pay for the protected person's support from his or her own funds. There may be other legal obligations, however, which require a guardian to provide support for a protected person from the guardian's personal funds. The most obvious of such an obligation is the legal duty of one spouse to support another. When a guardian is also the spouse of a protected person, the law requires the spouse to provide support to the protected person from his or her own funds. The legal source of this obligation is the legal responsibility of one spouse owed to support another and not guardianship law. A guardian is not required to pay for the support of the protected person from his or her own funds in the absence of such a special legal relationship.

While it is true that the guardian does not have a legal obligation to pay for the support of the protected person from the guardian's own funds just because that person was appointed guardian, it is also a reality that the exercise of a guardian's authority may impact the financial affairs of the protected person.

While responsibilities for the personal care and the financial affairs of a protected person are frequently divided in New Mexico between a guardian and conservator respectively, such a division is not always the case. There are times where a protected person may need a guardian, but not a conservator, or visa-versa. There are other times where personal care management is provided through a guardian and financial management through a durable power of attorney. The roles of personal care management and financial management are different.

It is the duty of the guardian to make a good faith effort to cooperate on an ongoing basis with any other person that may hold financial decision-making power for the benefit of the protected person. The person holding financial decision-making power may include an agent under a power of attorney, a conservator, or a trustee.

The guardian's plan for the protected person cannot be competently made without the guardian understanding the protected person's finances and whether the services the protected person may require are in line with his or her budget. Therefore, when the guardian creates his or her plan for the guardianship, he or she must cooperate with the person with financial decision-making power

in order to determine the protected person's budget and the ability to pay for necessary services for that person. In turn, the person with financial decision-making power must also cooperate with the guardian.

Under New Mexico law, an agent under a power of attorney must act in good faith. Unless the power of attorney states otherwise, the person serving as agent under a power of attorney has an affirmative duty to cooperate with the person that has the authority to make health care decisions for the protected person for the purpose of carrying out the expectations of the protected person. New Mexico law states:

> **Except as otherwise provided in the power of attorney, an agent that has accepted appointment shall:**
>
> > **(5) cooperate with a person that has authority to make health care decisions for the principal to carry out the principal's reasonable expectations to the extent actually known by the agent and otherwise act in the principal's best interest…NMSA 1978 § 45-5B-114 (B)(5) (2011).**

New Mexico law expressly grants the guardian the power to apply to the Court for relief in the event the person holding financial power of attorney refuses to cooperate with the guardian for the benefit of the protected person.

If the person holding financial decision-making power for the protected person is a conservator, the guardian is authorized by law to request that the conservator expend reasonable sums for room, board, and services for the protected person. If the conservator refuses to cooperate with the guardian, then the guardian should bring the matter to the attention of the Court that appointed them. Similarly, if the person holding financial decision-making power for the protected person is a trustee of a trust that is held for the benefit of the protected person and that trustee refuses to cooperate with the guardian in administering the trust according to its terms, that matter should also be brought to the Court's attention.

Under New Mexico law, a guardian may be granted limited power over the property of a protected person. The extent to which a guardian has responsibility for the property of the protected person is determined by the scope of the order appointing the guardian as well as the application of New Mexico law.

There are times where a Court will appoint a guardian for a protected person, but not a conservator. Such an arrangement can result from many factors, one of which may be the fact that a protected person's resources are very modest. In these cases, the Court may grant the guardian limited financial powers. When the Court appoints a guardian with limited financial authority, subject to the language of the order of appointment, the guardian's duties extend to:

a) receiving money and tangible personal property which may be deliverable to the protected person and applying these resources for the protected person's support, care and education;[12]

b) initiating proceedings to obtain benefits or support for the protected person;

c) advocating and making decisions for the protected person in any dispute with persons or organizations (including financial institutions) concerning the protected person's finances;

d) obtaining information concerning the protected person's assets and income and instituting proceedings to compel a person under a duty to support the protected person to do so; and

e) advocating and making decisions for the protected person as to disputes over the person's finances.

In the event there is no conservator, and the Court has granted the guardian limited financial powers, then the guardian will have additional legal duties similar to those duties the Court grants to a conservator. The guardian with limited financial powers must manage the property of the protected person only for the benefit of that person. Decisions related to the property of the protected person must be made using the same standards that govern decisions of a conservator. Those standards are discussed elsewhere in this Handbook.

The actions of a guardian with limited financial powers, like a conservator, are open to scrutiny by the Court at any time. It is therefore essential that the guardian with limited financial powers keep good records showing how the protected person's money has been spent and how his or her property has been managed.

The guardian who has been granted limited financial authority has additional legal obligations which include:

a) The guardian with limited financial powers has the duty to file an inventory of the protected person's property within ninety days of appointment;

b) The guardian with limited financial powers may not commingle or mix the guardian's funds or investments with those held for the protected person. New Mexico law requires that funds and investments held by the guardian personally be kept separate from funds and investments owned by the protected person. The law further requires that the protected person's assets be titled separately from the guardian's own property;

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[12] In such cases, unless the Court has entered an order approving the expenditure, the guardian should not use the protected person's funds to pay for room and board that the guardian, the guardian's spouse, the guardian's parent or the guardian's child provides. New Mexico law requires that, where possible, the protected person's next of kin receive notice of any motion filed by the guardian to obtain court approval of these expenditures.

c) If the guardian serves as a guardian for more than one protected person, the guardian with limited financial authority is required under law to hold the funds and investments of each protected person in accounts that are separate for each protected person. In the case where a guardian serves for more than one protected person, each protected person must have their assets titled separately from any other person for whom the guardian serves as fiduciary;

d) The guardian with limited financial authority must report all actions with the protected person's property to the Court using the annual report forms created by the New Mexico Supreme Court. New Mexico law states when these reports must be filed.

While the Court may require additional reporting, generally, the guardian must file an initial report with the appointing Court within ninety (90) days of the date of the order which appointed him or her and annually thereafter. An annual report must be filed with the appointing Court within thirty (30) days of the anniversary date of the order appointing the guardian. The guardian may be fined $25.00 per day for every day a report is not filed timely; and

e) A guardian must comply with the requirements of any audit of an account, inventory, property or guardian report concerning a protected person.

If the protected person owns an operational car or other vehicle, the vehicle must be insured, and registration fees paid. If the vehicle is no longer being driven, whether because the protected person is no longer able to drive or otherwise,[13] appropriate arrangements must be made for the vehicle which might include selling it. If a decision is made to sell the person's vehicle, prior Court approval should be obtained.

Subject to Court approval, the guardian should consider notifying the protected person's family and friends that the vehicle is being considered for sale if that decision has been made and afford those individuals an opportunity to obtain it. In most cases, the Court would expect that the car be sold to such a person for its market value. The guardian should document how the price was determined and keep the documentation of this decision in his or her file in preparation for filing the annual report and answering any questions the Court may have as to the sale of the vehicle. If the guardian believes that the car should be conveyed for less than market value, then prior Court approval of the transaction is highly recommended. The guardian should never take any of the protected person's property for himself or herself.

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[13] For a discussion on driving, see the publications on the Alzheimer's Association website www.alz.org under "driving", or order the publication, *At the Crossroads, A Guide to Alzheimer's Disease, Dementia and Driving*, published by The Hartford. The protected person may insist on driving when (s)he is unable to do so safely. Talking about the car and other financial issues with the conservator, if there is one, should help make good decisions for the protected person.

Similarly, the guardian should see to it that the protected person's furniture is properly cared for. This duty may require the guardian to consider whether certain personal property should be discarded, donated, sold, or stored when the protected person is no longer able to use it. As noted earlier in this Handbook, the guardian must consult with the protected person in this process. Sale of the protected person's personal property should be made over the person's objection only if substantial harm would result if the property was kept. Except for the case of items with sentimental value, that harm may come in the form of ongoing storage costs which a modest estate may not be able to pay.

If the decision is made that a protected person's property must be sold, the guardian should first seek a court order approving the sale. The guardian should also notify the protected person's family and friends that certain items may be discarded, donated, or sold. Items that may appear to have no financial value may have tremendous sentimental value, and family members may become very upset if such items are discarded. It is wise to afford those individuals an opportunity to obtain such sentimental items. The terms under which these individuals may receive the property (whether to be purchased or not) could be established by court order.

The NGA Standards require the guardian to make reasonable efforts to preserve (keep) property which is specifically designated in the protected person's will or other estate plan. The guardian is strongly advised to seek prior court authority when it comes to discarding, donating, or selling the protected person's personal property.

The conservator portions of this Handbook deal with the sale of a protected person's assets, and the guardian is encouraged to review those sections.

F. USING COMMUNITY RESOURCES

As noted elsewhere in this Handbook, the guardian must become familiar with the available options for the protected person's residence, care, medical treatment, vocational training, and education.

FURTHER READING: PLEASE SEE NGA STANDARD 8, FOR FURTHER DISCUSSION ON LEAST RESTRICTIVE ALTERNATIVES.

To understand what options may be available to the protected person to contribute to his or her support and add to his or her quality of life, the guardian must understand the person's incapacity, condition, functional limitations, personal and social situation, and his or her personal goals and preferences. The guardian should also understand the protected person's support network and any religious, ethnic, or tribal communities of which the protected person may belong.

The Guardian shall assess the person's physical and social situation, the person's educational, vocational and recreational needs, the person's preferences and the support systems available to the person…

NGA Standard 13 (I)(B)(3).

Considering the broader community in which the protected person resides, any religious, ethnic, or cultural communities which the protected person may belong and any social networks which may support the protected person, the guardian will likely find many resources available to contribute to the management of the protected person's personal affairs. Some services are free or have a reduced fee; others require payment. Services to care for a protected person include:

a) care management services which may include social workers, certified care managers or other care managers who will work with the guardian to identify suitable services for the protected person. Such individuals can also assist the guardian in monitoring the care of the protected person and coordinating services. Case or care managers may be self-employed, work for private companies, or be employees of city or state agencies;

b) meal services, such as Meals on Wheels (a private, nonprofit group) or home-delivered meals through the Department of Senior Affairs, other agency or private meal services. To locate these services, the guardian should contact local government agencies to see what may be available. For example, in Albuquerque, the Department of Senior Affair may provide useful information. In other communities, the guardian should look for services check under "Area Agency on Aging.");

c) day or vocational programs for persons with developmental disability;

d) senior centers for activities, meals, outings, and classes;

e) adult day care centers;

f) transportation services (Department of Senior Affairs or a private service);

g) personal contact programs, such as telephone visitors; and

h) emergency response services that offer things like "emergency call" buttons.

If the protected person continues to live in his or her home, there a many private individuals and agencies that provide in-home care at a variety of different skill levels. As noted earlier in the Handbook, if the guardian will be hiring persons not affiliated with an agency for such services, the guardian is wise to seek sound legal advice as to the hiring of that person. There can be important legal consequences which attach to a caregiver who is a direct employee as opposed to a caregiver who is working for the protected person through an agency.

G. MAKING HEALTH CARE DECISIONS

One of the most important functions a guardian can perform for a protected person is to make medical decisions for him or her. These decisions must be made in a manner that maximizes the participation of the person, as the NGA Standards state:

The guardian, in making health care decisions or seeking court approval for a decision, shall:

A. Maximize the participation of the person,

B. Acquire a clear understanding of the medical facts,

C. Acquire a clear understanding of the health care options and the risks and benefits of each option, and

D. Encourage and support the individual in understanding the facts and directing a decision. NGA Standards 14 (IV).

The extent to which the guardian has authority to make such decisions is defined by the Court order that appointed the guardian. It is the duty of the guardian to read the Court order that appointed him or her as guardian and to have a clear understanding as to the extent of the powers and limitations granted to him or her by the Court. If the guardian has doubt or uncertainty as to his or her role, it is the duty of the guardian to promptly ask the Court for clarification.

The Guardian shall clarify with the Court any questions about the meaning of the order or directions from the Court before taking action based on the order or directions.

NGA Standard 2 (III).

Generally, unless the order states otherwise and unless there is another person serving as agent for health care decisions for the protected person under an unrevoked health care power of attorney, the guardian will have authority to make health care decisions for the protected person.

New Mexico law states:

> **If no agent is entitled to make health care decisions for the protected person under the provisions of the Uniform Health-Care Decisions Act, then the guardian shall make health care decisions for the protected person in accordance with the provisions of that act.**
>
> **In exercising health care powers, a guardian may consent or withhold consent that may be necessary to enable the protected person to receive or refuse medical or other professional care, counsel, treatment or service.**
>
> **That decision shall be made in accordance with the values of the protected person, if known, or the best interests of the protected person if the values are not known…**NMSA 1978 Sec. 45-5-312 (B) (3) (2019).

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1. HEALTH CARE DECISIONS

There are many types of medical decisions which a guardian may be called upon to make for a protected person.

Unless the Court order states otherwise, a power of attorney for health care which is executed when the protected person had capacity remains in effect notwithstanding the fact that a guardian is later appointed for him or her.

NMSA 1978 Sec. 24-7A-2 (1995)

Examples of medical decisions and actions include:

a) Selecting health care professionals and care facilities;

b) Arranging for and attending routine and non-routine medical appointments with primary care medical and mental health providers and specialists;

c) Requesting and reviewing medical charts and records;

d) Consulting with health care professionals whether counselors, dentists, doctors, nurses, pharmacists, psychologists, social workers, therapists or otherwise;

e) Consenting to diagnostic procedures such as blood work; ultrasound, MRI or X-Ray imaging; biopsies and invasive procedures and making treatment decisions based on the results of these procedures;

f) Consenting to the administration of over the counter and prescription medication and vaccines;

g) Consenting to medical treatment, rehabilitation and surgical procedures;

h) Electing palliative care and hospice services;

i) Electing "do not resuscitate" status and giving instructions about whether or not to resuscitate the protected person;

j) Giving directions about withholding or withdrawing life support, artificial nutrition, hydration and ventilation;

k) Arranging for hearing aids or other amplification devices, glasses, walkers, canes, wheelchairs, chair alarms, and other medical equipment to benefit the protected person, including without limitation in-home oxygen delivery, medical beds and handicapped-friendly bathroom aids such as shower chairs, grab bars and commodes;

l) Arranging for dental care and foot care; and

m) Developing a proper nutrition plan.

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2. EXTRAORDINARY HEALTH CARE DECISIONS

There are certain extraordinary medical decisions that a guardian should not make for a protected person without a Court order, or an instrument signed by the protected person when he or she had capacity authorizing such procedures. The NGA Standards state:

The guardian may not authorize extraordinary medical procedures without prior authorization from the Court unless the protected person has executed a living will or durable power of attorney that clearly indicates the person's desire with respect to that action. Extraordinary procedures may include but are not limited to:

A. Psychosurgery;

B. Experimental treatment;

C. Sterilization;

D. Abortion; and

E. Electroshock therapy.

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3. DELEGATION

There are certain functions which a guardian may delegate to another person. For example, the guardian can arrange for a residential care facility to provide ongoing care for a protected person, a vocational center to provide job training, and a health care professional to provide medical care. If the guardian of an adult protected person is temporarily unavailable, however, New Mexico law states that a guardian may delegate to another person any of the guardian's powers regarding the care, custody, or property of the adult protected person. This delegation may not last longer than six months and must be documented in an acknowledged power of attorney signed by the guardian.

Subject to this short-term delegation power, unless the Court order appointing the guardian states otherwise, the guardian may not delegate his or her responsibility to another person to make health care decisions for the protected person. This is true as to all areas of health care, including without limitation end-of-life care. The guardian's responsibility to make such decisions continues until: (a) an order is entered approving the guardian's resignation, removing the guardian or terminating the guardianship; or (b) upon the death of the protected person.

4. INFORMED CONSENT

Every health care decision the guardian makes for the protected person should be an informed decision based on the principle of informed consent. The resulting decision is made based on informed consent, but in a manner that maximizes the participation of the person in the decision-making process. Under this principle, the guardian stands in the shoes of the protected person. The guardian is entitled to know the same information as the protected person and exercise the same freedom of choice as the protected person would be able to if he or she were not under guardianship. The principle of informed consent requires that the guardian make decisions based on proper investigation and consideration of alternatives. Under New Mexico law, professional guardians must respect NGA Standards governing informed consent in decision making. Lay guardians following the NGA Standards should also follow these rules.

To reach the objective of informed consent, the guardian must

a) become educated on the nature of the protected person's condition, incapacity, and functional capabilities; and

b) know all the available alternatives for a given decision.

The guardian stands in the place of the person and is entitled to the same information and freedom of choice as the person would have received if he or she were not under guardianship.

NGA Standard 6 (IV).

The NGA standards provide guidance as to how informed medical decisions are to be made:

V. In evaluating each requested decision, the guardian shall do the following:

A. Have a clear understanding of the issue for which informed consent is being sought;

B. Have a clear understanding of the options, expected outcomes, risks and benefits of each alternative;

C. Determine the conditions that necessitate treatment or action;

D. Encourage and support the person in understanding the facts and directing a decision;

E. Maximize the participation of the person in making the decision;

F. Determine whether the person has previously stated preferences in regard to a decision of this nature;

G. Determine why this decision needs to be made now rather than later;

H. Determine what will happen if a decision is made to take no action;

I. Determine what the least restrictive alternative is for the situation;

J. Obtain a second medical or professional opinion if necessary;

K. Obtain information or input from family and from other professionals; and

L. Obtain written documentation of all reports relevant to each decision.

NGA Standard 6 (V).

The guardian is required to consult with health care professionals providing care to the protected person in order to be able to make medical decisions for that person based on a full disclosure of all the necessary facts after involving that person in the decision-making process. To this end, a guardian has the right to review the protected person's medical records and to be fully informed about all aspects of his or her medical care.

Establishing good communication with doctors, health care providers, nurses, pharmacists, and other providers will allow the guardian to be more effective and make better decisions in collaboration with the protected person. Not only must the guardian communicate with health care providers in order to receive information, but the guardian must also ensure that proper information is being provided to any health care provider for the protected person. Health care providers develop treatment plans based on the information provided to them. For the guardian to make fully informed medical decisions, it is their duty to ensure that the health care provider receives the relevant information so that the health care provider's ultimate medical recommendation is

based on good data. For example, health care providers should know about all medications being given to the protected person (including over-the counter medications, vitamins, and any other supplements or herbs), progress or decline in a medical condition, or other developments related to the protected person's condition.

When communicating with a health care professional, the guardian should consider the following question list:

a) How often does the protected person need to be seen by the provider?

b) If the guardian decides to change health care providers, does the new provider have the protected person's medical records, including lab work and imaging results (MRI, X-Ray, CT and Ultrasound)?

c) Is there a record of allergies the protected person has to medical treatments?

d) Is there a medical provider coordinating care between or among specialists? The guardian should not assume that providers communicate with each other.

e) What medical tests need to be performed? The guardian should receive the results of all such tests and review them with the health care provider.

f) How are follow up appointments scheduled and when are they needed?

g) Are there special dietary components of the protected person's condition?

h) What are all the available treatment options?

i) What are the short-term and long-term effects of each option?

j) What side effects will other medicines, herbs or supplements have?

k) What reactions, if present, warrant an immediate call to the health care provider?

l) Will the protected person benefit from physical therapy or using special medical equipment?

m) How long medicines should be taken and why are they being prescribed?

n) If medications are discontinued, is there a necessity for the protected person to come off the medication gradually?

At times, the guardian may feel certain that a health care provider has given all possible treatment options but is still unsure of what to do. In those cases, the guardian may obtain a second opinion from another health care professional. Most insurance companies will pay for a second opinion.

The NGA Standards state that the guardian shall obtain a second opinion where a medical intervention poses a significant risk to the protected person and a reasonable person would do so. What is reasonable in any given cases varies. When deciding whether to get a second opinion, the guardian should consider the following:

a) the seriousness of the protected person's condition;

b) the time sensitivity of the decision;

c) the impact of the decision on the protected person's quality of life;

d) whether the guardian has doubts about the advice provided;

e) the quality of the interaction between the guardian and the health care provider;

f) whether the health care provider appears to have devoted adequate time to the protected person and the rationale for the proposed treatment;

g) the financial and non-financial costs in getting a second opinion;

h) the specialization of the health care professional; and

i) whether the diagnosis is rare.

The NGA Standards require that, unless there is an emergency, the guardian shall not make any decision as to medical intervention unless the guardian's consent (or non-consent) to a medical procedure is, in fact, fully informed.

If there is a medical emergency, the guardian must (a) become as informed as reasonably possible within the time permitted by the emergency; and (b) make an emergency medical decision based on the protected person's preferences, "substituted judgment" or "best interests."

NGA Standard 14 (IX).

The decision-making methods of following a person's preferences, "substituted judgment," and "best interests" are discussed below.

5. HOW THE GUARDIAN MUST MAKE HEALTH CARE DECISIONS

Every medical decision a guardian makes for a protected person must be based on the due diligence of the guardian and his or her duty to best serve the protected person's goals, needs, and preferences. As stated above, the NGA Standards require that, as to every medical decision, the guardian shall:

a) Maximize the participation of the protected person;

b) Acquire a clear understanding of the medical facts;

c) Acquire a clear understanding of the health care options and risks and benefits of each option; and

d) Encourage and support the individual in understanding the facts and directing a decision.

FURTHER READING: PLEASE SEE NGA STANDARD 14, FOR FURTHER DISCUSSION ON DECISION-MAKING ABOUT MEDICAL TREATMENT.

The guardian must know that the preferences that control are those of the protected person—not the guardian. But how does the guardian determine the person's goals, needs and preferences?

First, as to every medical decision, the guardian should ask the protected person his or her preferences and involve that person as much as possible. If the person has difficulty expressing himself or herself, the guardian should do everything possible to assist the person in expressing his or her preferences. There are times when persons who might otherwise be thought of as incapacitated can communicate more clearly when the effect of acute conditions have subsided. For example, an infection in an elderly individual can cause confusion, but when that condition is brought under control the person may be able to think more clearly. The same can be true of confusion brought about by acute medical conditions, certain medications, and certain medical procedures. A guardian should be aware of the timing of these events and the effects on the person. They should therefore consult with the protected person about medical treatment at times when that person is most likely to be able to offer his or her input.

If the protected person cannot presently direct a medical decision, his or her prior statements become very important. It is the duty of the guardian at the beginning of the guardianship to identify whether the protected person previously executed any advanced health care directives or health care powers of attorney. These legal documents are likely to contain the preferences of the protected person, at least as to major health care decisions. These documents can have various titles, including Advance Health Care Directive, Medical Power of Attorney, Health Care Power of Attorney, End of Life Instructions, Living Will, Five Wishes document, or values history. The guardian should ask family members if they ever discussed the person's wishes as to medical care when he or she had capacity.

The NGA Standards state:

To the extent that the person cannot currently direct the decision, the guardian shall act in accordance with the person's prior general statements, actions, values, and preferences to the extent actually known or ascertainable by the guardian. NGA Standard 14 (VII).

Only when the person's preferences are unknown and when he or she cannot express his or her preferences, even without help, should the guardian then seek the input of other persons who

demonstrate sufficient interest in the protected person's health care to determine what the person would have wanted as to any particular medical decision.

Following a person's preferences when the guardian makes a medical decision for him or her is known as "substituted judgment." Specifically, substituted judgment is a principle of decision making whereby the decision the person would have made when the person had capacity acts as the guiding force in any decision the guardian makes for that person.

Under the NGA Standards, substituted judgment is not followed when the guardian cannot ascertain what the protected person would have decided or when using substituted judgment would "cause substantial harm to the person."

FURTHER READING: PLEASE SEE NGA STANDARD 7, FOR FURTHER DISCUSSION ON SUBSTITUTED JUDGMENT.

The United States Supreme Court has ruled that a person has the right to refuse or accept medical treatment even if doing so will hasten or cause death. The person's doctor should be informed if the guardian knows that the protected person would not want a certain treatment or surgery. Likewise, if it is believed the protected person would want a treatment, the guardian must so instruct the health care provider.

In the event that: the protected person never had capacity; the protected person's preferences cannot be ascertained, even after assisting the protected person in expressing a preference; or when following substituted judgment would result in "substantial harm" to the protected person, then the guardian must make a decision for the protected person using the principle of "best interests." Under this principle, the guardian must consider the least intrusive, most normalizing, and least restrictive course of action possible to meet the needs of the protected person.

FURTHER READING: PLEASE SEE NGA STANDARD 7 (IV), FOR FURTHER DISCUSSION ON BEST INTEREST.

Some people have never been able to state their wishes competently. Those who have never had capacity may have intellectual or developmental disabilities, such as severe cerebral palsy or severe autism. For those who have never had capacity, decision-makers must be especially careful when determining best interests. Withholding treatment solely because someone is old or disabled is improper. Even if the person does not have the same quality of life that the guardian might enjoy, the guardian must consider what quality of life is "normal" for the protected person. If possible, the guardian's decisions should be made that help that person continue the activities that he or she had previously enjoyed.

As to "best interest," the NGA Standards state:

> **If the person's preferences are unknown and unascertainable, the guardian shall act in accordance with reasonable information received from**

> **professionals and persons who demonstrate sufficient interest in the person's welfare to determine the person's best interests, which determination shall include consideration of consequences for others that an individual in the person's circumstances would consider.** NGA Standard 14 (VIII).

When using the best interest approach, the guardian must consider past practice and evaluate evidence of likely choices the protected person would have made. New Mexico law requires that the guardian consider the protected person's personal values to the extent that they are known to the guardian when using this decision-making approach.

Deciding what is in a protected person's best interests can be challenging. When considering this question, the following factors should be considered:

a) What are the personal values of the protected person, including his or her personal, religious, spiritual, ethnic or tribal values?

b) Is the medical condition reversible if treated?

c) What is the potential for rehabilitation, either in whole or in part?

d) What is the protected person's ability to communicate with others through speech, eye contract or writing?

e) What quality of life would the protected person be expected to have based on any decision the guardian may make?

f) To what extent is the protected person in pain or expected to continue to experience pain?

Questions related to the withholding or withdrawal of medical treatment are among the most difficult decisions a guardian can make. These decisions can include withholding or withdrawing artificial nutrition and hydration for the protected person. In these situations, NGA Standard 15 (I) states a presumption in favor of the continued treatment of the person.[14]

In the event that the protected person currently expresses or expressed a preference for withholding or withdrawal of treatment, the NGA Standards state:

> **If the person had expressed or currently expresses a preference regarding the withholding or withdrawal of medical treatment, the guardian shall follow the wishes of the person. If the person's current wishes are in conflict with the**

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[14] Under the recently passed Elizabeth Whitefield End-of-Life Options Act, NMSA 1978 §24-7C-1t o 24-7C-8, a guardian for a protected person will not be able to request a health care provider to prescribe medication that will end the protected person's life in a peaceful manner because an individual must have capacity to make end-of-life decisions and must self-administer the medication.

wishes previously expressed when the person had capacity, the guardian shall have this ethical dilemma reviewed by an ethics committee and, if necessary, submit the issue to the Court for direction. NGA Standard 14 (II).

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6. KEEPING FAMILY AND FRIENDS INFORMED

A guardian must be prudent in sharing information about the protected person with those the protected person defines as friends and family. A guardian inevitably learns a lot of information about the protected person, including information about his or her financial, medical, personal, and social situation. Accordingly, the guardian should treat the information obtained about the protected person as confidential, especially as to medical matters.

The NGA Standards do require, however, the guardian to keep those who the protected person defines as immediate family members and friends reasonably informed of important health care decisions.

How does the guardian accomplish this if the protected person's affairs are meant to be confidential? The answer is that the disclosure of information should be limited to what is necessary and relevant to the medical issue being addressed at the time.

Respecting rules of confidentiality, the protected person's right to privacy, and his or her dignity requires the guardian not to discuss the protected person's medical condition with others unless necessary and relevant. For example, discussing a medical condition with someone who is helping take care of the protected person may be warranted. In a family where the protected person customarily shared information with others about his or her medical care, the guardian may also feel more comfortable in sharing such information, but even then, the guardian should be judicious and provide medical information only as necessary to keep the family reasonably informed.

The guardian may also request family input when it comes to medical decisions. That input would expect to be sought from those individuals close to the protected person. To do so, the guardian will have to provide the degree of information necessary to obtain that input.

If family members disagree over the decisions related to a protected person's health care, the guardian must recall that he or she is an advocate for the protected person and that this role can cause family tension, especially when other family members object to the decisions the guardian is making. If the guardian discusses difficult topics with family members, it may be helpful for the guardian to share what the medical providers recommend and review the protected person's known values and wishes. This may help dissipate tension in the family and gain greater understanding among family members.

7. MANAGING CONFLICT

Health care providers may be caught in the middle if the guardian directs one type of treatment and family members want a different treatment. Communication with family members and friends is essential to manage this problem. Ultimately, however, it is the guardian that is responsible for making the medical decisions for the protected person. If conflict with family or friends impedes the provision of medical care for the protected person or causes such a problem with medical providers that the provision of care is affected, the guardian should consider bringing this matter

to the attention of the Court. There are times when a health care provider will assist in mediating between family members in disagreement over medical care and there are other times when such a conflict makes health care providers very uncomfortable. It is important for the guardian to monitor the situation and if the conflict is negatively impacting the protected person to take steps to alleviate the problem—including bringing the matter to the attention of the Judge that appointed the guardian.

If a health care provider makes treatment recommendations at odds with the preferences of the protected person, the guardian should consider the recommendations of the health care provider, but should also consider obtaining a second opinion or changing providers. Ultimately, the preferences of the protected person must drive medical decisions.

Meeting with a hospital ethics committee or accessing the University of New Mexico Health Sciences Center Institute for Ethics may be helpful in coming to resolution of health care treatment dilemmas. Additionally, the guardian may ask the court for instructions.

8. MENTAL HEALTH TREATMENT

Regarding mental health decisions, if the protected person needs treatment such as visits to a psychiatrist or psychologist, a guardian can arrange for such visits. If the guardian has the authority to make health care decisions for the protected person, this authority can include the guardian arranging for the protected person to receive certain drugs for mental health conditions.

If it is recommended that the protected person enter a residential treatment facility for mental health treatment and he or she is unable to consent or refuses to go, the mental health treatment guardian can request for him or her to be picked up by the police.

New Mexico law prohibits a guardian from initiating the commitment of an adult to a mental health facility except in accordance with New Mexico's procedures for involuntary civil commitment. In some cases, the protected person may have created a Mental Health Power of Attorney. If this is the case, it should be useful information for the guardian regarding making decisions with and for the protected person.

The guardian may request that a mental health professional submit a Certificate of Evaluation for the protected person to be picked up. The Albuquerque Police Department Crisis Intervention Team (CIT) and a Crisis Outreach Officer are good sources of information in Albuquerque and support in these difficult situations. A local mental health facility can also offer guidance on what steps to take. The guardian should call 911 if there is an emergency.

If the protected person is committed against his or her wishes because of a dangerous situation, New Mexico's rules on involuntary civil commitments apply. There will be a court hearing on whether he or she needs to remain in the facility. At the hearing, it could be recommended that the protected person be committed to the facility for a period of time. A mental health treatment guardian may be appointed for a period of 6 months to 1 year to make mental health decisions for the protected person while he or she is in the facility. After that time if there is still reason to believe that the person cannot make their own mental health decisions, the mental health treatment guardian may petition for reappointment.

A treatment guardian works closely with the physicians and other mental health providers in making decisions about the protected person's treatment. A treatment guardian must be kept informed about what is happening with respect to the protected person.

Although the Mental Health Code is separate from the guardianship provisions of the Probate Code, there are overlaps with respect to treatment. Frequently the administration of psychotropic medications does not require the appointment of a treatment guardian if a guardian is already appointed and consents to such treatment. The powers of a guardian, under the Probate Code, are interpreted by many attorneys and health care providers as allowing a guardian to consent to the administration of psychotropic medications. This is because the guardian has the power to make all medical decisions which should include mental health decisions.

The Mental Health Code does not specify that a guardian may not make mental health decisions. Therefore, unless the law changes, many people feel that guardians under the Probate Code can make mental health decisions. Ideally, language stating the guardian has the powers of a mental health treatment guardian under the Mental Health Code is included in the court order appointing the guardian under the Probate Code.

Regarding mental health decisions, the guardian or treatment guardian should review any current requirements enacted based on issues involving what is commonly referred to as "Kendra's Law", including emergency treatment of non-hospitalized mental health patients against their will.

H. LIMITATIONS ON GUARDIAN'S POWERS

It is the legal duty of the guardian to exercise the guardian's powers over the protected person in a manner that is least restrictive of the protected person's personal freedom, but also consistent with the need for the guardian to exercise supervision.

The guardian shall carefully evaluate the alternatives that are available and choose the one that best meets the personal and financial goals, needs and preferences of the person under guardianship while placing the least restrictions on his or her freedom, rights and ability to control his or her environment.

NGA Standard 8 (I).

The guardian must respect the independence of the protected person as much as possible. The NGA Standards teach that the guardian must develop a balance between maximizing the independence and self-determination of the person and maintaining the person's dignity, protection, and safety.

The NGA Standards further teach that the guardian must provide the protected person under guardianship with every opportunity to exercise those individual rights that the person might be capable of exercising as they relate to the person's personal care and financial needs. The guardian should be limited in what the guardian does for the protected person by what the protected person can do for himself or herself. It is the guardian's job to encourage the protected person to

participate in all decisions that affect him or her and to allow the person to lead the planning process wherever possible.

FURTHER READING: PLEASE SEE NGA STANDARD 9, FOR FURTHER DISCUSSION ON SELF-DETERMINATION.

The guardian is also required to follow the protected person's preferences so long as they are not substantially harmful to the person—even if these preferences are not what the guardian would personally choose for himself or herself.

The Court order appointing the guardian will address the scope of the guardian's authority. The court may also have formally limited the authority of the guardian. For example, perhaps the guardian can only make medical decisions for the protected person because he or she does not understand his or her medical situation, but the protected person can make other decisions affecting his or her daily life, such as where to live. The guardian, however, has the final authority to make decisions for the protected person in those areas delegated to guardian by the Court. Ultimately all decisions by the guardian must be made with the objective of meeting the protected person's goals, needs, and preferences.

In addition to the guardian's duties and limitations on the actions of the guardian stated by these standards and rules, New Mexico law also states certain very specific limitations on the powers of a guardian.

It is critical that a guardian understand the following seven limitations:

a) Unless specifically allowed to do so by court order, a guardian may not revoke a power of attorney for health care or finances previously executed by the protected person.

b) A guardian may not initiate the commitment of the protected person to a mental health treatment facility except in accordance with New Mexico's procedure for involuntary civil commitment.

c) A guardian may not use the funds of the protected person to pay for room and board that the guardian or the guardian's spouse, parent or child has furnished to the protected person unless a charge for the service is approved by Court order. Notice of the proceeding to obtain such an order must be provided to the individuals whom the Court has identified must receive notice. When the Court appoints the guardian, the Court should also identify all those individuals who must receive notice of proceedings after the guardian is appointed. At the minimum, notice of a proceeding to approve payment to a guardian for room and board under this paragraph must be provided to at least one person who is a next of kin of the protected person, if such a notice is possible.

d) A person may not serve as guardian if that person operates or is an employee of a boarding home, residential care home, nursing home, group home or other similar facility in which the protected person lives. An employee of

such a facility, however, may serve as guardian if that employee is related to the protected person by blood or marriage.

e) A person may not serve as a guardian for more than two individuals not related by marriage, adoption, or third-degree of blood or affinity unless the guardian is certified and in good standing with a national or state organization recognized by the New Mexico Supreme Court as providing professional guardianship certification.

f) A guardian may not restrict the ability of the protected person to communicate, visit, or interact with others, including receiving visitors and making or receiving telephone calls, personal mail or electronic communications, including through social media or participating in social activities, unless (1) authorized by a court order; or (2) the guardian has good cause to believe restriction is necessary because interaction with a specified person poses a risk of significant physical, psychological or financial harm to the protected person. If the guardian believes that the protected person is at risk according to the definition in the previous paragraph, the guardian may only limit the protected person's contact with the other person for a period of time (a) not more than seven business days if the person has a family or preexisting social relationship with the protected person; or (b) for a period of not more than sixty days if the person does not have a family or preexisting social relationship with the protected person.

g) The protected person and any other person interested in the welfare of that person may petition the court for an order that the protected person is no longer incapacitated or that the guardian should be removed. Such a request may be by letter written to the Court that appointed the guardian. The guardian may not interfere with the transmission of such a letter to the Court.

I. LIABILITY OF THE GUARDIAN

The guardian is not liable to third persons for the wrongdoing of the protected person simply because he or she has been appointed as the guardian. That being said, situations may arise where the guardian may be liable to a third person for the acts of a protected person. How can this occur?

The question of whether a guardian may be liable to a third person based on the actions of a protected person will be answered on a case-by-case basis. Ultimately, a Court may find that a guardian has liability where he or she has been negligent in the administration of the guardianship and that negligence resulted in foreseeable harm to a third person. For example, assume a person is appointed a full guardian for a protected person and the guardian knows the person demonstrates behaviors which are harmful to others if unsupervised. If the guardian fails to take steps to arrange for the supervision of the protected person and that person then damages the property of a third person because he or she was unsupervised, the guardian could be legally responsible to pay the damages the third person suffered as a result.

Furthermore, if a full guardian places a protected person in the care of another person or entity whom the guardian knows does a poor job supervising the protected person and, as a result of that lack of supervision, the person then harms himself or another person, the guardian may be found liable for the damages that foreseeably result from his or her failure to arrange for proper supervision.

The Guardian must regularly monitor the guardianship and the suitability of services being provided to the protected person.

NGA Standard 13 (IV).

What is reasonable in any given case will vary, and the question of whether liability exists will be answered by studying the facts of any given case. If a guardian has specific concerns about liability risk due to the behavior propensities of a protected person, the guardian would be wise to speak to a qualified lawyer about how to properly manage this risk.

J. FEES FOR SERVING AS GUARDIAN AND CONFLICTS OF INTEREST

Unless the order appointing the guardian states otherwise, a guardian of a protected person may receive reasonable compensation for the services he or she provides to the protected person. The amount of compensation that is appropriate will vary and is based on a case-by-case analysis. The guardian's compensation is paid from the estate of the protected person.

While the amount of appropriate compensation will vary from case to case, what would normally be expected is that the guardian would maintain good records to demonstrate how the guardian has earned his or her fee. The notable exception to that rule would be if the Court approved compensation to the guardian in a fixed monthly amount with no obligation for the guardian to track his or her time. The guardian normally must keep an accurate accounting of time spent on matters relating to the protected person and expenses for which the guardian may seek reimbursement. All expense reimbursements must, in all cases, be supported by receipts or other proper documentation.

Time records must clearly and accurately state:

a) Date and time spent on a task;

b) The duty performed;

c) The amount of time spent on each function;

d) The expenses incurred;

e) Collateral contacts involved; and

f) Identification of the individual who performed the duty (i.e., family member, employee, staff).

When considering whether an amount of compensation is appropriate, the following factors may be considered:

a) Overall difficulty and complexity of the case;

b) The size and nature of the protected person's estate and the effect of guardian fees might impose on the protected person's financial ability to meet his or her foreseeable health, medical care, and maintenance needs;

c) The benefit to the protected person of the guardian's services;

d) The necessity for the services performed;

e) The protected person's anticipated future needs and income;

f) The time spent by the guardian in the performance of services;

g) Whether the services performed were routine or required more than ordinary skill or judgment;

h) Any unusual skill, expertise, or experience brought to the performance of services;

i) The guardian's estimate of the value of the services performed; and

j) The compensation customarily allowed by the court in the community where the court is located for the management of guardianships of similar complexity.

It is best practice that the question of the rate or methodology of the guardian's compensation should be addressed before the order is entered appointing the guardian.

If the guardian is also the conservator, the guardian (as conservator) will pay his or her guardian fees; otherwise, if a conservator has been appointed, that person will pay the guardian's fees. These fees the guardian receives are counted as his or her income for tax purposes.

K. REPORTING REQUIREMENTS AND RECORD KEEPING

A guardian must file an initial report with the appointing court within ninety days after the guardian's appointment. Thereafter, the guardian must file a report annually. The annual report must be filed every year, within thirty days of the anniversary date of the guardian's appointment. Note that the Court may require reports be filed more frequently. If so, that requirement will likely be found in a written Court order. Because the annual report is one of the primary tools available to the Court to monitor the guardianship, the timely filing of a complete and accurate report is critically important.

When reporting to the Court, it is mandatory that the Guardian use the form approved by the New Mexico Supreme Court. The following describes the type of information which will be provided on the form in general terms:

> **The report shall include information concerning the progress and condition of the incapacitated person, including the incapacitated person's health, medical and dental care, residence, education, employment and habitation; a report on the manner in which the guardian carried out the guardian's powers and fulfilled the guardian's duties; and the guardian's opinion regarding the**

continued need for guardianship. NMSA 1978 § 45-5-314 (A) (2021).

If an annual guardianship report cannot be filed on time, the guardian may request a sixty-day extension from the Court that appointed him or her. If this report is not filed timely, however, the guardian may be fined in the amount of $25.00 per day for every day the report is late. This fine would be paid by the guardian personally (from his or her own funds).

The guardian must give copies of each report to (a) the judge who appointed the guardian; (b) the judge who succeeded to the appointing judge if any; (c) the incapacitated person (even if he or she is unable to understand it); (d) the conservator, if one was appointed; and (e) any other person the Court determined should receive the report. For guardians appointed after July 1, 2018, the Court will have entered an order at or near the time the guardian is appointed which designates those other individuals who should also receive a copy of the annual report. The Court has the authority to allow other individuals access to these reports (a) if it is the protected person's best interest; or (b) in the public interest and does not endanger the welfare or financial interests of the protected person.

The guardianship annual report review division at the administrative office of the courts will review all guardianship reports upon their filing. The results of the review are delivered to the District Court Judge presiding over the guardianship case. The Court may request additional information from the guardian based on the review of the report.

If the report is provided to an incapacitated person who resides in a nursing home or other facility where other people have access to the person's property, the guardian should take due care to ensure that the report is available to the protected person but is also kept in a private location so that unauthorized individuals do not review the report.

If the Court has granted limited financial powers to the guardian, the guardian's report must contain information on financial decisions made by the guardian.

As to record keeping, the guardian must keep good records documenting his or her activities as guardian, the basis for the computation of the guardian's compensation and all financial decisions made for the protected person if the guardian was granted certain financial powers. New Mexico law specifically requires that the guardian maintain the records of the protected person's funds, investments, and property for at least seven years unless the time period is adjusted by the Court supervising the guardianship. While the controlling law does not state when the seven (7) year period begins to run, to be safe, all New Mexico guardians should assume that they have an obligation to keep the required records for a period of seven (7) years following the termination of the guardianship.

L. TIPS FOR GUARDIANS WHO LIVE OUTSIDE NEW MEXICO

A guardian can be appointed for the protected person even if he or she does not live in the same town, county, or state as the person. Recognizing that a guardian must (a) visit the protected person no less than monthly under the NGA Standards; (b) on an ongoing basis, assess the person's physical appearance and appropriateness of the person's current living situation; and (c) regularly examine all services, charts, notes and logs pertaining to the person, how does a non-local guardian satisfy the NGA standards?

It is best practice for the guardian to retain a professional care manager to oversee the care of the person, make routine visits with him or her, and communicate with the guardian for decision-making for the person. If resources will not permit this expenditure, the guardian finds himself or herself in a difficult situation. The lack of resources does not excuse the requirement that the guardian stay engaged in the life of the protected person as required by the NGA Standards. In these cases, the guardian must still ensure that the person receives the care and attention he or she needs. The guardian finding himself or herself in this situation may consider the following suggestions:

1) have a trusted person, such as a family member close to the person, visit the protected person regularly and report the results of those visits to the guardian as they occur;

2) regularly contact the place where the protected person lives and speak to him or her, ensuring that these discussions can occur in a private setting so the person can freely express concerns over his or her placement or other matters;

3) ensure the person has access to a telephone to call the guardian as needed;

4) regularly contact health care providers and caregivers for the person to check-in on the status of the person, the state of his or her health and care, and the suitability of his or her placement and necessary medical follow up;

5) write or e-mail frequently and arrange to have letters and cards read aloud if the person cannot see or read well;

6) visit the protected person in person on a regular basis which his or her resources will allow; and

7) consult a care manager or social worker if the guardian feels additional services are needed to adequately supervise the person and his or her living arrangements.

The guardian may consider whether the protected person should move to the guardian's community. Factors to consider when making this decision include the preferences of the protected person, the person's ability to travel, his or her needs, available resources to care for the person in the respective locations, the guardian's ability to properly oversee the person from a distance and the location of the person's friends and family and the person's ability to access those individuals. When considering the question of moving the person under guardianship, the guardian must recall the NGA Standards which require the guardian to:

1) see that the person is living in the most appropriate environment that addresses the person's, goals, needs and preferences;

2) promote social interactions and meaningful relationships for the person under guardianship;

3) consider the proximity of the setting to those people and activities that are important to the person when choosing a residential setting;

4) encourage and support the person in maintaining contact with family and friends;

5) not interfere with established relationships unless necessary to protect the person from substantial harm;

6) authorize moving a person to a more restrictive environment only after evaluating other medical and health care options and making an independent determination that the move is the least restrictive alternative at the time, fulfills the current needs of the person and serves the overall best interest of the person; and

7) at a minimum, the guardian shall report to a court before a move to a more restrictive residential setting, and the justification for the move.

FURTHER READING: PLEASE SEE NGA STANDARD 4, FOR FURTHER DISCUSSION ON THE GUARDIAN'S RELATIONSHIP WITH FAMILY MEMBERS AND FRIENDS OF THE PERSON.

If there is a plan to move the protected person at the time the guardianship is originally appointed, the Court visitor and guardian ad litem must be informed so that the evaluation of that plan may be made part of their reports to the Court.

As to the transfer of guardianships or conservatorships from or to New Mexico, the guardian should note that New Mexico adopted the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act which became effective on January 1, 2012. Many other states in the Country have also adopted that act and, as a result, there is some uniformity among the various states as to how guardianships and conservatorships may be transferred between them. The procedures to be followed will depend on whether the state receiving a New Mexico guardianship or conservatorship has adopted the act.

The Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act contains a detailed procedure for (a) transferring a guardianship or protective proceeding to another state; and (b) accepting a guardianship or protective proceeding into New Mexico from another state.

Generally speaking, if a New Mexico guardian or conservator wishes to transfer a guardianship or conservatorship to another state, the guardian or conservator must first file a petition seeking an order approving the transfer. That petition would be filed in the New Mexico guardianship or conservatorship case. The Court already presiding over the guardianship or conservatorship would then hold a hearing on the petition and may grant a provisional order approving the transfer. Upon the issuance of a provisional order allowing the transfer, the guardian or conservator must then file a petition in the state in which he or she wishes to transfer the proceeding. The purpose of that petition would be to ask the state in which the guardianship or conservatorship is to be transferred to issue an order accepting the transfer. Once that order is issued and the transfer accepted, the Court presiding over the guardianship and conservatorship in New Mexico may issue a final order approving the transfer.

M. REVIEWING A GUARDIANSHIP

Review of the guardianship occurs through the review of the annual reports which are filed in the case, as well as any additional hearings the Court may schedule. The court must review the guardianship at least every ten years. That review should occur at a status conference conducted by the District Court.

The guardian should note that a guardianship is an ongoing court appointment, until it is terminated. As a result, the court retains very broad discretion in reviewing any guardianship which may be pending before it, at any time. Specifically, the court retains very broad authority to review any report submitted by the guardian and to schedule a hearing at any time if the court has questions about the report or the guardianship generally. The court also has the authority to appoint a court investigator to assess the protected person's capacity and the continuing need for a guardian. It is prudent for the guardian to keep current on his or her reports and to keep good records of the guardianship in the event the court has questions and schedules a hearing to ask those questions of the guardian.

N. ENDING A GUARDIANSHIP

Ideally, every guardianship would end with the protected person regaining capacity; such an event does occur in some instances. By way of example, in cases where a person's medical or cognitive condition substantially improves, mental health is stabilized, or addiction effectively managed, it may be appropriate to lessen the amount of the decision-making authority granted to the guardian. Lessening the amount of decision-making power granted to the guardian and increasing the amount of decision-making power held by the protected persons furthers the goal of providing the protected person as much autonomy and dignity as possible.

Accordingly, it is the duty of the guardian to promptly inform the court of any change in the capacity of the protected person which would warrant a reduction in the amount of the guardian's authority. While the guardian has a duty to so inform the court under NGA Standard 2 (VIII), the protected person or any person interested in the protected person's welfare may petition the court for an order seeking to review the need or scope of the guardianship. New Mexico law does not require a formal petition to initiate this kind of review by the Court and, as such, a letter would be sufficient. A person may be found in contempt of court if he or she interferes with the delivery of such a petition or letter to the court.

Similarly, if the guardian requires more authority—whether due to the worsening condition of the protected person or other factors—in order to perform his or her duties effectively, the guardian has a duty to inform the court.

When increasing a guardian's authority or terminating a guardianship, New Mexico law requires the Court to follow the same procedures to safeguard the protected person's rights which are to be used when a guardian is first appointed. New Mexico law, however, grants the Court some discretion in deciding what procedures must be used when deciding to lessen the guardian's authority or terminate the guardianship.

That being said, a guardian cannot simply quit the position. A Judge must replace the guardian or determine a guardian is no longer needed due to the protected person regaining capacity or due to the death of the protected person. If a guardian decides that he or she is no longer able to handle the responsibility of being a guardian, the guardian must inform the Court of his or her intent to resign and request the court to appoint a new guardian. In addition, the Court may remove the guardian due to the guardian's own inactivity or for other reasons. If the Court rules that the protected person has regained capacity, or if the protected person dies, the guardian will be released as guardian. To end the guardianship or change the guardian, the guardian, protected person or other interested person must petition the Court. Unless the protected person has died or the court allows a change without a hearing, there will be a Court hearing on the matter that must follow the procedures set out in New Mexico law. The Judge would be expected to sign an order which terminates the guardian's appointment.

If the guardianship ends because of the protected person's death, the guardian must notify the court and provide a copy of the death certificate to the Judge. The presiding Judge may want the guardian to file a petition to dismiss the guardianship and submit a corresponding order. If so, an attorney can be asked to do this. A final guardianship report must be filed at the same time that reports the applicable information.

Chapter 6.

Powers and Duties of Conservator

A. WHAT IS A CONSERVATOR?[15]

In New Mexico, a conservator is a person or entity appointed by a New Mexico District Court to manage the property or finances of a person the Court finds to be:

1) partially or wholly "incapacitated;" or

2) confined or detained by a "foreign power;" or

3) disappeared.

In these cases, a conservatorship may be proper if the person is without available alternative resources to provide financial management. As discussed earlier in this Handbook, powers of attorney for financial matters, representative payee arrangements, and trust agreements are three of several alternatives that could render a conservatorship unnecessary. The suitability of such alternatives must be seriously considered, and ruled out as good options, before a conservatorship proceeding is filed.

In New Mexico, while the law would allow for conservatorship proceedings to be filed for those who are missing or detained, the most common reason for the appointment of a conservator is because a person is "incapacitated." That term has special meaning in the law. A person is "incapacitated" when, as demonstrated by recent behavior, he or she demonstrates gross mismanagement of his or her income or resources. This gross mismanagement must (a) be due to mental illness, "mental deficiency," physical illness or disability, chronic substance abuse, or other cause; and (b) have led, or likely to lead in the near future, to the person's financial vulnerability. In these cases, a Court may appoint a conservator if the person has assets or property that may be wasted unless a conservator is appointed.

Just as a guardian is appointed to make decisions for a protected person's personal care, a conservator is appointed to make decisions for a protected person's financial affairs. A conservator may be a family member, friend, bank, or other company that is in the business of providing such services.

Also as is the case with guardianship, accepting an appointment as a conservator for another person is to accept a very serious legal obligation. These obligations are defined by New Mexico law. Those rules and law can be found in:

1) Article 5 of the Uniform Probate Code as adopted in New Mexico;

2) Court Rules found in Article 14 of the New Mexico State Court Rules;

3) Official forms found in the New Mexico State Court Rules, Civil Forms; and

4) The judicial decisions of New Mexico's Appellate Courts.

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[15] New Mexico uses the term "conservator" for a court appointed person or entity that is responsible for the protected person's financial affairs but other states and organization, including NGA, may use the term "guardian of the estate".

In the context of conservatorships, the NGA Standards provide a series of rules which do not have the force of law in New Mexico, but which may be considered best practices for administering a conservatorship. The NGA Standards, however, will have the force of law with respect to professional guardians managing guardianships as to certain subject areas.

References in the financial sections of the NGA standards which refer to "guardians" should be read to apply to conservators.

FURTHER READING: PLEASE SEE NMSA 1978 § 45-5-312 (F) (2021) FOR A LIST OF THE SUBJECTS IN THE NGA STANDARDS PROFESSIONAL GUARDIANS ARE REQUIRED TO OBSERVE.

The NGA Standards reflect the best thinking among practitioners across the United States to make guardianship a person-centric practice. In addition, the NGA has developed a short list of ten ethical principles which are summarized on a single page, and which can serve as a good decision-making guide for conservators. The NGA ethical principles are repeated in their entirety on page 3 of this Handbook.

If a conservator has a question about a course of action he or she should take, consulting the NGA Standards and NGA ethical principles is often a good place to start in trying to determine the answer. This section of the Handbook will attempt to summarize those standards and apply them to conservatorships. New Mexico law, however, will always control the conduct of the guardian and the conservator. If a guardian has a specific question, the guardian should consider hiring a qualified attorney to obtain legal advice.

There are many reasons why a conservator might be needed. For example, because of a disability, substance abuse, or a debilitating illness, the protected person may be unable to monitor his or her finances or monthly income or may be unable to manage paying debts or monthly expenses such as rent or utilities. He or she may also be vulnerable to exploitation by unscrupulous persons by virtue of a condition the law recognizes as a "functional impairment" and a recent series of financial transactions that place the individual at risk. If such a person does not have a workable alterative to provide financial management, the Court may appoint a conservator to manage the person's assets and income so that these resources are available in the future for his or her benefit.

B. OVERRIDING CONSIDERATIONS

As discussed earlier in this Handbook regarding guardianship, the imposition of a guardianship and conservatorship involves the deprivation of the protected person's civil liberties, namely the ability to make decisions about his or her financial affairs. As a result, many of the overriding principles which pertain to guardianships also apply to conservatorships:

1) A conservatorship is to be used only to the extent necessitated by the protected person's mental and adaptive limitations. A conservatorship may only be ordered when there are no alternative resources available to enable the effective management of the protected person's financial affairs;

2) A conservatorship order should be tailored so that it is the least restrictive form of intervention necessary (1) to provide financial management for the protected person but yet also (2) afford to him or her the maximum level of decision-making possible without endangering that person's financial management;

3) A conservatorship must be designed to encourage the maximum self-reliance and independence of the protected person;

4) A conservator must exercise his or her powers as a conservator in a manner that is the least restrictive necessary to fulfill the duties assigned to the conservator by the Court; and

5) A person for whom a conservator has been appointed retains all legal and civil rights except those which have been expressly limited by court order or granted to the conservator by the court.

In addition to the above factors which also apply to guardianships, there are additional overriding considerations that are particular to conservatorships.

First, if there is a need to provide financial management for a single purpose, such as creating a trust or managing personal injury proceeds, New Mexico law allows for a targeted "protective arrangement" instead of a full conservatorship. This kind of arrangement may also be used to stop exploitation of the protected person. If the Court finds that (1) a person has used fraud, coercion, duress or deception or control to cause the person financial harm and (2) that this person presents a risk of substantial financial harm to the protected person or his or her property, the Court may enter a targeted protective order to stop that exploitation.

Second, after a conservator is appointed, the Court has exclusive power to determine how the assets of the protected person may be managed. Accordingly, the Court has broad authority over the financial affairs of the protected person. This authority can be exercised by the Court directly or through the conservator. The exercise of some of these powers, such as making exceptional gifts, requires a separate hearing.

Third, a determination that a person is "incapacitated" and in need of a conservator does not mean that the person lacks capacity to perform other tasks, especially the ability to execute a will. A person retains the ability to make a will even though a conservator has been appointed for him or her. However, when a court determines whether that person has sufficient mental ability to understand what it means to make a will, it does so using a different legal standard. As a result, a person may have a need for a conservator but still also may be able to make a valid will.

While all these considerations are important, there are even more core principles at play when a conservator administers a conservatorship. Under New Mexico law, a conservator acts as a fiduciary. A fiduciary relationship requires the agent to act on behalf of another person and in that person's best interests. In doing so, the agent must always put the person's interests ahead of the agent's own interests. Specifically, this means that (a) the conservator must put the protected person's interests ahead of his or her own when he or she is making decisions for the protected person and (b) the conservator must make decisions in the best interest of the protected person.

When it comes to the administration of a conservatorship, the following seven fundamental rules exist:

1. DUTY TO ADMINISTER. Once appointed, the duties of conservatorship are accepted and the letters of conservatorship are issued, the conservator has an affirmative duty to administer the conservatorship for the benefit of the protected person and "his dependents." This duty requires the conservator to take control of the assets put under his or her charge pursuant to Court order. This duty requires the conservator to then actively manage the financial affairs of the protected person as provided for in the order which appointed the conservator until such time that the conservatorship is terminated. The conservator must exercise his or her supervisory powers over the person's financial affairs in manner that is the least restrictive form of intervention consistent with the order that appointed the conservator. The conservator must develop a financial plan and budget for the person which corresponds with his or her care plan and which aims to address the goals, needs and preferences of the person under conservatorship. The conservator must identify these goals, needs and preferences at the beginning of the conservatorship and reevaluate regularly.

2. DUTY OF LOYALTY. The conservator has an absolute duty of loyalty to the protected person and may not use the protected person's property to benefit the conservator. He or she must administer the conservatorship in good faith, solely in the interest of the protected person. Therefore, the conservator may make distributions only for the protected person and the protected person's dependents. The conservator has a duty to avoid conflicts of interest while serving as conservator and must avoid self-dealing. Self-dealing includes without limitation:

a. commingling the protected person's money with the conservator's money;

b. gifting, conveying or transferring any interest in the protected person's property to the conservator, the conservator's spouse, the conservator's employees or to any entity in which the conservator has an interest;

c. borrowing money from the protected person or using the protected person's property as collateral for a loan to the conservator individually; or

d. the conservator profiting from any transaction made on behalf of the protected person.

Self-dealing arises when the conservator seeks to take advantage of his or her position as conservator and act for his own interest rather than for the interest of the protected person.

NGA Standard 20 (I).

New Mexico law empowers the Court to invalidate any sale or encumbrance of conservatorship property to the conservator, spouse, agent, or any corporation or trust in which the conservator has a substantial interest. New Mexico law also empowers the Court to invalidate any transaction that is affected by a substantial conflict of interest.

3. DUTY OF PRUDENCE. The conservator has a duty to administer the conservatorship as a prudent person. The conservator must use reasonable care, skill, and caution when administering the conservatorship.

4. DUTY TO PAY ONLY REASONABLE COSTS. The conservator may only incur costs that are reasonable and necessary for the protected person. What is reasonable will vary from case to case.

5. DUTY TO USE SPECIAL SKILLS. If a person possesses special skills and is appointed to serve as conservator in part due to those skills, that person is required to use those skills in managing the conservatorship.

6. DUTY TO TAKE CARE IN EMPLOYING AGENTS. If a conservator decides to employ persons to carry out a function of the conservatorship, the conservator is charged with the duty of ensuring that the function is one which can be delegated. Accountants, investment advisors, and real estate brokers are examples of the types of professionals a conservator may employ to perform certain functions of the conservatorship.

The conservator must exercise reasonable care, skill and caution to ensure that (a) the agent is qualified to perform the function; (b) the scope of the agent's work is properly defined; and (c) the agent's work is reviewed at proper intervals.

Not every function can be delegated, however; the conservator remains accountable to the Court for all decisions made for the protected person. For example, the conservator has the duty to report to the Court as required by law. While the conservator may elicit help from professionals to prepare his or her annual report, the conservator is absolutely accountable to ensure it is timely filed and accurate and complete.

7. RECORD KEEPING AND REPORTING. The conservator has an absolute obligation to keep records of his or her administration to document how the

protected person's assets have been managed under his care. The conservator must understand that his or her actions are open to scrutiny at all times. The conservator has an absolute obligation to provide thorough reports to the Court demonstrating how he or she managed the protected person's assets.

Core Duties of the Conservator

- ✓ Duty of loyalty
- ✓ Duty to administer
- ✓ Duty of prudence
- ✓ Duty to keep expenses at a reasonable level
- ✓ Duty to keep good records
- ✓ Duty to report
- ✓ Duty to use special skills
- ✓ Duty to take care in employing agents

C. POWERS AND DUTIES OF A CONSERVATOR

When the Court appoints a conservator for a protected person, it states the powers and duties of the conservator in its written order. The powers and duties stated in the Court's order are further explained by the New Mexico Uniform Probate Code and the cases that have applied it over the years. In order to understand the extent of authority granted to a conservator by the Court, it is imperative that the conservator obtain and read the Court's order.

For example, the judge who appointed the conservator may limit the conservator's powers. These limitations would be stated in the order appointing the conservator if the Court found that the protected person should retain the power to make some financial decisions. A protected person may lack the ability to make decisions regarding his or her investments but still be able to pay household expenses. In such a case, the judge could grant the conservator the power to make investment decisions but also allow the protected person to retain the power to make decisions over his or her household budget.

In other cases, the Court may appoint a "full" conservator. An order appointing a "full" conservator would rarely, if ever, explain all the powers and duties of a conservator. The extent of those powers is stated in the New Mexico Uniform Probate Code.

FURTHER READING: NMSA 1978 § 45-5-424 CONTAINS A NON-EXCLUSIVE LIST OF POWERS GRANTED TO A CONSERVATOR.

Unless the order appointing the conservator states otherwise, the duties of a conservator include:

1) Identifying the needs, goals and preferences of the person as they apply to his or her financial matters;

2) Locating, taking control of, and managing the protected person's benefits, income, and property which includes all of his or her financial assets;

3) Managing the protected person's financial affairs in an account separate from the conservator's own account and that of other protected persons for whom the conservator is providing financial management;

4) Safeguarding the protected person's property which includes ensuring that sufficient insurance is in place for that property;

5) Ensuring the protected person's appropriate bills are paid;

6) Ensuring the protected person's investments are prudently managed;

7) Timely preparing all State and Federal income tax returns for the protected person; and

8) Timely reporting to the Court which appointed him or her as conservator.

To some, these requirements may appear unnecessary and burdensome, especially when the protected person is a close relative or friend whom the conservator has been helping for a long time. A conservatorship appointment, however, is a court-appointment that carries with it legal responsibilities—some of which are inflexible—which apply to all conservators.

For example, the conservator may have helped the protected person in the past by using a power of attorney from the protected person. Although some of the duties as conservator will be similar to those under the power of attorney, there are important differences. The power of attorney grants the agent the power to do things—such as pay bills—for the person (called the principal) who gave the power of attorney. The power of attorney, however, does not take away the power of the principal to do such things for himself or herself or tell how he or she wants such things done. Unlike a power of attorney, a conservatorship takes away a protected person's power over his or her finances and gives it to the conservator. As a result, the conservator is the person responsible for making sure financial decisions are proper. Although the conservator should consult with the protected person regarding financial decisions when possible and should follow the protected person's preferences if feasible and not harmful, the conservator must use his or her own judgment in deciding what to do.

With a power of attorney, an agent may simply resign if he or she wishes to cease serving the principal in that role. That is not the case in a conservatorship. The conservator's responsibility will end only when:

1) the Judge approves the conservator's resignation;

2) the Judge removes the conservator;

3) the conservatorship terminates; or

4) the protected person dies.

In performing duties as conservator, it is important to always keep in mind that the protected person is a human being with dignity and feelings. Even if the Judge has given the conservator total control over the protected person's finances, the conservator must manage the financial affairs of the protected person in a way that maximizes the dignity, autonomy, and self-determination of the person.

FURTHER READING: NGA STANDARD 17.

The NGA standards state:

When making financial decisions for the protected person, the conservator must:

A. Give priority to the goals, needs and preferences of the person, and

B. Weigh the costs and benefits to the protected person's finances. NGA Standard 17 (II).

Recall that the NGA Standards require a person-centered approach to decision-making. As to conservatorships, the NGA standards require the conservator to "assist and encourage" the protected person to act on his or her own behalf and to elicit his or her participation in all financial decisions. If a conservator has been appointed as a full conservator over a protected person, the NGA standards also state that the conservator has a duty to act only as required "by the limitations of the person."

Affording the protected person control over some aspects of his or her assets undoubtedly requires the conservator to find a delicate balance. This is especially so, considering that the conservator is the one ultimately responsible to the Court for the manner in which the person's assets are managed.

How is this balance found? It is the duty of the conservator to become educated about the nature of the incapacity and functional limitations of the protected person. For example, one way in which this standard has been frequently implemented by conservators is to allow protected persons reasonable allowances to manage. The amount of that allowance would be consistent with the person's functional limitations and the Court order. When doing so, the conservator must still exercise reasonable efforts to provide oversight of that allowance, and he or she must still account for the payment of the allowance in the annual conservator report. In other situations, when the conservator has been granted a full conservatorship and the conservator has allowed the protected person the ability to continue managing other income or property, the conservator has a duty to exercise reasonable efforts to oversee how the property in that scenario is being managed.

While it is true that the conservator ultimately remains accountable to the Court for the manner in which he or she has managed a protected person's assets, the conservator should try to involve the protected person as much as possible in the decision-making process as it pertains to the amount of the allowance.

How does the conservator make financial decisions for the protected person? Certainly, past practices of the protected person provide some guidance. The NGA Standards also provide guidance as to the factors a conservator should take into account when making financial decisions:

> **The [conservator] shall consider the current wishes, past practices and reliable evidence of likely choices [by the protected person]. If substantial harm would result [from following those wishes, practices or likely choices] or there is no reliable evidence of likely choices, the conservator shall consider the best interests of the person.** NGA Standard 17 (III).

Furthermore, New Mexico law states that a conservator may make distributions as conservator for the benefit of the protected person and "for the support of those legally dependent on the protected person and others who are unable to support themselves and who are in need of support." When making these decisions, the conservator shall give "due regard" to the following factors:

a) The size of the estate;

b) The probable duration of the conservatorship;

c) The likelihood that the protected person may regain capacity;

d) The accustomed standard of living of the protected person and household members;

e) Other sources of funds used for the support of the protected person.

FURTHER READING: NMSA 1978 § 45-5-425.

D. TEMPORARY CONSERVATORS

Similar to cases involving emergencies in healthcare decision-making, there can be times when emergency intervention is needed to address the finances of a person in need of protection. If the Court concludes that serious, immediate, and irreparable harm may occur to the estate and financial interests of the person to be protected if a temporary conservator is not immediately appointed, the Court may make that appointment.

A petitioner may seek the appointment of a temporary conservator by a separate motion. The Court will appoint a guardian ad litem and schedule a hearing within ten (10) business days of the motion. The guardian ad litem shall file his or her report with the Court no later than two (2) days before the hearing on the motion. That report shall indicate that the guardian ad litem met with

the person, present the person's declared position to the Court, and identify any alternatives to the proposed conservatorship.

A temporary conservatorship may be entered if the Court concludes that serious, immediate, and irreparable harm would result to the alleged incapacitated person's estate and financial interests before a hearing on the conservatorship petition can occur.

If the evidence is clear based on sworn testimony or affidavits that immediate and irreparable harm to the person's estate and financial interests will occur before a ten-day hearing on the petition to appoint a temporary conservator can be held, the Court may enter the temporary conservatorship order without notice to the alleged incapacitated person or the person's attorney. If the Court enters a temporary conservatorship order without notice to the person and the person's attorney, the Court shall hold a hearing no later than ten (10) business days from the date the temporary conservatorship motion was filed to determine whether the temporary conservatorship should continue and, if so, to address the continued authority of the temporary conservator. Within twenty-four hours of the issuance of the temporary conservatorship order, the petitioner shall have the person and the person's attorney served with copies of the (a) petition; (b) notice of hearing; (c) notice of rights at the hearing; (d) motion for appointment of a temporary conservator; and (e) temporary conservatorship order.

The alleged incapacitated person, the person's counsel, or any interested person may file a motion to dissolve or modify the Court's temporary order.

A temporary conservatorship appointment has a duration not exceeding thirty (30) days. Upon a hearing in which there is a showing of good cause, the temporary conservatorship may be extended another sixty (60) days.

A temporary conservator must file a written report with the Court within fifteen (15) days of appointment by completing the conservator's report as required by the Court-approved form. The temporary conservator must file a final written report using the Court-approved form within fifteen (15) days of termination of the temporary conservatorship or as the Court may otherwise require.

As is the case with temporary guardians, there are important limitations on the authority of the temporary conservator. The temporary conservator may not sell or dispose of any property belonging to the alleged incapacitated person or make changes to the housing or placement of the alleged incapacitated person without specific authorization from the Court.

In the case of both temporary guardianship and temporary conservatorship, the protected person may appear and seek the dissolution of the order making the temporary appointment, and the hearing on that request may occur upon short notice to the person who originally obtained the appointment. The request for dissolution of the temporary order shall be heard at the ten-day hearing or ten (10) business days from the filing of the motion to dissolve the temporary order, whichever first occurs.

E. THE RELATIONSHIP BETWEEN THE GUARDIAN AND THE CONSERVATOR

If the protected person has a guardian which is a person or entity other than the conservator, the conservator must communicate with the guardian and work closely to meet the protected person's needs. The guardian is responsible for making personal decisions for the protected person, including decisions concerning health care, other help that the protected person is to receive, and deciding where the protected person is to live. These decisions should be made in collaboration with the protected person.

The conservator's role is to manage the protected person's finances (a) to promote the goals, needs and preferences of the protected person; and (b) to work with the guardian so that his or her decisions can best be implemented and, if resources do not allow, to work with the guardian to develop the most suitable budget given the income and assets available. Under New Mexico law, a guardian is entitled to receive payment from the conservator "for services and for room and board furnished to the protected person." The guardian is empowered to request that the conservator make payments from the conservatorship estate to third persons for the benefit of the protected person.

FURTHER READING: NMSA 1978 § 45-5-312 (2021) (STATING THE GENERAL POWERS AND DUTIES OF THE GUARDIAN AND LIMITED GUARDIAN).

The conservator should consider the recommendations of the guardian concerning the needs and appropriate care of the protected person. In most cases, the conservator would be expected to follow these recommendations without violating his or her duties. If the recommendations of the guardian appear unreasonable to the conservator, however, the conservator should conduct a more thorough review of the circumstances leading to the recommendation. The conservator should not fund any recommendations that will result in financial benefit to the guardian other than payment of reasonable fees and reimbursements for serving as guardian. The conservator should consider petitioning the court for instructions as to how to handle uncertainties about whether to fund a particular recommendation by the guardian.

Under New Mexico law, it is not unreasonable for a conservator to rely upon the recommendations of the guardian unless (a) the conservator knows that the guardian is deriving personal financial benefit from the sums paid, including relief from a duty to support the protected person; or (b) the recommendations are clearly not in the best interests of the protected person.

There is no doubt that certain decisions must involve the guardian and the conservator and require they coordinate with each other. An excellent example as to when collaboration is required is selecting the protected person's living arrangements. Often, this is the largest recurring expense. If the conservator disagrees with the decisions of the guardian as to budget requirements and the disagreement cannot be otherwise resolved, however, the conservator should consider bringing the disagreement to the attention of the Court. In such a case, the Court would be expected to resolve the issue or might otherwise change the guardian or conservator or both.

F. THE RELATIONSHIP BETWEEN THE CONSERVATOR AND THE TRUSTEE OF A TRUST

It is not uncommon that a conservator is appointed for a protected person who also has an interest in a trust. What is the relationship between the conservator and the trustee?

The answer to that question begins with a review of the document creating the trust. While the agreement which creates a trust may be written or verbal, more often than not, the conservator can be expected to encounter trust agreements that are in written form. Therefore, the first step in understanding the relationship between the conservator and the trustee is to understand the trust agreement. Additionally, the conservator should review the order which appointed him or her in that position. Such orders will occasionally identify the conservator's function with respect to the trust at issue.

If neither the trust agreement nor any court order describes the rights of the conservator regarding the trust, New Mexico law regarding trusts and conservatorships will govern. Generally speaking, that law provides the trustee will have the duty to administer the assets in the trust, while the conservator retains the duty to manage those assets of the protected person not held in trust.

Generally, if a person serves as conservator for a protected person who is a beneficiary under a trust, the conservator must understand the entitlements the protected person has to that trust. Knowing that the trustee has a fiduciary duty to manage the trust for the beneficiary, the conservator's duty is to ensure that the protected person is receiving the trust benefits to which he or she is entitled.

In most cases, the trustee can be expected to have a duty not only to administer the trust for the benefit of the protected person, but also to keep good records and to report to the beneficiary as to the trust management. If a conservator has been appointed for a beneficiary, it is the conservator's function to review those reports and satisfy him or herself that the trust has been managed as the trust agreement requires. Those reports should contain enough information for the conservator to protect the beneficiary's interests in the trust.

Trust agreements can not only require distribution of certain amounts of money but can also grant the trustee discretion to make distribution for the benefit of a beneficiary. In a trust designed to preserve a beneficiary's entitlement to receive needs based governmental assistance, the trustee may have broad discretion to determine whether to make a distribution. Even though the discretion granted to the trustee may be broad—such as in the above types of trusts—the trustee still has an affirmative duty to administer the trust in good faith, in keeping with the purpose of the trust.

Reviewing the trust agreement and trust reports is a good starting point to determine whether the beneficiary is receiving trust benefits as he or she should. If a protected person is in need of resources to pay for certain aspects of his or her support, it is normally the responsibility of the conservator to ensure that the trustee is making distributions for the beneficiary's support as the trust provides. In some cases, there can be federal and state tax consequences with the distribution of income from a trust. A conservator who receives such distributions may at the end of the tax year receive a Form K-1 from the trustee. This is a reporting form required by the Internal Revenue Service. The conservator should consult with a qualified accountant to determine whether there are tax consequences associated with any trust distributions the conservator receives.

The conservator and the trustee should work together to ensure that the trust is making distributions for the protected person as the trust agreement requires. To do so, the trustee and the conservator should communicate with each other, and it is important that the trustee understand the needs of the protected person. However, if a conservator believes that:

a) a trustee is not providing information on the trust;

b) a trustee has committed wrong-doing with respect to the trust; or

c) a trustee has not made sufficient distributions from the trust

the conservator should consider bringing the issue to the attention of the Court which appointed the conservator.

The trust agreement may spell out the rights of the conservator. Some trusts allow a conservator to change the trustee of the trust if there is a good reason to do so. Therefore, in these trusts, one way to rectify the problem of a non-cooperative trustee is to remove him or her from that position if the trust agreement permits such a removal.

Trust agreements can state other powers that directly relate to a conservator's function. For example, many trust documents provide that the grantor retains the power to change, amend, or revoke the Trust. Such trusts often provide, however, that these powers can be exercised only by the protected person and not by a guardian or conservator.

G. RELATIONSHIP BETWEEN THE CONSERVATOR AND AN AGENT UNDER A FINANCIAL POWER OF ATTORNEY.

Powers of attorney typically have unique significance in guardianships and conservatorships. This is because a properly prepared and executed power of attorney reflects the decision-making of the protected person when he or she had capacity. There is a strong tendency in the law to respect these decisions. Of particular importance is the selection of the person to manage the protected person's finances when the protected person becomes unable to do so. As a result, New Mexico law recognizes powers of attorney as alternatives to guardianship and conservatorship unless the arrangement is unsuitable to provide for the protected person's welfare, safety, and rehabilitation.

Powers of attorney will sometimes nominate a person to serve as conservator. In that case, the Court is required to appoint the conservator the protected person nominated in the power of attorney unless that person is disqualified from serving or other good cause exists to disregard the nomination.

In the context of guardianship, therefore, the decisions of an agent under either a power of attorney for finances or a power of attorney for health care "take precedence" over those of a guardian, and the guardian is required to cooperate with the agent to the extent feasible.[16]

New Mexico's Uniform Health Care Decisions Act affirms this rule. That act expressly states that a health care decision made by an agent appointed by a person having capacity takes precedence

[16] The NGA Standards also require the guardian to make a good faith effort to cooperate with agents named under a protected person's power of attorney.

over that of a guardian unless the Court directs otherwise after notice to the agent and the protected person. The guardian is prohibited under New Mexico law from revoking a power of attorney for finances or health care.

FURTHER READING: NEW MEXICO'S UNIFORM HEALTH CARE DECISIONS ACT IS FOUND AT NMSA 1978 §24-7A-1.

Similar policies are at play in the context of conservatorship. The entry of a conservatorship order by itself does not revoke a power of attorney. Unless a Court limits, suspends, or terminates a power of attorney, the power of attorney remains valid. In this case, the agent under the power of attorney remains accountable to the conservator, as well as to the protected person. It is the conservator's duty to oversee the actions of the agent in this situation.

If the conservator develops concerns over the conduct of an agent under a power of attorney which the conservator is unable to resolve, the conservator should consider bringing those concerns to the attention of the Court which appointed him or her. The Court retains ongoing jurisdiction over a protective proceeding and is able to address such concerns and provide instructions to the conservator.

H. RELATIONSHIP BETWEEN THE CONSERVATOR AND THE PROTECTED PERSON'S SPOUSE

If the conservator is not the spouse of the protected person and the protected person has a spouse who is living and not incapacitated, the conservator and the spouse will share the responsibility of managing jointly owned or community property assets. [17] In addition, if the spouse is involved in personal care decision-making for the protected person, the conservator will need to work closely with the spouse in the same way that the guardian must work closely with the conservator for the benefit of the protected person.

If the conservator believes, in managing jointly owned or community property assets, that the actions of the spouse do not serve the best interests of the protected person, the conservator should work with the spouse to resolve the management problem on a timely basis. Obviously, the facts and circumstances of each case will drive how the conservator will react in this situation. If the discussions with the spouse fail or if the conservator believes that the problems are so serious and time sensitive that engaging in such discussions will not serve the best interest of the protected person, the conservator may need to seek Court intervention. The conservator may seek instructions from the Court that appointed him or her. In addition, the conservator can petition the Court to separate the property of the protected person and the spouse. This proceeding results in a

[17] Community property means property acquired by either or both spouses during marriage which is not separate property. Separate property includes property acquired by either spouse before marriage or after divorce; property named as separate property in a legal separation or other court order; property received by gift or inheritance; and property named as separate in a written agreement between the spouses. New Mexico law considers community property to belong equally to both spouses, no matter which spouse earned or obtained the property.

legal separation or court-ordered division of property. If, for example, the spouse is unwilling to use community property assets to pay for the protected person's care or the spouse has transferred significant amounts of community property into his or her own name without a legal basis for doing so, such a petition may be proper. After the assets of the spouses are divided between them, the conservator would be solely responsible for the management of the assets allocated to the protected person in the proceeding.

If the protected person is receiving care in a nursing home and has a spouse who is not also living in a nursing home, it is important that the conservator seek information about Medicaid's rules concerning the protection of assets for the at-home spouse. If assets can be protected for the at-home spouse without adversely affecting the protected person, the conservator should cooperate with the at-home spouse in securing the protection of those assets. If protecting these assets entails a gift or transfer of property from the protected person to the surviving spouse, however, prior Court approval is necessary. The Medicaid rules change frequently, and an attorney knowledgeable in Medicaid planning should be consulted to ensure that the right action is taken on behalf of the protected person. The fees for this type of consultation are legitimately paid from the protected person's estate.

I. ACTIONS AFTER BECOMING CONSERVATOR

1. Letters of Conservatorship

After the Court enters its order appointing a conservator for the protected person, the conservator must sign an acceptance of that appointment and file the signed acceptance in the records of the protective proceeding. By signing and filing the acceptance, the conservator submits himself or herself to the jurisdiction of the Court in any proceeding related to the protected person that may be instituted by the Court or any interested person.

NGA Standard VII

The conservator shall act in a manner above reproach, and his or her actions will be open to scrutiny at all times.

After the acceptance is filed, and usually at the same time that document is filed, the Court Clerk will issue "Letters of Conservatorship" to the conservator as evidence of the fact that the conservator has been appointed by the Court and has been granted authority to manage the financial affairs of the protected person. These "Letters of Conservatorship" are not a Court order and are simply proof that a conservator has been appointed. As a result, the language of the order appointing the Conservator prevails over the language contained in the Letters of Conservatorship. If drafted properly, however, the Letters of Conservatorship will precisely track the language of the order appointing the conservator as to the scope of the conservatorship granted. In other words, if the Court has appointed only a limited conservator in its order, the Letters of Conservatorship should accurately state the limitations which the Court has placed upon the scope of the conservatorship. Similarly, if the order is for a full conservatorship, the Letters of Conservatorship

should state as much. In addition, the Letters of Conservatorship must state the name, address, and telephone number of the conservator and the protected person.

As discussed in other portions of this Handbook, to assume the duties of conservator is to assume a serious legal obligation to act for the benefit a vulnerable person. It follows that a conservator's authority continues until: (a) the death of the protected person; (b) the entry of an order terminating the conservatorship; (c) the entry of an order approving the resignation of the conservator; or (d) the entry of an order removing the conservator. Once appointed, the conservator remains the conservator for the protected person unless one of these four events occurs and, accordingly, remains accountable to the Court for all actions taken (or not taken) as conservator. If the duties of the conservatorship appointment become too difficult for the conservator to manage, for whatever reason, that conservator cannot simply quit and walk away from the appointment. He or she must have the permission of the Court to resign. Therefore, unless one of these four events occurs, the conservator continues to have the responsibility and duties of a conservator, and legal proof of that authority is found in the Letters of Conservatorship.

Certified Letters of Conservatorship

The Court Clerk may issue "certified" or uncertified Letters of Conservatorship. Certified Letters of Conservatorship contain an original certification by the Clerk that the document is genuine. Typically, at the beginning of the conservatorship, the Court Clerk will provide a certified Letters of Conservatorship without charge. For a nominal fee, the Conservator may request additional certified Letters of Conservatorship from the Clerk as they may be later needed.

The document "Letters of Conservatorship" is a Court-issued document which the conservator should present to those financial institutions where the protected person holds an account. Banks, credit unions, investment companies, and credit card companies are just a few examples of the many types of financial institutions which should receive the conservator's letters.

Before having the ability to conduct business on the protected person's accounts, the conservator must present Letters of Conservatorship to financial institutions where the protected person's assets are located. Many institutions will require certified Letters of Conservatorships. After reviewing the certified letters, institutions will usually simply make a photocopy of the document for their own files and return the original to the conservator. Others will retain the original. Ideally, at the beginning of the conservatorship, the Conservator would have a general idea as to how many certified letters to request from the Court Clerk. Finally, it is important to note that some institutions will require Letters of Conservatorship that were recently issued. What "recently issued" means will depend upon the policies of each individual institution, but the conservator should not be surprised if an institution refuses to accept Letters of Conservatorship more than

ninety days old. In that case, the conservator will need to contact the Court Clerk to have the letters recertified.

Certified Letters of Conservatorship should also be recorded in the records of the County Clerk of each county in which the protected person owns an interest in real property, including mineral interests. For example, if a protected person owns a residence in Santa Fe County but also owns oil and gas royalty rights in San Juan County, the conservator should record Letters of Conservatorship in both counties. The conservator should also be sure that the county assessor of each county in which the protected person's real property is located receives the letters. This would assure that the conservator would obtain a copy of all property tax bills for the protected person's real estate interests. By recording the Letters of Conservatorship in this way, the conservator should get official notice of all taxes, assessments, or other legal action affecting the real estate.

Should the conservator provide copies of the Letters of Conservatorship to any other person or entity? It would be difficult in this Handbook to identify every person or entity that should receive the Letters of Conservatorship because every case is different. That being said, the following is a general list of examples illustrating when Letters of Conservatorship might need to be presented:

a) placing a change of address for the protected person at the post office;

b) opening a bank account for the protected person in the name of the conservatorship;

c) transferring the protected person's bank, credit union, or investment accounts into the name of the conservatorship;

d) accessing the protected person's safe deposit box;

e) transferring the protected person's stocks, bonds, and other assets into the conservatorship;

f) signing agreements like leases, home-care contracts, admission agreements, care management contracts, etc.;

g) requesting information about the protected person's affairs from government agencies and private businesses, pension plans, etc.;

h) applying for government and other benefits on behalf of the protected person;

i) asking lawyers about legal matters, other than the conservatorship, in which the protected person is involved; and

j) gathering the protected person's assets from anyone who has been holding them for safekeeping.

This list is not exclusive, and there will inevitably be other uses for Letters of Conservator as the needs of each case require.

2. Meet with the Protected Person: the foundation for a person-centered administration.

It is imperative that the conservator meet with the protected person as soon as is feasible after the

entry of the order appointing the conservator. In the event the conservator has not previously met the protected person, this initial meeting provides an essential opportunity for the protected person and the conservator to begin a working relationship. It will also help the conservator develop an understanding of the protected person and the reasons a conservator was appointed.

The conservator shall become educated about the nature of any incapacity, condition and functional capabilities of the protected person. NGA Standards, 18 (II).

Whether or not a conservator is already well-acquainted with the protected person and his or her capabilities, this initial meeting provides the foundation for building a person-centered conservatorship. This initial meeting can set the stage for a collaborative working relationship.

During this meeting, the conservator should communicate to the protected person his or her role as conservator. If the Court appointed a limited conservator, the conservator should use this initial meeting to explain to the protected person the rights he or she retained under the terms of the order. For example, if the protected person retained the right to manage his or her own spending money, the conservator should explain this retained right to the protected person at this initial meeting. Whether the Court appointed a limited or a full conservator, the conservator should use this initial meeting to explain the scope of the appointment. The conservator should also learn information from the protected person which will be helpful to the conservator in identifying and securing the protected person's assets, which the Court expects the conservator to manage. The conservator should explain to the protected person what outlets he or she has to air grievances about the conservator, including writing a letter or e-mail to the Judge that appointed the conservator.

This initial meeting should accomplish additional, very important objectives. First, the conservator should keep in mind that the appointment of a conservator is an invasive action by the State. Although a protected person may suffer from a cognitive impairment, it is not uncommon for the invasive nature of these proceedings to be understood by the person, even though the person may have difficulty understanding or remembering other concepts or events. This initial meeting is a critical first step for the conservator to connect with the protected person and ensure him or her that the conservator's job is entirely protective in nature and that the protected person has the ability to complain to the Court if that person becomes unhappy with the conservator. The protected person deserves to know: (a) who will be managing his or her assets; (b) how to contact that person; (c) how to express concerns to the Court; and (d) the conservator will have his or her best interests at heart.

Finally, and perhaps most importantly, this initial meeting serves as an opportunity for the conservator to understand the goals, needs, and preferences of the protected person as to a variety of issues the conservator may be asked to address as the conservatorship continues. The conservator should learn the protected person's preferences as to:

a. Spending and saving money and budgeting;

b. Paying the cost of living at home vs. living elsewhere;

c. Paying for home upkeep;

d. Paying for in-home care or assisted living;

e. Educational goals, entertainment, and enriching activities;

f. Donations and tithing;

g. Clothing and groceries;

h. Gift-giving for holidays and birthdays;

i. Preservation of treasured collections, objects of art, etc.; and

j. Spending money for day-to-day items.

The conservator should document this meeting in his or her notes along with the information learned from the person during the meeting. In the event the conservatorship lasts for many years, this initial meeting may yield information the conservator will refer back to for years to come. The conservator should create a memorandum of the protected person's goals, needs, and preferences learned during this meeting and periodically revisit this memorandum with the protected person as the conservatorship continues.

3. Identify the Protected Person's Assets and Income

The conservator has initial duties that are very important for him or her to understand before he or she is appointed. Initially, it is critical that the conservator carefully review the order that appointed him or her. The order itself will often contain specific instructions the conservator must follow, and it is expected that the conservator will be aware of these instructions.

In fact, the facts and circumstances of some cases will require the conservator to act immediately after appointment. Such is the case when action is needed to stop exploitation, pay past due assisted living bills to prevent an eviction, or act to protect a protected person's interest in a foreclosure proceeding.

The conservator should keep in mind that some cases may require that they act urgently at the very beginning of the conservatorship. The NGA Standards provide an excellent summary of the conservator's duties after his or her appointment:

With the proper authority, the initial steps after appointment as [conservator] are as follows:

A. The [conservator] shall address all issues of the estate that require immediate action, which include, but are not limited to, securing all real and personal property, insuring it at current market value, and taking the steps necessary to protect it from damage, destruction or loss.

1. The [conservator] shall ascertain the income, assets, and liabilities of the person.

2. The [conservator] shall ascertain the goals, needs and preferences of the person. NGA Standard 18 I (A).

The NGA Standards provide further guidance for the conservator in his or her initial responsibilities, as follows:

> **The [conservator] shall meet with the person under [conservatorship] as soon after the appointment as feasible. At the first meeting, the [conservator] shall:**
>
> **1. Communicate to the person the role of the [conservator];**
>
> **2. Outline the rights retained by the person and the grievance procedures available;**
>
> **3. Assess the previously and currently expressed wishes of the person and evaluate them based on current acuity; and**
>
> **4. Attempt to gather from the person any necessary information regarding the estate. NGA Standard 18 I (B).**

Having carefully read the order appointing a conservator immediately after he or she is appointed, the conservator will understand the scope of his or her duties. The Court order will provide not only the basis for determining what needs to be done at the beginning of the conservatorship, but also a foundation for how to complete the required inventory and annual reports. The NGA Standards outlined above will provide guidance to the conservator as to how to commence the performance of his or her duties in compliance with the Court order.

If the Court order simply appoints a conservator without placing any limitation on the scope of the conservator's authority, the appointment is a "full" conservatorship. In these cases, the conservator must identify all the protected person's assets at the beginning of the conservatorship. If the appointment is limited in nature, the conservator is duty-bound to identify those assets over which he or she has been granted decision-making authority. Whether full or limited in scope, as will be discussed below, the Court will require the conservator to file a report ninety days after he or she is appointed which states an inventory of the protected person's assets. As a result, the conservator must get to work quickly to understand what the person owns.

Some of the protected person's assets will be readily ascertainable, such as his or her home and checking account. It is common for persons to have assets which are not so readily identifiable, however. Identifying those assets may require diligent research into the protected person's financial records. This task can be made even more difficult if the records had not been recently well organized, which can often be the case with elders who have suffered from progressively worsening dementia or other persons who may suffer from serious mental illness or chronic substance abuse. Knowing that the records may be incomplete or disorganized, it is important for the conservator to review the protected person's financial records. This may require going through mail that has piled up or even doing a thorough house cleaning.

What type of assets could be held? There is no end to describing what assets a person may own, but the following is a list of assets to consider:

a) cash;

b) un-cashed checks and refunds;

c) financial accounts (including checking, savings, and certificates of deposit);

d) stocks and bonds;

e) promissory notes (IOUs);

f) partnerships and other business interests;

g) life, health, long term care and other insurance policies including annuities;

h) real estate, including houses, land, ranches, and mineral rights;

i) furniture and/or antiques;

j) artwork;

k) jewelry;

l) valuable collections; and

m) vehicles, including cars, trucks, boats, campers and RV's.

The conservator should be careful in locating valuable items which may be kept in discrete locations in a protected person's home and taking steps to be sure that these items are secured against theft by intruders, visitors, or caregivers.

Because safe deposit boxes are often used to hold documents and things people believe have intrinsic or legal value, the conservator should check the protected person's safe deposit box, if any, to identify stock certificates, certificates of deposit, and other things of value. If it is unknown whether a protected person has a safe deposit box, the conservator should ask representatives of those financial institutions where the protected person owns other financial accounts if one is located there. Often individuals will maintain a safe deposit box at an institution where he or she has a checking or savings account or a certificate of deposit.

Caution should be used when accessing a protected person's safe deposit box, and the conservator must make a verifiable list of what was contained in that box at the moment he or she opened it. When opening the safe deposit box, the conservator should consider requesting a bank officer or other credible witness be present and verify what was located in that box. An inventory of the box must be made. Some banks will agree to witness an opening of a box without charge. Using this protocol should help to eliminate any questions over what was in the box when the conservator opened it.

It is also important to arrange with the United States Postal Service to have the protected person's mail sent to the conservator when attempting to identify a protected person's assets. The protected person's mail will likely reveal information about the protected person's assets, including account statements, investment prospectus, and bills.

A protected person's lawyer, accountant, tax preparer, or financial advisor may also be able to provide information to the conservator about the identification of a protected person's assets. For example, if the protected person has a will that was prepared by a lawyer, that lawyer will often

have a list of the protected person's assets at the time the will was prepared. The protected person's lawyer may be willing to share such information with the conservator as the protected person's legal representative. If the protected person has had tax returns professionally prepared, that person's accountant may be able to provide information on financial accounts and other property owned by the protected person.

If the protected person's income tax returns cannot be provided through an accountant or collected after a review of the person's financial records, the conservator can request the returns from the Internal Revenue Service by submitting Form 4506. Tax returns may prove invaluable documents in identifying assets that might otherwise be difficult for a conservator to discover. Past returns should be reviewed for this purpose as well. Past tax returns would be expected to identify those accounts that generated taxable income, such as interest in a bank account. How far back a conservator should go when completing this review will depend on the facts and circumstances of each case; the conservator's goal should be to collect enough information to identify all the assets in which the protected person has an interest.

In addition to identifying what property a protected person owns, the conservator must also identify the income the protected person receives or is entitled to receive.

Identifying Benefits

The conservator must obtain all public and insurance benefits for which the protected person is eligible. If the protected person has a claim for income or benefits, it is the conservator's duty to make the claim. NGA Standards, 18 (V), 17 (XII).

Types of income a protected person may be receiving or may have a right to receive include:

a) government benefits such as Social Security, Supplemental Security Income (SSI), Social Security Disability Income (SSDI), veterans' benefits, and welfare;[18]

b) insurance benefits;

c) wages including severance pay, disability, vacation and/or sick leave owed to the protected person;

d) pension payments;

[18] The protected person may not have applied for all the government benefits to which he or she is entitled. The conservator may have to apply for these benefits on behalf of the protected person. For example, if the conservator knows that the protected person served in the military, the conservator should research the eligibility requirements and, if appropriate, apply for veterans' benefits for the protected person, including Aid and Attendance if applicable.

e) settlements from divorce, injury, or other lawsuits;

f) payment of debts owed to the protected person including payments from real estate contracts;

g) money from trusts;

h) rental income; and

i) annuities.

Whatever income or benefits the protected person may have a right to receive, it is the conservator's duty to use reasonable efforts to capture those benefits for the protected person.

4. Making an Inventory.

The NGA Standards, as well as New Mexico law, impose upon the conservator standards and rules which require reporting to the Court for the conservator's actions. It is critical that the conservator comply with these obligations. To do so, the conservator would be wise to study all the forms he or she will be expected to complete and file as conservator at the very beginning of the conservatorship. These forms can be found on the website of the New Mexico Supreme Court and can be obtained through the Court Clerk's office. Especially when it comes to completing the detailed annual report form, it is very important to understand in advance what information and records the conservator will need to keep when administering the conservatorship. Reviewing the forms in advance would allow the conservator to do just that.

Unless the Court order states otherwise, the conservator's reporting obligation begins with the "inventory." The conservator has an affirmative obligation to make and file an inventory within ninety days of his or her appointment. New Mexico law states:

A. Within ninety days after his appointment, every conservator shall prepare and file with the appointing court a complete inventory of the estate of the protected person together with his oath or affirmation that it is complete and accurate so far as he is informed.

B. The conservator shall provide a copy of the inventory to the protected person if he can be located, has attained the age of fourteen years, and has sufficient mental capacity to understand these matters, and to any parent or guardians with whom the protected person resides.

C. The conservator shall keep suitable records of his administration and exhibit the same on request of any interested person. NMSA 1978 § 45-5-418.

To accomplish this task, the conservator must make a list of all of the protected person's assets as of the time the conservator is appointed and the value of each of the assets listed. This information will also be helpful for the conservator's own record-keeping in tracking assets in subsequent annual reports.

Valuing assets using formal opinions of value, such as appraisals, can be expensive. Generally speaking, it is not necessary to spend a lot of money valuing assets in order to prepare the inventory and place values on the assets listed there. Obtaining formal opinions of value on a person's assets, such as obtaining appraisals, is usually not necessary unless assets are to be sold or insured. In those cases, however, such formal opinions of value are required. The conservator should note that valuable items of tangible personal property may require insurance to safeguard against loss or damage. That insurance is often provided through a rider on a homeowner's insurance policy. Most insurance providers will require appraisals on those items to obtain such insurance.

Financial assets such as bank accounts, mutual funds, and publicly traded stock are almost always much easier to value on the inventory form, as account statements are customarily provided which state current account values. The conservator should keep in his or her records the initial statements from which these values were derived (as well as all other financial statements issued during the course of the conservatorship). Those values must appear on the inventory form, using the value reported on the most recent statement.

Identifying on an inventory form every single item of tangible personal property a protected person owns can seem like a daunting and tedious task. Generally speaking, an inventory would not need to identify every single item of tangible personal property, and categories of items can be created (such as "all bedroom furnishings") which would provide an aggregate value for all the items in that category. If there are specific items of tangible personal property that have significant monetary value in relation to the other items the protected person owns, however, the conservator should consider separately identifying these items in the inventory. This would be the case, for instance, with certain artwork, collectibles, or firearms. If firearms are discovered in the possession of the protected person during the inventory process, the conservator must secure those weapons in an appropriate manner.

5. Providing Notice of Appointment as Conservator

When doing business on behalf of the protected person, it is very important that the conservator disclose that he or she has been appointed conservator for the person and is acting in that capacity. This disclosure is important, in part, because the conservator has a duty to promptly assume control and management of the protected person's assets. Disclosing his or her appointment should lead to the conservator then receiving information which will be necessary to protect and account for the person's assets, debts, and income. That information should include not just account statements, but also income tax reporting forms (which will be needed later when it comes time to prepare and file the person's income tax returns).

Generally, providing notice comes in two forms: (1) providing initial notice after the conservator is appointed and ongoing notice as circumstances change; and (2) indicating the conservator's capacity when signing agreements and contracts for the person.

Before providing notice, the conservator must understand the scope of his or her duties. Again, it is important that the conservator review and understand the order that appointed him or her in this position. That review will enable the conservator to understand whether the Court has imposed any limitations on the scope of the conservatorship and whether the conservator's authority extends to only some or all of the protected person's assets. The presence of those limitations in the Court order can obviously affect to whom the conservator provides notice.

In the case of a full appointment, as soon as possible after being appointed, the conservator should provide notice of his appointment to all financial institutions with which the protected person has a financial relationship. This includes not only all banks, credit card companies, credit unions, and investment advisors but also all government agencies from which the protected person may receive payments or other benefits. In the case of a limited appointment, the conservator should provide notice to those entities or institutions providing benefits over which the conservator has been granted decision-making authority by the Court.

Example of entities which should be notified include:

a) banks, savings and loans, credit unions, and other financial institutions;

b) stockbrokers and investment advisors;

c) companies in which the protected person owns shares of stock;

d) insurance companies and agents issuing insurance for the protected person;

e) all companies and banks where the protected person holds charge accounts, credit cards, or a bank cash machine (ATM) card;

f) government agencies, such as Social Security, from which the protected person receives payments;

g) retirement plans;

h) people who owe the protected person money or to whom the protected person owes money;

i) county clerk's office (recording and filing division) in every county where the conservator thinks the protected person may own real property;

j) the United States Post Office to forward the protected person's mail; and

k) anyone involved in a lawsuit by or against the protected person.

The conservator's notice should include: (a) a statement that a conservator has been appointed for the protected person, along with the account number(s) for the accounts held by the protected person at the financial institution; (b) a copy of the Letters of Conservatorship; and (c) the conservator's mailing address, e-mail address, and telephone number. If the conservator's contact information changes, it is important that the conservator promptly provide updated information to the entity.

As indicated above, providing notice of the conservatorship appointment serves another valuable purpose. When entering into agreements on behalf of the protected person, disclosing the conservatorship appointment is necessary to ensure that the conservator does not become individually liable for contracts entered into on behalf of the protected person. When signing contracts or agreements for the protected person, the conservator should do so while clearly indicating the document is being signed as the person's conservator. For example, the conservator's signature on such an agreement should read:

"John Smith, Conservator for Jane Doe"

Any time the conservator signs an agreement on behalf of a protected person, the document being signed must be signed as noted above. For instance, if a conservator signs an admission contract for the protected person to an assisted living facility, the conservator must be careful to identify to the facility that he or she is signing the agreement only as the protected person's conservator. The importance of disclosing the conservator's role is aptly stated by New Mexico law which states:

> **Unless otherwise provided in the contract, a conservator is not individually liable on a contract properly entered into in the conservator's fiduciary capacity in the course of administration of the estate unless the conservator fails to reveal the conservator's representative capacity and identify the estate in the contract. NMSA 1978 § 45-5-429 (A) (2019) (emphasis added).**

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6. Determining how assets are titled

Along with identifying the protected person's assets, it is also very important to understand how his or her assets are titled. In other words, "who is listed as the owner of the account?" If the protected person has a checking account, for example, it is important for the conservator to identify whether the protected person's name is the only name on the account. Accounts that are held in more than one name are usually called joint accounts.

A conservator may find joint accounts difficult to deal with for two reasons. First, it must be determined who owns the money in the account. Under New Mexico law, joint accounts held by people who are not spouses are not automatically deemed to be owned equally. Rather, the account is owned in proportion to the amount of money each owner put into the account unless there is "clear and convincing evidence of a different intent." NMSA 1978 § 45-6-211 (B). As between spouses, in the absence of proof otherwise, the net contribution of each spouse in an account is presumed to be an equal amount.

If it was the protected person who deposited all the funds into a checking account and then added her child's name to the account (to assist in bill paying, for instance), all the money in the account will usually be treated as belonging to the protected person. On the other hand, if it was the other account owner who funded the account owned with the protected person, that person will usually be considered to own the money he or she contributed to the account. In the latter case, it is usually best to separate the protected person's money from that belonging to the other account owner. The protected person's money should be withdrawn from the joint account and deposited into a separate account only in the name of the conservator for the benefit of the protected person. The conservator will then be able to fully control the protected person's money without concern that another account owner would have access to it. Proceeding in this way also protects the conservator from later claims that he or she failed to take control of the account.

Joint accounts may also contain "a right of survivorship." When a right of survivorship is present on an account, if one account owner dies, the proceeds of the account automatically belong to the other account owner. No probate is required to pass ownership of the funds in the account to the surviving owner.

Rights of survivorship, like other beneficiary designations, present additional challenges. Rights of survivorship and beneficiary designations often are an important part of a person's overall estate plan. As will be discussed below, New Mexico law requires that a conservator take these plans into account when administering the conservatorship:

> **In investing the estate, and in selecting assets of the estate for distribution…and in utilizing powers of revocation or withdrawal available for the support of the protected person … the conservator or the court should take into account any known estate plan of the protected person, including his will; any revocable trust of which he is settlor; and any contract, transfer or joint ownership arrangement with provisions for payment or transfer of benefits or interests at his death to another or others which he may have originated… NMSA 1978 § 45-5-427.**

If a right of survivorship exists on an account created by the protected person, the conservator should not take action with respect to that account which modifies or eliminates the rights of survivorship without a prior order from the Court. While the conservator's primary concern should be to use the funds available to the protected person to pay for items related to his or her support, the conservator would be expected to respect the survivorship designation by not taking action which defeats it.

In other words, if the protected person has set up joint accounts that will pass to certain people when the protected person dies, the conservator must try to manage the protected person's estate in a way that the same people will receive that property (or what is left of it) after the protected person dies. If the conservator has any questions about how to manage this responsibility, the conservator is wise to ask the Court for instructions.

This rule applies not only to assets titled in the protected person's name but also to accounts which have beneficiary designations. It is important that the conservator review each account to determine if the protected person named any beneficiaries to receive the asset upon his or her death.

Life insurance policies, individual retirement accounts, certificates of deposit, and many other assets allow the owner to name a beneficiary, Payable on Death (POD) beneficiary or Transfer on Death (TOD) beneficiary to receive what is left of the asset after the protected person dies. Although POD and TOD beneficiaries have no rights to an asset until after the death of the protected person, it is important for the conservator to know who the POD and TOD beneficiaries are. This knowledge will assist the conservator in the responsibility to take the person's estate plan into account when managing the conservatorship.

The conservator must use caution when transferring or changing accounts to ensure that any POD or TOD designations are not lost in the process. If the conservator takes such an action, the beneficiary may later claim that the conservator breached his legal responsibilities by disrupting his or her expected inheritance. Importantly, not all financial institutions may allow a POD or TOD beneficiary designation for a conservatorship account. In those cases, if taking control of

the account will strip the beneficiary designation from that account, the conservator should seek Court instruction on how to properly proceed before electing to do so.

Finally, the legal status of marriage can present additional challenges for a conservator. If the protected person is married, the conservator must determine what property is "community property" and what property is the separate property of the protected person. The title of an asset does not necessarily determine whether the property is community or separate. For example, an individual retirement account that contains monies earned during the spouses' marriage is community property even though it is only titled in the name of the participant spouse. If property is community property and the conservator is not the spouse of the protected person, the conservator and the spouse will have to work together to manage the community property since neither will have total control over the community property. As noted in an earlier section of this Handbook, it may be necessary in some situations to separate community property in order to provide proper management of the protected person's interest in that property.

7. Take Control of the Protected Person's Assets

The order appointing the conservator will define the scope of the conservatorship, namely whether the conservatorship is "limited" or "full." The differences between these types of conservatorships are discussed elsewhere in this Handbook. Importantly, the scope of the conservatorship will define the scope of the conservator's responsibilities when it comes to taking control of the protected person's assets. If, for example, the conservator has been appointed in a limited role, the conservator will have an obligation to secure and assume control over the asset(s) or income which was the subject of the limited conservatorship appointment.

The scope of the conservator's initial duties is more complicated when the order appointing the conservator appoints a full conservatorship, however. In these cases, the initial process of identifying the protected person's assets, income, and liabilities is the first step of the administration process. This process begins by interviewing the person who filed the conservatorship action and reviewing the financial records available to the conservator.

The conservator has an affirmative duty to prepare an inventory of the protected person's estate and to file that inventory with the Court within ninety (90) days of the conservator's appointment. Fulfilling that responsibility requires that the conservator identify the protected person's assets for which the conservator has been given responsibility. The conservator's initial responsibilities, however, do not end there.

Once the conservator has identified the protected person's assets and income, the conservator must then take the steps reasonably necessary to protect these assets from damage, destruction, or loss. The conservator must work to the extent possible in collaboration with the protected person when doing so. In this process, the conservator must realize that in many cases assuming control of another person's property will be perceived to be an insult to that person's independence. Regular communication between the conservator and the protected person can help minimize this friction.

What is required to acquire control of a protected person's property will depend upon the nature of the property that person owns and the terms of the Court order which appointed the conservator. The steps a conservator must follow to gain control of a protected person's property will, therefore, vary from case to case. In some cases, for instance, there may be an active exploitation threat that

must be immediately taken into account so that the person's property is protected from the exploiter. While the steps to be taken in each case will vary, there are some basic rules that apply across the spectrum of conservatorship matters.

A conservator holds property for a protected person as trustee. As to those assets that are titled in the name of the protected person, the conservator should take steps to have titled ownership registered in the name of the conservator for the benefit of the protected person. While such retitling should occur so as to allow the conservator to control and monitor the asset, this retitling does not change ownership of the asset. The asset is still owned by the protected person even after the retitling occurs, with the conservator formally holding the property as a trustee.

New Mexico law states:

> **A. The appointment of a conservator vests in him title as trustee to all property of the protected person, presently held or thereafter acquired, including title to any property previously held for the protected person by custodians or attorneys-in-fact.**
>
> **B. The appointment of a conservator is not a transfer or alienation within the meaning of general provisions of any federal or state statute or regulation, insurance policy, pension plan, contract, will or trust instrument, imposing restrictions upon or penalties for transfer or alienation by the protected person of his rights or interest, but this section does not restrict the ability of persons to make specific provision by contract or dispositive instrument relating to a conservator. NMSA 1978 § 45-5-420.**

Accordingly, the retitling of a person's assets into the name of the conservator should not have adverse financial consequences for the protected person. The protected person's social security number should continue to be listed on all his or her accounts as the account owner's tax identification number.

If the protected person holds an account jointly with another person, the conservator should make reasonable efforts to understand the extent of the protected person's financial interest in that account on a timely basis. If the conservator believes that the protected person's interest in the joint account is at risk of being improperly diminished by the other owner, the conservator must consider taking steps to ensure that the person's interests in the joint account are not harmed. These steps may include asking the bank to prevent further withdrawals from the joint account until the Court can issue instructions as to how to proceed. Issues related to the management and possible separation of joint accounts is discussed above.

Specifically, as to financial assets, the ownership of a financial account should be changed to reflect the fact that the conservator now controls the account. For example, titling of a financial account would be changed to *"Jennifer Garcia, conservator for James Garcia"* or *"James Garcia, conservatee; Jennifer Garcia Conservator."* Each financial institution can be expected to handle this titling according to the policies and procedures of that institution.

In the case of a full conservatorship, the conservator has an obligation to notify all financial institutions where the protected person has funds on deposit that the conservator has been appointed; and to be sure that the account is titled in a manner that allows the conservator to have control of the account and to receive statements on an ongoing and regular basis. In the case of a limited conservatorship, the conservator must notify the institution of the account(s) over which the conservator has been granted authority by the Court and to title the account in the same manner as he or she would if appointed a full conservator.

There are, of course, many types of financial accounts ranging from checking accounts to investment accounts. Investment accounts, stocks, and bonds should also be titled in the name of the conservator for the protected person. The protected person's social security number should be used on the IRS Form W-9.[19] Before a company will reissue stocks and bonds, it will usually require the conservator to send certain forms including: (a) certified letters of conservatorship recently issued; (b) an affidavit of domicile; (c) a stock power; (d) a letter of instruction; and (e) the original stock certificates. The conservator's signature on some of these documents will need to be "guaranteed," sometimes referred to as a "medallion guarantee." A medallion guarantee differs from a notarization and generally can be done by a bank officer or stockbroker.

What if the conservator cannot find a stock certificate for shares of stock owned by the protected person? For example, suppose the protected person is receiving dividends from stock but the conservator cannot find the stock certificates. The conservator should work with the protected person to see if the stock certificate is in his or her personal papers; and, if not, the conservator should contact the company or its transfer agent and ask that replacement certificates be issued. The replacement certificates should be titled as noted herein.

Not all companies issue paper stock certificates. Certificateless shares are recorded by the company or its stock transfer agent so that all records of ownership are only shown on the books of the company or the stock transfer agent. If a stock certificate cannot be located, the conservator should contact the company issuing the stock to make sure the stock records are changed to reflect the appointment of the conservator.

If the protected person owns a safe deposit box the title should also be changed to the name of the conservator. If the protected person is renting a box with someone else, the conservator should open the box in the company of that person. The conservator should remove those items from the safe deposit box which belong to the protected person, inventory those items in writing, and then arrange for them to be stored in a location that ensures the safety of those items. The safe deposit box should then be put in the conservator's name only, and the conservator should have the only key to the box.

Whatever type of account a protected person owns, the point to be made is that the conservator has a duty to ensure that he or she takes control of these accounts so that they can be managed and

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[19] A W-9 Form is a Request for Taxpayer Identification Number and Certification. The number reported on the W-9 is usually the taxpayer's Social Security number, but could also be an employer identification number for certain Trusts or estates.

monitored regularly for the protected person's benefit. If the conservatorship is limited, the conservator's duty extends only to the accounts or assets subject to the limited order.

How does the conservator handle the titling of vehicles? Title to cars, boats, RVs, and other vehicles should also be changed to "Conservatorship of Jane Smith, John Smith Conservator" or a similar titling method that clearly identifies the conservator.

This duty extends to all other types of assets which the protected person owns. If the protected person owns mineral interests, an interest in a closely held business, or a day trading stock account, a conservator who is granted full conservatorship authority must gain control of these assets in the same manner as he or she would with a bank holding a checking account for the protected person.

The same is true as to other assets that may generate income for the protected person. If the conservator has been granted decision-making authority over a stream of income for the protected person, the conservator must take reasonable steps to receive the income and deposit that income into an account managed by the conservator for the benefit of the protected person. As discussed elsewhere in this Handbook, the protected person's income must never be commingled with the conservator's own money.

A full conservatorship appointment would require the conservator to take reasonable steps to capture all income paid to the protected person and to account for that income in each annual report.

When considering what "assets" over which a conservator must assert control, the conservator should think broadly about those interests a protected person owns. This process may reveal assets that are unexpected. Was the protected person, for example, involved in a lawsuit or otherwise have a legal claim against another person or entity? If so, the full conservator must take reasonable steps to ensure that the protected person's legal position as to those claims is not compromised. What is reasonable in this context will depend on the consideration of a variety of factors including the merit of the claim, the cost of proceeding, the chances of success, and the ability to recover.

Finally, the process of taking control of the protected person's assets is necessary to ensure that the property can be reasonably managed against loss. To safeguard against loss, the conservator must ensure that insurable assets remain or become insured. For example, the protected person's home should be insured against loss, as well as any vehicle that is maintained for the protected person. If there are riders on a homeowners policy extending the tangible personal property such as jewelry or artwork, that insurance should be continued provided that the items are still in the person's possession.

Controlling vehicles can present challenges. The conservator should insure a protected person's vehicle to cover damage to it, as well as liability that might arise if there is an accident. If someone uses the protected person's car (even to help the protected person) and he or she is involved in an accident, the protected person's estate may be sued. As a result, the conservator should be cautious when allowing a protected person's vehicle to be driven, should limit the use of the vehicle to those occasions necessary to provide for the protected person by a licensed driver and should be vigilant in maintaining adequate levels of insurance.

Sometimes the protected person will want to continue driving his or her car even though there are serious questions as to whether the person can safely drive. In these cases, the conservator should

work with the protected person and his or her guardian to determine whether the protected person can safely drive. This is a shared responsibility between the guardian and conservator, as the guardian's primary function is to protect "the person" and the conservator's chief duty is to protect the person's assets and minimize his or her liabilities.

The Department of Motor Vehicles and even the protected person's physician can assist in determining the ability of a person to safely operate a motor vehicle. Some driving schools offer testing for a fee. After testing, the instructor may offer a recommendation for the protected person to get a license, private lessons, or not to drive at all. A letter of concern can also be written to the Motor Vehicle Division, Driver Services Bureau in Santa Fe, or a "Report of Driver with Dementia" form from the DMV can be sent anonymously. If the protected person's physician writes a letter to the Department of Motor Vehicles stating that it is unsafe for a protected person to drive, the Department may suspend or revoke the person's driving privileges.

If a protected person cannot safely operate his or her motor vehicle, it is the conservator's responsibility to take reasonable steps to prevent the protected person from driving, which may include taking practical steps such as taking away the car keys or selling or disabling the car. The conservator and guardian should work together in this effort. Failing to take reasonable steps to prevent a protected person from using a motor vehicle after the conservator is on notice of the person's inability to drive and insistence on doing so may subject the conservator to a claim by any person who may be later injured in an accident with the protected person. If the conservator is not the protected person's guardian, the conservator should consult with the guardian, and if possible, the two should work together to solve this problem.

If the protected person does not need the car and has not expressed any particular desire to keep it, as may be the case with a collectible car, the conservator should consider selling the vehicle for its fair market value with the approval of the Court. Continuing to own an unnecessary vehicle will in all likelihood cause the conservator to pay for ongoing expenses and the car to depreciate in value. These items can be costly to the protected person over time. If the protected person wishes to keep the car, and it is not being operated, an "Affidavit of Non-Use" can be filed with the Motor Vehicle Division, which exempts the car from being insured. This form needs to be filed annually. In such a case, the conservator should take steps to properly store the vehicle.

8. Discover the protected person's debts

In addition to identifying the protected person's assets, the conservator should also identify and list the protected person's debts. Debts might include:

a. a mortgage or home equity loan on the protected person's house or other real estate;

b. amounts owed on the protected person's credit card;

c. income tax liability, including penalties and interest;

d. utility bills;

e. insurance premiums;

f. monies owed to service providers and in-home care companies; and

g. other loans or past due bills.

If the protected person has been functionally impaired for some time, he or she may have stopped actively managing his or her financial affairs and may have stopped paying bills on time. It is important that the conservator determine what the protected person owes, to whom those debts are owed, and to make sure these bills are paid as timely as is feasible. In this process, the conservator should identify any ongoing liabilities, such as credit cards. Credit cards can be stolen by third persons and, unless they are required to provide for the protected person, should be either in the sole possession of the conservator or cancelled.

Obviously, the conservator must take possession of all cards such as debit cards over which the conservator has been granted control. There is an exception to this rule, however. It is important to note that credit cards can serve important functions. On one hand, they can provide a protected person with the ability to make day-to-day purchases without giving the person the ability to put his or her checking account at risk by thieves or others who may wish to take advantage of the person and gain access to his or her cash reserves. On the other hand, a prepaid credit card or a credit card with a low spending limit can be useful to allow the protected person the independence of having money to spend on day-to-day matters while in a controlled setting. A True Link card is a prepaid credit card that can be restricted in its use. Such a card (a) allows a conservator to prevent his or her protected person from using his or her money improperly by allowing the conservator to program the types of purchases which can be made on the card; and (b) can even reduce the risk of exploitation if set up properly. As such, a low limit, prepaid or True Link card can be useful tools if monitored regularly by the conservator to promote a level of autonomy for the protected person.

Serious negative consequences can arise from the failure to pay certain bills on time. Those consequences can include the lapse of a health or life insurance policy, mortgage foreclosure, forfeiture of a real estate contract, utilities being shut off, or penalties being imposed as a result of late payment on credit card bills and other debts. If late penalties arose because the protected person was managing his or her own affairs and neglected to pay certain items due to a cognitive impairment, the conservator should attempt to pursue a forgiveness of penalties and late fees with creditors on the grounds that the protected person was unable to manage his or her own financial affairs. For example, the Internal Revenue Service may waive penalties on past due taxes if the taxpayer failed to pay as a result of a disability. Credit card companies may also waive late fees and/or finance charges if asked.

When identifying a protected person's debts, the conservator should review each debt to determine its validity. The conservator should challenge debts that are not valid. For instance, it may be that a third person incurred charges on a protected person's charge account without the protected person's permission or that the protected person was too impaired to give meaningful consent to the use of his or her credit card by that third person. If this is the case, the resulting charges may be invalid. The conservator should inform the credit card company in writing promptly in an effort not just to forgive the protected person's responsibility in this situation but also to ensure that any such credit card may not be misused in the future. The same is true if someone forged or wrote unauthorized checks on a protected person's checking account. In these cases, the financial institution holding the account may be responsible for refunding the account of the protected person for those amounts which were withdrawn from the account without proper authority.

What if a person claims that the protected person owes money to him or her? It is the conservator's duty to investigate the factual circumstances underlying each such claim. Before paying the claim, the conservator has a duty to ensure that the debt is valid and should be paid. If the claim is that services were provided to the protected person, the conservator should request proof that the services were performed. The conservator should also satisfy him or herself that the amounts being charged are reasonable.

It is important for the conservator to know that this process must be accomplished timely. New Mexico law provides time limits for the conservator to disallow claims against a protected person. The conservator should either "allow" or "disallow" a claim against a protected person within sixty days of receiving it. If there is a question about disallowing a claim, a conservator should seek qualified legal assistance.

FURTHER READING: NMSA 1978 §45-5-428 (A) (ENFORCEMENT OF CLAIMS AGAINST PROTECTED PERSON).

New Mexico law also allows a claimant whose claim has not been paid timely to petition the court for determination of his claim. That petition must be filed by the creditor before the statute of limitations expires on the claim.

When investigating the protected person's debts, it is important for the conservator to review the protected person's papers and mail. Again, because of the invasive nature of this exercise, the conservator should do this in collaboration with the protected person. In connection with notifying the protected person's creditors and service providers of the conservator's involvement, the conservator should inquire with these persons and entities whether the protected person is current on his or her payments. If the conservator believes the protected person may be delinquent in his tax filing or payment obligations, the conservator can learn the status of the protected person's federal tax obligations by requesting a transcript from the IRS using IRS Form 4506-T.

After determining the protected person's debts, it is important that the conservator create a schedule so that each monthly bill is paid timely.

9. Arrange to Have the Protected Person's Mail Sent to the Conservator

A protected person's mail can provide important information to the conservator about the person's assets, debts, and income. This mail can also contain important personal correspondence addressed to the protected person, however. How does the conservator handle a protected person's mail knowing that it contains both financial and personal correspondence?

Under New Mexico law, a guardian for a protected person "shall not restrict the ability of the protected person to communicate, visit or interact with others, including receiving … personal mail" unless (a) authorized by Court order; or (b) the guardian has good cause to believe restriction is necessary because interaction with a specified person poses a risk of "significant physical, psychological or financial harm" to the protected person. If the guardian believes that such contact is harmful, restrictions on contact are limited to seven days for a family member who had a preexisting social relationship or sixty days if no such relationship existed. NMSA 1978, § 45-5-312 (F) (2019).

The NGA standards further state: "The guardian shall encourage and support the person in maintaining contact with family and friends, as defined by the person, unless it will substantially harm the person." NGA Standards 4 (I)(A). While these authorities speak to the duties of a guardian, it is likely that a Court when confronted with the question would extend these duties to a conservator.

As a result, while it is usually best to have the protected person's mail sent to the conservator, the conservator must ensure that all personal mail is promptly provided to the protected person unopened.

To streamline the process, the conservator should notify all entities sending mail to the protected person of the conservator's address, so that the financial mail can be sent directly to the conservator. The conservator should be vigilant for sweepstakes or other potentially fraudulent solicitations as vulnerable adults can often be targeted in such scams. If the protected person is receiving these mailings, the conservator should send a letter asking them to remove the protected person from their mailing list.

Ultimately, however, the imposition of a conservatorship may not limit the ability of the protected person to communicate with others unless there is a Court order in place or there is an emergency which exposes the protected person to the risk of physical, psychological, or financial harm. If the risk of such harm is present, the conservator should seek instruction from the Court on managing future contact.

10. Selling Property Belonging to the protected person.

Subject to the language of the Court order which appointed the conservator, New Mexico law grants conservators broad powers to sell or otherwise dispose of a protected person's property without a court order. While the authority is granted to the conservator by law, the question arises in what circumstances the conservator should exercise the power of sale without a prior court order. When making the decision to sell any significant item of property bellowing to the protected person, Court approval should be obtained in advance.

The NGA Standards speak directly to this question:

In considering whether to dispose of the person's property, the [conservator] shall consider the following:

A. Whether disposing of the property will benefit or improve the life of the person,

B. The likelihood that the person will need or benefit from the property in the future,

C. The previously expressed or current desires of the person with regard to the property,

D. The provisions of the person's estate plan as it relates to the property, if any,

E. The tax consequences of the transaction,

F. The impact of the transaction on the person's entitlement to public benefits,

G. The condition of the entire estate,

H. The ability of the person to maintain the property,

I. The availability and appropriateness of alternatives to the disposition of the property,

J. The likelihood that property may deteriorate or be subject to waste, and the benefits versus the liability and costs of maintaining the property… NGA Standards, 19 (III).

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11. Real Estate

The term "real estate" generally refers to land and the buildings located upon it. The title to real estate is evidenced by the deed which vests ownership in the name of the person who received the property. As a general rule, it is best practice to retitle real estate into the conservator's name for the benefit of the protected person. Doing so ensures that the conservator receives all notices with respect to the property at issue. The conservator is wise to seek qualified legal help to be sure that the conveyance is drafted properly.

The conservator should also record a certified copy of the letters of conservatorship with the county clerk's office in every county in which the protected person owns real estate. By recording the letters in this way, the conservator provides official notice to anyone who may have business with respect to the real estate to contact the conservator. By recording the letters and notifying the office of the county assessor of his or her appointment, the conservator can also ensure that he or she gets all notices with respect to the property taxes which are due to be paid for the property.

May the conservator sell a protected person's real estate? Under New Mexico law, the conservator is authorized to sell a protected person's real estate without prior authorization from the Court. The NGA Standards, however, clearly state that the conservator "may not dispose of real or personal property of the person under [conservatorship] without judicial, administrative or other independent review." NGA Standards, 19 (I). This standard is in place to ensure that a protected person is not moved from his or her home without oversight of that decision by the Court and also that items of property which may have unique value to the protected person (such as a residence) are not sold in derogation of the person's wishes.

Therefore, the best practice is to seek Court authorization of the sale of real estate. If done properly, the added benefit of requesting prior Court approval is that the Court would be expected to approve the sales price in this process, thereby greatly reducing the chance of a claim against the conservator that the property was sold below fair market value. If the decision is made to sell real property, the conservator should note that a title company may require property to be re-titled into the conservatorship estate if it is to be sold. The conservator is wise to consult with legal counsel to ensure that the deed is properly prepared.

Real estate can be jointly owned by two or more persons or owned as tenants in common as between them. If a protected person has an interest in real estate which is subject to either form of ownership, it is important that the conservator consult with the other owners if the conservator sees a need to sell, encumber, or improve the property. Where a protected person owns real estate either jointly or as tenant in common with another person, the conservator should seek qualified legal counsel to determine how to preserve the protected person's interest in that real estate. Simple steps such as preparing and executing a deed improperly can have serious legal implications.

A Transfer on Death Deed ("TODD") is a form of a deed that allows real estate to pass by operation of law upon a person's death to the beneficiary named in the deed. This system of property ownership allows real estate to pass upon a person's death without the necessity of a probate. Under a TODD, the beneficiary does not have an interest in the real estate until the death of its owner.

A protected person may own real estate that has a TODD in place. In the event that real estate is sold, the TODD is effectively revoked without any further action. If a replacement property is purchased, the conservator should consider whether or not it is appropriate to execute a TODD for the replacement property. The conservator must seek Court approval, however, before executing a TODD.

As noted above, the conservator should ensure that a protected person's assets are properly protected and insured against loss. The same rule applies to real estate. Resources permitting, the conservator should ensure that all mortgage payments, real estate contract payments, and property taxes are timely paid. Failure to make these payments timely could result in the protected person losing his or her interest in the real estate. If resources are not sufficient to make these payments, the conservator should immediately bring this issue to the attention of the Court.

The conservator should also take reasonable steps to ensure that only authorized persons have the ability to access the protected person's residence and other buildings which may be on his or her property. If there is any question about whether unauthorized persons may have the ability to

access a protected person's home or other buildings, the conservator should consider changing the locks on these structures and having new keys issued to authorized persons.

The conservator should ensure that a protected person's improved real estate holdings are adequately insured. Vacant land (unimproved real estate) would usually not require insurance. Real estate which has a residence, commercial property, or other improvements, however, should be insured against loss, including fire, vandalism, and other losses. The conservator should ensure not just that the coverage is in force but also that the amount of coverage is sufficient to cover any loss.

It is not uncommon for a homeowners' insurance policy to contain a provision providing that coverage lapses if the insured property remains vacant for more than a month. In some policies, the insured can purchase a "vacancy rider" to provide coverage during a time when an insured property becomes vacant. If a protected person owns a home which is vacant due to the protected person's residence at a long-term care facility, hospital, or nursing home, the conservator should determine whether a vacancy rider is available to ensure that coverage remains in force while the property is vacant. The conservator should also take steps to ensure that the tangible personal property contained within the residence or other building is sufficiently protected against theft or other loss in those instances where the protected person might reside elsewhere. It may be necessary in some circumstances to move tangible personal property into an appropriate storage facility to ensure that it is not stolen while a residence remains vacant.

The conservator should take steps to ensure that any dangerous conditions on a protected person's property are remedied. For example, if there are vacant buildings on the protected person's property that present a hazard to others who may be on the property, the conservator should take steps to remedy those conditions. In the case of a dangerous condition that may be very costly to remedy, the conservator should consider obtaining prior Court approval on the expenditure.

12. Individual Retirement Accounts (IRA's) and Pension Accounts

If the protected person owns an IRA, pension, or other qualified retirement account, these accounts must remain in the protected person's name. The conservator should ensure that the financial institution holding the account is on notice of the conservatorship and that the conservator is the only one (a) to whom information about the account should be sent; and (b) the one who has the ability to withdraw money from the account. The conservator should regularly monitor these assets by, at the minimum, reviewing the accounts statements generated by the financial institutions which hold the accounts.

The conservator should be cautious when making the decision to make withdrawals from any type of IRA or pension accounts. If the protected person withdraws money before the age of 59, there may be a penalty imposed upon the withdrawal. After the protected person reaches a certain age, the protected person must withdraw at least a minimum amount from the IRA and pension accounts each year. The conservator should consult with a CPA or financial advisor regarding the applicable age for RMD. If he or she does not, penalties may be imposed on the amount that should have been withdrawn but was not.

Properly dealing with IRA, retirement, and pension accounts often requires specialized knowledge. Mistakes in this process can result in costly tax penalties. The conservator should seek the advice

of a qualified financial or tax professional before making the decision to withdraw money from these types of accounts.

13. Social Security and Other Income Benefits

If the protected person receives social security income, the Conservator must contact the Social Security Administration and ensure that the benefits are paid into an account the conservator will control. The conservator should apply to become the "representative payee" or "rep payee" of these benefits if the conservator feels he or she should control the funds or there is not another representative payee. To become a representative payee, the conservator must go to the Social Security Administration office to complete the applicable forms. The Social Security Administration may often appoint the conservator to be the representative payee.

If the protected person is receiving benefits from other agencies such as the Veterans' Administration, the Civil Service Retirement System, PERA, or other such agencies or entities, the conservator should contact each of these entities to provide notice of the conservatorship, to assume control of the benefits being issued to the protected person and to begin receiving regular account information.

What if the protected person is not obtaining such benefits? It is the conservator's duty to take reasonable steps to obtain benefits to which the protected person may be entitled. On this issue, the NGA Standards state:

The [conservator] shall obtain all public and insurance benefits for which the person is eligible. NGA Standards 18 (V).

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14. Managing the Conservatorship Estate

a. Comingling is prohibited

New Mexico law prohibits the conservator from "commingling" or mixing the conservator's funds or investments with those held for the protected person, whether a minor or adult. Furthermore, New Mexico law requires that funds and investments held by the conservator personally be kept separate from funds and investments owned by the protected person. The protected person's assets must be titled separately from the conservator's own property in accordance with the law.

In fact, even if the conservator serves as a conservator for more than one protected person, the conservator is required under law to hold the funds and investments of each protected person in accounts that are separated for each protected person. If a conservator serves as conservator for more than one protected person, each protected person must have their assets titled separately from any other person for whom the conservator serves as fiduciary.

It is critically important that the conservator not mix the protected person's money with the conservator's own money or with that of anyone else. Commingling money in such a manner could subject the conservator to an audit, sanction, or removal.

A guardian or conservator shall not commingle the guardian or conservator's funds or investments with those held by the guardian or conservator as a fiduciary for a minor or an adult. NMSA 1978 § 45-5-107 (A) (2018).

b. Protecting the protected person's important papers and valuable items.

If the conservator has been appointed as a full conservator, it is important that the conservator take reasonable steps to safeguard the important papers and valuable personal property of the protected person. If there is not a suitable system already in place to safeguard these items, the conservator may consider renting a safe deposit box from a local bank. The conservator should not put the protected person's valuable items and papers in the conservator's own safe deposit box, however, as to do so would violate the prohibition against commingling assets.

The conservator should take reasonable care to preserve the following types of documents:

1) the protected person's will and other estate planning documents;
2) stock certificates;
3) bonds;
4) real estate deeds;
5) vehicle registration documents;
6) promissory notes (IOUs);
7) insurance policies;
8) birth, marriage and death certificates;
9) pre-paid funeral or burial plan;
10) the protected person's passport; and
11) any other papers that would be difficult or impossible to replace.

The conservator should discuss with the protected person whether valuable personal items, such as jewelry, should be kept in a safe deposit box or in a secure location in the home of the protected person. Making a decision as to how to deal with a protected person's personal property requires a delicate balance of respecting the person's wishes while also safeguarding valuables from loss or theft by caregivers or others. Unfortunately, it is not uncommon to hear reports of personal items being stolen from incapacitated individuals living in an assisted living facility or even at home with in-home care givers. When making a decision as to how to safeguard a protected person's personal items, the conservator should give consideration to all the facts and circumstances but must be sensitive to the protected person's wishes.

As to larger valuable items which cannot be placed in a safe deposit box, such as fine art, the conservator might consider storing these items in a suitable storage facility if a decision is made

to move such items from their present location. A move to an assisted living facility is a good example of an event that might prompt this consideration.

Fine art may require climate-controlled storage. Before making the decision to store such items, however, the conservator must engage in a conversation with the protected person to determine how best to balance the need to safeguard property with the need to respect the protected person's wishes. Minimally, the conservator should document all valuable personal property at the beginning of the person's tenure as conservator. The conservator should take photos or video-record all valuable items belonging to the protected person.

What if there are valuable items of tangible personal property owned by the protected person which are uninsured? The conservator should consider purchasing riders to the protected person's homeowners insurance policy which would provide insurance coverage for certain items of tangible personal property scheduled on the riders. The company providing this insurance coverage will likely charge a separate premium for it.

As noted above, the conservator should be vigilant when bringing caregivers into a home or living facility to assist with the care of a protected person. Hiring caregivers through an agency is the preferred way to retain caregivers, even though this method may be more expensive. Contracting with an agency is preferred because agencies would be expected to screen their employees, bring experience and systems to the situation, possess workers' compensation coverage, and have the resources to provide support in the event a caregiver cannot cover his or her shift.

The availability of workers' compensation insurance is a particularly important advantage in contracting with an agency for providing care. If a caregiver is hurt while serving a protected person, the person's assets may be exposed to a lawsuit by that person. Workers' compensation coverage is intended to limit that exposure by creating insurance to pay for an employee's work-related injuries.

Whether hiring a private care giver or an agency, the conservator should:

1) request references for the caregivers and carefully check them;
2) if hiring through an agency, verify the agency screens, bonds and insures its employees; and
3) if hiring through an agency, confirm the agency performs a criminal background check and drug tests for its employees.

The caregivers should be aware that any valuable items in the residence have been inventoried and to report to the conservator if the caregiver finds any items to become missing.

c. Handling Investments and Financial Holdings

The conservator is charged with the responsibility of developing and implementing a financial plan and budget for the protected person that corresponds with the goals, needs, and preferences of that person. The NGA Standards state:

The [conservator] shall develop and implement a financial plan and budget for the management of income and assets that corresponds with the care plan for

the person and aims to address the goals, needs and preferences of the person. The [conservator] and the guardian of the person (if one exists) or other health care decision-maker shall communicate regularly and coordinate efforts with regard to the care and financial plans, as well as other events that might affect the person.

A. [The conservator] shall value the well-being of the person over the preservation of the estate.

B. [The conservator] shall maintain the goal of managing, but not necessarily eliminating, risks.

C. The financial plan shall emphasize a "person centered philosophy." NGA Standards 18 (III).

Therefore, it is critical the conservator understand the protected person's goals, needs, and preferences. The conservator must understand the needs of the conservatorship before any sound investment decisions can be made. This information is developed in the initial meeting with the protected person and with any other person who may possess financial information about the protected person, and it is revisited on a regular basis.

The conservator has many duties at the inception of the conservatorship. These duties are in place to be sure that the conservator is fully informed of the protected person's financial matters as soon as reasonably possible. Often, a conservator is appointed after a period of gross financial mismanagement by the protected person. As a result, the initial fact-finding by the conservator is important. As part of these initial duties, the conservator must identify all financial issues requiring immediate action.

i. Initial assessment

If the protected person owns investments, the duties at the inception of the conservatorship are equally as important. The conservator should make an assessment of the suitability of these holdings as soon as possible with the assistance of a qualified investment advisor or financial professional. For example, the conservator may learn the protected person has an investment portfolio that has not been reviewed by a professional investment manager for a long time. Because market conditions change, it is prudent that an investment portfolio be immediately reviewed upon the appointment of a conservator. It should also continue to be periodically reviewed going forward with the conservatorship.

In the first review, for example, the conservator may learn that the protected person's investments are concentrated into a single stock. If so, the entire value of the protected person's investments would be tied to the value of that stock. Thus, if a market decline occurs and the value of that stock declines, the value of the protected person's portfolio would be immediately affected. In these situations, the conservator is well advised to consult with an attorney to understand the extent of the conservator's legal duties to diversify the protected person's investment holdings. The conservator must carefully review the order which appointed him or her, as restrictions may be found there as to the ability of the conservator to diversify a protected person's investments.

Generally speaking, the conservator has a duty at the beginning of the conservatorship to identify problems with the protected person's investments. If there is any question about the conservator's obligations with regard to investments received at the beginning of the conservatorship, the conservator should consider bringing those issues to the attention of the Court. When doing so, part of the conservator's evaluation should be any tax cost associated with selling any investment holding. Diversification, for example, may trigger capital gain.

ii. Prudence

The conservator has a duty to manage a protected person's investments prudently. The duty of prudence requires that the conservator act with reasonable care and skill. Importantly, the investment decisions of the conservator should typically not be judged using hindsight. Just because a protected person's investment account lost value, for instance, does not mean that a conservator was negligent in managing the protected person's investments. Stock losses happen for a variety of reasons including stock market volatility which is not within anyone's control—provided the investments are properly diversified. Instead, the ultimate question will be whether the conservator acted prudently based on what he or she knew (or should have known) at the time the investment decision was made. In this regard, a decision to take no action regarding a protected person's investments is still a decision.

A conservator may be liable for losses to an investment portfolio if he or she did not use reasonable skill and care in handling a protected person's investments. If a conservator was appointed based on his or her investment skills, that person will be expected to use those skills when managing the investments in the conservatorship. That person may be liable to the conservatorship for failing to make a reasonably diligent use of those investment skills.

A lay person without skills in investments would not be held to the same standards as a person who has investment expertise. A person who does not have special investment skills would typically be expected to use the care and skill of a person of ordinary judgment in making such decisions. Even if a conservator is very careful when handling a protected person's investments, however, it is important to note that such caution may not be enough.

iii. Seeking professional investment help

A conservator's duty to act prudently may require greater knowledge and experience than what the conservator has. In these cases, the duty of prudence requires the conservator to seek competent guidance and assistance from investment professionals when making investment decisions for the protected person.

The conservator must exercise appropriate care and skill when (a) selecting an investment advisor; (b) defining the scope of that person's work; and (c) monitoring the work of the investment advisor and investments on a regular basis. The conservator would be wise to document in his or her file the interactions he or she has with the investment advisor, including the investment recommendations that person provides.

The duty of prudence also requires the conservator to make investment decisions with caution. Following this duty requires the conservator to make investment decisions with an eye toward not only safeguarding the protected person's investments from loss, but also meeting the financial needs of the conservatorship to the extent resources permit.

While all investments carry some degree of risk, the law will require the conservator to prudently manage that risk. Poor investment decisions may expose a protected person's investments to an unnecessary decline in value as well as a decline in the return those investments might produce. Market risk is a risk that can be mitigated through diversification strategies. Other types of risk include "compensated risk," which results when an investor seeks a high rate of return at the risk of capital preservation. Investing in a high-tech start up is an example of such investing. Therefore, a conservator should carefully consider whether such an aggressive investment strategy is in the best interest of the protected person. The conservator could be held accountable by the Court that appointed him or her if the conservator pursues an imprudent aggressive investment strategy with the protected person's investments and those investments drop in value because of that strategy. Conservators should generally not invest the assets of a protected person in a high risk investment. If the person owned such investments at the time the conservator was appointed, the conservator is wise to obtain a Court order expeditiously which either authorizes their retention or sale.

iv. Duty of loyalty controls

Under the NGA Standards of Practice, the conservator shall manage the conservatorship estate solely for the benefit of the protected person. Therefore, investment decisions must be made with an eye toward promoting the objectives of the conservatorship and not to promote the interests of others.

It would typically be considered a breach of the conservator's duty if he or she were to invest conservatorship assets in property the conservator personally owns. For example, if the conservator owned a small business, it would be a breach for the conservator to invest sums of money from the conservatorship in that business. If the protected person had a documented history of making such investments prior to becoming incapacitated and the conservator wanted to continue that investment practice, there is no question that the conservator must seek court approval before doing so. The duty of loyalty owed by a conservator to a protected person is a strict one, and the conservator must avoid making investment decisions which create a conflict with the conservator's personal financial interests.

v. Diversification

Diversification is a widely accepted strategy to reduce financial risk of loss in an investment portfolio. Diversification involves investing the assets in a single portfolio across different types of asset classes (equities, bonds, and cash equivalents) and investment vehicles. By diversifying an investment portfolio, the investor reduces the risk that events which might affect one stock will have a smaller impact on the investor's portfolio because the risk has been spread amongst many different investments. Losses on one holding might be offset by gains in another.

For example, if an investor has placed the majority of his or her wealth in a single oil and gas stock, his or her net worth is directly correlated to the fluctuations in price of that single stock. In the case of oil and gas stocks, global demand, output, and the rise of new drilling technologies can cause serious changes in the value of these holdings. Allowing the investment portfolio to remain in a single stock can have serious consequences on the net worth of that investor. By diversifying

the investment, the impact of an event in the oil and gas market on the portfolio as a whole is reduced.

vi. Diversification not always automatic

While fiduciary investment law generally favors diversification as a risk management strategy, it is not automatic that diversification should occur in all cases. To diversify a holding means in almost all cases that all or part of it needs to be sold. That sale may create a taxable capital gain which would be counted as income on the protected person's federal and state income tax returns. The tax treatment of such sales can vary wildly after the protected person dies, however, because his or her probate estate is likely to realize a basis adjustment. These laws can change at the federal level from time to time, and current tax advice is critical when making substantial diversification calls.

Accordingly, the question of whether to diversify can be a difficult one because capital gain taxes would be paid from the stock sale while they are living, where they would probably not be if the sales occur soon after the person dies. This is especially true with elderly protected persons.

The bottom-line inquiry is whether the purposes of the conservatorship are best served by diversifying and whether the conservator has a duty to do so under the laws of the jurisdiction in which he or she was appointed. The conservator should evaluate the other assets owned by the protected person and the needs of that person to determine whether diversification suits those needs. Sometimes, the asset at issue may have a special relationship to the protected person. For example, he or she may have invested most of his or her wealth in a family farming operation, and the protected person during his or her capacity insisted that the asset not be sold. In this situation, the conservator is wise to obtain court approval that the asset should not be diversified.

One method of achieving some level of diversification in an investment portfolio is through the purchase of mutual funds. It is not uncommon for a single mutual fund to be invested in dozens of securities within its portfolio. Mutual funds are professionally managed and supported by analysts whose business it is to know and select the best holdings for the fund's objectives. There are many types of mutual funds including equity funds, growth funds, fixed income funds, and index funds. An investor holding shares in a mutual fund will pay the expenses associated with this management.

vii. Caution in selling

Changes to a protected person's investment portfolio must be approached with caution—assuming the conservator has authority to make such changes under the order of appointment. Not only can such changes incur substantial capital gains tax, but they may also undermine the estate plan of a protected person if not done properly. There are times when a stock holding may be registered in "transfer on death" or "TOD" form. When securities are registered in this manner, they pass by operation of law to the named beneficiary upon the death of the account holder. The conservator would be expected not to alter the estate plan of a protected person. As a result, liquidating or changing an investment with a TOD designation should only be done with court approval. The effect of liquidating a security account registered in TOD form may very well have the effect of disinheriting the person named as a beneficiary on the account. Caution and Court approval should be the rules of the day in these situations.

viii. The investment advisor

Diversification and identification of an investment objective will often involve professional skill beyond the experience of many conservators. As a result, a conservator is well-advised to seek the guidance of a competent investment advisor when the conservator has been asked to manage a portfolio with any significant investment holdings.

Selecting the investment advisor is an important first step in this process. The conservator is charged with selecting advisors who have appropriate qualifications and charge appropriate fees for services rendered. Generally speaking, financial advisors either follow a suitability standard or a fiduciary standard. Those following a suitability standard ensure that the investments sold are suitable to an investor's situation. They charge a commission for their work. Those following a fiduciary standard are obligated under that standard to put the investor's interests above their own.

The rules of professional standards regarding investment advisors have undergone disruption over the last several years. During the Obama administration, in 2016, a U.S. Department of Labor measure was adopted to reduce conflicts of interest by financial advisors advising Americans with retirement accounts. The "fiduciary rule" required financial advisors prioritize their clients' best interest and to serve those needs ahead of their own potential compensation.

The U.S. Fifth Circuit Court of Appeals struck down this rule in 2018, citing among other reasons that the regulation was an overreach by the U.S. Department of Labor and that the practical consequences of the regulation economically disincentivized market participants from servicing smaller client accounts.

Although this fiduciary rule is no longer in effect, it has brought a new awareness as to the difference between the two types of financial advisors, fiduciary and non-fiduciary advisors. The fiduciary advisors have a fiduciary duty to their clients, which is the highest standard of client care. This requires that the clients' best interests to be the paradigm for decision-making, even when that interest is contrary to the fiduciary's interest. Although non-fiduciary advisors would argue they are always working on behalf of their clients' best interests, they often work for a company that provides investment products and incentivizes the advisor, by way of commissions, to sell that company's financial products.

The credential of Certified Financial Planner (CFP) is earned by a financial advisor who has undergone training, passed a licensing exam and are held to the requirements of the CFP board.

The conservator should ensure that the experience of the investment advisor selected is a good match for the particular factual circumstances presented by the protected person. Ideally, the advisor would have experience in providing investment advice to fiduciaries. If there is a unique investment occupying a prominent position in the portfolio, the advisor would ideally have experience in dealing with that type of holding. The conservator should interview more than one financial advisor before making a decision as to whom should be selected for this important position. One good reason to undergo this exercise is to ensure that the fees to be charged by the advisor are in keeping with what other advisors might charge for similar services. Ultimately, the conservator's job is to ensure that whatever fee may be paid to the investment advisor is kept to a reasonable level. If the conservator agrees to an unreasonable fee schedule for an investment advisor, he or she will likely be held accountable to the court for making these payments.

Effectively working with an investment advisor first requires that the conservator identify the assets owned by the protected person and his or her income and debts in a timely manner. It is important that the financial advisor have a complete understanding of the protected person's financial picture when it comes time to select an investment objective and asset allocation. The advisor cannot provide fully informed advice if the conservator does not give him or her a complete picture of the protected person's finances.

One of the considerations the advisor is likely to consider is whether the protected person's income is sufficient to pay his or her living expenses and debt obligations. For example, if a protected person has $4,000 in fixed monthly debt but only has $3,500 in monthly income, the conservator knows that at least $500 in the principal of the protected person's estate will be consumed on a monthly basis. These types of considerations are important for the advisor to know when he or she provides investment recommendations to the conservator.

Therefore, the conservator should provide the investment advisor with a complete list of the protected person's assets, current income, projected income, and living expenses. If the protected person has investment holdings, the conservator should bring the financial advisor the last twelve months of statements for each investment account. Information on checking accounts, savings accounts, and annuities should be also provided. Social security, investment income, pension and royalty, and interest income are just a few of the types of income that a protected person may receive. Whatever the income source is, the amount of income the protected person currently receives and is expected to receive should be provided to the financial advisor.

The conservator should also provide the investment advisor with the budget for the protected person, including any anticipated changes to that budget. For example, if a protected person is receiving in-home care but is expected to require a higher level of care, the financial advisor should be provided that information. In addition, the conservator should provide the financial advisor with a list of the conservator's debts, including those debts that are expected to be recurring. Finally, it will be important for the financial advisor to understand the protected person's tax bracket and whether any back taxes need to be paid.

Ideally, the conservator and investment advisor will develop a strong working relationship and, as the financial picture of the protected person changes, the conservator will keep the investment advisor informed. The conservator should meet with the investment advisor regularly to ensure that the investments and asset allocation originally selected remain suitable to the investment objectives selected for the protected person.

ix. Court involvement

While it is clear that a conservator has a duty to act prudently when it comes to managing the financial affairs of a protected person, how to perform that duty is not always so clear.

For example, what if the protected person has accumulated significant wealth by owning a single stock holding? Prudence may call for selling that single stock position and using the proceeds to invest in a diversified investment portfolio, especially if that stock is volatile or is now affected by market conditions not anticipated when the stock was originally purchased. There may be a significant tax burden, however, in selling the protected person's investment. To complicate matters further, the protected person may have often expressed a desire to hold the concentrated

stock position without diversifying it. A conservator must take into account the current wishes and past practices of a protected person when managing his or her financial affairs. What does a conservator do if continuing to own another type of asset (such as a vacant home) presents a serious financial risk to the protected person, who was often heard to want to retain that asset?

In such circumstances, and in others where there is uncertainty over the conservator's powers and duties, the conservator may seek instruction from the Court. That instruction may provide clarification as to the conservator's duties in difficult situations and, in the process, provide a level of protection to the conservator. New Mexico law provides:

B. A conservator may petition the appointing court for instructions concerning his fiduciary responsibility.

C. Upon notice and hearing, the court may give appropriate instructions or make any appropriate order. NMSA 1978 § 45-5-416.

Court instruction may also be proper when the conservator is considering paying substantial monthly charges and is concerned that he or she may be later criticized for over-spending. Such could be the case with paying for in-home care costs which can be extremely expensive depending on the facts of each case. Having the Court review these anticipated charges before they are incurred is prudent.

As the above-referenced statute makes clear, a conservator initiates the process by filing a petition for instructions. The Court would be expected to conduct a hearing on that petition. Notice of that hearing, along with a copy of the conservator's petition, should be delivered to those individuals the Court identified at the beginning of the conservatorship as persons entitled to notice. The Court may require additional notice be provided to other persons who may have an interest in the matter.

If a conservator has reasonable uncertainty as to his or her fiduciary duties, it is important to understand that he or she must move promptly if the conservator decides to seek Court instruction. In the case of a concentrated stock position, sudden market fluctuations can negatively impact the value of the person's portfolio without much forewarning. In the case of vacant real estate, the value of such an asset can be negatively impacted by intruders, squatters, or vandals. In these situations, the longer the issue goes unmanaged, the greater the risk that exists to the protected person's assets. Prompt action must be considered in order to minimize liability to the conservator who may otherwise be found to have been negligent in failing to move quickly.

x. Making a budget

The protected person's money and resources must be used to pay for the care, education, support, and rehabilitation of the protected person. To competently prepare this, the conservator must understand the nature of the incapacity, condition, and functional capabilities of the protected person.

The NGA Standards require that a conservator become educated about the protected person's incapacity. NGA Standard 18 (II).

New Mexico law speaks generally as to disbursement decisions a conservator must make:

…the conservator is to expend or distribute sums reasonably necessary for the support, education, care or benefit of the protected person with due regard to:

(a) the size of the estate, the probable duration of the conservatorship and the likelihood that the protected person, at some future time, may be fully able to manage his affairs and the estate which has been conserved for him;

(b) the accustomed standard of living of the protected person and members of his household; and

(c) other funds or sources used for the support of the protected person. NMSA 1978, § 45-5-425 (A)(2).

The conservator may also expend funds of the protected person for the support of persons legally dependent on the protected person and others who are members of the protected person's household who are unable to support themselves and who are in need of support. Included in that class of individuals are an adult disabled child or a sister or brother who lives with the protected person and depends on the protected person for support. Because conservatorships are usually only managed for the benefit of a single person (the protected person), however, the conservator should get Court authority for making such expenditures before doing so. This sets future expectations not just for the conservator but also with the Court when the conservator's annual report is reviewed.

The NGA Standards provide good general factors the conservator should keep in mind when making financial decisions for a protected person.

II. When making decisions the [conservator] shall:

A. Give priority to the goals, needs and preferences of the person and

B. Weigh the costs and benefits to the estate.

III. The [conservator] shall consider the current wishes, past practices, and reliable evidence of likely choices. If substantial harm would result or there is

no reliable evidence of likely choices, the [conservator] shall consider the best interests of the person. NGA Standard 17 (II), (III).

The financial support of a protected person begins with a well-considered budget. There are several fundamental principles in the NGA Standards which provide guidance to the conservator when managing a protected person's financial affairs. These principles include the following, under which the conservator shall:

1) manage the financial affairs of the person in a way that maximizes the dignity, autonomy and self-determination of the person;
2) when making decisions, give priority to the goals, needs and preferences of the person and weigh the costs and benefits of those decisions to the person's estate;
3) provide competent management of the person's financial affairs;
4) consider the current wishes, past practices and reliable evidence of likely choices of the person. If substantial harm would result by implementing those choices or if there is no reliable evidence of a person's likely choices, the conservator shall consider the best interests of the protected person;
5) assist and encourage the person to act on his or her own behalf and to participate in decisions;
6) in a manner consistent with the order of appointment and New Mexico law, exercise authority only as necessitated by the person's limitations; and
7) manage the estate only for the benefit of the protected person.

FURTHER READING: NGA STANDARD 17 (DUTIES OF GUARDIAN OF THE ESTATE).

Managing the conservatorship for the protected person's benefit requires that the conservator understand not just the extent of resources available to the person but also the needs, goals, and preferences of that person. With those goals, preferences, and needs understood, the conservator must develop a financial plan and budget which addresses them. Those plans will necessarily require an assessment of the person's financial limitations.

If the protected person has a guardian who is a person other than the conservator, the conservator must work closely with the guardian to develop a budget. The NGA Standards state:

The [conservator] and the guardian of the person (if one exists) or other health-care decision-maker shall communicate regularly and coordinate efforts with regard to the care and financial plans, as well as other events that might affect the person. NGA Standard 18 (III).

The conservator should determine the needs of the protected person and how much it will cost to meet those needs. The conservator should estimate a range of costs for meeting the protected person's needs, depending on his or her financial limitations. For example, the cost of assisted living care can vary considerably based on the quality of the facility and the level of services provided. The length of time certain services will be required has an obvious impact on the cost of those services. Once the costs for meeting a person's needs are understood, the reasonableness of these costs must be evaluated in light of the person's preferences, income, assets, and the amount of time the person is expected to require the service being considered.

Take the case of a conservator who is considering a living option for a protected person which, when combined with all other expenses for the person, will cost $4,500 a month as an example. The protected person has monthly income in the amount of $3,000. It is expected that this living option will be required for approximately five years. In this example, the conservator will need to review the person's assets to determine how long the person's assets can support a monthly payment in the amount of $1,500 taking into consideration not just all known expenses but also considering a contingency in the event of an emergency. When making these budget decisions, the NGA Standards require that the conservator, when formulating a budget for a protected person, shall "value the well-being of the person over the preservation of the estate." NGA Standards 18 (III)(A). The conservator must regularly revisit the budget to determine whether expenses or income have changed and whether the budget needs to be revised.

When making a budget for a protected person, unless the Court order states otherwise, the person's assets are to be used for the benefit of that person, and the conservator's focus must be on serving the protected person in a manner that reasonably meets his or her goals, needs, and preferences. The conservator's focus must not be on serving the interests of those who might inherit assets upon the protected person's death. If there is tension between the interests of the conservatorship and those who may inherit and who are displeased with a conservator's financial decisions, the conservator is wise to bring the matter to the attention of the Court by filing a petition for instructions.

That the conservator must apply the person's resources for the benefit of the person this conclusion does not give the conservator license to spend money unnecessarily for the protected person. Indeed, the conservator is fully accountable for all disbursements from the protected person and is required to make disbursements that are reasonable and prudent. The conservator should consult with the protected person, the guardian, the health care agent, and others when determining what is reasonable in his or her situation. While it is not possible to itemize every factor that may be taken into account when developing the budget, the principal objective is to put the interest of the protected person first. Reasonably meeting the person's goals, needs, and preferences is the conservator's objective—even if that means reducing the inheritance of the protected person's ultimate heirs.

xi. Set up a conservatorship checking account and keep good records

The conservator will likely be kept busy when managing the financial affairs of the protected person. While this may be the case, he or she might think that his or her duties end there and that

maintaining records of the conservatorship is an annoying detail or afterthought. The conservator should never make the mistake of viewing the conservator's record keeping function in this way. Instead, it is crucial that the conservator understand that proper record keeping is his or her job. The Court expects the conservator to do it well.

A conservator shall keep estate assets safe by keeping accurate records of all transactions and be able to fully account for all the assets in the estate. NGA Standard 17 (X).

It is not possible to itemize what records must be maintained in every case, because the financial situation of every protected person will be different. Generally speaking, the conservator must know that he or she has the burden to document (a) how all money the protected person received was handled; and (b) how the conservator spent the protected person's money. If the conservator is unable to document how he or she spent the person's money or what he or she did with income paid to the protected person, the conservator runs the risk of having to reimburse the conservatorship estate from his personal funds with the amounts which the conservator cannot document.

The NGA Standards address this.

The guardian shall employ prudent accounting procedures when managing the estate. NGA Standard 17 (XIV).

It follows that the conservator has a duty to keep proper records to document all actions the conservator takes and all activity in every account over which the conservator has control during the period of time that the conservator holds the position. These records must include the receipt of all money received into the conservatorship, the disbursement of all money from the conservatorship, and a list of all conservatorship assets.

If the protected person has investment accounts, regular and year-end investment statements must be kept. Keeping all income tax records, including tax returns, tax forms, and work papers is necessary to keep good records. If assets are sold during the course of the conservatorship, it is essential that the conservator maintain complete records showing not just the sale, but the information upon which the sales price was determined (such as opinions of value). If the conservator signs contracts for the protected person, the conservator must have copies of those contracts. If the conservator receives a claim against the conservatorship estate, the conservator must maintain all documents showing how he or she addressed that claim.

If the conservator pays property taxes for the protected person, the conservator must have the property tax bill and proof of payment. If the conservator pays a premium for an insurance policy for the protected person, the conservator should have a copy of the policy as well as proof of the premium payment made. If the conservator receives payment for a mineral interest, the

conservator must have the summary which was sent with the distribution for that interest. If the conservator pays for repair work for a protected person's home, the conservator must keep the invoice from the repairman as well as information showing the payment of the invoice. If the conservator buys clothes for the protected person, the conservator must keep the receipt for the purchase.

New Mexico law requires initial and annual reports of all activity conducted by the conservator during the reporting period. The initial report is due ninety (90) days from the date of the order appointing the conservator. New Mexico law states:

A. Within ninety days after his appointment, every conservator shall prepare and file with the appointing court a complete inventory of the estate of the protected person together with his oath or affirmation that it is complete and accurate so far as he is informed.

B. The conservator shall provide a copy of the inventory to the protected person if he can be located, has attained the age of fourteen years, and has sufficient mental capacity to understand these matters, and to any parent or guardians with whom the protected person resides.

C. The conservator shall keep suitable records of his administration and exhibit the same on request of any interested person. NMSA 1978 § 45-5-418.

The forms for completing this initial report are available on the website of the New Mexico Supreme Court.

Thereafter, the conservator has an obligation to file annual reports. These reports are due to be filed every year, thirty (30) days from the anniversary date of the conservator's appointment. The annual report forms, also located on the Supreme Court's website, require detailed explanations of all money spent and received by the conservator on behalf of the protected person.

Because the initial and annual report forms require the conservator to provide detailed information to the Court and the persons whom the Court rules should receive them, it is very important that the conservator keep good records of all actions the conservator takes, including all money spent and received. By keeping these records updated on a regular basis, the conservator will find completing the annual report form to be less difficult.

Keeping thorough records documenting the conservator's actions is mandated by law and will be necessary to answer questions which may later arise over a conservator's administration. Those questions can be raised by any number of sources, from other interested persons to the Court, Adult Protective Services, or other New Mexico state agencies. The Conservator's Reports are required to be reviewed by the State Auditor who may raise questions. The conservator must be prepared to quickly respond to information requests, and a strong record-keeping system allows him or her to do just that.

New Mexico law specifically requires the conservator to the maintain conservatorship records for at least seven (7) years unless the time period is adjusted by the Court supervising the conservatorship. While the controlling law does not state when the seven (7) year period begins to run, to be safe, all New Mexico conservators should assume that they have an obligation to keep the required records for a period of seven (7) years following the termination of the conservatorship or the end of the conservator's appointment.

The conservator may find that centralizing certain financial activities in a single account may simplify the record-keeping function. Centralizing bill paying from a single bank account can be very helpful to the conservator, because doing so allows a single source to be used to pay for and track payments. Similarly, depositing all income such as pension benefits, social security payments, and investment income into a single account, even if later transferred to another account (for example, in order earn more interest), will make record keeping easier.

As to all accounts over which the Court has given the conservator control, he or she must be able to identify the date, amount, and purpose of every disbursement which occurs while he or she is conservator. Thus, the conservator must note: (1) the check number; (2) to whom the check was made; (3) what it was for; (4) the date it was made; and (5) the amount of the check. The conservator must keep the receipts for all payments made, preferably filed in chronological order by date.

When making payments, the conservator should make payments directly to the person or entity receiving the payment, and this payment must be done in a manner that can be documented. Because cash payments are very difficult to track, the conservator is strongly discouraged from making cash payments or making cash withdrawals from a protected person's bank account.

There is an exception to this rule. Modest allowances for the benefit of a protected person can promote the autonomy and independence of that person. Accordingly, asking for receipts for the expenditure of such small amounts of money can be overly restrictive and intrusive, depending on the person's functional abilities.

If the conservator elects to provide a modest cash allowance to the protected person, a step which may be reasonable in some cases, the conservator still remains responsible to account for these disbursements in the conservator's annual report. Because the conservator must report annually as to the management of a protected person's assets and income, the conservator is wise to have the allowance amount approved by the Court. If not already defined by a Court order, the amount of any cash disbursement for a protected person's allowance must be responsibly determined with an eye toward promoting the person's autonomy but also preserving his or her resources. In these instances, if cash disbursements are made, the conservator must carefully note each disbursement to the protected person.

However, because cash withdrawals may be treated as suspect by the Court or other family members, the conservator should be careful when making them and, if possible, keep such disbursements to a minimum. Where possible, the conservator should request that the protected person sign a receipt for the cash received and keep the receipt in the conservator's records. Low limit credit cards or pre-paid debit cards (such as True Link cards) in a limited account are available to manage such cash withdrawals and provide some ability to track the distribution. As a result,

these are preferred vehicles for providing an allowance. Those who are in a long-term care facility and receiving Medicaid may be entitled to a personal care allowance.

The use of a prepaid debit or credit card is preferred if the conservator is providing money to third persons for the benefit of the protected person. If the conservator disburses cash to a third person, such as a caregiver or companion, to be used for the benefit of the protected person, then the conservator must have receipts showing how the cash was spent. The conservator must insist on receiving receipts from such third persons for all cash provided for the benefit of the protected person.

As income is deposited into the account, the conservator must note: (1) the amount of such income; (2) where it was from; and (3) when it was deposited. If depositing income from more than one source using a single deposit, the conservator must account for each source of income. For example, the conservator must show how much of the deposit was attributable to a social security payment, pension payment, payment on a real estate contract, etc.

Using a checking account from which the bank returns copies of all negotiated checks and deposit slips will aid the conservator in good record keeping. In a previous section of this Handbook, recommendations are provided as to how to title such a checking account. Also as stated in this Handbook, the conservator must keep the protected person's money in an account separate from the conservator's funds and from the funds of other protected persons.

xii. Selling or Borrowing Against Estate Assets

As mentioned repeatedly in this Handbook, selling a protected person's property is an issue which the conservator must approach with caution.

While the conservator is empowered to acquire and dispose of a protected person's property under New Mexico law (unless the order appointing the Conservator states otherwise), the NGA Standards require a court order or other independent review before the conservator disposes of the person's property. The better approach, therefore, is for the conservator to obtain prior Court approval for the sale of any significant asset which the protected person owns. This is especially true if the asset to be sold is the protected person's residence or important tangible personal property, such as a collectible car, firearm or artwork.

Whenever property is sold, the conservator must ensure that the sales price is appropriate, which will almost always be the asset's "fair market value." Fair market value is the amount of money that a willing seller would pay to a willing buyer in an open market. If the conservator must pay a commission to a person for brokering a sale, such as the case with a real estate broker in the sale of land, the amount of that commission must be reasonable. What is reasonable will be defined by the customary commission charges one would expect to pay in the community for similar services. The conservator may only incur expenses that are reasonable in amount.

It is part of the conservator's record-keeping function to ensure that he or she can document exactly how a sales price was determined. If publicly traded stock is being sold, for example, knowing the value on the date of the sale should be easy. If real estate is being sold, however, an appraisal or market analysis from a competent appraiser or realtor should be obtained to determine fair market value. In the case of borrowing, it is the conservator's duty to document why the loan was made and its terms. The terms must be reasonable in light of the purpose of the loan.

When selling a protected person's property, when borrowing against the protected person's property, and when hiring a broker who may earn a commission in the sale process, the conservator must avoid conflicts of interest at all costs.

The NGA Standards state in material part:

B. The [conservator] may not sell, encumber, convey, or otherwise transfer the person's real or personal property or any interest in that property to himself or herself, a spouse, a coworker, an employee, a member of the board of the agency or corporate guardian, an agent, or an attorney, or any corporation or trust in which the [conservator] has a substantial beneficial interest.

C. The [conservator] may not sell or otherwise convey to the person property from any of the parties noted above.

D. The [conservator] may not loan or give money or objects of worth from the person's estate unless specific prior approval is obtained.

E. The [conservator] may not use the person's income and assets to support or benefit other individuals directly or indirectly unless specific prior approval is obtained and a reasonable showing is made that such support is consistent with the person's goals, needs and preferences and will not substantially harm the estate.

F. The [conservator] may not borrow funds from, or lend funds to, the person unless there is prior notice of the proposed transaction to interested persons and others as directed by the court or agency administering the person's benefits, and the transaction is approved by the court.

G. The [conservator] may not profit from any transactions made on behalf of the person's estate at the expense of the estate, nor may the [conservator] compete with the estate, unless prior approval is obtained from the court. NGA Standard 20 (II).

New Mexico law forbids the conservator from entering into a sale or encumbrance with the protected person's property without a Court order. Thus, neither the conservator nor the conservator's family may purchase assets from the protected person without an express Court order that allows the sale to occur. New Mexico law states:

Any sale or encumbrance to a conservator, his spouse, agent or attorney, or to any corporation or trust in which he has a substantial beneficial interest, or any transaction which is affected by a substantial conflict of interest is voidable

unless the transaction is approved by the court after notice to interested persons and others as directed by the court. NMSA 1978 § 45-5-422.

The NGA Standards specifically address selling a protected person's assets:

In considering whether to dispose of the person's property, the [conservator] shall consider the following:

A. Whether disposing of the property will benefit or improve the life of the person,

B. The likelihood that the person will need or benefit from the property in the future,

C. The previously expressed or current desires of the person with regard to the property,

D. The provisions of the person's estate plan as it relates to the property, if any,

E. The tax consequences of the transaction,

F. The impact of the transaction on the person's entitlement to public benefits,

G. The condition of the entire estate,

H. The ability of the person to maintain the property,

I. The availability and appropriateness of alternatives to the disposition of the property,

J. The likelihood that property may deteriorate or be subject to waste, and

K. The benefits versus the liability and costs of maintaining the property. NGA Standard 19 (III).

Some of the most important reasons to sell assets include to the need to generate liquidity to pay bills or to reduce the cost or liability of continuing to carry the property. The typical examples of the latter include continuing to own a house or car which are not being used and which will not be used for the rest of the person's lifetime. Before doing so, and certainly before asking the Court to approve a sale of a protected person's property, there are several things for the conservator to consider.

First, selling an asset may affect the protected person's eligibility for Supplemental Security Income, Medicaid, and other governmental benefits. This is particularly true if the asset to be sold, such as the protected person's home, is considered exempt by these programs. For example, the

Medicaid program that helps pay for nursing home care will consider a protected person's home to be exempt as long as the protected person wants to return home. This is true even if the protected person's health is such that he or she cannot return home. If the home is sold, however, the money received from the sale will not be exempt and the protected person may no longer be eligible for Medicaid assistance.

Second, selling an asset may have capital gains tax consequences. For example, if a security is sold, the difference between the cost of the security (referred to as "its basis") and the net sales price will generally be considered capital gain and may subject to capital gain tax treatment on the protected person's income tax return. Capital gain may be realized in the sale of any number of other types of assets. The sale of other business investments, vacation property, or a plot of land may all generate capital gain which ordinarily must be reported on a person's income tax return. As to a person's primary residence, however, the Internal Revenue Service exempts a certain amount of gain from taxation. Therefore, the sale of a person's primary residence will usually not generate a taxable capital gain. If the conservator is not sure about the tax consequences of a particular sale, he or she should speak with a qualified tax professional before the asset is sold. The tax treatment of the sales proceeds may affect the decision to sell or hold the property at issue.

Third, if an asset that is specifically devised in the protected person's will is sold, the person who would have received that asset may be entitled to the amount that the protected person received from the sale after the protected person's death. As a result, the conservator should keep good records showing how much the conservator received as a result of the sale of the specifically devised item.

Fourth, before the protected person's home is sold, the conservator should consider and research the suitability of alternatives to a sale such as obtaining a home equity loan or a reverse mortgage (where the bank will pay the protected person a monthly amount in exchange for a mortgage that will be paid when the house is sold). Before acting on any particular alternative, it is a good idea to speak with a New Mexico lawyer regarding how the alternative will be treated under New Mexico law, including New Mexico's Medicaid rules. Lending terms should be carefully scrutinized when these alternatives are being considered. As stated above, however, the conservator should seek Court approval before agreeing to any alternative such as a home equity loan or reverse mortgage. The conservator should also obtain Court approval of the sale of the protected person's home before signing a listing agreement with a real estate broker.

xiii. Insurance

It is important that the conservator determine what insurance policies may be in place for the protected person and the protected person's property. The conservator should make this determination as soon as possible so arrangements can be made to pay a policy premium when it comes due. In most cases, if a premium is not timely paid, the policy of insurance will lapse. If a insurance policy lapses, there will be no coverage available when it might be needed. In the case of health, liability, or property insurance, lapsed coverage can have serious financial consequences for the protected person who may be exposed to paying out of pocket for a loss that might be otherwise covered by an insurance policy.

Part of the conservator's review should include making a judgment as to whether all insurance policies a protected person might have are, in fact, necessary. The conservator should determine

whether different insurance policies might provide coverage for the same event and, if so, cancel the redundant policy.

Especially when an older protected person is involved, the conservator should determine whether the person has long term care insurance. Long term care insurance may be available to provide financial assistance for certain covered recurring expenses, such as the cost of assisted living care. If this type of insurance benefit is available to the protected person, it is the conservator's duty to pursue those benefits for the person.

If the protected person owns a motor vehicle which is being operated whether by that person or another person for the benefit of the protected person, it is the conservator's obligation to ensure that the motor vehicle is adequately insured. The amount of that insurance must meet the financial responsibility requirements under New Mexico law for death, bodily injury, and property damage. Automobile insurance must be obtained from an insurance company that is licensed to do business in the State of New Mexico. If a vehicle is not being used or if the company providing the vehicle insurance is an out-of-state insurance company, the conservator must complete and file an affidavit with the New Mexico Taxation and Revenue Department, Motor Vehicle Division. Such an affidavit must be filed annually for vehicles not being used or upon the expiration of the policy term for policies issued by out of state insurance companies.

If the protected person owns real property, such as a home or building, the conservator should ensure that the property is insured with proper amounts of casualty insurance. Such insurance may provide insurance coverage not just for certain types of damage to structures, but also for liability for injuries that a person may suffer while visiting the protected person's property. If the property is vacant, the conservator should consider purchasing a "vacancy rider." If the protected person is being cared for in her home, the conservator should ensure there is insurance that will cover any work-related injuries of those who are being employed by the conservator to provide care to the person.

Does the protected person own items of tangible personal property which are insured? If so, the conservator should be sure to continue paying the premium for such a policy (often called a "personal articles policy"), which may be in the form of a rider to a homeowner's insurance policy. Expensive jewelry, artwork, and firearms are some of the types of property that might be insured by such a policy. In cases where a protected person has caregivers or service providers coming in and out of his or her home, such insurance could be useful in the event an item of personal property later becomes missing.

Finally, the conservator should determine whether the protected person has life insurance and, if so, whether that insurance is "term insurance" or a whole-life insurance product with cash value. Generally, term insurance coverage will provide a death benefit for as long as the premium is paid, and the policy remains in force. Typically, there is little or no cash value to be received if a term policy is cancelled or lapses. Other insurance products, however, may have a cash value. It is important for the conservator to make this determination early in the administration of the conservatorship.

If the conservator determines that a life insurance policy exists for the protected person, the conservator should continue paying the premiums for that policy, assuming the availability of resources to continue to do so. If the conservator believes that a life insurance policy should be

discontinued whether due to the burden on the person's finances or otherwise, the conservator should seek and obtain a Court order approving a plan to discontinue the policy before he or she stops the premium payment. In making this decision on his or her own without Court approval, the conservator runs the risk of being sued by the beneficiary of the death benefit for allowing the policy to lapse. If the protected person has a financial advisor, that individual may offer helpful recommendations concerning the continuation of the policy under consideration.

If the protected person does not have adequate health insurance coverage, the conservator must put such insurance in place, assuming the availability of resources to pay the premium. For example, if a protected person needs a supplement to Medicare coverage, or a Medicare Part D drug coverage program, the conservator should arrange to purchase this insurance coverage. When making this decision, the conservator should consider consulting with a person knowledgeable about insurance. An insurance expert can advise the conservator as to the protected person's insurance needs and how to obtain the best policy for the protected person. Additionally, a Benefits Counselor through the state Area Agency on Aging can provide helpful information about insurance benefit programs and Medicare Part D drug coverage issues.

xiv. Filing insurance claims

Recall that the guardian of a protected person is charged with the duty to ensure that the protected person receives proper medical care. Embedded in that duty is responsible advocacy.

A guardian shall ensure that all medical care for the person is appropriately provided and that the person is treated with dignity. NGA Standard 14 (II).

Also recall that, under the NGA Standard 18 (V), the conservator shall obtain all public and insurance benefits for which the person is entitled. When these duties are read together, it is clear that the conservator's duty is to work with the protected person's guardian or health care decision maker to ensure that the person is receiving the benefits to which he or she is entitled to under any insurance policy. The guardian and conservator are partners in this endeavor.

Navigating the field of managed care can be difficult, and there may be times where an insurance company will resist paying for certain medications or treatments. In these cases, the conservator should work with the guardian or other health care decision-maker to advocate that the protected person receives the medications, treatment, or other service that he or she needs. Because the need for medical treatment is often time sensitive, it is important that the conservator engage in this process with the guardian in a timely manner and remain responsive throughout. If coverage is denied for a particular treatment or therapy, the guardian and conservator should consider appealing that decision within the ranks of the company providing health insurance coverage. If a medication is needed that insurance won't cover, the guardian and conservator should consider applying directly to the manufacturer of the medication to determine if that company offers financial assistance to reduce the cost of the medication. If the protected person needs a service or therapy which is just not covered and for which no financial assistance is available, however, the conservator should work with the guardian to determine whether the person could benefit from

a substitute therapy, as is often the case with "generic" prescription medication.

Because there are times where several people may be involved with different companies (from insurance companies, pharmacies, and medication manufacturers) and because it is easy for a person to get lost in the insurance bureaucracy, the guardian and the conservator should maintain a written journal that documents all phone calls and contacts concerning questions of insurance coverage. All written communication should be saved.

There are times where similar levels of advocacy may be necessary under other types of insurance policies such as long-term care policies. If the conservator believes that a certain treatment or benefit for the protected person was wrongfully withheld by the long-term care provider, the conservator should work with the guardian or health care decision maker to appeal that decision or obtain a second review. In these cases, it may be necessary to hire a consultant, such as a registered nurse, to provide an opinion that the protected person's condition satisfies the requirements of the long-term care policy. If the involvement of such a person is necessary to secure benefits for the protected person, the conservator would normally be expected to pay for the cost of that consultant's services from the funds of the protected person.

The conservator should be sure that the protected person's insurance provider is paying for the items included in the insurance policy. That may involve tracking whether a deductible has been satisfied on a per visit or annual basis. Often, an insurance company will provide an Explanation of Benefits form which explains the cost of the service, the amount of coverage the company will provide for each service, and the expected contribution by the protected person. The conservator should review these forms and, in collaboration with the guardian, ensure that all insurance benefits are realized. The conservator should make sure that all insurance claims are filed in a timely manner.

xv. Pay taxes

Unless the Court order limits the scope of the conservator's authority, the conservator must arrange for the preparation and filing of a protected person's Federal and State income tax returns. Because the financial requirement to file an income tax return is based upon the filer's level of income, if the protected person earns an income in an amount below the annual filing requirement, it may not be necessary to file an income tax return for him or her.

As the conservator is entitled to pay reasonable expenses from the conservatorship estate, the conservator should employ a qualified accountant to prepare and file the current and any past due income tax returns for a protected person. Using a professional accountant for this function is prudent on many levels. Not only does the Court expect a protected person's income tax returns to be filed correctly, but an experienced accountant will be able to identify all deductions which can be used to offset a protected person's income tax liability. Nursing home costs, for example, may sometimes be used to reduce a protected person's income tax liability, and a professional accountant would be expected to maximize all such deductions.

Especially with older adults who have suffered from a progressively worsening cognitive problem such as Alzheimer's type dementia, it is not uncommon for a conservator to learn that the protected person is not current in his or her filing obligations for a prior year or even multiple prior years. In these cases, it is the conservator's duty to correct this problem by filing the late returns and

paying the taxes from the protected person's estate or, alternatively, reaching a payment arrangement with the taxing authority. If the protected person did not file tax returns or pay taxes as a result of disability, the IRS may waive any penalties (but not interest) for late filing based on a finding of reasonable cause. Most reasonable cause explanations require the submission of documentation to support that claim. Those documents may include medical records or a copy of the order adjudicating incapacity. In the case of the latter, because the order is sequestered, the Court must approve providing such information to the taxing authority.

A professional accountant can provide other assistance in addition to tax preparation. For example, if a private caregiver is hired for the protected person, payroll taxes such as Social Security, Medicare, and unemployment insurance may be owed, and the accountant can provide advice on how to address these financial obligations. The wisdom of hiring a private caregiver in this scenario is explored elsewhere in this Handbook and contrasted with hiring a separate caregiver agency which, while usually more costly than a private caregiver, would be expected to pay these additional costs on behalf of its employee. The conservator should consult with a lawyer to determine the suitability of hiring a private caregiver. If the decision is made to pursue that type of care, an accountant should be involved to be sure that the financial aspects of that relationship are handled properly. An experienced accountant can also assist the conservator in maintaining his or her accountings and reporting income generated by assets located in other states.

xvi. The Protected Person's Will and Estate Plan

What is an estate plan? An estate plan consists of an instrument or instruments that state how a person's assets will pass upon the death of that person. While a last will and testament immediately comes to mind as the document that most commonly performs this function, there may be other documents in any given estate which perform a similar function. A person's estate plan may consist of any one or more of the following types of instruments:

1) Last will and testament;
2) Trust agreement;
3) Exercise of power of appointment;
4) Beneficiary designation;
5) Joint tenancy with right of survivorship (either on a financial account, deed or title);
6) Payable on death beneficiary designation; and
7) Transfer on death beneficiary designation.

Under New Mexico law, the conservator has the authority to examine the protected person's will. That authority likely extends to inspecting other estate planning papers, such as trust instruments and beneficiary designations. Understanding the importance of these documents to the person-centered administration of a protected person's financial affairs, the NGA standards state:

The [conservator] shall determine if a will exists and obtain a copy to determine how to manage estate assets and property. NGA Standard 17 (XV).

It is important that the conservator examine and understand the dispositions contained in these instruments. Why is this important? A conservator has a duty to manage the protected person's estate (to the extent that this is possible while providing first for the needs of the protected person) in a way that does not change who receives the protected person's property after the protected person dies.

New Mexico law states:

In investing the estate, and in selecting assets of the estate for distribution under Subsection A of Section 5-425, and in utilizing powers of revocation or withdrawal available for the support of the protected person, and exercisable by the conservator or the court, and in exercising any other powers vested in them, the conservator or the court should take into account any known estate plan of the protected person, including his will; any revocable trust of which he is settlor; and any contract, transfer or joint ownership arrangement with provisions for payment or transfer of benefits or interests at his death to another or others which he may have originated... NMSA 1978 § 45-5-427.

Performing one's duties as conservator in a manner that respects the protected person's estate plan can present challenges. As the above statute states, however, when making disbursements for the protected person's benefit, the conservator should take into account any known estate plans the protected person has in place.

How might this rule play out in any given case? If the protected person owns three Certificates of Deposit (CD), each of which lists a different payable on death beneficiary, and one of them is being considered to be closed to generate funds to pay for the protected person's care, the person who is the payable on death beneficiary on that CD would not inherit that CD upon the death of the protected person because the conservator has closed the account. The conservator should consider spreading the payment of the protected person's expenses across all three certificate of deposit accounts so that not just one account bears all the financial burden of caring for the person. In this example, the conservator is wise to speak to all concerned and to seek a court order approving the application of the protected person's expenses in this manner.

Because New Mexico law states that the conservator "should take into account any known estate plan of the protected person" when making disbursements for the protected person and because this directive can be difficult to implement in practice, the conservator should consider speaking with a knowledgeable lawyer if there are concerns over how to preserve the person's estate plan. It may be that, in difficult situations, the conservator is best served by seeking Court approval of a

distribution plan. While these types of situations can definitely be complicated, at the minimum what can be said is that the conservator should not take any steps to alter beneficiary designations on a protected person's financial account(s).

What is the result if the conservator sells property which is specifically devised in a protected person's will? A "specific devisee" is a person named in a will to receive a specific item of property. If the protected person has devised a specific item of property to a person in his or her last will and testament and the conservator sells that item, the devisee identified in the protected person's will is likely entitled to receive the net sales proceeds upon the death of the protected person. For example, if the protected person's will devises his or her home to "John" and the conservator sells the house, John will likely be entitled to receive the net sales price of the house upon the death of the protected person. This rule only applies to specifically devised items of property. However, the ability of a specific devisee to inherit the net sales proceeds of a specifically devised item upon the protected person's death does not prevent the conservator from selling assets which may be needed to pay for necessary expenses for the protected person during his or her life. Elsewhere in this Handbook, we have recommended seeking Court approval of significant asset sales.

New Mexico's non-ademption statute is found at NMSA 1978 § 45-2-606 (1993).

May a conservator execute estate planning documents for a protected person? A conservator cannot make a will for a protected person under New Mexico law. Unless the Court order limits the conservator's authority, however, the conservator has other powers under New Mexico law that may affect a protected person's estate planning. These powers include creating a trust for the protected person. If the conservator wishes to create a trust for the benefit of a protected person, the conservator must obtain Court approval before doing so. Other authority, such as making exceptional gifts (see below) and changing beneficiary designations under life insurance policies and annuities can be exercised but only with the prior approval of the Court.

Trusts are effective to avoid the probate process only if they contain all assets the person owns where the ownership is contained in a formal legal title such as a deed, account agreement at a financial institution, or motor vehicle title. If a protected person has a trust which exists for his or her benefit during life but has not funded all of his or her assets into the trust, the conservator should consider funding that trust by transferring the ownership of the protected person's property into that trust. Transfer to a trust effectively places legal title in the transferred assets in the name of the trustee. Therefore, if authority to transfer the assets is not contained in the order appointing the conservator or in any other Court order, the conservator should obtain Court approval before transferring the protected person's assets to the trust. The conservator is wise to speak to effected parties when this decision is made. In that process, the conservator must be sure that the transfer of assets to the trust does not effectively destroy any beneficiary designation or joint tenancy agreement that might control the disposition of the transferred asset upon the death of the protected person.

If the conservator desires to proceed with funding a protected person's trust, the conservator should strongly consider hiring a qualified legal professional to assist in that process. The same recommendation holds for a conservator of a large estate where estate tax is likely to be assessed upon the protected person's death. The conservator should consult with counsel to determine if steps can be taken to reduce the exposure of the person's estate to estate taxes and, if such steps are available, pursue Court approval of those steps before taking them.

What does the conservator do with the originals of a protected person's estate plan? If the protected person has a will, trust, or other estate planning document, it is the conservator's job (unless the court order limits the conservator's authority) to take steps to safeguard those documents along with any other important legal documents the protected person has. These documents would ideally be accessible upon the protected person's death.

xvii. Medicare, Medicaid, and other public benefits

For those protected persons without considerable financial resources, public benefits can be vital to the person's survival. The conservator must ascertain what public benefits, if any, may be available to the protected person. The conservator is charged with the duty of securing the person's right to receive these benefits. This is particularly important if the protected person is in a nursing home or otherwise needs long term care and may be eligible for Medicaid assistance.

Equally as important is that the conservator not make decisions which disqualify a person from receiving government benefits he or she may already be receiving.

The rules for qualifying for Medicaid are very complex and are beyond the scope of this Handbook. The conservator should consider retaining qualified legal counsel to determine what benefits the protected person may be entitled to receive and how the process to apply for those benefits is initiated. The availability of public benefits may affect the way the conservator manages the protected person's estate. For example, even for a single person, the home is usually exempt from being considered a financial resource in deciding whether the person qualifies for nursing home benefits under Medicaid. As a result, in many cases, the home does not have to be sold before the person will qualify for Medicaid benefits.

The Senior Citizens Law Office in Albuquerque and the Bernalillo County Department of Senior Affairs may be able to provide answers to questions on Medicare and Medicaid issues. Medicare and Medicaid are completely different programs with different rules and different benefits. Both may be important to the protected person.

xviii. Make funeral and burial arrangements

The conservator should determine whether any funeral or burial arrangements have been made by or for the protected person. If none have been made, the conservator may make such arrangements, provided there are sufficient resources available to provide for the person during life.

If appropriate, the conservator should consult with the protected person to understand his or her preferences for burial and funeral arrangements. If the person is unable to provide input as to burial arrangements, the conservator must select the burial options which the protected person would have selected if he or she was able to do so. In making these decisions, the conservator should consult not just with the guardian, but with other individuals familiar with the preferences of the protected person. If the protected person executed an estate plan, the conservator should determine whether the person executed any instruments in that process which might provide guidance as to burial arrangements. A cremation authorization, for example, may be included among the estate planning documents a protected person signed.

xix. Confidentiality

As stated in earlier portions of this Handbook as they pertain to guardianship, the conservator should generally treat the financial affairs of the protected person as confidential. Those affairs include without limitation that person's level of income, savings, and estate planning items. The conservator must respect the person's privacy and dignity, especially when the disclosure of information is necessary. Disclosure of information should be limited to that disclosure necessary and relevant to the issue being addressed.

FURTHER READING: NGA STANDARD 11 (DISCUSSING CONFIDENTIALITY).

As to the family and close friends of the protected person (as defined by the protected person), however, the conservator may share information that would otherwise be treated as confidential to those without such relationships. Such disclosure is discretionary. If the conservator believes that the provision of a protected person's financial information to a family member or friend would cause substantial harm to the protected person or expose his or her finances to undue risk, then the conservator may withhold the information from them.

Families of protected persons often express concern over barriers to information relating to a loved one's financial affairs. It is important that a conservator remain communicative and responsive to questions about a protected person which may be posed by family and friends whom the protected person would want information shared. The conservator should consult with the protected person to determine what that person's preferences may be with respect to disclosing financial information. Every case is different, and the outcome will vary depending on the facts and circumstances of each case and the nature of the material being requested.

Concerns about access to information in guardianship and conservatorship cases were once so significant that in 2018 New Mexico began a series of legal modifications in this field. The New Mexico legislature added a provision to its probate code requiring that the Court enter an order at the time that the conservatorship is entered which specifies who receives copies of future filings

in the case. All future filings in conservatorship cases must be provided to the individuals identified in that order. As to individuals identified in this Order, the conservator can have an increased level of comfort that these individuals have been authorized by the Court to receive information about the protected person's finances.

Why are concerns over access to financial information so significant? While the financial affairs of a protected person should be regarded as confidential, a lack of transparency of financial information can raise suspicions of theft and other wrong-doing by a conservator. As a result, claims of undue secrecy by the family of a protected person may be taken seriously by the Court. Because of these concerns, the conservator should consider allowing certain information to pass to the protected person's family and close friends (as defined by the protected person), especially those identified in the Court's order as persons entitled to receive information about the protected person. If the conservator believes that providing information to any of these individuals would (a) violate the preferences of the protected person or (b) present an undue risk of harm to the protected person's financial affairs, the conservator should bring that concern to the attention of the Court and seek direction from the Court as to how to handle future information requests.

The conservator has the legal right to review all information pertaining to those affairs unless the Court has limited the conservator's authority. The conservator may demand the production of financial information for the protected person and that information should flow upon the conservator's presentment of current Letters of Conservatorship to the person or entity holding the information for the person. If the person or entity refuses to provide information to the conservator as it relates to a protected person, the conservator should seek legal counsel as to how to proceed in the face of that refusal.

xx. Conservator's Fees

The conservator is entitled to a reasonable fee for serving as conservator although he or she is not required charge. If a fee is charged, the fee is income to the conservator and may be reportable on his or her income tax returns.

If a fee is charged, it must be reasonable. What is reasonable will depend on the actions being performed. For example, the conservator may be entitled to a higher hourly fee for time making investment decisions than for time spent cleaning out the protected person's house.

The conservator shall bear in mind at all times the responsibility to conserve the person's estate when making decisions regarding providing conservatorship services and charging a fee for those services. NGA

As a best practice, the basis for the fee should be disclosed at the beginning of the conservatorship. For example, will the fee be charged based on an hourly rate or based upon a rate schedule? Will the conservator be charging a fee for the protected person for other fiduciary functions such as serving as trustee or as an accountant? The basis for all fees the conservator expects to receive should be disclosed at the beginning of the appointment.

The NGA Standards states 13 factors to be taken into account when determining whether a fee is reasonable and are applicable to both guardians and conservators.

Factors to be considered in determining reasonableness of the [conservator's] fees include:

A. Powers and responsibilities under the court appointment;

B. Necessity of the services;

C. The request for compensation in comparison to a previously disclosed basis for fees, and the amount authorized in the approved budget, including any legal presumption of reasonableness or necessity;

D. The [conservator's] expertise, training, education, experience, professional standing, and skill, including whether an appointment in a particular matter precluded other employment;

E. The character of the work to be done, including difficulty, intricacy, importance, time, skill, or license required, or responsibility undertaken;

F. The conditions or circumstances of the work, including emergency matters requiring urgent attention, services provided outside of regular business hours, potential danger (e.g., hazardous materials, contaminated real property, or dangerous persons), or other extraordinary conditions;

G. The work actually performed, including the time actually expended, and the attention and skill-level required for each task, including whether a different person could have rendered the service better, cheaper, faster;

H. The result, specifically whether the [conservator] was successful, what benefits to the person were derived from the efforts, and whether probable benefits exceeded costs;

I. Whether the [conservator] timely disclosed that a projected cost was likely to exceed the probable benefit, affording the court the opportunity to modify its order in furtherance of the best interest of the estate;

J. The fees customarily paid, and time customarily expended, for performing like services in the community, including whether the court has previously approved similar fees in another comparable matter;

K. The degree of financial or professional risk and responsibility assumed;

L. The fidelity and loyalty displayed by the [conservator], including whether the [conservator] put the best interests of the estate before the economic interest of the [conservator] to continue the engagement; and

M. The need for a local availability of specialized knowledge and the need for retaining outside fiduciaries to avoid conflict of interest. NGA Standard 22 (VII).

As the above list shows, unless there is a rate schedule or flat fee involved, when it comes to determining the reasonableness of a conservator's fee based upon hourly charges, there is no fixed formula. All of the above factors will be considered in one form or another.

While the determination of the reasonableness of a conservator's fee is based upon many factors, there are certain parts of the fee determination process that are not so fluid. Such is the case with the record keeping requirement. The NGA Standards state:

Fees or expenses charged by the [conservator] shall be documented through billings maintained by the [conservator]. If time records are maintained, they shall clearly and accurately state:

A. Date and time spent on a task,

B. Duty performed,

C. Expenses incurred,

D. Collateral contacts involved, and

E. Identification of individual who performed the duty (e.g., [conservator], staff, volunteer). NGA Standard 22 (VIII).

The Court will expect the conservator to keep these records if the conservator intends to collect a fee based upon an hourly rate basis.

The payment of a conservator's fees does not require prior court approval. Having said that, the conservator must disclose the basis for the fees he or she expects to charge at the beginning of his or her appointment, and it is prudent to have that fee approved in the order of appointment if possible. Furthermore, the assessment of conservator fees must be reported to the Court annually. The conservator should expect careful scrutiny of his or her fees a stated in those annual reports.

xxi. Gifts

If the protected person's estate has ample funds to pay for his or her support, care, education, and benefit and the support of his or her dependents as outlined above, the conservator may make gifts including charitable donations. If the conservator decides that gifts should be made, he or she must do so keeping in mind what the person would be expected to do if he or she was able. Does the protected person have a track record of holiday gifts or donations to a church or charities? These are all questions the conservator should ask.

The conservator must never give a gift to himself or herself from the protected person's estate without express Court approval. The NGA Standards state:

> **The [conservator] shall avoid all conflicts of interest and self-dealing or the appearance of a conflict of interest and self-dealing when addressing the needs of the person under [conservatorhip].**
>
> **Impropriety or conflict of interest arises where the [conservator] has some personal or agency interest that can be perceived as self-serving or adverse to the position or best interest of the person. Self-dealing arises when the [conservator] seeks to take advantage of his or her position as a [conservator] and acts for his or her own interests rather than for the interests of the Person. NGS Standard 20 (I).**

How much of a gift can be given? The total of such gifts in any year may not exceed twenty percent (20%) of the protected person's income in that year. Gifts exceeding twenty (20%) of the protected person's income in any year may be made only if approved by the court. If the conservator wishes to make gifts exceeding twenty (20%) percent of the person's income in one year, the conservator must file a motion with the Court requesting that authority, and the Court will likely schedule a hearing on the conservator's request. To approve gifts larger than twenty (20%) of income, the Court must conclude that such gifts are: (1) in the best interest of the protected person; and (2) that he or she either is not able, due to incapacity, to agree to the gift or has agreed to making the gift.

The conservatorship rules concerning gifting do not make any exception for annual gift tax exclusion gifts. This amount can change from year to year. The conservator should contact an accountant or other tax advisor for the applicable amount. Whether such gifts can be made are subject to the same considerations set forth above.

xxii. Service Providers

When hiring people to perform services for the protected person, those arrangements must be arm's length. Arrangements with others, whether hiring a realtor or handyman, must be on terms which are in the best interest of the protected person. The NGA Standards directly address this requirement with equal force to guardians and conservators:

The guardian [or conservator] may not employ his or her friends or family to provide services for a profit or fee unless no alternative is available, and the guardian [or conservator] discloses this arrangement to the court. NGA Standard 16 (G).

A conservator may not keep an incentive provided by a person or entity related to services provided to a protected person. If a bank provides a cash incentive, for example, for opening a bank account and the conservator uses that bank to open an account for the protected person, the conservator must not keep the cash incentive. The NGA Standards prohibit such conduct with equal force to guardians and conservators.

The guardian [or conservator] shall neither solicit nor accept incentives from service providers. NGA Standard 16 (H).

I. LIABILITY OF THE CONSERVATOR

1. No requirement to pay from the conservator's personal funds

The conservator is not required to provide financial support for an adult protected person from the conservator's own funds. For example, if the conservator is caring for his or her mother, the conservator does not have to pay for her medical and other expenses out of his or her own money.

When the conservator signs contracts or agreements for the protected person, such as the nursing home agreement, it is very important that the conservator make clear that he or she is signing as conservator. The conservator can do this by signing as follows: "[Conservator's name], as Conservator for [Name of Protected person]."

CAUTION

WHEN SIGNING CONTRACTS FOR A PROTECTED PERSON, ALWAYS INDICATE YOU ARE SIGNING THE CONTRACT AS CONSERVATOR.

If the conservator signs a contract for the protected person in his or her own name, and the person that the conservator is contracting with does not know that the conservator is signing only as conservator for the protected person, the conservator can be held personally responsible for paying on the contract out of his or her own money. New Mexico law squarely addresses this point.

Unless otherwise provided in the contract, a conservator is not individually liable on a contract properly entered into in the conservator's fiduciary capacity in the course of administration of the estate unless the conservator fails to reveal the conservator's representative capacity and identify the estate in the contract. NMSA 1978 § 45-5-429 (A) (2019).

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2. Conservator liability to the protected person

If the conservator is sued arising out of his or her management of the conservatorship, the conservator will be responsible for paying out of his or her own funds only if the conservator is personally at fault. New Mexico law states as much.

The conservator is individually liable for obligations arising from ownership or control of property of the estate or for torts committed in the course of administration of the estate only if the conservator is personally at fault. NMSA 1978 § 45-5-429 (B) (2019).

When is the conservator personally at fault? If the conservator uses the protected person's assets to benefit the conservator, the conservator can be sued and will be personally liable for the amount taken. In certain cases, a judgment arising from this type of action by the conservator is not dischargeable in bankruptcy.

Furthermore, if the conservator is negligent in providing prudent management over the protected person's funds, the conservator can be sued.

Failing to take control of assets which become lost; failing to insure property which becomes destroyed; overcharging a conservator fee which results in loss to the conservatorship estate; failing to file tax returns which create IRS penalties; failing to prudently supervise a protected person's investments which result in a loss of value; failing to maintain real property which results in damage to that property; failing to pay a protected person's assisted living bill resulting in his or her eviction from the facility; failing to account for income which results in uncertainty over what the person received or didn't receive; investing the protected persons money in risky investments which cause a loss to the conservatorship estate; failing to maintain the protected person's eligibility for public benefits; and distributing the property of a protected person to others not entitled to the property are all examples of conduct by a conservator that may result in the conservator being sued. If the conservator is sued and then found liable for a breach of duty, the conservator can be expected to pay to restore the conservatorship to what it would have been

assuming the breach did not occur. The conservator may also be responsible for paying attorney fees and costs involved in such a proceeding.

It is because of this liability that a conservator should consider involving the Court when it comes to decisions that appear risk to the conservator.

3. Suits against the protected person

If the conservator is not personally at fault and is sued as conservator, any resulting damages and litigation costs would be paid out of the protected person's funds. The person suing would not be able to receive any more money than the protected person has, even if the protected person's assets are not enough to pay the damages.

4. The conservator's bond

The conservator's bond is not available to the conservator to lessen the impact of the conservator's liability.

Effective July 1, 2018, New Mexico has strengthened its bonding requirements for conservators. Under this law, the Court must require a conservator to post a bond and may excuse the bond requirement only if the Court finds that the bond is not necessary to protect the person's property. The Code allows the conservator to post other collateral to secure the faithful performance of his or her duties instead of a bond, but those arrangements are not typical. The Court may not waive the bond requirement even if the conservator is in the business of serving as conservator and is being paid for its work in that capacity.

The amount of the bond is set in the amount of the aggregate value of the conservatorship estate plus the amount of one year's income. The amount of the bond may be reduced if the Court has entered an order which prohibits a conservator from dealing with certain property without a court order. In that case, the value of the property which cannot be disposed of without a prior court order may be reduced from the face amount of the bond. Only certain types of financial institutions are exempt from the bonding requirement.

To acquire a bond, a conservator will have to apply with a company that sells such bonds. A credit check of the conservator may be involved. Many insurance companies sell bonds and will charge an annual premium for the bond which is usually set according to a percentage of the value of the property being bonded. The conservator should be sure that the company issuing the bond is financially stable. The cost of the bond is usually an expense of the conservatorship estate and can vary depending on the bonding company underwriting the bond. Proof that the bond has been obtained must be submitted to the Court with the Inventory by filing a Surety Statement with the report. Thereafter, the Surety Statement should be filed with the Annual Report to prove to the court that the bond remains in force

A bond only serves to protect the conservatorship estate from losses as stated in the bond itself. A bond does not protect the conservator and is not the same as a liability insurance policy. If a bond is not renewed annually by a conservator, the bonding company is required to notify the Court.

A bonding company has the right to make the conservator repay it for any damages that it might pay as a result of the conservator's actions. As a result, getting a bond can be hard unless the conservator has assets from which the bonding company could get paid back if the conservator

were sued and found responsible for damages.

5. Waivers of liability

New Mexico law prohibits a conservator from requesting, procuring or receiving a waiver of liability, and any such waiver is void under current New Mexico law. If there is a transaction over which the conservator has a particular concern, the conservator should consult with legal counsel.

J. REPORTING REQUIREMENTS

As stated in a previous portion of this Handbook, a conservator's reporting should not be treated as an annoying detail that comes along with the job. To the contrary, it is the job. The NGA Standards address the reporting function directly.

The [conservator] shall obtain and maintain a current understanding of what is required and expected of the [conservator], statutory and local court rule requirements, and necessary filings and reports. NGA Standard 17 (XVI).

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1. Inventory

The conservator must file a listing with the court describing the protected person's assets and their value within 90 days of his or her appointment as conservator. This filing is called an "Inventory." The Inventory should list all the assets of the protected person, their value, and the amount of any loan against an asset. The Inventory should contain a statement by the conservator stating that it is correct to the best of their knowledge. The Inventory must be signed by the conservator and notarized. The Inventory must be filed with the court and copies must be sent to the protected person and any person identified by the Court as person's entitled to receive filings.

2. Conservator's Report and Accounting

Each year, within 30 days of the anniversary of his or her appointment as conservator, the conservator is required to file a conservator's report and account with the court. The conservator must also provide a copy of the report and account to the:

1) judge who appointed the conservator;
2) protected person, even if he or she cannot understand the report. The conservator should use caution in allowing detailed financial reports to exist in the protected person's room in an assisted living or nursing facility or other location where unauthorized persons can gain access to the financial report. In those cases, it will be the conservator's job to determine how to provide the report to the protected person while also respecting his or her confidentiality as to caregivers and facility employees;
3) guardian, if one is appointed; and
4) Veterans Administration if the protected person receives Veterans

Administration Benefits.

The Report must be in the form approved by the New Mexico Supreme Court.

It is very important that the conservator file the report and account timely and completely. If the conservator does not file the report and account on time, the conservator may have to personally pay the court a $25.00 per day penalty for each day that the report is late. If the conservator is having trouble meeting the deadline for filing the annual report, the conservator must ask the court for an extension by filing a motion. If the conservator is late in filing the report, some judges will send the conservator a letter or hold a hearing to have the conservator explain under oath why the report is late.

The report can be filed by going to the clerk of the court where the conservator was appointed. The conservator must bring the original report and at least four extra copies with him or her. The clerk will file the original and will stamp the copies with a stamp showing when the original was filed. The conservator should then take one of the copies to the office of the Judge who appointed the conservator and leave it with the Judge's secretary. The conservator should then mail another copy to the guardian (if the conservator is not also the guardian), to the protected person and to all other persons whom the Court ordered to receive it. The conservator should keep an endorsed copy of the report for his or her own file.

The Court will forward all conservator reports to the office of the State Auditor for review within five (5) business days of submitting the report. Under law, upon review of the report, the State Auditor shall decide whether it will conduct an audit of the report and submit its decision within fifteen (15) days of receipt of the professional conservator's report and financial statements. The State Auditor will submit an audit report within ninety (90) days of issuing its letter accepting the audit of the report. In connection with its audit of any conservator report, the State Auditor has the authority to issue subpoenas. These requirements can be found at NMSA 1978 § 45-5-409 (H) (2021).

For cases filed or pending after March 22, 2022, New Mexico imposes more rigorous reporting requirements for professional conservators.[20] These requirements are stated in Rule 1-145. In addition to the reporting requirements applicable to conservators generally, professional conservators must file a separate confidential filing of financial statements for all income, assets, expenses, and debts which are listed on the conservator annual report form. For these purposes, financial statements shall mean written documentation in any form issued by third-party financial institutions that reflect the transactions listed on the annual report. These financial statements must be filed at the same time as the annual report and are automatically sealed upon their filing. The applicable rule acknowledges the confidential nature of the information contained in these statements and provides that the conservator shall not disclose the information to the protected person, the parties to the proceeding, the guardian, counsel of record or any of their employees. Given the fact that the information is to be reviewed only by the State Auditor and the Court, the

[20] A professional conservator is an individual or entity that serves as a conservator for more than two individuals who are not related to the conservator by marriage, adoption, or third degree of blood or affinity.

rule also provides that the professional conservator shall not redact any of the information on the financial statements.

All the financial information provided with the annual report shall be forwarded to the State auditor's office for review. Rule 1-145 requires the State Auditor to review the report and within fifteen (15) days of receiving it, submit its decision as to whether it will decline an audit, require an audit, or request additional information from the professional conservator. The professional conservator shall respond to a request for information within fifteen (15) days. If the professional conservator fails to respond to the request for information or provides an inadequate response, the Court shall conduct a status conference at which the professional conservator shall appear with counsel and advise the Court as to the reason for the delayed or inadequate response.

All fees and costs associated with attending the status conference shall be paid by the professional conservator and not charged to the protected person's estate.

Any audit report shall be filed within ninety (90) days of the State Auditor submission of the letter of acceptance to conduct the audit. If the State Auditor incurs costs to subpoena documents or records, those costs shall be assessed against the professional conservator and not the protected person's estate.

G. Ending a Conservatorship

A conservator must serve in that role until the protected person dies, the conservatorship is terminated, the Court removes the conservator, or until the Court approves the conservator's resignation.

If the protected person dies, the conservator should file his or her final report with the Court using the forms mandated by the Supreme Court and then file a motion to end the conservatorship by virtue of the protected person's death. The conservator must deliver the original of the protected person's will to the Court. The conservator must also deliver any assets belonging to the protected person to the personal representative of his or her estate once that person is appointed. New Mexico law states these duties.

If a protected person dies, the conservator shall deliver to the court for safekeeping any will of the deceased protected person which may have come into his possession, inform the personal representative or a beneficiary named therein that he has done so, and retain the estate for delivery to a duly appointed personal representative of the decedent or other persons entitled thereto. NMSA 1978 § 45-5-425 (E).

New Mexico law will permit the conservator to apply to be a personal representative of the protected person's probate estate if no other person has been appointed personal representative within forty days of the person's death.

If the conservator believes that the protected person has regained capacity and no longer needs a conservator or the scope of the conservatorship should be lessened, the conservator must file a

motion with the Court seeking to terminate the conservatorship or limit its scope. The NGA Standards address this requirement.

The [conservator] shall seek termination or limitation of the guardianship in the following circumstances:

A. When the person has developed or regained capacity in areas in which he or she was found incapacitated by the court,

B. When less restrictive alternatives exist,

C. When the person expresses the desire to challenge the necessity of all or part of the [conservatorship],

D. When the person has died, or

E. When the [conservatorship] no longer benefits the person. NGA Standard 21 (III).

If the protected person moves out of state, the conservator should work with the protected person's guardian to determine if the guardianship and conservatorship should be transferred to that state. A lawyer will need to file papers with the New Mexico court and the court in the new state to transfer the proceeding. Effective in 2012, New Mexico adopted the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA). Many states have adopted the UAGPPJA and, as a result of that act, the transfer of guardianship and conservatorships from state to state has been greatly streamlined. Even though the process has been streamlined, proceedings under the UAGPPJA should be initiated using qualified legal counsel. Additional details related to the transfer of a guardianship are discussed in previous portions of this Handbook.

Conclusion

Across the United States, there are ongoing efforts to continually revisit the state of the law as it applies to both guardianship and conservatorship. The National Guardianship Association is one leader in the national dialogue over guardianship reform. At the heart of this dialogue is a relentless effort to find the right balance between offering protection while also maximizing self-determination and independence of vulnerable persons. New Mexico has proven itself on the forefront of such efforts. As of 2022, the law of guardianship and conservatorship in New Mexico is evolving and dynamic. New Mexico guardians and conservators are wise to stay abreast of changes in the law to assure compliance with these and other legal obligations. The New Mexico Guardianship Association is dedicated to staying abreast of these developments and looks forward to continually updating this Handbook as they occur.

APPENDIX

LIST OF PERSONS ENTITLED TO NOTICE OF A HEARING TO APPOINT A GUARDIAN AND CONSERVATOR

1. the alleged incapacitated person's spouse, or, if none, an adult with whom the alleged incapacitated person is in a long-term relationship of indefinite duration in which the individual has demonstrated an actual commitment to the alleged incapacitated person similar to the commitment of a spouse and in which the individual and the alleged incapacitated person consider themselves to be responsible for each other's well-being;
2. adult children or, if none, each parent and adult sibling of the alleged incapacitated person or, if none, at least one adult nearest in kinship to the alleged incapacitated person who can be found with reasonable diligence;
3. adult stepchildren whom the alleged incapacitated person actively parented during the stepchildren's minor years and with whom the alleged incapacitated person had an ongoing relationship in the two-year period immediately preceding the filing of the petition;
4. a person responsible for care of the alleged incapacitated person;
5. any attorney currently representing the alleged incapacitated person;
6. any representative payee appointed by the federal social security administration for the alleged incapacitated person;
7. a guardian or conservator acting for the alleged incapacitated person in New Mexico or in another jurisdiction;
8. a trustee or custodian of a trust or custodianship of which the alleged incapacitated person is a beneficiary;
9. any fiduciary for the alleged incapacitated person appointed by the federal department of veterans' affairs;
10. an agent designated under a power of attorney for health care in which the alleged incapacitated person is identified as the principal;
11. an agent designated under a power of attorney for finances in which the alleged incapacitated person is identified as the principal;
12. a person nominated as guardian by the alleged incapacitated person;
13. a person nominated as guardian by the alleged incapacitated person's parent or spouse in a will or other signed record;
14. a proposed guardian and the reason the proposed guardian should be selected; and
15. a person known to have routinely assisted the alleged incapacitated person with decision making during the six months immediately preceding the filing of the petition.