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SENATE BILL 185

45TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2001

INTRODUCED BY

Dede Feldman

AN ACT

RELATING TO MINORS; PROVIDING FOR KINSHIP GUARDIANSHIP OF  
MINORS; ENACTING THE KINSHIP GUARDIANSHIP ACT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. A new section of Chapter 45, Article 5 NMSA  
1978 is enacted to read:

" [NEW MATERIAL] SHORT TITLE. -- This act may be cited as  
the "Kinship Guardianship Act". "

Section 2. A new section of Chapter 45, Article 5 NMSA  
1978 is enacted to read:

" [NEW MATERIAL] POLICY--PURPOSE. --

A. It is the policy of the state that all children  
have the right to care, guidance and control by an adult  
caregiver. The interests of a child are best served by his  
parents. Nevertheless, there are circumstances that require

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1 substitution for or supplementation of parental care and  
2 supervision.

3 B. The purposes of the Kinship Guardianship Act  
4 are to:

5 (1) establish procedures to effect a legal  
6 relationship between a child and a kinship caregiver when the  
7 child is not residing with either parent; and

8 (2) provide a child with a stable and  
9 consistent relationship with a kinship caregiver that will  
10 enable the child to develop physically, mentally and  
11 emotionally to the maximum extent possible when the child's  
12 parents are not willing or able to do so. "

13 Section 3. A new section of Chapter 45, Article 5 NMSA  
14 1978 is enacted to read:

15 "[NEW MATERIAL] DEFINITIONS. -- As used in the Kinship  
16 Guardianship Act:

17 A. "caregiver" means an adult, who is not a parent  
18 of a child, with whom a child resides and who provides that  
19 child with the care, maintenance and supervision consistent  
20 with the duties and responsibilities of a parent of the child;

21 B. "child" means an individual who is a minor;

22 C. "kinship" means the relationship that exists  
23 between a child and a relative of the child, a godparent or a  
24 member of the child's tribe or clan;

25 D. "parent" means a biological or adoptive parent

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1 of a child; and

2 E. "relative" means an individual related to a  
3 child as a spouse, parent, stepparent, brother, sister,  
4 stepbrother, stepsister, half-brother, half-sister, uncle,  
5 aunt, niece, nephew, first cousin or any person denoted by the  
6 prefix "grand" or "great", or the spouse or former spouse of  
7 the persons specified. "

8 Section 4. A new section of Chapter 45, Article 5 NMSA  
9 1978 is enacted to read:

10 "[NEW MATERIAL] JURISDICTION AND VENUE. --

11 A. The district court has jurisdiction of  
12 proceedings pursuant to the Kinship Guardianship Act.

13 B. Proceedings pursuant to the Kinship  
14 Guardianship Act shall be in the district court of the county  
15 of the child's legal residence or the county where the child  
16 resides, if different from the county of legal residence. "

17 Section 5. A new section of Chapter 45, Article 5 NMSA  
18 1978 is enacted to read:

19 "[NEW MATERIAL] PETITION--WHO MAY FILE--CONTENTS. --

20 A. A petition seeking the appointment of a  
21 guardian pursuant to the Kinship Guardianship Act may be filed  
22 only by:

23 (1) a kinship caregiver;

24 (2) a caregiver, but with whom no kinship

25 exists, and who has been nominated in writing by a child who

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1 has reached his fourteenth birthday to be the guardian of the  
2 child; or

3 (3) a caregiver designated formally or  
4 informally in writing by a parent who retains parental rights.

5 B. A guardian may be appointed pursuant to the  
6 Kinship Guardianship Act only if:

7 (1) a parent of the child is living, retains  
8 parental rights and has consented in writing to the  
9 appointment of a guardian;

10 (2) one or both parents of the child is  
11 living, but all parental rights in regard to the child have  
12 been legally terminated or suspended;

13 (3) a parent having parental rights and legal  
14 custody of the child has permitted the child to reside with  
15 the petitioner for a period of three or more months  
16 continuously on the date the petition is filed and has failed,  
17 refused or is unable to provide the petitioner with legal  
18 authority to furnish care, maintenance and supervision for the  
19 child; or

20 (4) the child has resided with the petitioner  
21 for a period of three or more months continuously on the date  
22 the petition is filed and a parent having parental rights and  
23 legal custody of the child is unwilling or unable to provide  
24 adequate care, maintenance and supervision for the child; and

25 (5) in addition to one of the conditions

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1 described in Paragraphs (1) through (4) of this subsection:

2 (a) no guardian of the child is  
3 currently appointed pursuant to a provision of the Uniform  
4 Probate Code; and

5 (b) all requirements of the Kinship  
6 Guardianship Act have been complied with and it is in the best  
7 interests of the child for a guardian of the child to be  
8 appointed.

9 C. A petition seeking the appointment of a  
10 guardian shall be verified by the petitioner and allege the  
11 following with respect to the child:

12 (1) facts fulfilling the requirements of  
13 Subsection B of this section;

14 (2) the date and place of birth of the child,  
15 if known, and if not known, the reason for the lack of  
16 knowledge;

17 (3) the legal residence of the child and the  
18 place where he resides, if different from the legal residence;

19 (4) the marital status of the child;

20 (5) the name and address of the petitioner;

21 (6) the kinship, if any, between the  
22 petitioner and the child;

23 (7) the names and addresses of the parents of  
24 the child who retain parental rights;

25 (8) the names and addresses of persons having

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1 legal custody of the child;

2 (9) the existence of any matters pending  
3 involving the custody of the child;

4 (10) a statement that the petitioner agrees  
5 to accept the duties and responsibilities of guardianship;

6 (11) the existence of any matters pending  
7 pursuant to the provisions of Chapter 32A, Article 4 NMSA 1978  
8 and, if so, a statement that the children, youth and families  
9 department consents to the relief requested in the petition;

10 (12) whether the child is subject to  
11 provisions of the federal Indian Child Welfare Act of 1978  
12 and, if so:

13 (a) the tribal affiliations of the  
14 child's parents; and

15 (b) the specific actions taken by the  
16 petitioner to notify the parents' tribes and the results of  
17 the contacts, including the names, addresses, titles and  
18 telephone numbers of the persons contacted, and copies of  
19 correspondence with the tribe; and

20 (13) other facts in support of the  
21 guardianship sought. "

22 Section 6. A new section of Chapter 45, Article 5 NMSA  
23 1978 is enacted to read:

24 "[NEW MATERIAL] SERVICE OF PETITION--NOTICE. --

25 A. At the time of filing the petition, the

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1 petitioner shall obtain an order of the court setting a date  
2 for hearing on the petition, which date shall be no less than  
3 thirty days from the date of filing the petition. The  
4 petition and a notice of the hearing shall be served upon:

5 (1) the children, youth and families  
6 department if there is any pending matter relating to the  
7 child pursuant to the provisions of Chapter 32A, Article 4  
8 NMSA 1978;

9 (2) the child if he has reached his  
10 fourteenth birthday;

11 (3) the parents of the child who retain  
12 parental rights;

13 (4) a person having custody of the child or  
14 visitation rights pursuant to a court order; and

15 (5) if the child is an Indian child as  
16 defined in the federal Indian Child Welfare Act of 1978, the  
17 appropriate Indian tribe and any "Indian custodian", together  
18 with a notice of pendency of the guardianship proceedings,  
19 pursuant to the provisions of the federal Indian Child Welfare  
20 Act of 1978.

21 B. Service of persons required by Subsection A of  
22 this section shall be made in accordance with Subsection A of  
23 Section 45-1-401 NMSA 1978.

24 Section 7. A new section of Chapter 45, Article 5 NMSA  
25 1978 is enacted to read:

1           "[NEW MATERIAL] TEMPORARY GUARDIANSHIP PENDING HEARING. --

2           At or after the time the petition seeking guardianship is  
3           filed, the court may appoint a temporary guardian to serve for  
4           not more than six months or until a guardian is appointed,  
5           whichever occurs first. Notice of this appointment shall be  
6           made a part of the notice of hearing if the action is taken at  
7           the time of filing the petition and, if taken subsequently,  
8           notice of the appointment shall be made separately and served  
9           in the same manner as the notice of hearing. "

10           Section 8. A new section of Chapter 45, Article 5 NMSA  
11           1978 is enacted to read:

12           "[NEW MATERIAL] HEARING-- BURDEN OF PROOF-- JUDGMENT-- CHILD  
13           SUPPORT. --

14           A. After considering the evidence presented at the  
15           hearing, if the court determines that the petitioner has  
16           proved the allegations of the petition by a preponderance of  
17           the evidence and that the guardianship sought is in the best  
18           interests of the child, it shall enter judgment granting the  
19           requested guardianship, except that in those cases involving  
20           an Indian child as defined in the federal Indian Child Welfare  
21           Act of 1978, the burden of proof shall be proof beyond a  
22           reasonable doubt.

23           B. As part of a judgment entered pursuant to the  
24           Kinship Guardianship Act, the court may order a parent  
25           retaining parental rights to pay the reasonable cost of

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1 support of the child."

2 Section 9. A new section of Chapter 45, Article 5 NMSA  
3 1978 is enacted to read:

4 "[NEW MATERIAL] ~~GUARDIAN AD LITEM - APPOINTMENT. --~~

5 A. In a proceeding to appoint a guardian pursuant  
6 to the Kinship Guardianship Act, the court may appoint a  
7 guardian ad litem for the child upon the motion of a party or  
8 solely in the court's discretion. The court shall appoint a  
9 guardian ad litem if a parent of the child is participating in  
10 the proceeding and objects to the appointment requested.

11 B. In a proceeding in which a parent of the child  
12 has petitioned for the revocation of a guardianship  
13 established pursuant to the Kinship Guardianship Act and the  
14 guardian objects to the revocation, the court shall appoint a  
15 guardian ad litem.

16 C. The court may order the parties to a proceeding  
17 to pay a reasonable fee of a guardian ad litem. If the  
18 parties are indigent, the court may award a reasonable fee to  
19 the guardian ad litem to be paid out of funds of the court."

20 Section 10. A new section of Chapter 45, Article 5 NMSA  
21 1978 is enacted to read:

22 "[NEW MATERIAL] ~~GUARDIAN AD LITEM - POWERS AND DUTIES. --~~ A  
23 guardian ad litem appointed by the court in a proceeding  
24 pursuant to the Kinship Guardianship Act shall:

25 A. in connection with a petition for guardianship,

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1 make a diligent investigation of the circumstances surrounding  
2 the petition, including visiting the child in the home,  
3 interviewing the person proposed as guardian and interviewing  
4 the parents of the child;

5 B. in connection with a petition or motion for  
6 revocation of a guardianship, recommend an appropriate  
7 transition plan in the event the guardianship is revoked; and

8 C. at a hearing held in connection with  
9 proceedings described in Subsection A or B of this section,  
10 report to the court concerning the best interests of the child  
11 and the child's position on the requested relief. "

12 Section 11. A new section of Chapter 45, Article 5 NMSA  
13 1978 is enacted to read:

14 "[NEW MATERIAL] NOMINATION OBJECTION BY CHILD. --In a  
15 proceeding for appointment of a guardian pursuant to the  
16 Kinship Guardianship Act:

17 A. the court shall appoint a person nominated by a  
18 child who has reached his fourteenth birthday unless the court  
19 finds the nomination contrary to the best interests of the  
20 child; and

21 B. the court shall not appoint a person as  
22 guardian if a child who has reached his fourteenth birthday  
23 files a written objection in the proceeding before the person  
24 accepts appointment as guardian. "

25 Section 12. A new section of Chapter 45, Article 5 NMSA

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1 1978 is enacted to read:

2 "[NEW MATERIAL] REVOCATION OF GUARDIANSHIP. --

3 A. Any person, including a child who has reached  
4 his fourteenth birthday, may move for revocation of a  
5 guardianship created pursuant to the Kinship Guardianship Act.  
6 The person requesting revocation shall attach to the motion a  
7 transition plan proposed to facilitate the reintegration of  
8 the child into the home of a parent or a new guardian. A  
9 transition plan shall take into consideration the child's age,  
10 development and any bond with the guardian.

11 B. If the court finds that a preponderance of the  
12 evidence proves a change in circumstances and the revocation  
13 are in the best interests of the child, it shall grant the  
14 motion and:

15 (1) adopt a transition plan proposed by a  
16 party or the guardian ad litem;

17 (2) propose and adopt its own transition  
18 plan; or

19 (3) order the parties to develop a transition  
20 plan by consensus if they will agree to do so."

21 Section 13. A new section of Chapter 45, Article 5 NMSA  
22 1978 is enacted to read:

23 "[NEW MATERIAL] RIGHTS AND DUTIES OF GUARDIAN. --

24 A. A guardian appointed for a child pursuant to  
25 the Kinship Guardianship Act has the legal rights and duties

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1 of a parent except the right to consent to adoption of the  
2 child and except for parental rights and duties that the court  
3 orders retained by a parent.

4 B. Unless otherwise ordered by the court, a  
5 guardian appointed pursuant to the Kinship Guardianship Act  
6 has authority to make all decisions regarding visitation  
7 between a parent and the child.

8 C. A certified copy of the court order appointing  
9 a guardian pursuant to the Kinship Guardianship Act shall be  
10 satisfactory proof of the authority of the guardian, and  
11 letters of guardianship need not be issued. "

12 Section 14. A new section of Chapter 45, Article 5 NMSA  
13 1978 is enacted to read:

14 "[NEW MATERIAL] CONTINUING JURISDICTION OF THE COURT. --  
15 The court appointing a guardian pursuant to the Kinship  
16 Guardianship Act retains continuing jurisdiction of the  
17 matter. "

18 Section 15. A new section of Chapter 45, Article 5 NMSA  
19 1978 is enacted to read:

20 "[NEW MATERIAL] CAREGIVER'S AUTHORIZATION AFFIDAVIT. --

21 A. A caregiver who executes a caregiver's  
22 authorization affidavit substantially in the form contained in  
23 Subsection J of this section by completing Items 1 through 4 of  
24 the form and who subscribes and swears to it before a notary  
25 public, is authorized to enroll the named child in school and

1 consent to school-related medical care for the child.

2 B. A caregiver who is a relative of the child, who  
3 executes a caregiver's authorization affidavit substantially in  
4 the form set forth in Subsection J of this section by completing  
5 items one through eight and who subscribes and swears to the  
6 affidavit before a notary public, has the same authority to  
7 authorize medical care, dental care and mental health care for  
8 the child as a guardian appointed pursuant to the Kinship  
9 Guardianship Act.

10 C. A caregiver's authorization affidavit executed  
11 pursuant to this section is not valid for more than one year  
12 after the date of its execution.

13 D. The decision of a caregiver to consent to or  
14 refuse medical, dental or mental health care pursuant to a  
15 caregiver's authorization affidavit is superseded by a  
16 contravening decision of a parent having parental rights or other  
17 person having legal custody of the child if the contravening  
18 decision does not jeopardize the life, health or safety of the  
19 child.

20 E. No person who acts in good faith reliance on a  
21 caregiver's authorization affidavit to provide medical, dental or  
22 mental health care to a child without actual knowledge of facts  
23 contrary to those stated in the affidavit is subject to criminal  
24 culpability, civil liability or professional disciplinary action  
25 if the affidavit complies with the requirements of this section.

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1 The foregoing exclusions apply even though a parent having  
2 parental rights or person having legal custody of the child has  
3 contrary wishes as long as the provider of the care has no actual  
4 knowledge of the contrary wishes.

5 F. A person who relies upon a caregiver's  
6 authorization affidavit is under no duty to make further inquiry  
7 or investigation.

8 G. If a child stops living with the caregiver, the  
9 caregiver shall give notice of that fact to a school, health care  
10 provider, mental health care provider, health insurer or other  
11 person who has been given a copy of the caregiver's authorization  
12 affidavit.

13 H. A caregiver's authorization affidavit is invalid  
14 unless it contains the warning statement set out in the form  
15 contained in Subsection J of this section in not less than ten-  
16 point boldface type, or a reasonable equivalent thereof, enclosed  
17 in a box with three-point rule lines.

18 I. As used in this section "school-related medical  
19 care" means medical care that is required by the state or a local  
20 government authority as a condition for school enrollment.

21 J. The caregiver's authorization affidavit shall be  
22 in substantially the following form:

23 "Caregiver's Authorization Affidavit

24 Use of this affidavit is authorized by Section 45-5-506 NMSA  
25 1978.

1 Instructions:

2 A. Completion of Items 1-4 and the signing of the  
3 affidavit is sufficient to authorize enrollment of a minor in  
4 school and authorize school-related medical care.

5 B. Completion of Items 5-8 is additionally required to  
6 authorize any other medical care.

7 Print clearly:

8 The minor named below lives in my home and I am 18 years of age  
9 or older.

10 1. Name of minor: \_\_\_\_\_.

11 2. Minor's birth date: \_\_\_\_\_.

12 3. My name (adult giving authorization): \_\_\_\_\_.

13 4. My home address: \_\_\_\_\_.

14 5. ( ) I am a grandparent, aunt, uncle, or other qualified  
15 relative of the minor (see back of this form for a definition of  
16 "qualified relative").

17 6. Check one or both (for example, if one parent was advised and  
18 the other cannot be located):

19 ( ) I have advised the parent(s) or other person(s)  
20 having legal custody of the minor of my intent to authorize  
21 medical care, and have received no objection.

22 ( ) I am unable to contact the parent(s) or other  
23 person(s) having legal custody of the minor at this time, to  
24 notify them of my intended authorization.

25 7. My date of birth: \_\_\_\_\_.

1 8. My NM driver's license or other identification card number:  
2 \_\_\_\_\_.

3 WARNING: Do not sign this form if any of the statements above  
4 are incorrect, or you will be committing a crime punishable by a  
5 fine, imprisonment, or both.

6 I declare under penalty of perjury under the laws of the state of  
7 New Mexico that the foregoing is true and correct.

8 Signed: \_\_\_\_\_

9 The foregoing affidavit was subscribed sworn to and acknowledged  
10 before me this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by  
11 \_\_\_\_\_.

12 My commission expires: \_\_\_\_\_

13 Notary Public

14 Notices:

15 1. This declaration does not affect the rights of the minor's  
16 parents or legal guardian regarding the care, custody, and  
17 control of the minor, and does not mean that the caregiver has  
18 legal custody of the minor.

19 2. A person who relies on this affidavit has no obligation to  
20 make any further inquiry or investigation.

21 3. This affidavit is not valid for more than one year after the  
22 date on which it is executed.

23 Additional Information:

24 TO CAREGIVERS:

25 1. "Qualified relative", for purposes of Item 5, means a spouse,



1 parent, stepparent, brother, sister, stepbrother, stepsister,  
2 half-brother, half-sister, uncle, aunt, niece, nephew, first  
3 cousin, or any person denoted by the prefix "grand" or "great",  
4 or the spouse or former spouse of any of the persons specified in  
5 this definition.

6 2. If the minor stops living with you, you are required to  
7 notify any school, health care provider, mental health care  
8 provider, health insurer or other person to whom you have given  
9 this affidavit.

10 3. If you do not have the information requested in item 8,  
11 provide another form of identification such as your social  
12 security number or medicaid number.

13 TO HEALTH CARE PROVIDERS AND HEALTH CARE SERVICE PLANS:

14 1. No person who acts in good faith reliance upon a caregiver's  
15 authorization affidavit to provide medical, dental or mental  
16 health care, without actual knowledge of facts contrary to those  
17 stated on the affidavit, is subject to criminal liability or to  
18 civil liability to any person, or is subject to professional  
19 disciplinary action, for such reliance if the applicable portions  
20 of the form are completed.

21 2. This affidavit does not confer dependency for health care  
22 coverage purposes. ". "