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ROLE OF THE PETITIONING ATTORNEY IN LIMITED GUARDIANSHIPS AND CONSERVATORSHIPS

Petitions for appointment of a guardian and/or a conservator are structured in a way to present a problem for the court to solve within the limits of the law. The petition is trying to document that something is amiss; some problem that the petitioner believes can be solved best or only by the appointment of a guardian or a conservator. If the petitioner requests less than a full guardianship and/or conservatorship, isn't it a risk that the petition will be viewed as unworthy or improvidently filed? At least that is the way things used to work. In recent years, however, the guardianship system in New Mexico has seen a small but detectable shift toward the use of "limited" guardianship and conservatorship. As a result of changes in the law, a petitioner is required to consider what is the least restrictive form of intervention

When in Doubt, read ARTICLE 5 - Protection of Persons Under Disability and Their Property

NMSA 1978 § 45-5-101.

J. "least restrictive form of intervention" means that the guardianship or conservatorship imposed on the incapacitated person or minor protected person represents only those limitations necessary to provide the needed care and rehabilitative services and that the incapacitated person or minor protected person shall enjoy the greatest amount of personal freedom and civil liberties;

What does Least Restrictive Form of Intervention mean? A least restrictive form of intervention is an option which allows a person to keep as much autonomy and self-determination as possible while still protecting the person. If a least restrictive form of intervention can provide proper protection for the person, it must be used to avoid guardianship or conservatorship. Some examples include, but are not limited to: protective orders, representative payee for certain government benefits, establishment of a trust, joint bank accounts or advance directives for health care.

Less restrictive alternatives to full guardianship or conservatorship should always be considered first.

Checklist for Petitioning Attorney when considering if a limited guardianship or protective arrangement instead of guardianship is appropriate. Know your client, ask your client:

1. In your opinion, why is this guardianship necessary?
2. Will the person for whom protection is sought agree?
3. What alternatives to guardianship have you considered?
 - a. Does the person have family or friends willing to play an active role in helping to make decisions? A person who meets the legal standard for appointment of a guardian may be able to function well without one, because he/she is able to know when help is needed and how to seek it.
4. What alternatives to conservatorship have you considered?
 - a. Does the person have finances that are not complicated?
 - b. Is the person at risk of exploitation?
 - c. Is the person willing to have some or all of his/her funds managed by an agent?
 - d. Why does this person need a conservator?
5. Will that person be willing to share important information and bring major medical and service decisions to a support circle of family, friends and paid support workers? If so, the person may not need a guardian, or may only need one for complex medical decisions.
6. Even if guardianship is ordered, how can these kinds of support still serve the purpose of keeping the person involved in decisions, and making sure his or her opinions and goals are considered?
 - a. Are the people providing support willing to take the time and do the work required to help the person gain needed experience, take in information in a form he or she is most likely to understand, and overcome communication barriers.
 - b. What kinds of checks and balances can be set up to ensure that an advisor or agent will not use the person's trust to serve his or her own interests?
 - c. Do family members rely on the person's income to maintain their household, or expect to inherit the person's money if it is not used during his or her life? Does the proposed Guardian and/or Conservator owe money to the person? A person may be less likely to be dominated, or taken advantage of, if he or she has multiple sources of support or advocacy that are independent of each other, e.g., both involved family, and strong ties to service providers who respect the person's right to have a say in his or her life.
 - d. If one family member is given authority to manage finances, it may be a good idea for another family member to automatically get copies of financial records and accounts.
7. Consider that if the person is isolated, or if power over the person is concentrated in the hands of one person or agency, the procedural protections and court oversight that a guardianship provides may be necessary protections.
8. Consider if the person has significant dependence on medical, social or mental health services, which may increase the importance of having a guardianship or other authoritative outside advocate. Service providing agencies can be very powerful, and, unless the person has been able to plan ahead to appoint a health care agent, a guardian

may be the only means to provide outside monitoring of how that power is used. This becomes particularly true in services, such as institutions, that are isolated from the larger society and/or have the potential to control every aspect of a person's life.

9. Consider whether guardianship, even if available, is going to be a useful tool for solving a problem, and whether it may do more harm than good.
 - a. If a person who is engaging in risky behavior understands the nature of a decision or right and has a strong desire to be in control of decisions, guardianship is not only inappropriate, it is also unlikely to be effective in reducing the risk of harm and may undermine relationships so that voluntary cooperation becomes unlikely.
 - b. Even where the person lacks capacity to make an informed decision, guardianship is not likely to be an effective tool to protect a person from harm, where the person has the determination and practical ability to continue to engage in risky behaviors, such as associating with poorly chosen friends, or engaging in risky sexual behavior, despite the objection of the guardian.
 - c. It is important to consider whether there will be any practical way of enforcing the guardian's authority over a person who is likely to resist, before putting the relationship through the strain of a court battle.

Since guardianship and conservatorship represents a transfer of the responsibility for exercising an individual's rights, adequate safeguards are needed to assure the individual retains as much decision-making power as possible. The restrictions on the individual's rights and decision-making powers should be confined to those areas in which the individual clearly cannot understand the serious consequence of his or her decisions or lack of foresight, such as through the use of limited conservatorship, power of attorney, etc.

Instead of a check-list of rights and powers that the person can keep (in whole or in part), the petition requesting an order appointing a guardian and/or conservator can provide options:

- Leave all powers and duties with the person, except specific powers given to the guardian and/or conservator in the court order. The powers given to the guardian and/or conservator must be individually spelled out in the order. This might be used, for example: when the person can handle his or her daily affairs, but needs a guardian to manage large or complex property that he or she owns, such as large investments or an interest in a business; when the guardian is needed only to sign certain contracts on the person's behalf; or when the guardian is needed to represent the person about some specific claims.
- Give all powers to the guardian, except specific powers that the person keeps under the court order. The powers the person keeps must be individually spelled out. Examples of the kinds of powers that the person might keep include:
 - Power to manage his or her earnings from work, income from public benefits, or from a trust or annuity, that the person uses for personal expenses.
 - Power to manage a checking account, up to a limited amount.

- Power to make contracts, for specific purposes or up to limited amounts. For example, the person might be given power to sign his or her own lease for an apartment, up to a maximum amount that he or she can afford.
- Give all powers to the guardian and/or conservator, with the person keeping no powers.