

SENATE FINANCE COMMITTEE SUBSTITUTE FOR
SENATE BILL 185

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

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 the
interests of children are best served when they are raised by
their parents. When neither parent is able or willing to
provide appropriate care, guidance and supervision to a child,

1 it is the policy of the state that, whenever possible, a child
2 should be raised by family members or kinship caregivers.

3 B. The Kinship Guardianship Act is intended to
4 address those cases where a parent has left a child or
5 children in the care of another for ninety consecutive days
6 and that arrangement leaves the child or children without
7 appropriate care, guidance or supervision.

8 C. The purposes of the Kinship Guardianship Act
9 are to:

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

13 (2) provide a child with a stable and
14 consistent relationship with a kinship caregiver that will
15 enable the child to develop physically, mentally and
16 emotionally to the maximum extent possible when the child's
17 parents are not willing or able to do so."

18 Section 3. A new section of Chapter 45, Article 5 NMSA
19 1978 is enacted to read:

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

22 A. "caregiver" means an adult, who is not a parent
23 of a child, with whom a child resides and who provides that
24 child with the care, maintenance and supervision consistent
25 with the duties and responsibilities of a parent of the child;

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

2 C. "kinship" means the relationship that exists
3 between a child and a relative of the child, a godparent, a
4 member of the child's tribe or clan or an adult with whom the
5 child has a significant bond;

6 D. "parent" means a biological or adoptive parent
7 of a child whose parental rights have not been terminated; and

8 E. "relative" means an individual related to a
9 child as a spouse, parent, stepparent, brother, sister,
10 stepbrother, stepsister, half-brother, half-sister, uncle,
11 aunt, niece, nephew, first cousin or any person denoted by the
12 prefix "grand" or "great", or the spouse or former spouse of
13 the persons specified. "

14 Section 4. A new section of Chapter 45, Article 5 NMSA
15 1978 is enacted to read:

16 "NEW MATERIAL JURISDICTION AND VENUE. --

17 A. The district court has jurisdiction of
18 proceedings pursuant to the Kinship Guardianship Act.

19 B. Proceedings pursuant to the Kinship
20 Guardianship Act shall be in the district court of the county
21 of the child's legal residence or the county where the child
22 resides, if different from the county of legal residence. "

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

25 "NEW MATERIAL PETITION-- WHO MAY FILE-- CONTENTS. --

underscored material = new
[bracketed material] = delete

1 A. A petition seeking the appointment of a
2 guardian pursuant to the Kinship Guardianship Act may be filed
3 only by:

4 (1) a kinship caregiver;

5 (2) a caregiver, who has reached his twenty-
6 first birthday, with whom no kinship with the child exists,
7 who has been nominated to be guardian of the child by the
8 child, and the child has reached his fourteenth birthday; or

9 (3) a caregiver designated formally or
10 informally by a parent in writing if the designation indicates
11 on its face that the parent signing understands:

12 (a) the purpose and effect of the
13 guardianship;

14 (b) that he has the right to be served
15 with the petition and notices of hearings in the action; and

16 (c) that he may appear in court to
17 contest the guardianship.

18 B. A petition seeking the appointment of a
19 guardian shall be verified by the petitioner and allege the
20 following with respect to the child:

21 (1) facts that if proved will meet the
22 requirements of Subsection B of Section 8 of the Kinship
23 Guardianship Act;

24 (2) the date and place of birth of the child,
25 if known, and if not known, the reason for the lack of

1 knowl edge;

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

4 (4) the marital status of the child;

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

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

8 (7) the names and addresses of the parents of
9 the child;

10 (8) the names and addresses of persons having
11 legal custody of the child;

12 (9) the existence of any matters pending
13 involving the custody of the child;

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

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

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

23 (a) the tribal affiliations of the
24 child's parents; and

25 (b) the specific actions taken by the

. 137130. 4

1 petitioner to notify the parents' tribes and the results of
2 the contacts, including the names, addresses, titles and
3 telephone numbers of the persons contacted, and copies of
4 correspondence with the tribe; and

5 (13) other facts in support of the
6 guardianship sought. "

7 Section 6. A new section of Chapter 45, Article 5 NMSA
8 1978 is enacted to read:

9 "[NEW MATERIAL] SERVICE OF PETITION--NOTICE--PARTIES.--

10 A. At the time of filing the petition, the
11 petitioner shall obtain an order of the court setting a date
12 for hearing on the petition, which date shall be no less than
13 thirty and no more than ninety days from the date of filing
14 the petition.

15 B. The petition and a notice of the hearing shall
16 be served upon:

17 (1) the children, youth and families
18 department if there is any pending matter relating to the
19 child pursuant to the provisions of Chapter 32A, Article 4
20 NMSA 1978;

21 (2) the child if he has reached his
22 fourteenth birthday;

23 (3) the parents of the child;

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

1 (5) if the child is an Indian child as
 2 defined in the federal Indian Child Welfare Act of 1978, the
 3 appropriate Indian tribe and any "Indian custodian", together
 4 with a notice of pendency of the guardianship proceedings,
 5 pursuant to the provisions of the federal Indian Child Welfare
 6 Act of 1978.

7 C. Service of process required by Subsection A of
 8 this section shall be made in accordance with the requirements
 9 for giving notice of a hearing pursuant to Subsection A of
 10 Section 45-1-401 NMSA 1978.

11 D. The persons required to be served pursuant to
 12 Subsection B of this section have a right to file a response
 13 as parties to this action. Other persons may intervene
 14 pursuant to Rule 1-024 NMRA."

15 Section 7. A new section of Chapter 45, Article 5 NMSA
 16 1978 is enacted to read:

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

18 A. After the filing of the petition, upon motion
 19 of the petitioner or a person required to be served pursuant
 20 to Subsection B of Section 6 of the Kinship Guardianship Act,
 21 or upon its own motion, the court may appoint a temporary
 22 guardian to serve for not more than one hundred eighty days or
 23 until the case is decided on the merits, whichever occurs
 24 first.

25 B. A motion for temporary guardianship shall be

. 137130. 4

1 heard within twenty days of the date the motion is filed. The
2 motion and notice of hearing shall be served on all persons
3 required to be served pursuant to Subsection B of Section 6 of
4 the Kinship Guardianship Act.

5 C. An order pursuant to Subsection A of this
6 section may be entered ex parte upon good cause shown. If the
7 order is entered ex parte, a copy of the order shall be served
8 on the persons required to be served pursuant to Subsection B
9 of Section 6 of the Kinship Guardianship Act. If a person
10 files an objection to the order, the court immediately shall
11 schedule a hearing to be held within ten days of the date the
12 objection is filed. Notice of the hearing shall be given to
13 the petitioner and all persons required to be served pursuant
14 to Subsection B of Section 6 of the Kinship Guardianship Act."

15 Section 8. A new section of Chapter 45, Article 5 NMSA
16 1978 is enacted to read:

17 "[NEW MATERIAL] HEARING--ELEMENTS OF PROOF--BURDEN OF
18 PROOF--JUDGMENT--CHILD SUPPORT.--

19 A. Upon hearing, if the court finds that a
20 qualified person seeks appointment, the venue is proper, the
21 required notices have been given, the requirements of
22 Subsection B of this section have been proved and the best
23 interests of the minor will be served by the requested
24 appointment, it shall make the appointment. In other cases
25 the court may dismiss the proceedings or make any other

1 disposition of the matter that will serve the best interests
2 of the minor.

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

5 (1) a parent of the child is living and has
6 consented in writing to the appointment of a guardian and the
7 consent has not been withdrawn;

8 (2) a parent of the child is living but all
9 parental rights in regard to the child have been terminated or
10 suspended by prior court order; or

11 (3) the child has resided with the petitioner
12 without the parent for a period of ninety days or more
13 immediately preceding the date the petition is filed and a
14 parent having legal custody of the child is currently
15 unwilling or unable to provide adequate care, maintenance and
16 supervision for the child or there are extraordinary
17 circumstances; and

18 (4) no guardian of the child is currently
19 appointed pursuant to a provision of the Uniform Probate Code.

20 C. The burden of proof shall be by clear and
21 convincing evidence, except that in those cases involving an
22 Indian child as defined in the federal Indian Child Welfare
23 Act of 1978, the burden of proof shall be proof beyond a
24 reasonable doubt.

25 D. As part of a judgment entered pursuant to the

1 Kinship Guardianship Act, the court may order a parent to pay
2 the reasonable costs of support and maintenance of the child
3 that the parent is financially able to pay. The court may use
4 the child support guidelines set forth in Section 40-4-11.1
5 NMSA 1978 to calculate a reasonable payment.

6 E. The court may order visitation between a parent
7 and child to maintain or rebuild a parent-child relationship
8 if the visitation is in the best interests of the child."

9 Section 9. A new section of Chapter 45, Article 5 NMSA
10 1978 is enacted to read:

11 "[NEW MATERIAL] GUARDIAN AD LITEM - APPOINTMENT. --

12 A. In a proceeding to appoint a guardian pursuant
13 to the Kinship Guardianship Act, the court may appoint a
14 guardian ad litem for the child upon the motion of a party or
15 solely in the court's discretion. The court shall appoint a
16 guardian ad litem if a parent of the child is participating in
17 the proceeding and objects to the appointment requested.

18 B. In a proceeding in which a parent of the child
19 has petitioned for the revocation of a guardianship
20 established pursuant to the Kinship Guardianship Act and the
21 guardian objects to the revocation, the court shall appoint a
22 guardian ad litem.

23 C. The court may order all or some of the parties
24 to a proceeding to pay a reasonable fee of a guardian ad
25 litem. If all of the parties are indigent, the court may

1 award a reasonable fee to the guardian ad litem to be paid out
2 of funds of the court."

3 Section 10. A new section of Chapter 45, Article 5 NMSA
4 1978 is enacted to read:

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

8 A. in connection with a petition for guardianship,
9 make a diligent investigation of the circumstances surrounding
10 the petition, including visiting the child in the home,
11 interviewing the person proposed as guardian and interviewing
12 the parents of the child if available;

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

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

20 Section 11. A new section of Chapter 45, Article 5 NMSA
21 1978 is enacted to read:

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

25 A. the court shall appoint a person nominated by a

. 137130. 4

1 child who has reached his fourteenth birthday unless the court
2 finds the nomination contrary to the best interests of the
3 child; and

4 B. the court shall not appoint a person as
5 guardian if a child who has reached his fourteenth birthday
6 files a written objection in the proceeding before the person
7 accepts appointment as guardian. "

8 Section 12. A new section of Chapter 45, Article 5 NMSA
9 1978 is enacted to read:

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

11 A. Any person, including a child who has reached
12 his fourteenth birthday, may move for revocation of a
13 guardianship created pursuant to the Kinship Guardianship Act.
14 The person requesting revocation shall attach to the motion a
15 transition plan proposed to facilitate the reintegration of
16 the child into the home of a parent or a new guardian. A
17 transition plan shall take into consideration the child's age,
18 development and any bond with the guardian.

19 B. If the court finds that a preponderance of the
20 evidence proves a change in circumstances and the revocation
21 is in the best interests of the child, it shall grant the
22 motion and:

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

25 (2) propose and adopt its own transition

1 plan; or

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

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

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

7 A. A guardian appointed for a child pursuant to
8 the Kinship Guardianship Act has the legal rights and duties
9 of a parent except the right to consent to adoption of the
10 child and except for parental rights and duties that the court
11 orders retained by a parent.

12 B. Unless otherwise ordered by the court, a
13 guardian appointed pursuant to the Kinship Guardianship Act
14 has authority to make all decisions regarding visitation
15 between a parent and the child.

16 C. A certified copy of the court order appointing
17 a guardian pursuant to the Kinship Guardianship Act shall be
18 satisfactory proof of the authority of the guardian, and
19 letters of guardianship need not be issued."

20 Section 14. A new section of Chapter 45, Article 5 NMSA
21 1978 is enacted to read:

22 "[NEW MATERIAL] CONTINUING JURISDICTION OF THE COURT. --

23 The court appointing a guardian pursuant to the Kinship
24 Guardianship Act retains continuing jurisdiction of the
25 matter."

. 137130. 4

1 Section 15. A new section of Chapter 45, Article 5 NMSA
2 1978 is enacted to read:

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

4 A. A caregiver who executes a caregiver's
5 authorization affidavit substantially in the form contained in
6 Subsection J of this section by completing Items 1 through 4 of
7 the form and who subscribes and swears to it before a notary
8 public, is authorized to enroll the named child in school and
9 consent to school-related medical care for the child.

10 B. A caregiver who is a relative of the child, who
11 executes a caregiver's authorization affidavit substantially in
12 the form set forth in Subsection J of this section by completing
13 Items 1 through 8 and who subscribes and swears to the affidavit
14 before a notary public, has the same authority to authorize
15 medical care, dental care and mental health care for the child as
16 a guardian appointed pursuant to the Kinship Guardianship Act.

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

20 D. The decision of a caregiver to consent to or
21 refuse medical, dental or mental health care pursuant to a
22 caregiver's authorization affidavit is superseded by a
23 contravening decision of a parent or other person having legal
24 custody of the child if the contravening decision does not
25 jeopardize the life, health or safety of the child.

1 E. No person who acts in good faith reliance on a
2 caregiver's authorization affidavit to provide medical, dental or
3 mental health care to a child without actual knowledge of facts
4 contrary to those stated in the affidavit is subject to criminal
5 culpability, civil liability or professional disciplinary action
6 if the affidavit complies with the requirements of this section.
7 The foregoing exclusions apply even though a parent having
8 parental rights or person having legal custody of the child has
9 contrary wishes as long as the provider of the care has no actual
10 knowledge of the contrary wishes.

11 F. A person who relies upon a caregiver's
12 authorization affidavit is under no duty to make further inquiry
13 or investigation.

14 G. If a child stops living with the caregiver, the
15 caregiver shall give notice of that fact to a school, health care
16 provider, mental health care provider, health insurer or other
17 person who has been given a copy of the caregiver's authorization
18 affidavit.

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

24 I. As used in this section, "school-related medical
25 care" means medical care that is required by the state or a local

1 government authority as a condition for school enrollment.

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

4 "Caregiver's Authorization Affidavit

5 Use of this affidavit is authorized by the Kinship Guardianship
6 Act.

7 Instructions:

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

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

13 Print clearly:

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

16 1. Name of minor: _____.

17 2. Minor's birth date: _____.

18 3. My name (adult giving authorization): _____.

19 4. My home address: _____.

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

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

25 () I have advised the parent(s) or other person(s)

underscored material = new
[bracketed material] = delete

1 having legal custody of the minor of my intent to authorize
2 medical care, and have received no objection.

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

6 7. My date of birth: _____.

7 8. My NM driver's license or other identification card number:
8 _____.

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

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

14 Signed: _____

15 The foregoing affidavit was subscribed, sworn to and acknowledged
16 before me this ____ day of _____, 20____, by
17 _____.

18 My commission expires: _____

19 Notary Public

20 Notices:

21 1. This declaration does not affect the rights of the minor's
22 parents or legal guardian regarding the care, custody and control
23 of the minor, and does not mean that the caregiver has legal
24 custody of the minor.

25 2. A person who relies on this affidavit has no obligation to

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1 make any further inquiry or investigation.

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

4 Additional Information:

5 TO CAREGIVERS:

6 1. "Qualified relative", for purposes of Item 5, means a spouse,
7 parent, stepparent, brother, sister, stepbrother, stepsister,
8 half-brother, half-sister, uncle, aunt, niece, nephew, first
9 cousin, godparent, member of the child's tribe or clan, an adult
10 with whom the child has a significant bond or any person denoted
11 by the prefix "grand" or "great", or the spouse or former spouse
12 of any of the persons specified in this definition.

13 2. If the minor stops living with you, you are required to
14 notify any school, health care provider, mental health care
15 provider, health insurer or other person to whom you have given
16 this affidavit.

17 3. If you do not have the information requested in Item 8,
18 provide another form of identification such as your social
19 security number or medicaid number.

20 TO HEALTH CARE PROVIDERS AND HEALTH CARE SERVICE PLANS:

21 1. No person who acts in good faith reliance upon a caregiver's
22 authorization affidavit to provide medical, dental or mental
23 health care, without actual knowledge of facts contrary to those
24 stated on the affidavit, is subject to criminal liability or to
25 civil liability to any person, or is subject to professional

1 disciplinary action, for such reliance if the applicable portions
2 of the form are completed.

3 2. This affidavit does not confer dependency for health care
4 coverage purposes. ". "

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