

Corrections to this opinion/decision not affecting the outcome, at the Court's discretion, can occur up to the time of publication with NM Compilation Commission. The Court will ensure that the electronic version of this opinion/decision is updated accordingly in Odyssey.

1      **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2      Opinion Number: \_\_\_\_\_

Court of Appeals of New Mexico  
Filed 12/4/2025 9:06 AM

3      Filing Date: **December 4, 2025**

  
Mark Reynolds

4      **IN THE MATTER OF THE  
5      GUARDIANSHIP AND  
6      CONSERVATORSHIP PROCEEDINGS  
7      FOR LINDA D., a person in need  
8      of protection.**

9      **LINDA D.,**

10     Respondent-Appellant,

11     v.

**No. A-1-CA-41980**

12     **SHARON M. OTERO,**

13     Petitioner-Appellee.

14     **APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY  
15     Erin B. O'Connell, District Court Judge**

16     Disability Rights of New Mexico

17     Caitlin M. Palencia

18     Albuquerque, NM

19     for Appellant

20     Law Office of Benjamin Hancock, P.C.

21     Benjamin Hancock

22     Albuquerque, NM

23     for Appellee

## OPINION

2 HANISEE, Judge.

3 {1} The opinion filed August 18, 2025, is hereby withdrawn, and this opinion is  
4 substituted in its place. Respondent Linda D. appeals the district court's order  
5 appointing a limited conservator pursuant to Article 5 of the Uniform Probate Code.  
6 See NMSA 1978, §§ 45-5-101 to -7-612 (1975 as amended through 2024).  
7 Respondent primarily argues, among other things, that the district court's decision  
8 to appoint a conservator is not supported by substantial evidence. We agree and  
9 reverse. As such, we do not address Respondent's other arguments.

## 10 | BACKGROUND

11 {2} This matter arose from a petition filed by Respondent’s daughter (Petitioner)  
12 for the appointment of a plenary guardian and plenary conservator for Respondent.  
13 In her petition, Petitioner alleged that Respondent suffers from several mental health  
14 conditions that render her an “incapacitated person” within the meaning of Section  
15 45-5-101(F) and that such requires appointment of a guardian and a conservator for  
16 Respondent’s personal and financial affairs. After receiving the petition, the district  
17 court appointed a guardian ad litem, a court visitor, and a qualified healthcare  
18 professional (collectively, Court-Appointed Professionals), as required by statute, to  
19 evaluate Respondent’s “capacity and whether a guardian and/or conservator shall be  
20 appointed.” See § 45-5-407(B)-(D). All three Court-Appointed Professionals

1 conducted the required investigations into Respondent's capacity and submitted  
2 separate written reports to the district court containing their findings and  
3 recommendations. In their separate reports, each Court-Appointed Professional  
4 concluded that while a guardian was not appropriate, a limited conservatorship was  
5 necessary to protect Respondent only during those times in which Respondent was  
6 hospitalized or unable to manage her financial affairs during periods when she feels  
7 "down."

8 {3} The district court then held a hearing on the matter that was attended by  
9 Respondent, who was represented by counsel, along with Petitioner and the three  
10 Court-Appointed Professionals. During the hearing, all three Court-Appointed  
11 Professionals provided testimony consistent with the conclusions in their reports:  
12 that neither a guardianship of any kind nor a plenary conservatorship was  
13 appropriate, but a limited conservatorship was necessary to protect Respondent's  
14 financial affairs during periods in which Respondent is hospitalized or incapacitated  
15 due to her mental health.

16 {4} The Guardian Ad Litem (GAL), Milos Marjanovic, specifically noted three  
17 instances within the preceding year in which Respondent had attempted to self-harm  
18 and required medical attention, inpatient treatment, or law enforcement involvement.  
19 The GAL further explained that Respondent admitted she had stored approximately  
20 \$30,000 in cash in her apartment and that such was a concern for Respondent's safety

1 because Respondent had told people in her neighborhood about the money. All three  
2 reports from the Court-Appointed Professionals noted allegations that Respondent  
3 had recently allowed at least one unidentified person to live with her in her  
4 apartment, bolstering concerns about Respondent's personal and financial safety.

5 {5} Both the GAL and the court visitor, Mary Galvez, testified about their  
6 concerns regarding Respondent's ability to manage her estate and financial affairs  
7 during potential future instances of mental incapacity. The GAL explained that much  
8 of Respondent's estate consists of real property and associated bank accounts held  
9 in a special needs trust established for her benefit. The court visitor testified that  
10 Respondent did not have many assets outside of the trust that needed to be managed.  
11 Specifically, Respondent receives approximately \$1,600 per month in social security  
12 disability income and back child support. Collectively, the Court-Appointed  
13 Professionals noted that Respondent was expected to inherit money from the sale of  
14 real property owned by Respondent's family members, but there is no indication in  
15 the record whether that money would be placed in trust or distributed to Respondent  
16 outright in the future. The GAL expressed concern about Respondent's ability to  
17 manage income from the properties should the proceeds be distributed while  
18 Respondent was experiencing a mental health episode similar to those she  
19 experienced in the months preceding the hearing. The court visitor expressed similar  
20 concerns, stating that if Respondent's current residence was sold—which is a

1 property held in trust for her—during such an episode, Respondent would need  
2 someone to make financial decisions for her, such as executing a new lease. The  
3 court visitor stated that a limited conservatorship was the least restrictive means to  
4 accomplish this while protecting Respondent’s personal autonomy and financial  
5 well-being.

6 {6} The testimony of the qualified healthcare professional, Dr. Rex Swanda,  
7 consisted mainly of his assertion that he stood by the conclusions in his report. He  
8 did, however, reiterate his opinion that Respondent “lacks full capacity” to make  
9 financial decisions and that limited conservatorship was necessary to protect her  
10 financial resources and affairs. His report stated that Respondent has struggled with  
11 financial decision-making “to the point that her long-term financial stability and  
12 security is precarious.”

13 {7} Respondent also testified on her own behalf during the hearing. Respondent  
14 stated that since the time she was interviewed by the Court-Appointed Professionals,  
15 she had put the \$30,000 in cash into a bank account that was jointly owned by her  
16 sister. Respondent further testified that she had named her sister and her nephew in  
17 an “advanced designation” of a representative payee for her social security income  
18 should Respondent become unable to manage her finances. Respondent further  
19 discussed other mechanisms of protection for herself and her assets, such as an  
20 advanced healthcare directive and a psychiatric advanced directive, which she had

1 already established or was in the process of establishing at the time of the hearing.  
2 Respondent also testified at length regarding her ability to manage her finances  
3 throughout the past thirty years, including during instances in which she was  
4 hospitalized due to her mental health, noting that she had no bills that went unpaid  
5 and that she had maintained a credit score of 806. Respondent stated that she has not  
6 gone into debt during these instances.

7 {8} At the conclusion of the hearing, the district court found that Respondent  
8 lacked capacity within the meaning of the New Mexico Probate Code and concluded  
9 that a limited conservatorship was necessary to protect Respondent's estate and  
10 financial affairs during periods of incapacity. The court appointed a professional to  
11 act as Respondent's conservator with plenary authority, but limited the conservator's  
12 authority to periods in which Respondent "is unable to manage all of her estate and  
13 all of her financial affairs during periods of incapacity." Respondent appeals,  
14 arguing in pertinent part that substantial evidence does not support the district court's  
15 decision to appoint a limited conservator for her affairs.

16 **DISCUSSION**

17 {9} Appointment of a conservator requires proof of certain statutory elements by  
18 clear and convincing evidence. *See* § 45-5-407(I). In district court, clear and  
19 convincing evidence is that which "instantly tilt[s] the scales in the affirmative when  
20 weighed against the evidence in opposition[,] and the fact[-]finder's mind is left with

1 an abiding conviction that the evidence is true.” *State ex rel. Child., Youth & Fams.*  
2 *Dep’t v. Heather S.*, 2025-NMSC-002, ¶ 43, 563 P.3d 821 (internal quotation marks  
3 and citation omitted). On appeal, when reviewing whether a district court’s decision  
4 is supported by substantial evidence of a clear and convincing nature, “we do not  
5 reweigh the evidence and we will uphold the district court’s judgment if, viewing  
6 the evidence in the light most favorable to the judgment, a fact[-]finder could  
7 properly determine that the clear and convincing standard was met.” *Id.* (alteration,  
8 internal quotation marks, and citation omitted). If we conclude that such an  
9 evidentiary standard was met, we then review the district court’s resulting legal  
10 conclusions de novo. *See id.* ¶ 44 (stating that we review the district court’s  
11 conclusions of law de novo).

12 {10} In general terms, a conservator may be appointed only if clear and convincing  
13 evidence establishes the following: (1) the person to be protected is either “totally  
14 incapacitated” or is “incapacitated only in specific areas”; (2) the conservatorship is  
15 necessary to “effectively manag[e] the estate or financial affairs, or both, of the  
16 person to be protected”; (3) “there are not available alternative resources that enable  
17 management” of such; (4) “the conservatorship is appropriate as the least restrictive  
18 form of intervention consistent with the preservation of the property of the person to  
19 be protected”; and (5) the proposed conservator is “qualified[,]” “suitable,” and  
20 “willing to serve.” Section 45-5-407(I)(1)-(5). An “incapacitated person” is defined

1 as “any person who demonstrates over time either partial or complete functional  
2 impairment by reason of mental illness[ or] mental deficiency . . . to the extent that  
3 the person is unable to manage the person’s personal affairs or the person is unable  
4 to manage the person’s estate or financial affairs or both.” Section 45-5-101(F).  
5 “[I]nability to manage [one’s] estate or financial affairs” is further defined as “gross  
6 mismanagement, as evidenced by recent behavior, of one’s income and resources or  
7 medical inability to manage one’s income and resources that has led or is likely in  
8 the near future to lead to financial vulnerability.” Section 45-5-101(H). If the district  
9 court determines that “the person to be protected possesses the capacity to manage  
10 the person’s estate or financial affairs, or both, the court shall dismiss the petition.”  
11 Section 45-5-407(H).

12 {11} Respondent argues that the record lacks evidence supporting that  
13 conservatorship is necessary, however limited, because there is no evidence  
14 Respondent is incapacitated to such an extent that she could not manage her financial  
15 affairs and estate “even during times when she is experiencing depressive episodes.”  
16 Respondent points to her credit score of 806, her substantial cash savings, and the  
17 facts that she has always paid her bills and has never gone into significant debt.  
18 While Respondent acknowledges that the three Court-Appointed Professionals all  
19 “relied heavily on the three instances [Respondent] received inpatient treatment” in

1 the year preceding the hearing, she asserts that there was no evidence connecting her  
2 mental health issues with an inability to manage her estate or financial affairs.

3 {12} Petitioner argues to the contrary, pointing to evidence of Respondent's  
4 longstanding struggles with mental illness. Petitioner highlights Section 45-5-  
5 101(H), which allows a person to be deemed incapacitated through a showing of  
6 "medical inability to manage one's income and resources that has led or is likely in  
7 the near future to lead to financial vulnerability." Petitioner asserts that the evidence  
8 presented regarding Respondent's hospitalizations and other mental health episodes  
9 clearly and convincingly establishes such medical inability, although intermittent,  
10 and justifies the district court's appointment of a limited conservator. For the reasons  
11 set forth, we disagree with Petitioner and conclude that substantial evidence does not  
12 exist to support the district court's finding that Respondent cannot manage her  
13 financial affairs.

14 {13} The most direct evidentiary support for the district court's appointment of a  
15 limited conservator is the unanimous recommendations and associated testimony of  
16 the three Court-Appointed Professionals that one was necessary. However, neither  
17 the reports nor the testimony of any of these three witnesses contains evidence that  
18 Respondent is unable to "manage [her] estate or financial affairs," as required by  
19 statute. *See* § 45-5-407(H) ("If it is determined that the person to be protected  
20 possesses the capacity to manage the person's estate or financial affairs, or both, the

1 court shall dismiss the petition.”). For instance, the qualified healthcare  
2 professional’s statement that Respondent has struggled with financial decision-  
3 making “to the point that her long-term financial stability and security is precarious”  
4 is supported only by observations of Respondent’s behavior unrelated to finances.  
5 He asserted that Respondent’s “behavior has resulted in significant problems in  
6 effectively managing [the property held in trust for Respondent]” and pointed to  
7 instances in which Respondent verbally forgave rent for other tenants or  
8 “interfer[ed] with the relationship between tenants and the management company.”  
9 He further pointed to Respondent’s “behavioral outbursts” and alcohol abuse.

10 {14} While Respondent’s behavior in this regard, as well as the qualified healthcare  
11 professional’s conclusion that she suffers from mildly impaired cognitive  
12 functioning, may indirectly result in some adverse financial consequences for  
13 Respondent, such is not evidence that Respondent is unable to manage her estate or  
14 finances. *See* § 45-5-101(H) (defining “inability to manage [one’s] estate or financial  
15 affairs” as “gross mismanagement, as evidenced by recent behavior, of one’s income  
16 and resources or medical inability to manage one’s income and resources”). The  
17 qualified healthcare professional’s report and testimony do not contain allegations  
18 or factual circumstances showing that Respondent has mismanaged her finances but  
19 simply advances that conclusion based on her other behaviors. Any conclusion that  
20 Respondent’s behavior *may* have a deleterious effect on Respondent’s long-term

1 financial well-being is speculative and insufficient to constitute clear and convincing  
2 evidence of “medical inability” that may lead to “financial vulnerability.” *See id.*  
3 {15} The court visitor’s and the GAL’s reports and testimony similarly lack  
4 evidence supporting their conclusions that a limited conservatorship is necessary to  
5 protect Respondent’s financial affairs. At the hearing, both expressed concern about  
6 Respondent’s mental health episodes, pointing to concerns related to the quantity of  
7 cash Respondent once stored in her apartment—even if now moved to a bank  
8 account—her past hospitalizations for mental health reasons, and Respondent’s  
9 anticipated inheritance of significant amounts of money if trust assets or other  
10 properties are sold to continue supporting her. The GAL specifically noted that the  
11 apartment complex in which Respondent lives and that is held in trust for her has  
12 presented significant maintenance costs and is “steadily . . . losing revenue.” The  
13 court visitor, in turn, stated that “if the apartment complex had to be sold . . . [and  
14 Respondent] is in a period where she’s lacking capacity, somebody would have to  
15 have authority to, for example, execute a lease.” Both the court visitor and the GAL  
16 opined that during Respondent’s mental health episodes, she cannot manage such  
17 financial affairs and, in those instances, requires the assistance of a conservator.

18 {16} As with the qualified healthcare professional’s concerns, these too are  
19 conclusory and do not indicate that Respondent is, in fact, unable to manage her  
20 finances. While the record establishes that Respondent had been hospitalized and

1 suffered from mental health issues, neither the court visitor nor the GAL pointed to  
2 any instance in which such circumstances have had a negative effect on  
3 Respondent's financial estate or affairs. *But see* § 45-5-407(I)(2) (stating that  
4 appointment of a conservator requires "clear and convincing evidence that . . . the  
5 conservatorship is necessary as a means of effectively managing the estate or  
6 financial affairs, or both, of the person to be protected"). It is undisputed that  
7 Respondent, despite her history with mental illness and her hospitalizations related  
8 to that illness, has maintained a remarkably high credit score, has never gone into  
9 significant debt, if any, and has not let bills go unpaid. The court visitor's and the  
10 GAL's concerns that Respondent may be unable, due to a mental health crisis, to  
11 manage large sums of money if a family property is sold or to execute a new lease  
12 if necessary are also speculative. As we have already indicated, while Respondent  
13 has been hospitalized in the recent past, her financial estate has remained in good  
14 standing. Absent evidence that Respondent cannot manage her financial affairs there  
15 is little basis, if any, for us to conclude that a conservator is necessary. *See* § 45-5-  
16 407(I)(1)-(2) (requiring, for appointment of a conservator, that clear and convincing  
17 evidence show that the person to be protected is both incapacitated and that a  
18 conservatorship is "necessary as a means of effectively managing [their] estate or  
19 financial affairs"); *see also* § 45-5-101(F) (defining an "incapacitated person," in

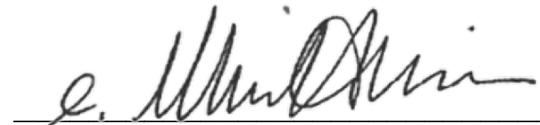
1 part, as one who “by reason of mental illness[ or] mental deficiency . . . is unable to  
2 manage the person’s estate or financial affairs”).

3 {17} We further note that, even if substantial evidence did exist to establish that  
4 Respondent was at times incapacitated within the meaning of Section 45-5-101(F)  
5 and (H) during periods when she was hospitalized, there was no showing that other,  
6 less-restrictive forms of intervention were inadequate to protect Respondent’s  
7 financial resources. *See* § 45-5-407(I)(4) (requiring that “the conservatorship is  
8 appropriate as the least restrictive form of intervention consistent with the  
9 preservation of the property of the person to be protected”). Respondent points out  
10 that the conservator was appointed to manage only those components of  
11 Respondent’s estate outside of the trust established for her. That includes  
12 Respondent’s social security income, her child support payments, and her cash assets  
13 of approximately \$30,000, which is now stored in a joint bank account. As  
14 Respondent indicates, some alternatives to protecting these assets are various  
15 advance directives and a joint bank account designation. Despite the district court’s  
16 assertions to the contrary, the record is absent any evidence that such measures,  
17 among others, are insufficient to adequately protect Respondent’s property. For all  
18 of the above reasons, we conclude that substantial evidence does not exist to support  
19 the district court’s appointment of a limited conservator for Respondent.

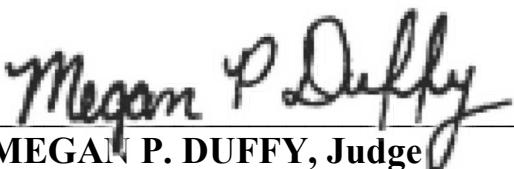
1 **CONCLUSION**

2 {18} We reverse the district court's order appointing a limited conservatorship.

3 {19} **IT IS SO ORDERED.**

4   
5 **J. MILES HANISEE, Judge**

6 **WE CONCUR:**

7   
8 **MEGAN P. DUFFY, Judge**

9   
10 **SHAMMARA H. HENDERSON, Judge**