



**Alternatives to Guardianship &  
Conservatorship**  
**and**  
**Handbook for Guardians & Conservators**  
*A practical guide to New Mexico law*



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and  
New Mexico Developmental Disabilities Planning Council Office of Guardianship  
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Information provided in this manual reflects laws and regulations in effect in New Mexico as of 2014. This manual is intended as a practical guide for the general public's use. The purpose of the manual is to provide general information concerning guardianship, conservatorship and alternatives to guardianship and conservatorship. The authors of this manual are not engaged in providing legal advice or other professional services. This manual should not be used as a substitute for professional service in a specific situation. Users of the manual are urged to seek professional services regarding any specific situation. The manual was initially developed with funds made available from the State of New Mexico, Office of New Mexico Attorney General, Guardianship Services Project and subsequently through the New Mexico Developmental Disabilities Planning Council Office of Guardianship. The opinions expressed should not be construed as representing the opinion or legal advice of the Attorney General or any state agency or public entity.

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## *Preface*

This manual is designed to assist concerned families and friends with learning options to address protecting elders and disabled adults who may be demonstrating questionable, impaired, or erratic decision making and/or behavioral concerns. These individuals may be at risk of exploitation, abuse, neglect and/or undue influence.

The goal of this manual is for it to be a reference tool and useful resource. While it may not cover every situation, it will provide information on powers of attorney and other alternatives to pursuing court action. Also included is information about guardianships and conservatorships, roles and duties, reporting requirements, accounting and overall responsibilities. The manual will assist families and friends on how to be more helpful and informed, knowing when there is a need to hire or involve a professional such as: an attorney, a mediator, a professional geriatric care manager, a social worker, a specialist in disabilities or mental health or a certified care manager. There are also videos that can be viewed on the website of the New Mexico Guardianship Association at [www.nmgaresourcecenter.org](http://www.nmgaresourcecenter.org).

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***Chapter One***  
***ALTERNATIVES TO GUARDIANSHIP***

- Introduction
- Negotiation and Mediation
- Health Care Power of Attorney
- Surrogate Health Care Decisions Under the Uniform Health Care Decisions Act (UHCDA)
- Right to Die and UHCDA
- Federal Patient Self-Determination Act
- Emergency Medical Service “Do Not Resuscitate” Regulations

## ➤ Introduction

A **guardian** is a person or an entity appointed by a court to make personal and health care decisions for someone who is impaired because of mental illness, dementia, physical or mental disability, or substance abuse. Someone who is impaired in this way is considered incapacitated. New Mexico law defines an “incapacitated person” as a “person who demonstrates over time either partial or complete functional impairment by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication or other cause, except minority, to the extent that the person is unable to manage the person’s personal affairs or the person is unable to manage the person’s estate or financial affairs or both.” Before a court will appoint a guardian, it must be determined that the person is not able to manage his or her personal care decisions. Personal care decisions cover such things as medical care, nutrition, clothing, shelter, hygiene, safety, and day-to-day living. New Mexico law states that a guardianship should encourage the individual’s independence and should be limited to the powers necessary to help with the person’s mental and physical limitations.

A **conservator** is a person or entity appointed by a court to make financial decisions for an incapacitated person. The court may appoint a conservator to manage the property or financial affairs of an incapacitated person or a minor ward. Unlike a guardian who may be nominated under a will, a court may only appoint a conservator.

Current New Mexico law allows the court to impose a guardianship or conservatorship on a person only if it is the least restrictive alternative. The least restrictive alternative means that everything else has been tried and will not work. The law also allows the court to impose a limited or a full guardianship and/or conservatorship that meet(s) the specific needs of an individual. Guardianship is a drastic legal measure. New Mexico law views guardianship as a last resort and should be considered only if and when all other options have been tried and failed. This chapter describes several alternatives to guardianships.

## ➤ Negotiation and Mediation

The first option to explore is negotiation. Typically when a disagreement arises between two or more people, they attempt to resolve their differences through informal negotiation. In a negotiation, the disputing parties might explore the problem and suggest some solutions without the help of a third party such as a lawyer, judge or mediator.

For example, negotiation may resolve a situation where family members have conflicting views on what is in “Mom’s” best interests. Each family member may have a different opinion regarding what Mom’s core needs are and how they should be met. Furthermore, Mom herself may have specific preferences regarding whether she even needs assistance and, if so, the kind and amount of assistance she is willing to accept. Family members may be able to negotiate with Mom and each other and reach a mutual decision regarding Mom’s care that she should have a homemaker come to her home for a few hours each day to help her shop for groceries, prepare her meals and clean her home.



If negotiation fails, it is becoming increasingly common to ask a neutral person to facilitate the negotiation. The neutral person is called a mediator or facilitator. The facilitator or mediator is not a decision-maker nor does (s)he suggest solutions. Rather, the mediator's role is to listen to all sides and guide the parties. If the mediator is successful in using problem-solving skills, the parties should be able to resolve the dispute themselves. Mediators can be a family friend, clergy, a counselor, a care manager, a professional mediator or an attorney - any person who can be objective and can help the family reach agreement.

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

Ideally, all concerned family members should take part in the mediation. The mediator should be sensitive to the particular needs or disabilities of the elderly or disabled person and should consider if anyone has special needs such as loss of eyesight, hearing problems or limited attention span. Some or all participants may wish to have a friend or other supportive person present at the mediation to help communicate their viewpoint.

To be effective, participants must be able to:

- ❖ understand the mediation process;
- ❖ fully participate in the negotiation; and
- ❖ be bound by the final agreement.

Consequently, mediation may not be a guardianship alternative for a person experiencing severe memory problems. While the individual may be able to participate fully in the negotiation process, (s)he may not remember the final outcome or what (s)he has agreed to. However, when appropriate, mediation as an alternative to guardianship preserves the independence of participants. Mediation also promotes family harmony by encouraging family members to work together to find a satisfying solution to a family problem.

If the vulnerable family member is unable to mediate because of incapacity, mediation may still be an option for other family members who cannot agree on how to handle the problem. For example, it is not unusual for children to disagree on a plan of care for a parent who is exhibiting unusual behavior. Family members will be much better off mediating their differences and finding a common solution rather than spending time and money in court having a judge decide an outcome that may not be acceptable to everyone.

## ➤ Health Care Power of Attorney

Having a Health Care Power of Attorney (Health Care Directive) may avoid a guardianship. If needed and if the incapacitated person is willing to accept help from a homemaker or family member for such activities as grocery shopping, food preparation, medication reminders, bathing assistance and cleaning, guardianship may be avoided. Perhaps the only decisions that need to be made for an incapacitated person concern health care. If so, in the majority of cases where the

family agrees about the incapacitated person's care, guardianship will not be necessary. New Mexico law authorizes persons other than guardians to make health care decisions for incapacitated people.

A Health Care Power of Attorney is a document in which the person signing the document (principal) authorizes another person (agent or attorney-in-fact) to make health care decisions for the principal. The Power of Attorney may be very broad and include end-of-life decisions, such as withholding or withdrawing life support, or may be limited to specific health care decisions. To be valid, the Health Care Power of Attorney must be in writing and signed by the principal. Although New Mexico law does not require witnesses, having two adult witnesses is recommended. Preferably, witnesses should not be family members or the person being named as agent. While witnesses are not required, having them should make the document harder to challenge and easier to use in another state.

A person creating a Health Care Power of Attorney must have sufficient mental capacity to understand the content of the document (s)he is signing and to whom the power is being given. The authority granted to the agent to make health care decisions continues even if the principal later becomes incapacitated – this is what is referred to by the term “durable.” In New Mexico, a person suffering from dementia who has lucid moments may, during a lucid period, sign a legal document, including a Health Care Power of Attorney. A properly executed Health Care Power of Attorney remains in effect even if the person is later found to be incapacitated in a court proceeding unless the court order states otherwise.

New Mexico law states that a person has capacity to make health care decisions if (s)he has the “ability to understand and appreciate the nature and consequences of proposed health care, including its significant benefits, risks and alternatives to proposed health care and to make and communicate an informed health-care decision.” A health care provider will always ask the patient first for the patient's health care decisions. Only if the provider feels the patient is incapable of informed consent will the provider turn to the patient's health care agent. Persons suffering from a mental impairment may not be able to meet all of these requirements. However, they may understand that a health care decision needs to be made and know whom they trust to make that decision. New Mexico law allows that mentally impaired person to either sign a Health Care Power of Attorney or to orally appoint another person to act as a surrogate health care decision-maker. Surrogates are discussed in the next section.

Unlike guardianships, Health Care Powers of Attorney do not necessarily require an attorney or legal action and, in fact, are readily accessible online and at many senior centers, through the Senior Citizens' Law Office, Lawyer Referral for the Elderly and the Office of the Guardianship. However, meeting with an attorney to discuss a Power of Attorney ensures full understanding of the provisions and the authority being given to the agent. If a person has enough mental capacity to sign a Power of Attorney, it is a good alternative to going to court.

Importantly, a person may designate in a Health Care Power of Attorney who (s)he wishes to serve as his or her guardian in the event it becomes necessary to have one appointed. Additionally, a Health Care Power of Attorney can include an addendum regarding other advance planning such as where one would like to live and preferences regarding care. These types of instructions are very helpful to the agent and the care providers regarding a person's wishes. Written instructions regarding the care of pets are also helpful.

## ➤ Surrogate Health Care Decisions Under the Uniform Health Care Decisions Act (UHCDA)

When a person does not have signed a Health Care Power of Attorney, but still has the mental capacity to express his or her wishes, under New Mexico's Uniform Health Care Decisions Act (UHCDA), this person can orally appoint another to be his or her surrogate health care decision-maker. Typically a surrogate is appointed in the situation where a person is receiving medical treatment. This surrogate would act on the patient's behalf and tell the doctor or other health care provider what treatment to give or withhold, depending on the wishes of the patient.

The patient who orally appoints a surrogate must personally inform his or her primary doctor about the appointment of a surrogate. If the primary doctor is unavailable, the patient must tell the health care provider who has primary responsibility for that individual's health care about the surrogate appointment.

In the case where a person lacks capacity to sign a Health Care Power of Attorney or is unable to name a surrogate decision maker, then the UHCDA states that certain individuals are allowed by law to act as a surrogate health care decision maker for an incapacitated person. From first to last priority, the following people may act as surrogate decision-makers:

- ❖ the spouse (unless legally separated or unless there is a pending petition for annulment, divorce, dissolution of marriage or legal separation);
- ❖ an individual in a long term relationship of indefinite duration with the patient in which the individual has demonstrated an actual commitment to the patient similar to the commitment of a spouse and in which the individual and the patient consider themselves to be responsible for each other's well-being;
- ❖ an adult child;
- ❖ a parent;
- ❖ an adult brother or sister;
- ❖ a grandparent; or
- ❖ an adult who has exhibited special care and concern for the person, and who is familiar with the patient's personal values.

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

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

## ➤ Right to Die and UHCDA

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

It is important that these documents be included in a person's advance planning, because they cannot be created for an incapacitated person.

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

The UHCDA offers more choices because it covers all health care decisions, including end-of-life decisions. The Health Care Power of Attorney authorized by the UHCDA, discussed above, includes a section to express one's wishes about end-of-life decisions. Because the UHCDA combines a Power of Attorney and a Living Will, it is no longer necessary to sign two separate documents. Sometimes people may not want to put their wishes in writing. It is a good idea to at least have them discuss their wishes with family members and doctors.

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

- ❖ whether to use a respirator, ventilator, dialysis (kidney) machine, or other life support equipment;
- ❖ whether or not a person wants artificial nutrition or hydration (commonly called food and water);
- ❖ what kind of pain medicine is appropriate and whether it may hasten someone's death;
- ❖ whether to provide antibiotics to someone who is dying; and
- ❖ what kind of medicine, surgery or treatment is best for a person's illness.

Doctors may not want to withhold life-sustaining treatment if conflict exists. If the patient has mental capacity and is able to communicate with the doctor, the doctor should follow the patient's wishes. Otherwise, it may be necessary for family members, doctors and others to sit down together and try to determine what the patient's wishes would be. Consequently, it is important to discuss health care issues with family and doctors ahead of time.

Many elderly New Mexicans have both a Living Will and Health Care Power of Attorney. These documents continue to be legal and valid. It is not necessary to execute a new, combined form under the UHCDA. Under the UHCDA, doctors are supposed to honor valid instructions

given to them under most circumstances. The two exceptions are reasons of conscience and a request for medically ineffective health care treatment. If a health care provider, based on reasons of conscience, refuses to comply with a decision to withhold or withdraw life support, for example, the provider is under a duty to immediately assist in the transfer of the patient to another provider who is willing to comply with the decision. Under the second exception, a doctor can refuse to comply with an instruction to provide treatment that (s)he believes will not offer the patient any significant benefit.

### ➤ Federal Patient Self-Determination Act

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

- ❖ give written information to patients at the time of admission concerning their right to make decisions about medical care, including the right to accept or refuse treatment and the right to make advance directives, such as Powers of Attorney and Living Wills;
- ❖ have written policies and procedures about advance directives and to inform patients of the policies;
- ❖ state in the patient's medical record whether or not the individual has signed an advance directive;
- ❖ comply with state law regarding advance directives (this means the health care provider should honor a valid Living Will, Power of Attorney or other advance health care directive); and
- ❖ educate staff and the community on issues concerning advance directives.

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

### ➤ Emergency Medical Service “Do Not Resuscitate” Regulations

Health care providers, other than doctors, recognize a person's right to refuse medical treatment. While a person may have documented their wishes in an advance directive that may include a Do Not Resuscitate (DNR), Emergency Medical Service (EMS) workers are required to administer all procedures to resuscitate unless there is an EMS DNR Form signed by a doctor and the person.

If a person is too sick to give consent to such an order, his or her health care decision-maker can ask for one IF that is what the person would have wanted. People can also wear an EMS bracelet that says they have an EMS DNR Order. EMS DNR forms do not end (expire) unless they are revoked. Documents can be revoked at any time by destroying them.

To obtain an EMS DNR form with instructions, contact the New Mexico Department of Health EMS Bureau at (505) 476-8200 or go to [www.nmems.org](http://www.nmems.org). The DNR form, along with adjoining coversheet, can be printed from the website. Once the form is completed, keep the form in an envelope, with the coversheet attached, in sight of a bed or on a refrigerator. Tell the doctor to put a copy in the person's medical file.

*Chapter Two*  
***ALTERNATIVES TO CONSERVATORSHIP***

- Introduction
- Negotiation and Mediation
- Co-Ownership of Property
- Bank Account Signatory
- Financial Power of Attorney
- Representative Payeeship
- Trusts

## ➤ Introduction

It is not uncommon for a person to be able to manage a household and appear to function normally in activities of daily living, except the handling of personal finances. Sometimes a person who has always been cautious about spending money suddenly subscribes to dozens of magazines, applies for multiple credit cards or is talked into investing large sums of money in get rich schemes by unscrupulous strangers. The first reaction of worried family members is to seek a court-appointed conservatorship. Like guardianship, conservatorship is a drastic legal measure that should only be used when all less restrictive alternatives have been tried. This chapter will describe less drastic alternatives to help a person with financial matters and to preserve family harmony. All of the alternatives discussed in this chapter can have two purposes: (1) to allow a trusted family member or friend to assist a person without obtaining a conservatorship; and, if necessary, (2) to prevent exploitation of a vulnerable person and/or waste of that person's assets.

## ➤ Negotiation and Mediation

The first option to explore is negotiation. As discussed in Chapter One, when a disagreement arises between two or more people, they can attempt to resolve their differences through informal negotiation. If negotiation fails, the people can ask a neutral person to facilitate the negotiation. The facilitator or mediator is not a decision-maker and does not suggest solutions. Rather, the mediator's role is to guide the parties by using constructive problem solving skills to resolve the dispute themselves.

Negotiation or mediation may be helpful in the situation where, for example, "Dad" who has always been frugal, suddenly starts investing large sums of money in gambling. Negotiation and mediation are discussed in detail in Chapter One.

## ➤ Co-Ownership of Property

Property, whether it is real (such as land or houses) or personal (such as bank accounts, motor vehicles or stock), may be owned by more than one person. When real property is co-owned by more than one person, an owner may not dispose of the property (such as sell, mortgage, or transfer) without the written agreement of the other co-owner(s). Similarly, personal property may be owned or titled in such a way that more than one signature is required to sell the property, write checks, etc. Holding land in joint tenancy<sup>1</sup> is a way of protecting and preserving the property for the original owner's use and reasonable enjoyment. If "Mom" puts the home in joint tenancy with one or more children, she will not be able to sell the home or

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<sup>1</sup> Joint tenancy means that two or more people own property with the right of survivorship. Upon the death of one joint tenant, the property passes automatically to the surviving joint tenant(s) without a court proceeding. It does not matter what the deceased joint tenant's will may say about the property; the property goes to the other joint tenant. Both real and personal property can be owned in joint tenancy.



borrow money using the home as collateral unless the co-tenants agree to the transaction in writing.

**WARNING:** Placing property in joint tenancy may be very dangerous. Joint tenancy means that co-owners have a right to all of the property. This means that jointly owned property, such as a bank account, can be accessed and utilized by a co-owner. Further, creditors can use co-owned property to pay the co-owner's debts, even if the other co-owner did not incur the debt. The co-owner's creditor can also place a lien on a house, and the house can ultimately be sold to pay off debts of co-owner(s). Placing property in joint tenancy may also invalidate a gift in a will since joint tenancy property automatically passes to the surviving co-owner(s) upon the death of one of them, regardless of a contrary gift in the decedent's will. Finally, even if it is in Mom's best interest to sell her home so that she can move to a more appropriate setting, such as assisted living, if a joint tenant refuses to agree to the sale, Mom's home cannot be sold. Once a home is placed in joint tenancy, the only way to remove the names of co-owners from the title is for them to deed the home back to the original owner. If they refuse, there is little that can be done other than a court proceeding to force the co-owner to sign the deed.

The ownership of other personal property, such as stock certificates, whole or universal life insurance (which can be cashed in for a certain amount of money), and motor vehicles may also be changed so that they are co-owned in such a way that more than one signature is required to dispose of the asset. One should be aware that if a motor vehicle is in an accident, ALL owners may be sued.

### ➤ Bank Account Signatory

An alternative to joint tenancy on bank accounts is to have an additional signatory. Do not add an additional signator unless that person is trustworthy. An account could also be set up so that all account transactions require at least two signatures. The advantage of this second type of account is that the funds in the account are protected from being spent. For example, suppose a family is concerned about "Dad" who suddenly is spending large amounts of his life savings on questionable purchases or investments. If an additional signatory is added, then his or her signature is required for all transactions. This would at least provide some oversight of Dad's spending habits. Being a signatory allows a person to sign checks, but does not give the signatory ownership rights to the account. Having a signatory allows another person to help pay bills. The bank or credit union can set up the account so that the signatures of the owner and the signatory are required on every check or account transaction. With proper paperwork at the bank or credit union, the owner will be unable to write checks or make withdrawals from the account without the other signatory's signature. Of course, the original owner of the account must be willing to change the account to require more than his or her signature on every transaction.

In order to give Dad some sense of independence, and especially if the signator lives in another town, Dad should be allowed to maintain a smaller bank account of his own in which funds are deposited from the larger account on a weekly, bi-weekly or monthly basis. The amount in Dad's own bank account will depend on his needs and ability to manage smaller amounts. So, for example, each month \$300 is placed in Dad's own account for him to use for expenses such as gas, food, and entertainment. His bills and more major expenses are paid from the other account so that the other signatory will have some oversight of the account.

## ➤ Financial Power of Attorney

A Financial Power of Attorney is a legal document in which the person signing the document (principal) authorizes another person (agent or attorney-in-fact) to make financial decisions for the principal. The principal who creates a Power of Attorney must have enough mental capacity to understand what (s)he is signing. The Power of Attorney may be very broad and include every type of transaction the principal could do, or may be limited to specific transactions, such as writing and signing checks on a bank account or collecting rental payments for a piece of property. Additionally, a person may designate who (s)he wishes to be appointed as his or her conservator, if one becomes necessary. An agent's authority to act under a Power of Attorney terminates with the principal's death.

The Financial Power of Attorney may be effective immediately. If so, the principal is still free to handle his or her own business matters. A Power of Attorney may also "spring" into effect if a certain event happens, such as the incapacity of the principal. A "springing" Power of Attorney goes into effect only if the principal is incapacitated and usually requires two qualified health care professionals<sup>2</sup> to certify the principal's incapacity.

If effective immediately, the Power of Attorney should contain a durability clause, which states that the Power of Attorney shall not be affected by the subsequent incapacity of the principal or by lapse of time. A "springing" Power of Attorney should contain the words "this Power of Attorney shall become effective upon the incapacity of the principal" to make it durable. Without a durability clause, the Power of Attorney will end if the principal is incapacitated. All Powers of Attorney end and are no longer valid upon the death of the principal. A Financial Power of Attorney must be signed in the presence of a notary public. A mentally capacitated principal who is unable to sign his or her name, but can make an "X" in lieu of his or her signature may do so before two witnesses and a notary public.

A Financial Power of Attorney can be a good way to avoid a conservatorship if the principal is agreeable. But be careful whom the principal appoints as his or her agent. Make sure the agent is trustworthy and financially stable. The agent has a "fiduciary duty" (a duty to act with honesty, good faith and sound investment skills) to handle the assets in his or her control for the sole benefit of the principal. The agent may not use the assets for any other purpose. A dishonest agent could misuse the principal's assets.

A Power of Attorney does not prevent the principal from also conducting his or her affairs. (S)he could still write checks, invest assets and do other financial transactions even if the agent were also acting for the principal. Therefore, a Power of Attorney will not necessarily prevent the principal from squandering his or her funds. For example, the principal may still apply for credit cards and run up a huge debt, continue to subscribe to hundreds of magazines, enter into all kinds of contracts, and make questionable purchases. These types of transactions can be canceled if the principal has a court appointed conservator managing his or her affairs. It will be more difficult and time consuming for an agent to invalidate an unreasonable transaction entered into by the principal.

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<sup>2</sup> Under the Uniform Health Care Decisions Act discussed in Chapter One, qualified health care professionals can be physicians, physician assistants, nurse practitioners, nurses, psychologists or social workers.

If the principal continues to squander his or her funds and refuses to give up control of his or her finances, a conservatorship may be necessary. If the court imposes a full conservatorship on the principal, the principal will no longer be able to handle financial matters.

A guardianship or conservatorship may also be necessary if an incapacitated person is being abused, neglected or exploited by family members or others. New Mexico has laws prohibiting the abuse, neglect and exploitation of others, but a detailed discussion of these laws is outside the scope of this handbook. The Adult Protective Services Division (APS) of the Children, Youth and Families Department oversees abuse, neglect and exploitation cases. See Appendix One for contact information.

### ➤ Representative Payeeship

Some private pensions and the following federal agencies authorize a protective arrangement, called a representative payeeship, for those who receive federal funds if the recipient is unable to manage those funds due to a physical or mental disability:

- ❖ Social Security Administration;
- ❖ Veterans' Administration;
- ❖ Department of Defense;
- ❖ Railroad Retirement Board; and
- ❖ Office of Personal Management

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

Representative payeeship is another less restrictive alternative to conservatorship for incapacitated persons who receive a federal pension or other benefits. Typically, the person seeking to be appointed representative payee contacts the appropriate federal agency and fills out forms provided by the agency. The incapacitated person's physician must also complete and submit a form. The agency often appoints a representative payee for a person based on the written documentation without a hearing or without informing the beneficiary if it determines that the appointment is in the "interest" of the incapacitated person.

Once appointed, the representative payee receives a check on behalf of the incapacitated person. This means that funds must be spent on the incapacitated person's needs such as food, clothing, shelter and medical care. Any remaining funds may be spent on the incapacitated person's legal dependents and past debts. If there are more than sufficient funds to meet the person's obligations, the representative payee may hold the excess funds in a trust account for the benefit of the incapacitated person. It is inappropriate for the representative payee to mix the incapacitated person's money with the representative payee's own funds.

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

## ➤ Trusts

A trust is a legal arrangement whereby the right to certain property, both real (the home) or personal (such as bank accounts, motor vehicles and stock) is held by one person or institution (such as a bank) for the benefit of another. A trust is created by a grantor or trustor who transfers the assets to the trust to be managed or administered by a trustee for the benefit of the grantor or other beneficiaries. The trustor must be mentally competent (able to understand what a trust is) when (s)he creates a trust.

The trustee may be the person who sets up the trust, a family member or other person, or a bank, trust company or law firm. The trust instrument is the document that describes how the trust income and corpus (principal assets) are to be distributed by the trustee. A trust created during the lifetime of the grantor is called a living trust. A testamentary trust is created by a will and does not take effect until the testator's (person who made the will) death. Trusts are either revocable (the creator of the trust may change, set aside or undo the trust at any time) or irrevocable (only a court, for good cause, may change, invalidate or undo the trust).

A revocable living trust may be appropriate for a person who wants to avoid a conservatorship. It is often used as a planning tool for competent individuals who plan for their potential future incapacity. A paragraph of the revocable trust will state who is to become trustee after the grantor/trustor becomes incapacitated. Another paragraph may state how to determine when the grantor/trustor is incapacitated. While revocable living trusts may be a good planning tool, they may not be the right choice for everyone. A qualified attorney who practices routinely in trusts should be consulted if this option is under consideration. Sometimes, even though a person created a trust, it still may be necessary to have a conservatorship. In such case, depending on what the judge orders, the court-appointed conservator and trustee have to work together to best serve the incapacitated person's needs.

There are many types of trusts created for a variety of reasons. The type of trust described in the remainder of this section, as an alternative to a conservatorship, is an irrevocable living trust. The creation of an irrevocable living trust is effective in avoiding a conservatorship while fully protecting the assets, both real and personal, of an incapacitated person. This trust is typically created by a person who has been either threatened with conservatorship or for whom the proceeding has already started. The typical scenario is that "Mom", who has always been frugal and prudent when it comes to spending money, is acting out of character and is rapidly depleting her assets by making high risk investments or giving money away to total strangers. Otherwise, Mom's behavior appears normal. She is furious that family members are seeking to be appointed as conservator in order to preserve her remaining assets. A compromise is to place the assets in an irrevocable trust for her sole benefit and appoint either a family member or the bank as trustee

or as a co-trustee with Mom. If Mom refuses to create an irrevocable trust, a conservatorship may be necessary.

Given a choice of a court proceeding or creating a trust, the trust may seem preferable. This is especially true if the court proceeding results in the appointment of a conservator and the loss of many of Mom's rights. It is important to note, in order for Mom to create a trust, she must have the mental capacity to understand the nature of the document she is signing as well as specific provisions contained in the document. To maintain family harmony, it may be advisable to appoint a trustee who is not a family member. Mom may not like asking a child acting as a trustee for spending money. Trustees are entitled to compensation. Institutional trustees, such as banks and trust companies, charge annual fees for their services, while family members may or may not charge for their services.

The alternatives to conservatorship described in this chapter have proved successful for many families that have considered seeking a court-appointed conservatorship for a family member or friend. Any or all of these recommendations should be considered and tried before going to court.

***Chapter Three***  
***GUARDIAN AND/OR CONSERVATOR:***  
***COURT PROCEEDING***

- Introduction
  
- Appointment of Guardian by Will
  
- Appointment of Guardian and/or Conservator by Court Proceeding
  - ◆ Is the Appointment Necessary?
  - ◆ What Kind of Information Will the Lawyer Need?
  - ◆ What Kind of Appointment is Necessary?
  - ◆ Who is Involved in the Court Proceeding?
  - ◆ Hearing and Court Order

## ➤ Introduction

Perhaps the alternatives discussed in Chapters One and Two will not work for the family member or friend who needs help. In such case, a guardianship and/or conservatorship may need to be considered in order to assist that person.

A guardian is a person or an entity appointed by a court to make personal and health care decisions for someone who is impaired because of mental illness, dementia, physical disability or substance abuse. Someone who is impaired in this way is considered incapacitated. New Mexico law defines an “incapacitated person” as a “person who demonstrates over time either partial or complete functional impairment by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication or other cause, except minority, to the extent that the person is unable to manage the person’s personal affairs or the person is unable to manage the person’s estate or financial affairs or both.” Before a court will appoint a guardian, it must be determined that the person is not able to manage his or her personal care decisions. Personal care decisions cover such things as medical care, nutrition, clothing, shelter, hygiene, safety, and day-to-day living. New Mexico law states that a guardianship should encourage the individual’s independence and should be limited to the powers necessary to help with the person’s mental and physical limitations.

A conservator is a person or entity appointed by a court to make financial decisions for an incapacitated person.<sup>3</sup> The court may appoint a conservator to manage the property or financial affairs of an incapacitated person or minor.

Unlike a guardian who may be nominated under a will, a conservator may only be appointed by a court. To become a guardian or conservator for another usually requires a lengthy court proceeding. However, a guardian of a minor or an incapacitated adult can be named in a will and be recognized after a much shorter court procedure.

## ➤ Appointment of Guardian by Will

It is common for parents to name a guardian for their minor child in their wills. Additionally, New Mexico law allows spouses and parents to name in a will, or in another writing that is witnessed by two persons, a guardian of their incapacitated spouse or adult child. Only parents and spouses can use this method.

If the nominated person is willing to take on the responsibility as guardian when the person who wrote the will dies, (s)he can be appointed fairly easily as guardian by the district court in the probate proceeding. First, written notice of the intention to act as a guardian for the incapacitated person must be given to his or her caregiver or closest adult relative. At least seven days after giving notice, a form must be filed accepting responsibility with the district court where the will is being probated. “Filing” means taking or mailing the written acceptance to the court clerk at the district court.

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<sup>3</sup> The New Mexico Uniform, Health-Care Decisions Act, discussed in Chapter One, may reduce the need for guardianships, but not conservatorships.

The clerk will keep the original acceptance form for the court records and provide a certified copy and one stamped (endorsed) copy. There will be a small fee for the certified copy. A certified copy should be kept as proof of your authority, and copies can be used and provided as necessary. You can use the copies where necessary but keep the certified copy as proof of your authority. The judge may also issue Letters of Guardianship specifying the authority to act as guardian. Since being appointed in this way takes place as part of a court probate proceeding, the attorney who is representing the personal representative of the deceased person's estate may be able to file the necessary paperwork.

After the acceptance has been filed, the guardianship is in effect. If someone files a written objection to the appointment of the guardian, then the appointment is no longer valid and another court proceeding that deals specifically with the appointment of a guardian will be necessary.

### ➤ Appointment of Guardian and/or Conservator in a Court Proceeding

The more common way to be appointed as guardian and/or conservator for another is through a district court proceeding brought specifically for this purpose. A guardian and a conservator can be appointed in the same court proceeding if it is determined both are necessary. This type of proceeding is necessary when the less restrictive alternatives described in the first two chapters are not available or are inadequate. The court procedure applies to minors and people over the age of eighteen who have never had capacity, or adults who have subsequently become incapacitated. A person or entity can be named as either guardian or conservator or both. A lawyer will be needed for this process.

#### ◆ Is the Appointment Necessary?

Before going to a lawyer, it should be determined that the person of concern really needs a guardian/conservator and that other means of assisting the person discussed in Chapters One and Two have been considered or tried. If the person either cannot or will not accept any of these "less restrictive alternatives" and there is a serious concern about his or her health and safety, or his or her financial situation, then a guardianship/conservatorship may be necessary. At this point, an attorney will need to be contacted to prepare and file the necessary documents with the court to begin the proceeding.

The proposed guardian/conservator must be willing and able to make important decisions for the incapacitated person such as:

- ❖ where the person will live;
- ❖ what kind of medical treatment (s)he will need;
- ❖ whether to withdraw life support in case of terminal illness;
- ❖ if there is property involved, whether to sell or invest;
- ❖ how to qualify the person for institutional Medicaid for nursing home care or other Medicaid programs if appropriate; and
- ❖ arranging for appropriate in home care.

A guardianship or conservatorship proceeding can be expensive. Although the incapacitated person's money can be used to pay for the proceeding if the judge orders, sometimes the incapacitated person's estate will not have the funds. If the person for whom a guardian or



conservator is being sought does not have sufficient resources, contact the Office of Guardianship at the New Mexico Developmental Disabilities Planning Council (see Appendix One for contact information). Some legal resources will charge reduced or no fees.

Choose a lawyer who is familiar with guardianship/conservatorship proceedings. The following resources can help with finding an appropriate lawyer: the New Mexico State Bar Foundation's Lawyer Referral for the Elderly Program, the Senior Citizen's Law Office, the New Mexico Guardianship Association's website, and the National Academy of Elder Law Attorneys' website. Contact information for these programs can be found in Appendix One or online.

#### ◆ **What Information Will the Lawyer Need?**

To assist you in the appointment process, the lawyer will need information about the incapacitated person's physical and mental condition, living conditions, contact information for closest family members, and whether alternatives have been tried to take care of the person's affairs such as a Power of Attorney or representative payee arrangements. The lawyer will also need information, to the extent feasible, on the incapacitated person's assets including real estate, stocks and bonds, income from all sources, and debts. It is important to be as detailed as possible to show the need for the guardianship/conservatorship.

#### ◆ **What Kind of Appointment is Necessary?**

After getting all the important information about the incapacitated person, the lawyer will advise whether or not an appointment of a guardian and conservator is indicated, and, if so, who should be considered. The decision will depend on how the incapacitated person is managing his or her personal affairs and property. If (s)he has very little property and income, such as a Social Security check, perhaps only a guardianship is necessary. A representative payee, discussed in Chapter Two, could be set up for the Social Security check.

The lawyer will prepare a petition asking the court to appoint a guardian for the person and/or a conservator of the person's assets. The lawyer can also ask the court to appoint a full or limited guardian and/or conservator. The court will determine the scope of the guardianship. A full appointment gives total control over the incapacitated person's life and assets. A limited appointment gives only the power to make certain decisions while the incapacitated person continues to make other decisions.

Sometimes the person's situation is such that a guardian or conservator needs to be appointed immediately. The court can make temporary appointment before there is a hearing on the permanent appointment if there is an emergency or some urgent need. This temporary appointment can only last for sixty days. A temporary appointment might be necessary if the person is about to lose his or her home, is being financially exploited or taken advantage of, or (s)he is in need of immediate medical care and will not consent to the treatment.

#### ◆ **Who is Involved in the Court Proceeding?**

The lawyer will inform all the people who must be given notice that there will be a court hearing on the permanent guardianship. People who are entitled to notice include parents, adult children, other adult relatives if there are no children, the proposed guardian and/or conservator, and any person previously nominated by the incapacitated person to serve in these roles. The attorney may identify others who are entitled to notice.

Other important people in the guardianship or conservatorship proceeding are the court visitor, the qualified health care professional, and the guardian ad litem. The court appoints these professionals.

The court appointed visitor is a social worker, certified care manager, or other person who is qualified to make recommendations about the incapacitated person's need for a guardian and/or conservator. The visitor focuses on how the person functions in his or her daily life. The visitor will evaluate the person's functional ability to perform daily living tasks such as, bathing, dressing, toileting, managing medication, eating, walking or transferring from a wheelchair to a bed, preparing meals, etc.

The court visitor and guardian ad litem also investigate whether concerns about the ability of the person to care for him or herself have arisen over a long time or are recent developments. One factor that will help the judge decide whether a guardianship and/or conservatorship must be imposed on the person is the length of time the person has been unable to care for himself or herself as the judge will want to be sure the person is not experiencing a temporary setback.

The qualified health care professional is a doctor, psychiatrist, neurologist, neuropsychologist, primary care physician, nurse practitioner, or other health care practitioner. This professional must be qualified to render an opinion as to the person's condition, either due to a history with the person or their special expertise in evaluating physical or medical conditions. The qualified health care professional will conduct a psychological and physical evaluation of the person. This professional is required to submit a written report regarding the person's condition with a recommendation. This professional can recommend whether or not the guardianship and/or conservatorship are necessary.

The guardian ad litem is not a decision maker but is the attorney appointed to represent the incapacitated person's position and to make sure the person's rights are protected in the proceeding. The guardian ad litem is required to interview the alleged incapacitated person, the proposed guardian and/or conservator, the court visitor, and the qualified health care professional. The guardian ad litem also recommends to the court whether it is in the incapacitated person's best interest to have a guardian and/or conservator appointed.

#### ◆ **Hearing and Court Order**

After the court visitor, qualified health care professional, and guardian ad litem have made their inquiries and examinations, a hearing is held at the district courthouse. If the incapacitated person is unable to attend, the judge can hold the hearing where the person resides. Otherwise, the person must be excused from attending. Usually, however, the hearing takes place in a courtroom or judge's office.

At the hearing, the court visitor and qualified health care professional, either in person or through written reports, describe the person's condition and limitations that make him or her unable to manage his or her personal life and finances. The written reports should also stress what the person can do independently, with assistance, and with supervision. The guardian ad litem may submit a written report to the judge and/or report orally to the judge at the hearing. Additionally, the guardian ad litem may question the court visitor and the qualified health care professional about their findings, conclusions and recommendations. The guardian ad litem may also call or question any other witness who has pertinent information. The judge should allow the

allegedly incapacitated person to make a statement or answer questions about his or her abilities and wishes.

At the close of the hearing, the judge will sign a prepared order or may have the attorney draw up one based on the testimony heard in court. If the judge decides that the person is incapacitated, the order will appoint a guardian and/or conservator of the incapacitated person. The order may also limit the scope of the guardian and/or conservator's authority. The order should state that the guardian's and/or conservator's powers override any powers given to an agent previously appointed under a Power of Attorney.

When the court appoints a guardian and/or conservator, the appointed guardian and/or conservator must sign an acceptance of this appointment. With the acceptance and order, the attorney will get Letters of Guardianship and/or Conservatorship issued by the court clerk. The Letters are formal authorization from the court to act as guardian and/or conservator for the person.

Before the guardian and conservator are appointed, (s)he should be advised as to the duties and responsibilities in serving as a guardian and/or conservator. These are covered in Chapters 5 and 6. Additionally, training videos outlining the responsibilities are available at [www.nmgaresourcecenter.org](http://www.nmgaresourcecenter.org).

## *Chapter Four*

### ***PROTECTED PERSON'S RIGHTS***

When a person has a guardian and/or conservator named for him or her, (s)he loses many rights. This is why guardianship and/or conservatorship is a drastic measure and should only be used when there is no other way to take care of a person's needs.

However, the protected person (as (s)he is known in New Mexico) does not lose all rights. The protected person still retains certain legal and civil rights as well as basic human rights. The protected person or protected person still has the right to:

- ❖ make or change a will or trust;
- ❖ marry;
- ❖ vote and participate in political activities;
- ❖ practice religion;
- ❖ receive personal mail;
- ❖ receive representation from a lawyer;
- ❖ associate with friends and family; and
- ❖ ask the court to end the guardianship and/or conservatorship or change the guardian and/or conservator.

The extent to which the protected person can exercise these rights depends on his or her mental capacity. For example, although the protected person has the right to make a will, if (s)he does not know what property (s)he owns or who his or her heirs are, the will would not be valid. The protected person has the right to marry, but if (s)he does not understand what marriage means, then the marriage would not be valid. What is important to remember is that certain rights of a protected person cannot be denied just because (s)he is under a guardianship order.

If the protected person is in a residential care home, nursing home, or other long term care facility, the Patient's Bill of Rights and other state laws give him or her more rights. These include the rights to privacy, to have visitors, to have telephone calls and to be free from non-therapeutic chemical and physical restraints. Again, depending on the protected person's situation, restrictions may be placed on these rights (e.g. forbidding undesirable visitors or limiting telephone calls).

If the guardianship is limited, the protected person has all the rights not specifically granted to the guardian and/or conservator in the court order. For example, (s)he could continue to run a small business, hire his or her own caretakers, continue to participate in his or her own health care, choose a place to live, or take a trip if none of these activities were forbidden by the court order.

In general, the protected person is entitled to respect and the right to have his or her voice heard. The protected person has the right to express concerns, ask questions, and make suggestions about decisions affecting his or her life. The protected person has basic human rights of privacy and the right to be well cared for. The protected person also has the right to be free from physical or sexual abuse, financial exploitation, neglect, and self-neglect.

A guardian and conservator must understand what rights the protected person retains in order to perform the powers and duties as guardian. The guardian and conservator must follow the protected person's preferences so long as such preferences are not harmful to the protected person or others. This is required even if the guardian and/or conservator would not choose these preferences personally. This is crucial in respecting the rights and dignity of the protected person.

***Chapter Five***  
***POWERS AND DUTIES OF GUARDIAN***

- Temporary Guardian
- Permanent Guardian
- Guardian's Duties: What Should the Guardian Do After Becoming Appointed?
  - ◆ Give Notice of Appointment as Guardian
  - ◆ Plan for the Protected Person's Needs
- Make Living Arrangements
  - ◆ Staying at Home
  - ◆ Living Facility Options
  - ◆ Independent Living (Retirement Senior Apartments or Communities)
  - ◆ Assisted Living Facilities (ALF)
  - ◆ Residential Care Homes (Board & Care or Group Homes)
  - ◆ Nursing Homes
  - ◆ Dementia Specific Facilities (Alzheimer's Units)
  - ◆ Continuing Care Retirement Communities
- Tips for Guardians Who Live Outside of New Mexico
- Arranging for Meals
- Caring for Clothes and Other Personal Property, Including the Car
- Arranging Recreation and Education
- Using Community Resources
- Making Health Care Decisions

- Limits on Guardian's Powers
- Liability of Guardian and Penalties for Failure to Perform Duties
- Fees for Serving as Guardian
- Reporting Requirements
- Ending a Guardianship

### ➤ Temporary Guardian

Temporary guardians are appointed to take care of the immediate and pressing needs of the protected person. The order appointing a temporary guardian lasts for only 60 days unless the attorneys and judge agree to extend it for no more than an additional 30 days. During this time, the temporary guardian will only be able to perform the specific tasks outlined in the order, such as agreeing to a medical procedure needed immediately. The protected person should not be moved from his or her residence unless the court specifically orders it. Unless the protected person is at immediate risk, the status quo should be maintained until the hearing for the appointment of a permanent guardian is held.

### ➤ Permanent Guardian

After a permanent guardian has been appointed, the guardian has the power to make certain decisions for the protected person, depending on whether it is a limited or a full guardianship. As mentioned above, if the guardianship is limited, the guardian has the power only to make specific decisions for the protected person as outlined in the court's order. The protected person will be able to make all other decisions because (s)he retains that right.

A full, or plenary, guardian of the protected person has the same powers, rights and duties that a parent of a minor child has except the guardian does not have to pay the protected person's bills out of the guardian's own money. Unlike a parent, the guardian is not liable (legally responsible) for the protected person's acts. The guardian must be found negligent or careless in performing his or her duties to be liable for damages or injuries to others.

The guardian is entitled to the custody of the protected person. That does not mean that the protected person must live with the guardian, but the guardian must decide where (s)he will live, depending on his or her wishes. The guardian must decide what is appropriate for the protected person: (1) staying in his or her home or apartment; (2) living in a residential care home, or an assisted living facility; or (3) moving into a nursing home. The guardian is responsible generally for making sure that the protected person stays healthy and his or her food and clothing needs are met. The guardian is also responsible for recreation and for seeing that the protected person receives appropriate training and education and involvement in their chosen spiritual practice. Most importantly, the guardian must make sure the protected person receives appropriate medical care and that medications are managed correctly. Additionally, a full guardian has the responsibility to consent to or refuse medical treatment of any kind for the protected person.

The order appointing the guardian should state that the guardian has complete authority over the incapacitated person's health care matters. If the protected person is taking psychotropic medications or has mental health issues, the court may add an additional provision that allows the guardian to authorize the administration of such medications, or other psychiatric treatment, and to authorize admission to a psychiatric facility for evaluation. The order should also state that the guardian's powers override any powers given to an agent previously appointed under a Power of Attorney.



## ➤ Guardian's Duties: What Should the Guardian Do After Becoming Appointed?

### ◆ Give Notice of Appointment as Guardian

The guardian should notify any family members of the protected person that (s)he has been appointed guardian. The guardian should also notify the protected person's medical providers, health insurers, teachers, caretakers, nursing home administrator, and any other interested person that (s)he is responsible for the protected person and is authorized to make decisions and act on his or her behalf. A photocopy of the Letters of Guardianship should be sent to each of these people for their file. A sample letter giving notice is included in Appendix Two.

Occasions may arise when a doctor, nursing home administrator, or family member will not recognize that the guardian has the authority to make personal decisions for the protected person. It is important to remind them that the guardian is the only person able to make these decisions.

If the conflict continues, the guardian may need to seek the assistance of an attorney or contact the judge who presided over the guardianship (or his or her replacement). A letter or telephone call from the lawyer, or a judge's order, may convince those who are refusing to accept the guardian's authority. When the situation is serious, such as conflict over the withdrawal or continuation of life support treatment or care being received in a nursing home, it is important to seek legal help quickly.

If family members object to the guardian's decisions, mediation<sup>4</sup> may be a good way to settle these conflicts. Sometimes having one family member, who acts as the spokesperson for the family, communicate with the guardian can help calm an unpleasant situation and contain expenses. Unfortunately, in some families, the guardian's decisions may always be opposed, no matter how well the underlying reasoning is explained.

Often, there is conflict between the protected person and the guardian when the protected person has enough capacity to know that (s)he been able to take care herself or himself for many years and doesn't understand why (s)he would need a guardian's help now. Sometimes the guardian can make the situation better simply by giving the protected person responsibility in areas (s)he can handle such as choosing the homemaker who helps with daily chores, buying groceries, deciding on certain medical treatment, helping to choose a residential care home, and/or deciding on religious and recreational activities. Often, trust can be gained by remaining calm and explaining to the protected person what the guardian is doing. By always including the protected person in what is going on, the protected person may feel better about having a guardian.

With careful monitoring, sometimes the best resolution is to let the protected person care for himself or herself until (s)he can no longer safely do so. The guardian can also get advice from other guardians, a care manager, a social worker, or an agency that deals with people like the protected person. Additionally, the guardian can petition the court for instructions regarding major decisions. In the end, the guardian may have to resign as guardian if the protected person would better accept the authority of someone else. If the protected person's behavior makes it

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<sup>4</sup> Mediation and other ways to resolve conflict is discussed in Chapter One of this Manual.

unsafe for him or her to continue in his or her living situation, the protected person may have to be placed in a facility that can handle his or her behavior.

#### ◆ **Plan for the Protected Person's Needs**

Each person is different and the protected person is an individual whose wishes about his or her specific needs should be taken into account. When making arrangements, the guardian should take care of the protected person's most urgent needs first and then address the general needs, including:

- ❖ living situation;
- ❖ health care, discussed in more detail below;
- ❖ meals;
- ❖ clothing and personal property, such as jewelry, cars and furniture;
- ❖ personal care, such as bathing, haircuts, manicures;
- ❖ housekeeping, including cleaning and arranging for yard work;
- ❖ if the protected person is a pet owner, care of their pet(s), including feeding, grooming, exercising, medical care, medications, and getting yearly shots;
- ❖ transportation to appointments, social events, shopping, church, etc.;
- ❖ recreation and hobbies; and
- ❖ education.

If the guardian does not know the person well, or if the protected person is very difficult, the guardian can hire a professional person to help, such as a care manager or social worker who is experienced in working with disabled adults or the elderly. The guardian should involve the protected person as much as possible in making these arrangements.

The following is a checklist to help assess the protected person's needs. Decide which tasks the protected person can do without help and which tasks the protected person needs help with:

- ❖ ambulating, including whether the protected person needs a cane, walker or wheelchair;
- ❖ using the bathroom and bathing, including whether the protected person needs help getting in and out of the shower or bathtub, bathing without assistance, and/or getting on and off the toilet without assistance;
- ❖ managing incontinence care;
- ❖ toileting, including whether the protected person knows when (s)he needs to use the bathroom and can complete all the necessary steps;
- ❖ grooming tasks, such as hair care, shaving, and nail care;
- ❖ managing medications to ensure taking them on time and in proper amounts;
- ❖ preparing meals including whether the protected person can shop, prepare nutritious meals, clean up, properly store food, and remember to eat regularly;
- ❖ selecting clothes and dressing;
- ❖ performing housekeeping such as cleaning, doing laundry, and yard work;
- ❖ dialing and answering the telephone;
- ❖ handling an emergency at home, including using the phone to call 911 and being able to exit the home independently if needed;
- ❖ managing transportation such as taking the bus and/or arranging for and taking other transportation services such as a taxi;

- ❖ paying bills
- ❖ managing investments;
- ❖ managing money for shopping, money, errands and transportation;
- ❖ making shopping decisions for the purchase of groceries, clothes, shoes and other personal items; and
- ❖ planning and arranging for travel.

Sometimes the protected person can perform the above tasks independently but simply needs cueing and reminders. Other factors to consider are: (1) to what extent can the protected person participate in decisions regarding his or her care; (2) to what extent does the protected person's memory affect his or her ability to make decisions; (3) is the protected person violent or uncooperative; (4) is the protected person confused or disoriented, and, if so, how often; and (5) is the protected person a danger to himself or herself or others. The kind of help that is arranged for the protected person will depend on how the guardian evaluates the protected person's needs and abilities.

If the guardian is not also the appointed conservator of the protected person's estate, or does not have Power of Attorney for financial matters, the guardian should meet with the conservator to find out about the protected person's assets in order to make arrangements that (s)he can afford. If the protected person's money is spent by the guardian without the approval of the conservator, the guardian may have to repay that money out of his or her own pocket.

## ➤ Make Living Arrangements

### ◆ Staying at Home

One of the most important decisions to be made is where the protected person will live, keeping in mind the protected person's wishes and lifestyle and what (s)he can afford. The first place to consider is the protected person's current residence. If the protected person is living at home, (s)he should be able to stay at home if (s)he wants as long as help is available to ensure (s)he will be safe while remaining as independent as possible. The following are some suggestions for keeping the protected person at home, considering what (s)he can afford:

- ❖ hire part-time or full-time help to prepare meals, do laundry and other housekeeping jobs (it is usually safer to obtain help through reputable licensed and bonded agencies, but if the protected person cannot afford such help, be sure to screen in-home help carefully); if not using an agency, make sure that the in-home help is covered by insurance, such as homeowners insurance, in case of accident or injury. Consult with an attorney or a CPA regarding hiring such help as an employee or as an independent contractor.
- ❖ organize volunteers to help with caregiving and household tasks (see Appendix One for websites that help organize volunteer care);
- ❖ adapt the house where necessary for the protected person's physical needs with wheelchair ramps, grab bars, sensor lights, etc.;
- ❖ clean the house and yard;
- ❖ buy a fire extinguisher, smoke and carbon monoxide detectors;
- ❖ subscribe to an emergency response medical system (e.g. Lifeline);

- ❖ get a safe return bracelet;
- ❖ change the locks and/or consider installing a burglar alarm or other security system;
- ❖ if someone else is living in the home to hear the alarm, install a wander guard system;
- ❖ if the protected person is renting, see what repairs the landlord can make and how (s)he can adapt the house or apartment for you;
- ❖ get relatives, friends and neighbors or social service agencies to help with the protected person. The guardian should investigate the community resources like Meals on Wheels, adult day care, home health/homemaker assistance and the disabled and elderly waiver program administered by the state (see Appendix One for contact information); and
- ❖ assess the home for fall risks such as rugs, electrical cords, or other items that could be a tripping hazard.

These suggestions are also applicable if the protected person moves in with a family member.

If the protected person has the assets to pay for extra help, it is your job to arrange for as much help as possible to ensure the protected person's safety and independence. It is not a guardian's responsibility to preserve the protected person's assets for the inheritance of other family members. The protected person's money should be spent on his or her care first and foremost. No one but the protected person has a right to his or her assets during the protected person's lifetime, unless the protected person owes a duty of support to a spouse and/or a minor child.

#### ◆ **Living Facility Options**

If the protected person cannot safely live at home or remaining at home is not affordable, there are alternative places to consider. There are many choices. The first steps are: learning what type of care facilities exist, what they cost and what they offer, learning if the facilities are Medicaid providers, if long term care insurance would help with the expense, and getting advice from the physician or other professional as to whether the setting is appropriate given the current and future needs of the protected person. Tools to help make the decision as to where to look and how to decide are available on-line. Further, one can meet with a qualified professional such as the primary care doctor, geriatric nurse practitioner, physician's assistant, or geriatric care manager for advice. Alternative living arrangements include:

#### ◆ **Independent Living (Retirement Senior Apartments or Communities)**

These facilities offer apartment-style accommodations and expect that the person moving in is independent. Most offer full kitchens but no additional supportive care. Some may have an independent home care agency that can be hired if needed at an extra cost. Alternatively, outside home care can be arranged to provide extra supportive care. Many of these facilities offer transportation and have a van to transport residents at scheduled times for grocery shopping and doctors' appointments. Some offer a dining room service for 1 or 2 meals/day and some do not.

### ◆ **Assisted Living Facilities (ALF)**

These vary in size from a large apartment complex to smaller buildings. They are licensed by the state to provide care for 14 residents to upwards of 100 residents depending on the size of the building and the licensing application. Assisted Living offers a wide range of styles. Some have private apartments (studio, 1 bedroom or 2 bedroom) and some have private or shared rooms. Some have no cooking available in the apartments and some have full kitchens. However, most offer no cooking to mini-kitchens with a microwave and small refrigerator. They offer all meals in a dining room. They provide activities and most provide transportation. Housekeeping is included. Laundry service is often at an extra charge. For extra care, an assessment is done to determine what other specific assistance is needed and to develop a care plan, which may include assistance with activities of daily living, such as medication management, bathing, grooming, dressing, and toileting. Additional assistance may also include reminders and a caregiver to walk with or transport residents to meals and activities within the building. If needed, there are trained staff members to manage medication and provide personal care. The staff go to the apartment at scheduled times focused on the specific care that is needed. Usually, this takes from 10 minutes to 45 minutes. If a person needs a companion or caregiver to remain with them for blocks of time, private caregivers or family would need to be scheduled for this. Some communities have multi-levels of care with different price levels. A few of these are contracted with the state Medicaid program. These are non-medical facilities and are required to have a nurse on-call, but not on staff. A resident can remain there until end of life with extra care being brought in through private homecare or family, and hospice services.

### ◆ **Residential Care Homes (Board & Care or Group Homes)**

These types of settings are categorized as assisted living and are licensed by the state but have different requirements. Residential Care Homes (RCH) are generally private homes that have been modified. They may be licensed as family care homes for 2 or 3 residents or up to 10 residents. Some are contracted with Medicaid and some with another low-income program called PACE/InnoVage. There is more supervision provided in this type of setting because it is a smaller and closer environment. Many charge a flat monthly rate regardless of level of care needed and are “all inclusive.” However, some charge an extra fee for caring and providing supplies for heavy incontinence needs. In these settings, the facility and staff manage all medications, prepare and provide all meals and snacks, provide laundry and room cleaning, and provide assistance with activities of daily living such as grooming, bathing, dressing, and mobility assistance as needed. The resident does have to be able to assist with transfers. Most residential care homes have awake staff at night and all offer 24/7 care. Some have 2 to 3 caregivers during the day and 1 caregiver for the overnight shift. Generally, a resident can remain living in this level of care to end of life with the involvement of a hospice service. Some RCH’s offer dementia specific care and are secure with coded entrances and exits. It is required there be a nurse on-call but not on staff. Many of these homes do not offer transportation for errands and appointments or offer as many activities to participate in as assisted living facility would.

### ◆ **Nursing Homes**

Within a nursing home setting, there are two levels of care: skilled rehabilitation and long term care. In these facilities, nursing supervision and nurses’ aides are provided to all residents whether they are recovering from a hospital stay, requiring long-term medical care, or are

needing high levels of care. A hospital discharge planner may arrange for discharge from the hospital to a rehabilitation facility or to a nursing home with a rehabilitation department. Medicare or an insurance HMO will cover this level of care if specific strict criteria are met. The patient has to have been hospitalized for 3 or more consecutive “midnights” before this can be considered. Insurance will pay for up to 100 days of daily therapies. The insurance covers 100% of the care for 20 days. Then, beyond that, if criteria are being met and progress in therapies according to a Care Plan is still being made, Medicare or the primary insurance will pay 80%. The remaining 20% is paid either out of pocket by the patient or by a supplemental insurance. At the skilled rehabilitation level of care, most stays are about 2 weeks. Patients are expected to participate in therapies for about 3 hours/day.

Nursing homes also offer long term care for people to live to end of life. This setting has a medical director and physicians are on the premises daily seeing patients. The staff also includes 24/7 nursing and care by nurses’ aides. Qualified staff manages medications, and all care is provided. Some residents are ambulatory and some are wheelchair or bedbound.

Medicaid covers long term care for medically and financially qualified individuals. Most nursing homes accept Medicaid. Residents may pay privately, and when their assets are spent down and they qualify for Medicaid, the social services director can assist them with applying for Medicaid. Most rooms are shared rooms. Some nursing homes do have private rooms available. Nursing homes offer transportation to outside medical appointments.

#### ◆ **Dementia Specific Facilities (Alzheimer’s Units)**

There are some nursing homes, assisted living facilities, and residential care homes that are designed and staffed to meet the unique care needs of people who have dementia.

#### ◆ **Continuing Care Retirement Communities**

These facilities include all levels of care from independent living, to assisted living, to nursing home. These are usually “buy in” communities. An initial large amount of money is charged before moving in to the community. Generally, a person moves in when they are fully independent, and they may initially live in a small house on the grounds of the community or in an independent apartment. As the resident ages, they may move along a continuum of care to assisted living and then to long term nursing home care. This is all offered in the same community setting. In addition to the “buy in” amount, a monthly fee is also charged, which remains the same over time, regardless of the level of care.

### ➤ **Tips for Guardians Who Live Outside New Mexico**

A guardian can be appointed even if he/she does not live in the same town, county or even state as the protected person. In such case, the guardian should consider whether the protected person should move to the guardian’s community. The guardian must balance the protected person’s wish to stay where (s)he lives against the importance of being physically close to the protected person and how the guardian will be able to oversee the protected person’s living situation and provide the necessary support. If the protected person remains in his or her community, here are several useful suggestions for helping him or her from a long distance:

- ❖ have someone visit the protected person frequently and report back; offer to pay a friend or neighbor a reasonable fee;
- ❖ regularly contact the place where the protected person lives and speak to him or her and their caretakers; make sure the protected person is able to speak privately to inform the guardian of any problems with his or her living situation; have a telephone placed in the protected person's room;
- ❖ write or e-mail frequently and arrange to have letters and cards read aloud if (s)he cannot see or read well; remember to include photographs;
- ❖ visit the protected person from time to time; the guardian may be able to get travel expenses reimbursed from the protected person's assets;
- ❖ consult a case or care manager, the social worker in the protected person's living community, or the court visitor if the guardian needs information, referrals or assistance; and
- ❖ hire a professional care manager to oversee care, make routine visits, address personal care needs, be on call 24/7, and communicate with the guardian for decision-making.

During the court proceeding, if it is planned to move the protected person, the court visitor and guardian ad litem must be informed of this plan before the guardian is appointed as the court will need to consider whether this is in the best interest of the protected person. It may be easier to begin the guardianship process in the contemplated district. However, if the protected person will not move willingly, the guardianship process must be completed where the protected person resides. If it is decided to move the protected person later, the court will need to be informed and the guardianship transferred to the new state. Be aware that there may be differing laws in different states regarding guardianship, and these laws may affect the transfer of the guardianship appointment from one state to another. An attorney should be consulted for the proper procedure to transfer the guardianship.

### ➤ Arranging for Meals

If the protected person is living in his or her home, be sure that the protected person has adequate nutrition and hydration. The following are suggestions for helping the protected person eat well at home:

- ❖ ask the protected person what food (s)he likes;
- ❖ learn about his or her eating problems, such as poor dentures, digestion problems, swallowing problems, or special diet needs;
- ❖ remove old, moldy, or expired food from the refrigerator and cabinets;
- ❖ take the protected person to a senior meal site every day (or arrange for transportation there);
- ❖ arrange for Meals on Wheels or a private meal preparation/delivery service to provide daily meals, and provide nutritional shakes (e.g. Ensure, Boost) between meals if the primary physician agrees;
- ❖ regularly invite the protected person to your home for dinner or out for a restaurant meal if appropriate; and

- ❖ hire someone to prepare meals in the protected person's home (this could be in conjunction with other home care duties such as medication reminders, bathing assistance, shopping, errands, and laundry).

Whether the protected person lives at home with the guardian or in a residential care setting or nursing facility, it should be noted whether the protected person is showing signs of problems that could lead to poor nutrition. Make sure that other caregivers are aware of these changes and problems such as:

- ❖ depression;
- ❖ stress or agitation;
- ❖ death of someone close;
- ❖ fear that (s)he is running out of money;
- ❖ lack of money;
- ❖ memory problems;
- ❖ dentures that do not fit, gum disease or need for dental care; and
- ❖ drinking or taking drugs or medicines that interfere with appetite.

### ➤ Caring for Clothes and Other Personal Property, Including the Car

The guardian is responsible for making sure the protected person has adequate clothing. The protected person may not be aware that his or her clothing is dirty, worn or ill-fitting, may not want to change clothes, and/or may refuse to buy new clothes. The guardian does not have to use his or her own money to buy clothes, but the guardian may use the protected person's money to buy new or secondhand clothes. The protected person may enjoy shopping, or arrangements can be made for someone else (a trusted friend or relative) to take the protected person to the stores. The guardian should keep in mind the protected person's living situation and buy suitable clothes and footwear. Remember these things about clothing:

- ❖ make a list of the protected person's clothes and correct sizes;
- ❖ do not throw away or donate clothes without checking with the protected person first;
- ❖ take the protected person shopping and/or go through a catalogue with him or her;
- ❖ help the protected person choose clothes for special occasions;
- ❖ make sure clothes are washed and/or dry-cleaned; and
- ❖ if the protected person is in a care facility, make sure clothes and shoes are permanently labeled with his/her name and (s)he gets new clothes as needed.

If the protected person has a car or other vehicle and (s)he is still able to drive, the vehicle must be insured and fees paid. Appropriate arrangements must be made for the vehicle if the protected person is no longer able to drive. For a discussion on driving, see the publications on the Alzheimer's Association website [www.alz.org](http://www.alz.org) under "driving", or order the publication, *At The Crossroads, A Guide to Alzheimer's Disease, Dementia and Driving*, published by The Hartford. The protected person may insist on driving when (s)he is unable to do so safely. Talking about the car and other financial issues with the conservator, if there is one, should help make good decisions for the protected person.



Similarly, see that the protected person's furniture is cared for by storing, selling or giving it away when the protected person is no longer able to use it. If there is other property that needs protection and the guardian is not authorized to protect it, a petition must be filed to have the guardian or another person named as conservator.

### ➤ Arranging Recreation and Education

Provide the protected person with a television, radio or stereo if (s)he likes music. If (s)he has a pet, try to keep the pet with him or her or have the pet visit the protected person or the protected person visit the pet. Before the protected person moves to a nursing facility, check whether it has a "visiting pet" program. Be sure the protected person's hearing aids are working properly and that (s)he can hear. Have family and friends visit frequently and take the protected person on outings. Arrange for the protected person to take trips if (s)he can. Consider adult day care, adult education classes such as those offered by Oasis, and programs offered by senior centers and other organizations. If the protected person needs training, either to be able to do tasks of daily living or to get a job, or if (s)he is able to be educated, make sure (s)he can take advantage of whatever programs or resources there are. Side by side programs in public schools, state vocational rehabilitation programs and community colleges are available for incapacitated adults. Work programs are available for persons with developmental disabilities.

### ➤ Using Community Resources

The protected person's community probably has one or more of the following support services available. Become familiar with what is offered and take advantage of what would benefit the protected person. Some services are free or have a reduced fee; others require payment. Services to care for the protected person include:

- ❖ care management services (a social worker, certified care manager or other care manager will recommend, coordinate and monitor necessary services for the protected person. Case or care managers work for city or state agencies, private companies or are self-employed);
- ❖ meal services, such as Meals on Wheels (a private, nonprofit group) or home-delivered meals through the Department of Senior Affairs or other agency (In Albuquerque, check the blue pages of the telephone directory under City, Department of Senior Affairs, for information; in other communities, check under Area Agency on Aging); there are also specialized caterers who provide meals and charge for their services;
- ❖ homemaker, home health and personal care services for chores, bathing, shopping, cooking, etc.;
- ❖ senior centers for activities, meals, trips and classes;
- ❖ adult day care;
- ❖ day programs for people with developmental disabilities;
- ❖ transportation services (Department of Senior Affairs or a private service);
- ❖ personal contact programs, such as telephone visitors; and
- ❖ emergency response services that offer things like "emergency call" buttons.

Appendix One of this Handbook contains some information about available community resources.

## ➤ Making Health Care Decisions

Examples of health care decisions that may need to be made include:

- ❖ buying or maintaining health insurance;
- ❖ consenting to medical treatment, such as medicine, surgery, flu or pneumonia shots or treatment options;
- ❖ choosing doctors, hospital, hospice services, rehabilitation centers or other health related facilities;
- ❖ giving instructions about whether or not to resuscitate the protected person;
- ❖ giving directions about withholding or withdrawing life support;
- ❖ deciding whether or not to provide, withhold or withdraw artificial nutrition and hydration;
- ❖ working with doctors, nurses, social workers and pharmacists;
- ❖ arranging dental care;
- ❖ obtaining hearing aids or other amplification devices, glasses, walkers, canes, merrywalkers, wheelchairs, chair alarms, oxygen and other devices to help the protected person;
- ❖ obtaining care for the feet (podiatric care); and
- ❖ ensuring proper diet.

Although there are many duties that the guardian can delegate to another to perform for the protected person (such as providing shelter and other daily care, transportation and education), ordinarily the duty to make health care decisions cannot be delegated, especially end-of-life decisions. However, if the guardian is temporarily unavailable due to illness or being out of the country and is unable to communicate, a specific and temporary Limited Power of Attorney appointing someone else to make these important decisions on the guardian's behalf can be prepared. If a guardian no longer wants to serve as guardian, the guardian may resign and have a substitute guardian appointed by the court.

The guardian's job is to stand in the incapacitated person's shoes and make health care decisions on behalf of that person. The guardian should make health care decisions according to the person's instructions and other wishes, if known. There may be advance health care directives or a Medical Power of Attorney with end of life instructions contained within the document. Check for other written documents, such as a Living Will or Five Wishes, or a values history. Ask family members if they ever discussed the person's wishes when (s)he was mentally alert and try to apply that person's values and beliefs. Keeping the guardian's own desires or wishes out of the decision-making process is very important.

The United States Supreme Court has ruled that a person has the right to refuse or accept medical treatment, including the right to refuse a particular treatment even if doing so will hasten or cause death. Doctors are supposed to honor the guardian's wishes or instructions regarding the protected person. If the guardian knows that the protected person would not want a certain

treatment or surgery, the doctor should be told about these wishes. Likewise, if it is believed the protected person would want a particular treatment, the guardian must instruct the doctor.

If the guardian does not know the incapacitated person's wishes, health care decisions should be made in that person's best interest, taking into account his or her personal values. While there is no set test for deciding the best interests of a person, consider whether a person has:

- ❖ a reversible condition that could be changed for the better if treated;
- ❖ the ability to be rehabilitated;
- ❖ the ability to communicate with others through speech, eye contact or writing;
- ❖ any quality of life, no matter how minimal;
- ❖ pain; and
- ❖ a disease, the treatment of which would make the person suffer more.

When trying to decide another person's best interests, medical, ethical, economic and religious issues, as well as legal issues, must be considered.

Some people have never been able to state their wishes; these cases are the most difficult. Those who have never had capacity may have developmental disabilities, such as mental retardation, severe cerebral palsy or autism. For those who have never had capacity, decision-makers must be especially careful when determining best interests. Withholding treatment solely because someone is old or disabled is improper. Even if the person does not have the same quality of life that the guardian might enjoy, the guardian must consider what quality of life is "normal" for the incapacitated person. If possible, decisions should be made that help that person continue the activities that (s)he has done in the past.

The incapacitated person may be able to offer guidance from time to time. Some people have limited capacity but may think clearly when medications have worn off or at certain times of the day. An agent or surrogate for someone who is able to communicate should talk to him or her before making important decisions. That person's instructions should be followed as closely as possible, no matter what the guardian's own personal beliefs are.

The guardian should talk to doctors and pharmacists and ask questions to understand what is being decided for the protected person. Do not agree to treatment or medication for the protected person unless all the needed information to make an informed decision is obtained. Doctors need to know about all medications being given to the protected person, including over-the-counter medications as well as vitamins and any other supplements or herbs. Sometimes medications can work against each other. Establishing good communication with doctors and pharmacists makes the guardian's job easier. Nurses and physician's assistants are also able to answer some questions.

Other things to discuss with the doctor include:

- ❖ how often the protected person needs to see the doctor;
- ❖ if the protected person needs a special diet;
- ❖ what the long range effects of treatment options are;
- ❖ whether the doctor has talked with all of the protected person's other doctors;
- ❖ be aware of and ask for lab work;
- ❖ what side effects medicines, herbs or other supplements may have and what reactions are serious enough to call the doctor immediately;

- ❖ whether the protected person has any allergies or other medical conditions of which the guardian should be aware;
- ❖ whether the protected person would benefit from physical therapy or using special medical equipment; and
- ❖ how long medicines should be taken and why they are being prescribed; and, if they are discontinued, finding out if they require a gradual dose reduction.

The guardian may feel certain that the doctor has given all possible treatment options but is still unsure of what to do. The guardian can get a second opinion from another doctor. Most insurance companies will pay for a second opinion.

A guardian has the right to review the protected person's medical records and to be fully informed about the medical care. The guardian is also free to change doctors. If a doctor is changed, make sure the new doctor receives all of the protected person's old medical records.

If family members disagree over the protected person's health care, remember that sometimes the guardian may have to advocate for the rights of the person. Being an advocate for a patient can be difficult, especially when other family members object to the decisions the guardian is making. If the guardian discusses difficult topics with family members, it may be helpful for the guardian to share what the medical providers recommend and review the protected person's known values and wishes. This may help dissipate tension in the family and help gain greater understanding among family members.

Health care providers may be caught in the middle if the guardian directs one type of treatment and family members want a different treatment. Communication with family members and friends is essential. If the guardian and the doctor disagree on health care decisions (for instance, the doctor may believe in trying all treatments no matter what the patient's wishes are), consider finding a doctor whose views are more compatible with those of the protected person.

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

A guardian should be cautious about what is communicated with family or friends. A guardian learns a lot of information about the protected person, including information about his or her behavior, and financial and medical information. The guardian must be careful about sharing this information and history, especially medical information. Doctors and other health personnel do not tell anyone about a person's medical condition without authorization from the person. Respecting rules of confidentiality, the protected person's right to privacy and his or her sense of dignity, means that the guardian should not discuss what is known about the protected person with others unless absolutely necessary. For example, discussing a medical condition with someone who is helping take care of the protected person is appropriate. In a family where everyone shares information and nothing is a secret, the guardian must decide how much can be told to others about the protected person—enough to help them have basic information and not feel left out but not the details that most adults would want kept private.

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

If it is recommended that the protected person enter a residential treatment facility for mental health treatment and (s)he is unable to consent or refuses to go, the guardian can request for him or her to be picked up by the police. The guardian may need to have a mental health professional submit a Certificate of Evaluation for the protected person to be picked up if it is not an emergency (For assistance in the Albuquerque area, call 242-COPS, or 242-2677). The Albuquerque Police Department Crisis Intervention Team (CIT) and a Crisis Outreach Officer are good sources of information and support in these difficult situations. A local mental health facility can also offer guidance on what steps to take. In an emergency situation, call 911. If the protected person is committed against his or her wishes because of a dangerous situation, there will be a court hearing on whether (s)he needs to remain in the facility. If, at the hearing, it is recommended that the protected person be committed to the facility for a period of time, a mental health treatment guardian may be appointed to make mental health decisions for the protected person while (s)he is in the facility and for up to a year after. Other mental health treatment such as electroconvulsive therapy, psychosurgery and experimental treatment may also require that a treatment guardian be named. Most likely the guardian will also be named as the mental health treatment guardian, but someone else could be appointed since the laws governing mental health (Mental Health Code) are separate from the laws of guardianship (Probate Code).

A treatment guardian works closely with the physicians and other mental health providers in making decisions about the protected person's treatment. A treatment guardian must make sure that he is kept informed about what is happening. Be sure the duties of the treatment guardian are carefully explained before the hearing at which the guardian is appointed.

Although the Mental Health Code is separate from the guardianship provisions of the Probate Code, there are overlaps with respect to treatment. Frequently the administration of psychotropic medications does not require the appointment of a treatment guardian if a guardian is already appointed and consents to such treatment. The powers of a guardian, under the Probate Code, are interpreted by many attorneys and health care providers as allowing a guardian to consent to the administration of psychotropic medications. This is because the guardian has the power to make all medical decisions, which by definition include mental health decisions. The Mental Health Code does not specify that a guardian may not make mental health decisions. Therefore, unless the law changes, many people feel that guardians under the Probate Code can make mental health decisions. Ideally, language stating the guardian has the powers of a mental health treatment guardian under the Mental Health Code is included in the court order appointing the guardian under the Probate Code.

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

Guardians should obtain court review and judgment regarding any proposed extremely invasive procedures, such as sterilization; a judge should decide whether this is appropriate.

In some cases, the protected person may have created a Mental Health Power of Attorney. If this is the case, it should be useful information for the guardian regarding making decisions with and for the protected person, even if the guardianship now overrides this Power of Attorney.

### ➤ Limitations on Guardian's Powers

It cannot be stressed enough that the guardian must respect as much as possible the independence of the protected person. The guardian should be limited in what the guardian does for the protected person by what the protected person can do for himself or herself. The guardian is also required to follow the protected person's preferences so long as they are not harmful even if these preferences are not what the guardian would personally choose. However, if the guardian is appointed as a full guardian, the guardian has the final authority to act for the protected person. As discussed above, the guardian must act in the protected person's best interest, deciding what the protected person can do and what the guardian should do. The court may also have formally limited the guardian in its order as to what can be done for the protected person. For example, perhaps the guardian can only make medical decisions for the protected person because (s)he does not understand his or her medical situation, but the protected person can make other decisions affecting his or her daily life, such as where to live.

### ➤ Liability of Guardian and Penalties for Failure to Perform Duties

New Mexico law states that a guardian is not legally obligated to use his or her own money to pay for the protected person's needs or debts. The guardian uses whatever funds or income the protected person has for his or her care. If the protected person's income is very low, for example (s)he only receives SSI payments (Supplemental Security Income) and/or has no savings accounts or other assets and no family members or others who can help financially, the guardian may have to place the protected person in a facility that provides good care and accepts the low payment. The guardian will have to obtain clothing from a clothing bank or second-hand store and generally do what can be done with the available funds. In other words, the guardian must see that the protected person's needs for shelter, food and clothing are met, but the guardian does not have to use its own assets to do so.

The guardian is not liable for the wrongdoing of the protected person just because (s)he is the guardian. In order for the guardian to be personally liable (financially responsible), the guardian must be negligent in some way in caring for the protected person that allows the protected person to harm someone else or their property. For example, if the guardian knows the protected person is somewhat destructive and, while being left alone, the protected person goes next door and breaks into a neighbor's house, the guardian may be liable for any damages because the guardian knew the protected person had destructive tendencies and should not have been left alone.

If the protected person is placed in the care of someone else whom the guardian knows is not keeping a careful watch over him or her and the protected person harms someone or something, the guardian might be found liable. The guardian may also be liable if the protected person hurts himself or herself. For example, if the guardian allows the protected person to ride a bicycle without a helmet and (s)he has an accident, the guardian can be held liable. In other words, the guardian may be liable for damages if the guardian does not take reasonable steps to prevent the protected person from hurting himself or herself. The guardian may want to talk to a lawyer in more detail about liability and consider buying insurance that will protect the guardian or the protected person from having to use the guardian's money for damages the protected person might cause.

A guardian wears many hats. In some ways, a guardian is like a parent having to make important decisions about the protected person's care and sometimes being the protected person's caretaker. Like a parent, the guardian is often a teacher. A guardian is an advocate for the protected person to make sure (s)he receives what (s)he is entitled to and is treated with dignity. However, if the guardian is not the conservator of the protected person, the guardian does not take on the role of financial planner, money-manager, bill payer or investor.

Please note, it is not appropriate for a professional guardian (someone who does this work for a living and usually works with more than one person under guardianship) to have the protected person live with them. Also, it is not appropriate for an owner or staff of a residential facility where the protected person lives to be guardian of the protected person, unless related by blood or marriage.

### ➤ Fees for Serving as Guardian

A guardian is entitled to reasonable fees for his or her services. A guardian can also receive reasonable fees for room and board provided to the protected person. Many family members do not ask for fees for their services as guardians, but others who give up jobs and limit their activities to become guardians, do receive compensation when the protected person's income and assets allow for it.

The guardian's lawyer or the petitioner's lawyer may ask that the guardian receive compensation at the guardianship hearing. Keep an accurate accounting of time spent on matters relating to the protected person, money spent on travel, or buying things for the protected person, and the amount the protected person should pay for room and board. Remember to keep receipts for all of the protected person's expenses.

If the guardian is also the conservator, the guardian (as conservator) will pay his/her guardian fees; otherwise, the conservator, if any, will pay the guardian. Reasonable fees are based on the protected person's assets and the amount of work it takes to care for the protected person. For example, if the protected person receives only Social Security as income and must spend most of that on shelter care, the fees will be low. Compensation received by a guardian is treated as income for tax purposes. Besides paying state and federal taxes on them, the guardian has to pay New Mexico gross receipts tax because the guardian is providing a service. Consult with an accountant or the New Mexico Taxation and Revenue Department about these taxes and how they should be reported.

### ➤ Reporting Requirements

A guardian must file an initial report with the appointing court within ninety days after the guardian's appointment. Thereafter, the guardian has to file a report every year on the protected person's personal situation (see Appendix Two for a sample report). On the anniversary of the guardian's appointment, the guardian should complete and file the report with the court that appointed him/her. If the protected person moves out of state, it may be necessary to transfer the guardianship to the state where the protected person lives. The annual report is due each year within thirty days of the anniversary date of the guardian's appointment. If the report cannot be

completed on time, the court can be asked for an extension of up to sixty days. If this report is not filed, the guardian may have to personally pay the court \$5.00 for each day that the report is late. The guardian must also give copies of the report to the judge who appointed the guardian, to the incapacitated person (even if they cannot read or understand), and to the conservator, if any. The judge who appointed the guardian should review the reports. The judge can follow up with inquiries or further court proceedings if (s)he reads something in the report that does not sound right or that (s)he does not understand. These reports are kept confidential.

### ➤ Ending a Guardianship

A guardian cannot just quit. A judge must replace the guardian or determine a guardian is no longer needed due to the protected person regaining capacity or due to the death of the protected person. If a guardian decides that (s)he is no longer able or available to handle the responsibility of being a guardian, the guardian must inform the court of its intent to resign and request the court to appoint a new guardian. The guardian may also be removed due to the guardian's own inactivity or for other reasons by the court. If the court rules that the protected person has regained capacity, or if the protected person dies, the guardian will be released as guardian. The guardian's lawyer or the protected person's lawyer will petition the court to end the guardianship or change the guardian. Unless the protected person has died, or the court allows a change without a hearing, there will be a court hearing on the matter, following the procedures set out in New Mexico law. The judge will sign an order formally releasing the guardian and making any other appropriate orders.

If the guardianship ends because of the protected person's death, the guardian must notify the court and provide a copy of the death certificate to the judge. The presiding judge may want the guardian to file a petition to dismiss the guardianship and submit a corresponding order. If so, an attorney can be asked to do this. A final guardianship report must be filed at the same time that reports the applicable information.

If the protected person moves out of state, the guardian should contact an attorney about the steps necessary to transfer the guardianship. The lawyer will file a petition asking that the New Mexico guardianship be recognized in the new state, following the procedures set out in the new state's law. There are specific procedures for transferring a guardianship and/or conservatorship to a different state. An attorney should be consulted regarding the requirements.

Serving as a guardian for another person requires a large amount of time, patience, sensitivity and care. Before the guardian agrees to serve, make sure the guardian has the time and dedication to do a good job.



***Chapter Six***  
***POWERS AND DUTIES OF CONSERVATOR***

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## ➤ What is a Conservator?

In New Mexico, a conservator is someone appointed by a court to protect and manage the finances of someone who is unable to do so himself or herself as a result of illness or other disability. Thus, just as guardians make personal decisions for people unable to make such decisions for themselves, conservators are responsible for protecting an incapacitated person's property and using the property for the protected person's benefit. The responsibilities of a conservator include:

- ❖ locating and managing the protected person's finances;
- ❖ making sure the protected person's bills are paid;
- ❖ investing his or her money wisely;
- ❖ making sure that the property is safe and insured when necessary and appropriate;
- ❖ seeing that the protected person is receiving all the income and benefits (s)he is entitled to; and
- ❖ verifying that tax returns are filed on time.

There are many reasons why a conservator might be needed. For example, the protected person may not be able to keep track of his or her money or may not remember to pay his or her bills. (S)he may be giving away large amounts of money to strangers or spending large amounts of money on sweepstakes and lotteries. (S)he may need help managing investments.

A conservator can be a family member or friend, or it can be a bank or other company that is in the business of managing finances for other people. In any case, the conservator is expected to act wisely and for the good of the person who needs assistance.

## ➤ Powers and Duties of a Conservator

A conservator has the power and the duty to protect and manage the protected person's property. This includes gathering the assets of the estate, investing them, and using them for the protected person's benefit. The powers and duties of a conservator, including practical steps that should be taken, are described in the rest of this chapter.

The judge who appointed the conservator may limit the conservator's powers if the protected person is still able to take care of some of his or her own finances. For example, a protected person may not be able to make decisions regarding investments, but (s)he still may be able to pay household expenses. In such a case, the judge can grant the power to make investments but allow the protected person to manage his or her own household budget.

A conservator has a fiduciary relationship to the protected person just as a trustee has to the beneficiaries of a trust. Having a fiduciary relationship means that the conservator has a very special duty to the protected person to act with more than the usual amount of trustworthiness and care. The conservator must take steps to:

- ❖ make sure the protected person's property is safe;
- ❖ budget for the protected person to make sure his or her needs are met;
- ❖ keep careful records of all transactions and financial decisions;
- ❖ report to the court and others; and

- ❖ make sure the protected person's finances are kept separate from the conservator's own finances.

Some of these requirements may seem to be a lot of unnecessary trouble, especially if the protected person is a close relative or friend whom the conservator has been helping for a long time. However, the very high degree of responsibility and trust that is being placed in the conservator requires this extra care.

The conservator may have helped the protected person in the past by using a Power of Attorney from the protected person. Although some of the duties as conservator will be similar to those under the Power of Attorney, there are important differences. The Power of Attorney gives the power to do things, such as pay bills, for the person (called the principal) who gave the Power of Attorney. However, the Power of Attorney does not take away the power of the principal to do such things for himself or herself or tell how (s)he wants such things done. Most importantly, a Power of Attorney may be revoked by the principal while a conservator cannot be removed, except by the court.

Unlike a Power of Attorney, a conservatorship takes away a protected person's power over his or her finances and gives it to the conservator. As a result, the conservator is the person responsible for making sure financial decisions are proper. Although the conservator should consult with the protected person regarding financial decisions when possible and should follow the protected person's preferences if feasible, the conservator must use his or her own judgment in deciding what to do.

The conservator's powers will end only when the judge terminates the conservatorship or when the protected person dies. If a protected person dies, the conservator must deliver to the court any will of the protected person for safekeeping. Additionally, the conservator must inform the personal representative or beneficiary nominated in the protected person's will of his or her death. The conservator will then deliver the deceased protected person's assets to the personal representative. If, after forty days from the death of the protected person, no other person has been appointed personal representative and no application or petition has been filed, the conservator may apply to the court to exercise the powers and duties of a personal representative so that the conservator may proceed to administer and distribute the deceased protected person's estate without additional or further appointment. The conservator must give notice of this request to any person demanding notice and to any person nominated in the decedent's will as personal representative. If there is no objection, the judge may endorse the letters of the conservator to note that the formerly protected person is deceased and that the conservator has acquired all of the powers and duties of a personal representative.

In performing duties as conservator, it is important to always keep in mind that the protected person is a human being with dignity and feelings. Even if the judge has given the conservator total control over the protected person's finances, it is important to consult with the protected person when possible to keep him or her informed of what the conservator is doing and, where his or her preferences are reasonable and proper, to do what (s)he would prefer. The conservator has the ultimate responsibility for making sure that decisions are proper even if the protected person disagrees with a decision, but this does not prevent the conservator from encouraging the protected person to continue to be as involved as possible.

## ➤ Relationship Between the Guardian and the Conservator

If the protected person has a guardian other than the conservator, it is important that the conservator and the guardian communicate with each other and work closely together to meet the protected person's needs. The guardian is responsible for making personal decisions, including decisions concerning health care and other help that the protected person is to receive along with where the protected person is to live. The conservator is responsible for using the funds solely for the benefit of the protected person and budgeting them to make sure there is enough to meet the protected person's needs over his or her expected life. Some decisions such as the appropriate place where the protected person is to live involve both the guardian and conservator. If the guardian and conservator are not getting along with each other or do not take the time to work together, the interests of the protected person will be harmed. In such a case, the court might change the guardian or conservator or both.

The conservator should consider the recommendations of the guardian concerning the needs of and appropriate care of the protected person. The conservator can follow these recommendations without violating his or her duties unless they are clearly not in the protected person's best interest. The conservator should not follow any recommendations that will result in financial benefit to the guardian (other than payment of reasonable fees for serving as guardian). If the guardian will receive a financial benefit, such as payment for caring for the protected person, the conservator can decide whether the recommendation is proper, fair and reasonable. The conservator must use his or her own careful judgment and not be influenced solely by the guardian's request. If uncertain, the conservator can always petition the court for instructions.

## ➤ Relationship Between the Conservator and the Trustee of a Trust

In some cases, the protected person's assets may already be in a trust that is being managed by someone else (called a trustee) for the protected person's benefit. This could happen, for example, if the protected person set up a living trust to hold his or her assets before (s)he became incapacitated and appointed someone else to serve as successor trustee if (s)he became incapacitated.

Powers of the conservator in regard to the trustee and the assets held in the trust may be found in the terms of the trust itself, in the terms of any court orders concerning the trust or the conservatorship, and in the rules governing conservatorships and trusts generally.

The trust document may spell out the rights of the conservator. For example, many trust documents provide that the person creating the trust (which in the case of a revocable living trust would usually be the protected person) retains the power to change, amend, or revoke the trust. Such trusts often provide, however, that these powers can be exercised only by the protected person and cannot be exercised by a guardian or conservator. Some trusts allow a conservator to change the trustee of the trust if there is a good reason (the types of reasons are often described in the trust).

Sometimes there will be a court order that describes what a conservator's powers are in regard to the trust. For example, the order appointing the conservator may describe the relationship between the conservator and the trust.

If neither the trust nor any court order describes the rights of the conservator, the general laws regarding trusts and conservatorships will govern. The trustee will generally have the power to control the assets in the trust. but the conservator, as the protected person's representative, would be entitled to information about what the trustee is doing and would have the right to challenge the trustee's actions in court (including to ask that the trustee be changed) if the conservator thinks (s)he is not acting in the best interest of the protected person.

### ➤ Relationship Between the Conservator and an Agent Under a Financial Power of Attorney

The protected person may have given a Financial Power of Attorney to a person other than the conservator. If that is the case, the conservator can choose either to allow the person appointed under the Power of Attorney to continue to act for the protected person or, with court approval, the conservator can revoke the Power of Attorney. If the Power of Attorney is revoked, all persons or companies that hold assets belonging to the protected person should be notified that the Power of Attorney has been revoked. If the Power of Attorney is not revoked, the conservator will have the responsibility of supervising the person acting under the Power of Attorney and making sure that (s)he is acting wisely, honestly and for the benefit of the protected person. To avoid any conflict between the Power of Attorney and the conservator's powers, it is advisable to have the order appointing the conservator to revoke all Powers of Attorney.

### ➤ Relationship Between the Conservator and the Protected Person's Spouse

If the conservator is not the spouse of the protected person, and the protected person has a spouse who is living and not incapacitated, the conservator and the spouse will share the responsibility of managing jointly owned or community property<sup>5</sup> assets. In addition, if the spouse is involved in personal care decision-making for the protected person, the conservator will need to work closely with the spouse in the same way that the guardian must work closely with the conservator for the protected person.

If the conservator feels, in managing jointly owned or community property assets, that the actions of the spouse are unwise or otherwise not in the best interest of the protected person, the conservator can petition the court to separate the property of the protected person and the spouse. This is called a legal separation or court-ordered division of property. One example of a situation in which such action might be appropriate is if the spouse is unwilling to use community property assets to pay for the protected person's care. After the assets of the spouses are divided between the spouses, the conservator would be solely responsible for the management of the protected person's portion.

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<sup>5</sup> Community property means property acquired by either or both spouses during marriage which is not separate property. Separate property includes property acquired by either spouse before marriage or after divorce; property named as separate property in a legal separation or other court order; property received by gift or inheritance; and property named as separate in a written agreement between the spouses. New Mexico law considers community property to belong equally to both spouses, no matter which spouse earned or obtained the property.

If the protected person is receiving care in a nursing home and has a spouse who is not in a nursing home, it is important that the conservator seek information about Medicaid's rules concerning the protection of assets for the at-home spouse. If assets can be protected for the at-home spouse without hurting the protected person, the necessary steps should be taken to do so. This is because the protected person probably would have done the same thing had (s)he had the ability to make such decisions. Permission from the court may have to be obtained to gift or otherwise transfer assets to the at-home spouse. The Medicaid rules change frequently, and an attorney knowledgeable in Medicaid planning should be consulted to ensure that the right action is taken on behalf of the protected person. The fees for this type of consultation are legitimately paid from the protected person's estate.

## ➤ Actions After Becoming Conservator

### ◆ Using Letters of Conservatorship

Letters of Conservatorship will be issued as evidence of the conservator's authority to deal with the protected person's property. The conservator will need to present the Letters to financial institutions where the protected person's assets are located. Most banks, after reviewing the certified copy of the Letters, will simply make a photocopy for their own files. Out-of-state banks, stockbrokers, and other companies will often want their own certified copy. Consequently, enough certified copies for each such company should be obtained. Stockbrokers will usually want a copy of the Letters that are certified within 60 days of the time it is used.

A certified copy of the Letters should also be recorded with the County Clerk of each county in which the protected person owns land. This will help prevent any property from being sold, given away, or mortgaged without the conservator being informed.

Examples of when to use the Letters of Conservatorship include the following:

- ❖ putting in a change of address for the protected person at the post office;
- ❖ opening a bank account for the protected person's money in the name of the conservatorship;
- ❖ transferring the protected person's bank accounts to the conservatorship account;
- ❖ accessing the protected person's safe deposit box;
- ❖ transferring the protected person's stocks, bonds, and other assets into the conservatorship;
- ❖ signing agreements like leases, home-care contracts, admission agreements, care management contracts, etc.;
- ❖ requesting information about the protected person's affairs from government agencies and private businesses, pension plans, etc.;
- ❖ applying for government and other benefits on behalf of the protected person;
- ❖ asking lawyers about legal matters, other than the conservatorship, in which the protected person is involved; and
- ❖ gathering the protected person's assets from anyone who has been holding them for safekeeping.



### ◆ **Locate and Identify the Protected Person's Assets and Income**

The protected person's assets should be identified and located. There may be some assets that are readily apparent, such as the protected person's home and checking account, but there may be other assets that are not as easily determined. It is important to review the protected person's papers (this may require going through mail that has piled up and sometimes even doing a thorough house cleaning).

Check the protected person's safe deposit box (if (s)he has one) for stock certificates, certificates of deposit, and other valuable items. If it is unknown whether the protected person has a safe deposit box, ask at the banks where (s)he has accounts since, if (s)he has a box, it is most likely to be at one of those banks. When opening the safe deposit box, request that a bank officer be present and prepare a list of what is inside the box. This is a free service offered by banks that is worth using. That way, if anyone has a question later about what was in the safe deposit box, a list prepared by the bank officer can be presented.

Arrange with the post office to have the protected person's mail sent to the conservator. The protected person's mail will likely reveal account statements and other information about the protected person's assets. If the protected person has an accountant or other tax preparer, (s)he may be able to give the conservator information about the protected person's assets. If the protected person has a will that was prepared by a lawyer, the lawyer will often have a list of the protected person's assets at the time the will was prepared. The protected person's lawyer should be willing to share such information with the conservator as the protected person's legal representative. The protected person's past tax returns will contain information about the sources of the protected person's income, which may lead to additional accounts and other property owned by the protected person. If the protected person's income tax returns cannot be located, the conservator can request them from the Internal Revenue Service by submitting Form 4506-T. Often friends and family members are also a good source of information.

Some types of assets to look for include:

- ❖ cash;
- ❖ un-cashed checks and refunds;
- ❖ bank accounts (including checking, savings, and certificates of deposit);
- ❖ stocks;
- ❖ bonds;
- ❖ promissory notes (IOUs);
- ❖ partnerships and other business interests;
- ❖ life, health, long term care and other insurance policies;
- ❖ real estate, including houses, land, ranches, and mineral rights;
- ❖ furniture and/or antiques;
- ❖ artwork;
- ❖ jewelry;
- ❖ valuable collections; and
- ❖ vehicles, including cars, trucks, boats, campers and RV's.

Sometimes protected persons are wary or afraid and have hidden some of their assets. Search the house, garage, under furniture, in the refrigerator and other hiding places to locate valuables.

In addition to finding out what property the protected person owns, the conservator should also find out what income the protected person is receiving or has a right to receive. This is very important because one of the duties as conservator is to make sure the protected person receives the income (s)he has a right to receive. Some types of income the protected person may be receiving or may have a right to receive include:

- ❖ government benefits such as Social Security, Supplemental Security Income (SSI), Social Security Disability Income (SSDI), veterans' benefits, and welfare<sup>6</sup>;
- ❖ insurance benefits;
- ❖ wages including severance pay, disability, vacation and/or sick leave owed to the protected person;
- ❖ pensions;
- ❖ settlements from divorce, injury or other lawsuits;
- ❖ payment of debts owed to the protected person including payments from real estate contracts;
- ❖ money from trusts;
- ❖ rental income; and
- ❖ annuities.

#### ◆ **Make an Inventory of the Protected Person's Assets**

A list of all of the protected person's assets, including the value of each of the assets, should be made as of the time the conservator is appointed. The conservator is required to file an Inventory and Appraisal listing such assets and their value within 90 days after appointment as conservator. This information will also be helpful for the conservator's own record-keeping.

It is not necessary to spend a lot of money valuing assets in order to prepare the inventory and appraisal. Assets such as bank accounts, mutual funds, and publicly traded stock should be easy to value. Use estimates on items such as real estate. It is not necessary to get a formal appraisal unless the assets are to be sold. Each household item does not have to be listed and categories of items can be lumped together, such as "all household furnishings." If there are items of unusually large value, however, such as an expensive antique, it would be worth listing such an item separately.

#### ◆ **Give Notice of Appointment as Conservator**

As soon as possible, notice should be given to all banks, stockbrokers, credit card companies, and other businesses and government agencies with which the protected person has an account or a financial relationship or from which (s)he receives money. The notice should include: (1) a statement that a conservator has been appointed for the protected person; (2) a copy of the Letters; and (3) the conservator's contact information including address and telephone number. A sample letter giving notice is in Appendix Two.

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<sup>6</sup> The protected person may not have applied for all the government benefits to which (s)he is entitled. The conservator may have to apply for these benefits on behalf of the protected person. For example, if the conservator knows that the protected person served in the military, the conservator should research the eligibility requirements and, if appropriate, apply for veterans' benefits for the protected person, including Aid and Attendance if applicable.

Some of the people and institutions that should be notified are the following:

- ❖ the protected person's employer, if (s)he is working;
- ❖ banks, savings and loans, credit unions, and other financial institutions;
- ❖ stockbrokers;
- ❖ companies in which the protected person owns stock;
- ❖ insurance companies and agents where the protected person owns policy(ies);
- ❖ all companies and banks where the protected person has charge accounts, credit cards, or a bank cash machine (ATM) card;
- ❖ government agencies, such as Social Security, from which the protected person receives payments;
- ❖ retirement plans;
- ❖ people who owe the protected person money or to whom the protected person owes money;
- ❖ county clerk's office (recording and filing division) in every county where the conservator thinks the protected person may own real property;
- ❖ the post office, if the conservator wants the protected person's mail to be forwarded to the conservator's address; and
- ❖ anyone involved in a lawsuit by or against the protected person.

#### ◆ Find Out How the Protected Person's Assets are Titled

Along with finding out what assets the protected person has, it is very important to find out how the assets are titled (whose name is listed as the owner of the asset). For example, if the protected person has a bank account, it is important to find out if the protected person's name is the only name on the bank account or whether someone else's name is also on the account. Accounts that are held in more than one name are called joint accounts.

Joint accounts can be difficult to deal with for two reasons. First, it must be determined who really owns the money in the account. Under New Mexico law, joint accounts held by people who are not spouses are not automatically owned half and half. Rather, the account is owned in proportion to the amount of money each owner put into the account. As a result, if it was the protected person who put the money into the bank account and added a child's name to the account (for example, to help write checks on the account), all the money in the account will usually be treated as belonging to the protected person. If the other person put money into the account, that person will usually be considered to own what (s)he put in. If that is the case, it is usually best to separate the protected person's money from that belonging to the other person and put it into a separate account. The conservator will then be able to fully control the account with the protected person's share of the money.

The second reason why joint accounts are difficult to deal with is that they usually have what is called a right of survivorship. This means that if one of the persons whose name is on the account dies, the account will go automatically to the other person. As discussed below, the conservator has a duty to try to "preserve the protected person's estate plan" to the extent possible while at the same time making sure that the protected person's needs are fully met. If the protected person has set up joint accounts that will pass to certain people when the protected person dies, the conservator must try to manage the protected person's estate in a way that the same people will receive that property (or what is left of it) after the protected person dies. This can be a very tricky and difficult task.

Even if an asset is only in the protected person's name, check to see if the protected person named any beneficiaries to receive the asset after his/her death. Life insurance policies, individual retirement accounts, certificates of deposit, and many other assets allow the owner to name a Payable on Death (POD) or Transfer on Death (TOD) beneficiary to receive what is left of the asset after the protected person dies. Although POD and TOD beneficiaries have no rights to an asset until after the protected person dies, it is important to know who the POD and TOD beneficiaries are so that one can preserve the protected person's estate plan to the extent possible. A Transfer on Death Deed may be needed. A more detailed discussion on Transfer on Death Deeds is in the section regarding real estate.

If the protected person is married, it must be determined whether property is community property that belongs to both spouses or the separate property of one spouse or the other. The title of an asset does not necessarily determine whether it is community or separate. For example, an individual retirement account that contains monies earned during the spouses' marriage is community property even though it is only in the name of one of the spouses. If property is community property and the conservator is not the spouse of the protected person, the conservator and the spouse will have to work together to manage the property since neither will have total control over the community property. It may be necessary in some situations to divide out the community property if there is too much disagreement on how assets are to be managed and spent.

#### ◆ **Take Control of the Protected Person's Assets**

After identifying the protected person's assets, it is very important that the conservator take control of them. The conservator is now responsible for making sure that the protected person's assets are safe. Unless the conservator takes control of the assets, their safety cannot be ensured.

The title to the protected person's other assets should generally be changed to "Conservatorship of [protected person's name], [the conservator's name], Conservator." If that is not possible, the person or company holding such assets should be informed of the conservatorship and that only the conservator has the power to sell or otherwise deal with the assets.

#### ◆ **Find Out What Debts the Protected Person Owes and Decide Which Debts Should be Paid**

In addition to finding out what assets the protected person has, also find out what money the protected person owes to other people. Make a list of all such debts. Such debts might include:

- ❖ a mortgage or home equity loan on the protected person's house or other real estate;
- ❖ amounts owed on the protected person's credit card;
- ❖ taxes;
- ❖ utility bills;
- ❖ insurance premiums; and
- ❖ other loans or past due bills.

If the protected person has been disabled for some time, (s)he may have stopped paying bills. One of the most important tasks the conservator has is to figure out what the protected person owes and to make sure these bills are paid as soon as possible. Otherwise, there may be negative

consequences such as health insurance lapsing (being canceled) because (s)he didn't pay the premiums, the home being foreclosed because (s)he didn't pay on a real estate contract or mortgage, the utilities being shut off, or penalties being imposed as a result of late payment on credit card bills and other debts. Before paying penalties, try to get them waived by explaining that the protected person was disabled. For example, the Internal Revenue Service will waive penalties on past due taxes if the taxpayer failed to pay as a result of disability. Credit card companies may waive late fees and/or finance charges if asked.

In figuring out what debts the protected person has, it is the conservator's responsibility to check the debt and decide whether it is valid. The conservator should challenge debts that are not valid. For example, it may be that someone made charges on the protected person's charge account without the protected person's permission or the protected person may have been too disabled to really give permission. If this is the case, those charges may not be valid. Inform the credit card company in writing right away to attempt to cancel the charges. The same is true if someone forged or wrote unauthorized checks on the protected person's checking account. The bank should not have paid on such checks and may have to credit the protected person's account.

Another situation might be that someone is claiming that the protected person owes him or her money for helping the protected person. Before paying, the conservator should look into whether the protected person really owes the money by asking for some proof that the services were performed. Also decide whether the amount the protected person is being charged is reasonable. If the conservator believes that the protected person does not owe a debt that is being claimed or that the protected person was unfairly taken advantage of (which often happens to disabled people), consult with an attorney before deciding what to do.

In investigating the protected person's debts, it is important to review the protected person's papers and mail. It is worth giving service providers and creditors like the health insurance company, homeowner's insurance company, and mortgage company a call to make sure the protected person is current on payments. If the conservator thinks the protected person may not have paid taxes, they can find out whether or not (s)he has been filing returns or paying taxes from the IRS by requesting a transcript using IRS Form 4506-T.

After determining what the protected person's debts are and deciding which are valid, set up a payment schedule or use a computer program to make sure they are paid on time.

#### ◆ **Arrange to Have the Protected Person's Mail Sent to the Conservator**

It is usually best to have the protected person's mail sent to the conservator. As mentioned above, looking at the protected person's mail is a good way to find out about assets and debts of the protected person that might not otherwise be apparent. Having the protected person's mail directed to the conservator ensures all bills are received and promptly paid. If possible, have the protected person's creditors send mail directly to the conservator so that the protected person can receive any personal mail directly. If the personal mail is being sent to the conservator, (s)he should deliver the mail to protected person as soon as possible, in accordance with his or her decisional and emotional best interest.

Another reason to have the protected person's mail sent to the conservator is that there are a lot of companies that send junk mail in an effort to get recipients to buy things or donate money. Some are not harmful, but there are others such as certain "sweepstakes" companies or lotteries that try to get people to send more and more money in the hope of winning. These companies

often end up unfairly taking advantage of people who are elderly or disabled. If the protected person is receiving these mailings, the conservator should send a letter asking them to remove the protected person from their mailing list.

## ➤ Real Estate

The term “real estate” generally refers to land and the buildings on it. Title to real estate, including the protected person’s home, can be left in the protected person’s name, but title companies frequently require that the property be re-titled into the conservatorship estate if it is to be sold. As a general rule, it is best to re-title any property owned by the protected person into the conservatorship estate with a new deed. Have an attorney assist with this to ensure the deed is prepared correctly. Make sure that a certified copy of your Letters of Conservatorship is recorded with the county clerk’s office in every county in which the protected person owns real estate. That way, anyone who may want to buy the real estate from the protected person or lend money to the protected person secured by a mortgage on the real estate will have notice of the conservatorship.

If real estate is owned jointly by the protected person and another person in joint tenancy or as tenants in common, consult the other person before selling, encumbering or improving the property. If property is held in joint tenancy, deeding the property to a conservatorship could sever the joint tenancy. Consult with an attorney to ensure that severing a joint tenancy will not cause any problems and to understand the ramifications of selling property owned jointly by the protected person and other persons.

A Transfer on Death Deed (“TODD”) is a way to avoid a probate of the protected person’s estate with respect to real estate. TODDs offer numerous benefits to the protected person’s heirs without endangering the protected person’s interest in the property. The execution of a TODD may be in the protected person’s best interest to ensure that the estate plan of the protected person is maintained.

Any real estate owned by the protected person may already have a TODD in place. In the event that real estate is sold, the TODD is effectively revoked without any further action. If a replacement property is purchased, consider whether or not it is appropriate to do a TODD for the replacement property.

Although the statute does not specifically authorize a conservator to execute a TODD, theoretically conservators can do anything the record owner of the property can do. If the conservator feels a TODD may be appropriate, (s)he should discuss this with an attorney.

It is very important that the protected person’s real estate is adequately insured. Insurance for real estate with a building on it, including the protected person’s home, should include fire, vandalism, and liability insurance. Make sure insurance is current and that the amount of the insurance coverage is sufficient to cover any loss.

Most homeowner’s insurance policies contain a provision that the fire and vandalism coverage will lapse or become invalid if the home is vacant for more than a month unless the conservator pays an additional amount for a “vacancy rider”. If no one is living in the protected

person's home, such as if the protected person is in a hospital or nursing home, the conservator should tell the insurance company and purchase a vacancy rider, if possible.

The conservator is responsible for making sure the protected person's property is reasonably safe. If there are unsafe conditions on the protected person's property, these conditions should be corrected. For example, if there are vacant buildings on the protected person's property that are beginning to fall apart, they should be boarded up or removed. Take steps to make sure the property is physically secure. For example, the conservator should change the locks to the house because others who should not have access may have keys to the property.

Lastly, make sure that property taxes are paid up if a mortgage company is not paying them.

### ➤ Bank Accounts

The title of all bank accounts should be changed to "Conservatorship of [protected person's name], [conservator's name], Conservator". If the title of accounts such as Certificates of Deposit cannot be changed without losing interest on the account, wait until such accounts mature and then change the title. Even with such accounts, however, make sure that the banks have noted in their records that there is a conservatorship in place. The protected person's social security number should be used on all the accounts rather than that of the conservator.

As discussed above, accounts that have more than one name (joint accounts) create special problems. Find out who put money in the account in order to establish who is the owner of the account. Until this is determined, inform the bank in writing not to allow anyone to withdraw money from such accounts.

### ➤ Safe Deposit Boxes

The title to the protected person's safe deposit box, if (s)he has one, should be changed to "Conservatorship of [protected person's name], [conservator's name], Conservator of the Estate." If the protected person is renting a box with someone else, have that person look at what is inside the box with you. Items belonging to the protected person should be separated from those belonging to the other person. The safe deposit box should then be put in the conservator's name only, and the conservator should have the only key to the box.

### ➤ Stocks and Bonds

All stocks and bonds should be reissued to "Conservatorship of [protected person's name], [conservator's name], Conservator." The protected person's social security number should be used on the IRS Form W-9.<sup>7</sup> Before a company will reissue stocks and bonds, it will usually

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<sup>7</sup> A W-9 Form is a Request for Taxpayer Identification Number and Certification. The number reported on the W-9 is usually the taxpayer's Social Security number but could also be an employer identification number for certain trusts or estates.

require that certain forms be sent, including: (1) an affidavit of domicile; (2) a stock power; (3) a letter of instruction; and (4) the original stock certificates. The conservator's signature on some of these documents will need to be signature guaranteed, sometimes referred to as a "medallion guarantee." This is different from notarization and generally can be done by a bank officer or your stockbroker. In addition, companies usually require Letters of Conservatorship that have been certified by the court clerk within the last 60 days.

Some stock certificates may be missing. For example, suppose the protected person is receiving dividends from stock but the conservator cannot find the stock certificates. First, ask the protected person's stockbroker if (s)he is holding the certificates. If not, write to the stock company and ask that replacement certificates be issued. The replacement certificates should be titled as noted in the above paragraph.

Some companies do not issue paper stock certificates so each stockholder owns "certificateless" shares. Certificateless shares are recorded by the company or its stock transfer agent so that all records of ownership are only shown on the books of the company or the stock transfer agent. Thus, it is also possible that the protected person owns these kinds of shares in one or more companies. Check stubs or other documentation may indicate ownership of shares. If a stock certificate cannot be located, contact the company to make sure the stock records are changed to reflect the conservatorship accordingly.

### ➤ Cars and Other Vehicles

Title to cars, boats, RVs and other vehicles should be changed to "Conservatorship of [protected person's name], [conservator's name], Conservator". Do not let anyone use the protected person's car except if it is being used for the benefit of the protected person (such as to take the protected person to the doctor). Make sure there is car insurance that covers any damage to the car and any liability that might arise if there is an accident. If someone uses the protected person's car (even to help the protected person) and they get into an accident, the protected person's estate may be sued.

Sometimes the protected person will want to continue to drive even though it is not safe. In such a case, it is part of the conservator's responsibility to take reasonable steps to prevent the protected person from driving. If the protected person's doctor writes a letter to the Department of Motor Vehicles (DMV) stating that it is unsafe for the protected person to drive, DMV will take away the protected person's drivers' license. Practical steps can be taken to prevent the protected person from driving, such as taking away the car keys or selling or disabling the car. If the conservator is not the protected person's guardian, the conservator should consult with the guardian, and if possible, the two should work together to solve this problem. Further, if the protected person gets into an accident and gets hurt or hurts others, and the conservator knows that it is unsafe for the protected person to drive but does not take reasonable steps to prevent him or her from driving, the conservator may be held legally responsible.

Check to see if there are driving schools offering testing for a fee. After testing, the instructor can offer a recommendation for the protected person to get a license, private lessons, or not to drive at all. A letter of concern can also be written to the Motor Vehicle Division, Driver



Services Bureau in Santa Fe (MVD 888-683-4636), or a “Report of Driver with Dementia” form from the DMV can be sent anonymously.

If the protected person does not need the car, it should probably be sold since it will decrease in value over time and the expenses of insurance and maintenance will not offset the benefit of keeping it. However, if the protected person wishes to keep the car, and it is not being operated, an “Affidavit of Non-Use” can be filed with the Motor Vehicle Division, which exempts the car from being insured. This form needs to be filed annually.

### ➤ Credit Cards, Charge Accounts, and Bank Cash Machine Cards

It is usually best to cancel all credit cards, charge accounts, and bank cash machine (ATM) cards in the protected person’s name. The protected person or others can too easily misuse these. If credit cards have already been misused, the conservator may be able to avoid paying the charges.

### ➤ Debts Owed to the Protected Person

As conservator, try to make sure that all debts owed to the protected person are paid, unless doing so would not be worth it to the protected person. Sometimes this may be easy, such as if the protected person owns a real estate contract and the buyer is regularly paying on the contract. Sometimes this may be hard, such as when another person has stolen money from the protected person and will not pay it back. It is best to speak with a lawyer about such cases for advice about what should be done.

### ➤ Individual Retirement Accounts (IRAs) and Pension Accounts

The title to IRAs, pension accounts, and other retirement accounts must remain in the participant’s (protected person’s) name. Make sure that the company holding the account knows about the conservatorship and that the conservator is the only one who can withdraw money from the account.

If the protected person has IRA and pension accounts, make sure that the monies in these accounts are being withdrawn properly. If the protected person withdraws money before age 59, there may be a penalty. After the protected person reaches a certain age (usually by April 1 of the year after the protected person becomes 70 ½ years old), the protected person must withdraw at least a minimum amount from the IRA and pension accounts each year. If (s)he does not, there are penalties on the amount that should have been withdrawn but was not. Dealing with IRA, retirement, and pension accounts is a tricky area and making a mistake can cause the protected person to pay a lot in tax penalties. It is best to talk with a lawyer or CPA about how to best take money out of these accounts.

## ➤ Social Security and Other Income Benefits

The conservator will have to deal with the Social Security Administration regarding the protected person's social security benefits, such as having them directly deposited into an account other than the one into which they were being deposited before the conservatorship. The conservator will have to become the "representative payee" or "rep payee" of such benefits. This is true even though the conservator was already appointed as the representative payee. To become a representative payee, the conservator must go to the Social Security Administration office to complete the applicable forms. Usually, Social Security will appoint the conservator to be the representative payee without much difficulty.

Inform (in writing) any other persons or entities from whom the protected person is receiving income, such as the Veterans' Administration, the Civil Service Retirement System, and/or pension companies of the conservatorship. Ask whether there is anything else needed to become the protected person's representative for such income.

## ➤ Managing the Protected Person's Estate

### ◆ **Keep the Protected Person's Money Separate From that of the Conservator**

It is very important that the conservator does not mix the protected person's money with the conservator's own money. Mixing the money can get the conservator into serious trouble. Therefore, never put the protected person's money into the conservator's personal account or the conservator's money into the protected person's account. This "commingling" of assets is prohibited.

### ◆ **Protecting the Protected Person's Important Papers and Valuable Items**

If the protected person does not have a safe deposit box, consider renting one for him or her. Important papers, such as the following, should be kept in the safe deposit box:

- ❖ the protected person's will or other estate planning documents;
- ❖ stock certificates;
- ❖ bonds;
- ❖ real estate deeds;
- ❖ vehicle registration documents;
- ❖ promissory notes (IOUs);
- ❖ insurance policies;
- ❖ birth, marriage and death certificates;
- ❖ pre-paid funeral or burial plan;
- ❖ the protected person's passport; and
- ❖ any other papers that would be difficult or impossible to replace.

Small valuable items such as jewelry should also be kept in the safe deposit box unless it is decided that it is more important to let the protected person keep the items in their possession than it is to make sure that they are safe.

The conservator should not put the protected person's valuable items and papers in the conservator's own safe deposit box. It is very important to keep the conservator's property separate from the protected person's property. The one thing that can get the conservator most easily in trouble is to mix the protected person's money or other assets with the conservator's own.

The protected person may have valuable items, such as expensive artwork, that cannot be placed in a safe deposit box. Consider storing them in an insured warehouse, with appropriate art storage conditions, unless the protected person wants to keep them at home and it would be reasonably safe to do so. Take photos or make a videotape of all valuable items, especially those that are being left in the house. Also make sure that valuable items are insured against loss. This can usually be done by adding items to the protected person's homeowner's or renter's insurance policy. Such policies usually allow the conservator to list valuable items to be listed individually. The insurance company may charge an extra premium for insuring specific valuable items.

If the protected person is living at home, in-home caregivers coming in to help the protected person may be necessary. Unfortunately, sometimes caregivers take things belonging to the protected person when they should not do so. In some cases, the protected person will not know that the item was taken but in others, the protected person will have "given away" the item. In either case, it would be wrong for the caregiver to take the item without the conservator's permission.

It is very important that the conservator (or guardian) who is doing the hiring of caregivers carefully check the references of caregivers. If hiring through an agency, make sure the agency screens, bonds and insures its employees. In particular, make sure the agency does a criminal background check and drug tests its employees. Agency employees have more oversight and accountability than non-agency employees. If the caregiver cannot come to work, an agency can usually provide a substitute more easily as well. The agency will also ensure that taxes and other work-related issues are taken care of so the conservator does not have this additional work. Agency employees are sometimes more expensive, but the overall benefit for the protected person is generally worth the expense.

It is also a good idea to inform the caregiver that an inventory of valuable items has been taken and will be checked from time to time. This can be done without offending the caregiver by simply explaining that this is part of the duties of a conservator and does not imply that this particular caregiver will take anything.

#### ◆ **Investing the Protected Person's Assets**

If the protected person has enough assets to invest, the conservator is responsible for making sure that the protected person's assets are properly invested. The conservator should invest the protected person's assets prudently through diversified investments that will provide a reasonable return with minimal risk.

Unless the conservator has expertise in investments, it is best to seek professional help from a good financial planner. Be careful in choosing a financial planner. Check references. Ask a lawyer, accountant, and trusted friends for referrals. There are many people who say they are financial planners but who are not well-qualified. Some planners may have an interest in selling a particular product rather than advising based on the protected person's needs. Because the amount of money that many financial planners make depends on the type of investments they

sell, be sure that the financial planner is both knowledgeable about investments and is honest. Do not go to someone who will recommend investments based on what they will make in commissions from the investments rather than what is good for the protected person.

If the protected person already has a financial planner, the conservator can use that person. It is still the conservator's responsibility to check into that person's background and references to make sure the person is appropriate. While the conservator should do what the protected person would like, if appropriate, the conservator is the person ultimately responsible for the protected person's finances. Therefore, the conservator must make his or her own decisions regarding who would be a good financial planner and what would be good investments for the protected person.

After a financial planner is selected, (s)he should review the protected person's investments and make recommendations. The conservator should consider whether the investments are appropriate given the protected person's needs, age, life expectancy, income requirements and financial resources. The investments that the protected person already has may be proper and nothing may need to be done. If changes are recommended, the conservator can consider making them. If the protected person is still able to participate in such decisions, discuss the recommendations with the protected person and consider his or her opinion. As always, if what the protected person would like to do would not be harmful to his or her finances, the conservator may follow the protected person's preferences. However, the conservator is the one who is ultimately responsible for the finances and must make his or her own decisions.

If investing in certificates of deposit or other bank accounts, do not put more than the Federal Deposit Insurance Corporation (FDIC) insurance limit (currently \$250,000.00) in any one bank or credit union. If more than \$250,000 is deposited in one bank or credit union, and that organization fails, the assets in excess of this amount will not be insured.

#### ◆ **Make a Budget**

The conservator has the duty to wisely manage the protected person's assets for the protected person's benefit. A very important part of this duty is figuring out what the protected person needs and balancing this with what (s)he can afford.

If the protected person has a guardian other than the conservator, work closely with the guardian in making a budget. The conservator should determine the needs of the protected person and how much it will cost to meet those needs. Estimate a range of costs for meeting the protected person's needs, depending on what (s)he can afford. For example, if the protected person needs nursing home care, some nursing homes are nicer than others but cost more. After figuring the range of possible costs, look at the protected person's income and assets and determine what (s)he can reasonably afford. Take into account what the predicted future needs of the protected person may be throughout his or her lifetime.

In deciding what the protected person can afford, keep in mind that the protected person's assets are for his or her benefit during his or her lifetime. While the protected person's assets should not be wasted on things that will not make a difference, the focus should not be on saving the protected person's assets for those who will receive the assets after the protected person dies. The protected person's assets may be needed now to give as good a quality of care and life as (s)he can afford. Those assets should be used to do that even if it will reduce, or use up entirely, the protected person's assets. It is the conservator's responsibility to put the protected person's

needs first, not to save the protected person's assets for those who will inherit from the protected person after death.

#### ◆ **Set Up a Conservatorship Checking Account and Keep Good Records**

It is very important to keep good records that show all income that the protected person receives and all payments that are made from the protected person's money. This is not hard and an elaborate computer program is not necessary to do it well.

It is very helpful in keeping good records of income and payments to have one checking account into which all income is deposited and from which all payments are made. Set up a new account in the name of the conservatorship, that is "Conservatorship of [protected person's name], [conservator's name], Conservator", or use one of the protected person's existing checking accounts after changing the title into the name of the conservatorship. The second option might be easier if it is already the account into which the protected person's social security benefit and other income are being directly deposited.

Whichever method is chosen, be sure to keep the protected person's money in a separate account(s). Do not use an account that is a joint account with another person, unless the other person's name is removed from the account. If the account is still a joint account with another person, the other joint owner may withdraw some or all of the funds in the account. If the joint account was held in "joint tenancy with right of survivorship", the joint owner may be entitled to any funds in the account after the protected person dies. The conservator should not put income into or make payments from such an account. For purposes of record keeping, it is best to use a checking account in which the bank returns all canceled checks and deposit slips to the conservator, or provides images of checks and deposit slips.

Have all income deposited into that account even if it is planned to later transfer the income to another account (for example, in order to let it earn more interest than it would in the checking account). This would include income such as the protected person's social security benefits, pension benefits, and payments from annuities. Also consider having dividends from investments and interest from certificates of deposit paid into this one account. This will make it easier to keep track of such income for purposes of accounting to the court. It may be more convenient and easier to track activity with an account that is accessible online.

As income is deposited into the account, carefully note on the check register: (1) the amount of such income; (2) where it was from; and (3) when it was deposited. If depositing income from more than one source in a single deposit, break out each different source of income in the check register. For example, show how much of the income is due to a payment on a real estate contract, how much is reimbursement from the insurance company for prescription medications, etc. If it is not too difficult, make a photocopy of each check that is being deposited.

In addition to depositing all income into this one account, make all payments from this account. Carefully note in the check register: (1) the check number; (2) to whom the check was made; (3) what it was for; (4) the date it was made; and (5) the amount of the check. It may be useful to use checks that allow the conservator to keep a duplicate or carbon copy as each check is written. If a large payment is due and there is not enough money in the checking account to make the payment, transfer money from another account into the checking account, note in the check register where the transferred money is from, and then make the payment from the checking accounting. Keep the receipts for payments made and write the number of the check on

the receipt. File the receipts in chronological order by date. Alternatively, categorize by the name of the payee or the subject. A helpful tool could be to use a large expanding file to organize check registers, receipts, account statements and other documents.

Make payments from the conservatorship estate by check directly to the person, if at all possible. Do not make checks for cash or make cash withdrawals from the checking account unless absolutely necessary. An exception to this rule might be if a small cash allowance is given to the protected person for spending money. If cash withdrawals are made, carefully note in the check register what the money was used for and keep receipts if possible. A lot of cash withdrawals will not look good to the court or to other family members who may have questions regarding management of the estate. For the conservator's own protection, keep cash withdrawals to the very minimum possible.

#### ◆ **Selling or Borrowing Against Estate Assets**

If there is not enough money in the protected person's estate to pay expenses, assets may have to be sold to meet those expenses. Before selling assets, there are several things to consider.

First, selling an asset may affect the protected person's eligibility for Supplemental Security Income, Medicaid and other governmental benefits. This is particularly true if the asset to be sold, such as the protected person's home, is considered exempt by these programs. For example, the Medicaid program that helps pay for nursing home care will consider a protected person's home to be exempt as long as the protected person wants to return home. This is true even if the protected person's health is such that (s)he cannot return home. If the home is sold, however, the money received from the sale will not be exempt and the protected person may no longer be eligible for Medicaid assistance.

Second, selling an asset may have income tax or capital gains tax consequences. If the conservator is not sure what the tax consequences of a particular sale would be, speak with an accountant or a lawyer who knows about these taxes before the asset is sold.

Third, if an asset that is specifically given away in the protected person's will is sold, the person who would have received that asset may be entitled, after the protected person's death, to the amount that the protected person received from the sale. As a result, keep careful records showing how much the conservator received as a result of the sale and that it was a reasonable amount of money (fair market value) for the asset. This will be discussed in more detail below.

Fourth, before the protected person's home is sold, consider alternatives such as getting a home equity loan or a reverse mortgage (where the bank will pay the protected person a monthly amount in exchange for a mortgage that will be paid back when the house is sold). Research options by finding publications from various resources or using the Internet. Some organizations have information on their websites that give information on these alternatives. As is true of all websites and publications that are distributed in more than one state, however, the website or publication may not take into account rules that are specific to New Mexico. Therefore, before acting on any of the suggestions, it is a good idea to speak with a New Mexico lawyer regarding how the action being considered by the conservator will be treated under New Mexico law, including Medicaid rules.

Lastly, whenever property is sold, make sure it is at fair market value. Fair market value is the amount of money that a purchaser who is willing, but not obligated, to buy the property

would pay the owner who is willing, but not obligated, to sell the property. In other words, ensure that the property is being sold at the best price.

If publicly traded stock or mutual funds shares are being sold, knowing the value on the date of the sale will be easy. If real estate is being sold, however, an appraisal or at least a market analysis from a competent realtor should be obtained. Have good records showing that fair market value was received for the sale, how much was received, and when it was received. This is especially true if the asset is being sold to a family member or a friend since it is more likely in such cases that a question may later arise as to whether fair market value was received. Do not sell an asset to a family member for a greatly reduced price. Doing so is a breach of your fiduciary duty as conservator and could cause removal by the court.

#### ◆ **Obtain Adequate Insurance**

Make sure that the protected person has adequate health and property insurance. Also review other insurance policies such as life insurance to make sure they are appropriate. Find out if the protected person has long term care insurance and what it might cover. It may help pay expenses such as homecare, assisted living and nursing home care.

If the protected person already has health insurance policies, review them carefully. Sometimes the protected person has been taken in by misleading advertising and purchased too much insurance. For example, (s)he may have several policies covering the same things. In such cases, cancel the unnecessary policies. If the protected person does not have adequate health insurance coverage, such as if (s)he needs a supplement to Medicare coverage, or a Medicare Part D drug coverage program, arrange to purchase a policy that will cover the needs. As is always true, it is worth consulting someone who has special knowledge in the area of health insurance. An insurance expert can advise the guardian on what the protected person needs and how to obtain the best policy for the protected person.

A Benefits Counselor through the state Area Agency on Aging can provide helpful information about insurance benefit programs and Medicare Part D drug coverage issues. There is an overview of the different Medicare coverage programs in Appendix Four of these materials. If the protected person owns a home or other real estate, make sure (s)he has adequate insurance that will cover damage to the property and lawsuits that might be brought by persons who may be injured on the property. If the property is vacant, the conservator will probably need to purchase a “vacancy rider.” If the protected person is being cared for in her home, make sure that there is insurance that will cover any work-related injuries of those who are being employed by the conservator.

If the protected person owns any automobiles or other motor vehicles, make sure that they are covered by enough insurance both for damage to the vehicle and for any lawsuits that may be brought against the protected person, or any person who the conservator lets drive the car, if there is an accident. Review any life insurance policies owned by the protected person. Some policies that the protected person is still paying on might not be worth keeping. Have the protected person’s financial planner review any life insurance policies and make recommendations regarding what to do.

### ◆ **File Insurance Claims**

The conservator should make sure that insurance claims, particularly health insurance claims, are filed in a timely matter. This is an important and often very time-consuming task.

### ◆ **Pay Taxes**

The conservator is responsible for filing the protected person's income tax returns and making sure that all taxes owed are paid. If a private caregiver is hired for the protected person, payroll taxes such as Social Security, Medicare, and unemployment insurance may be owed. Check with a lawyer or CPA if the conservator has any questions about this. If the caregiver is an employee of an agency, the agency will be responsible for paying these taxes.

Sometimes it is discovered that the protected person owed taxes but did not file a tax return or pay taxes for several years. It is the conservator's duty to correct this problem by filing the late returns and paying the taxes from the protected person's estate. If the protected person did not file tax returns or pay taxes as a result of disability, the IRS will waive any penalties for late filing once explained to the IRS representative.

Many long term care expenses, including payments for nursing home care and sometimes home care or residential care home fees, are deductible as medical expenses. This may greatly reduce or eliminate any taxes that are owed by the protected person.

If the protected person has limited income, it may not be necessary to file an income tax return for him or her. Check with a tax preparer or the IRS to find out how much income the protected person can have before an income tax return must be filed.

Hire an accountant or other tax preparer to prepare the protected person's tax returns. As is true in other areas that require special knowledge, paying someone who knows what they are doing is usually worthwhile. Hiring an expert can often save money and stress in the long run and provide certainty to tax questions.

### ◆ **The Protected Person's Will and Estate Plan**

The conservator has the right to look at the protected person's will, trust, and any other estate planning papers, such as accounts that name a payable on death beneficiary, that outline to whom the protected person wants to leave his or her property after (s)he dies. This is important because one of the duties as conservator is to try to manage the protected person's estate (to the extent that this is possible while providing first for the needs of the protected person) in a way that does not change who receives the protected person's property after the protected person dies. Also, if the protected person has given a specific item to someone in their will and that item is sold on the protected person's behalf, the recipient outlined in the will is entitled to receive the net amount that was received from the sale less the amount that was spent for the protected person's benefit. For example, if the protected person's will states that his or her house goes to their daughter, and the house is sold, the daughter will be entitled, after the protected person dies, to receive the net amount that was received from the sale less the amount that was spent for the protected person's benefit. Performing your duties, as conservator, in a way that does not change whom will receive the protected person's property after death can be tricky. The conservator is required to preserve the protected person's estate plan to the extent possible. For example, the protected person's will might provide that all stocks (s)he owns when (s)he dies will go to one son while all bank accounts that (s)he owns will go to one daughter. If money from bank



accounts is invested in stock, or stock is sold and the money received is placed in a bank account, what each child will receive after the protected person's death is affected. Another example is if the protected person owns three Certificates of Deposit (CD), each of which lists a different payable on death beneficiary, and one CD is cashed to pay for the protected person's care, the person who is the payable on death beneficiary of that CD loses out. In such a case, consider cashing in all three of the CD's and setting up a new account in which all of the beneficiaries of the CD's are listed as beneficiaries of the account after the protected person's death.

The duty of preserving the protected person's estate plan can be very difficult. The conservator should discuss the problem with a lawyer before selling assets or making any other decisions that affect whom receives the protected person's property after death.

If a question arises, consult a lawyer and possibly obtain court approval for the proposed action. The conservator can create a trust on behalf of the protected person if this is in his/her best interest, but the court must approve it first. Consult an attorney for this issue.

The protected person's will, trust or other estate planning papers should be kept in a safe place, preferably in the protected person's safe deposit box.

If the protected person's estate is large enough, estate taxes will have to be paid after death. Contact an accountant or tax advisor regarding the current estate tax limit. If the protected person's estate is taxable, discuss with a tax attorney or accountant as to whether any steps can be taken to reduce estate taxes owed by the protected person.

#### ◆ Deal with Medicare, Medicaid and Other Public Benefits

One of the duties of a conservator is to find out what public benefits the protected person may be eligible for and to obtain those benefits for the protected person if doing so makes sense. This is particularly important if the protected person is in a nursing home or otherwise needs long term care and may be eligible for Medicaid assistance.

The rules for qualifying for Medicaid are very complex and are beyond the scope of this handbook. It is worth speaking with a lawyer who knows about public benefits to find out what benefits the protected person may be entitled to receive. This may affect the way the guardian manages the protected person's estate. For example, even for a single person, the home is usually exempt from being considered in deciding whether the person qualifies for nursing home Medicaid. As a result, the home does not have to be sold before the person will qualify.

The Senior Citizens Law Office in Albuquerque offers a free seminar each month on Medicaid for nursing home care. The Department of Senior Affairs also has an excellent program for answering questions on Medicare issues. Medicare and Medicaid are completely different programs with different rules and different benefits. Both may be important to the protected person. See Appendix One for how to contact these organizations.

Attached to this handbook as Appendix Four is an excerpt from the New Mexico Senior Legal Handbook, which describes Medicare Parts A, B, C and D.

#### ◆ Make Funeral and Burial Arrangements

Check to see if any funeral and burial arrangements have been made by the protected person. If none have been made, the conservator can make such arrangements. If the protected person can tell the conservator what (s)he would prefer, discuss this with him or her. Otherwise, look at

the will, cremation authorization and other papers to see if these indicate what (s)he would want. Talk with the protected person's family members to find out if they ever discussed this issue when the protected person was lucid.

#### ◆ **Confidentiality**

The protected person's finances, including the amount of their assets, their will and other estate planning papers, are his or her private business. Check with a lawyer before giving anyone else information about these matters. It may be that the judge will want this information shared with other people, such as certain family members, but that should be clear before this information is sent to them. Explain to family members that it is the conservator's duty to protect the protected person's privacy. Before information is shared with them, seek court approval to do so.

The conservator has the right to receive information about all of the protected person's assets. If a bank or other business will not cooperate or give information, contact a lawyer.

#### ◆ **Payments that Can be Made from the Protected Person's Estate**

##### • **Payments for the Benefit of the Protected Person**

The protected person's money can be used for the support, education, care or benefit of the protected person. In deciding how much to spend and on what, take into account:

- ❖ how much money and other assets the protected person has;
- ❖ the protected person's accustomed standard of living, that is, how the protected person lived when (s)he was able to manage his or her own finances; and
- ❖ any other sources of funds or support that might be available to the protected person.

##### • **Payments for the Benefit of Those Who Depend on the Protected Person**

The protected person's money may be used to support people who are legally dependent on the protected person such as:

- ❖ a spouse;
- ❖ minor children; or
- ❖ others who live in the home who are unable to support themselves and who are in need of support (such as an adult disabled child or a sister or brother who lives with the protected person and depends on the protected person for support).

##### • **Conservator's Fees**

The conservator is entitled to a reasonable fee for serving as conservator. What is reasonable depends on the actions being performed. For example, the conservator may be entitled to a higher hourly fee for time making investment decisions than for time spent cleaning out the protected person's house. Since what is reasonable is different in each case, check with a lawyer before deciding on a fee.

Things that may affect fees include:

- ❖ time spent on the task;
- ❖ complexity of the task;

- ❖ skill required to do the task; and
- ❖ amount of assets the protected person has.

Although the conservator can charge a fee, he is not required to do so. If a fee is charged, the fee is income to the conservator and should be reported on the conservator's state and federal income tax returns. The conservator may also be responsible for paying New Mexico gross receipts tax and possibly Social Security taxes on any fees the conservator earns. Depending upon the size of the fee, the conservator may have to make quarterly estimated tax payments to the IRS on the amount the conservator received.

Your fees as conservator do not have to be approved by the judge unless otherwise provided in the court order appointing the conservator. However, for protection, the conservator may want to get approval, especially if the conservator feels that family members may question the amounts.

- **Gifts**

If the protected person's estate has more than enough money to support the protected person for the rest of his or her life and any dependents, the conservator may make gifts to other people or to charities that the protected person might have been expected to make were (s)he able to do so. The total of such gifts in any year, however, may not exceed twenty percent (20%) of the protected person's income in that year.

Gifts exceeding 20% of the protected person's income in any year may be made only if approved by the court. In most cases, the judge is not likely to approve such gifts. In order to approve gifts larger than 20% of income, the judge would have to find that such gifts are: (1) in the best interest of the protected person; and (2) that (s)he either is not able, due to incapacity, to agree to the gift or (s)he has agreed to making the gift.

Unless approved by the judge, it is not a good idea for the conservator to make gifts to him/herself even if it's less than 20% of the protected person's income. If the conservator makes gifts without court approval, it will look like there is a conflict between the conservator's interests and those of the protected person and may result in the court's removal of the conservator. It is the conservator's job to take care of the protected person and not act for the conservator's own benefit.

The conservatorship rules concerning gifting do not make any exception for annual gift tax exclusion gifts. This amount can change from year to year. Contact an accountant or other tax advisor for the applicable amount. Whether such gifts can be made are subject to the same considerations set forth above.

## ➤ Liability of the Conservator

### ◆ **The Conservator Does Not Have to Financially Support the Protected Person**

The conservator is not required to financially support the protected person. For example, if the conservator is caring for his/her mother, the conservator does not have to pay for her medical and other expenses out of his/her own money.

When the conservator signs contracts or agreements for the protected person, such as the nursing home agreement, it is very important that the conservator make clear that (s)he is signing as conservator. The conservator can do this by signing as follows: “[Conservator’s name], as Conservator for [Name of Protected person].” If the conservator signs a contract for the protected person in his/her own name, and the person that the conservator is contracting with does not know that the conservator is signing only as conservator for the protected person, the conservator can be held personally responsible for paying on the contract out of his/her own money.

#### ◆ **Conservator Liability**

If the conservator is sued, the conservator will be responsible for paying out of the conservator’s own funds only if the conservator is personally at fault. The conservator can be personally at fault because: (1) the conservator did something wrong, such as using the protected person’s money to pay his/her own bills; or (2) the conservator was negligent, such as being careless in performing his/her duties as conservator and the protected person or someone else was hurt as a result. One example would be if the conservator invested the protected person’s money in investments that the conservator should have known were unsafe (such as all in junk bonds) and the protected person lost money as a result. Another example would be if the conservator did not pay the protected person’s homeowner’s insurance and the house burned down.

If the conservator is not personally at fault and is sued as conservator, any damages would be paid out of the protected person’s funds. The person suing would not be able to receive any more money than the protected person has, even if the protected person’s assets are not enough to pay the damages.

The court can require the conservator to obtain a bond to cover any losses that might result from wrongdoing or negligence. A bond is different from most insurance in that a bonding company has the right to make the conservator pay it back for any damages that it might pay on his/her behalf. As a result, getting a bond can be hard unless the conservator has assets from which the bonding company could get paid back if the conservator were sued and found responsible for damages.

### ➤ **Reporting Requirements**

#### ◆ **Inventory**

The conservator must file a listing with the court describing the protected person’s assets and their value within 90 days of his/her appointment as conservator. This is called an Inventory. The Inventory should list all the assets of the protected person, their value, and the amount of any loan against an asset. The Inventory should contain a statement by the conservator stating that it is correct to the best of their knowledge. The Inventory must be signed by the conservator and notarized. The Inventory must be filed with the court and copies must be sent to the protected person, if (s)he has the ability to understand it, and to any parent(s) or conservator with whom the protected person lives.

### ◆ **Conservator's Report and Accounting**

Each year, within 30 days of the anniversary of his/her appointment as conservator, the conservator is required to file a conservator's report and account with the court. The conservator must also provide a copy of the report and account to the:

- ❖ judge who appointed the conservator;
- ❖ protected person, even if (s)he cannot understand the report;
- ❖ guardian, if one is appointed; and
- ❖ Veterans Administration if the protected person receives Veterans Administration Benefits.

The report should include: (1) information about the protected person's mental and physical health; (2) descriptions of any important contracts and other agreements entered into for the protected person during the year; and (3) any important decisions the conservator made. The accounting should list: (1) all payments made from the estate during the year; (2) all income received; and (3) the protected person's present assets. A sample report form is contained in Appendix Two. Since accountings will vary depending on the size and activity of each protected person's estate, the handbook does not include a sample account form.

It is very important that the conservator file the report and account. If the conservator does not file the report and account on time, the conservator may have to personally pay the court a \$5.00 per day penalty for each day that the report is late. If the conservator is having trouble meeting the deadline, the conservator must ask the court for an extension. If the conservator is late in filing the report, some judges will send the conservator a letter or hold a hearing to have the conservator explain under oath why the report is late.

The report can be filed by going to the clerk of the court where the conservator was appointed. Bring the original and at least four extra copies of the report. The clerk will file the original and will stamp the copies with a stamp showing when the original was filed. The conservator should then take one of the copies to the office of the judge who appointed the conservator and leave it with the secretary. Mail another copy to the guardian (if the conservator is not also the guardian) and to the protected person. Keep a copy for your records.

### ➤ **Ending a Conservatorship**

A conservator must serve until (s)he is replaced by the court or the court decides a conservator is no longer necessary. If the court rules that the protected person has regained capacity or if the protected person dies, the conservator will be released as conservator. The conservator's lawyer or the protected person's lawyer will petition the court to end the conservatorship or change the conservator. Unless the protected person has died, or the court allows a change without a hearing, there will be a court hearing on the matter following the procedures set out in New Mexico law. The judge will sign an order formally releasing the conservator from the position of conservator and will make any other appropriate order.

If the conservatorship ends because of the protected person's death, the conservator must notify the court and provide a copy of the death certificate to the judge. The presiding judge may want the conservator to file a petition to dismiss the conservatorship and submit a corresponding

order. If so, the conservator can ask the attorney to do this. A final conservator's report must be filed at the same time that reports the applicable information.

If the protected person moves out of state, the conservator will have to arrange to have the conservatorship transferred to the new state. A lawyer will need to file papers with the New Mexico court and the court in the new state to transfer the conservatorship. Serving as conservator for an incapacitated person is a major responsibility with many tasks. It should only be undertaken if the proposed conservator has the time, skill and patience to carry out the duties as required.

## APPENDIX ONE – Resources

There are a number of organizations, public and private, that can help you with your duties as power of attorney, guardian and/or conservator. Unfortunately, this manual cannot list the phone numbers of all the organizations that exist in your town or near your community. What we can suggest are the resources that may exist near you. For example:

- ❖ Adult day healthcare programs
- ❖ Adult social day care programs
- ❖ Care management services
- ❖ Counseling
- ❖ Caregiving courses at schools, colleges, and non-profits such as the Alzheimer’s Association
- ❖ Day programs for people with developmental disabilities
- ❖ Emergency response devices
- ❖ Homemaker, home health, and personal care services
- ❖ Legal assistance
- ❖ Meal services
- ❖ Personal contact programs
- ❖ Respite care
- ❖ Senior centers
- ❖ Transportation services
- ❖ Work training programs

Some sources of referrals for assistance:

- ❖ The court visitor in your guardianship and conservatorship
- ❖ The social services department of your local hospital, specifically the discharge planners
- ❖ The regional center for people with developmental disabilities
- ❖ The information and referral department of your Area Agency on Aging

The numbers below are for Bernalillo County unless otherwise noted. The 1-800 numbers are statewide.

### AARP

(Statewide American Association of Retired Persons) ..... (505) 830-3096  
 ..... [www.aarp.org](http://www.aarp.org)

### Adult Protective Services

(Children, Youth & Families Department);

Monday—Friday, 8:00 a.m. - 5:00 p.m. .... (505) 841-4500

Monday—Friday, 5:00 p.m. - 8:00 a.m. & Saturday & Sunday ..... (505) 476-4912

Statewide ..... (866) 654-3219

..... [www.nmaging.state.nm.us](http://www.nmaging.state.nm.us)

- Alzheimer’s Association**..... (505) 266-4473  
 Statewide ..... (800) 777-8155  
 ..... <http://alz.org/newmexico> and [www.alz.org](http://www.alz.org)  
 Savvy Caregiver classes (free) as well as extensive resource information rack and individual consulting meetings and support groups statewide
- ARC of New Mexico** ..... (505) 883-4630  
 Statewide ..... (505) 358-6493  
 Provides assistance for the developmentally disabled community
- Area Agency on Aging** ..... (800) 432-2080
- Caregiver Survival Resources** ..... [www.caregiver911.com](http://www.caregiver911.com)
- Case Management** through the City of Albuquerque, Dept. of Senior Affairs (DSA)  
 ..... (505) 764-6400  
 They offer Case Management for Disabled Adults and Senior Citizens. This case management service is at no cost and is offered through the City of ABQ.
- Catholic Charities**..... (505) 724-4634
- City of Santa Fe County Division Senior Services** ..... (505) 955-4721
- Community Outreach Program for the Deaf** ..... (505) 255-7636 or (800) 229-4262  
 ..... [www.copdnm.org](http://www.copdnm.org)
- Department of Senior Affairs (DSA) (City of ABQ)**  
**Information and Referral Services** ..... (505) 764-6400  
 Call the DSA for a list of a wide range of resources for older people and disabled adults including: senior and disabled adults’ subsidized apartments, retirement communities, assisted living facilities, residential care homes, nursing homes, nutrition sites, senior centers, adult daycare, transportation, pharmacies that deliver, grocery stores that deliver, laundries that deliver, home health agencies, homecare agencies, hospice, durable medical equipment providers, and dementia care providers. DSA also operates the Silver Alert program to find elders with dementia who are lost. Also, DSA offers the Manage Your Chronic Disease (MyCD) Program that can be reached directly at (505) 880-2800. Not every community calls the DSA office by the same name. If you are uncertain on how to find this agency within your community, check with the Area Agency on Aging for the office nearest you. Also, Bernalillo County’s DSA publishes the *Quick Guide to Senior Services in Bernalillo County* that contains many useful resources.
- Department of Health**  
 Licensing & Certification (Albuquerque) ..... (505) 881-4389  
 Licensing & Certification (Santa Fe) ..... (505) 827-4200  
 Licensing & Certification Complaint Hotline (Santa Fe) ..... (800) 752-8649  
 Developmental Disabilities Division (Albuquerque) ..... (505) 841-8772  
 Developmental Disabilities Division (Santa Fe) ..... (505) 827-2891
- Easter Seals** ..... (505) 852-4243  
 ..... [www.nm.easterseals.com](http://www.nm.easterseals.com)



- Emergency Medical Service Bureau (EMS) (Santa Fe)**  
 ..... main phone # (505) 476-7701  
 ..... to obtain EMS DNR forms call (505) 476-8200 or go to: [www.nmems.org](http://www.nmems.org)
- Family Caregiver Guide** ..... [www.ptfcg.com](http://www.ptfcg.com) or [www.thefamilycaregiver.org](http://www.thefamilycaregiver.org)
- Food Stamps**..... (505) 841-7700
- Friends in Time Caregiver Support Group** ..... (505) 872-9301  
 For family or friend caregivers for those affected by severe neuromuscular disease such as ALS and MS
- Health Law and Ethics**..... (505) 277-5006  
 Provides packets with values history and optional advance directive for health care forms with English and Spanish versions available
- Help with Household Expenses**  
 Low Income Telephone Assistance Program..... (800) 244-1111  
 PNM Good Neighbor Fund..... (888) 342-5766  
 Heat New Mexico Fund – gas only..... (505) 697-3335  
 Silver Horizons – heat and water bills, home retrofitting ..... (505) 884-3881
- HIBAC (Health Insurance Benefits Assistance Corps)**  
 Region 1 (Bernalillo County)..... (505) 764-6426  
 Regions 2-5 (All other Counties) ..... (800) 432-2080
- Human Services Department (info & referral)** ..... (800) 432-6217
- Indian Health Services** ..... [www.ihs.gov](http://www.ihs.gov)
- Information Center for New Mexicans with Disabilities**..... (800) 552-8195
- Long-Term Care Ombudsman Program (nursing home oversight)**..... (505) 841-8051  
 Statewide ..... (800) 432-2080
- Los Ojos de la Familia** ..... (505) 362-6073  
 ..... [www.losojosdelafamilia.org](http://www.losojosdelafamilia.org)  
 Non-profit that helps families, from children through old age
- LREP (Lawyer Referral for the Elderly Program)**..... (505) 797-6005  
 Statewide ..... (800) 876-6657
- Meals on Wheels**..... (505) 823-8064  
 (Can call this number for information about programs in other communities)  
 ..... <http://www.mow-nm.org>
- Medbank** ..... (800) 432-2080  
 For information about prescription drug help for insured and non-insured
- Medicaid Medical/Financial Assistance**  
 (Medical and institutional care benefits)..... (505) 841-7700  
 Statewide ..... (800) 432-6217

- Medicare:** ..... [www.cms.hhs.gov](http://www.cms.hhs.gov)  
 Part A..... (800) 813-8868  
 Part B..... (505) 821-3350  
 Part B, Statewide..... (800) 423-2925  
 Hotline..... (800) 638-6833
- Medicare/Health Insurance Counseling**..... (505) 764-6426  
 (Department of Senior Affairs)
- National Academy of Elder Law Attorneys** ..... [www.naela.org](http://www.naela.org)
- National Association for Home Care and Hospice**..... [www.nahc.org](http://www.nahc.org)
- National Association of Professional Geriatric Care Managers (NAPGCM)**  
 ..... [www.caremanager.org](http://www.caremanager.org)  
**Western Region Chapter of NAPGCM**..... [www.WesternGCM.org](http://www.WesternGCM.org)  
 This professional organization can help find a consultant and professional care manager to  
 assess elders' needs, refer to specific resources to meet those needs, and coordinate care.  
 (Most are private pay)
- National Center on Elder Abuse**..... [www.elderabusecenter.org](http://www.elderabusecenter.org)
- National Center for Injury Prevention and Control**  
**Fall Prevention Programs for Seniors**..... [www.cdc.gov/ncipc/falls/default.htm](http://www.cdc.gov/ncipc/falls/default.htm)  
 Contact: NM Aging and Long Term Care ..... (800) 432-2080
- National Guardianship Association**..... (877) 326-5992  
 ..... [www.guardianship.org](http://www.guardianship.org)
- National Indian Council on Aging**..... [www.nicoa.org](http://www.nicoa.org)
- New Mexico Aging and Long Term Care** ..... (800) 432-2080 or (505) 476-4799  
 Medicaid services; information about waiver programs; Institutional Medicaid; in-home care  
 programs, assisted living and residential care homes. State registry program.
- Aging & Disabilities Resource Center**..... (505) 476-4799  
 ..... [www.nmaging.state.nm.us](http://www.nmaging.state.nm.us)
- New Mexico Commission for the Blind**..... (505) 841-8844  
 ..... [www.cfb.state.nm.us](http://www.cfb.state.nm.us)
- New Mexico Commission for the Deaf and Hard of Hearing** ..... (800) 489-8536  
 ..... [www.cdhh.state.nm.us](http://www.cdhh.state.nm.us)
- New Mexico Developmental Disabilities Planning Council**  
**NM Office of Guardianship**..... (888) 779-6183  
 ..... [www.nmddpc.com](http://www.nmddpc.com)
- New Mexico Guardianship Association**..... [www.nmgaresourcecenter.org](http://www.nmgaresourcecenter.org)  
 Training video on-line as well as education and information about guardianships and  
 conservatorships
- New Mexico Health Policy Commission (Santa Fe)**..... (505) 827-7500  
 Provides free optional advance directive for health care form

- New Mexico Outreach**..... (505) 917-8120  
..... [www.nmoutreach.org](http://www.nmoutreach.org)  
Non-profit that connects seniors to resources from no cost to private pay. Wide range of professional organizations volunteer their time to help those in need.
- New Mexico State Bar Foundation** (Lawyer Referral for The Elderly Program). (800) 876-6657  
..... [www.nmbar.org](http://www.nmbar.org)
- PACE/InnovAge** ..... (505) 924-2650  
..... [www.PACEMyInnovAge.org](http://www.PACEMyInnovAge.org)  
This is an all inclusive care program for elderly who meet criteria. Includes day center; health center; social services; medical, dental, hearing, eye care services, rehabilitation therapies, transportation, in-home care, provision of medications. Free for those who have both Medicare & Medicaid and are 55 years of age and older. Private pay also accepted.
- Protection and Advocacy System**  
(advocates of rights of developmentally disabled community) ..... (505) 256-3100  
Statewide ..... (800) 432-4682
- RCI (Rehabilitation Center)**..... (505) 255-5501  
Brain injuries as result of accident
- Senior Citizens' Law Office, Inc.** ..... (505) 265-2300
- Share Your Care Adult Daycare**..... (505) 881-8982  
or through the Department of Senior Affairs ..... (505) 764-6400
- Social Security Administration** ..... (800) 772-1213  
..... [www.ssa.gov](http://www.ssa.gov)
- Society of Certified Public Accountants**..... (505) 246-1699  
They will provide a list of CPA's. They also accept complaints to their Ethics Committee and can check on professional disciplinary record of accountants throughout New Mexico.
- State Agency on Aging** ..... (800) 432-2080  
New Mexico state agency contains multiple resources for seniors, including nursing homes, ombudsman program, insurance and more
- State Bar Disciplinary Board** ..... (505) 842-5781  
They can check on professional disciplinary record of any attorney licensed in New Mexico
- U.S. Administration on Aging (AoA)**..... (202) 619-0724  
..... [www.aoa.gov](http://www.aoa.gov)  
Eldercare Locator through AoA ..... (800) 677-1116
- VA Administration Regional Office** ..... (800) 827-1000 x 10  
..... [www.va.gov](http://www.va.gov)
- VA Medical Center**..... (505) 265-1711

**Web-based systems that organize help for families and their loved ones during times of illness along with providing status updates:**

- ❖ [www.lotsahelpinghands.com](http://www.lotsahelpinghands.com)
- ❖ [www.carecalendar.org](http://www.carecalendar.org)
- ❖ [www.caringbridge.org](http://www.caringbridge.org)
- ❖ [www.fullcircleofcare.com](http://www.fullcircleofcare.com)
- ❖ [www.mylifeline.org](http://www.mylifeline.org)

**PUBLICATIONS:**

Below is a list of publications that can help you with your duties as power of attorney, guardian and/or conservator:

**At the Crossroads**, published by The Hartford  
Family conversations about Alzheimer's, Dementia, and Driving

**How to Care for Aging Parents, 3<sup>rd</sup> edition**, 2014 by Virginia Morris with forward by Robert N. Butler, MD

**Life Planning in New Mexico**, by Merri Rudd, J.D. (former Probate Judge)  
The book is a guide to New Mexico law on powers of attorney, health care decision-making, nursing home benefits, wills, trusts and probate. Written in plain English, the book will help educate and inform senior citizens, their families, those who work with seniors and others about important issues. The book is available on-line at [www.abogadapress.com](http://www.abogadapress.com), in many bookstores, and at [www.amazon.com](http://www.amazon.com).

**Understanding Difficult Behaviors**, by Anne Robinson, Beth Spencer and Laurie White  
Available at NM Chapter of the Alzheimer's Association  
Practical suggestions for coping with Alzheimer's disease and related illnesses

**Uniform Health Care Decision Act Optional Form**

(a copy of the optional form should be available for a nominal fee from):

Institute of Public Law  
1117 Stanford NE  
Albuquerque, NM 87131  
(505) 277-5006

or

N.M. Coalition for Advance Directives  
2801 Lomas NE  
Albuquerque, NM 87106  
(505) 255-6717

**We Need to Talk...Family Conversations with Older Drivers**, published by The Hartford

## APPENDIX TWO – Forms

\*Please note: the forms provided in this Appendix are for reference only, may not be appropriate for your particular situation, and should be used under the guidance and consultation of an attorney.

### *Form 1 – Optional Advance Directive for Health Care*

#### EXPLANATION OF POWER OF ATTORNEY FOR HEALTH CARE

#### AND

#### INSTRUCTIONS FOR HEALTH CARE AND END-OF-LIFE DECISIONS

You have the right to give instructions about your own health care. You also have the right to name someone else to make health-care decisions for you. This form lets you do either or both of these things. It also lets you express your wishes regarding the designation of your primary physician.

THIS FORM IS OPTIONAL. Each paragraph and word of this form is also optional. If you use this form, you may cross out, complete or modify all or any part of it. You are free to use a different form. If you use this form be sure to sign and date it.

PART 1 of this form is a Power of Attorney for health care. Part 1 lets you name another individual as agent to make health-care decisions for you if you become incapable of making your own decisions or if you want someone to make those decisions for you now even though you are still capable. You may also name an alternate agent to act for you if your first choice is not willing, able or reasonably available to make decisions for you. Unless related to you, your agent may not be an owner, operator or employee of a health-care institution at which you are receiving care.

Unless the form you sign limits the authority of your agent, your agent may make all health-care decisions for you. This form has a place for you to limit the authority of your agent. You need not limit the authority of your agent if you wish to rely on your agent for all health-care decisions that may have to be made. If you choose not to limit the authority of your agent, your agent will have the right to:

- ❖ Consent or refuse consent to any care, treatment, service or procedure to maintain, diagnose or otherwise affect a physical or mental condition;
- ❖ Select or discharge health-care providers and institutions;
- ❖ Approve or disapprove diagnostic tests, surgical procedures, programs of medication and orders not to resuscitate; and
- ❖ Direct the provision, withholding or withdrawal of artificial nutrition and hydration and all other forms of health care.

PART 2 of this form lets you give specific instructions about any aspect of your health care. Choices are provided for you to express your wishes regarding the provisions, withholding or

withdrawal of treatment to keep you alive, including the provision of artificial nutrition and hydration, as well as the provision of pain relief. Space is also provided for you to add to the choices you have made or for you to write out any additional wishes.

PART 3 of this form lets you designate a physician to have primary responsibility for your health care.

After completing this form, sign and date the form at the end. It is recommended but not required that you request two other individuals to sign as witnesses. Give a copy of the signed and completed form to your physician, to any other health-care providers you may have, to any health-care institution at which you are receiving care and to any health-care agents you have named. You should talk to the person you have named as agent to make sure that (s)he understands your wishes and is willing to take the responsibility.

You have the right to revoke this advance health-care directive or replace this form at any time.

## *Optional Advance Directive for Health Care*

### PART 1

#### POWER OF ATTORNEY FOR HEALTH CARE

I, \_\_\_\_\_, reside in \_\_\_\_\_ County, New Mexico:

**(1) DESIGNATION OF AGENT:** I designate the following individual as my agent to make health-care decisions for me:

\_\_\_\_\_  
(name of individual you choose as agent)

\_\_\_\_\_  
(address) (city) (state) (zip code)

\_\_\_\_\_  
(home phone ) (work phone)

If I revoke my agent's authority or if my agent is not willing, able or reasonably available to make a health-care decision for me, I designate as my first alternate agent:

\_\_\_\_\_  
(name of individual you choose as first alternate agent)

\_\_\_\_\_  
(address) (city) (state) (zip code)

\_\_\_\_\_  
(home phone ) (work phone)



If I revoke the authority of my agent and first alternate agent or if neither is willing, able or reasonably available to make a health-care decision for me. I designate as my second alternate agent:

---

(name of individual you choose as second alternate agent)

---

(address) (city) (state) (zip code)

---

(home phone ) (work phone)

**(2) AGENT'S AUTHORITY:** My agent is authorized to obtain and review medical records, reports and information about me and to make all health-care decisions for me, including decisions to provide, withhold or withdraw artificial nutrition, hydration and all other forms of health care to keep me alive, except as I state here:

(Add additional sheets if needed.)

**(3) WHEN AGENT'S AUTHORITY BECOMES EFFECTIVE:** My agent's authority becomes effective when my primary physician and one other qualified health-care professional determine that I am unable to make my own health-care decisions. If I initial this box [ ] my agent's authority to make health-care decisions for me takes effect immediately.

**(4) AGENT'S OBLIGATION:** My agent shall make health-care decisions for me in accordance with this Power of Attorney for health care, any instructions I give in Part 2 of this form and my other wishes to the extent known to my agent. To the extent my wishes are unknown; my agent shall make health-care decisions which are in my best interest. In determining my best, my agent shall consider my personal values to the extent known to my agent.

**(5) NOMINATION OF GUARDIAN:** If a guardian of my person needs to be appointed for me by a court, I nominate the agent designated in this form. If that agent is not willing, able or reasonably available to act as guardian, I nominate the alternate agents whom I have named in the order designated.

## PART 2

## INSTRUCTIONS FOR HEALTH CARE

If you are satisfied to allow your agent to determine what is best for you in making end-of-life decisions, you need not fill out this part of the form. If you do fill out this part of the form, you may cross out any wording you do not want.

**(6) END-OF-LIFE DECISIONS:** If I am unable to make or communicate decisions regarding my health care, and IF (i) I have an incurable or irreversible condition that will result in my death within a relatively short time, OR (ii) I become unconscious and to a reasonable degree of medical certainty, I will not regain consciousness, OR (iii) the likely risks and burdens of treatment would outweigh the expected benefits, THEN I direct that my health-care providers and others involved in my care provide, withhold or withdraw treatment in accordance with the choice I have **initialed** below in one of the following three boxes:

(a) I CHOOSE NOT To Prolong Life  
I do not want my life to be prolonged.

(b) I CHOOSE To Prolong Life  
I want my life to be prolonged as long as possible within the limits of generally accepted health-care standards.

**(7) ARTIFICIAL NUTRITION AND HYDRATION:** If I have chosen above NOT to prolong life, I also specify by marking my initials below:

I DO NOT want artificial nutrition OR

I DO want artificial nutrition.

I DO NOT want artificial hydration unless required for my comfort OR

I DO want artificial hydration

**(8) RELIEF FROM PAIN:** Regardless of the choices I have made in this form and except as I state in the following space, I direct that the best medical care possible to keep me clean, comfortable and free of pain or discomfort be provided at all times so that my dignity is maintained, even if this care hastens my death:

**(9) OTHER WISHES:** (If you wish to write your own instructions for either health care or end-of-life decisions, or if you wish to add to the instructions you have given above, you may do so here.) I direct that:

(Add additional sheets if needed.)

## PART 3

## PRIMARY PHYSICIAN

**(10)** I designate the following physician as my primary physician:

---

(name of physician)

---

(address) (city) (state) (zip code)

---

(phone)

If the physician I have designated above is not willing, able or reasonably available to act as my primary physician. I designate the following physician as my primary physician:

---

(name of physician)

---

(address) (city) (state) (zip code)

---

(phone)

**(11) EFFECT OF COPY:** A copy of this form has the same effect as the original unless the original has been revoked.

**(12) REVOCATION:** I understand that I may revoke this OPTIONAL ADVANCE HEALTH-CARE DIRECTIVE at any time, and that if I revoke it, I should promptly notify my supervising health-care provider and my health-care institution where I am receiving care and any others to whom I have given copies of this Power of Attorney. I understand that I may revoke the designation of an agent only by a signed writing or by personally informing the supervising health-care provider.

**(13) DURABILITY:** This advance directive for health care, including but not limited to the Power of Attorney, shall remain in effect despite my later incapacity. This advance directive, including but not limited to the Power of Attorney, remains in effect from the date it was signed unless I revoke it or die.

**(14) SIGNATURES:** Sign and date the form here:

SIGNATURE OF PERSON GIVING POWER OF ATTORNEY:

---

Sign your name

---

Print your name

---

Date

---

Address (Street, City, State, Zip)

SIGNATURES OF WITNESSES:

(Witnesses are not required by law, but are recommended.)

First Witness:

Second Witness:

---

Sign your name

---

Sign your name

---

Print your name

---

Print your name

---

Date

---

Date

---

Address

---

Address

---

City, State Zip

---

City, State Zip

## ***FORM 2 – Sample Statutory Power of Attorney***

45-5B-301. Statutory form power of attorney.

A document substantially in the following form may be used to create a statutory form power of attorney that has the meaning and effect prescribed by the Uniform Power of Attorney Act:

"NEW MEXICO

STATUTORY FORM POWER OF ATTORNEY

**IMPORTANT INFORMATION** This power of attorney authorizes another person (your agent) to make decisions concerning your property for you (the principal). Your agent will be able to make decisions and act with respect to your property (including your money) whether or not you are able to act for yourself. The meaning of authority over subjects listed on this form is explained in the Uniform Power of Attorney Act.

This power of attorney does not authorize the agent to make health care decisions for you.

You should select someone you trust to serve as your agent. Unless you specify otherwise, generally the agent's authority will continue until you die or revoke the power of attorney or the agent resigns or is unable to act for you.

Your agent is entitled to reasonable compensation unless you state otherwise in the Special Instructions.

This form provides for designation of one agent. If you wish to name more than one agent, you may name a co-agent in the Special Instructions. Co-agents are not required to act together unless you include that requirement in the Special Instructions.

If your agent is unable or unwilling to act for you, your power of attorney will end unless you have named a successor agent. You may also name a second successor agent. This power of attorney becomes effective immediately unless you state otherwise in the Special Instructions.

If you have questions about the power of attorney or the authority you are granting to your agent, you should seek legal advice before signing this form.

### DESIGNATION OF AGENT

I, \_\_\_\_\_,

(Your Name) name the following  
person as my agent:

Name of Agent: \_\_\_\_\_

Agent's Address: \_\_\_\_\_

Agent's Telephone Number: \_\_\_\_\_

## DESIGNATION OF SUCCESSOR AGENT(S)

(OPTIONAL) If my agent is unable or unwilling to act for me, I name as my successor agent:

Name of Successor Agent: \_\_\_\_\_

Successor Agent's Address: \_\_\_\_\_

Successor Agent's Telephone Number: \_\_\_\_\_

If my successor agent is unable or unwilling to act for me, I name as my second successor agent:

Name of Second Successor Agent: \_\_\_\_\_

Second Successor Agent's Address: \_\_\_\_\_

Second Successor Agent's Telephone Number: \_\_\_\_\_

## GRANT OF GENERAL AUTHORITY

I grant my agent and any successor agent general authority to act for me with respect to the following subjects as defined in the Uniform Power of Attorney Act:

(INITIAL each subject you want to include in the agent's general authority. If you wish to grant general authority over all of the subjects, you may initial "All Preceding Subjects" instead of initialing each subject.)

Real Property

Tangible Personal Property

Stocks and Bonds

Commodities and Options

Banks and Other Financial Institutions

Operation of Entity or Business

Insurance and Annuities

Estates, Trusts and Other Beneficial Interests

Claims and Litigation

Personal and Family Maintenance

Benefits from Governmental Programs or Civil or Military Service

Retirement Plans

Taxes

All Preceding Subjects

#### GRANT OF SPECIFIC AUTHORITY (OPTIONAL)

My agent MAY NOT do any of the following specific acts for me UNLESS I have INITIALED the specific authority listed below:

(CAUTION: Granting any of the following will give your agent the authority to take actions that could significantly reduce your property or change how your property is distributed at your death. INITIAL ONLY the specific authority you WANT to give your agent.)

Create, amend, revoke or terminate an inter vivos trust

Make a gift, subject to the limitations of Section 217 of the Uniform Power of Attorney Act

and any special instructions in this power of attorney

Create or change rights of survivorship

Create or change a beneficiary designation

Authorize another person to exercise the authority granted under this power of attorney

Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a

survivor benefit under a retirement plan

Exercise fiduciary powers that the principal has authority to delegate

Disclaim or refuse an interest in property, including a power of appointment

#### LIMITATION ON AGENTS AUTHORITY

An agent that is not my ancestor, spouse or descendant MAY NOT use my property to benefit the agent or a person to whom the agent owes an obligation of support unless I have included that authority in the Special Instructions.

#### SPECIAL INSTRUCTIONS (OPTIONAL)

You may give special instructions on the following lines: \_\_\_\_\_

#### EFFECTIVE DATE

This power of attorney is effective immediately unless I have stated otherwise in the Special Instructions.



### NOMINATION OF CONSERVATOR OR GUARDIAN (OPTIONAL)

If it becomes necessary for a court to appoint a conservator or guardian of my estate or guardian of my person, I nominate the following person(s) for appointment:

Name of Nominee for conservator of my estate: \_\_\_\_\_

Nominee's Address: \_\_\_\_\_

Nominee's Telephone Number: \_\_\_\_\_

Name of Nominee for guardian of  
my person: \_\_\_\_\_

Nominee's Address: \_\_\_\_\_

Nominee's Telephone Number: \_\_\_\_\_

### RELIANCE ON THIS POWER OF ATTORNEY

Any person, including my agent, may rely upon the validity of this power of attorney or a copy of it unless that person knows it has terminated or is invalid.

### SIGNATURE AND ACKNOWLEDGMENT

Your Signature: \_\_\_\_\_

Date: \_\_\_\_\_

Your Name Printed: \_\_\_\_\_

Your Address: \_\_\_\_\_

Your Telephone

Number: \_\_\_\_\_

State of \_\_\_\_\_

(County) of \_\_\_\_\_

This instrument was acknowledged before me on

(Date) by \_\_\_\_\_ (Name of Principal).

(Seal, if any)

Signature of notarial officer: \_\_\_\_\_

My commission expires: \_\_\_\_\_

## IMPORTANT INFORMATION FOR AGENT

### Agent's Duties

When you accept the authority granted under this power of attorney, a special legal relationship is created between you and the principal. This relationship imposes upon you legal duties that continue until you resign or the power of attorney is terminated or revoked. You must:

1. do what you know the principal reasonably expects you to do with the principal's property or, if you do not know the principal's expectations, act in the principal's best interest;
2. act in good faith;
3. do nothing beyond the authority granted in this power of attorney; and
4. disclose your identity as an agent whenever you act for the principal by writing or printing the name of the principal and signing your own name as "agent" in the following manner:

\_\_\_\_\_ by \_\_\_\_\_ as Agent

(Principal's Name) (Your Signature)

Unless the Special Instructions in this power of attorney state otherwise, you must also:

1. act loyally for the principal's benefit;
2. avoid conflicts that would impair your ability to act in the principal's best interest;
3. act with care, competence and diligence;
4. keep a record of all receipts, disbursements and transactions made on behalf of the principal;
5. cooperate with any person that has authority to make health care decisions for the principal to do what you know the principal reasonably expects or, if you do not know the principal's expectations, to act in the principal's best interest; and
6. attempt to preserve the principal's estate plan if you know the plan and preserving the plan is consistent with the principal's best interest.

### Termination of Agent's Authority

You must stop acting on behalf of the principal if you learn of any event that terminates this power of attorney or your authority under this power of attorney. Events that terminate a power of attorney or your authority to act under a power of attorney include:

1. death of the principal;
2. the principal's revocation of the power of attorney or your authority;
3. the occurrence of a termination event stated in the power of attorney;
4. the purpose of the power of attorney is fully accomplished; or
5. if you are married to the principal, a legal action is filed with a court to end your marriage, or for your legal separation, unless the Special Instructions in this power of attorney state that such an action will not terminate your authority.

### Liability of Agent

The meaning of the authority granted to you is defined in the Uniform Power of Attorney Act. If you violate the Uniform Power of Attorney Act or act outside the authority granted, you may be liable for any damages caused by your violation.

***FORM 3 – Sample Notice Letter from Guardian***

Date \_\_\_\_\_

Name \_\_\_\_\_

Address \_\_\_\_\_

City, State, Zip \_\_\_\_\_

Re: Guardianship of the Person of \_\_\_\_\_

also known as \_\_\_\_\_

Birth Date: \_\_\_\_\_

Social Security Number: \_\_\_\_\_

Dear \_\_\_\_\_,

Please be advised that I have been appointed guardian of \_\_\_\_\_.  
I have enclosed a copy of the Letters of Guardianship for your files. Please contact me about any  
of \_\_\_\_\_'s health issues.

Sincerely,

Name

Address

City, State, Zip

Phone

Enclosure

***FORM 4 – Sample Notice Letter from Conservator***

Date \_\_\_\_\_

Name \_\_\_\_\_

Address \_\_\_\_\_

City, State, Zip \_\_\_\_\_

Re: Conservatorship of the Estate of \_\_\_\_\_

also known as \_\_\_\_\_

Conservatee's Birth Date: \_\_\_\_\_

Conservatee's Social Security Number: \_\_\_\_\_

Dear \_\_\_\_\_,

Please be advised that I have been appointed conservator to the estate of \_\_\_\_\_. Please have all future checks [this letter will vary, depending on what it is being used to do] made out to me, \_\_\_\_\_, conservator of the Estate of \_\_\_\_\_. I have enclosed a certified copy of the Letters of Conservatorship for your files. Please contact me about any of \_\_\_\_\_'s financial matters at the address listed on this letter.

Sincerely,

Name

Address

City, State, Zip

Phone

Enclosure

**FORM 5 – Sample Guardian’s Report**

\_\_\_ JUDICIAL DISTRICT COURT  
 COUNTY OF \_\_\_\_\_  
 STATE OF NEW MEXICO

No. \_\_\_\_\_

**IN THE MATTER OF THE GUARDIANSHIP  
 AND CONSERVATORSHIP OF \_\_\_\_\_,  
 an adult incapacitated person.**

**GUARDIAN'S 90-DAY \_\_\_ ANNUAL \_\_\_ FINAL \_\_\_ REPORT ON THE  
 CONDITION AND WELL-BEING OF AN ADULT PROTECTED PERSON**

**(Check One)**

Date of Appointment: \_\_\_\_\_

Pursuant to § 45-5-314 NMSA 1978, the undersigned duly appointed, qualified and acting guardian of the above-mentioned protected person reports to the court as follows (attach additional sheets, if necessary):

**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 No. 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

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 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: \_\_\_\_\_

***FORM 6 – Sample Conservator’s Report***

\_\_\_\_\_ JUDICIAL DISTRICT COURT  
 COUNTY OF \_\_\_\_\_  
 STATE OF NEW MEXICO

No. \_\_\_\_\_

**IN THE MATTER OF THE GUARDIANSHIP  
 AND CONSERVATORSHIP OF \_\_\_\_\_,  
 an adult incapacitated person.**

**CONSERVATOR'S REPORT AND ACCOUNT**

Pursuant to § 45-5-409 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 are:

\_\_\_\_\_

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:

---

---

---

DATED: \_\_\_\_\_, 20 \_\_\_\_\_

\_\_\_\_\_  
Signature of Conservator

## **APPENDIX THREE – Summary of Duties and Authority of a Guardian and Conservator**

### ***General Principles***

- ❖ A guardian/conservator must act in accord with the least restrictive form of intervention, such that the incapacitated person enjoys the greatest amount of personal freedom and civil liberties. The guardian/conservatorship may be terminated or the guardian/conservator replaced or removed if in the best interest of the incapacitated person.
- ❖ A guardian/conservator personally consents to the jurisdiction of the court in any proceeding related to the guardian/conservatorship.

### ***Powers, Rights, and Duties***

- ❖ A guardian has the same powers, rights, and duties as a parent has to a minor child, except that there is no obligation to provide from one's own funds. A conservator acts as a fiduciary with the standards of care of a trustee.
- ❖ A conservator may petition the court for appropriate orders or instructions.
- ❖ The conservator is to act in accordance with the estate plan of the protected person.
- ❖ Upon the death of the protected person, the conservator is to deliver the will of the deceased person to the court.

### ***Initial Report by Guardian – within 90 days of appointment***

- ❖ The guardian of an incapacitated person shall file an initial report with the appointing court within ninety days of the guardian's appointment.

### ***Inventory by Conservator – within 90 days of appointment***

- ❖ The conservator is to keep suitable records, and within ninety days after appointment, file an inventory with the court and generally provide a copy to the protected person and possibly others.

### ***Annual Reports of Guardian and Conservator***

- ❖ An annual report shall be filed with the court within 30 days of the anniversary date of the appointment as guardian and/or conservator. Copies are to be mailed also the judge and incapacitated person. Overdue reports may be subject to a fine of \$5 per day. Limited extensions may be granted.

## APPENDIX FOUR – Medicare Programs

The following section is largely excerpted from the *New Mexico Senior Legal Handbook* presented by the Legal Resources for the Elderly Program (LREP) in conjunction with the New Mexico State Bar Foundation. The entire handbook can be found at [www.nmbar.org/public/seniorlegalhandbook.html](http://www.nmbar.org/public/seniorlegalhandbook.html).

This excerpt is intended to provide a brief overview of the Medicare system based on 2014 Medicare and Social Security rules. For a complete and current explanation of Medicare benefits and regulations, please contact Medicare at (800) 633-4227, or visit the Medicare website at [www.medicare.gov](http://www.medicare.gov).

Medicare is federally funded medical insurance that is administered by the Social Security Administration. Generally, you qualify for benefits if you are 65 and have worked and paid into Social Security for the required period of time. If you are under age 65, you may qualify for benefits if: 1) you have been eligible to receive Social Security Disability benefits for 24 months; 2) you receive a disability pension from the Railroad Retirement Board and meet certain requirements; 3) you have Lou Gehrig's Disease; or 4) you have end-stage renal disease (permanent kidney failure requiring dialysis or a transplant) and meet certain requirements.

Medicare is divided into what are referred to as "Parts". This discussion will include Parts A, B, C and D. Each Part provides a different type of service.

**Medicare Part A.** If you are receiving Social Security benefits or a railroad retirement benefit prior to turning 65 years old, you will be automatically enrolled in Medicare Part A when you turn 65. If you are not receiving these benefits, you should contact Medicare about three months before your 65<sup>th</sup> birthday to enroll. Most people do not have to pay for Part A because they paid Medicare taxes while working. Medicare Part A is similar to private hospital insurance in that it helps to pay for inpatient care in hospitals and skilled nursing facilities (for a limited time), hospice, and some home healthcare.

**Medicare Part B.** Medicare Part B covers many medical services not covered by Part A. Part B pays for doctor visits, outpatient hospital care, and other services such as physical and occupational therapy. Part B generally only covers services that are medically necessary. Part B requires you to pay a monthly premium, which changes every year to reflect inflation. Programs are available to help seniors pay this premium if the senior meets certain income and resource eligibility guidelines.

As with Part A, you become eligible to receive Medicare Part B when you turn 65. Enrollment in Medicare Part B is optional; however, if you do not sign up for Part B when you become eligible, and you later decide you would like Part B coverage, you will pay a penalty in the form of increased premiums.<sup>1</sup>

**Medicare Supplemental ("Medigap").** Even with Medicare Parts A and B, some healthcare costs are not covered. These costs include deductibles, co-pays, and co-insurance costs. Supplemental plans, commonly called Medigap policies, can be purchased from many private insurance providers such as AARP, USAA, Blue Cross/Blue Shield, etc., to cover



expenses not covered by Parts A and B. Medigap policies are generally only available to people over 65 who have both Medicare Parts A and B.

**Medicare Part C (Medicare Advantage Plans).** Medicare Part C provides an alternative to traditional Medicare described above. Under Medicare Part C, private companies contract with the Medicare program to offer Medicare Advantage Plans which include the benefits covered by Medicare Parts A and B, and may also include Medicare Part D (Medicare Prescription Drug Coverage discussed in the next section). Several types of private plans are offered, including HMO, PPO, and private fee-for-service plans. Medicare Advantage Plans often offer a wider range of services than traditional Medicare. Medicare Advantage Plans require you to have Medicare Parts A and B. Some plans also charge a fee beyond the Part B premium. Some plans offer discounts on prescription drugs and coordinate care among providers, which may lower out-of-pocket expenses. A Medigap policy is not generally needed when an individual is enrolled in Medicare Part C.

**Medicare Part D.** Medicare Part D (Medicare Prescription Drug Coverage) helps cover the cost of prescription drugs. Medicare Part D is open to anyone entitled to Medicare Part A or enrolled in Medicare Part B. Like Medicare Part B, enrollment in Part D is optional, and, as with Part B, there is a penalty in the form of increased premiums for delayed enrollment. There are a variety of Part D plans from which to choose and it is important when selecting a Part D plan that you search the plan's covered drug list to make sure your drugs are covered. Special assistance in paying Part D premiums is available for those with low incomes and few assets. If you receive both Medicare and Medicaid, you will receive your prescription coverage under Medicare Part D, instead of through Medicaid.

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<sup>i</sup> If you are 65 or older, and you are covered under a group health plan from your (or your spouse's) current employment, you may sign-up for Medicare Part B without a penalty when you terminate or lose coverage under that plan.