

Memorial Task Force Re: Guardianship of Adults

- Resource/Tool Kit -

List of Available Resource Material (applicable NM and Federal Statutes, and other). The resource material below is primarily related to guardianship of adults. For guardianship of minors, see: NMSA 1978, §§ 45-5-204-207.

Statutes and Regulations	URL Link	Contact
Statutory Chapters in NM Statutes NMSA 1978	http://www.conwaygreene.com/nmsu/lpext.dll?f=templates&fn=main-h.htm&2.0	
Chapter 28 - Human Rights Article 16B - Office of Guardianship <u>Regulations:</u> Title 9 - Human Rights Chapter 4 - Persons with Disabilities Part 21 - Guardianship Services	http://www.conwaygreene.com/nmsu/lpext.dll?f=templates&fn=main-h.htm&2.0 http://www.nmcpr.state.nm.us/nmac/_title09/title09.htm http://www.nmcpr.state.nm.us/nmac/_title09/T09C004.htm http://www.nmcpr.state.nm.us/nmac/parts/title09/09.004.0021.htm	DDPC Office of Guardianship Ph: 505-476-7332 frank.fajardo@state.nm.us
Chapter 27 - Public Assistance NMSA 1978 27-7 §14-31 (as amended 2007) Article 7 - Adult Protective Services	http://www.conwaygreene.com/nmsu/lpext.dll?f=templates&fn=main-h.htm&2.0 a number of revisions made in 2006-7 legislative session, including the definition of "incapacitated person."	Gerald F. McBride Adult Protective Services Attorney Ph: 505-841-4543 E-mail: gerald.mcbride@state.nm.us
(New) Uniform Power of Attorney Act - applies only to financial powers of attorney, HB 231	http://legis.state.nm.us/Sessions/07%20Regular/final/HB0231.pdf effective July 1, 2007; repeals previous NM power of attorney statutes, except the Uniform Health-Care Decisions Act and powers of attorney for minors.	
Uniform Probate Code Chapter 45 - Uniform Probate Code NMSA 1978	http://www.conwaygreene.com/nmsu/lpext.dll?f=templates&fn=main-hit-h.htm&2.0	
<u>Statutes and Regulations</u> Chapter 45 Uniform Probate Code - continued	<u>URL Link</u>	<u>Contact</u>

<p>Article 5 - Protection of Persons Under Disability and Their Property</p> <p>Part 3 - Guardians of Incapacitated Persons - NMSA 1978, §§ 45-5-301-315 (1995 & Supp. 2005). Some of the important definitions are in NMSA 1978, § 45-1-201 and 45-5-101(1995 & Supp. 2005).</p> <p>Part 5 - Power of Attorney NMSA 1978 §§ 45-5-501- 614</p> <p>Important Definitions: §45-1-201; also in 45-5-101(1995 & Supp. 2005).</p>	<p>http://www.conwaygreene.com/nmsu/lpext.dll?f=templates&fn=main-hit-h.htm&2.0</p>	
<p>Chapter 24 - Health and Safety NMSA1978</p> <p>Article 7A - Uniform Health-Care Decisions §§ 24-7A (1-18); 2006</p> <p>Article 7B - Mental Health Care Treatment Decisions §§ 24-7B (1-16); 2006</p>	<p>http://www.conwaygreene.com/nmsu/lpext.dll?f=templates&fn=main-hit-h.htm&2.0</p> <p>http://www.conwaygreene.com/nmsu/lpext.dll?f=templates&fn=main-hit-h.htm&2.0</p>	
<p>Chapter 43 - Commitment Procedures</p> <p>The entire Mental Health Code is relevant.</p> <p>Article 1 - Mental Health and Developmental Disabilities</p> <p>§ 43-1-14. Voluntary admission to residential treatment or habilitation. NMSA 1978 §43-1-14</p> <p>§43-1-15. Consent to treatment; adult clients (Treatment Guardian) NMSA 1978, § 43-1-15</p>	<p>http://www.conwaygreene.com/nmsu/lpext.dll?f=templates&fn=main-hit-h.htm&2.0</p>	

Statutes and Regulations	URL Link	Contact
Public Education		
NM Public Education Dept. (NMPED) 6.31.2.13 K (1) NMAC	NM Register / Volume XVI, Number 17 /Sept.15, 2005 http://www.nmcpr.state.nm.us/nmregister/xvi/xvi17/6.31.2amend.pdf A guardianship proceeding under the Probate Code is the only way an adult in New Mexico can legally be determined to be incompetent and have the right to make his or her own decisions taken away.	
20 USCode 1415(m) 2 and 34 CFR §300.520(b)	http://uscode.house.gov/uscode-cgi/fastweb.exe?getdoc+uscview+t17t20+3831+0++%28%29%20%20A http://www.access.gpo.gov/nara/cfr/waisidx_02/34cfr300_02.html Federal law that a state must establish procedures for appointing the parent of a child with a disability, or another appropriate individual, if the parent is not available, to represent the educational interests of the child, who has reached the age of majority, but has not been determined to be incompetent, can be determined not to have the ability to provide informed consent with respect to the child's educational program.	

For Guardianship of Minors NMSA 1978, §§ 45-5-204-207		

Resources Material	URL Link	Contact
National Guardianship Association (NGA) Model of Ethics, and Standards of Practice	Website: http://www.guardianship.org/ Click on: Publications, then click on Model Code of Ethics for Guardians , and Standards of Practice for Guardians	Ph: 814-238-3126 E-mail: info@guardianship.org
Handbook for Guardians and Conservators (rev. 2007) - a practical guide to NM law, is available on line.	Website: www.guardianshipnm.org Click on: Publications and Resources, then click on: New Mexico Guardianship Association Handbook See at: http://www.guardianshipnm.org/NMGA_Handbook_May07.pdf Or at: http://www.nmddpc.com/publications-og	NM Guardianship Association Ph: 505-881-3338
Alternatives to Guardianship & Conservatorship	Publication of NM Attorney General, 1997 Written by Ellen Litzer, Merri Rudd, Patricia Stelzner, and Susan Tomita	Being revised by the NM Guardianship Association

URL Links to other Resources:	URL Link	Contact
Disability Info.gov New Mexico	http://www.disabilityinfo.gov	
	http://www.disabilityinfo.gov/digov-public/public/DisplayPage.do?parentFolderId=5692	
Nat'l Assoc. of Prof. Geriatric Care Mngrs, Inc.	http://www.caremanager.org/	
National Academy of Elder Law Attorneys	http://www.naela.com/	
La Familia, Inc.	http://www.la-familia-inc.org/adult.html	
Senior Legal Handbook -NMBAR	http://www.nmbar.org/Content/NavigationMenu/Public_Services_Resource/s/Senior_Legal_Handbook/Senior_Legal_Handbook.htm	
Homeless Legal Clinic -NMBAR	http://www.nmbar.org/Content/NavigationMenu/Public_Services_Resource/s/Homeless_Legal_Clinic_SignUp/Homeless_Legal_Clinic_SignUp.htm	
Attorney/Firm Finder -NMBAR	http://www.nmbar.org/Template.cfm?Section=Attorney_Firm_Finder&Template=/MemberDirectory/MemberDirectorySearch.cfm	
Advance Health Care Directive (Living Will) Request -NMBAR	http://www.nmbar.org/Template.cfm?Section=Public_Services_Resources&Template=/CustomSource/LivingWillRequest.cfm	
Wait Lists Olmstead, Litigation powerpoint		
Litigation Status Report	http://www.familysupport-hsri.org/resources/Waitlists,%20Olmstead%20&%20Litigation%20(Gary%20Smith).ppt	
Human Services Research Institute (HSRI)	http://www.hsri.org/index.asp?id=news	
NM Social Services Resources Directory	http://www.nmresourcedirectory.org/site/371/services.aspx	
University of Montana Rural Institute	http://ruralinstitute.umt.edu/ Technical Assistance & Training: http://ruralinstitute.umt.edu/training_projects.asp	

<p>University of Pittsburgh School of Medicine, Dept. of Psychiatry</p> <p>Lawyer Referral for the Elderly (LREP)</p>	<p>Free, web-based educational opportunities: http://www.wpic.pitt.edu/OERP/Webcast/default.htm</p> <p>Ph: 797-6005 or 1-800-876-6657</p>	
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Please submit changes and additions to: Frank Fajardo, Manager, DD Planning Council, Ph:505-476-7332, E-mail: frank.fajardo@state.nm.us

Advocacy, the Law and Surrogate Decision Makers

General Principles:

A person is capable and can give power as they choose.

If a person gives a power, they can take it back (revoke it) if they are still capable.

There are legal documents and processes a person can use while capable to determine what should happen when he or she becomes incapable.

If a person becomes incapable (incapacitated) in a particular aspect of life, there are legal processes to determine how decisions are made.

Capacity is evaluated by health care professionals. It generally means the ability to understand what's happening and manage one's living needs and financial affairs.

The law guides who to ask for health care and financial decisions, and the ultimate authority is the court.

The least restrictive way of limiting a person's power is the best and most favored by the law.

Powers a person can give in writing while capable:

- Power of Attorney (POA) for financial matters
- Advance Health Care Directive (AHCD) for health care matters
- Do Not Resuscitate (DNR) Order for Emergency Medical Services

Power a person can give orally while capable:

- Designate a surrogate health care decision maker

Power the law governs without a court order:

- Designation of a surrogate health care decision maker according to listed priorities

Powers a court can give for an incapacitated person:

Guardian over the person

Conservator over the person's finances (estate)

Power of Attorney (POA)

POA is a legal document in which a person (principal) gives a person they trust (agent) authority to act on their behalf in financial matters. The best POA is durable, which means it's still good once person is incapacitated. We recommend POA be springing, which means it's only good once person is incapacitated. An agent's power is limited by the terms of the POA and the law. A POA can be broad or specific. It only governs the financial matters that the principal says the agent can handle. A POA needs to be notarized, and it's best if it is prepared by an attorney working for the principal.

Advance Health Care Directive (AHCD)

AHCD is a legal document in which a person designates an agent for health care decisions (medical POA). It's generally only effective when person is incapacitated. This document also allows a person to give individual instructions about end-of-life care and organ donation (or allow agent to decide).

Do Not Resuscitate (DNR) Order

This is an order issued by a physician and signed by a person saying that resuscitative measures should not be performed by Emergency Medical Services if person dies. It can also be signed by an authorized health care decision maker (agent who has medical POA or legal guardian).

Uniform Health Care Decisions Act

This law governs how to designate someone (surrogate decision maker) to make health care decisions for a person who is incapable of making them. A person who is capable can designate a surrogate in writing or orally. If a surrogate hasn't been designated, the law provides for people (in descending order of priority) to be named. If all people in a certain category (like all adult children) don't agree on a decision, health care provider can go by majority rule. If all are equally divided, the court must get involved.

Guardian and Conservator under the Uniform Probate Code

If person is incapacitated and hasn't given power in writing to an agent, the court can appoint a guardian over the person and a conservator over financial matters. A guardian can then make placement and health care decisions and a conservator can make financial decisions. A court can also appoint a temporary guardian or conservator if needed to prevent immediate and irrevocable serious harm. A court can also limit the powers of the guardian and conservator depending on the person's capacity and needs. Two other people involved in the court process are a **visitor** and **guardian ad litem**. A visitor is usually a social worker who gives the court an objective report on the person's situation. A guardian ad litem (GAL) is an attorney appointed to represent the incapacitated person. The GAL reports to the court what the best interests of the person are.

All these legal processes are complicated and can lead to overstepping and family fights. Please call the Lawyer Referral for the Elderly (LREP) at 797-6005 or 1-800-876-6657 whenever you encounter these processes and we can help.