

HB 120 – Visitation Bill

AN ACT

RELATING TO FAMILIES; CREATING A PRESUMPTION IN FAVOR OF VISITATION FOR AN INCAPACITATED PERSON OR PROTECTED PERSON UNDER THE UNIFORM PROBATE CODE; SPECIFYING THAT PETITIONS FOR VISITATION CAN BE HEARD IN PROCEEDINGS SUBSEQUESNT TO THE APPOINTMENT OF A GUARDIAN; DECLARING AN EMERGENCY.

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

SECTION 1. A new section of the Uniform Probate Code is enacted to read:

“[NEW MATERIAL] PRESUMPTION IN FAVOR OF VISITATION. - -

A. There shall be a rebuttable presumption that it is in the best interests of an alleged incapacitated person or protected person to have visitation from the alleged incapacitated person’s or protected person’s:

- (1) Spouse;
- (2) Adult children;
- (3) Adult grandchildren;
- (4) Parents;
- (5) Adult siblings; or
- (6) Interested person.

B. A spouse, adult child, adult grandchild, adult parent, adult sibling or interested person may petition the court where the alleged incapacitated person or protected person resides or in the court that appointed a guardian for the protected person for reasonable visitation with the alleged incapacitated person or protected person.

C. The petition for reasonable visitation shall be verified and shall state facts showing:

- (1) That the petitioner is a person listed in Paragraphs (1) through (6) of Subsection A of this section;
- (2) That the visitation has been unreasonably interfered with or denied; and
- (3) The identity of the person or persons who have unreasonably interfered with or denied visitation.

D. If an alleged incapacitated person or protected person has the ability to consent to the visitation and the alleged incapacitated person or protected person objects to a petition for visitation, the burden of proof shall shift to the petitioner to prove, by a preponderance of the evidence, that the alleged incapacitated person's or protected person's objection was not procured by undue influence.

E. A person seeking to rebut the presumption set forth in Subsection A, except for an alleged incapacitated person or protected person as set forth in Subsection D, has the burden of proving, by a preponderance of the evidence, that the visitation is not in the best interests of the alleged incapacitated person or protected person because (1) the person seeking visitation has committed abuse as defined by Subsection B of Section 16 of Article 7 of Chapter 27 or exploitation as defined by Subsection I of Section 16 of Article 16 of Article 7 of Chapter 27, or (2) visitation would be harmful to the health or mental well-being of the alleged incapacitated person or protected person.

SECTION 2. Section 45-5-313 NMSA 1978 (being Laws 1975, Chapter 257, Section 5-313, as amended) is amended to read:

"45-5-313. PROCEEDINGS SUBSEQUENT TO APPOINTMENT

A. The court where the protected person resides has concurrent jurisdiction with the court that appointed the guardian, or in which acceptance of a testamentary appointment was filed, over resignation, removal, accounting, petitions for visitation by a person listed in Paragraphs (1) through (5) of Subsection A of Section 1 of this 2016 act and other proceedings relating to the guardianship.

B. Subject to the transfer provisions of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, if the court located where the protected person resides is not the court in which acceptance of appointment is filed, the court in which proceedings subsequent to appointment are commenced shall in all appropriate cases notify the other court, in this or another state, and after consultation with the court determine whether to retain jurisdiction or transfer the proceedings to the other court, whichever may be in the best interests of the protected person. A copy of any order accepting a resignation or removing a guardian shall be sent to the court in which acceptance of appointment is filed.”

SECTION 3. Section 45-5-312 NMSA 1978 (being Laws 1975, Chapter 257, Section 5-313, as amended) is amended to read:

“§ 45-5-312. General powers and duties of the limited guardian and guardian

A. If the court enters judgment pursuant to Subsection C of Section 45-5-304 NMSA 1978, it shall appoint a limited guardian if it determines that the incapacitated person is able to manage some but not all aspects of personal care. The court shall specify those powers that the limited guardian shall have and may further restrict each power so as to permit the incapacitated person to care for the incapacitated person's own self commensurate with the incapacitated person's ability to do so. A person for whom a limited guardian has been appointed retains all legal and civil rights except those that have been specifically granted to the limited guardian by the court. The limited guardian shall

exercise supervisory powers over the incapacitated person in a manner that is the least restrictive form of intervention consistent with the order of the court.

B. A guardian of an incapacitated person has the same powers, rights and duties respecting the incapacitated person that a parent has respecting an unemancipated minor child, except that a guardian is not legally obligated to provide from the guardian's own funds for the incapacitated person and is not liable to third persons for acts of the incapacitated person solely by reason of the guardianship. In particular and without qualifying the foregoing, a guardian or the guardian's replacement has the following powers and duties, except as modified by order of the court:

(1) to the extent that it 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, a guardian shall make provision for the care, comfort and maintenance of the incapacitated person and, whenever appropriate, arrange for training and education. The guardian 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) if no agent is entitled to make health-care decisions for the incapacitated person under the provisions of the Uniform Health-Care Decisions Act, then the guardian shall make health-care decisions for the incapacitated person in accordance with the provisions of that act. In exercising health-care powers, 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, if the court has determined that a conservatorship is not appropriate and if a guardian appointed by the court has been granted authority to make financial decisions on behalf of the protected person in the order of appointment and in the letters of guardianship pursuant to Subsection C of Section 45-5-308 NMSA 1978, the guardian has the following powers and duties, including the power:

(a) to institute proceedings to compel any person under a duty to support the protected person or to pay sums for the welfare of the protected person to perform that duty;

(b) to receive money and tangible property deliverable to the protected person and apply the money and property for support, care and education of the protected person, but the guardian shall not use funds from the protected person's estate for room and board that the guardian or the guardian's spouse, parent or child has furnished the protected person, unless a charge for the service is approved by order of the court made upon notice to at least one of the next of kin of the protected person, if notice is possible;

(c) to serve as advocate and decision-maker for the protected person in any disputes with persons or organizations, including financial institutions, regarding the protected person's finances;

(d) to obtain information regarding the protected person's assets and income from persons or organizations handling the protected person's finances;

(e) to file an initial inventory of all property belonging to the protected person within ninety days after appointment; and

(f) to exercise care to conserve any excess for the protected person's needs and include in the guardian's ninety-day and annual reports a description of decisions made regarding the protected person's finances and property; and

(5) the guardian shall exercise the guardian's supervisory powers over the incapacitated person in a manner that is least restrictive of the incapacitated person's personal freedom and consistent with the need for supervision.

C. A guardian of an incapacitated person for whom a conservator also has been appointed shall control the care and custody of the incapacitated person and is entitled to receive reasonable sums for services and for room and board furnished to the incapacitated person. The guardian may request the conservator to expend the incapacitated person's estate by payment to third persons or institutions for the incapacitated person's care and maintenance.

D. A guardian of an incapacitated person shall have the duty to provide notice within a reasonable time at the last known address to a spouse, adult child, adult grandchild, parent, or adult sibling of the following events:

(1) The death of the incapacitated person;

(2) Plans for burial or cremation of a deceased incapacitated person;

(3) The hospitalization of the incapacitated person for a period of three days or more.

(4) The relocation of the incapacitated person to a new residence.

SECTION 4. EMERGENCY. - - It is necessary for the public peace, health, and safety that this act take effect immediately.