

Guardianship & Alternatives to Guardianship in New Mexico

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Weaving Colors 2.21.24

Objectives

Today, you will learn how to:

- Determine what level of support a person needs
- Identify and access alternatives to guardianship
- Obtain guardianship through New Mexico courts

What is Guardianship

Guardianship is the legal process in which the court appoints a guardian for an individual that is **unable** to make decisions regarding:

- Healthcare/ Mental Healthcare
- Personal care
- Residential placement
- Finances and/or property
- Reporting abuse, neglect, exploitation, and/or fraud.

Guardianship **MUST** be least restrictive . . .

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 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, § 45-5-301.1

- "Guardian" means a person who is appointed by a court to assist with decisions regarding the care, custody or control of the person of a minor or incapacitated adult.
- "Conservator" means a person who is appointed by a court to manage the property or financial affairs or both of a minor or incapacitated adult.

2014 Handbook for Guardians and Conservators
NMSA 1978 45-5-101, 45-5-201(21) (2011).

Alternatives to Guardianships and Conservatorships



MEDICAL



MENTAL HEALTH



FINANCIAL



**SPECIFIC DECISION
AREAS, OR AS
NEEDED**

Medical Decision Making Supports

The Uniform Health-Care Decisions Act supports the individual's choice:

- “Individual Instruction”
- Surrogate for Health Care Decisions
- Power of Attorney for Health Care
 - ❖ *“Advance Health-Care Directive”*

NMSA 24-7A-1 et seq.

Mental health Decision Making Supports

The Mental Health Care Treatment Decisions Act supports the individual's choice:

- “Individual Instruction”
- Power of Attorney for Mental Health Treatment
 - ❖ *“Advance Directive for Mental Health Treatment”*
 - ❖ *Often known as “Psychiatric Advance Directive”*

NMSA 24-7B-1 et seq.

Financial Decision Making Supports or Substitute Decisions

To preserve the individual's choice:

- Joint account
- Trust
- ABLE account
- Power of Attorney
NMSA 45-5B-301

Without the individual's choice:

- Representative-payee / fiduciary
- Protective arrangement / single transaction *NMSA 45-5-405.1*

Power of Attorney (POA) Decision Making Supports

If not judged to be incapacitated,
an individual can set up a POA for
most other functions, with a few
notable exceptions including:

- Health care decisions (covered with separate POAs)
- Voting

NMSA 45-5B-103

Supported Decision Making

Preserves the
individual's
choice

Series of social
interventions to
assist the
individual in
understanding and
implementing
decisions

The Agreement or
Plan is
individualized to
the person, the
needs, and the
available support
system



Importance of Independence for Young Adults

- **Development of new skills**
- **Sense of fulfillment with life**
- **Better specific health outcomes**

**Guardianship
should only be
used as a means of
last resort.**

What level of support do I need?

For each task, what can you do?

- I can do this alone.
- I can do this with support.
- I need someone else to do this for me.

For each decision, what can you do?

- No decision-making ability (e.g. comatose)
- Provide opinions or preferences
- Make decisions with assistance
- Make decisions independently



Definitions



- Supported Decision-Making: A way to get help making choices while you control the final decision that is made.
- Supporters: People who help you understand and make your choices.
- Deciders: The person who makes the final decision, or YOU!

Figure out who is who

- On a piece of paper, write down who potential supporters are.



What kind of choices can you name?

- where you live
- what you will do in school
- where you work
- who you spend time with
- if you want to go to the doctor
- if you want to go on a date
- Anything else?



Speaking of choices...

- Write down the choice that you want to think about and talk about it
- Who made the choice?
 - *I made the choice alone.*
 - *I made the choice, but someone helped me. The people who helped me were:*

 - *Someone else made the choice for me. The person who made the choice for me is named:*



What did I do to help me make my choice?

Talk about it. Who did you talk with?

Write down your possible options.

Write down the good and bad things about each choice (pros and cons).

Visit places (like a home, office, or school).

Do research.

Talk to people who had made the same choice before.

How do I understand what I am reading?

- Use of plain language, which is using simple words without jargon or acronyms.
 - *SCA (acronym)*
 - *Sudden cardiac arrest (jargon)*
 - *Heart attack (plain language)*
- Information in pictures
- Someone to explain information to you.



How do I find out more about the choice I am going to make?

-
- Research to learn more about choices.
 - Help knowing what choices you have.
 - Visits and trials to see for yourself what you like and don't like



Tips and strategies

- Send reminders of dates and times and have them written or circled somewhere.
- Make a list of the good and bad parts of different choices.
- Have your supporters come to meetings and appointments with you.
- Talk to experts who know a lot about my choice.



More Tips and Strategies

- Take extra time to make decisions.
- Think about your values. Write them down so you look back at them.
- Take classes to learn information.
- Use technology such as phones or computers to help you.



You've made the choice, now what?

Get someone to help you communicate about your choice to others.

What level of support do I need – Communication

- Telling people what I want and don't want
 - I can do this alone*
 - I can do this with support*
 - I need someone else to do this for me*
- Telling people how I make choices
 - I can do this alone*
 - I can do this with support*
 - I need someone else to do this for me*
- Making sure people understand what I am saying
 - I can do this alone*
 - I can do this with support*
 - I need someone else to do this for me*



What level of support do I need – Personal Care

- Choosing what I wear
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*
- Getting dressed
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*
- Choosing what to eat, and when to eat
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*



What level of support do I need – Personal Care Continued

- Taking care of my personal hygiene (for example, showering, bathing, brushing teeth)
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*
- Remembering to take medicine
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*

What level of support do I need – Staying Safe

- Making safe choices around the house (for example, turning off the stove, having fire alarms)
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*
- Understanding and getting help if I am being treated badly (abuse or neglect)
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*
- Making choices about alcohol and drugs
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*



What level of support do I need – Home and Friends

- Choosing where I live
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*
- Choosing who I live with
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*
- Choosing what to do and who to see in my free time
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*



A photograph of a woman with dark, curly hair and a light-colored long-sleeved shirt leaning over a young boy with light brown hair. The boy is wearing a blue turtleneck sweater and blue jeans, and is seated in a wheelchair. Both are smiling at the camera. The background is a plain, light-colored wall.

What level of support do I need – Home and Friends Continued

- Keeping my room or home clean
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*
- Finding support services and hiring and firing support staff
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*



What level of support do I need – Health Choices

- Choosing when to go to the doctor or the dentist
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*
- Making medical choices in everyday situations (for example, check-up, medicine from the drug store)
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*
- Making medical choices in serious situations (for example, surgery, big injury)
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*
- Making medical choices in an emergency
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*



What Level of Support Do I Need - Partners

- Choosing if I want to date, and who I want to date
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*
- Making choices about sex
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*

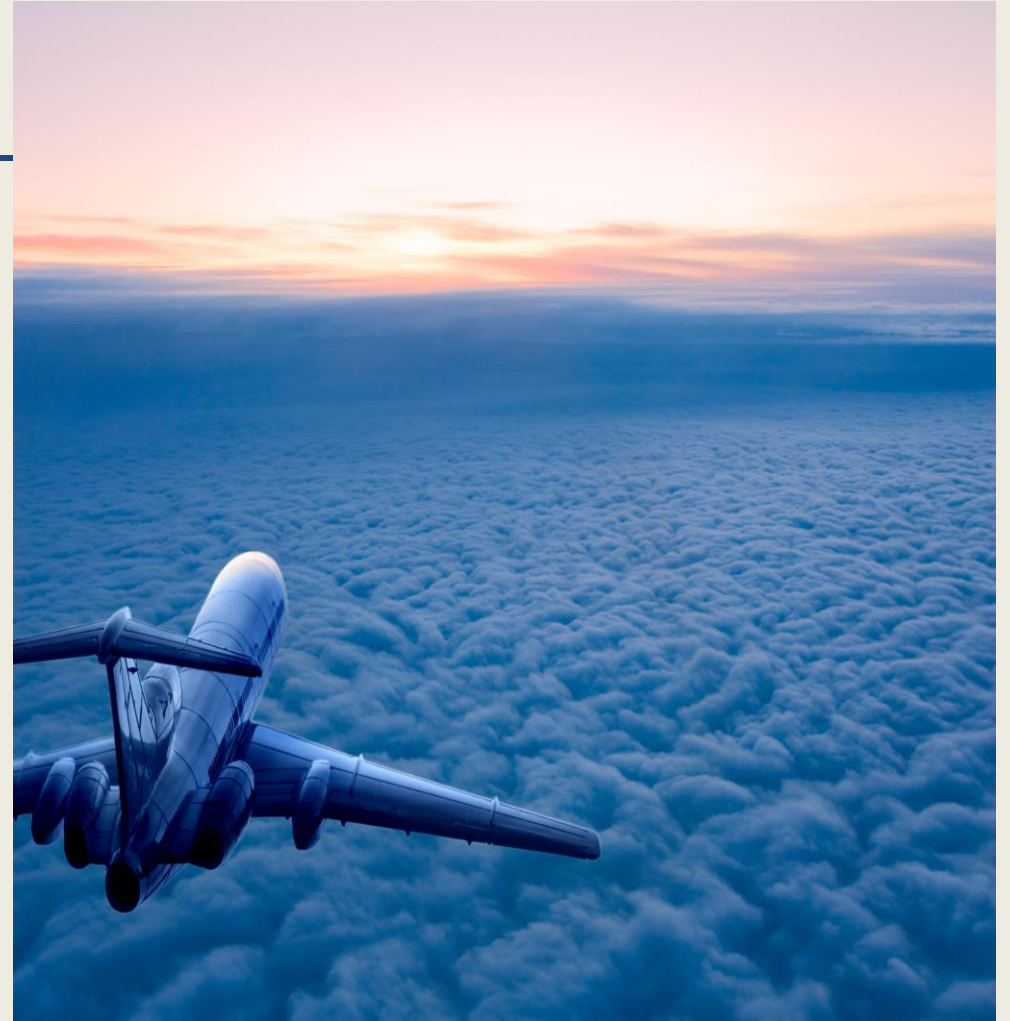


What Level of Support Do I Need – Partners Continued

- Making choices about marriage
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*
- Making choices about birth control and pregnancy
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*

What level of support do I need – Travel

- Traveling to places I go often (for example, getting to work, stores, friends' homes)
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*
- Traveling to places I do not go often (for example, doctors' appointments, special events)
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*



What level of support do I need – Jobs

- Choosing if I want to work
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*
- Understanding my work choices
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*
- Choosing classes or training I need to get a job I want, and taking these classes
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*



What level of support do I need – Jobs Continued

- Applying for a job
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*
- Going to my job every work day
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*



What level of support do I need - Money



- Paying the rent and bills on time
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*
- Keeping a budget so I know how much money I can spend
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*

What level of support do I need – Money Continued



- Making big decisions about money (for example, opening a bank account, signing a lease)
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*
- Making sure no one is taking my money or using it for themselves
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*

What level of support do I need - Citizen

- Signing contracts and formal agreements
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*
- Choosing who to vote for and voting
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*



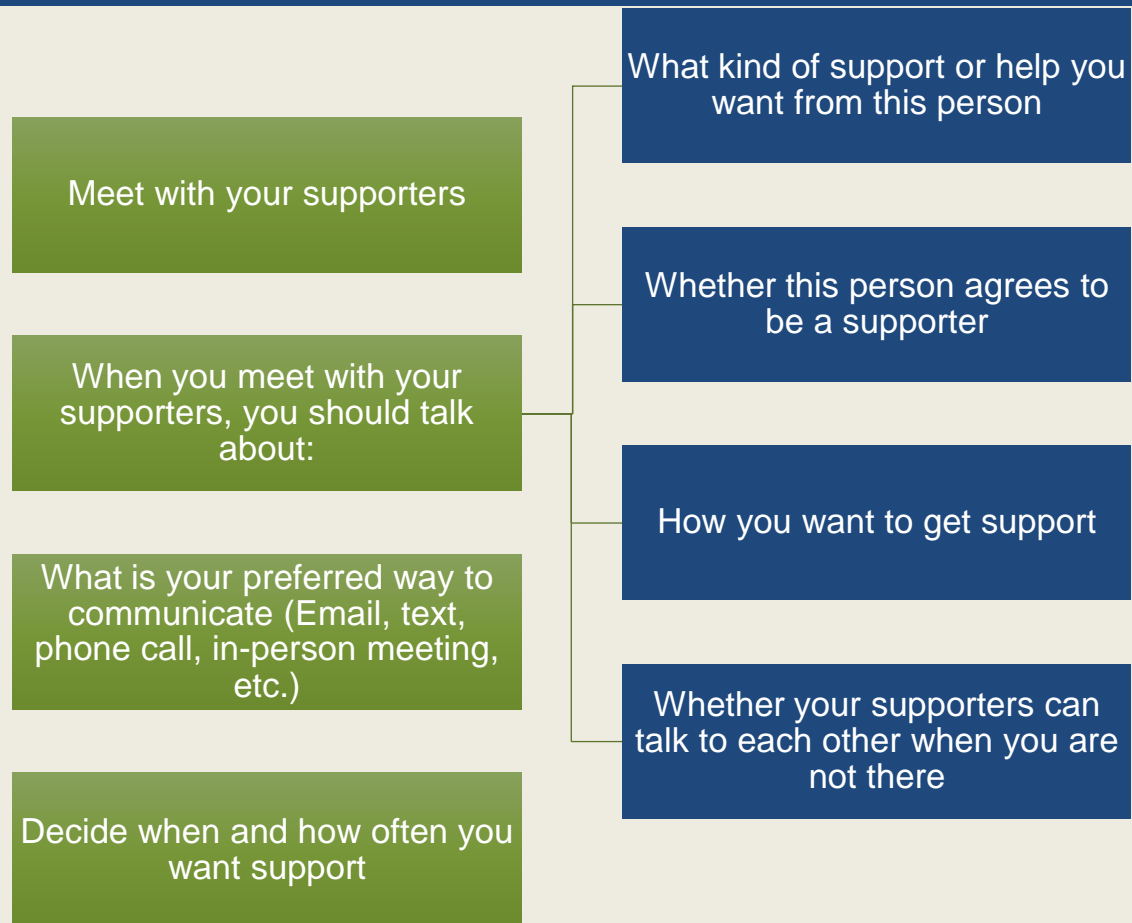
NO ONE CAN TAKE AWAY
YOUR RIGHT TO VOTE

Who are supporters?

- Someone you trust
- Someone who agrees to be a supporter
- YOU CAN CHANGE YOUR SUPPORTERS AT ANY TIME



What to do with your supporters?



Additional Supported Decision Making Resources



- Susan Mizner, ACLU Disability Rights Program smizner@aclu.org 415-343-0781
- Jonathan Martinis, Burton Blatt Institute at Syracuse University jmartin@law.syr.edu
- American Civil Liberties Union Disability Rights Program: www.aclu.org/supported-decision-making-resource-library
- National Resource Center for Supported Decision-Making www.supporteddecisionmaking.org
- Center for Public Representation Supported Decision-Making Pilot Project www.supporteddecisions.org

Who can be a guardian?

- **Family Member or a Friend**

- *Must be 18 years old or older*
- *Must be able and willing*
- *Complete Court trainings:*
 - ❖ Elder and Disability Initiative Training (Second Judicial District court requirement)
 - ❖ Adult Guardian and Conservator Orientation Program (videos)
 - [Adult Guardian and Conservator Orientation Program \(VIDEOS\) | Adult Guardianship \(nmcourts.gov\)](#)

Who can be a guardian?

➤ Professional Guardian

- Certified by the Center for Guardianship Certification
- Comply with the Caregivers Criminal History Screening
- Comply with National Guardianship Association
 - Standards of Practice
 - Model Code of Ethics for Guardians
 - Agency Standards
- Ensure the Civil Rights of the Protected Persons

Levels of Authority

➤ **Limited Guardianship**

Decision making authority is limited to the individual's incapacity (for example, making medical decisions only).

➤ **Plenary (full) Guardianship**

Includes making medical, financial, residential placement, safety, and supervision decisions.

How a Guardian Is Appointed

A Petitioning Attorney writes a petition and files the petition to open a case in District Court.

- *Petitioning Attorney investigates the case and prepares a Petition laying out the statutory and factual reasons for a guardianship. They also prepare necessary documents to file in court and are responsible for ensuring compliance with all statutory and local rules.*
- *Family must be prepared to provide contact information for relatives and people with ongoing relationships with person to be protected.*
- *In Office of Guardianship cases, the Petitioning Attorney represents the Office of Guardianship as a Special Assistant Attorney General. The family and professional guardian are not represented by the petitioning attorney.*
- *In private cases, the Petitioning Attorney contracts with the family (or whoever is petitioning) to represent them in the case.*

Section 45-5-303 requires that the court appoint the following case professionals:

- *Guardian ad Litem (GAL)*
- *Court Visitor (CV) and*
- *Qualified Health Care Professional (QHCP)*

How a Guardian Is Appointed

Qualified Health Care Professional:

- *A health care professional who assesses the person's functional impairments and his or her ability to make decisions and manage the activities of daily living (ADLs). Typically complete a form called "Report of Health Care Professional." It is preferable to have this form completed before filing the case in district court.*

Guardian ad Litem:

- *An attorney appointed by the court who has a dual duty to represent the person's position and report to the court whether and to what extent guardianship is needed. The attorney must articulate the least restrictive means of protecting the person.*
- *In some cases, the Guardian ad Litem, Court, or anyone else may recommend that the person have a separate attorney to represent the person's position.*

Court Visitor:

- *A person, usually a social worker, who evaluates the needs of the alleged incapacitated person. The court visitor must visit the person where they live.*

NM Guardianship Procedures

- A hearing is set no sooner than 60 days from the filing of the Petition.
- A hearing must be held with the alleged incapacitated person; Guardian ad Litem; Petitioner; Court Visitor, and proposed guardian present *in person* in Court.
- Hearings are open to the public.
- If the District Court Judge determines the person is “incapacitated” the court will appoint a guardian to assist the protected person with making decisions.
- The individual who has a guardian appointed is now referred to as a “protected person.”

Guardianship Court Order

- States the guardian's duties and powers, including but not limited to:
 - *Ensuring that the protected person's legal and civil rights are retained;*
 - *Ensuring the basic needs of the protected person are met;*
 - *Monitoring the protected person's services for abuse, neglect, exploitation and/or fraud;*
 - *Residential Placement Decision Making;*
 - *Healthcare or Medical Decision Making; and*
 - *Financial Decision Making.*

Guardianship Documents

- **Acceptance of Appointment**
Guardian will sign with a notary certifying that they will fulfill their duties according to law.
- **Order Appointing Guardian**
Adjudicates the person incapacitated and sets forth the guardian's powers and duties.
- **Order Identifying Persons Entitled to Notice**
Sets forth the people allowed to view the case documents and have notice of future hearings.
- **Order Securing Bond**
Bond protecting the person's assets required in conservatorships.
- **Letters of Guardianship**
Document showing others the guardian's authority.
- **Letters of Conservatorship**
Document showing others conservator's authority.

Tribal Courts

- Guardianship laws and procedures vary by jurisdiction.
- For tribal courts that do not have detailed guardianship laws and procedures, New Mexico guardianship law and procedure could be a helpful guide to the judge.
- The Navajo Nation Guardianship Act allows for appointment of a “court appointed representative” to assist a person when decision making support is needed, or to speak or act on the person’s behalf on specific issues. The court appointed representative does not substitute their decisions or judgment in place of the person’s decisions or judgment. The person can request to void the appointment or name a replacement.

Office of Guardianship

- Provides one-time legal services to request the court appoint a guardian for eligible adults;
- Provide professional guardians;
- If any person is not eligible, refer them to other legal providers;

Office of Guardianship

- Respond to complaints and investigate complaints against professional guardians contracted with the Office of Guardianship
- Educate the public; and
- Recruit and train guardians, attorneys, and court visitors.

OOG Eligibility

Applicants must meet the following eligibility requirements:

- *New Mexico resident*
- *18 or older*
- *Documented incapacity*
- *Low income*

Obtain an OOG Application

- Call **(505) 841-4519** to request an application, or
- Download and print an application from our website:
 - *English application:*
<https://www.nmddpc.com/media/files/OOG%20Intake%20Form.pdf>
 - *Spanish Application:*
<https://www.nmddpc.com/media/files/APPLICATION%20SPANISH.pdf>

How to Apply for OOG Services

Complete the application and submit the required documents by mail, fax, or email:

- DDC Office of Guardianship
Attn: Intake Coordinator
625 Silver Avenue, SW, Ste 100
Albuquerque, NM 87102
- Fax: (505) 841-4455
- Email: DDPCOOG.Intake@state.nm.us

What if we don't qualify?

- Request or download a list of attorneys from our website: <http://www.nmddc.org/contractors>
- State Bar of New Mexico: (505) 797-6066
- Advocacy, Inc.: (505) 266-3166
- New Mexico Guardianship Association:
<https://www.nmguardianassoc.org>



Questions?

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(505) 841-4519

nmddc.org