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The logo for Pemberton Law features a stylized red flame icon above the word "PEMBERTON" in a large, green, serif font. Below "PEMBERTON" is the word "LAW" in a smaller, red, serif font. The logo is centered on a white background with a faint, light gray circular graphic behind it. The entire logo is framed by a dark green border.

Guardianship and Conservatorship in Minnesota and North Dakota

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This presentation is meant to give you some basic information and nothing in this presentation is intended to be relied upon as legal advice. If you have any questions, please contact your attorney or Pemberton Law.

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Agenda

- Overview
- Terminology
- Comparison of Minnesota and North Dakota Law
 - Competency / capacity
 - Guardianship
 - Conservatorship



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Guardianships & Conservatorships

WHAT ARE THEY

- Often spoken about together, **but** they are *different*
 - Some individuals only need a conservator
 - Some individuals only need a guardian
 - Others need both
- **Guardianships:** help with day-to-day activities and choices
- **Conservatorships:** help with finances and protection of property



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Guardianship vs. Conservatorship

Guardianship

- Protection of the *person*
- Ability to make decisions regarding care and custody of the person
- The ability to choose:
 - Medical facility
 - Doctor
 - Housing
 - Programs and benefits for care of the person

Conservatorship

- Protection of the *estate*
- Ability to manage property
- Ability to manage funds
- The ability to:
 - Pay bills
 - Invest funds
 - Approve/disapprove contracts
 - Make business decisions



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Terminology

- **Ward:** individual who needs help by way of guardianship
- **Guardian:** individual who looks after the personal needs of the ward
- **Protected Person:** individual who needs help by way of conservatorship
- **Conservator:** individual who looks after the financial affairs of the protected person



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- Courts look to whether an individual has competency
 - Consider various factors in making that determination
- Lack of competency may result in guardianship or conservatorship
 - However, if the court is not satisfied that a conservatorship or guardianship is necessary, they will NOT grant the petition

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Is there Competence/Capacity?

- Ways to lack competence
 - Minor – under the age of 18
 - Incapacitation
- Incapacitated person
 - An individual who is impaired by one or multiple of the following reasons:
 - Mental illness, mental deficiency, physical illness or disability, chemical dependency
 - Either of the impairments to the extent that individual lacks capacity to make or communicate **responsible personal decisions**



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Competency Compared

- | MINNESOTA | NORTH DAKOTA |
|---|---|
| <ul style="list-style-type: none">• Cannot make or communicate responsible personal decisions<ul style="list-style-type: none">○ Inability to meet personal needs for:<ul style="list-style-type: none">• Medical care• Nutrition• Clothing• Shelter• Safety | <ul style="list-style-type: none">• Cannot make or communicate responsible decisions concerning:<ul style="list-style-type: none">– Residence– Education– Medical treatment– Legal affairs– Vocation– Finances– OR incapacity endangers their health or safety |



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Guardianship

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When Does A Person Need A Guardian?

- Unable to make responsible decisions about their own care; and
- Individual has behavioral deficits that make it impossible to meet their own needs for medical care, nutrition, clothing, shelter and/or safety; and
- **There is no less restrictive way to help the person**



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What the Court Must Find to Appoint A Guardian

1. Inability to make decisions: this could be cognitive
 - ❖ Dementia, Alzheimer's disease, developmental disability, traumatic brain injury
2. Behavioral deficits
 - ❖ Inability to communicate; mental health issues; inability to complete activities of daily living
 (note: 1 & 2 above get to **competency**)
3. No less restrictive means:
 - ❖ Examples of less restrictive means:
 - Assistive services; personal care attendant, walkers, wheelchairs
 - Health Care Directives
 - Power of Attorney



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Court Proceeding

- The court shall set a hearing after a petition for appointment of a guardianship has been filed
- In both MN and ND, the respondent or the proposed ward shall have the right to be represented by an attorney
- In ND, the court also appoints:
 - Guardian ad litem (attorney)
 - Expert examiner
 - Visitor
 - Interviews the proposed guardian and proposed ward
 - In Minnesota, the court may appoint a visitor



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Who Can Be A Guardian?

Both states adhere to a hierarchical, priority scheme when contemplating who is guardian



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MINNESOTA	NORTH DAKOTA
<ul style="list-style-type: none"> • Existing guardian (other than temporary or emergency guardian), currently acting for proposed ward in MN or elsewhere; • Health care agent appointed by proposed ward • Spouse of proposed ward OR someone nominated by will • Adult child of proposed ward • A parent of the proposed ward • Adult whom proposed ward has resided with for more than 6 months before filing the petition • Adult related to proposed ward by blood, adoption, or marriage • Any other adult or professional guardian 	<ul style="list-style-type: none"> • Proposed ward's most recent nomination in a durable power of attorney • If not disqualified, priority in this order: <ul style="list-style-type: none"> ○ Person nominated by the proposed ward (prior to being determined to be incapacitated) ○ Spouse of incapacitated ○ Adult child of incapacitated ○ Parent of incapacitated ○ Any relative the incapacitated person has resided with for more than 6 months before filing the petition ○ Any relative or friend who maintained significant contacts with the incapacitated person ○ Non-profit corporation established to provide guardianship services (no direct care) ○ Government agency ○ Person nominated by the person who is caring or paying benefits for incapacitated person

NOTE: The court may decline to appoint a person with priority if it is in the proposed ward's best interest



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Powers and Duties of Guardian

The court must grant to the guardian **only those powers necessary** for the needs of the ward

- Determine the ward's home
- Provide for the ward's care, comfort, and maintenance
 - Food, clothing, shelter, health care, social and recreational requirements, training, education, habilitation or rehabilitation
- Take care of ward's personal belongings and effects
- Give consent to administer or withhold medical or other professional care
- Approve or withhold approval of any contract
- Supervise the ward
- Apply for assistance for the ward



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Guardian Responsibilities

- Submit annual reports/accounting regarding:
 - Ward's condition
 - Mental, physical, social condition
 - Address of all residences during the reporting period
 - ND: change of residence and reason for change
 - Medical services received by the ward
 - Expenditure and income affecting the ward
 - **MN**: restrictions placed on the ward's right to communication and visitation



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Responsibilities Cont.

- Also, a guardian must report to the court if the guardian:
 - Is removed as guardian in any other proceeding
 - Has a professional license revoke or suspended
 - Is convicted of a crime
 - Fraud, misrepresentation, material omission theft etc.
 - Files for bankruptcy
 - Has a protective order issued against the guardian
 - Has a judgment entered against the guardian



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Termination of Guardianship

- Death of the ward or guardian
- The ward is no longer incapacitated
- Inappropriate use of the ward's funds/property
- Failure to provide adequate care for the ward
- Failure to make accurate or timely reports to the court
- If it is in the best interest of the ward and the ward



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Conservatorship

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When Does A Person Need A Conservator?

- **Inability to manage property, affairs, or business**
 - Due to mental illness, mental deficiency, physical illness or disability, chronic use of drugs, or chronic intoxication
 - Or simply an inability to receive and evaluate information; and
- **Inability to properly manage the estate**
 - Does not understand process or importance of paying bills
 - Giving money away
 - Consistently falling for “scams”
- **There is no less restrictive way to help the person**
 - Power of Attorney
 - Joint ownership on accounts
 - Assistive Technology

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What the Court Must Find to Appoint A Conservator

1. There is clear and convincing evidence the person cannot manage his or her estate due to impairment
2. The person has property that will be wasted or dissipated without a conservator
3. There are no less restrictive interventions

These requirements are similar in both MN and ND



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Court Proceeding

- In both Minnesota and North Dakota, the protected person has the right to an attorney
- Minnesota
 - Court may appoint a visitor
- North Dakota
 - Guardian ad litem may be appointed
 - Expert examiner *shall* be appointed



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Who Can Be A Conservator

- A conservator appointed or recognized by another jurisdiction
- A person nominated by the protected person in a power of attorney
- A spouse
- An adult child
- A parent
- An adult related by blood, marriage, or adoption (MN)
- Any relative of the protected person whom the protected person has resided with for more than 6 months before the petition was filed (ND)
- Any other adult or professional conservator



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Powers and Duties of A Conservator

The court must grant to the conservator **only those powers necessary** for the needs of the protected person

- Use the protected person's resources to pay for the protected person's care and needs
- Pay all lawful debts
- Possess and manage the protected person's estate
- Apply for assistance, services, or benefits on behalf of and for the protected person
- Initiate legal proceedings on behalf of the protected person
- Exchange or sell interests in real property
- Approve or withhold approval of any contract
- **ND:** employ person (attorneys, auditors, investment advisers, or agents etc.) to advise or assist in the conservator's administrative duties
- **ND:** enter into a lease or arrangement for exploration and removal of mineral or other natural resources (or enter into pooling agreement)



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Responsibilities of Conservator

- Mirrors those responsibilities of a guardian
- Must submit an inventory of the estate within **60 days** of appointment in **MN**. In **ND** the inventory must be completed within **90 days**.



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Termination of Conservatorship

- Death of protected person
- Emancipation of protected person
- Incapacity is resolved
- Failure to make accurate or timely reports to the court
- Failure to provide adequate care for the protected person
- Inappropriate use of the protected person's funds or property



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Liability of Conservator or Guardian & Rights of Protected Person or Ward



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Conservator or Guardian Personal Liability

Conservator

- Not personally liable for a contract properly entered into BUT must reveal the conservator relationship
- **Is** personally liable for obligations arising from control of property of the estate if personally at fault
 - Mismanagement
 - Breach of fiduciary duties

Guardian

- Guardian is not liable to a third person for the acts of the ward solely because of the relationship



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Reasonable Compensation

A conservator or guardian (along with attorney, expert examiner etc.) is entitled to reasonable compensation from the estate for services provided and expenses



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Rights Retained By the Ward or Protected Person

- So long as these rights are not restricted by court order – the rights of the ward or protected person must be enforced by the court
 - Treatment with dignity and respect
 - Consideration for stated personal desires, medical preferences, religious beliefs
 - Receive timely and appropriate health and medical care (which does not violate conscientious religious or moral beliefs)
 - Personal privacy
 - **Marry** and procreate
 - Petition the court to terminate or modify the guardianship or conservatorship
 - Be represented by an attorney through any proceeding
 - **Vote**
 - Execute a health care directive
 - **ND**: obtain or retain motor vehicle operator's license



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Consult With A Legal Professional

- Consult with a legal professional to determine if a guardianship, conservatorship, neither or both are best for your circumstances
- **Restrictive.** Guardianships and conservatorships are restrictive, and **should only be used as last resort**
 - Consult to determine possible alternatives



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Guardianships and Conservatorships

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