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Family Law - New Mexico Expands the Power of a Guardian to Include the Right to Initiate and Maintain a Divorce Action on Behalf of the Guardian's Incompetent Ward: Nelson v. Nelson

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FAMILY LAW—New Mexico Expands the Power of a Guardian to Include the Right to Initiate and Maintain a Divorce Action on Behalf of the Guardian's Incompetent Ward: *Nelson v. Nelson*

I. INTRODUCTION

In *Nelson v. Nelson*,¹ a case of first impression, the New Mexico Court of Appeals held that the guardian² of a legally incompetent³ spouse may initiate divorce proceedings on behalf of the incompetent spouse.⁴ The *Nelson* decision considerably enlarged the power of guardians by liberally construing the New Mexico guardianship statute.⁵ New Mexico's decision permitting guardians to bring divorce suits for their mentally incompetent wards⁶ is a minority view, but one that has been increasingly adopted by other jurisdictions.⁷ The *Nelson* decision puts New Mexico at the forefront of a minority of states that view the rights of incapacitated people as equally important as those of other citizens. This Note provides an overview of how other jurisdictions have decided this issue, examines the rationale of *Nelson*, and explores the ramifications of the decision.

II. STATEMENT OF THE CASE

Mr. Claude L. Nelson ("Husband") and Mrs. Irva T. Nelson ("Wife") were married in 1962.⁸ Wife subsequently developed Alzheimer's Disease and the Roosevelt County District Court declared her mentally incompetent in January 1992.⁹ The court then appointed Mr. Bobbie K. Sanders, Wife's son from a previous marriage, guardian of Wife and conservator

1. 118 N.M. 17, 878 P.2d 335 (Ct. App. 1994).

2. A guardian is "a person who has qualified to provide for the care, custody or control of . . . a minor or incapacitated person pursuant to testamentary or court appointment . . ." See N.M. STAT. ANN. § 45-1-201(18) (Repl. Pamp. 1993). A guardian is different from a "guardian ad litem," which is a person the district court appoints "to represent and protect the interests of a minor or an incapacitated person in connection with litigation or any other court proceeding" See N.M. STAT. ANN. § 45-1-201(19) (Repl. Pamp. 1993).

3. An incapacitated person is one "who demonstrates over time either partial or complete functional impairment by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication or other cause . . . to the extent that he is unable to manage his personal affairs . . . his estate or financial affairs or both . . ." N.M. STAT. ANN. § 45-5-101(F) (Repl. Pamp. 1993). Neither *Nelson* nor the legislature distinguish incompetent from incapacitated. *Nelson*, 118 N.M. at 18, 878 P.2d at 336; N.M. STAT. ANN. § 45-5-101 (Repl. Pamp. 1993). For the purpose of this Note, the two terms shall have the same meaning.

4. *Nelson*, 118 N.M. at 22, 878 P.2d at 340.

5. N.M. STAT. ANN. § 45-5-312 (Repl. Pamp. 1993).

6. A ward is "a person for whom a guardian has been appointed . . ." N.M. STAT. ANN. § 45-5-101(U) (Repl. Pamp. 1993).

7. *Nelson*, 118 N.M. at 21, 878 P.2d at 339.

8. *Id.* at 18, 878 P.2d at 336.

9. Brief for Appellant at 3, *Nelson v. Nelson*, 118 N.M. 17, 878 P.2d 335 (Ct. App. 1994) (No. 14,873) [hereinafter "Appellant's Brief"]. See also N.M. STAT. ANN. § 45-5-101(F) (Repl. Pamp. 1993).

of her property.¹⁰ In January 1993, Mr. Sanders, acting on behalf of Wife, filed for divorce from Husband alleging irreconcilable differences.¹¹ Husband contested the divorce, testifying that Mr. Sanders was only seeking the divorce to "hurt" Husband and to prevent Husband from inheriting from Wife. Husband affirmatively alleged that the divorce petition was insufficient because Wife had not verified it herself. Based on this verification issue, the trial court dismissed the action with prejudice on June 7, 1993. Despite dismissing the petition, however, the trial court allowed Mr. Sanders to make a factual record in an evidentiary hearing.¹²

During the evidentiary hearing Mr. Sanders asserted that a divorce was in the best interest of Wife because Husband had physically neglected her.¹³ Mr. Sanders testified that he received a phone call from Mrs. Lu Knox, Wife's neighbor, who told him that Wife appeared to be deteriorating in health and that Husband did not adequately supervise Wife.¹⁴ In response to the call, Mr. Sanders traveled to New Mexico to check on his mother.¹⁵ Mr. Sanders testified that when he arrived at his mother's home, he found her "weighing approximately sixty-nine pounds, un-

10. *Nelson*, 118 N.M. at 21, 878 P.2d at 336. The court appointed Mr. Sanders as guardian over the objection and statutory priority of Husband under N.M. STAT. ANN. §§ 45-5-311(B)(1) & (2) (Repl. Pamp. 1993). Section 45-5-311(B) reads as follows:

Persons who are not disqualified have priority for appointment as guardian in the following order:

- (1) a guardian or other like fiduciary appointed by the appropriate court of any other jurisdiction;
- (2) any person previously nominated to serve as guardian in a writing signed by the incapacitated person prior to his incapacity;
- (3) the spouse of the incapacitated person;
- (4) an adult child of the incapacitated person;
- (5) a parent of the incapacitated person, including a person nominated by will or other writing signed by a deceased parent;
- (6) any relative of the incapacitated person with whom he has resided for more than six months prior to the filing of the petition;
- (7) a person nominated by the person who is caring for the incapacitated person or paying benefits to him; and
- (8) any other person.

N.M. STAT. ANN. § 45-5-311(B) (Repl. Pamp. 1993).

11. The procedure of the lower court is set out in *Nelson*, 118 N.M. at 19, 878 P.2d at 337. Mr. Sanders verified the original petition for divorce because Wife, as a legally incompetent person, could not verify the legal document in her own right. *Id.*

12. *Id.*

13. *Id.* Mr. Sanders moved to amend the petition for dissolution of marriage to allege cruel and inhumane treatment as well as irreconcilable differences, claiming that Husband was abusive to Wife during the marriage. *Id.* Guardian further stated that prior to the onset of Alzheimer's Disease, Wife communicated to Guardian and other family members that her marriage to Husband was a "mistake" but that she did not know what to do about it. *Id.*

14. *Id.* Mr. and Mrs. Harold Knox also testified at the evidentiary hearing. The Knoxes stated that Wife admitted to being physically abused by Husband and that Husband left Wife alone for long periods of time during the day. *Id.* Mr. Knox further testified that Husband had sold items belonging to the couple. *Id.* See Appellant's Brief, *supra* note 9, at 4. Mr. Sanders asserted at the hearing that Wife would not want the marital assets to be used solely by Husband, and that she "would want to contribute to her own care from her share of the estate." *Nelson*, 118 N.M. at 19, 878 P.2d at 337.

15. *Nelson*, 118 N.M. at 19, 878 P.2d at 337.

clothed, sleeping in an unmade bed stained with urine and fecal matter, and living in a cluttered, unkept house.¹⁶

Mr. Sanders stated that a divorce would prevent further harassment of Wife and allow her to be enrolled in federal assistance programs to cover the cost of her future care. Furthermore, Mr. Sanders testified that a divorce would protect the marital assets from Husband's improper use. Husband denied that he abused or neglected Wife. Husband maintained that Mr. Sanders prevented him from seeing Wife and that Mr. Sanders had kidnapped her from their home and taken her to Dayton, Ohio.¹⁷

In June 1993, the District Court entered its Final Order dismissing with prejudice the divorce petition because it was not verified by Wife.¹⁸ Mr. Sanders appealed.¹⁹ The Court of Appeals reversed and remanded with instructions to reinstate the petition for divorce and conduct proceedings to determine whether to grant the divorce.²⁰

III. HISTORICAL BACKGROUND

Because New Mexico had never addressed whether a guardian can initiate and maintain a divorce action on behalf of his or her incompetent ward, the *Nelson* court looked to other jurisdictions for guidance in determining this issue.²¹ The jurisdictions which have ruled on this issue have established two basic rules.

A. *The Majority Rule*

The majority of jurisdictions hold that, without specific statutory authority, a guardian cannot initiate or maintain a divorce on behalf of a mentally incompetent spouse.²² The controlling rationale for this view is that a divorce action is so personal and volitional in nature that a party outside the marriage, even a legal guardian, cannot possibly make such a private decision.²³ Personal consent of a spouse is the only way to dissolve the very intimate relationship of a marriage.²⁴ When the ward of a guardian is mentally incompetent and incapable of making such a

16. *Id.* Mr. Sanders further testified that Husband had not contributed any financial assistance for Wife's care. *Id.*

17. *Id.* After the court appointed Mr. Sanders guardian, he moved Wife to a nursing home in Dayton, Ohio. *Id.* at 18, 878 P.2d at 336.

18. Appellant's Brief, *supra* note 9, at 2.

19. *Nelson*, 118 N.M. at 16, 878 P.2d at 336.

20. *Id.* at 23, 878 P.2d at 341.

21. *See id.* at 19, 878 P.2d at 337.

22. *See, e.g., In re Drews*, 503 N.E.2d 339, 341 (Ill. 1986) (holding that in the absence of statutory authority a guardian cannot maintain an action for divorce on behalf of their ward); *Indiana ex rel. Quear v. Madison Circuit Court*, 99 N.E.2d 254, 256 (Ind. 1951) (stating that without statutory authority, a trial court has no jurisdiction to entertain a divorce action maintained by a guardian on behalf of her ward).

23. *See, e.g., Murry v. Murry*, 426 S.E.2d 781, 784 (S.C. 1993) (noting that the underlying theory of the majority rule is that a divorce action is so strictly personal that it cannot be maintained at the pleasure of a guardian).

24. *See id.*

personal decision, personal consent cannot be given.²⁵ Therefore, a guardian cannot initiate and maintain a divorce action for his or her incompetent ward.

Another reason underlying the majority rule is that there are no marital offenses which, in and of themselves, end the marital relation.²⁶ The majority rule does not want to destroy the effect of condonation within marriage, which preserves to the injured spouse the right to forgive, excuse, or pardon.²⁷ Although a third party outside the marriage would file for a divorce if treated a certain way, there is no way of knowing that the incompetent ward would do the same—even if they were competent.²⁸ The incompetent ward may elect to stay in the marriage for personal, religious, moral, or economic reasons.²⁹

B. *The Minority Rule*

Only a minority of states have allowed a legal guardian the right to initiate or maintain a divorce action on behalf of the incompetent ward.³⁰ The holdings from these states vary. For example, some jurisdictions allow a guardian to petition the court that appointed them for an order that will grant them the authority to bring an action for divorce on behalf of the incompetent ward.³¹ Other states prevent divorce actions initiated solely by the guardian but allow such actions when the ward is able to understand the nature of the action and communicates a desire to dissolve the marriage.³² Several states have statutes that specifically allow guardians the right to sue for divorce on behalf of their incompetent

25. See *Higginbotham v. Higginbotham*, 146 S.W.2d 856, 857 (Mo. Ct. App. 1940) (stating that the affidavit which is required for a divorce must be made by the plaintiff and no one else can make it for her; consequently, a spouse of unsound mind is incapable of making the required affidavit and, therefore, cannot file a petition for a divorce).

26. See *In re Jennings*, 453 A.2d 572 (N.J. Super Ct. Ch. Div. 1981) (ruling that allegations of marital infidelity against the incompetent spouse were not enough to grant the mother of the incompetent spouse guardianship for the purpose of filing for divorce).

27. See *Scott v. Scott*, 45 So.2d 878, 879 (Fla. 1950).

28. See *Jennings*, 453 A.2d at 574.

29. *Nelson*, 118 N.M. at 20, 878 P.2d at 338 (citing J.A. Connelly, Annotation, *Power of Incompetent Spouse's Guardian, Committee, or Next Friend To Sue For Granting or Vacation of Divorce or Annulment of Marriage, or To Make a Compromise or Settlement in Such Suit*, 6 A.L.R.3d 681, 683 (1966 & Supp. 1993)).

30. See, e.g., *In re Ruvalcaba*, 850 P.2d 674 (Ariz. Ct. App. 1993) (holding that a court-appointed guardian has the legal authority to petition for the dissolution of marriage on behalf of an incompetent adult ward); *Wahlenmaier v. Wahlenmaier*, 750 S.W.2d 837 (Tex. Ct. App. 1988) (ruling that guardian can file for a divorce on behalf of their incompetent ward).

31. See *In re Gannon*, 702 P.2d 465, 467 (Wash. 1985). The *Gannon* court held that if the guardian of an incompetent ward believes that a divorce is in the best interests of her ward, she may specially petition the appointing court for the authority to initiate a divorce action. *Id.* *Gannon* noted that once the guardian petitions the court, a hearing must be held to determine the best interests of the ward. *Id.* The court must then weigh the interests of the ward against the necessities and interests of the competent spouse before granting the guardian authority to initiate a divorce action. *Id.*

32. See e.g., *In re Higgason*, 516 P.2d 289 (Cal. 1973) (finding that if it is established that the incompetent spouse is capable of exercising judgment, and the incompetent spouse expresses a wish that the marriage be dissolved, the guardian may bring a divorce action on behalf of the incompetent spouse).

ward.³³ Nonetheless, most courts in minority-rule states that do not have this statutory authority interpret existing statutes authorizing guardians to initiate and defend civil claims in the interests of their wards to include the authority to bring an action for divorce on behalf of their mentally incompetent ward.³⁴ This is the avenue that the New Mexico Court of Appeals chose to follow in *Nelson*.³⁵

IV. RATIONALE AND IMPLICATIONS OF THE *NELSON* DECISION

A. *Rationale of the Court*

Nelson's interpretation of the New Mexico guardianship statute allows a guardian the right to initiate and maintain a divorce proceeding on behalf of the incompetent ward.³⁶ The *Nelson* court's statutory inter-

33. See, e.g., *Cohen v. Carlisle*, 37 N.E.2d 260, 262 (Mass. 1941). Libel for divorce shall be signed by guardian of ward or by a person admitted by the court to prosecute the libel as his next friend. See MASS. ANN. LAWS ch. 208, § 7 (Law. Co-op. 1933). When a party to a marriage has become incompetent to such an extent that it is necessary for a guardian to be appointed for such party, and the other party to the marital contract commits any act that constitutes ground for divorce, the guardian shall have the right to maintain a divorce action on behalf of their incompetent ward. See MISS. CODE ANN. § 93-5-15 (1972).

34. See *Knight v. Radomski*, 414 A.2d 1211 (Me. 1980) (holding that guardians have standing to sue for divorce that is inherent in their responsibility for protecting the rights of the ward).

35. *Nelson*, 118 N.M. at 22, 878 P.2d at 340.

36. *Id.* The relevant section of the New Mexico guardianship statute reads as follows: In particular and without qualifying . . . a guardian or his replacement has the following powers and duties, except as modified by order of the court:

(1) to the extent that is consistent with the terms of any order by a court of competent jurisdiction relating to detention or commitment of the incapacitated person, a guardian is entitled to custody of the incapacitated person and may establish the incapacitated person's place of abode within or without New Mexico;

(2) if entitled to custody of the incapacitated person, [he] shall make provision for the care, comfort and maintenance of the incapacitated person and, whenever appropriate, arrange for his training and education. He shall take reasonable care of the incapacitated person's clothing, furniture, vehicles and other personal effects and commence conservatorship proceedings if other property of the incapacitated person is in need of protection;

(3) a guardian may consent or withhold consent that may be necessary to enable the incapacitated person to receive or refuse medical or other professional care, counsel, treatment or service. That decision shall be made in accordance with the values of the incapacitated person, if known, or the best interests of the incapacitated person if the values are not known;

(4) if no conservator for the estate of the incapacitated person has been appointed, the guardian may institute proceedings to compel any person under a duty to support the incapacitated person or to pay sums for the welfare of the incapacitated person;

(5) if the incapacitated person is certified as terminally ill or in an irreversible coma under the procedures described in Section 24-7-5 NMSA 1978, a guardian may consent to the physician removing or withholding maintenance medical treatment, as defined in Section 24-7-2 NMSA 1978, if the guardian concludes that the incapacitated person, if competent, would have chosen the termination of that treatment;

(6) the guardian shall exercise his supervisory powers over the incapacitated person in a manner which is least restrictive of his personal freedom and consistent with the need for supervision.

N.M. STAT. ANN. § 45-5-312(B) (Repl. Pamph. 1993).

pretation concentrated on the statute's intended scope by examining the general powers and duties the statute gives to the guardian.

The court found that, "[w]hile not expressly granting authority to the guardian to initiate a divorce action on behalf of a ward, New Mexico's guardianship statutes grant guardians exceedingly broad powers."³⁷ The court stated that "[t]he legislature grants guardians the authority to interfere in the most intimately personal concerns of an individual's life."³⁸ The *Nelson* court then noted some of the specific powers and duties a guardian has under the New Mexico guardianship statutes.³⁹ For example, the statute states that guardians shall provide for the care, maintenance, and education of their incompetent wards.⁴⁰ Also, guardians have the power to give or withhold consent for medical treatment relating to their incompetent wards.⁴¹ Moreover, if the incapacitated person is terminally ill or in an irreversible coma, guardians have the power to consent to the physician removing or withholding maintenance of medical treatment.⁴²

The *Nelson* opinion further noted that the powers the statute gives to a guardian should be read as illustrative of the nature of a guardian's power.⁴³ Therefore, the statute is a non-exhaustive list of a guardian's duties and rights; according to the court the statute does not limit the scope of the guardians responsibilities and actions to the language of the statute.⁴⁴ Therefore, *Nelson* held that because of the broad legislative intent regarding the powers of guardians in the guardianship statute, combined with the fact that New Mexico is a "no-fault divorce"⁴⁵ state, the guardian of an incompetent ward undeniably has a right to file and maintain an action for divorce on behalf of the incompetent ward.⁴⁶

The primary and perhaps only limitation on the guardian's statutory powers is, if possible, to recognize the primacy of the ward's values.⁴⁷ Therefore, *Nelson* concluded that the ward's values should be "primary.

37. *Nelson*, 118 N.M. at 21, 878 P.2d at 339. In fact, the court noted that a guardian in New Mexico has the "same rights, powers, and duties respecting the ward as a parent has respecting a child." *Id.*

38. *Id.* at 22, 878 P.2d at 340.

39. *Id.*

40. See N.M. STAT. ANN. § 45-5-312(B)(2) (Repl. Pamp. 1993).

41. See N.M. STAT. ANN. § 45-5-312(B)(3) (Repl. Pamp. 1993).

42. See N.M. STAT. ANN. § 45-5-312(B)(5) (Repl. Pamp. 1993).

43. *Nelson*, 118 N.M. at 22, 878 P.2d at 340.

44. See *id.*

45. See *Garner v. Garner*, 85 N.M. 324, 326-27, 512 P.2d 84, 86-87 (N.M. 1973). In *Garner* the New Mexico Supreme Court laid the foundation for no-fault divorce in this state and further noted that the tendency is toward liberalizing, not narrowing, divorce laws. *Id.* at 327, 512 P.2d at 87. A no-fault divorce in New Mexico does not lay blame on either party as a reason for ending a marriage, but rather, takes into consideration that if there are irreconcilable differences in the marriage, preventing the divorce would only preserve an already bad situation. *Id.*

46. See *Nelson*, 118 N.M. at 22, 878 P.2d at 340. *Nelson* also took into consideration that the appointing court felt the Husband was inappropriate to become the Wife's guardian. See *supra* note 10. The court further noted that before becoming incompetent, Wife had expressed a desire to end the marriage. *Nelson*, 118 N.M. at 22, 878 P.2d at 340. See also *In re Ruvalcaba*, 850 P.2d 674, 682-83 (Ariz. Ct. App. 1993) (ruling that the guardian may testify about conversations regarding desires expressed by the ward prior to becoming incompetent).

47. *Nelson*, 118 N.M. at 22, 878 P.2d at 340.

in determining whether the guardian should file for divorce."⁴⁸ *Nelson* stated that, "[w]hen the trial court is convinced by testimony of friends, family members, clergy, or other knowledgeable sources that the incompetent ward would have resisted divorce under any circumstances, perhaps due to religious or moral beliefs, those wishes are to be upheld."⁴⁹ The court then expressly noted its reversal of the trial court in this case and allowed the divorce petition to proceed.⁵⁰

B. Implications for the Future

Nelson's holding is a precedent that will help protect the rights and interests of an incompetent ward. Without *Nelson*, an incompetent spouse who is severely mistreated in his or her marriage would essentially have no alternative but to remain in the marriage.

However, the *Nelson* decision will deny a guardian a divorce on behalf of their incompetent ward if the ward's wishes can be definitely ascertained and the trial court is convinced that the incompetent ward would have resisted divorce under any circumstances.⁵¹ The *Nelson* court was "concerned that the wishes of an incompetent adult ward with regard to the permanence of marriage vows be respected."⁵²

It is possible that an incompetent spouse's religious or moral beliefs prohibit them from seeking a divorce regardless of the situation.⁵³ Under the *Nelson* reasoning, a guardian would be denied a divorce on behalf of his or her incompetent ward if the ward, under any circumstances, has values which adhere faithfully to the institution of marriage. Conceivably, an incompetent ward may be in a marriage that is abusive or even life threatening. His or her best interests may be better served by a divorce. However, under the *Nelson* rationale, the incompetent ward is bound to the marriage if it can be shown that he or she would not seek a divorce under any circumstances.⁵⁴

Nonetheless, if the ward's wishes cannot be definitely ascertained and upon judicial examination the court finds that the best interests of the ward are better served by a divorce, the divorce will be granted.⁵⁵ *Nelson* also opened the door for a guardian to testify about his or her ward's expressed desire to end the marriage prior to becoming incompetent.⁵⁶ One primary concern that courts must be aware of is any unscrupulous intentions from overbearing guardians who may have something to gain from the dissolution of the marriage. Potential inheritances or mere dislike for the competent spouse are some possible examples of why a

48. *Id.*

49. *Id.* at 23, 878 P.2d at 341.

50. *Id.*

51. *Id.*

52. *Nelson*, 118 N.M. at 22, 878 P.2d at 340.

53. See *id.* at 23, 878 P.2d at 341; see also *In re Jennings*, 453 A.2d 572, 574 (N.J. Super. Ct. Ch. Div. 1981).

54. *Id.*

55. *Nelson*, 118 N.M. at 22, 878 P.2d at 340.

56. *Id.* at 21, 878 P.2d at 339. See also *supra* note 46 and accompanying text.

guardian may want to initiate and maintain a divorce proceeding on behalf of an incompetent ward. Although the guardian has the burden of proving the necessary factual basis to support a divorce action,⁵⁷ there may be instances when a court cannot see the guardian's evil purpose. Thus, the courts must closely examine the circumstances surrounding each case to determine if there are any hidden intentions behind the guardian's desire to obtain a divorce for an incompetent ward.

The need to examine each case's unique and specific facts make it difficult to construct a specific test that would determine whether a divorce is in the best interests of the ward. Given this difficulty, it is not surprising that the *Nelson* court does not attempt to offer such a test or even offer factors to consider in determining when a ward's best interests will be better served by a divorce. Therefore, one judge may conclude that a divorce is in the best interests of the ward while, based on very similar facts, another judge could determine that a divorce action is not in the best interests of the ward. Consequently, the courts of New Mexico must try to maintain consistent rulings based on factually similar situations. Also, because each case is fact specific, the legislature should not pass a law that would specifically state when a divorce should be granted to a guardian that initiates a divorce action on behalf of an incompetent ward. The legislature does not have the capacity to determine exactly what a ward's best interests are in any given situation. This determination should be left for a full hearing in front of an impartial judge.

V. CONCLUSION

In *Nelson*, the New Mexico Court of Appeals turned against the majority of jurisdictions and held that the guardian of an incompetent ward may initiate and maintain a divorce proceeding on behalf of their incompetent ward. The court enlarged the powers of the guardian under the New Mexico guardianship statute to extend into the very private feelings of not only the ward but also the competent spouse. By expanding the power of the guardian, the court showed that it is willing to run the risk that guardians may initiate divorce actions on behalf of wards based on impure motives. The court seemed motivated by the best interests of incompetent citizens in making such a large expansion of the guardian's role in *Nelson*. The issue after *Nelson* will concern instances where a divorce is clearly in the best interest of the incompetent ward, but the ward's known values do not permit divorce under any circumstances. The court must then decide if it is willing to grant the guardian the divorce on behalf of their incompetent ward and interfere with the ward's spiritual or moral values that honor the permanence of their marriage vows.

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57. *Nelson*, 118 N.M. at 23, 878 P.2d at 340.