

Fall Elder Law Institute – Hot Topics in Adult Guardianship Law

Friday, Oct. 27, 2017



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Speaker Biographies

Gregory W. Mackenzie is currently an attorney with Hurley Toevs Styles Hamblin & Panter PA. Mackenzie was admitted to practice before the New Mexico courts in 1993 and has been working as a litigation lawyer since that time. Since 1997, Greg has devoted virtually all of his practice to representing clients in estate and trust litigation. This includes representing clients who are contesting or defending the validity of wills, trusts and other estate planning documents and those who are involved in litigation over the administration of estates and trusts. His cases frequently involve allegations of breach of fiduciary duty and the construction of controlling instruments such as wills and trusts. Mackenzie also frequently handles litigation in contested complex guardianships and conservatorships. He has been appointed by judges in several of New Mexico's judicial districts to serve as guardian ad litem for incapacitated adults involved in those types of proceedings. Mackenzie has received his certificate from the UNM School of Law mediation course and has served as a mediator in cases involving contested trusts, probates and difficult guardianships and conservatorships.

Patricia M. Galindo is a native New Mexican who has been practicing law for 20 years. She received her undergraduate degree from New Mexico State University in government (political science) and her juris doctorate from the University of New Mexico School of Law. Galindo's legal career includes being an assistant district attorney in the First and Second Judicial District courts, working as a policy analyst for the Albuquerque City Council and being a sole practitioner. Galindo is currently employed by the Administrative Office of the Courts where one of the subjects she focuses on is adult guardianship and conservatorship issues. She was appointed the vice-chair of the N.M. Adult Guardianship Study Commission in April of this year. Galindo is a member of the Committee on Women and the Legal Profession, Hispanic Bar Association and has been the chair of the Elder Law Section of the State Bar for the past two years.

Amanda H. Frazier is an EDI Special Master for the Second Judicial District Court, managing the Court's existing adult guardianships. Formerly the director of the Guardianship Project for Advocacy Inc., in Albuquerque, she represented families petitioning for Kinship Guardianship for children in their care, and represented children and parents in the foster care system. Frazier previously managed the Lawyer Referral for the Elderly Program and began her legal career as an associate at Sutin, Thayer and Browne, where she focused primarily in Commercial litigation. She received her J.D. from UNM School of Law and her Bachelor's degree from Rutgers University. Frazier is licensed in New Mexico and the Navajo Nation.

Tim Gardner is the legal director at Disability Rights New Mexico, New Mexico's protection and advocacy organization serving to protect and promote the legal rights of people with disabilities. Gardner has worked on dozens of guardianship defense cases, and occasionally as Guardian ad Litem. DRNM and Gardner have an excellent record in preventing unnecessary guardianships and eliminating, limiting or otherwise amending already imposed guardianships. He currently serves on the Supreme Court's New Mexico Adult Guardianship Study Commission. DRNM also works on access to Medicaid, particularly for home- and community-based services and a variety of other disability-rights issues. At home Tim is the father of five children.

Mary Galvez is the owner and operator of Guardianship and Care Management Services LLC. A nationally certified master guardian, a certified manager of care and a certified senior advisor, Galvez

has been providing guardianship services in New Mexico for more than 18 years. Having worked in the healthcare and social services arenas for over twenty years, Galvez has a particular interest in assisting individuals and families navigate their unique and challenging circumstances. Galvez' agency acts as court-appointed guardian, court visitor, healthcare power of attorney and care manager. Galvez serves on several local boards including the New Mexico Guardianship Association and the Alzheimer's Association. Galvez is the affiliate representative to the National Guardianship Association. She is also a member of the Adult Protective Proceedings Task Force. On a personal note, Galvez is happily married and has two beautiful daughters (and two newly acquired sons-in-law!). After 16 half marathons, she finally ran her first full marathon in March. She enjoys volunteering in a variety of ways throughout the Albuquerque community.

Mary Ann Green has been practicing law in private practice for over 30 years. Her practice is primarily limited to guardianships and conservatorships, wills, trusts, probate, Medicaid law and estate planning for the elderly and disabled. Green received her B.A. and M.A. degrees from Northwestern University and her J.D. degree from the University of New Mexico School of Law. She has Lectured at continuing legal education programs and community education programs in a variety of elder law issues. Green is rated AV by the Martindale Hubbell Legal Directory and she is a Fellow of the American College of Trust and Estate Counsel. She serves on the board of directors for the Elder Law Section of the State Bar of New Mexico. She is a former board member of the New Mexico Guardianship Association, the New Mexico Chapter of the National Academy of Elder Law Attorneys and the New Mexico Alzheimer's Association. She is a member of the State Bar of New Mexico Real Property, Trust and Estate Practice Section and the New Mexico Estate Planning Council.

Susan Stuart, BUS, CMC, NMG is the principal of Decisions in Care, LLC. She has over twenty-eight years of experience in long term care, specializing with elderly and disabled individuals and their families, largely in the guardianship arena. She is a founding member of the New Mexico Guardianship Association, and a member of the National Guardianship Association. She is a nationally certified master guardian, a nationally certified long term care manager and a member of The Aging Life Care Association. Susan is also a family caregiver. She is passionate about assisting those with cognitive impairments to maintain the highest quality of life possible, based upon their values.

Revised Uniform Guardianship and Conservatorship Act

[illegible]

A Report from the N.M. Adult Guardianship Study Commission

1 **IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

2 **April 6, 2017**

3 **NO. 17-8110**

4 **IN THE MATTER OF THE ESTABLISHMENT**
5 **OF THE NEW MEXICO ADULT**
6 **GUARDIANSHIP STUDY COMMISSION**

7 **ORDER**

8 WHEREAS, this matter came on for consideration upon the Court's own
9 motion to establish an *ad hoc* commission to study the operation and structure
10 of the adult guardianship system in New Mexico, to report its findings to this
11 Court and other participants in guardianship administration, and to make any
12 recommendations it deems appropriate for improving the operation or structure
13 of the New Mexico guardianship system;

14 WHEREAS, in light of the foregoing, and the Court being sufficiently
15 advised, Chief Justice Charles W. Daniels, Justice Petra Jimenez Maes, Justice
16 Edward L. Chávez, Justice Barbara J. Vigil, and Justice Judith K. Nakamura
17 concurring;

18 NOW, THEREFORE, IT IS ORDERED that the New Mexico Adult
19 Guardianship Study Commission hereby is ESTABLISHED;

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IT IS FURTHER ORDERED that the following persons are appointed to
serve as members of the Commission until further order of this Court:

Wendy York
Albuquerque, NM

Patricia M. Galindo
Santa Fe, NM

Sen. Jerry Ortiz y Pino
Albuquerque, NM

Conrad James
Albuquerque, NM

Leslie Porter
Santa Fe, NM

Stephen Clampett
Santa Fe, NM

District Judge Nancy Franchini
Albuquerque, NM

District Judge Jarod Hofacket
Deming, NM

District Judge Dustin K. Hunter
Roswell, NM

Dr. Samuel Roll
Albuquerque, NM

Tim Gardner
Albuquerque, NM

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Patricia Stelzner
Albuquerque, NM

Jorja Armijo-Brasher
Albuquerque, NM

Emily Darnell Nunez
Albuquerque, NM

Gaelle McConnell
Albuquerque, NM

Jill Johnson Vigil
Las Cruces, NM

IT IS FURTHER ORDERED that Commissioner Wendy York shall serve as chair of the Commission and Commissioner Patricia Galindo shall serve as vice-chair until further order of this Court;

IT IS FURTHER ORDERED that the Office of Supreme Court Counsel shall provide staff support to the committee; and

IT IS FURTHER ORDERED that the Commission shall conduct such public information-gathering hearings as it determines helpful, shall review both facts and law relating to operation of the current system, shall consider proposed improvements to the current system, and shall submit its findings and recommendations to this Court without undue delay, including any

1 recommendations the Commission may have for changes in court rules, statutes,
2 administrative practices, additional resources, or any other proposals that may
3 reasonably improve the guardianship system in New Mexico, with an initial
4 status report to the Court no later than October 1, 2017, and such other interim
5 and final reports as the Commission deems appropriate.

6 IT IS SO ORDERED.

7 WITNESS, Honorable Charles W. Daniels, Chief Justice
8 of the Supreme Court of the State of New Mexico, and
9 the seal of said Court this 6th day of April, 2017.

10 (S E A L)
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Joey D. Moya, Chief Clerk of the Supreme Court
of the State of New Mexico

**NEW MEXICO ADULT GUARDIANSHIP STUDY COMMISSION
INITIAL STATUS REPORT**

**SUMMARY OF RECOMMENDATIONS
AND ISSUES FOR FURTHER STUDY**

***Note:** This summary is intended for reference purposes only. For a full explanation of the Commission's recommendations and issues for further study, please see the Initial Status Report, dated October 1, 2017.*

Recommendations:

- A. Require certification by statute or court rule of professional guardians and conservators by a national organization, such as the Center for Guardianship Certification. This recommendation is not intended to preclude New Mexico from developing its own certification requirements.
- B. Require bonding or an alternative asset-protection arrangement by statute or court rule for conservators to protect the interests of the individual subject to the conservatorship.
- C. Propose legislation to establish and fund an adult protected person oversight board to regulate certified, bonded, professional guardians and conservators and to communicate concerns about professional guardians and conservators to the courts.
- D. Seek legislative funding for appropriate personnel, including but not limited to monitors and auditors, to investigate information contained in annual reports and audits of guardians and conservators, and to report to the court.
- E. Establish stringent reporting and financial accountability measures for conservators, including the following:
 - 1. require conservators, upon appointment, to sign releases permitting the courts to obtain financial documents of protected persons;
 - 2. require annual reports to include bank and financial statements and any other documentation requested by the court auditor, with appropriate protections to prevent disclosure of confidential information;
 - 3. require conservators to maintain a separate trust account for each protected person to avoid commingling of funds; and
 - 4. require conservators to maintain financial records for seven years.
- F. Require regular training for all current and future judges about the law that applies in guardianship and conservatorship proceedings.
- G. Create a flowchart and glossary of terms for the guardianship/conservatorship process.
- H. Create educational and training resources for non-lawyers involved in a guardianship or conservatorship proceeding.

- I. Require mediation or facilitated family meetings in all contested guardianship and conservatorship proceedings.
- J. Require by court rule that a judge make specific findings of fact when appointing a guardian or conservator if the judge deviates from the protected person's advance directive, trust, will, or estate plan or the order of priority listed in the statute.
- K. Create and mandate the use of a coversheet in adult guardianship and conservatorship proceedings.
- L. Authorize and seek funding for the Administrative Office of the Courts to hire special masters or commissioners to hear grievances against guardians and conservators.
- M. Seek legislative funding for technology and necessary staffing to modernize accounting and tracking of conservatorships and to build safeguards to protect vulnerable adults from financial exploitation.
- N. Establish a recurring, diverse commission, which would be appointed every four years to hold public hearings about the guardianship and conservatorship statutes, rules, and procedures in New Mexico and to make recommendations for continued improvement of the guardianship system.
- O. Establish an Adult Guardianship and Conservatorship Rules Committee.
- P. Establish an Adult Guardianship and Conservatorship Forms Committee that includes members who are not lawyers.
- Q. Authorize the Commission Chair to seek a formal ethics advisory opinion regarding potential ethical issues that have come to the attention of the Commission.

Issues for further study:

- 1. Whether to support the enactment of the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act.
- 2. Whether to recommend changes to the statutes and court rules that govern sequestration of court hearings and confidentiality of court records in guardianship and conservatorship proceedings.
- 3. Whether to recommend changes to the procedures for seeking or appointing a temporary guardian or conservator in an emergency, ex parte proceeding.
- 4. Whether to recommend changes to the statutes that govern the order of priority for the appointment of a guardian or conservator.

5. Whether to recommend the creation of a “limited conservator” whose authority is limited to accessing financial information to enable informed decision-making about the alleged incapacitated person’s placement pending the appointment of a guardian or conservator.
6. Whether to recommend appointing Guardians *ad litem* and court-appointed visitors on a rotating basis, rather than on the recommendation of a petitioning attorney.
7. Whether to recommend auditing and reporting requirements for conservators like those applicable to charitable organizations under the Charitable Solicitations Act, NMSA 1978, §§ 57-22-1 to -11.

**NEW MEXICO ADULT GUARDIANSHIP STUDY COMMISSION
INITIAL STATUS REPORT**

To: New Mexico Supreme Court
Hon. Judith K. Nakamura, Chief Justice

From: New Mexico Adult Guardianship Study Commission
Hon. Wendy York (Ret.), Chair
Patricia Galindo, Vice-chair
Neil R. Bell, Commission staff

Date: October 1, 2017

Re: Initial status report

The New Mexico Adult Guardianship Study Commission (the Commission) is proud to submit its initial status report for consideration by the Supreme Court. This report includes an overview of the Commission's activities since it was established on April 6, 2017, a preliminary list of recommendations for improving the guardianship system in New Mexico, and a list of issues that the Commission intends to study further, with the Court's permission.

OVERVIEW

The Supreme Court established the Commission on April 6, 2017, and charged the Commission with the following objectives:

[T]o study the operation and structure of the adult guardianship system in New Mexico, to report its findings to [the] Court and other participants in guardianship administration, and to make any recommendations it deems appropriate for improving the operation or structure of the New Mexico guardianship system.

To that end, the Court ordered the Commission to "conduct public information-gathering hearings," to "review facts and law relating to operation of the current system," to "consider proposed improvements to the current system," and to "submit its findings and recommendations to [the] Court without undue delay, including any recommendations the Commission may have for changes in court rules, statutes, administrative practices, additional resources, or any other proposals that may reasonably improve the guardianship system in New Mexico." The Court further ordered the Commission to submit an initial status report no later than October 1, 2017, and "such other interim and final reports as the Commission deems appropriate."

The all-volunteer Commission has worked diligently to meet its responsibilities under the Court's order. The Commission held seven full-day meetings in less than six months. The meetings were open to the public and were held in geographically diverse areas of the state, including five meetings in Albuquerque, one in Las Cruces, and one in Santa Fe. Commissioners also collaborated on their own time to develop recommendations for the full Commission to

consider at its public meetings. Additionally, the Commission has responded to numerous inquiries from the press and has maintained a publicly accessible website that it has used to foster transparency about the Commission's work. The website includes information about meetings, including agendas, materials, and minutes, full audio recordings of meetings, and numerous resources about the guardianship systems in New Mexico and in other states. The website also permits members of the public to submit written comments about the guardianship system, which are posted to the website for viewing by the Commission and the public.

In studying the guardianship system, the Commission considered information from a variety of sources. First, the Commission heard from many members of the public about their experiences with, concerns about, and recommendations for improving the guardianship system. These individuals and groups addressed the commission during public comment sessions at its meetings, submitted written comments through the Commission's website, and in some instances met privately with the chair. Family members of protected persons, in particular, took the opportunity to share highly personal, heartfelt, and often painful stories of their experiences with the guardianship system, hoping their stories would lead to meaningful reform. Public input was invaluable in educating the Commission about the strengths and weaknesses of the current system, particularly in meeting the needs of protected persons and their families.

The Commission also requested and heard presentations from an array of individuals and groups associated with the guardianship system. The presentations ranged from an overview of the guardianship process and the current statutes, to a summary of alternatives to guardianship, to an explanation of the role of each participant in the process. The latter category included presentations by court-appointed guardians and conservators (both professional and family member), a petitioning attorney, a guardian *ad litem*, a qualified health care provider, a court-appointed visitor, and representatives from the Office of Guardianship. A member of the Adult Protective Persons Task Force presented a summary of that group's efforts to identify ways in which the guardianship system could be reformed. And Senior Justice Maes and representatives from the Judicial Information Division of the Administrative Office of the Courts presented an overview of the courts' case management system. They offered insight into how the system might be used, for example, to collect data and to monitor deadlines in guardianship proceedings.

A variety of written materials also informed the Commission's work. Most notably, the Commission reviewed the proposed Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (the Uniform Act). Approved by the National Conference of Commissioners on Uniform State Laws on July 19th, 2017, the Uniform Act is the product of a years-long effort to address common problems—indeed many of the same problems that have been brought to the Commission's attention during the past six months—in guardianship and conservatorship proceedings across the country. The Uniform Act is intended to replace Article 5 of the Uniform Probate Code. New Mexico adopted Article 5 in 1975 and has not meaningfully revised it in the past 40-plus years.

Based on an informal, preliminary vote, the Commission is generally supportive of the Uniform Act and of the significant changes that it would make to the guardianship system if it were enacted in New Mexico. Further study of the Uniform Act is necessary, however, before the Commission can make a formal recommendation about whether to support its introduction

and passage in the upcoming legislative session. To that end, the chair of the Uniform Act's drafting committee, Professor David English, has generously agreed to speak with the Commission in person on Friday, November 17th, and to answer questions about the drafting process and about the Uniform Act itself. The Commission plans to make a final recommendation about the Act after meeting with Professor English.

Another issue that has significantly influenced the Commission's work is the pair of federal indictments that were issued this summer against two corporate officers of Ayudando Guardians. These indictments revealed structural weaknesses in the oversight of guardians and conservators in New Mexico. The Commission used these public allegations as a case study to help identify improvements that should be made to prevent similar misconduct in the future.

And as a final matter, the Commission strongly believes that the recommendations in this report, if implemented, would improve the guardianship system for those whom it affects the most: protected persons and their families. The recommendations address issues that range from requiring stricter accountability and oversight of guardians and conservators, to establishing clear grievance processes for family members and other interested parties, to creating easily accessible educational and training resources, to protecting the assets of protected persons from fraud or other forms of misconduct. Other issues still require study, including the proper balance between transparency, confidentiality, and sequestration in guardianship proceedings and the appropriate role of temporary, emergency appointments in the guardianship process. Overall, however, the Commission is proud of the progress that it has made in such a short time. The Commission is honored to have been given the opportunity to address this important issue and is hopeful that the Court will support the Commission's recommendations, including its desire to continue working to find ways to improve the guardianship system.

RECOMMENDATIONS

The Commission offers the following recommendations for the Court's consideration.

- A. Require certification by statute or court rule of professional guardians and conservators by a national organization, such as the Center for Guardianship Certification. This recommendation is not intended to preclude New Mexico from developing its own certification requirements.*

Currently, certification is required only for guardians and conservators who provide contract services through the Office of Guardianship. The Commission recommends requiring certification for all professional guardians and conservators. Requiring certification would (1) set the standard of care commensurate with the National Guardianship Association standards and ethical rules and would mandate training; (2) create oversight, accountability, and grievance procedures through the national organization; (3) place the responsibility on the guardian and conservator to obtain and maintain certification at no cost to the state or protected person; (4) create a formalized vetting process to evaluate the competency of the guardian or conservator; (5) provide a background check at no cost to the state or protected person's estate; and (6) help rebuild public confidence in protective proceedings.

The Commission recommends limiting the certification requirement to a *professional* guardian or conservator, which would be defined as a person (including a corporation) appointed to serve as a guardian or conservator for more than two non-family members. The Commission made this distinction in response to several members of the public who suggested that guardians appointed to care for family members typically lack the time and resources to obtain certification.

B. Require bonding or an alternative asset-protection arrangement by statute or court rule for conservators to protect the interests of the individual subject to the conservatorship.

In addition to stringent oversight requirements, the Commission recommends requiring conservators to furnish a bond or to secure another asset-protection arrangement as a further protection for individuals subject to conservatorship. The Uniform Act includes a substantially similar bonding requirement. The Commission is aware that the Second Judicial District now requires bonding of estates valued at more than \$30,000.

C. Propose legislation to establish and fund an adult protected person oversight board to regulate certified, bonded, professional guardians and conservators and to communicate concerns about professional guardians and conservators to the courts.

The Commission recommends establishing a guardian and conservator oversight board with the authority to establish state-certification requirements and to require bonding of professional guardians and conservators. The oversight board also should communicate with the courts about misconduct by guardians or conservators.

Minority views: Two commissioners would prefer an oversight board with greater authority over guardians and conservators, including the authority to hear grievances, to require audits, and to monitor compliance with laws, rules, and estate plans. A third commissioner dissented from this recommendation, citing the view that greater transparency in guardianship proceedings would empower family members and the public to hold guardians and conservators accountable without the need for an oversight board.

D. Seek legislative funding for appropriate personnel, including but not limited to monitors and auditors, to investigate information contained in annual reports and audits of guardians and conservators, and to report to the court.

The Commission recommends seeking funding for personnel within the judiciary who would be responsible for monitoring and auditing information submitted by guardians and conservators. These reviews should be performed in a targeted manner, when appropriate, and on a random basis to instill an expectation of accountability for individuals who provide guardianship or conservatorship services.

Minority view: One commissioner dissented from this recommendation, preferring to assign investigative responsibilities to an office or agency outside of the judiciary.

E. Establish stringent reporting and financial accountability measures for conservators, including the following:

- 1. require conservators, upon appointment, to sign releases permitting the courts to obtain financial documents of protected persons;*
- 2. require annual reports to include bank and financial statements and any other documentation requested by the court auditor, with appropriate protections to prevent disclosure of confidential information;*
- 3. require conservators to maintain a separate trust account for each protected person to avoid commingling of funds; and*
- 4. require conservators to maintain financial records for seven years.*

These recommendations are the result of the chair's meeting with a forensic accountant to discuss sufficient oversight requirements of conservators to reduce the potential for fraud. They also incorporate the revised fiduciary accounting requirements imposed by the Department of Veterans' Affairs in its report dated March 1, 2011.

F. Require regular training for all current and future judges about the law that applies in guardianship and conservatorship proceedings.

The Commission recommends requiring training of all judges at the 2018 or 2019 Judicial Conclave, whichever follows consideration by the legislature of the Uniform Act. The Commission also recommends requiring regular guardianship and conservatorship training for all new judges and creating an online video or web resource that could be accessed by judges whenever they have questions about guardianship or conservatorship proceedings. The Commission recommends requiring regular training because of the unique nature of these cases, which includes the courts' independent oversight responsibility, regardless of whether a specific motion is filed.

G. Create a flowchart and glossary of terms for the guardianship/conservatorship process.

The Commission recommends the creation of a flowchart of, and glossary of terms used in, the guardianship and conservatorship processes to assist judges, attorneys, family members, and members of the public. The glossary of terms should be written in plain English, and the flowchart and glossary should be readily available online. The Commission believes that a flowchart and glossary of terms would be an invaluable resource to judges, attorneys, and family members and that it would have an immediate, discernible impact on guardianship proceedings.

H. Create educational and training resources for non-lawyers involved in a guardianship or conservatorship proceeding.

Based on numerous comments from members of the public about the complexity of the guardianship and conservatorship processes, the Commission recommends developing educational and training resources to make the processes more understandable.

I. Require mediation or facilitated family meetings in all contested guardianship and conservatorship proceedings.

The Commission heard from multiple sources that getting family members together early in contested guardianship and conservatorship proceedings could help to avoid many common problems in these types of cases. The Commission therefore recommends requiring mediation of or facilitated family meetings for all contested proceedings.

J. Require by court rule that a judge make specific findings of fact when appointing a guardian or conservator if the judge deviates from the protected person's advance directive, trust, will, or estate plan or the order of priority listed in the statute.

This recommendation is intended to address the numerous comments that the commission has received about estate plans being disregarded or not followed in the course of a guardianship or conservatorship proceeding. The recommendation would require the court to document in a court order any deviation from an estate plan to ensure that the change has not been overlooked and that it was a considered, deliberate decision made by the court, based upon evidence.

K. Create and mandate the use of a coversheet in adult guardianship and conservatorship proceedings.

The Commission recommends the creation of a coversheet that must be filed with all adult guardianship and conservatorship petitions as a way to identify individuals who are entitled to notice of the proceeding and to sort cases based on the potential issues that may arise. For example, it would be useful for a court to know early in a proceeding whether a petition for the appointment of a guardian or conservator is contested or uncontested, or whether it is for a minor who is moving to adulthood. The coversheet also should be filed with a motion to appoint a successor guardian or conservator and with every annual report submitted by a guardian or conservator to alert the court to changes in the circumstances of case participants, such as a change of address or the death of a guardian.

L. Authorize and seek funding for the Administrative Office of the Courts to hire special masters or commissioners to hear grievances against guardians and conservators.

The Commission recommends authorizing and seeking funding for the hiring of special masters or commissioners who would advise the assigned judge of the master's or commissioner's recommended action in a grievance. The goal of this recommendation is to provide quick and easy access for any interested party who has a grievance against a guardian or a conservator. The special masters or commissioners should be hired by the Administrative Office of the Courts and authorized to hear grievances on a statewide basis, rather than employed by individual districts.

M. Seek legislative funding for technology and necessary staffing to modernize accounting and tracking of conservatorships and to build safeguards to protect vulnerable adults from financial exploitation.

The Commission recommends seeking funding for technology and necessary staffing to implement improvements to the courts' case management system that would alert judges when

annual reports are due, indicate “red flags” that may reveal financial exploitation or other problematic issues, and automate auditing functions. The Minnesota courts have developed a system, including software and staffing, that would serve as a model for this recommendation.

N. Establish a recurring, diverse commission, which would be appointed every four years to hold public hearings about the guardianship and conservatorship statutes, rules, and procedures in New Mexico and to make recommendations for continued improvement of the guardianship system.

The Commission recommends establishing a recurring commission that would focus on inquiries or requests about the system as a whole, including rules or statutes, and not on problems in individual cases.

Minority view: One commissioner dissented from this recommendation, citing the view that a permanent commission is unnecessary and would defer work that already has been assigned to the Commission.

O. Establish an Adult Guardianship and Conservatorship Rules Committee.

The Commission recommends establishing a Supreme Court rules committee to review and develop rules necessary to ensure that all processes and procedures are followed in guardianship cases.

P. Establish an Adult Guardianship and Conservatorship Forms Committee that includes members who are not lawyers.

The Commission recommends establishing a Supreme Court forms committee to develop a set of Court-approved forms for use in adult guardianship proceedings.

Q. Authorize the Commission Chair to seek a formal ethics advisory opinion regarding potential ethical issues that have come to the attention of the Commission.

Several attorney-related ethical concerns have been raised during the course of the Commission’s work. These ethical concerns include, for example, whether the Rules of Professional Conduct allow an attorney to recommend the appointment of a particular guardian whom the attorney has represented in another proceeding. The Commission recommends authorizing the chair to request one or more formal ethics advisory opinions to address how the rules apply in each scenario. A copy of the proposed letter is attached as Exhibit A.

ISSUES FOR FURTHER STUDY

1. Whether to support the enactment of the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act.

As explained previously, the Commission plans to submit a formal recommendation about whether to support passage of the Uniform Act after meeting with Professor David English

on November 17, 2017. Passage of the Uniform Act would represent a significant shift in the laws governing guardianship and conservatorship proceedings and would be the single largest reform of the guardianship system in decades.

2. *Whether to recommend changes to the statutes and court rules that govern sequestration of court hearings and confidentiality of court records in guardianship and conservatorship proceedings.*

The Commission has heard numerous appeals from the public about this issue. On the one hand, many have advocated for greater access to information for family members. On the other hand, many have argued to continue to protect the privacy of individuals subject to guardianship or conservatorship. The Commission has not had time yet to fully consider this complicated issue. The Commission notes, however, that the Uniform Act addresses these competing concerns in its provisions regarding who may attend hearings and the confidentiality of court records. The Commission would like to speak with Professor English about the approach taken in the Uniform Act before making a recommendation on this issue.

3. *Whether to recommend changes to the procedures for seeking or appointing a temporary guardian or conservator in an emergency, ex parte proceeding.*

The overuse of temporary appointments, which are often made on an ex-parte, emergency basis, is a troubling issue that has been repeatedly brought to the Commission's attention. Numerous family members have shared stories of feeling blindsided, overwhelmed, and powerless when learning that a guardian or conservator has been appointed for their loved one without their knowledge. The Commission supports limiting the use of temporary appointments and providing judges with training and education to ensure that temporary appointments are the exception, rather than the rule. The Commission also would like to speak with Professor English about the Uniform Act, which proposes stricter requirements for temporary appointments.

4. *Whether to recommend changes to the statutes that govern the order of priority for the appointment of a guardian or conservator.*

The Commission has heard from several members of the public who believe that the statutory order of priority for the appointment of a guardian or conservator is unfair or is not followed in all cases. The Commission also is considering whether a protected person should be permitted to disqualify in an estate plan or other legal document a particular individual from being appointed as guardian or conservator. The Commission has not had time to fully consider this issue and would like to speak with Professor English about how it is addressed in the Uniform Act before taking action.

5. *Whether to recommend the creation of a "limited financial conservator" whose authority is limited to accessing financial information to enable informed decision-making about the alleged incapacitated person's placement pending the appointment of a guardian or conservator.*

The Commission would like to consider whether to recommend the creation of a “limited financial conservator” while a guardianship or conservatorship proceeding is pending. This recommendation would address a concern raised by the New Mexico Hospital Association about frequent delays in obtaining a guardianship or conservatorship for in-patients in a hospital’s psychiatric unit. The limited financial conservator would be permitted to access and share the protected person’s financial information with service providers to enable them to arrange for placement in another setting pending a hearing on the petition. The Commission has not had time to consider this proposal.

6. *Whether to recommend appointing guardians ad litem and court-appointed visitors on a rotating basis, rather than on the recommendation of a petitioning attorney.*

The Commission heard from several commenters that the current system allows the petitioning attorney to “stack the deck” in the petitioner’s favor by recommending the appointment of certain individuals as guardian *ad litem* and visitor. The Commission would like to explore the idea of creating a rotating list of GALs and visitors to remove this perceived unfairness from the system.

7. *Whether to recommend auditing and reporting requirements for conservators like those applicable to charitable organizations under the Charitable Solicitations Act, NMSA 1978, §§ 57-22-1 to -11.*

The Commission would like to explore whether conservators should be subject to auditing and reporting requirements like those applicable to charitable organizations under the Charitable Solicitations Act. The Commission generally supports a requirement for conservators to obtain and submit annual audits to the Attorney General’s Office and for those audits to be posted on the Attorney General’s publicly accessible website. However, further study is necessary to determine whether these requirements should apply, for example, to all professional conservators or only to conservators who oversee assets valued at more than a certain amount, e.g., \$500,000.

NEXT STEPS

With the Court’s permission, the Commission would like to continue working on the items identified above and to submit a final report by January 1, 2018. The meeting with Professor English on November 17th, in particular, is a critical step in determining whether to recommend supporting the adoption of the Uniform Act. As explained throughout this report, the Commission views the Uniform Act as a potentially transformative piece of legislation and would like to have a full understanding before making a recommendation about whether to support its adoption.

If the Court permits the Commission to continue its work, the Commission also would request permission to invite public comment on the recommendations included in this report. Specifically, the Commission would request a two-week comment period through the Commission’s website, beginning as soon as possible. The Commission has tried to involve the public as much as possible in its work and would like to provide an opportunity for the public to

respond to the Commission's recommendations and to suggest revisions or additional recommendations that could be included in the final report.

On behalf of the entire Commission, thank you for the opportunity to work on this important issue. Please do not hesitate to contact the chair if you have questions or require further assistance in considering the Commission's recommendations.



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September 27, 2017

William Slease
Disciplinary Board
20 First Plaza Ctr NW, #710
Albuquerque, NM 87102-5802

Dear Mr. Slease:

As you know, I was appointed by the New Mexico Supreme Court to chair the Adult Guardianship Study Commission. The commission has been meeting since April of this year. Several potential ethical issues have come to our attention and we believe that a Formal Advisory ethics opinion addressing these issues would be beneficial. The issues are as follows:

1. A guardianship or conservatorship for an alleged incapacitated person begins with the filing of petition by an interested person. The interested person may or may not be a family member. The proceeding can be contested by the alleged incapacitated person, family members or other individuals. These individuals may or may not be represented by an attorney.

It is not uncommon for disputes to arise over whether a guardian or conservator should be appointed and who that guardian and conservator should be. We would like to obtain a Formal Advisory Ethics opinion on the following scenario: May an attorney recommend the appointment of a guardian or conservator if he or she has had an attorney-client relationship with that particular guardian or conservator? If the attorney may make the recommendation, must he or she disclose the fact of representation to (a) his or her client; (b) the other individuals who are involved in the case; and/or (c) the court. If that guardian or conservator is proposed by another individual, must the attorney disclose his or her current or past attorney-client relationship?

2. If an attorney has an ownership interest in a guardianship or conservatorship organization, may the attorney recommend that organization to serve as guardian or conservator? If the attorney may make the recommendation, must he or she disclose the fact of representation to (a) his or her client; (b) the other individuals who are involved in the case; and/or (c) the court. If that guardian or conservator is proposed by another individual, must the attorney disclose his or her current or past ownership interest?

Exhibit A

3. If an attorney has served on the board of a guardianship or conservatorship organization, may the attorney recommend that organization serve as guardian or conservator? If the attorney may make the recommendation, must he or she disclose the fact of board membership to (a) his or her client; (b) the other individuals who are involved in the case; and/or (c) the court. If that guardian or conservator is proposed by another individual, must the attorney disclose his or her current or past board membership?
4. In order to appoint a guardian or conservator, the court must appoint a guardian ad litem and a visitor to independently assess whether a guardianship or conservatorship is necessary and whether a full or limited appointment should be made. The number of individuals who serve in these capacities is limited and it is not uncommon for them to have worked as guardian ad litem or visitor for the petitioning attorney in the past (and vice versa). In these situations, where the petitioning attorney, guardian ad litem and visitor have worked on other cases, must the attorneys disclose that fact to the individuals who are involved in the case; and/or (c) the court. Must the guardian ad litem make the same disclosures? Is disclosure required if someone else recommends the GAL or Visitor? If there is a duty to disclose, what is the extent of that disclosure?

If you have any questions, please contact me. We would appreciate any guidance you can give to the lawyers who practice in this area.

Very truly yours,

SHEEHAN & SHEEHAN, P.A.

A handwritten signature in black ink, appearing to read "Wendy York", written in a cursive style.

By: WENDY E. YORK

WEY:aep

[illegible]

Second Judicial Court's Elderly and Disabled Initiative

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

D-202-

IN THE MATTER OF THE
GUARDIANSHIP PROCEEDING FOR
_____, a protected person.

GUARDIAN'S REPORT (check one): 90-DAY ____ ANNUAL ____ FINAL ____

REPORT ON THE CONDITION AND WELL-BEING OF AN ADULT PROTECTED
PERSON

Date of Appointment: _____

1. PROTECTED PERSON:

Name _____
Residential Address _____ Facility Name _____

City, State, Zip Code _____
Telephone _____ Date of Birth _____
Name of person primarily responsible at protected person's place of
residence: _____.

2. GUARDIAN:

Name _____ Business Name (if
any) _____
Address _____ City, State, Zip
Code _____
Telephone _____ Alternate Telephone # _____
Relation to Protected Person _____

3. FINAL REPORTS ONLY (otherwise, go to #4)

I am filing a Final Report because of: ____ My resignation ____ Death of the Protected Person
____ Court Order ____ Other (please explain):

A. If because of resignation, Name of successor, if appointed:

Address _____ City, State, Zip
Code _____

B. If because of Protected Person's death: (attach copy of death certificate, if available)

Date and place of death: _____

Name of personal representative if appointed: _____

Address _____

City, State, Zip Code _____

4. During the past year or 90 days (if initial report), I have visited the Protected Person _____ times. The date of my last personal visit was _____.

5. (A) Describe the residence of the Protected Person:

_____ Hospital/medical facility _____ Protected Person's home
_____ Guardian's home _____ Relative's home (explain below)
_____ Nursing home _____ Boarding/Foster/Group Home
_____ Other: _____

(B) During the past year or 90 days (if first report), has the Protected Person changed his/her residence? _____

Do you anticipate a change of residence for the protected person in the next year? _____

6. The name and address of any hospital or other institution (if any) where the Protected Person is now admitted: _____

_____.

7. The Protected Person is under a physician's regular care. _____ Yes _____ No

Identify the health care providers.

Physician: _____ Dentist (if any): _____

_____ Mental Health Professional (i.e., psychiatrist, counselor): _____

Other: _____

8. (A) During the past year or 90 days (if initial report), the Protected Person's physical health:

Remained the same _____

Primary diagnosis: _____

_____ improved _____ deteriorated (explain)

(B) During the past year or 90 days (if initial report), the Protected Person's mental health:

Remained the same _____

Major diagnosis, if any: _____

Improved _____ deteriorated (explain) _____

If physical or mental health has deteriorated, please explain:

9. Describe any significant hospitalizations or mental or medical events during the past year or 90 days (if initial report): _____

10. List the Protected Person's activities and changes, if any, over the past year or 90 days (if initial report):

Recreational Activities: _____

Educational Activities: _____

Social Activities: _____

List Active Friends and/or Relatives: _____

Occupational activities: _____

Other: _____

11. Describe briefly any contracts entered into and major decisions made on behalf of the Protected Person during the past year or 90 days (if initial report):

12. The Protected Person has made the following statements regarding his/her living arrangements and the guardianship over him/her: _____

13. I believe the Protected Person has unmet needs. _____ Yes (explain) _____ No

If yes, indicate efforts made to meet these needs: _____

14. The Protected Person continues to require the assistance of a guardian: _____ Yes _____ No
Explain why or why not:

15. The authority given to me by the Court should: _____ remain the same _____ be decreased
_____ be increased

Why:

16. Additional information concerning the Protected Person or myself (the guardian) that I wish to share with the Court: _____

17. If the court has granted you the authority to make financial decisions on behalf of the Protected Person, then please describe the decisions you have made for the protected person:

_____.

Signature of Guardian: _____ **Date:** _____
Printed Name: _____.

A. Any guardian may rely on a qualified health care professional's current written report to provide descriptions of the physical and mental conditions required in items 7, 8, 9, 14 and 15 of the annual report as specified in Subsection A of this section.

B. The guardian may be fined five dollars (\$5.00) per day for an overdue annual report. The fine shall be used to fund the costs of visitors, counsel and functional assessments utilized in conservatorship and guardianship proceedings pursuant to the Uniform Probate Code.

C. The court shall not waive the requirement of an annual report under any circumstance but may grant an extension of time not to exceed sixty days. The court may require the filing of more than one report annually.

**STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT**

D-202-PQ-

**IN THE MATTER OF THE GUARDIANSHIP
AND CONSERVATORSHIP PROCEEDINGS
FOR**

CONSERVATOR'S REPORT AND ACCOUNT

Pursuant to Section 45-5-407 NMSA 1978, the undersigned duly appointed, qualified and acting conservator of the above-mentioned protected person reports to the court as follows:

1. My name is: _____
2. My address and telephone number are: _____
3. The name, if applicable, and address of the place where the person under conservatorship now resides is: _____
4. The name of the person primarily responsible for the care of the person under conservatorship at such person's place of residence is: _____
5. The name and address of any hospital or other institution where the person under conservatorship is now admitted on a temporary basis are:

6. A brief description of the physical condition of the person under conservatorship is:

7. A brief description of the mental condition of the person under conservatorship is:

8. A description of contracts entered into on behalf of the person under conservatorship during the past year: _____

9. Describe all financial decisions made during the past year including all receipts and disbursements, any sale, lease or mortgage of estate assets and any investment made on behalf of the person under conservatorship: _____

_____.

10. The reasons, if any, why the conservatorship should continue are: _____

_____.

Signature of Conservator:

Date: _____

Any conservator may rely on a qualified health care professional's current written report to provide descriptions of the physical and mental conditions required in items 6, 7 and 10 of the annual report and account.

The court shall not waive the requirement of an annual report and account under any circumstance, but may grant an extension of time. The court may require the filing of more than one report and account annually.

The conservator may be fined five dollars (\$5.00) per day for an overdue annual report and account. The fine shall be used to fund the costs of visitors, counsel and functional assessments utilized in conservatorship and guardianship proceedings pursuant to the [Uniform] Probate Code [45-1-101 NMSA 1978].

In connection with any account, the court may require a conservator to submit to a physical check of the property in his control, to be made in any manner the court may order.

In any case in which property consists in whole or in part of benefits paid by the veterans administration to the conservator or his predecessor for the benefit of the protected person, the

veterans administration office that has jurisdiction over the area is entitled to a copy of any report and account filed under Chapter 45, Article 5 NMSA 1978.

SJDC Attachment to Annual Conservator Report

This form is due within 90 days of appointment as conservator and then annually thereafter. The completed form must be attached to the Annual Conservator Report.

Protected Person's Name: _____ D-202- _____

Conservator/Guardian Email address: _____

REPORT DATE:

Dates covered in report: _____ through _____ (MM/DD/YYYY) _____

Protected Person's INCOME from all sources

Social Security/SSDI/Veteran's Benefits	\$
Retirement- Pension, IRA, 401K distributions	
Annuity distributions/settlement payments	
Employment	
Dividends and Interest	
Rents COLLECTED on Protected Person's properties	
Other Sources of Income	
TOTAL INCOME	\$

SJDC Attachment to Annual Conservator Report

Protected Person's Name: _____ D-202-PQ- _____ (case number)

Conservator/Guardian Email Address: _____

REPORT DATE:

Dates covered in report: _____ through _____ (MM/DD/YYYY) _____

Protected Person's EXPENSES

Rent/housing	\$
Utilities (include cell phone)	
Food/groceries/dining out	
Transportation (include gas expense)	
Clothing	
Entertainment	
Memberships	
Professional Fees (attorney, accountant, fiduciary)	
Insurance premiums	
Medical expenses (include co-pays, prescription costs, etc)	
Household goods and electronics	
Travel	
Gifts	
Charitable donations	
Incidentals/Miscellaneous	
Other Expenses	
TOTAL EXPENSES	

SJDC Attachment to Annual Conservator Report

Protected Person's Name: _____ D-202-PQ- _____ (case number)

Conservator/Guardian Email Address: _____

REPORT DATE:

Dates covered in report: _____ through _____ (MM/DD/YYYY) _____

Report on Assets

Report here on CHANGES to assets listed in INVENTORY; example "sold 2012 Toyota \$17,800.00"

"money/proceeds from sale deposited into SECU checking account \$17,800.00"

SJDC Conservator Report-Inventory

This report is due within 90 days of appointment of conservator.

Protected Person: _____

Address and Phone Number: _____

Conservator: _____

Address and Phone Number: _____

Email Address of Conservator: _____

Date of Appointment as Conservator: _____

Protected Person's Assets: (use approximate Fair Market Value, if actual value not known)

House/Mobile home/real property	\$
Vehicles	
Bank Accounts	
Investment Accounts	
Trusts	
Pension/Deferred Compensation Accounts	
Annuity/Structured Settlement	
Electronics	
Medical Devices	
Furniture	
Household Belongings	
Other Assets	
TOTAL FAIR MARKET VALUE	\$

[illegible]

Alternatives to Guardianship and Supported Decision Making

Supported Decision-Making and Alternatives to Guardianship

Mary Galvez and Tim Gardner

Range of Decision-Making Ability

- ▶ No decision-making ability (e.g., comatose)
- ▶ Can provide opinion or preferences
- ▶ Can make decision with assistance
- ▶ Can make decision

Decision-Making Standards

► Substituted Judgment

- The principle of decision-making that substitutes the decision the person would have made when the person had capacity as the guiding force in any surrogate decision the guardian makes.
- Promotes the underlying values of self-determination and well-being of the person.
- Not used when following the person's wishes would cause substantial harm to the person or when the guardian cannot establish the person's goals and preferences even with support.

Decision-Making Standards

► Best Interest

- The principle of decision-making that should be used only when the person has never had capacity, when the person's goals and preferences cannot be ascertained even with support, or when following the person's wishes would cause substantial harm to the person.
- Requires the guardian to consider the least intrusive, most normalizing, and least restrictive course of action possible to provide for the needs of the person.
- Requires the guardian to consider past practice and evaluate reliable evidence of likely choices.

Decision-Making Standards

- ▶ The guardian shall identify and advocate for the person's goals, needs, and preferences. Goals are what are important to the person under guardianship, whereas preferences are specific expressions of choice.
 - ▶ The guardian shall ask the person what he or she wants.
 - ▶ If the person has difficulty expressing what he or she wants, the guardian shall do everything possible to help the person express his or her goals, needs, and preferences.
 - ▶ Only when the person, even with assistance, cannot express his or her goals and preferences, shall the guardian seek input from others familiar with the person to determine what the individual would have wanted.
 - ▶ Finally, only when the person's goals and preferences cannot be ascertained, may the guardian make a decision in the person's best interest.

Dignity of Risk

- ▶ **Dignity of risk** is the idea that self-determination and the right to take reasonable risks are essential for dignity and self esteem, thus should not be impeded by excessively cautious caregivers concerned about their duty of care.
- ▶ The concept means that all adults have the right to make their own choices about their health and care, even if healthcare professionals believe these choices endanger the person's health or longevity.

What is Supported Decision-Making?

- ▶ Supported Decision-Making (SDM) is a tool that allows people with disabilities to retain their decision-making capacity by choosing supports to help them make choices. A person using SDM selects trusted advisors, such as friends, family members, or professionals, to serve as supporters and tools, such as apps and assistive technology, to understand and communicate choices. The supporters agree to help the person with a disability to understand, consider, and communicate decisions, giving the person the tools to make their own informed decisions.

Supported Decision-Making

- ▶ Though a nationally growing trend, Supported Decision-Making has not been adopted as a formal “Guardianship Alternative” in most states.
- ▶ Texas has adopted this method of decision-making and is utilizing it as an alternative to guardianship for many persons with disabilities.
- ▶ Without enabling legislation, this practice cannot be used in an official capacity.
- ▶ However, the basics principles can and should often be applied for individuals who are under guardianship but able to participate in their own decision-making.
- ▶ Use of this practice is consistent with the “Least Restrictive” principle.

Supported Decision-Making

- ▶ Supported Decision-Making will look different for everyone. It means finding supports to help a person with a disability understand, make, and communicate their own choices. Examples of these tools might be:
 - ▶ Plain language materials or information in visual or audio form
 - ▶ Extra time to discuss choices
 - ▶ Creating lists of pros and cons
 - ▶ Role-playing activities to help the person understand choices
 - ▶ Bringing a supporter into important appointments to take notes and help the person remember and discuss their options
 - ▶ Bill payment tools such as auto-payments or bill management notification apps

Supported Decision-Making Agreements

- ▶ Under a Supported Decision-Making Agreement, the Supporter...
 - ▶ CAN help a person with a disability.....
 - ▶ Understand the options, responsibilities, and consequences of their decisions
 - ▶ Obtain and understand information relevant to their decisions
 - ▶ Communicate their decisions to the appropriate people
 - ▶ CANNOT.....make a decision FOR the person with a disability

Supported Decision-Making Agreements

- ▶ People with disabilities who want to use supported decision-making should...
 - ▶ Choose people they trust to help them make decisions
 - ▶ Ask these individuals to be their supporters
 - ▶ Think about the type of decisions they need help making
 - ▶ Complete a written plan called a supported decision-making agreement
 - ▶ Provide the agreement to people like doctors and service providers

PRACTICAL Tool for Lawyers: Steps in Supporting Decision-Making

- ▶ Joint ABA product from:
 - ▶ Commission on Law and Aging
 - ▶ Commission on Disability Rights
 - ▶ Section on Civil Rights and Social Justice
 - ▶ Section on Real Property, Trust and Estate Law
 - ▶ with assistance from the National Resource Center on Supported Decision-Making:
 - ▶ <http://www.supporteddecisionmaking.org>
- ▶ https://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice/practical_tool.html

Practical Tool for Lawyers

► **PRESUME** guardianship is not needed

- Consider less restrictive options like financial or health care power of attorney, advance directive, trust, or supported decision-making
- Review state statute for requirements about considering such options

Practical Tool for Lawyers

► **REASON**: Clearly identify the reasons for concern

Consider whether the individual can meet some or all of the following needs:

► **Money Management:**

- Managing accounts, assets, and benefits
- Recognizing exploitation

► **Health Care:**

- Making decisions about medical treatment
- Taking medications as needed
- Maintaining hygiene and diet
- Avoiding high-risk behaviors

Practical Tool for Lawyers

▶ **REASON**: Clearly identify the reasons for concern

▶ **Relationships:**

- ▶ Behaving appropriately with friends, family, and workers
- ▶ Making safe decisions about sexual relationships

▶ **Community Living:**

- ▶ Living independently
- ▶ Maintaining habitable conditions
- ▶ Accessing community resources

▶ **Personal Decision-Making:**

- ▶ Understanding legal documents (contracts, lease, powers of attorney)
- ▶ Communicating wishes
- ▶ Understanding legal consequences of behavior

Practical Tool for Lawyers

▶ **REASON**: Clearly identify the reasons for concern

▶ **Employment:**

- ▶ Looking for, gaining, and retaining employment

▶ **Personal Safety:**

- ▶ Avoiding common dangers
- ▶ Recognizing and avoiding abuse
- ▶ Knowing what to do in an emergency

Practical Tool for Lawyers

- ▶ **ASK** if a triggering concern may be caused by temporary or reversible conditions
- ▶ Are concerns the result of or related to temporary or reversible conditions such as:
 - ▶ **Medical conditions:** Infections, dehydration, delirium, poor dental care, malnutrition, pain
 - ▶ **Sensory deficits:** hearing or vision loss
 - ▶ **Medication** side effects
 - ▶ **Psychological conditions:** stress, grief, depression, disorientation
 - ▶ **Stereotypes** or cultural barriers

Practical Tool for Lawyers

- ▶ **COMMUNITY:** Determine if concerns can be addressed by connecting the individual to family or community resources and making accommodations

Might any of the following supports meet the needs:

- ▶ **Community Supports:**
 - ▶ In-home care, adult day care, personal attendant, congregate and home delivered meals, transportation
 - ▶ Care management, counseling, mediation
 - ▶ Professional money management
- ▶ **Informal Supports from Family/Friends:**
 - ▶ Assistance with medical and money management
 - ▶ Communication assistance
 - ▶ Identifying potential abuse

Practical Tool for Lawyers

- ▶ **COMMUNITY:** Determine if concerns can be addressed by connecting the individual to family or community resources and making accommodations
- ▶ **Accommodations:**
 - ▶ Assistive technology
 - ▶ Home modifications
- ▶ **Residential Setting:**
 - ▶ Supported housing or group home
 - ▶ Senior residential building
 - ▶ Assisted living or nursing home

Practical Tool for Lawyers

- ▶ **TEAM:** Ask the person whether he or she already has developed a team to help make decisions
 - ▶ Does the person have friends, family members, or professionals available to help?
 - ▶ Has the person appointed a surrogate to help make decisions?

Practical Tool for Lawyers

- ▶ **IDENTIFY abilities:** Identify areas of strengths and limitations in decision-making

Can the individual:

- ▶ Make decisions and explain his/her reasoning?
- ▶ Maintain consistent decisions and primary values over time?
- ▶ Understand the consequences of decisions?

Practical Tool for Lawyers

- ▶ **CHALLENGES:** Screen for and address any potential challenges presented by the identified supports and supporters

Screen for any of the following challenges:

- ▶ **Possible challenges to identified supports:**
 - ▶ Eligibility, cost, timing or location
 - ▶ Risk to public benefits
- ▶ **Possible concerns about supporters:**
 - ▶ Risk of undue influence
 - ▶ Risk of abuse, neglect, exploitation (report suspected abuse to adult protective services)
 - ▶ Lack of understanding of person's medical/mental health needs
 - ▶ Lack of stability, or cognitive limitations of supporters
 - ▶ Disputes with family members

Practical Tool for Lawyers

- ▶ **APPOINT** legal supporter or surrogate consistent with person's values and preferences

Determine if any of these appointments could meet the needs:

- ▶ Agent under health care power of attorney or advance directive
- ▶ Health care surrogate under state law
- ▶ Agent under financial power of attorney
- ▶ Trustee
- ▶ Social Security representative payee
- ▶ VA fiduciary
- ▶ Supporter under representation agreement, legally or informally recognized

Practical Tool for Lawyers

- ▶ **LIMIT** any necessary guardianship petition and order

If a guardian is needed:

- ▶ Limit guardianship to what is absolutely necessary, such as:
 - ▶ Only specific property/financial decisions
 - ▶ Only property/finances
 - ▶ Only specific personal/health care decisions
 - ▶ Only personal/health care decisions
- ▶ State how guardian will engage and involve person in decision-making
- ▶ Develop proposed person-centered plan
- ▶ Reassess periodically for modification or restoration of rights

Alternatives to Guardianship

Financial

Individual Choice

- ❖ Joint Account / Trust
- ❖ Power of Attorney

Financial

No Choice

- ❖ Fiduciary

Medical

Individual Choice (Uniform Health-Care Decisions Act)

- ❖ “Individual Instruction”
- ❖ Surrogate for Health Care Decisions
- ❖ Power of Attorney for Health Care

Mental Health

Individual Choice (Mental Health Care Treatment Decisions Act)

- ❖ “Individual Instruction”
- ❖ Power of Attorney for Mental Health Treatment (“Psychiatric Advance Directive”)

Financial Decisions - Individual's Choice

Joint Account

Someone else signs checks needed for daily living

- ▶ However, the other signer also does not have full access to the account

Trust

Money is put away, paid only under certain conditions

- ▶ The person may not be able to regain access to the trust amount

Financial Decisions - Individual's Choice

Power of Attorney (POA) for financial decisions

The individual lets another person act for her/him in financial matters, in case of incapacitation (NMSA § 45-5B-101 to -123)

- The individual may also terminate a power of attorney at any time (NMSA § 45-5B-110(A)(3) and (B)(1))

Not the Individual's Choice, but Without Court: Fiduciaries

If the Social Security Administration (SSA) believes that a person cannot properly spend her/his Social Security check, it may appoint a representative payee.

- SSA prefers someone of trust as payee, especially a family member.
- The representative-payee appointment survives despite the individual's objections.

The Veterans' Administration (VA) has a similar system.

Uniform Health-Care Decisions Act

(NMSA § § 24-7A-1 to -18)

Advance health-care directives

Advance “Individual Instruction”

While able to make medical decisions, an individual can give an individual instruction - communicating prospectively what medical procedures s/he wants and does not want (NMSA § 24-7A-2(A)).

- Lets family and health care providers know what one's wishes are in case of losing capacity to make or communicate medical decisions.
- A model, including the appointment of an agent (Power of Attorney) to make health care decisions, is found at NMSA § 24-7A-4.

These instructions should determine medical care even if guardian is later appointed and disagrees (NMSA § 24-7A-6(A)).

Uniform Health-Care Decisions Act

(NMSA § § 24-7A-1 to -18)

Advance health-care directives

Surrogate for Health Care Decisions

If the person never had capacity or has lost it, NMSA § 24-7A-5(A) provides that a family member can act as a surrogate health care decision maker

- ▶ A person with capacity can appoint a surrogate, but this is more used by people who never had or who lost their capacity to make medical decisions
- ▶ NMSA § 24-7A-5(B) has a priority list for family members to act as a surrogate health care decision maker

Uniform Health-Care Decisions Act

(NMSA § § 24-7A-1 to -18)

Advance health-care directives

Power of Attorney (POA) for medical decisions

A power of attorney for health care authorizes decisions when the person loses capacity to make or communicate medical decisions (NMSA § 24-7A-2(B))

- ▶ The authority usually becomes effective only when the person lacks capacity (NMSA § 24-7A-2(C))
- ▶ Governed by Uniform Health-Care Decisions Act, as the Uniform Power of Attorney Act does not apply to health care decisions (NMSA § 45-5B-103(B))

Mental Health Care Treatment Decisions Act

(NMSA § § 24-7B-1 to -16)

Advance mental health directives

Advance “Individual Instruction”

While having capacity, may give instruction on decisions in case of incapacity (NMSA § 24-7B-4(A))

- May be oral or written
 - Oral instruction: made personally to health care provider
- “A guardian shall comply with the protected person’s individual instructions made while the protected person had capacity” (NMSA § 24-7B-8(A))

Mental Health Care Treatment Decisions Act

(NMSA § § 24-7B-1 to -16)

Advance mental health directives

Psychiatric Advance Directive (PAD)

➤ **Power of Attorney (POA) for mental health treatment decisions**

PAD remains “in effect notwithstanding the principal’s later incapacity under ... Article 5 of the Uniform Probate Code” (NMSA § 24-7B-4(B))

PAD “effective only upon certification that the principal lacks capacity” (NMSA § 24-7B-4(C))

➤ **See NMSA § 24-7B-5 on “Capacity”**

Individual with Disability Is Still in Charge

Until finding of incapacity, individual can:

- Revoke individual instruction
- Revoke designation of agent (POA/PAD)
- Disqualify a surrogate
- Reassert financial authority, except for representative-payee appointment

Individual may challenge a finding of incapacity; the challenge “shall prevail” unless otherwise ordered by court (NMSA § § 24-7A-6(B), 24-7B-5(D))

New Mexico Courts Protect the Individual's Choice

Corum v. Roswell Senior Living, LLC (2010-NMCA-105) includes an excellent analysis of the Uniform Health-Care Decisions Act

- The intent of the Act is to protect the rights of individuals to make their own medical decisions
- Unless statutory requirements are met, the right of a person to make medical decisions will not be transferred to a surrogate not chosen by the person
 - » Even when there is no dispute that the person lacks capacity

Thank you!

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PRACTICAL Tool for Lawyers:

Steps in Supporting Decision-Making

The PRACTICAL Tool aims to help lawyers identify and implement decision-making options for persons with disabilities that are less restrictive than guardianship. It is a joint product of four American Bar Association entities – the Commission on Law and Aging, Commission on Disability Rights, Section on Civil Rights and Social Justice, and Section on Real Property, Trust and Estate Law, with assistance from the National Resource Center for Supported Decision-Making. Learn more about the PRACTICAL Tool and Resource Guide at www.ambar.org/practicaltool.

PRESUME guardianship is not needed.

- Consider less restrictive options like financial or health care power of attorney, advance directive, trust, or supported decision-making
- Review state statute for requirements about considering such options

Observations and Notes:

REASON. Clearly identify the reasons for concern.

Consider whether the individual can meet some or all of the following needs:¹

Money Management:

- Managing accounts, assets, and benefits
- Recognizing exploitation

Health Care:

- Making decisions about medical treatment
- Taking medications as needed
- Maintaining hygiene and diet
- Avoiding high-risk behaviors

Relationships:

- Behaving appropriately with friends, family, and workers
- Making safe decisions about sexual relationships

Community Living:

- Living independently
- Maintaining habitable conditions

Observations and Notes
(List supports needed.):

¹ Adapted from University of Missouri Kansas City, Institute for Human Development, "MO Guardianship: Understanding Your Options & Alternatives," <http://moguardianship.com>.

PRACTICAL Tool for Lawyers: Steps in Supporting Decision-Making

<ul style="list-style-type: none"> • Accessing community resources <p>Personal Decision-Making:</p> <ul style="list-style-type: none"> • Understanding legal documents (contracts, lease, powers of attorney) • Communicating wishes • Understanding legal consequences of behavior <p>Employment:</p> <ul style="list-style-type: none"> • Looking for, gaining, and retaining employment <p>Personal Safety:</p> <ul style="list-style-type: none"> • Avoiding common dangers • Recognizing and avoiding abuse • Knowing what to do in an emergency 	
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<p>ASK If a triggering concern may be caused by temporary or reversible conditions. Look for steps to reverse the condition or postpone a decision until the condition improves.</p>	
<p>Are concerns the result of or related to temporary or reversible conditions such as:</p> <ul style="list-style-type: none"> • Medical conditions: Infections, dehydration, delirium, poor dental care, malnutrition, pain • Sensory deficits: hearing or vision loss • Medication side effects • Psychological conditions: stress, grief, depression, disorientation • Stereotypes or cultural barriers 	<p>Observations and Notes:</p>

<p>COMMUNITY. Determine if concerns can be addressed by connecting the individual to family or community resources and making accommodations. Ask "what would it take?" to enable the person to make the needed decision(s) or address the presenting concern.</p>	
<p>Might any of the following supports meet the needs:</p> <p>Community Supports:</p> <ul style="list-style-type: none"> • In-home care, adult day care, personal attendant, congregate and home delivered meals, transportation • Care management, counseling, mediation • Professional money management <p>Informal Supports from Family/Friends:</p> <ul style="list-style-type: none"> • Assistance with medical and money management 	<p>Observations and Notes:</p>

<ul style="list-style-type: none"> • Communication assistance • Identifying potential abuse <p>Accommodations:</p> <ul style="list-style-type: none"> • Assistive technology • Home modifications <p>Residential Setting:</p> <ul style="list-style-type: none"> • Supported housing or group home • Senior residential building • Assisted living or nursing home 	
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TEAM. Ask the person whether he or she already has developed a team to help make decisions.

<ul style="list-style-type: none"> • Does the person have friends, family members, or professionals available to help? • Has the person appointed a surrogate to help make decisions? 	Observations and Notes:
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IDENTIFY abilities. Identify areas of strengths and limitations in decision-making if the person does not have an existing team and has difficulty with specific types of decisions.

<p>Can the individual:</p> <ul style="list-style-type: none"> • Make decisions and explain his/her reasoning • Maintain consistent decisions and primary values over time • Understand the consequences of decisions 	Observations and Notes:
---	--------------------------------

CHALLENGES. Screen for and address any potential challenges presented by the identified supports and supporters.

<p>Screen for any of the following challenges:</p> <p>Possible challenges to identified supports:</p> <ul style="list-style-type: none"> • Eligibility, cost, timing or location • Risk to public benefits <p>Possible concerns about supporters:</p> <ul style="list-style-type: none"> • Risk of undue influence • Risk of abuse, neglect, exploitation (report suspected abuse to adult protective services) • Lack of understanding of person's medical/mental health needs 	Observations and Notes:
--	--------------------------------

PRACTICAL Tool for Lawyers: Steps in Supporting Decision-Making

<ul style="list-style-type: none"> • Lack of stability, or cognitive limitations of supporters • Disputes with family members 	
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APPPOINT legal supporter or surrogate consistent with person's values and preferences.

<p>Could any of these appointments meet the needs:</p> <ul style="list-style-type: none"> • Agent under health care power of attorney or advance directive • Health care surrogate under state law • Agent under financial power of attorney • Trustee • Social Security representative payee • VA fiduciary • Supporter under representation agreement, legally or informally recognized 	<p>Observations and Notes:</p>
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LIMIT any necessary guardianship petition and order.

<p>If a guardian is needed:</p> <ul style="list-style-type: none"> • Limit guardianship to what is absolutely necessary, such as: <ul style="list-style-type: none"> • Only specific property/financial decisions • Only property/finances • Only specific personal/health care decisions • Only personal/health care decisions • State how guardian will engage and involve person in decision-making • Develop proposed person-centered plan • Reassess periodically for modification or restoration of rights 	<p>Observations and Notes:</p>
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*For people with intellectual
and developmental disabilities*

Under Texas law, you can use the form below or any form that is not inconsistent with this one.

Supported Decision-Making Agreement

This agreement is governed by the Supported Decision-Making Act, Chapter 1357 of the Texas Estates Code. This supported decision-making agreement is to support and accommodate an individual with a disability to make life decisions, including decisions related to where and with whom the individual wants to live, the services, supports, and medical care the individual wants to receive, and where the individual wants to work, without impeding the self-determination of the individual with a disability. This agreement may be revoked by the individual with a disability or his or her supporter at any time. If either the individual with a disability or his or her supporter has any questions about the agreement, he or she should speak with a lawyer before signing this supported decision-making agreement.

Appointment of Supporter:

I (Name of Adult with Disability), _____ am entering into this agreement voluntarily.

I choose (Name of Supporter) _____ to be my Supporter.

Supporter's Address: _____

Phone Number: _____

E-mail Address: _____

My Supporter may help me with life decisions about:

Yes ___ No ___ obtaining food, clothing and a place to live

Yes ___ No ___ my physical health

Yes ___ No ___ my mental health

Yes ___ No ___ managing my money or property

Yes ___ No ___ getting an education or other training

Yes ___ No ___ choosing and maintaining my services and supports

Yes ___ No ___ finding a job

Yes ___ No ___ Other: _____

My Supporter does not make decisions for me. To help me make decisions, my Supporter may:

1. Help me get the information I need to make medical, psychological, financial, or educational decisions;
2. Help me understand my choices so I can make the best decision for me; or
3. Help me communicate my decision to the right people.

Yes ___ No ___ My Supporter may see my private health information under the Health Insurance Portability and Accountability Act of 1996. I will provide a signed release.

Yes ___ No ___ My Supporter may see my educational records under the Family Educational Rights and Privacy Act of 1974 (20 U.S.C. Section 1232g). I will provide a signed release.

This agreement starts when signed and will continue until _____ (date) or until my Supporter or I end the agreement or the agreement ends by law.

Signed this _____ (day) of _____ (month), _____ (year)

(Signature of Adult with Disability)

(Printed Name of Adult with Disability)



*For people with intellectual
and developmental disabilities*

CONSENT OF SUPPORTER

I (Name of Supporter), _____ consent to act as a Supporter under this agreement.

(Signature of Supporter)

(Printed Name of Supporter)

This agreement must be signed in front of two witnesses or a Notary Public.

(Witness 1 Signature)

(Printed Name of Witness 1)

(Witness 2 Signature)

(Printed Name of Witness 2)

OR

Notary Public

State of _____

County of _____

This document was acknowledged before me on _____ (date)

By _____ and _____
(Name of Adult with a Disability) (Name of Supporter)

(Signature of Notary)

(Printed Name of Notary)

(Seal, if any, of notary) _____

My commission expires: _____

WARNING: PROTECTION FOR THE ADULT WITH A DISABILITY

If a person who receives a copy of this agreement or is aware of the existence of this agreement has cause to believe that the adult with a disability is being abused, neglected, or exploited by the supporter, the person shall report the alleged abuse, neglect, or exploitation to the Department of Family and Protective Services by calling the Abuse Hotline at 1-800-252-5400 or online at www.txabusehotline.org.

DUTY OF CERTAIN PERSONS WITH RESPECT TO AGREEMENT

A person who receives the original or a copy of a supported decision-making agreement shall rely on the agreement. A person is not subject to criminal or civil liability and has not engaged in professional misconduct for an act or omission if the act or omission is done in good faith and in reliance on a supported decision-making agreement.

This image shows a blank sheet of white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.

Ethics – Family Dynamics in Guardianship and Conservatorship Cases

ETHICS

FAMILY DYNAMICS IN GUARDIANSHIP AND CONSERVATORSHIP CASES

October 27, 2017

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Attorney at Law

SUSAN STUART
Decisions in Care, LLC

ETHICS — FAMILY DYNAMICS IN GUARDIANSHIP AND CONSERVATORSHIP CASES

Given the dynamic and evolving nature of elder law, attorneys should and often must represent their clients “holistically”, adapting and applying information and insight obtained from a wide range of legal and social disciplines. Family members and other persons with fiduciary responsibilities also may be involved. The attorney-client relationship in elder law is not always as clear-cut and unambiguous as in other areas of law. Questions relating to end-of-life planning, self-determination, exploitation, abuse, long-term care planning, best interests, substituted judgment and fundamentally, “who is the client?” present issues not often faced by attorneys in other fields. Almost inevitably, elder law attorneys must deal with “family dynamics” in guardianship and conservatorship cases and must plan not only to protect their client from exploitation, abuse and neglect and obtaining access to high quality healthcare and long-term care services and supports, but also to promote family harmony and minimize conflicts.

In taking the “holistic approach”, the elder law attorney will often encourage the use of family members and other third parties to support the client in the legal representation where appropriate and the client consents. In the elder law practice, the assistance of non-client family members and other third parties is often appropriate and useful, especially when the capacity of the client is diminished. Of course, the attorney needs to confirm that (1) non-clients who are involved understand who the attorney’s client is and are not unduly influencing the client and (2) the client has authorized the involvement of the non-client in the process, preferably in writing.

In an attempt to avoid a guardianship and conservatorship, the attorney may explain to a client seeking estate planning services how conflicts among family members may develop and recommend harmony-enhancing measures consistent with the client’s estate planning goals to minimize these conflicts. For example, the attorney should point out to the client the risk of disharmony in the client’s selection of healthcare and financial fiduciaries. Often the attorney can suggest proactive planning measures to minimize the risk of disharmony.

Of course, conflicts among a client’s family members or other interested parties may occur even if preventative measures are taken. For example, a client may have more than one family member to choose from when selecting an agent under a healthcare or financial power of attorney. The selection of one family member as a fiduciary may create resentment among the other family members not selected. This resentment may later fuel or create conflicts and can potentially lead to a guardianship or conservatorship proceeding to remove the appointed fiduciary.

In recommending conflict resolution solutions, the attorney should be careful not to violate ethical obligations to the client and be mindful whether the proposed action creates a conflict of interest, whether the attorney has authorization to take the proposed action or whether the action results in a disclosure of the client’s confidential information.

The elder law attorney is often confronted with issues of financial exploitation, physical and emotional abuse and neglect and conflict among family members when the person whose

interests are served in the legal representation has diminished capacity or has a disability. Attorneys should make an effort to be educated and trained in detecting and preventing exploitation, abuse and neglect. As a preventative measure, attorneys might consider encouraging clients to 1) sign a written pre-consent form authorizing the attorney to take protective action if the attorney discovers exploitation, abuse or neglect; 2) encourage the client to place the client's assets into living trust; or 3) give a trustworthy family member access to view the client's bank account in order for such trusted person to be able to act as a protector by checking on expenditures.

Family conflicts often arise in planning for long-term care and financing such care. In some cases, this planning involves transfers of assets to qualify for needs-based benefits. The attorney should be especially cautious when an asset transfer is proposed and even more cautious when the recipient of the transfer is the person requesting the transfer or when the transfer benefits one family member over others, especially if the transfer is inconsistent with the client's existing estate plan. If the attorney determines that undue influence is present, the attorney should decline representation unless the attorney determines that the prospective client will be able to, perhaps with assistance from the attorney, overcome the impact of such undue influence. In some cases, the attorney may decide to take further protective action. Model Rule 1.14(b) provides: "When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian *ad litem*, conservator or guardian." As the Rule implicitly indicates, the decision to initiate a formal protective proceeding – including appointment of a guardian *ad litem* – should be a last result, after all attempts to resolve the problem in a less invasive manner have been attempted.

In elder law, identifying the client is sometimes challenging because the individual whose welfare and interests are to be protected in the proposed representation may not be present or may be accompanied by family members, appointed fiduciaries or other third parties. Usually, the client is the individual whose property and interests are to be protected but a family member or fiduciary seeking to protect or assist another person can be the client. Often several people are present at the initial client meeting. When more than one person at the meeting believes the attorney to be representing him or her, the attorney should take additional steps to clarify the identity of the client. The identity of the client should be resolved at the earliest stage so that the client, the attorney, and other involved persons understand:

1. Whose interests are to be protected in the representation process;
2. To whom the attorney owes the professional duties of competence, communication, diligence, loyalty and confidentiality;
3. The steps that may or may not be taken after the initial consultation if the client or protected individual is not present at that meeting;
4. That the attorney will arrange at the earliest practicable time to communicate privately with the person who is expected to be the client.

Once the client is identified, the attorney should also determine whether the client authorizes the attorney to communicate with another person, such as a fiduciary or family member and obtain the client's written consent to such authorized involvement.

What is the lawyer's duty when retained as counsel for the guardian, conservator or agent under a power of attorney? There are unique challenges of identifying the client when a fiduciary is acting on behalf of the protected individual. When an individual has been appointed as guardian for an incapacitated person, the attorney may identify the protected person, even though incapacitated, as the client even though the fiduciary retains the attorney. Alternatively, the attorney may treat the fiduciary as the client. However, the attorney who represents only the fiduciary still has a derivative duty towards the incapacitated person and a duty to prevent or rectify any misconduct on the part of the guardian. When a fiduciary is involved, client identification should be clarified in the engagement agreement between the attorney and the party with the authority to enter into the engagement agreement.

Ethics and Family Dynamics Of Guardianship

What professional assistance is available to assist families with challenging dynamics prior to filing a petition?

- An independent assessment could be completed by an aging life care professional or geriatric care manager to provide objective recommendations based on the individual's needs
- Professional coaching may be effective for individual family members to address areas of concern
- Family counseling may be beneficial
 - Who should pay the cost? For how long?
 - All parties may not be willing to participate
- Mediation

If a Corporate Guardian is appointed, who is the professional Guardian's client?

The duty of the guardian is to the incapacitated adult of whom the guardian is appointed to protect in accordance with the court order.

What are the Patterns of Family Conflict the Professional Guardian encounters?

The professional guardian encounters varying patterns of relating between family members. Each family system and its dynamics are unique, although there are some common patterns. Some of these patterns include:

- Adult disabled children dependent on a parent who is no longer able to continue to provide needed support
- Adult children who have relied on a parent financially or emotionally not accepting of the inability for the support to continue
- Differing perspectives may exist amongst family members regarding care needs and the appropriateness and adequacy of what is being provided
- A desire for control from at least one family member may exist
- Family members may have a desire to resolve or prolong longstanding issues
- Family members may believe they deserve more than what they have received and use this an opportunity to be compensated similarly to others in the family
- Some family members may have a need to prove they are the "better" child through their efforts to gain approval and acceptance
- Some family members attempt to use the situation to ensure a sibling receives retribution for their prior actions
- Decisions are made based on protecting one's inheritance
 - Issues may be minimized or quality compromised as a result

- Family members may continue attempts to manipulate an incapacitated adult for their own benefit or financial gain to the incapacitated adult's detriment
- Conflict may exist between adult children and a new spouse
- The incapacitated adult may fluctuate in their desire to remain involved with another family member

When should visitation guidelines and restrictions be established?

- Open visitation should always be the goal
- Visitation guidelines may need to be established for all visitors with visitors signing an agreement in advance if there are concerns
- Monitoring or supervised visitation may be needed if established guidelines are not followed causing upset or potential harm to the incapacitated person
- In extreme circumstances where there is concern of harm to the incapacitated person, visits may be restricted. Court review and approval is advisable if guardianship is in place
- A status conference may be held to review and restore visitation if appropriate in the future

Core principles used by Guardians

- Autonomy
- Self-determination (NGA Standard 9)
- Substituted judgment standard (NGA Standard 7)
- Least restrictive alternative (NGA Standard 8)
- The Guardian's Relationship with Family Members and Friends of the Person (NGA Standard 4)
- Confidentiality (NGA Standard 11)
- Informed consent (NGA Standard 6)



NATIONAL GUARDIANSHIP ASSOCIATION

National Guardianship Association Ethical Principles

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

The term "guardian" includes all court-appointed fiduciaries. These Ethical Standards are reflected throughout the National Guardianship Association's *Standards of Practice*. Guardians should look to the Standards for guidance on ways to carry out these ethical principles, with specific reference to the highlighted standards.



NATIONAL GUARDIANSHIP ASSOCIATION

A large, solid black five-pointed star is the central graphic element. A solid black circle is positioned above the star, centered horizontally. The text "Standards of Practice" is overlaid on the star in a large, white, outlined font.

Standards of Practice

*Adopted 2000
Fourth Edition - 2013*

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National Guardianship Association

www.guardianship.org • info@guardianship.org • 877-326-5992

Standards of Practice, National Guardianship Association

🔄 NGA Standard 3 – The Guardian’s Professional Relationship with the Person

- I. The guardian shall treat the person under guardianship with dignity.
- II. The guardian shall avoid personal relationships with the person, the person's family, or the person's friends, unless the guardian is a family member, or unless such a relationship existed before the appointment of the guardian.
- III. The guardian may not engage in sexual relations with a person unless the guardian is the person's spouse or in a physical relationship that existed before the appointment of the guardian.
- IV. The guardian shall seek ongoing education concerning the following:
 - A. Person-centered planning,
 - B. Surrogate decision-making,
 - C. Responsibilities and duties of guardians,
 - D. Legal processes of guardianship, and
 - E. State certification of guardians.

🔄 NGA Standard 4 - The Guardian's Relationship with Family Members and Friends of the Person

- I. The guardian shall promote social interactions and meaningful relationships consistent with the preferences of the person under guardianship.
 - A. 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.
 - B. The guardian may not interfere with established relationships unless necessary to protect the person from substantial harm.
- II. The guardian shall make reasonable efforts to maintain the person's established social and support networks during the person's brief absences from the primary residence.
- III. When disposing of the person's assets, the guardian may notify family members and friends and give them the opportunity, with court approval, to obtain assets (particularly those with sentimental value).
- IV. The guardian shall make reasonable efforts to preserve property designated in the person's will and other estate planning devices executed by the person.
- V. The guardian may maintain communication with the person's family and friends regarding significant occurrences that affect the person when that communication would benefit the person.
- VI. The guardian may keep immediate family members and friends advised of all pertinent medical issues when doing so would benefit the person. The guardian may request and consider family input when making medical decisions.

Note: Refer to Standard 11 as it relates to confidentiality issues.

Standards of Practice, National Guardianship Association

🌀 NGA Standard 5 – The Guardian’s Relationship with Other Professionals and Providers of Service to the Person

- I. The guardian shall treat all professionals and service providers with courtesy and respect and shall strive to enhance cooperation on behalf of the person.
- II. The guardian shall develop and maintain a working knowledge of the services, providers and facilities available in the community.
- III. The guardian shall stay current with changes in community resources to ensure that the person under guardianship receives high-quality services from the most appropriate provider.
- IV. A guardian who is not a family member guardian may not provide direct service to the person. The guardian shall coordinate and monitor services needed by the person to ensure that the person is receiving the appropriate care and treatment.
- V. The guardian shall engage the services of professionals (attorneys, accountants, stock brokers, real estate agents, physicians) as necessary to appropriately meet the goals, needs, and preferences of the person.
- VI. The guardian shall make a good faith effort to cooperate with other surrogate decision-makers for the person. These include, where applicable, any other guardian, agent under a power of attorney, health care proxy, trustee, VA fiduciary and representative payee.
- VII. The guardian may consider mentoring new guardians.

🌀 NGA Standard 6 – Informed Consent

- I. Decisions the guardian makes on behalf of the person under guardianship shall be based on the principle of Informed Consent.
- II. Informed Consent is an individual’s agreement to a particular course of action based on a full disclosure of facts needed to make the decision intelligently.
- III. Informed Consent is based on adequate information on the issue, voluntary action, and lack of coercion.
- IV. 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.
- 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,

Standards of Practice, National Guardianship Association

- 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 7 – Standards for Decision-Making

- I. Each decision made by the guardian shall be an informed decision based on the principle of Informed Consent as set forth in Standard 6.
- II. The guardian shall identify and advocate for the person's goals, needs, and preferences. Goals are what are important to the person under guardianship, whereas preferences are specific expressions of choice.
 - A. First, the guardian shall ask the person what he or she wants.
 - B. Second, if the person has difficulty expressing what he or she wants, the guardian shall do everything possible to help the person express his or her goals, needs, and preferences.
 - C. Third, only when the person, even with assistance, cannot express his or her goals and preferences, shall the guardian seek input from others familiar with the person to determine what the individual would have wanted.
 - D. Finally, only when the person's goals and preferences cannot be ascertained, may the guardian make a decision in the person's best interest.
- III. Substituted Judgment
 - A. Substituted Judgment is the principle of decision-making that substitutes the decision the person would have made when the person had capacity as the guiding force in any surrogate decision the guardian makes.
 - B. Substituted Judgment promotes the underlying values of self-determination and well-being of the person.
 - C. Substituted Judgment is not used when following the person's wishes would cause substantial harm to the person or when the guardian cannot establish the person's goals and preferences even with support.
- IV. Best Interest
 - A. Best Interest is the principle of decision-making that should be used only when the person has never had capacity, when the person's goals and preferences cannot be ascertained even with support, or when following the person's wishes would cause substantial harm to the person.
 - B. The Best Interest principle requires the guardian to consider the least intrusive, most normalizing, and least restrictive course of action possible to provide for the needs of the person.
 - C. The Best Interest principle requires the guardian to consider past practice and evaluate reliable evidence of likely choices.

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🌀 NGA Standard 8 – Least Restrictive Alternative

- I. 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.
- II. 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.
- III. The guardian shall make individualized decisions. The least restrictive alternative for one person might not be the least restrictive alternative for another person.
- IV. The following guidelines apply in the determination of the least restrictive alternative:
 - A. The guardian shall become familiar with the available options for residence, care, medical treatment, vocational training, and education.
 - B. The guardian shall strive to know the person's goals and preferences.
 - C. The guardian shall consider assessments of the person's needs as determined by specialists. This may include an independent assessment of the person's functional ability, health status, and care needs.

🌀 NGA Standard 9 – Self-Determination of the Person

- I. 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.
- II. The guardian shall attempt to maximize the self-reliance and independence of the person.
- III. 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 own 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.
- IV. The guardian shall make and implement a plan that seeks to fulfill the person's goals, needs, and preferences. The plan shall emphasize the person's strengths, skills, and abilities to the fullest extent in order to favor the least restrictive setting.
- V. The guardian shall wherever possible, seek to ensure that the person leads the planning process; and at a minimum to ensure that the person participates in the process.

🌀 NGA Standard 10 – The Guardian's Duties Regarding Diversity and Personal Preferences of the Person

- I. The guardian shall determine the extent to which the person under guardianship identifies with particular ethnic, religious, and cultural values. To determine these values, the guardian shall also consider the following:
 - A. The person's attitudes regarding illness, pain, and suffering,
 - B. The person's attitudes regarding death and dying,
 - C. The person's views regarding quality of life issues,

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- D. The person's views regarding societal roles and relationships, and
 - E. The person's attitudes regarding funeral and burial customs.
- II. The guardian shall acknowledge the person's right to interpersonal relationships and sexual expression. The guardian shall take steps to ensure that a person's sexual expression is consensual, that the person is not victimized, and that an environment conducive to this expression in privacy is provided.
- A. The guardian shall ensure that the person has information about and access to accommodations necessary to permit sexual expression to the extent the person desires and to the extent the person possesses the capacity to consent to the specific activity.
 - B. The guardian shall take reasonable measures to protect the health and well-being of the person.
 - C. The guardian shall ensure that the person is informed of birth control methods. The guardian shall consider birth control options and choose the option that provides the person the level of protection appropriate to the person's lifestyle and ability, while considering the preferences of the person. The guardian shall encourage the person, where possible and appropriate, to participate in the choice of a birth control method.
 - D. The guardian shall protect the rights of the person with regard to sexual expression and preference. A review of ethnic, religious, and cultural values may be necessary to uphold the person's values and customs.

🔒 NGA Standard 11 - Confidentiality

- I. The guardian shall keep the affairs of the person under guardianship confidential.
- II. The guardian shall respect the person's privacy and dignity, especially when the disclosure of information is necessary.
- III. Disclosure of information shall be limited to what is necessary and relevant to the issue being addressed.
- IV. The guardian may disclose or assist the person in communicating sensitive information to the person's family and friends, as defined by the person, unless it will substantially harm the person.
- V. The guardian may refuse to disclose sensitive information about the person where disclosure would be detrimental to the well-being of the person or would subject the person's estate to undue risk. Such a refusal to disclose information must be reported to the court.

🔒 NGA Standard 12 – Duties of the Guardian of the Person

- I. The guardian shall have the following duties and obligations to the person under guardianship unless the order of appointment provides otherwise:
 - A. To see that the person is living in the most appropriate environment that addresses the person's goals, needs, and preferences.
 - 1. The guardian shall have a strong priority for home or other community-based settings, when not inconsistent with the person's goals and preferences.

SCENARIO:

Husband and Wife have been married for 20 years. Husband is incapacitated and Wife has been appointed his guardian and conservator. Wife meets with an attorney for Medicaid advice.

Discussion:

1. Is it appropriate for the attorney to represent only Wife?
2. Alternatively, may the attorney represent both spouses as joint clients if the attorney determines that they share the same goals and have no apparent conflict of interest between them?
3. What if the parties have children from prior marriages?
4. What if the parties have always kept their assets separate?
5. What if their estate planning goals differ significantly?

SCENARIO:

Client is guardian for his father and conservator of his father's estate. Client informs you that he has lived with his father in his father's house and has provided care for his father for several years. However, his father now requires 24/7 care and will soon enter a nursing home. Your client is one of three siblings. He consults you about Medicaid planning, and asks your assistance in transferring his father's residence to himself.

Discussion:

1. Can you assist son with the transfer?
2. Are there ways to minimize conflict among siblings?

SCENARIO:

Fred, in his 80s, has just married a woman he met at his assisted living facility where he has lived since his diagnosis of dementia. His new wife, Gertrude, has two children from a prior marriage and Fred has three children from a prior marriage. Gertrude has been appointed Fred's guardian and conservator. However, prior to his new marriage, and unbeknownst to the court in the guardianship and conservator proceeding, Fred designated his daughter as agent under his health care power of attorney and financial power of attorney. His will directs that his estate is to be distributed in equal shares to his children upon his death. Gertrude calls you to schedule a meeting, without Fred in attendance, explaining that Fred's meeting with an attorney would be too stressful for him. Gertrude tells you that Fred's children never visit or call their father and that they did not even attend their wedding and now Fred would like to change his will and powers of attorney.

Discussion:

1. Is it appropriate for you to represent only Gertrude?

2. Can you prepare a new will for Fred?
3. What if Fred comes to appointment but he seems confused and tells you to do whatever Gertrude wants?

SCENARIO:

Johnny is the primary caregiver for his mother, Mary, in his mother's residence. He has not been employed for a number of years other than holding down part-time, temporary jobs. Mary's daughter, Sally, is a physician who lives in Texas. She comes to town several times per year and has increasing concerns regarding her mother's physical needs which seem to be growing. Mary does not seem to be bathing and her dementia is getting worse. Mary reports to Sally that Johnny is mean to her. Johnny is not open to outside help. Johnny does not have a support system in place where he can get respite and has no money to go anywhere if he does get a break. His outside contacts have become limited since he is with his mother constantly to meet her needs.

Discussion:

1. Is there a Power of Attorney that has been established by Mary? Was she capacitated at the time?
2. How can Sally ensure that Mom's needs are effectively met?
3. At what point would it be appropriate to file for guardianship?
4. Should a caregiver contract be established to pay Johnny for providing needed care? Why or why not? Are there safeguards that should be put into place?
5. What can be done to ensure that Johnny receives sufficient respite care?

SCENARIO:

Ben is a disabled, fifty-eight year old man who has resided with his father, Fred, his entire life. Ben suffered a traumatic brain injury at the age of four. He is high functioning but requires some degree of supervision. He has no means of support other than SSDI. Fred has two other children, Kate and Sarah. Fred's will leaves his estate in equal shares to his children upon his death. Kate and Sarah are concerned about the amount of support their father is spending on Ben's needs and his perceived lavish lifestyle.

Discussion:

1. Fred has demonstrated that he is in the beginning stages of dementia.
2. How should possible exploitation on Ben's part be assessed and addressed?
3. Is Kate and Sarah's concern driven by their concern over their inheritance?
4. Is there a concern that Kate and Sarah have been appointed as co-guardians and co-trustees in Fred's will?
5. How might existing family dynamics impact resentment by the siblings later in Ben's life?

SCENARIO:

Carmen has three children and has appointed all three, Tom, Dick and Harry, as co-agents in both her financial and health care powers of attorney. The power of attorney documents requires all three agents to work in concert. Carmen recently suffered a stroke and can no longer live at home. She was recently discharged from a rehabilitation facility to a nursing home. Tom applied for Medicaid benefits to pay for Carmen's care but Medicaid was denied because Carmen has a rental property that is considered a countable resource in excess of the Medicaid resource limit. Tom proposes to his brothers that the house be sold to provide funds to pay for their mother's care. His brothers are resisting because they know Tom will privately pay for their mother's care (since he has been supplementing her meager income for years) and they fear, justifiably so, that their inheritance will be less if the rental is sold and the proceeds used to pay for their mother's care.

Discussion:

1. What suggestions would you have for Tom to resolve this conflict?
2. Given the restrictions on the power of attorney, is there an alternative to a guardianship and conservatorship?
3. Will the existence of the power of attorney appointing all three of Carmen's sons as agents and further stating that they serve as co-guardians and co-conservators should a guardianship and conservatorship proceeding be necessary?

SCENARIO:

Joan has a son, Tom, who is a drug addict who has been living with her and is being supported by her. She has a daughter, Stephanie, who lives in town and has recently become increasingly concerned about mom. Stephanie and her brother scream at one another in front of mom and Stephanie blames Joan for enabling Tom. In the meantime, Mom is refusing to attend medical appointments and Stephanie is limited on her availability as she works two jobs to provide care for her family as a single mother. Mediation was tried unsuccessfully and a corporate guardian was appointed. Everyone is unhappy with the situation.

Discussion:

1. What steps can the corporate guardian take to protect mom from the fighting between the children?
2. Should the guardian have concern regarding Tom and Joan living together?
3. Should the guardian or Stephanie petition for a conservator for Joan?
4. What intervention should be recommended for Tom and by whom?

This image shows a single sheet of white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.