



Senior Supplement

An Educational Service of Legal Resources for the Elderly Program (LREP)

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For more information call the LREP toll-free Legal Helpline at 1-800-876-6657 or 505-797-6005 (Albuquerque area)
www.nmbar.org/public/LREP

Adult Guardianships

What is the purpose of an Adult Guardianship?

A Guardian is a person or entity appointed by the district court and given the power and responsibility to make certain decisions about the care of another. Guardianship for an incapacitated person is used only as necessary to promote and to protect the well being of the person; encourage self reliance and independence; and only to the extent necessary based on the mental and physical limitations of the person to be protected. Unless expressly limited, an incapacitated person retains all legal and civil rights.

Who is an “incapacitated person”?

Any person who over time shows either partial or complete functional impairment, i.e., unable to make a rational decision, because of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication or other cause, to the extent that the person is unable to manage his personal or financial affairs.

Who can become a Guardian?

State law prioritizes who can be named a guardian from highest to lowest priority:

- Guardian appointed by another jurisdiction;
- Person previously nominated to serve in writing by incapacitated person prior to his incapacity;
- Spouse of incapacitated person;
- Adult child of the incapacitated person;
- Parent of the incapacitated person;
- Any relative of the incapacitated person with whom he/she has resided for more than six months prior to the filing of petition;
- Person nominated by the person who is caring for the incapacitated person or paying benefits to him; or any other person or a corporation..

The court, acting in the best interest of the incapacitated person, may pass over a person having priority and appoint a guardian with lower priority, taking

into consideration the preference of the incapacitated person, the geographic location, the relationship with the proposed guardian and the ability of the proposed guardian to fulfill the duties of guardianship.

Who cannot become a Guardian?

No individual who operates or is an employee of a boarding home, residential care home, nursing home, group home or other similar facility in which the incapacitated person resides may serve as a guardian for the incapacitated person except an employee related to the incapacitated person may serve as guardian.

How can a person get a Guardianship set up?

Any interested person may file a petition with the district court for the appointment of a person to serve as guardian for an alleged incapacitated adult. The petition must include, among other things, the biographical information about the alleged incapacitated person, the nature of the alleged incapacity and why a guardianship is sought, information and qualifications of the proposed guardian, a listing of the most closely related persons and the steps taken to

find a less restrictive alternatives. After proper notice the court will set a date for the hearing, appoint a Guardian *ad litem*, qualified health care professional and visitor to investigate the case.

Who is the Guardian *ad litem*?

The Guardian *ad litem* (GAL) is a New Mexico Attorney, in good standing, appointed by the district court to represent and protect the interests of the alleged incapacitated adult in connection with the court proceeding. A GAL is appointed unless the alleged incapacitated adult already has an attorney to represent his or her interests.



Adult Guardianship (Continued)

What are the duties of the Guardian *ad litem*?

The GAL will interview the alleged incapacitated person and present his or her declared position to the court. The GAL will also interview the qualified health care professional, the visitor and the proposed guardian; review both written reports submitted by the qualified health care professional and visitor; obtain independent medical or psychological assessments if necessary and give an independent assessment and recommendation to the court.

Who is the Qualified Health Care Professional and what does he or she do?

The court appointed qualified health care professional is a physician, psychologist, nurse practitioner or other health care practitioner whose training and expertise aid in the assessment of functional impairment. The qualified health care professional will examine the alleged incapacitated adult and submit a written report describing the nature and degree of the incapacity, if any, and the level of the intellectual, developmental and social functioning. The report will contain observations regarding the ability to make health care decisions and manage the activities of daily living.

Who is the court appointed Visitor and what does he or she do?

The court appointed visitor is a person who has been trained or has expertise to appropriately evaluate the needs of the alleged incapacitated adult. The visitor will interview the person seeking appointment as guardian and the alleged incapacitated adult as well as visiting the living quarters. The visitor submits a written report evaluating the needs and abilities of the alleged incapacitated adult, stating those activities the incapacitated person can do alone and those activities the incapacitated person needs assistance with, and recommendations as to the appropriateness of the appointment of the proposed guardian.

What are the powers, rights and duties of a Guardian once appointed?

There are many important responsibilities, powers, rights and duties that are associated with being ap-

pointed guardian over an individual. A guardian of an incapacitated adult has the same powers, rights and duties that a parent has over an un-emancipated minor except that the guardian is not legally obligated to provide his or her own funds to support the incapacitated adult and is not liable to third persons for acts of the incapacitated adult solely by reason of the guardianship. Powers and duties may include; placement decisions, custody, care, comfort and maintenance, training, education, care of personal items, medical and professional care. The guardian must exercise his supervisor powers in a manner that is least restrictive of the incapacitated adult's freedom and consistent with the need for supervision.

What is the annual reporting requirement?

The guardian must file an annual report with the court within 30 days of the anniversary date of the guardian's appointment. The report must include information concerning the progress and condition of the incapacitated person. There is a form in the state statute that must be followed.

How do you end a Guardianship?

A hearing to terminate or remove a guardianship may be scheduled when an informal letter to the Judge or a petition to the court by the incapacitated person is submitted. A petition by any person interested in the incapacitated adult's welfare is also permitted. After proper notice, a hearing will be set.

Can the Adult Guardianship be avoided?

A guardianship must be the least restrictive form of intervention. Other options must first be explored. These include but are not limited to: power of attorney, advance health-care directive, representative payee, limited guardianship and conservatorship.

This program is a joint project of the New Mexico Aging & Long-Term Services Department and the State Bar of New Mexico