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ROLE OF THE GUARDIAN AD LITEM IN LIMITED GUARDIANSHIPS AND CONSERVATORSHIPS

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The role of the Guardian ad Litem in protective proceedings is defined in the relevant statutes:

1. Section 45-5-303(D) Procedure for Court Appointment of a Guardian on an Incapacitated Person

D. After the filing of a petition, the court shall set a date for hearing on the issues raised by the petition. Unless an alleged incapacitated person already has an attorney of the alleged incapacitated person's own choice, the court shall appoint an attorney to represent the alleged incapacitated person. The court-appointed attorney in the proceeding shall have the duties of a guardian ad litem, as set forth in Section 45-5-303.1 NMSA 1978

2. Sections 45-5-303.1 and 45-5-404.1 Duties of the Guardian ad Litem

A. The guardian ad litem shall:

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

- B. Unless otherwise ordered by the court, the duties of the guardian ad litem terminate and the guardian ad litem is discharged from duties upon entry of the order appointing the guardian and acceptance of the appointment by the guardian.

Other than these statutory provisions, the Probate Code is silent as to the responsibility of the Guardian ad Litem in a protective proceeding. Often, the expectation of the Court varies by county. Although it is not specifically stated in the Probate Code, the Guardian ad Litem has a duty to act in the best interest of the alleged incapacitate person (AIP). How the Guardian ad Litem fulfills that duty will depend on the circumstances of the case.

Arguably the most important of the duties of the Guardian ad Litem is that set forth at Section 45-5-303.1(A)(2), to present the AIP's position to the Court. In all cases, the Guardian ad Litem should interview the AIP and do his or her best to understand the AIP's position. Where the AIP has some understanding of the nature of guardianship and conservatorship and can articulate his or her position, the discussion must be thorough and should always include a discussion as to less restrictive alternatives to full guardianship and conservatorship.

Where the Petitioner seeks limited guardianship, the Guardian ad Litem has a responsibility to determine whether the limits to be imposed on the Guardian, and the areas where the AIP will be able to make his or her own decisions, are appropriate and in the AIP's best interest. Is the authority requested to be given to the Limited Guardian appropriate? Is the request tailored to meet the needs of the AIP? Could the authority be further limited to allow the AIP more autonomy? Will the AIP be safe if the limited authority is granted? There is no formula for making these determinations and will depend on the circumstances of each individual case.

These are difficult questions to answer with the limited knowledge a Guardian ad Litem can gather if her or she were only interviewing the professionals as specified in Section 45-5-303.1, as these professionals also have limited knowledge of the AIP. It is therefore incumbent upon the Guardian ad Litem to interview other important people in the AIP's life; other family members, teachers, case managers, caregivers, long-time friends, the list could go on and on. However, the Guardian ad Litem must gather enough information about the AIP to make a well-founded recommendation to the Court as to whether the limitations on the anticipated guardianship are enough to insure the AIP's safety and well-being, but not overly restrictive. It is a matter of finding balance between protecting the AIP and protecting his or her autonomy to the greatest extent possible.

Where a Petition seeks the appointment of a full Guardian or Conservator, the Guardian ad Litem must determine whether such plenary authority is absolutely necessary and no less restrictive alternatives are available. Understanding what those less restrictive alternatives are is essential in making an appropriate recommendation to the Court.

Powers of Attorney. If an AIP has the cognitive ability to understand the nature and effect of a Power of Attorney, it may be possible to avoid guardianship or conservatorship altogether. In New Mexico, a Power of Attorney is valid if the principal was capable of understanding in a reasonable manner, the nature and effect of the document at the time he or she executed it. *Estate of Head v. Taute*, 94 N.M. 656 (Ct. App. 1980). The principal does not have to demonstrate such cognitive condition over time, rather it is sufficient for the document to be signed in a "lucid moment." *Estate of Taggart v. Taggart*, 95 N.M. 117 (Ct. App. 1980)

While many AIP's may meet this rather low bar, the analysis regarding whether a Power of Attorney will be an appropriate alternative to guardianship will require the Guardian ad Litem to understand the relationship between the AIP and his or her selected agent, and the nature of the decisions that will be made by the agent. Under a Power of Attorney, which is revocable as long as the principal has the degree of capacity described above, the principal is not required to cooperate with the agent, nor do what the agent believes is in the principal's best interest. An example of this is where the AIP is not safe at home and requires placement in a residential facility but does not want to move. While the Power of Attorney may give the agent the authority to admit the principal to a care facility, if the principal is not willing to move, the Power of Attorney will not be an effective way of insuring the principal's safety.

Limited Guardianship or Conservatorship. In many protective proceedings, it will be the Guardian ad Litem who will advocate for limited authority. Most petitioners seek plenary authority. Consequently, in protecting the rights of the AIP, it may fall on the Guardian ad Litem to determine which aspects of the AIP's personal or financial affairs the AIP is capable of managing without a guardian or conservator. This analysis requires the input of the Petitioner, the AIP, the Qualified Health Care Professional and the Court Visitor, because each of these individuals has a unique perspective. The QHCP is charged with determining the AIP's degree of cognitive function and the Court Visitor is charged with assessing the AIP's functional capabilities. It is the responsibility of the Guardian ad Litem to protect the legal rights of the AIP and to insure that the limitations placed on the Guardian or Conservator are in the AIP's best interest. It takes a village and the Guardian

ad Litem should take a leadership role in insuring that the AIP retains as much autonomy as possible.