



New Guardianship and Conservatorship Statutes, Rules and Forms

Senate Bill 19 (2018) and
Senate Bill 395 (2019)

Guardianship Reform

2017 – Supreme Court created the Adult Guardianship Study Commission.

- 16 members
- diverse representation
- held 10 statewide meetings
- received public comment
- issued report to Supreme Court suggesting improvements to the Guardianship system

Uniform Law Commission

Met from 2015-2017

- Substantial changes to Adult Guardianship/Conservatorship system
- Late 2017: Uniform Guardianship, Conservatorship and Other Protective Arrangements Act (UGCOPAA) was passed.

Senate Bill 19

- Introduced UGCOPAA (Uniform Act) during 2018 legislative session
- Uniform Act made substantial changes to guardianship system
- Compromise – adopted several portions of Uniform Act that were incorporated into NM's Probate Code.

Supreme Court

After passage of Senate Bill 19 (Spring 2018), the Supreme Court created:

- Guardianship Rules Committee
- Guardianship Reform Implementation Steering Committee

Today's Presentation

- General Overview of Senate Bill 19 (2018) and Senate Bill 395 (2019)
- Highlight statutory changes to NM's Probate Code
- Focus on significant changes made to the guardianship system
- Change and reform is a work-in-progress.

Applicability of Senate Bill 19

Applies to all proceedings:

- Commenced on or after July 1, 2018
- In existence on June 30, 2018 unless the Court finds that application would substantially interfere with the proceeding or prejudice rights of party.

Petition Requirements

§ 45-5-303 (Guardianship)
§ 45-5-404 (Conservatorship)

**Petition must include contact
information for:**

1. Petitioner, including their relationship to the Alleged Incapacitated Person (AIP)
2. Name of the Alleged Incapacitated Person (AIP)

Petition Requirements (cont.)

CLOSE FAMILIAL RELATIONSHIPS

- AIP's spouse/domestic partner
- AIP's adult children/parent(s)
- AIP's adult siblings/adult relative
- AIP's adult step-children who AIP parented and has ongoing relationship

Petition Requirements (cont.)

ADDITIONAL INFORMATION

- AIP's current care taker
- AIP's Attorney
- Representative Payee
- Guardian/Conservator
- Trustee/Custodian
- VA Fiduciary
- Agent under a Power of Attorney

Petition Requirements (cont.)

ADDITIONAL INFORMATION (cont.)

- Person previously nominated as Guardian by AIP
- Proposed Guardian
- Recent Decision Maker of AIP

Information Sheet

Information Sheet

Supreme Court Form 4-992

- Mandatory use
- Pre-adjudication: determines who has access to the court record and who is entitled to Notice of Hearings (NOH)

Guardianship Cases Available to the Public

Public Record

Guardian: NMSA § 45-5-303(J)

Conservator: NMSA § 45-5-407(M)

The existence of a proceeding or the existence of a guardianship and/or conservatorship is a matter of public record UNLESS:

Sealing Guardianship Case

1. Alleged Incapacitated Person or Protected Person requests the record be sealed AND

2. The petition for guardianship and/or conservatorship is **dismissed** or **terminated**.

Confidential Records

Rule 1-079.1

The court's docket sheet is open to public access PROVIDED THAT the court shall not disclose:

- diagnostic,
- treatment, or
- other medical or psychological information

**Guardianship Hearings
Are No Longer
Sequestered**

OPEN HEARINGS

Hearings are open unless good cause is shown to close a hearing.

Rule 1-104 requires a motion to be filed if a hearing is to be closed. Motion should cite:

- statute
- regulation
- rule
- other source of law that addresses courtroom closure in the particular type of proceeding.

**Notice of Hearing
and
Notice of Rights**

Notice of Hearing (NOH) on Petition

- Notice must inform AIP of rights:
 - to attend the hearing
 - To obtain an attorney of their own choice
 - To object to professionals appointed
 - To respond to any statements
 - To object to proceeding

Notice of Hearing (NOH) on Petition

- Alleged Incapacitated Person (AIP) must be personally served
- Notice of Hearing must include a description of nature, purpose and consequences of granting petition.

Notice of Hearing (NOH) on Petition

- The Court SHALL NOT grant the Petition if the Notice of Hearing does not substantially comply with these requirements.
 - Personal Service on AIP
 - Notice of Rights to AIP

**NOTICES IN
PROCEEDINGS & ACCESS
TO COURT RECORDS**

PRE-ADJUDICATION

Prior to a Judicial Determination on
the Alleged Incapacitated Person's
Need for the Appointment of a
Guardian/Conservator

Pre-Adjudication Notice

Guardianship: § 45-5-309(B) & (C)

Conservatorship: § 45-5-405(B) & (C)

In a guardianship/conservatorship proceeding, the following shall be given notice:

- Every person listed in the Petition
- Any other person interested in the AIP's welfare that the court determines

Access to Court Record Pre-Adjudication

**NMSA § § 45-5-303(K),
45-5-407(N) and Rule 1-079.1**

- Alleged Incapacitated/Protected Person and their Attorney
- Persons listed in petition
- Others if in AIP/PP's best interest or furthers public interest

POST-ADJUDICATION

After a Judicial Determination has been made that an Alleged Incapacitated Person Needs a Guardian and/or Conservator Appointed

Post-Adjudication Notice

Guardianship: §45-5-309(D)

Conservatorship: §45-5-405(D)

After the appointment of a guardian and/or conservator, notices of future hearings shall be given to:

- Protected Person
- Guardian and/or Conservator
- Any other person the court determines

Bonding

Mandatory Bonding

NMSA § 45-5-411

- All Conservators are required to post a bond to secure their performance
- The Court may waive the bonding requirement if the Court makes specific findings that the bond “is not necessary to protect the interest of” the Protected Person

Bonding Forms

Supreme Court Approved Forms

Mandatory:

- 4-994 Order – Waive or Secure Bond

If Bond Applicable:

- 4-995 Notice of Bonding
- 4-995.1 Statement of Bond

Liability of Guardian/Conservator

NMSA § 45-5-108

Guardian and/or Conservator are not personally liable for acts of a Protected Person solely because of the guardianship or conservatorship.

Record Keeping and Accounting Requirements

NMSA §45-5-107

- Separate Accounts
- No co-mingling of funds
- Guardian/Conservator shall maintain books and records for seven (7) years
- Must cooperate with audit or review

NEW MANDATORY REPORTS

- Required for all reports filed after July 1, 2018
- Even for case adjudicated before July 1, 2018

NEW REPORTS

- **90 Day and Guardian's Annual Report (Form 4-996)**
- **Conservator's Inventory (Form 4-997)**
- **Conservator's Annual Report (Form 4-998)**

Guardian's Report

- Expanded to 20 pages
- If Protected Person is in a facility, asks questions about cleanliness, nutrition, personal care, safety ...
- Asks whether restrictions have been placed on who is able to visit the Protected Person
- Expanded questions regarding the Protected Person's health

Guardian's Report (cont.)

Asks whether the Guardian:

- has experienced significant physical or mental health problems in the past year
- charges a fee, and if so how much is charged and who pays the fee

Guardian's Report (cont.)

Asks whether the Guardian:

- has been arrested, charged, or convicted of any felony or misdemeanor
- has been investigated by Children Youth and Families Department, Adult Protective Services or the Internal Revenue Service.

Conservator's Report

- Expanded to 18 pages
- Created in conjunction with the Office of the State Auditor
- 3 year view (Income)
- Breaks assets and liabilities into small components
- Asks similar questions about Conservator

Audits

Audits

NMSA § 45-5-409(G)

- A conservator SHALL comply with the requirements of any audit of an account, inventory, report or property of the Protected Person.

State Auditor

- MOU executed with courts to audit conservatorship cases:
 - Referred by the assigned judge, after conducting a hearing
- State Auditor already has the authority to audit Guardians under contract with the Office of Guardianship

Powers of Attorney

NMSA § 45-5-312(D)

- Guardian shall not revoke or amend a POA for healthcare or finances
- Medical or financial decisions of POA agent takes precedence over guardian's decisions and guardian shall cooperate with POA agent

Powers of Attorney

CONSERVATORS

→ See **NMSA § 45-5B-108(B)** for similar language on Conservator and Power of Attorney

Visitation

Visitation

NMSA §45-5-312(F)

- Guardian shall not restrict the Protected Person's interaction, communication or visitation with others unless:
 1. Authorized specific court order, or
 2. A less restrictive alternative is already in effect, or

Visitation (cont.)

3. Guardian has good cause to believe the restriction is necessary to protect the Protected Person and the restriction is:
 - no more than **seven (7)** days if the person has a family or preexisting social relationship with the Protected Person, or

Visitation (cont.)

3. Guardian has good cause to believe the restriction is necessary to protect the Protected Person and the restriction is:
 - for a period for no more than **sixty (60) days** if the person does not have a family or preexisting social relationship with the Protected Person.

Certification of Professional Guardians and Conservators

Certification

NMSA §§ 45-5-311(D) & 45-5-410 (D)

A professional guardian and/or conservator shall not serve unless the professional is certified and is in good standing with a national or state organization recognized by the Supreme Court.

Definition of Professional

Rule 1-142 of Civil Procedure

A “professional guardian or conservator” means an individual or entity that serves as guardian or conservator for more than two individuals who are not related to the guardian or conservator by marriage, adoption, or third degree of blood or affinity.

Proof of Certification

The professional guardian or conservator must submit proof that the individual who has been assigned the duties of guardian or conservator for the protected person is certified and in good standing with the **Center for Guardianship Certification**.

Center of Guardianship Certification

- Only national organization that provide certification
- Provides certification to guardians and conservators who demonstrate "sufficient skill, knowledge and understanding of the universal guardianship principles to be worthy of the responsibility entrusted to him or her."

Proof of Certification

A person **assigned the duties** of a guardian or conservator is the individual who makes decisions on behalf of the protected person, including but not limited to the professional guardian's or conservator's **employee, subcontractor, agent, case manager, guardianship coordinator,** or an **individual who signs any report.**

Increased Fines for Overdue Reports

Fines

**NMSA § 45-5-314(C) and
NMSA § 45-5-409 (D)**

Increased fine from \$5 a day to
\$25 a day for any overdue report.

**Grievance Procedure
Against Guardian and/or
Conservator**

Grievance

NMSA § 45-5-110

A protected person, or any interested person regardless of previous standing, who believes a guardian, conservator or representative payee is breaching their fiduciary duty or otherwise acting in a manner inconsistent with the Uniform Probate Code or orders of appointment, may file a grievance with the court.



Patricia M. Galindo, JD
Administrative Office of the Courts

aocpmg@nmcourts.gov