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NMGA 2020 ***Limited Guardianships – Introduction***

Related Concepts: Distinctions Often Blurred

- Least Restrictive Means
- Alternatives to Guardianship
- Limited Guardianship

Least Restrictive Means

NMSA 1978 § 45-5-301.1 (1989)

Guardianship for an incapacitated person shall be used only as is necessary to promote and to protect the well-being of the person, shall be designed to encourage the development of maximum self-reliance and independence of the person and shall be ordered only to the extent necessitated by the person's actual functional mental and physical limitations.

NMSA 1978 § 45-5-303(A) (12) (2009) (must plead least restrictive alternatives)
NMSA 1978 § 45-5-404(B)(8) (1989) (must plead least restrictive alternatives)

Alternatives to Guardianship

In appointing a guardian, the Court must find clear and convincing evidence in the record that:

“there are no available alternative resources that are suitable with respect to the alleged incapacitated person's welfare, safety and rehabilitation” and “the guardianship is appropriate as the least restrictive form of intervention consistent with the preservation of the civil rights and liberties of the alleged incapacitated person.” NMSA 1978 § 45-5-304(C)(3) -(4) (2009).

In appointing a conservator, the Court must find clear and convincing evidence that:

“there are not available alternative resources that enable the effective management of the estate and financial affairs of the person to be protected” and “the conservatorship is appropriate as the least restrictive form of intervention consistent with the preservation of the property of the person to be protected.” NMSA 1978 § 45-5-407(I)(3) -(4) (2019).

Matter of O.S.D., 672 P.2d 1304, 1306 (Alaska 1983) (clear and convincing evidence standard stated applies to any determination which may lead to the imposition of guardianship, including existence of alternatives)

EVOLUTION OF LIMITED GUARDIANSHIP - NATIONALLY

- Uniform Probate Code (1969)
- Uniform Guardianship and Protective Proceedings Act (1982)
- Wingspread Conference Recommendations (1988)
- NGA Code of Ethics (1991)
- National Probate Court Standards (1993)
- Uniform Guardianship and Protective Proceedings Act (Rev. 1997)
- Wingspan Conference (2001)
- ABA, AARP Survey of Court Practices (2006)
- Third National Guardianship Summit (2011)
- Uniform Guardianship Conservatorship and Other Protective Arrangements Act (2017)

New Mexico

- Adopted the Uniform Probate Code effective July 1, 1976
- Prior to UPC, procedural protections anemic (1953)

32-3-2. Appointment of guardian.—A guardian of the estate of an insane or incompetent person may be appointed upon the verified petition of any interested person; Provided, however, that when a person is adjudged incompetent and it appears upon such adjudication that he has property, the court may, without the filing of any further petition, appoint a guardian of his estate. For the purposes of this rule, an interested person shall be deemed to include any friend, relative or creditor of the insane or incompetent person, or the donor of all or any part of the estate of such incompetent, whether such donor be a natural or artificial person or entity. A guardian for the estate located in the state of New Mexico of a nonresident insane or incompetent person may be appointed upon the petition of any friend, relative, guardian or other person interested in said estate, and such petition shall be accompanied by a certified copy of the decree adjudicating such person insane or incompetent.

Uniform Probate Code (1969)

- **Limited guardianships not recognized**
- **Modest guardianship provisions**

Section 5-304. [Findings; Order of Appointment.]

The Court may appoint a guardian as requested if it is satisfied that the person for whom a guardian is sought is incapacitated and that the appointment is necessary or desirable as a means of providing continuing care and supervision of the person of the incapacitated person. Alternatively, the Court may dismiss the proceeding or enter any other appropriate order.

COMMENT

Uniform Guardianship and Protective Arrangements Act (1982)

2-206 (C), recognizes limited guardianships

(c) The Court, at the time of appointment or later, on its own motion or on appropriate petition or motion of the incapacitated person or other interested person, may limit the powers of a guardian otherwise conferred by this [Act] and thereby create a limited guardianship.

Uniform Guardianship and Protective Arrangements Act (1982)

2-206 (C), Comment:

The purpose of subsections (a) and (c) is to remind an appointing court that a guardianship under this legislation should not confer more authority over the person of the ward than appears necessary to alleviate the problems caused by the ward's incapacity. This is a statement of the general principle underlying a "limited guardianship" concept.

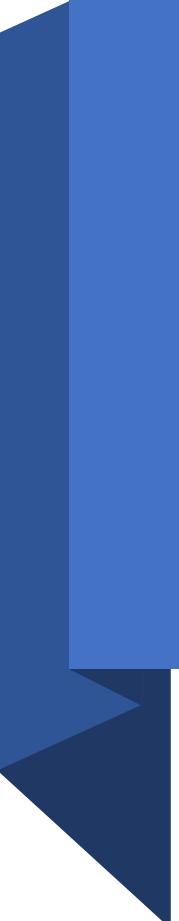
For example, if the principal reason for a guardianship is the ward's inability to comprehend a personal medical problem, the guardian's authority could be limited to making a judgment, after evaluation of all circumstances, concerning the advisability and form of treatment and to authorize actions necessary to carry out the decision.

Or, if the ward's principal problem stems from memory lapses and associated wanderings, a guardian with authority limited to making arrangements for suitable security against this risk might be indicated. Subsection (c) facilitates use by the appointing court of a trial-and error method to achieve a tailoring of the guardian's authority to changing needs and circumstances.



Wingspread Conference

Recommendations
of the
National Guardianship Symposium
1988



WINGSPREAD

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1988

... since guardianships always involves a loss of autonomy, judges should attempt to minimize this loss through the effective use of limited guardianship and other less restrictive alternatives. Rcmd. IV (B) cmt.

WINGSPREAD - 1988

...the Wingspread conference favored limited rather than plenary dispositions. While many jurisdictions have statutory language requiring courts to use limited guardianships, implementation of this requirement is spotty. The additional time and resources required to tailor a guardianship to the respondent's specific needs and provide ongoing supervision, when combined with the reality of overcrowded dockets, results in substantial judicial resistance to this concept.

WINGSPREAD 1988

...the Wingspread conferees encouraged courts to make their orders as specific as possible with respect to the guardian's powers and duties. If used, such specificity would help courts limit guardianships and tailor them to the circumstances presented.

WINGSPREAD – 1988

Recommendation III-D: *Scope of the Court's Decision*

- ***Limited Guardianship*** – There should be a statutory presumption in favor of limited guardianship.
- ***Modifications*** – Court order should make it relatively easy for the court to extend, limit or dissolve guardianships.
- ***Specificity of Order*** – The order should be specific as possible with respect to the guardian's powers and duties.

WINGSPREAD - 1988

Recommendation IV-B: Use of Limited Guardianship and Other Less Restrictive Alternatives

Use of Limited Guardianship – In the absence of statute, judges should use their inherent or equity powers to limit the scope of and tailor the guardianship order to the particular needs of the ward. The petition and order should include detailed statements of the respondent's functional capabilities and limitations. If practical, the court's order should require the guardian to attempt to maximize self-reliance, autonomy and independence. Finally, the guardian periodically should report these efforts to the court.



National Probate Court Standards 1993

National Probate Court Standards -1993

Standard 3.3.12: Order

The court should be as specific as possible in actions relating to guardianships. Specificity helps to prevent any unnecessary intrusions into the life and affairs of the respondent. Specifically, enumerated duties and powers serve as a guide for the court and other interested parties in evaluating and monitoring the guardian.

National Probate Court Standards -1993

Standard 3.3.12: Order, Comments

Because the preferred practice is to limit the powers and duties of the guardian to those necessary to meet the needs of the respondent, the court should specifically enumerate in its order the assigned duties and powers of the guardian, as well as limitations on them, with all other rights reserved to the respondent. By listing the powers and duties of the guardian, the court's order can serve as an educational roadmap to which the guardian can refer and use to help answer questions about what the guardian can or cannot do in carrying out the guardian's assigned responsibilities.

UNIFORM GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT (REPORTED WITH 1987 AMENDMENTS)

§ 5-306. [Findings; Order of Appointment]

(A) The Court shall exercise the authority conferred in this Part so as to encourage the development of maximum self-reliance and independence of the incapacitated person and make appointive and other orders only to the extent necessitated by the incapacitated person's mental and adaptive limitations or other conditions warranting the procedure.

UNIFORM GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT (REPORTED WITH 1987 AMENDMENTS)

§ 5-306. [Findings; Order of Appointment], comment

The purpose of subsections (a) and (c) is to remind an appointing court that a guardianship under this legislation should not confer more authority over the person of the ward than appears necessary to alleviate the problems caused by the ward's incapacity. This is a statement of the general principle underlying a "limited guardianship" concept.

UNIFORM GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT (REV. 1997)

§ 311. Findings, Order of Appointment

- a) The court may:
 - 1) appoint a limited or unlimited guardian for a respondent only if it finds by clear and convincing evidence that:
 - (A) the respondent is an incapacitated person; and
 - (B) the respondent's identified needs cannot be met by less restrictive means, including use of appropriate technological assistance; or
 - 2) with appropriate findings, treat the petition as one for a protective order under Section 401, enter any other appropriate order, or dismiss the proceeding.
- b) The court, whenever feasible, shall grant to a guardian only those powers necessitated by the ward's limitations and demonstrated needs and make appointive and other orders that will encourage the development of the ward's maximum self-reliance and independence.

UNIFORM GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT (REV. 1997)

§ 5-311. Comments

A guardian is to be appointed only when no less restrictive alternative will meet the respondent's identified needs. The clear and convincing evidence standard for the appointment of a guardian is new to the Act, but mandated by the Constitution and strongly recommended by many commentators on guardianship...

The use of limited guardianship is emphasized in this section. If a guardian is to be appointed, the guardian shall be given only those powers needed to meet the ward's needs and limitations. The court must specify the powers granted to the guardian and the limits on the incapacitated person's rights. The Act's emphasis on less restrictive alternatives, a high evidentiary standard and the use of limited guardianship is consistent with the Act's philosophy that a guardian should be appointed only when necessary, only for as long as necessary, and with only those powers as are necessary.



Wingspan The Second National Guardianship Conference 2001 Recommendations

WINGSPAN - 2001

38. Statutes be adopted and forms developed to enable courts to fashion the appropriate limited guardianship orders.

Comment: Consistent with the Uniform Guardianship and Protective Proceedings Act, the initial petition should include the reasons why either a limited or plenary finding of diminished capacity is being sought. This requirement will promote the concept of limited guardianship and preserve individual rights.

NOTE: 45-5-303 (b)(5)

WINGSPAN-2001

39. Orders establishing a plenary guardianship rather than a limited guardianship require proof of why the guardianship should be plenary.

Comment: Responsible advocacy includes advising the court with respect to material aspects of the ward's financial and health-related circumstances that will promote autonomy (i.e., the right to choose one's residence, vote, medical consent, participation in research).

NMSA 1978 § 45-5-301.1 (1989)

Guardianship for an incapacitated person shall be used only as is necessary to promote and to protect the well-being of the person shall be designed to encourage the development of maximum self-reliance and independence of the person and shall be ordered only to the extent necessitated by the person's actual functional mental and physical limitations. An incapacitated person for whom a guardian has been appointed retains all legal and civil rights except those which have been expressly limited by court order or have been specifically granted to the guardian by the court.

NMSA 1978 § 45-5-304 (orig. 1989)

C. Alternatively, the court may appoint a full guardian as requested in the petition or a limited guardian and confer specific powers of guardianship after finding in the record based on clear and convincing evidence that:

- (1) The person for whom a guardian is sought is totally incapacitated or is incapacitated only in specific areas as alleged in the petition;
- (4) The guardianship is appropriate as the least restrictive form of intervention consistent with the preservation of the civil rights and liberties of the alleged incapacitated person; and

THIRD NATIONAL GUARDIANSHIP SUMMIT (2011)

Recommendation #2.2

The court should issue orders that implement the least restrictive alternative and maximize the person's right to self-determination and autonomy.

- The court should develop a protocol to obtain an accurate and detailed assessment of the person's functional limitations.
- The court should conduct a factual investigation and review the assessment to determine the rights to be retained by the person and the powers to be granted to the guardian.
- The factual investigation may include contact with the person, interviews with interested persons and family members, and discussions with court-appointed attorneys and court evaluators or any other court representative.

Third National Guardianship Summit Standards and Recommendations, 2012 Utah L. Rev. 1191, 1200 (2012).

THIRD NATIONAL GUARDIANSHIP SUMMIT (2011) – PERSON CENTERED

Person-centered planning: Person-centered planning refers to a family of approaches designed to guide change in a person's life. This type of planning is carried out in alliance with the person, their family and friends and is grounded in demonstrating respect for the dignity of all involved. Recognized approaches seek to discover, understand, and clearly describe the unique characteristics of the person, so that the person:

- Has positive control over the life he/she desires and finds satisfying;
- Is recognized and valued for contributions (current and potential) to the person's communities; and
- Is supported in a web of relationships, both natural and paid, within the person's communities.

Third National Guardianship Summit Standards and Recommendations, 2012 Utah L. Rev. 1191, 1192 (2012)

UGCOPPA (2017)

§ 301 (b)

The court shall grant a guardian appointed under subsection (a) only those powers necessitated by the demonstrated needs and limitations of the respondent and issue orders that will encourage development of the respondent's maximum self-determination and independence. The court may not establish a full guardianship if a limited guardianship, protective arrangement instead of guardianship, or other less restrictive alternatives would meet the needs of the respondent.

UGCOPPA (2017)

§ 301 (b), comments

As set forth under subsection (b), a guardian may never be granted powers that are not required by the adult's demonstrated limitation and needs. Thus, most guardianships should be limited, not full, as almost all respondents possess some ability to act or make decisions on their own behalf.

UGCOPPA (2017)

§ 301 (b), comments

Overall, as in the 1997 act, the section's emphasis on less restrictive alternatives, a high evidentiary standard, and the use of limited guardianship is consistent with the act's philosophy that a guardian should be appointed only when necessary, only for as long as necessary, and with only the powers that are necessary.

UGCOPPA (2017)

§ 310

- c) A court order establishing a full guardianship for an adult must state the basis for granting a full guardianship and include specific findings that support the conclusion that a limited guardianship would not meet the functional needs of the adult subject to guardianship.
- d) A court order establishing a limited guardianship for an adult must state the specific powers granted to the guardian.

UGCOPPA (2017)

§ 310, comment

It also recognizes that it has often been – as a practical matter – easier for courts to appoint a full guardian than a limited one because the former has often allowed the court to avoid the need to make a lengthy finding as to specific rights retained, and to secure additional assessments if needed. Requiring additional fact finding for imposition of full guardianships helps counter such perverse incentives.