

AN ACT

RELATING TO GUARDIANSHIP; AMENDING SECTIONS OF THE NMSA 1978 REGARDING RESPONSIBILITIES OF A GUARDIAN OF A PROTECTED PERSON.

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

Section 1. Section 24-7A-1 NMSA 1978 (being Laws 1995, Chapter 182, Section 1, as amended) is amended to read:

"24-7A-1. DEFINITIONS.--As used in the Uniform Health-Care Decisions Act:

A. "advance health-care directive" means an individual instruction or a power of attorney for health care made, in either case, while the individual has capacity;

B. "agent" means an individual designated in a power of attorney for health care to make a health-care decision for the individual granting the power;

C. "capacity" means an individual's ability to understand and appreciate the nature and consequences of proposed health care, including its significant benefits, risks and alternatives to proposed health care and to make and communicate an informed health-care decision. A determination of lack of capacity shall be made only according to the provisions of Section 24-7A-11 NMSA 1978;

D. "emancipated minor" means an individual between the ages of sixteen and eighteen who has been married, who is

on active duty in the armed forces or who has been declared by court order to be emancipated;

E. "guardian" means a judicially appointed guardian or conservator having authority to make a health-care decision for an individual;

F. "health care" means any care, treatment, service or procedure to maintain, diagnose or otherwise affect an individual's physical or mental condition;

G. "health-care decision" means a decision made by an individual or the individual's agent, guardian or surrogate, regarding the individual's health care, including:

(1) selection and discharge of health-care providers and institutions;

(2) approval or disapproval of diagnostic tests, surgical procedures, programs of medication and orders not to resuscitate;

(3) directions relating to life-sustaining treatment, including withholding or withdrawing life-sustaining treatment and the termination of life support; and

(4) directions to provide, withhold or withdraw artificial nutrition and hydration and all other forms of health care;

H. "health-care institution" means an institution, facility or agency licensed, certified or otherwise authorized or permitted by law to provide health care in the ordinary

course of business;

I. "health-care provider" means an individual licensed, certified or otherwise authorized or permitted by law to provide health care in the ordinary course of business or practice of a profession;

J. "individual instruction" means an individual's direction concerning a health-care decision for the individual made while the individual has capacity;

K. "life-sustaining treatment" means any medical treatment or procedure without which the individual is likely to die within a relatively short time, as determined to a reasonable degree of medical certainty by the primary physician;

L. "person" means an individual, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision, agency or instrumentality or any other legal or commercial entity;

M. "physician" means an individual authorized to practice medicine or osteopathy;

N. "power of attorney for health care" means the designation of an agent to make health-care decisions for the individual granting the power, made while the individual has capacity;

O. "primary physician" means a physician designated by an individual or the individual's agent,

guardian or surrogate to have primary responsibility for the individual's health care or, in the absence of a designation or if the designated physician is not reasonably available, a physician who undertakes the responsibility;

P. "principal" means an adult or emancipated minor who, while having capacity, has made a power of attorney for health care by which the adult or emancipated minor delegates the right to make health-care decisions for the adult or emancipated minor to an agent;

Q. "protected person" means an adult or emancipated minor for whom a guardian has been appointed;

R. "qualified health-care professional" means a health-care provider who is a physician, physician assistant, nurse practitioner, nurse, psychologist or social worker;

S. "reasonably available" means readily able to be contacted without undue effort and willing and able to act in a timely manner considering the urgency of the patient's health-care needs;

T. "state" means a state of the United States, the District of Columbia, the commonwealth of Puerto Rico or a territory or insular possession subject to the jurisdiction of the United States;

U. "supervising health-care provider" means the primary physician or, if there is no primary physician or the primary physician is not reasonably available, the health-care

provider who has undertaken primary responsibility for an individual's health care; and

V. "surrogate" means an individual, other than a patient's agent or guardian, authorized under the Uniform Health-Care Decisions Act to make a health-care decision for the patient."

Section 2. Section 24-7A-6 NMSA 1978 (being Laws 1995, Chapter 182, Section 6) is amended to read:

"24-7A-6. DECISIONS BY GUARDIAN.--

A. A guardian shall comply with the protected person's individual instructions made while the protected person had capacity and shall not disregard the protected person's preferences contained in an advance health-care directive unless the appointing court expressly so authorizes after notice to the agent, if any, and the protected person. The court may disregard such preferences if it finds by clear and convincing evidence that the preferences do not accurately reflect the free choice of the protected person at the time of making the individual instructions or that the protected person revoked the individual instructions while the protected person had capacity pursuant to Subsection B of Section 24-7A-3 NMSA 1978. This provision does not affect the court's ability to grant relief pursuant to a petition as provided in Section 24-7A-14 NMSA 1978.

B. A health-care decision of an agent appointed by

a person having capacity takes precedence over that of a guardian, unless the appointing court expressly directs otherwise after notice to the agent and the protected person.

C. Subject to the provisions of Subsections A and B of this section, a health-care decision made by a guardian for the protected person is effective without judicial approval, if the appointing court has expressly authorized the guardian to make health-care decisions for the protected person, in accordance with the provisions of Section 45-5-312 NMSA 1978, after notice to the protected person and any agent."

Section 3. Section 24-7A-17 NMSA 1978 (being Laws 1995, Chapter 182, Section 17) is amended to read:

"24-7A-17. SHORT TITLE.--Chapter 24, Article 7A NMSA 1978 may be cited as the "Uniform Health-Care Decisions Act"."

Section 4. Section 24-7B-1 NMSA 1978 (being Laws 2006, Chapter 7, Section 1) is amended to read:

"24-7B-1. SHORT TITLE.--Chapter 24, Article 7B NMSA 1978 may be cited as the "Mental Health Care Treatment Decisions Act"."

Section 5. Section 24-7B-3 NMSA 1978 (being Laws 2006, Chapter 7, Section 3) is amended to read:

"24-7B-3. DEFINITIONS.--As used in the Mental Health Care Treatment Decisions Act:

A. "advance directive for mental health treatment" HB 161
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means an individual instruction or power of attorney for mental health treatment made pursuant to the Mental Health Care Treatment Decisions Act;

B. "agent" means an individual designated in a power of attorney for mental health treatment to make a mental health treatment decision for the individual granting the power;

C. "capacity" means an individual's ability to understand and appreciate the nature and consequences of proposed mental health treatment, including significant benefits and risks and alternatives to the proposed mental health treatment, and to make and communicate an informed mental health treatment decision. A written determination or certification of lack of capacity shall be made only according to the provisions of the Mental Health Care Treatment Decisions Act;

D. "emancipated minor" means an individual between the ages of sixteen and eighteen who has been married, who is on active duty in the armed forces or who has been declared by court order to be emancipated;

E. "guardian" means a judicially appointed guardian having authority to make a mental health decision for an individual;

F. "individual instruction" means an individual's direction concerning a mental health treatment decision for

the individual, made while the individual has capacity, which is to be implemented when the individual has been determined to lack capacity;

G. "mental health treatment" means services provided for the prevention of, amelioration of symptoms of or recovery from mental illness or emotional disturbance, including electroconvulsive treatment, treatment with medication, counseling, rehabilitation services or evaluation for admission to a facility for care or treatment of persons with mental illness, if required;

H. "mental health treatment decision" means a decision made by an individual or the individual's agent or guardian regarding the individual's mental health treatment, including:

(1) selection and discharge of health care or mental health treatment providers and institutions;

(2) approval or disapproval of diagnostic tests, programs of medication and mental health treatment; and

(3) directions relating to mental health treatment;

I. "mental health treatment facility" means an institution, facility or agency licensed, certified or otherwise authorized or permitted by law to provide mental health treatment in the ordinary course of business;

J. "mental health treatment provider" or "health

care provider" means an individual licensed, certified or otherwise authorized or permitted by law to provide diagnosis or mental health treatment in the ordinary course of business or practice of a profession;

K. "mental illness" means a substantial disorder of a person's emotional process, thoughts or cognition that grossly impairs judgment, behavior or capacity to recognize reality, but "mental illness" does not mean a developmental disability;

L. "power of attorney for mental health treatment" means the designation of an agent to make mental health treatment decisions for the individual granting the power, made while the individual has capacity;

M. "primary health care professional" means a qualified health care professional designated by an individual or the individual's agent or guardian to have primary responsibility for the individual's health care or, in the absence of a designation or if the designated qualified health care professional is not reasonably available, a qualified health care professional who undertakes that responsibility;

N. "principal" means an adult or emancipated minor who, while having capacity, has made a power of attorney for mental health treatment by which the adult or emancipated minor delegates the right to make mental health treatment decisions for that adult or emancipated minor to an agent;

O. "protected person" means an adult or emancipated minor for whom a guardian has been appointed;

P. "qualified health care professional" means a licensed health care provider who is a physician, physician assistant, nurse practitioner, nurse or psychologist;

Q. "reasonably available" means able to be contacted without undue effort and willing and able to act in a timely manner considering the urgency of the patient's mental health treatment needs; and

R. "supervising health care provider" means the primary qualified health care professional or, if the primary qualified health care professional is not reasonably available, the health care provider who has undertaken primary responsibility for an individual's health care."

Section 6. Section 24-7B-8 NMSA 1978 (being Laws 2006, Chapter 7, Section 8) is amended to read:

"24-7B-8. DECISIONS BY GUARDIAN.--

A. A guardian shall comply with the protected person's individual instructions made while the protected person had capacity and may not disregard the protected person's preferences contained in an advance directive for mental health treatment unless the appointing court expressly so authorizes after notice to the agent, if any, and the protected person. The court may disregard such preferences if it finds by clear and convincing evidence that the preferences

do not accurately reflect the free choice of the protected person at the time of making the individual instructions or that the protected person revoked the individual instructions while the protected person had capacity pursuant to Subsection B of Section 24-7A-3 NMSA 1978.

B. A mental health treatment decision of an agent appointed by an individual having capacity takes precedence over that of a guardian, unless the appointing court expressly directs otherwise after notice to the agent and the protected person.

C. Subject to the provisions of Subsections A and B of this section, a mental health treatment decision made by a guardian for the protected person is effective without judicial approval, if the appointing court has expressly authorized the guardian to make mental health treatment decisions for the protected person, in accordance with the provisions of Sections 43-1-15 or 45-5-312 NMSA 1978, after notice to the protected person and any agent."

Section 7. Section 28-16B-1 NMSA 1978 (being Laws 2003, Chapter 280, Section 1) is amended to read:

"28-16B-1. SHORT TITLE.--Chapter 28, Article 16B NMSA 1978 may be cited as the "Office of Guardianship Act"."

Section 8. Section 28-16B-3 NMSA 1978 (being Laws 2003, Chapter 280, Section 3) is amended to read:

"28-16B-3. OFFICE--POWERS AND DUTIES.--

A. The office of guardianship may:

(1) promulgate rules in accordance with the State Rules Act to carry out the provisions of the Office of Guardianship Act; and

(2) enter into agreements with other state or federal agencies to provide guardianship services and to provide or receive payment for such services.

B. The office of guardianship shall:

(1) contract for the provision of probate guardianship services to income-eligible incapacitated persons, including temporary guardianship as provided in Section 45-5-310 NMSA 1978;

(2) provide for the recruitment and training of persons interested and willing to serve as mental health treatment guardians;

(3) provide training and information to interested persons on the duties and responsibilities of guardians, including alternatives to guardianship and mental health treatment guardianship;

(4) establish procedures for the investigation and resolution of complaints against contractors;

(5) contract for attorneys to petition the district court for guardianship of persons believed to be incapacitated or to seek amendment or termination of existing

guardianship orders if the needs or situation of protected persons have changed; provided that the selection of persons to be served under such contracts shall be made by the office based on selection criteria established by rule; and

(6) serve as an interested person as defined in Subsection I of Section 45-5-101 NMSA 1978."

Section 9. Section 28-16B-4 NMSA 1978 (being Laws 2003, Chapter 280, Section 4) is amended to read:

"28-16B-4. CONTRACT MONITORING AND ENFORCEMENT.--

A. The office of guardianship shall monitor and enforce all guardianship contracts. In carrying out this duty, the office may:

(1) have access to case records, copies of court filings and reports, financial records and other records maintained by contractors related to contract services provided unless specifically sequestered by the court;

(2) petition the court of jurisdiction for access to records that have been sequestered;

(3) arrange visits with protected persons who are served by contract guardians; and

(4) pursue legal and other remedies against contractors for noncompliance with contract provisions.

B. The office shall protect and maintain the confidentiality of all client-specific information and records obtained to the same extent as required for the contractor and

to any extent otherwise required by state or federal law."

Section 10. Section 28-16B-5 NMSA 1978 (being Laws 2003, Chapter 280, Section 5) is amended to read:

"28-16B-5. CONTRACTS.--A contract for guardianship services shall include:

A. a requirement that contractors and their staff meet nationally recognized standards for guardianship services;

B. a requirement for adoption and compliance with a code of ethics for guardians;

C. the maximum caseload for guardians;

D. the fee schedule for services provided;

E. assurance that the civil rights of protected persons served by the contractor shall be met, including the right to be served in the most integrated setting appropriate to the needs of the protected person;

F. provisions for access by the office of guardianship to records, protected persons and contractor staff as needed to monitor and enforce contract compliance and for quality assurance purposes; and

G. minimum financial accounting and reporting requirements."

Section 11. Section 28-16B-6 NMSA 1978 (being Laws 2003, Chapter 280, Section 6) is amended to read:

"28-16B-6. RESOLUTION OF COMPLAINTS.--

A. The office of guardianship shall establish by rule for the filing, investigation and resolution of complaints about guardianship services provided by contractors.

B. The office shall acknowledge receipt of the complaint, notify all parties involved and initiate an investigation within fifteen working days of the filing of the complaint.

C. A determination shall be made and a decision rendered on the complaint within sixty working days unless mutually agreed upon by all parties or unless a shorter time is required to protect the protected person.

D. The office may refer complaints to other agencies for investigation or prosecution, as appropriate.

E. Complaints against the office or a staff member of the office shall be investigated by the human services department."

Section 12. Section 38-1-12 NMSA 1978 (being Laws 1935, Chapter 60, Section 10, as amended) is amended to read:

"38-1-12. SERVICE AGAINST INCAPACITATED.--Whenever there is a guardian of the estate or a guardian of the person of an incapacitated person, duly appointed by a court of competent jurisdiction of this state, every process against the incapacitated person shall be served upon either of the guardians in the manner as may be provided by law for service

of process, including service by publication. Service of process so made shall be considered as proper service upon the protected person. In all other cases, process shall be served upon the protected person in the same manner as upon competent or sane persons."

Section 13. Section 38-4-16 NMSA 1978 (being Laws 1925, Chapter 22, Section 6, as amended) is amended to read:

"38-4-16. COMPROMISE BY GUARDIAN AD LITEM.--The guardian ad litem so appearing in any action or proceeding for and on behalf of an incapacitated person shall have power to compromise the same and to agree to the judgment to be entered in the action or proceeding for or against the protected person, subject to the approval of the court in which the suit is pending."

Section 14. Section 43-1-11 NMSA 1978 (being Laws 1977, Chapter 279, Section 10, as amended) is amended to read:

"43-1-11. COMMITMENT OF ADULTS FOR THIRTY-DAY PERIOD.--

A. Every adult client involuntarily admitted to an evaluation facility pursuant to Section 43-1-10 NMSA 1978 has the right to a hearing within seven days of admission unless waived after consultation with counsel. If a physician or evaluation facility decides to seek commitment of the client for evaluation and treatment, a petition shall be filed with the court within five days of admission requesting the commitment. The petition shall include a description of the

specific behavior or symptoms of the client that evidence a likelihood of serious harm to the client or others and shall include an initial screening report by the evaluating physician individually or with the assistance of a mental health professional or, if a physician is not available, by a mental health professional acceptable to the court. The petition shall list the prospective witnesses for commitment and a summary of the matters to which they will testify. Copies of the petition shall be served on the client, the client's guardian, and treatment guardian if one has been appointed, and the client's attorney.

B. At the hearing, the client shall be represented by counsel and shall have the right to present evidence on the client's behalf, including testimony by an independent mental health professional of the client's own choosing, to cross-examine witnesses and to be present at the hearing. The presence of the client may be waived upon a showing to the court that the client knowingly and voluntarily waives the right to be present. A complete record of all proceedings shall be made.

C. A court-appointed guardian for an adult involved in an involuntary commitment proceeding shall have automatic standing to appear at all stages of the proceeding and shall be allowed to testify by telephone or through affidavit if circumstances make live testimony too burdensome.

D. The court shall include in its findings the guardian's opinion regarding the need for involuntary treatment or a statement detailing the efforts made to ascertain the guardian's opinion.

E. Upon completion of the hearing, the court may order a commitment for evaluation and treatment not to exceed thirty days if the court finds by clear and convincing evidence that:

(1) as a result of a mental disorder, the client presents a likelihood of serious harm to the client's own self or others;

(2) the client needs and is likely to benefit from the proposed treatment; and

(3) the proposed commitment is consistent with the treatment needs of the client and with the least drastic means principle.

F. Once the court has made the findings set forth in Subsection E of this section, the court shall hear further evidence as to whether the client is capable of informed consent. If the court determines that the client is incapable of informed consent, the court shall appoint for the client a treatment guardian who shall have only those powers enumerated in Section 43-1-15 NMSA 1978.

G. An interested person who reasonably believes that an adult is suffering from a mental disorder and presents a

likelihood of serious harm to the adult's own self or others, but does not require emergency care, may request the district attorney to investigate and determine whether reasonable grounds exist to commit the adult for a thirty-day period of evaluation and treatment. The applicant may present to the district attorney any medical reports or other evidence immediately available to the applicant, but shall not be required to obtain a medical report or other particular evidence in order to make a petition. The district attorney shall act on the petition within seventy-two hours. If the district attorney determines that reasonable grounds exist to commit the adult, the district attorney may petition the court for a hearing. The court may issue a summons to the proposed client to appear at the time designated for a hearing, which shall be not less than five days from the date the petition is served. If the proposed client is summoned and fails to appear at the proposed time and upon a finding of the court that the proposed client has failed to appear, or appears without having been evaluated, the court may order the proposed client to be detained for evaluation as provided for in Subsection C of Section 43-1-10 NMSA 1978.

H. Any hearing provided for pursuant to Subsection G of this section shall be conducted in conformance with the requirements of Subsection B of this section."

Section 15. Section 43-1-12 NMSA 1978 (being Laws 1977,

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Chapter 279, Section 11, as amended) is amended to read:

"43-1-12. EXTENDED COMMITMENT OF ADULTS.--

A. A physician or evaluation facility may file a petition for extended commitment within twenty-one days after the beginning of the thirty-day commitment. The petition shall explain the necessity for extended commitment, specify the treatment that has been provided during the evaluation and include an individual treatment plan for the proposed commitment period. The petition shall list the prospective witnesses for commitment and a summary of the matters to which they will testify. Copies of the petition shall be served on the client, the client's guardian, and treatment guardian if one has been appointed, and the client's attorney.

B. A hearing shall be held upon the petition prior to the expiration of the thirty-day commitment period, at which the client shall have all rights granted to the client under Section 43-1-11 NMSA 1978 and in addition shall have a right to a trial by a six-person jury, if requested, and to an expeditious appeal, unless waived.

C. A court-appointed guardian for an adult involved in an involuntary commitment proceeding shall have automatic standing to appear at all stages of the proceeding and shall be allowed to testify by telephone or through affidavit if circumstances make live testimony too burdensome.

D. The court shall include in its findings the

guardian's opinion regarding the need for involuntary treatment or a statement detailing the efforts made to ascertain the guardian's opinion.

E. If, at the conclusion of the hearing, the factfinder determines by clear and convincing evidence that the client presents a likelihood of harm to the client's self or to others, that extended treatment is likely to improve the client's condition and that the proposed extended commitment is consistent with the least drastic means principle, the court shall order commitment of the client for a period not to exceed six months, except that when the client has been committed for two consecutive periods of commitment, any commitment commencing thereafter shall not exceed one year. At the expiration of the commitment order, the client may be detained only after a new commitment hearing, unless waived after consultation with the client's attorney, and entry of a new order for commitment not to exceed six months.

F. A client involuntarily referred for treatment pursuant to this section shall be entitled to a reexamination of the order for the client's involuntary referral for treatment on the client's own petition, or that of the client's legal guardian, parent, spouse, relative or friend, to the district court of the county in which the client resides or is detained. Upon receipt of the petition, the court shall conduct a proceeding in accordance with this

section, except that a proceeding shall not be required to be conducted if the petition is filed sooner than sixty days after the issuance of the order for involuntary referral for treatment or sooner than sixty days after the filing of a previous petition under this subsection.

G. Nothing in this section shall limit the right of a client to petition the court for a writ of habeas corpus.

H. Nothing in this code shall prohibit a client from seeking voluntary admission under Section 43-1-14 NMSA 1978.

I. No mental health treatment facility is required to detain, treat or provide services to a client when the client does not require such detention, treatment or services."

Section 16. Section 43-1-13 NMSA 1978 (being Laws 1977, Chapter 279, Section 12, as amended) is amended to read:

"43-1-13. INVOLUNTARY COMMITMENT OF DEVELOPMENTALLY DISABLED ADULTS TO RESIDENTIAL CARE.--

A. A guardian appointed pursuant to the Uniform Probate Code may file an application with an evaluation facility seeking residential habilitation services for the protected person. The application shall set forth the basis for the guardian's belief that residential habilitation is necessary and shall include a copy of pertinent medical and psychological evaluations that have been completed.

B. Upon receipt of an application filed according to HB 161
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Subsection A of this section, an evaluation facility may accept the proposed client for a period of evaluation and treatment not to exceed fourteen days. An evaluation facility shall prepare an individualized habilitation plan that shall be consistent with the least drastic means principle.

C. If the habilitation plan recommends residential services, the evaluation facility shall file with the court a petition for extended residential placement. Upon receipt of the petition, the court shall appoint an attorney to represent the proposed client. Notice of the hearing scheduled on the petition and a copy of the habilitation plan shall be given to the proposed client, the client's attorney and the client's guardian. The petition shall contain a list of the names and addresses of proposed witnesses.

D. At the hearing on the petition, the proposed client shall be represented by counsel and shall have the right to present evidence on the proposed client's behalf, including testimony of a developmental disability professional of the proposed client's choosing; to cross-examine witnesses; to be present at the hearing; and to trial by a six-person jury, if requested. A complete record of the hearing shall be made. There shall be a right to an expeditious appeal.

E. The guardian of an adult involved in a commitment proceeding for extended residential habilitation services shall have automatic standing to appear at all stages of the

proceeding and shall be allowed to testify by telephone or through affidavit if circumstances make live testimony too burdensome.

F. The court shall include in its findings the guardian's opinion regarding the need for residential habilitation services or a statement detailing the efforts made to ascertain the guardian's opinion.

G. The court shall order residential placement of the proposed client if it is established by clear and convincing evidence that the proposed client has a developmental disability that creates an imminent likelihood of serious harm to the proposed client's self or to others, or the person is so greatly disabled that residential services would be in the person's best interest and that such residential placement is, in the person's case, the least drastic means. The court's order of residential placement shall be for a period not to exceed six months. At the expiration of the commitment order, the client may be detained only after a new commitment hearing, unless waived after consultation with the client's attorney, and entry of a new order for commitment not to exceed six months.

H. The court shall order placement that is least restrictive to the client and may order attendance and participation as a nonresident in habilitation programs conducted at residential or nonresidential facilities.

I. Any client involuntarily referred for habilitation treatment shall be entitled to a reexamination of the order for the client's involuntary referral for habilitation and treatment on the client's own petition, or that of the client's legal guardian, parent, spouse, relative or friend, to the district court of the county in which the client resides or is detained. Upon receipt of the petition, the court shall conduct or cause to be conducted by a special commissioner a proceeding in accordance with this section, except that a proceeding shall not be required to be conducted if the petition is filed sooner than sixty days after the issuance of the order for involuntary referral for habilitation and treatment or sooner than sixty days after the filing of a previous petition under this subsection.

J. Nothing in this section shall limit the right of a client to petition the court for a writ of habeas corpus.

K. No developmental disabilities treatment or habilitation facility is required to detain, treat or provide services to a client when the client does not appear to require detention, treatment or habilitation."

Section 17. Section 43-1-14 NMSA 1978 (being Laws 1977, Chapter 279, Section 13, as amended) is amended to read:

"43-1-14. VOLUNTARY ADMISSION TO RESIDENTIAL TREATMENT OR HABILITATION.--

A. A person may voluntarily seek admission to

residential treatment or habilitation.

B. A guardian appointed under the Uniform Probate Code, an agent or surrogate under the Uniform Health-Care Decisions Act or an agent under the Mental Health Care Treatment Decisions Act shall not consent to the admission of an individual to a mental health care facility. If a guardian has full power or limited power that includes medical or mental health treatment or, if the individual's written advance health-care directive or advance directive for mental health treatment expressly permits treatment in a mental health care facility, the guardian, agent or surrogate may present the person to a facility only for evaluation for admission pursuant to Subsection E of Section 43-1-10 NMSA 1978.

C. Nothing in this section shall be construed as depriving voluntary clients of any right given to involuntary clients.

D. A client voluntarily admitted to residential treatment or habilitation has the right to immediate discharge from the residential facility upon request, unless the director of the facility or a physician determines that the client requires continued confinement and meets the criteria for involuntary residential treatment or habilitation under the code. If the director or physician so determines, the director or physician shall, on the first business day

following the client's request for release, request the district attorney to initiate commitment proceedings under the code. The client has a right to a hearing on the client's confinement within five days of the client's request for release."

Section 18. Section 43-1-15 NMSA 1978 (being Laws 1977, Chapter 279, Section 14, as amended) is amended to read:

"43-1-15. CONSENT TO TREATMENT--ADULT CLIENTS.--

A. No psychotropic medication, psychosurgery, convulsive therapy, experimental treatment or behavior modification program involving aversive stimuli or substantial deprivations shall be administered to a client without proper consent. If the client is capable of understanding the proposed nature of treatment and its consequences and is capable of informed consent, the client's consent shall be obtained before the treatment is performed. A client shall not be presumed to be incapable of giving consent for administration of psychotropic medications solely because the client has been involuntarily committed to a treatment facility or is awaiting a hearing on whether the client should be involuntarily committed to a treatment facility.

B. If the mental health or developmental disabilities professional or physician who is proposing this or any other course of treatment or any other interested person believes that the client is incapable of informed

consent, the mental health or developmental disabilities professional or physician or other interested person may petition the court for the appointment of a treatment guardian to make a substitute decision for the client.

C. This original petition shall be served on the client and the client's attorney. A hearing on the petition shall be held within three court days. At the hearing, the client shall be represented by counsel and shall have the right to be present, to present witnesses and to cross-examine opposing witnesses.

D. When appointing a treatment guardian for an adult, the court shall give priority to a court-appointed guardian or, if no guardian has been appointed by a court, to an agent designated or nominated by the client when the client had capacity.

E. If after the hearing the court finds by clear convincing evidence that the client is not capable of making the client's own treatment decisions, the court may order the appointment of a treatment guardian.

F. The treatment guardian shall make a decision on behalf of the client whether to accept treatment, depending on whether the treatment appears to be in the client's best interest and is the least drastic means for accomplishing the treatment objective. In making a decision, the treatment guardian shall consult with the client and consider the

client's expressed opinions, if any, even if those opinions do not constitute valid consent or rejection of treatment. The treatment guardian shall give consideration to previous decisions made by the client in similar circumstances when the client was able to make treatment decisions.

G. If a client, who is not a resident of a medical facility and for whom a treatment guardian has been appointed, refuses to comply with the decision of the treatment guardian, the treatment guardian may apply to the court for an enforcement order. Such an order may authorize a peace officer to take the client into custody and to transport the client to an evaluation facility and may authorize the facility forcibly to administer treatment.

H. The treatment guardian shall consult with the physician or other professional who is proposing treatment, the client's attorney and interested friends, relatives or other agents or guardians of the client to the extent reasonably practical in making a decision.

I. If the client, physician or other professional wishes to appeal the decision of the treatment guardian, the client, physician or other professional may do so, filing an appeal with the court within three calendar days of receiving notice of the treatment guardian's decision. In such a decision, the client shall be represented by counsel. The court may overrule the treatment guardian's decision if it

finds that decision to be against the best interest of the client.

J. When the court appoints a treatment guardian, it shall specify the length of time during which the treatment guardian may exercise the treatment guardian's powers, up to a maximum period of one year. If at the end of the guardianship period the treatment guardian believes that the client is still incapable of making the client's own treatment decisions, the treatment guardian shall petition the court for reappointment or for appointment of a new treatment guardian. The petition shall be served on the client, the client's attorney and the previously appointed treatment guardian if filed by another party. The guardianship shall be extended or a new guardian shall be appointed only if the court finds the client is, at the time of the hearing, incapable of understanding and expressing an opinion regarding treatment decisions. The client shall be represented by counsel and shall have the right to be present and present evidence at all such hearings.

K. If during a period of a treatment guardian's power, the treatment guardian, the client, the treatment provider, a member of the client's family or the client's attorney or another person believes that the client has regained competence to make the client's own treatment decisions, that person shall petition the court for a

termination of the treatment guardianship. If the court finds the client is capable of making the client's own treatment decisions, it shall terminate the power of the treatment guardian and restore to the client the power to make the client's own treatment decisions.

L. A treatment guardian shall only have those powers enumerated in the code, unless the treatment guardian has also been appointed a guardian under the Uniform Probate Code pursuant to provisions of Section 45-5-303 NMSA 1978. A person carrying out the duties of a treatment guardian as provided in this section shall not be liable in any civil or criminal action so long as the treatment guardian is not acting in bad faith or with malicious purpose.

M. If a licensed physician believes that the administration of psychotropic medication is necessary to protect the client from serious harm that would occur while the provisions of Subsection B of this section are being satisfied, the licensed physician may administer the medication on an emergency basis. When medication is administered to a client on an emergency basis, the treating physician shall prepare and place in the client's medical records a report explaining the nature of the emergency and the reason that no treatment less drastic than administration of psychotropic medication without proper consent would have protected the client from serious harm. Upon the sworn

application of the treating physician, the court may issue an order permitting the treating physician to continue to administer psychotropic medication until a treatment guardian is appointed, if the requirements of Subsection B of this section for appointment of a treatment guardian are in the process of being satisfied in a timely manner."

Section 19. Section 43-1-19 NMSA 1978 (being Laws 1977, Chapter 279, Section 18, as amended) is amended to read:

"43-1-19. DISCLOSURE OF INFORMATION.--

A. Except as otherwise provided in the code, no person shall, without the authorization of the client, disclose or transmit any confidential information from which a person well acquainted with the client might recognize the client as the described person, or any code, number or other means that can be used to match the client with confidential information regarding the client.

B. Authorization from the client shall not be required for the disclosure or transmission of confidential information in the following circumstances:

(1) when the request is from a mental health or developmental disability professional or from an employee or trainee working with a person with a mental disability or developmental disability, to the extent that the practice, employment or training on behalf of the client requires access to such information is necessary;

(2) when such disclosure is necessary to protect against a clear and substantial risk of imminent serious physical injury or death inflicted by the client on the client's self or another;

(3) when the disclosure of such information is to the primary caregiver of the client and the disclosure is only of information necessary for the continuity of the client's treatment in the judgment of the treating physician or certified psychologist who discloses the information; or

(4) when such disclosure is to an insurer contractually obligated to pay part or all of the expenses relating to the treatment of the client at the residential facility. The information disclosed shall be limited to data identifying the client, facility and treating or supervising physician and the dates and duration of the residential treatment. It shall not be a defense to an insurer's obligation to pay that the information relating to the residential treatment of the client, apart from information disclosed pursuant to this section, has not been disclosed to the insurer.

C. No authorization given for the transmission or disclosure of confidential information shall be effective unless it:

(1) is in writing and signed; and

(2) contains a statement of the client's right

to examine and copy the information to be disclosed, the name or title of the proposed recipient of the information and a description of the use that may be made of the information.

D. The client has a right of access to confidential information and has the right to make copies of any information and to submit clarifying or correcting statements and other documentation of reasonable length for inclusion with the confidential information. The statements and other documentation shall be kept with the relevant confidential information, shall accompany it in the event of disclosure and shall be governed by the provisions of this section to the extent they contain confidential information. Nothing in this subsection shall prohibit the denial of access to such records when a physician or other mental health or developmental disabilities professional believes and notes in the client's medical records that such disclosure would not be in the best interests of the client. In any such case, the client has the right to petition the court for an order granting such access.

E. Where there exists evidence that the client whose consent to disclosure of confidential information is sought is incapable of giving or withholding valid consent and the client does not have a guardian or treatment guardian appointed by a court, the person seeking such authorization shall petition the court for the appointment of a treatment guardian to make a substitute decision for the client, except

that if the client is less than fourteen years of age, the client's parent or guardian is authorized to consent to disclosure on behalf of the client.

F. Information concerning a client disclosed under this section shall not be released to any other person, agency or governmental entity or placed in files or computerized data banks accessible to any persons not otherwise authorized to obtain information under this section.

G. Nothing in the code shall limit the confidentiality rights afforded by federal statute or regulation.

H. A person appointed as a treatment guardian in accordance with the Mental Health and Developmental Disabilities Code may act as the client's personal representative pursuant to the federal Health Insurance Portability and Accountability Act of 1996, Sections 1171-1179 of the Social Security Act, 42 U.S.C. Section 1320d, as amended, and applicable federal regulations to obtain access to the client's protected health information, including mental health information and relevant physical health information, and may communicate with the client's health-care providers in furtherance of such treatment."

Section 20. Section 45-1-201 NMSA 1978 (being Laws 1993, Chapter 174, Section 4, as amended) is amended to read:

"45-1-201. DEFINITIONS.--

A. As used in the Uniform Probate Code, unless the context otherwise requires:

(1) "agent" includes an attorney-in-fact under a durable or nondurable power of attorney, an individual authorized to make decisions concerning another's health care and an individual authorized to make decisions for another under a natural death act;

(2) "application" means a written request to the probate court for an order of informal probate or appointment pursuant to Sections 45-3-301 through 45-3-311 NMSA 1978;

(3) "beneficiary", as it relates to a trust beneficiary, includes a person who has any present or future interest, vested or contingent, and also includes the owner of an interest by assignment or other transfer; as it relates to a charitable trust, includes any person entitled to enforce the trust; as it relates to a "beneficiary of a beneficiary designation", refers to a beneficiary of an insurance or annuity policy, of an account with POD designation, of a security registered in beneficiary form (TOD) or of a pension, profit-sharing, retirement or similar benefit plan or other nonprobate transfer at death; and, as it relates to a "beneficiary designated in a governing instrument", includes a grantee of a deed, a devisee, a trust beneficiary, a beneficiary of a beneficiary designation, a donee, appointee

or taker in default of a power of appointment or a person in whose favor a power of attorney or a power held in any individual, fiduciary or representative capacity is exercised;

(4) "beneficiary designation" refers to a governing instrument naming a beneficiary of an insurance or annuity policy, of an account with POD designation, of a security registered in beneficiary form (TOD) or of a pension, profit-sharing, retirement or similar benefit plan or other nonprobate transfer at death;

(5) "child" includes an individual entitled to take as a child pursuant to the Uniform Probate Code by intestate succession from the parent whose relationship is involved and excludes a person who is only a stepchild, a foster child, a grandchild or any more remote descendant;

(6) "claims", in respect to estates of decedents and protected persons, includes liabilities of the decedent or protected person, whether arising in contract, in tort or otherwise and liabilities of the estate that arise at or after the death of the decedent or after the appointment of a conservator, including funeral expenses and expenses of administration. "Claims" does not include estate or inheritance taxes or demands or disputes regarding title of a decedent, an incapacitated person or a minor protected person to specific assets alleged to be included in the estate;

(7) "conservator" means a person who is

appointed by a court to manage the property or financial affairs or both of an incapacitated person or a minor protected person;

(8) "descendant" of an individual means all of the individual's descendants of all generations, with the relationship of parent and child at each generation being determined by the definition of child and parent contained in the Uniform Probate Code;

(9) "devise", when used as a noun, means a testamentary disposition of real or personal property and, when used as a verb, means to dispose of real or personal property by will;

(10) "devisee" means a person designated in a will to receive a devise. For the purposes of Chapter 45, Article 3 NMSA 1978, in the case of a devise to an existing trust or trustee or to a trustee or trust described by will, the trust or trustee is the devisee and the beneficiaries are not devisees;

(11) "distributee" means a person who has received property of a decedent from the decedent's personal representative other than as a creditor or purchaser. A testamentary trustee is a distributee only to the extent of distributed assets or increment thereto remaining in the testamentary trustee's hands. A beneficiary of a testamentary trust to whom the trustee has distributed property received

from a personal representative is a distributee of the personal representative. For the purposes of this paragraph, "testamentary trustee" includes a trustee to whom assets are transferred by will, to the extent of the devised assets;

(12) "estate" includes the property of the decedent, trust or other person whose affairs are subject to the Uniform Probate Code as originally constituted and as it exists from time to time during administration;

(13) "exempt property" means that property of a decedent's estate that is described in Section 45-2-403 NMSA 1978;

(14) "fiduciary" includes a personal representative, guardian, guardian ad litem, conservator and trustee;

(15) "foreign personal representative" means a personal representative appointed by another jurisdiction;

(16) "formal proceedings" means proceedings conducted before a judge with notice to interested persons;

(17) "governing instrument" means a deed, will, trust, insurance or annuity policy, account with POD designation, security registered in beneficiary form (TOD), pension, profit-sharing, retirement or similar benefit plan, instrument creating or exercising a power of appointment or a power of attorney or a dispositive, appointive or nominative instrument of a similar type;

(18) "guardian" means a person who has qualified to provide for the care, custody or control of the person of a minor or incapacitated person pursuant to testamentary or court appointment, but excludes one who is merely a guardian ad litem;

(19) "guardian ad litem" means a person appointed by the district court to represent and protect the interests of a minor or an incapacitated person in connection with litigation or any other court proceeding;

(20) "heirs", except as controlled by Section 45-2-711 NMSA 1978, means persons, including the surviving spouse and the state, who are entitled under the statutes of intestate succession to the property of a decedent;

(21) "incapacitated person" means an individual described in Section 45-5-101 NMSA 1978;

(22) "informal proceedings" means those proceedings conducted without notice to interested persons before the probate court for probate of a will or appointment of a personal representative, except as provided for in Section 45-3-306 NMSA 1978;

(23) "interested person" includes heirs, devisees, children, spouses, creditors, beneficiaries and any others having a property right in or claim against a trust estate or the estate of a decedent, a minor protected person or an incapacitated person. "Interested person" also includes

persons having priority for appointment as personal representatives and other fiduciaries representing interested persons. The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of, and matter involved in, a proceeding. "Interested person" does not apply to the provisions of Chapter 45, Article 5 NMSA 1978;

(24) "issue" of a person means all of the person's descendants of all generations, with the relationship of parent and child at each generation being determined by the definition of child and parent contained in the Uniform Probate Code;

(25) "lease" includes an oil, gas or other mineral lease;

(26) "letters" includes letters testamentary, letters of guardianship, letters of administration and letters of conservatorship;

(27) "minor" means a person who has not reached eighteen years of age;

(28) "mortgage" means any conveyance, agreement or arrangement in which property is encumbered or used as security;

(29) "nonresident decedent" means a decedent who was domiciled in another jurisdiction at the time of death;

(30) "organization" means a corporation, business trust, estate, trust, partnership, joint venture, association, government or governmental subdivision or agency or any other legal or commercial entity;

(31) "parent" includes any person entitled to take, or who would be entitled to take if the child died without a will, as a parent pursuant to the Uniform Probate Code by intestate succession from the child whose relationship is in question and excludes any person who is only a stepparent, foster parent or grandparent;

(32) "payor" means a trustee, insurer, business entity, employer, government, governmental agency or subdivision or any other person authorized or obligated by law or a governing instrument to make payments;

(33) "person" means an individual or an organization;

(34) "personal representative" includes executor, administrator, successor personal representative, special administrator and persons who perform substantially the same function under the law governing their status. "General personal representative" excludes special administrator;

(35) "petition" means a written request to the probate court for an order after notice;

(36) "proceeding" includes action at law and

suit in equity;

(37) "property" includes both real and personal property or any interest therein and means anything that may be the subject of ownership;

(38) "protected person" is as defined in Section 45-5-101 NMSA 1978;

(39) "protective proceeding" means a proceeding described in Section 45-5-101 NMSA 1978;

(40) "security" includes any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in an oil, gas or mining title or lease or in payments out of production under such a title or lease, collateral trust certificate, transferable share, voting trust certificate or, in general, any interest or instrument commonly known as a security or any certificate of interest or participation, any temporary or interim certificate, receipt or certificate of deposit for or any warrant or right to subscribe to or purchase any of the foregoing;

(41) "settlement", in reference to a decedent's estate, includes the full process of administration, distribution and closing;

(42) "special administrator" means a personal representative as described by Sections 45-3-614 through 45-3-618 NMSA 1978;

(43) "state" means a state of the United States, the District of Columbia, the commonwealth of Puerto Rico or any territory or insular possession subject to the jurisdiction of the United States;

(44) "successor personal representative" means a personal representative, other than a special administrator, who is appointed to succeed a previously appointed personal representative;

(45) "successors" means persons, other than creditors, who are entitled to property of a decedent under the decedent's will or the Uniform Probate Code;

(46) "supervised administration" refers to the proceedings described in Article III, Part 5 of the Uniform Probate Code;

(47) "survive" means that an individual has neither predeceased an event, including the death of another individual, nor is deemed to have predeceased an event pursuant to Section 45-2-104 or 45-2-702 NMSA 1978. "Survive" includes its derivatives, such as "survives", "survived", "survivor" and "surviving";

(48) "testacy proceeding" means a proceeding to establish a will or determine intestacy;

(49) "testator" includes an individual of either sex;

(50) "trust" includes an express trust, private

or charitable, with additions thereto, wherever and however created. "Trust" also includes a trust created or determined by judgment or decree under which the trust is to be administered in the manner of an express trust. "Trust" excludes other constructive trusts and excludes resulting trusts, conservatorships, personal representatives, trust accounts as defined in Article VI of the Uniform Probate Code, custodial arrangements, including those created under the Uniform Transfer to Minors Act, business trusts providing for certificates to be issued to beneficiaries, common trust funds, voting trusts, security arrangements, liquidation trusts, trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions or employee benefits of any kind and any arrangement under which a person is nominee or escrowee for another;

(51) "trustee" includes an original, additional or successor trustee, whether or not appointed or confirmed by court; and

(52) "will" includes codicil and any testamentary instrument that merely appoints a personal representative, revokes or revises another will, nominates a guardian or expressly excludes or limits the right of an individual or class to succeed to property of the decedent passing by intestate succession. "Will" does not include a holographic will.

B. The definitions in Subsection A of this section are made subject to additional definitions contained in subsequent articles that are applicable to specific articles."

Section 21. Section 45-1-303 NMSA 1978 (being Laws 1975, Chapter 257, Section 1-303) is amended to read:

"45-1-303. VENUE--MULTIPLE PROCEEDINGS--TRANSFER.--

A. Subject to the provisions of Section 45-3-201 NMSA 1978, where a proceeding under the Uniform Probate Code could be maintained in more than one place in New Mexico, the court in which the proceeding is first commenced has the exclusive right to proceed.

B. If proceedings concerning the same estate, protected person or trust are commenced in more than one court of New Mexico, the court in which the proceeding was first commenced shall continue to hear the matter and the other courts shall hold the matter in abeyance until the question of venue is decided. If the ruling court determines that venue is properly in another court, it shall transfer the proceeding to the other court.

C. If a court finds that in the interest of justice a proceeding or a file should be located in another court of New Mexico, the court making the finding may transfer the proceeding or file to the other court."

Section 22. Section 45-1-305 NMSA 1978 (being Laws 1975, Chapter 257, Section 1-305, as amended) is amended to read:

"45-1-305. RECORDS AND CERTIFIED COPIES.--

A. The clerk of the district court and the clerk of the probate court shall each keep a record for each decedent, protected person or trust involved in any document that may be filed with the clerk's respective court under the Uniform Probate Code, including petitions and applications, demands for notices or bonds and orders by the respective court, and responses relating thereto, and shall establish and maintain a system for indexing, filing or recording that is sufficient to enable users of the records to obtain adequate information. Upon payment of the fees required by law, the clerk shall issue certified copies of any probated wills, letters issued to personal representatives or any other record or paper filed or recorded. Certificates relating to probated wills shall indicate whether the decedent was domiciled in New Mexico and whether the probate was formal or informal. Such certificates shall also indicate the names and addresses of any known heirs. Certificates relating to letters shall show the date of appointment.

B. If convenient or desirable for any reason, the presiding district judge for each judicial district shall have the power, at the judge's discretion, to order that the records of informal probate proceedings of a particular county be kept under the supervision of the probate court or clerk of the probate court of that county for such period of time as

the district judge may determine."

Section 23. Section 45-1-402 NMSA 1978 (being Laws 1975, Chapter 257, Section 1-402, as amended) is amended to read:

"45-1-402. NOTICE--WAIVER.--A person, including a guardian ad litem, conservator or other fiduciary, may waive notice either by a writing signed by the person and filed in the proceeding or by appearance in the proceeding. A person for whom a guardianship or other protective order is sought or a protected person may not waive notice."

Section 24. Section 45-1-403 NMSA 1978 (being Laws 1975, Chapter 257, Section 1-403) is amended to read:

"45-1-403. PLEADINGS--WHEN PARTIES BOUND BY OTHERS--NOTICE.--In judicial proceedings involving trusts, or estates of decedents, minors, protected persons or incapacitated persons, and in judicially supervised settlements, the following apply:

A. interests to be affected shall be described in pleadings that give reasonable information to owners by name or class, by reference to the instrument creating the interests or in other appropriate manner;

B. persons are bound by orders binding others in the following cases:

(1) orders binding the sole holder or all co-holders of a power of revocation or a presently exercisable general power of appointment, including one in the form of a

power of amendment, bind other persons to the extent their interests as objects, takers in default or otherwise are subject to the power;

(2) to the extent there is no conflict of interest between them or among persons represented:

(a) orders binding a conservator bind the person whose estate the conservator controls;

(b) orders binding a guardian bind the protected person if no conservator of the protected person's estate has been appointed;

(c) orders binding a trustee bind beneficiaries of the trust in proceedings to probate a will establishing or adding to a trust, to review the acts or accounts of a prior fiduciary and in proceedings involving creditors or other third parties; and

(d) orders binding a personal representative bind persons interested in the undistributed assets of a decedent's estate in actions or proceedings by or against the estate. If there is no conflict of interest and no conservator or guardian has been appointed, a parent may represent the parent's minor child; and

(3) an unborn or unascertained person who is not otherwise represented is bound by an order to the extent the unborn or unascertained person's interest is adequately represented by another party having a substantially identical

interest in the proceeding;

C. notice is required as follows:

(1) notice as prescribed by Section 45-1-401 NMSA 1978 shall be given to any person having an interest in the subject of the hearing or to one who can bind that person as described in Paragraph (1) or (2) of Subsection B of this section. Notice may be given both to a person and to another who may bind that person; and

(2) notice is given to unborn or unascertained persons who are not represented under Paragraph (1) or (2) of Subsection B of this section by giving notice to all known persons whose interests in the proceedings are substantially identical to those of the unborn or unascertained persons; and

D. at any point in a proceeding, the district court shall appoint a guardian ad litem to represent the interest of a minor; an incapacitated, unborn or unascertained person; or a person whose identity or address is unknown, if the district court determines that representation of the interest would otherwise be inadequate. If not precluded by conflict of interests, a guardian ad litem may be appointed to represent several persons or interests. The district court shall set out its reasons for appointing a guardian ad litem as a part of the record of the proceeding."

Section 25. Section 45-3-203 NMSA 1978 (being Laws 1975, Chapter 257, Section 3-203) is amended to read:

"45-3-203. PRIORITY AMONG PERSONS SEEKING APPOINTMENT AS PERSONAL REPRESENTATIVE.--

A. Whether the proceedings are formal or informal, persons who are not disqualified have priority for appointment in the following order:

(1) the person with priority as determined by a probated will, including a person nominated by a power conferred in a will;

(2) the surviving spouse of the decedent who is a devisee of the decedent;

(3) other devisees of the decedent;

(4) the surviving spouse of the decedent;

(5) other heirs of the decedent; and

(6) on application or petition of an interested person other than a spouse, devisee or heir, any qualified person.

B. An objection to an appointment may be made only in formal proceedings. In case of objection, the priorities stated in Subsection A of this section apply except that:

(1) if the estate appears to be more than adequate to meet exemptions and costs of administration but inadequate to discharge anticipated unsecured claims, the court, on petition of creditors, may appoint any qualified person; and

(2) in case of objection to appointment of a

person other than one whose priority is determined by will by an heir or devisee appearing to have a substantial interest in the estate, the court may appoint a person who is acceptable to heirs and devisees whose interests in the estate appear to be worth in total more than half of the probable distributable value of the estate or, in default of this accord, any suitable person.

C. A person entitled to letters under Paragraphs (2) through (5) of Subsection A of this section or a person who has not reached the age of majority and who might be entitled to letters but for the person's age may nominate a qualified person to act as personal representative and thereby confer the person's relative priority for appointment on the person's nominee. Any person who has reached the age of majority may renounce the right to nominate or to an appointment by appropriate writing filed with the court. When two or more persons share a priority, those of them who do not renounce shall concur in nominating another to act for them or in applying for appointment.

D. Conservators of the estates of protected persons or, if there is no conservator, any guardian except a guardian ad litem of a minor or incapacitated person may exercise the same right to nominate, to object to another's appointment or to participate in determining the preference of a majority in interest of the heirs and devisees that the protected person

would have if qualified for appointment.

E. Appointment of one who does not have highest priority, including highest priority resulting from renunciation or nomination determined pursuant to this section, may be made only in formal proceedings. Before appointing one without highest priority, the court shall determine that those having highest priority, although given notice of the proceedings, have failed to request appointment or to nominate another for appointment and that administration is necessary.

F. No person is qualified to serve as a personal representative who is:

- (1) under the age of majority;
- (2) a person whom the court finds unsuitable in formal proceedings; or
- (3) a creditor of the decedent unless the appointment is to be made after forty-five days have elapsed from the death of the decedent.

G. A personal representative appointed by a court of the decedent's domicile has priority over all other persons except where the decedent's will nominates different persons to be personal representatives in New Mexico and in the state of domicile. The domiciliary personal representative may nominate another, who shall have the same priority as the domiciliary personal representative.

H. This section governs priority for appointment of a successor personal representative but does not apply to the selection of a special administrator."

Section 26. Section 45-5-101 NMSA 1978 (being Laws 1975, Chapter 257, Section 5-101, as amended) is amended to read:

"45-5-101. DEFINITIONS AND USE OF TERMS.--Unless otherwise apparent from the context, in Chapter 45, Article 5 NMSA 1978:

A. "conservator" is as defined in Section 45-1-201 NMSA 1978;

B. "court" means the district court or the children's or family division of the district court where such jurisdiction is conferred by the Children's Code;

C. "functional impairment" means an impairment that is measured by a person's inability to manage the person's personal care or the person's inability to manage the person's estate or financial affairs or both;

D. "guardian" is as defined in Section 45-1-201 NMSA 1978;

E. "guardian ad litem" is as defined in Section 45-1-201 NMSA 1978;

F. "incapacitated person" means any person 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, except minority, to the extent that the person is unable to manage the person's personal affairs or the person is unable to manage the person's estate or financial affairs or both;

G. "inability to manage the person's personal care" means the inability, as evidenced by recent behavior, to meet one's needs for medical care, nutrition, clothing, shelter, hygiene or safety so that physical injury, illness or disease has occurred or is likely to occur in the near future;

H. "inability to manage the person's estate or financial affairs or both" means gross mismanagement, as evidenced by recent behavior, of one's income and resources or medical inability to manage one's income and resources that has led or is likely in the near future to lead to financial vulnerability;

I. "interested person" means any person who has an interest in the welfare of the person to be protected under this article;

J. "least restrictive form of intervention" means that the guardianship or conservatorship imposed on the incapacitated person or minor protected person represents only those limitations necessary to provide the needed care and rehabilitative services and that the incapacitated person or minor protected person shall enjoy the greatest amount of personal freedom and civil liberties;

K. "letters" is as defined in Section 45-1-201 NMSA 1978;

L. "limited conservator" means any person who is qualified to manage the estate and financial affairs of an incapacitated person pursuant to a court appointment in a limited conservatorship;

M. "limited conservatorship" means that an incapacitated person is subject to a conservator's exercise of some but not all of the powers enumerated in Sections 45-5-424 and 45-5-425 NMSA 1978;

N. "limited guardian" means any person who is qualified to manage the care, custody and control of an incapacitated person pursuant to a court appointment of a limited guardianship;

O. "limited guardianship" means that an incapacitated person is subject to a guardian's exercise of some but not all of the powers enumerated in Section 45-5-312 NMSA 1978;

P. "minor" is as defined in Section 45-1-201 NMSA 1978;

Q. "minor protected person" means a minor for whom a guardian or conservator has been appointed solely because of minority;

R. "protective proceeding" means a conservatorship proceeding under Section 45-5-401 NMSA 1978;

S. "protected person" means a minor or other person for whom a guardian or conservator has been appointed or other protective order has been made;

T. "qualified health care professional" means a physician, psychologist, physician assistant, nurse practitioner or other health care practitioner whose training and expertise aid in the assessment of functional impairment; and

U. "visitor" means a person who is an appointee of the court who has no personal interest in the proceeding and who has been trained or has the expertise to appropriately evaluate the needs of the person who is allegedly incapacitated. A "visitor" may include, but is not limited to, a psychologist, a social worker, a developmental incapacity professional, a physical and occupational therapist, an educator and a rehabilitation worker."

Section 27. Section 45-5-104 NMSA 1978 (being Laws 1975, Chapter 257, Section 5-104) is amended to read:

"45-5-104. DELEGATION OF POWERS BY PARENT OR GUARDIAN.-- A parent or a guardian of a minor or an incapacitated person, by an acknowledged power of attorney, may delegate to another person, for a period not exceeding six months, any of the parent's or guardian's powers regarding care, custody or property of the minor child or protected person, except the power to consent to marriage or adoption of a minor protected

person."

Section 28. Section 45-5-201 NMSA 1978 (being Laws 1975, Chapter 257, Section 5-201, as amended) is amended to read:

"45-5-201. APPOINTMENT AND STATUS OF GUARDIAN OF MINOR--GENERAL.--A person becomes a guardian of a minor by parental appointment or upon appointment by the court. The guardianship status continues until terminated, without regard to the location from time to time of the guardian or minor protected person."

Section 29. Section 45-5-209 NMSA 1978 (being Laws 1995, Chapter 210, Section 54) is amended to read:

"45-5-209. POWERS AND DUTIES OF GUARDIAN OF MINOR.--

A. A guardian of a minor protected person has the powers and responsibilities of a parent regarding the protected person's support, care and education, but a guardian is not personally liable for the protected person's expenses and is not liable to third persons by reason of the relationship for acts of the protected person.

B. In particular and without qualifying the foregoing, a guardian shall:

(1) become or remain personally acquainted with the protected person and maintain sufficient contact with the protected person to know of the protected person's capacities, limitations, needs, opportunities and physical and mental health;

(2) take reasonable care of the protected person's personal effects and commence protective proceedings if necessary to protect other property of the protected person;

(3) apply any available money of the protected person to the protected person's current needs for support, care and education;

(4) conserve any excess money of the protected person for the protected person's future needs, but if a conservator has been appointed for the estate of the protected person, the guardian, at least quarterly, shall pay to the conservator money of the protected person to be conserved for the protected person's future needs; and

(5) report the condition of the protected person and of the protected person's estate that has been subject to the guardian's possession or control, as ordered by the court on petition of any person interested in the protected person's welfare or as required by court rule.

C. A guardian may:

(1) receive money payable for the support of the protected person to the protected person's parent, guardian or custodian under the terms of any statutory benefit or insurance system or any private contract, devise, trust, conservatorship or custodianship and money or property of the protected person paid or delivered pursuant to the provisions

of Section 45-5-103 NMSA 1978 or any other statute;

(2) if consistent with the terms of any order by a court of competent jurisdiction relating to detention or commitment of the protected person, take custody of the person of the protected person and establish the protected person's place of abode within or without New Mexico;

(3) if no conservator for the estate of the protected person has been appointed, institute proceedings, including administrative proceedings, or take other appropriate action to compel the performance by any person of a duty to support the protected person or to pay sums for the welfare of the protected person;

(4) consent to medical or other professional care, treatment or advice for the protected person without liability by reason of the consent for injury to the protected person resulting from the negligence or acts of third persons unless a parent would have been liable in the circumstances;

(5) consent to the marriage or adoption of the protected person; and

(6) if reasonable under all of the circumstances, delegate to the protected person certain responsibilities for decisions affecting the protected person's well-being.

D. A guardian is entitled to reasonable compensation for services as guardian and to reimbursement for room, board

and clothing personally provided to the protected person, but only as approved by order of the court. If a conservator, other than the guardian or one who is affiliated with the guardian, has been appointed for the estate of the protected person, reasonable compensation and reimbursement to the guardian may be approved and paid by the conservator without order of the court controlling the guardian.

E. In the interest of developing self-reliance on the part of a protected person or for other good cause, the court, at the time of appointment or later, on its own motion or on appropriate petition or motion of the minor or other interested person, may limit the powers of a guardian otherwise conferred by this section and thereby create a limited guardianship. Any limitation on the statutory power of a guardian of a minor must be endorsed on the guardian's letters or, in the case of a guardian by parental appointment, must be reflected in letters that are issued at the time any limitation is imposed. Following the same procedure, a limitation may be removed and appropriate letters issued."

Section 30. Section 45-5-210 NMSA 1978 (being Laws 1975, Chapter 257, Section 5-210) is amended to read:

"45-5-210. TERMINATION OF APPOINTMENT OF GUARDIAN--GENERAL.--A guardian's authority and responsibility terminate upon the death, resignation or removal of the guardian or upon the minor's death, adoption, marriage or attainment of

majority, but termination does not affect the guardian's liability for prior acts nor the guardian's obligation to account for money and property of the protected person. Resignation of a guardian does not terminate the guardianship until it has been approved by the court. A testamentary appointment under an informally probated will terminates if the will is later denied probate in a formal proceeding."

Section 31. Section 45-5-211 NMSA 1978 (being Laws 1975, Chapter 257, Section 5-211) is amended to read:

"45-5-211. PROCEEDINGS SUBSEQUENT TO APPOINTMENT--
VENUE.--

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 and other proceedings relating to the guardianship.

B. 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 New Mexico or another state, and, after consultation with that court, determine whether to retain jurisdiction or transfer the proceedings to the other court, whichever is 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 32. Section 45-5-212 NMSA 1978 (being Laws 1975, Chapter 257, Section 5-212, as amended) is amended to read:

"45-5-212. RESIGNATION, REMOVAL AND OTHER POST-APPOINTMENT PROCEEDINGS.--

A. Any person interested in the welfare of a protected person, or the protected person if fourteen or more years of age, may petition for removal of a guardian on the ground that removal would be in the best interest of the protected person. A guardian may petition for permission to resign. A petition for removal or for permission to resign may, but need not, include a request for appointment of a successor guardian.

B. Notice of hearing on a petition for an order after the appointment of a guardian must be given to the protected person, the guardian and any other person as ordered by the court.

C. After notice pursuant to Section 45-1-401 NMSA 1978 and hearing on a petition for removal or for permission to resign, the court may terminate the guardianship and make any further order that may be appropriate.

D. If at any time in the proceeding the court finds that the interest of the protected person is or may be inadequately represented, it may appoint an attorney to

represent the minor, giving consideration to the preference of the minor if the minor is fourteen or more years of age."

Section 33. Section 45-5-303 NMSA 1978 (being Laws 1989, Chapter 252, Section 5, as amended) is amended to read:

"45-5-303. PROCEDURE FOR COURT APPOINTMENT OF A GUARDIAN OF AN INCAPACITATED PERSON.--

A. An interested person may file a petition for the appointment of a person to serve as guardian for an alleged incapacitated person under the Uniform Probate Code. The petition shall state the following:

(1) the name, date of birth and address of the alleged incapacitated person for whom the guardian is sought to be appointed;

(2) the nature of the alleged incapacity as it relates to the functional limitations and physical and mental condition of the alleged incapacitated person and the reasons why guardianship is being requested;

(3) if a limited guardianship is sought, the particular limitations requested;

(4) whether a guardian has been appointed or is acting in any state for the alleged incapacitated person;

(5) the efforts that have been made that demonstrate due diligence to locate the other court-appointed guardian, agent or surrogate designated by the allegedly incapacitated person;

(6) the name and address of the proposed guardian;

(7) the name and address of two persons able to contact the proposed guardian if address or telephone contact information of the proposed guardian changes;

(8) the names and addresses, as far as known or as can reasonably be ascertained, of the persons most closely related by blood or marriage to the alleged incapacitated person;

(9) the name and address of the person or institution having the care and custody of the alleged incapacitated person;

(10) the number of other protected persons served by the proposed guardian, the other protected persons' relationships to the proposed guardian and the types of guardianship held if the proposed guardian is an individual;

(11) the reasons the appointment of a guardian is sought and the interest of the petitioner in the appointment;

(12) the steps taken to find less restrictive alternatives to the proposed guardianship; and

(13) the qualifications of the proposed guardian, including whether the guardian has ever been convicted of a felony.

B. Notice of a petition under this section for the

appointment of a guardian and the hearing on the petition shall be given as provided in Section 45-5-309 NMSA 1978.

C. After the filing of a petition, the court shall set a date for hearing on the issues raised by the petition. Unless an alleged incapacitated person already has an attorney of the alleged incapacitated person's own choice, the court shall appoint an attorney to represent the alleged incapacitated person. The court-appointed attorney in the proceeding shall have the duties of a guardian ad litem, as set forth in Section 45-5-303.1 NMSA 1978.

D. The person alleged to be incapacitated shall be examined by a qualified health care professional appointed by the court who shall submit a report in writing to the court. The report shall:

(1) describe the nature and degree of the alleged incapacitated person's incapacity, if any, and the level of the respondent's intellectual, developmental and social functioning; and

(2) contain observations, with supporting data, regarding the alleged incapacitated person's ability to make health care decisions and manage the activities of daily living.

E. The court shall appoint a visitor who shall interview the person seeking appointment as guardian and the person alleged to be incapacitated. The visitor shall also

visit the present place of abode of the person alleged to be incapacitated and the place where it is proposed the alleged incapacitated person will be detained or reside if the requested appointment is made. The visitor shall evaluate the needs of the person alleged to be incapacitated and shall submit a written report to the court. The report shall include a recommendation regarding the appropriateness of the appointment of the proposed guardian. The report to the court shall also include recommendations regarding:

(1) those aspects of personal care that the alleged incapacitated person can manage without supervision or assistance;

(2) those aspects of personal care that the alleged incapacitated person could manage with the supervision or assistance of support services and benefits; and

(3) those aspects of personal care that the alleged incapacitated person is unable to manage without the supervision of a guardian.

Unless otherwise ordered by the court, the appointment of the visitor terminates and the visitor is discharged from the visitor's duties upon entry of an order appointing a guardian and acceptance of the appointment by the guardian.

F. A person alleged to be incapacitated shall be present at the hearing on the issues raised by the petition and any response to the petition unless the court determines

by evidence that it is not in the alleged incapacitated person's best interest to be present because of a threat to the health or safety of the alleged incapacitated person or others as determined by the court.

G. The court upon request or its own motion may conduct hearings at the location of the alleged incapacitated person who is unable to be present in court.

H. The rules of evidence shall apply and no hearsay evidence that is not otherwise admissible in a court shall be admitted into evidence except as otherwise provided in this article. There is a legal presumption of capacity, and the burden of proof shall be on the petitioner to prove the allegations set forth in the petition. Such proof shall be established by clear and convincing evidence.

I. A record of the proceedings shall be made if requested by the alleged incapacitated person or the alleged incapacitated person's attorney or when ordered by the court. Records, reports and evidence submitted to the court or recorded by the court shall be confidential, except that the public shall be granted access to the following information:

- (1) docket entries;
- (2) date of the proceeding, appointment and termination;
- (3) duration of the guardianship; and
- (4) the name and other information necessary to

identify the alleged incapacitated person.

J. Notwithstanding the provisions of Subsection I of this section, a disclosure of information shall not include diagnostic information, treatment information or other medical or psychological information.

K. The issue of whether a guardian shall be appointed for the alleged incapacitated person shall be determined by the court at a closed hearing unless the alleged incapacitated person requests otherwise.

L. Upon request of the petitioner or alleged incapacitated person, the court shall schedule a jury trial."

Section 34. Section 45-5-304 NMSA 1978 (being Laws 1989, Chapter 252, Section 7, as amended) is amended to read:

"45-5-304. FINDINGS--ORDER OF APPOINTMENT.--

A. The court, at the hearing on the petition for appointment for a guardian pursuant to provisions of Chapter 45, Article 5 NMSA 1978, shall:

(1) inquire into the nature and extent of the functional limitations of the alleged incapacitated person; and

(2) ascertain the alleged incapacitated person's capacity to care for the alleged incapacitated person's own self.

B. If it is determined that the alleged incapacitated person possesses the capacity to care for the

alleged incapacitated person's own self, the court shall dismiss the petition.

C. Alternatively, the court may appoint a full guardian as requested in the petition or a limited guardian and confer specific powers of guardianship after finding in the record based on clear and convincing evidence that:

(1) the person for whom a guardian is sought is totally incapacitated or is incapacitated only in specific areas as alleged in the petition;

(2) the guardianship is necessary as a means of providing continuing care, supervision and rehabilitation of the incapacitated person;

(3) there are no available alternative resources that are suitable with respect to the alleged incapacitated person's welfare, safety and rehabilitation;

(4) the guardianship is appropriate as the least restrictive form of intervention consistent with the preservation of the civil rights and liberties of the alleged incapacitated person; and

(5) the proposed guardian is both qualified and suitable, has reviewed the proposed order of appointment and is willing to serve.

D. The court may enter any other appropriate order consistent with the findings of this section.

E. A copy of the order appointing the guardian shall

be furnished to the proposed guardian, the incapacitated person and the incapacitated person's counsel.

F. The order shall contain the name and address of the guardian as well as notice of the incapacitated person's right to appeal the guardianship appointment and of the right to seek alteration or termination of the guardianship at any time."

Section 35. Section 45-5-306 NMSA 1978 (being Laws 1975, Chapter 257, Section 5-306) is amended to read:

"45-5-306. DEATH OF PROTECTED PERSON OR GUARDIAN-- INCAPACITY OF GUARDIAN.--The authority and responsibility of a guardian for an incapacitated person terminates upon the death of the guardian or protected person, the determination of incapacity of the guardian or upon removal or resignation as provided in Section 45-5-307 NMSA 1978. Upon the death of the protected person, the guardian shall submit notice to the appointing court. Testamentary appointment under an informally probated will terminates if the will is later denied probate in a formal proceeding. Termination does not affect the guardian's liability for prior acts nor the guardian's obligation to account for funds and assets of the guardian's protected person."

Section 36. Section 45-5-307 NMSA 1978 (being Laws 1975, Chapter 257, Section 5-307, as amended) is amended to read:

"45-5-307. SUBSTITUTION, REVIEW AND TERMINATION OF

GUARDIANSHIP.--

A. On the petition of the incapacitated person or any person interested in the incapacitated person's welfare and upon notice and hearing, the court may remove a guardian and appoint a successor if it is in the best interest of the incapacitated person.

B. Upon death, removal or resignation of a guardian, the court may appoint another guardian or make any other order that may be appropriate. If a successor guardian is appointed, the successor guardian succeeds to the title and powers of the successor guardian's predecessor.

C. The incapacitated person or any person interested in the incapacitated person's welfare may petition for an order that the incapacitated person is no longer incapacitated and for removal or resignation of the guardian. A request for this order may be made by informal letter to the court or judge. Any person who knowingly interferes with transmission of this kind of request to the court may be adjudged guilty of contempt of court.

D. Unless waived by the court upon the filing of a petition to terminate a guardianship for reasons other than the death of the incapacitated person, the court shall follow the same procedures to safeguard the rights of the incapacitated person as those that apply to a petition for appointment of a guardian as set forth in Section 45-5-303

NMSA 1978.

E. In a proceeding that increases the guardian's authority or reduces the autonomy of the protected person, the court shall follow the same procedures to safeguard the rights of the incapacitated person as those that apply to a petition for appointment of a guardian, as set forth in Section 45-5-303 NMSA 1978.

F. Following receipt of a request for review, the court shall hold a status hearing, which may be informal, to determine the appropriate order to be entered. If the court finds the incapacitated person is capable of more autonomy than at the time of the original order, the court may enter an order removing the guardian, terminating the guardianship or reducing the powers previously granted to the guardian. The court has the option to follow all or part of the procedures that apply for the appointment of a guardian as set forth in Section 45-5-303 NMSA 1978.

G. At any time following the appointment of a guardian, but not later than ten years after the initial appointment of a guardian for a protected person and every ten years thereafter, the court shall hold a status hearing, after notice to the guardian, the protected person and appropriate interested persons, to review the status of the protected person's capacity and the continued need for a guardian. If the court is unable to contact either the guardian or the

protected person and neither appears for the status hearing, the court shall appoint a guardian ad litem to investigate and advise the court as to the status of the protected person and the guardian.

H. Following the status hearing or the court's report from the guardian ad litem on the status of the protected person and the guardian as provided in Subsection G of this section, the court may enter an appropriate order; provided that, in entering an order that increases the guardian's authority or reduces the autonomy of the protected person, the court shall follow the same procedures to safeguard the rights of the incapacitated person as those that apply to a petition for appointment of a guardian, as set forth in Section 45-5-303 NMSA 1978."

Section 37. Section 45-5-309 NMSA 1978 (being Laws 1975, Chapter 257, Section 5-309, as amended) is amended to read:

"45-5-309. NOTICES IN GUARDIANSHIP PROCEEDINGS.--

A. In a proceeding for the appointment or removal of a guardian of an incapacitated person, other than the appointment of a temporary guardian or temporary suspension of a guardian, notice of hearing and a copy of the petition and any interim orders that may have been entered shall be given to each of the following:

- (1) the person alleged to be incapacitated;
- (2) the person's spouse, parents and adult

children, or if there are no adult children, at least one of the person's closest adult relatives if any can be found;

(3) the proposed guardian; and

(4) a person, as far as known or as can reasonably be ascertained, previously nominated or designated in a writing signed by the incapacitated person prior to incapacity that has not been revoked by the incapacitated person or terminated by a court. This includes but is not limited to writings executed under the Uniform Health-Care Decisions Act, the Mental Health Care Treatment Decisions Act, the Uniform Power of Attorney Act, the Uniform Probate Code and the Uniform Trust Code.

Notice of hearing shall be given to a person who is serving as the guardian or conservator of the person to be protected or who has primary responsibility for the person's care.

B. Notice shall be served personally on the alleged incapacitated person and the person's spouse if they can be found within New Mexico. Notice to an out-of-state spouse, the parents and to all other persons, except the alleged incapacitated person, shall be given as provided in Section 45-1-401 NMSA 1978.

C. At least fourteen days' notice shall be given before the hearing takes place. The notice shall be in plain language and large type and shall include the following

information and shall be substantially in the following form:

"NOTICE

TO: (name and address of person receiving notice)

On (date of hearing) at (time of hearing) in (place of hearing) at (city), New Mexico, the (name and address of court) will hold a hearing to determine whether a guardian should be appointed for (name of alleged incapacitated person). The purpose of this proceeding is to protect (name of alleged incapacitated person). A copy of the petition requesting appointment of a guardian is attached to this notice.

At the hearing, the court will determine whether (name of alleged incapacitated person) is an incapacitated person under New Mexico law.

If the court finds that (name of alleged incapacitated person) is incapacitated, the court at the hearing shall also consider whether (name of proposed guardian, if any) should be appointed as guardian of (name of alleged incapacitated person). The court may, in its discretion, appoint some other qualified person as guardian. The court may also, in its discretion, limit the powers and duties of the guardian to allow (name of alleged incapacitated person) to retain control over certain activities.

(Name of alleged incapacitated person) shall attend the hearing and be represented by an attorney. The petition may

be heard and determined in the absence of (name of alleged incapacitated person) if the court determines that the presence of (name of alleged incapacitated person) is not possible. If (name of alleged incapacitated person) attends the hearing and is not represented by an attorney, the court must appoint an attorney to represent the alleged incapacitated person.

The court may, on its own motion or on request of any interested person, postpone the hearing to another date and time.

(signature of petitioner)".

Section 38. Section 45-5-311 NMSA 1978 (being Laws 1975, Chapter 257, Section 5-311, as amended) is amended to read:

"45-5-311. WHO MAY BE APPOINTED GUARDIAN--PRIORITIES.--

A. Any person deemed to be qualified by the court may be appointed guardian of an incapacitated person, except that no individual who operates or is an employee of a boarding home, residential care home, nursing home, group home or other similar facility in which the incapacitated person resides may serve as guardian for the incapacitated person, except an employee may serve in such capacity when related by affinity or consanguinity.

B. 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) a person, as far as known or as can be reasonably ascertained, previously nominated or designated in a writing as defined in Paragraph (4) of Subsection A of Section 45-5-309 NMSA 1978 to serve as guardian or agent in a writing signed by the incapacitated person prior to the incapacitated person's incapacity that has not been revoked by the incapacitated person or terminated by a court;

(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 the incapacitated person 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 the incapacitated person; and

(8) any other person.

C. With respect to persons having equal priority, the court shall select the person it considers best qualified to serve as guardian. The court, acting in the best interest of the incapacitated person and for good cause shown, may pass

over a person having priority and appoint a person having a lower priority under this section and shall take into consideration:

(1) the preference of the incapacitated person, giving weight to preferences expressed in writing by the person while having capacity;

(2) the geographic location of the proposed guardian;

(3) the relationship of the proposed guardian to the incapacitated person;

(4) the ability of the proposed guardian to carry out the powers and duties of the guardianship; and

(5) potential financial conflicts of interest between the incapacitated person and proposed guardian."

Section 39. Section 45-5-312 NMSA 1978 (being Laws 1975, Chapter 257, Section 5-312, 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."

Section 40. Section 45-5-313 NMSA 1978 (being Laws 1975, Chapter 257, Section 5-313) is amended to read:

"45-5-313. PROCEEDINGS SUBSEQUENT TO APPOINTMENT--
VENUE.--

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 and other

proceedings relating to the guardianship.

B. 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 that 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 41. Section 45-5-314 NMSA 1978 (being Laws 1989, Chapter 252, Section 14, as amended) is amended to read:

"45-5-314. ANNUAL REPORT.--

A. The guardian of an incapacitated person shall file an initial report with the appointing court within ninety days of the guardian's appointment. Thereafter, the guardian shall file an annual report within thirty days of the anniversary date of the guardian's appointment. A copy of the report shall also be submitted to the district judge who appointed the guardian or the judge's successor, to the incapacitated person and to the incapacitated person's conservator, if any. The court shall review this report. The report shall include information concerning the progress and

condition of the incapacitated person, including but not limited to the incapacitated person's health, medical and dental care, residence, education, employment and habitation; a report on the manner in which the guardian carried out the guardian's powers and fulfilled the guardian's duties; and the guardian's opinion regarding the continued need for guardianship. If the guardian has been provided power pursuant to Paragraph (4) of Subsection B of Section 45-5-312 NMSA 1978, the report shall contain information on financial decisions made by the guardian. The report shall be substantially in the following form:

"STATE OF NEW MEXICO

COUNTY OF _____

_____ JUDICIAL DISTRICT COURT

IN THE MATTER OF THE GUARDIANSHIP OF

CAUSE NO. _____

an incapacitated adult

GUARDIAN'S 90-DAY _____ ANNUAL _____ FINAL _____ (check one)

REPORT ON THE CONDITION AND WELL-BEING OF AN ADULT PROTECTED PERSON

Date of Appointment: _____

Pursuant to Section 45-5-314 NMSA 1978, the undersigned duly appointed, qualified and acting guardian of the above-mentioned protected person reports to the court as follows

(attach additional sheets, if necessary):

1. **PROTECTED**

Name _____

PERSON: Residential Address _____

Facility Name _____

City, State, Zip Code _____

Telephone _____ Date of Birth _____

Name of person primarily responsible at protected person's
place of residence: _____.

2. **GUARDIAN:** Name _____

Business Name (if any) _____

Address _____

City, State, Zip Code _____

Telephone _____ Alternate Telephone # _____

Relation to Protected Person _____

3. **FINAL REPORTS ONLY** (otherwise, go to #4)

I am filing a Final Report because of: ___ My resignation

___ Death of the Protected Person ___ Court Order

___ Other (please explain): _____

A. If because of **resignation**, Name of successor, if
appointed: _____

Address _____

City, State, Zip Code _____

B. If because of **Protected Person's death**: (attach
copy of death certificate, if available)

Date and place of death: _____

Name of personal representative if appointed: _____

Address _____

City, State, Zip Code _____

4. During the past year or 90 days (if initial report), I have visited the Protected Person _____ times. The date of my last personal visit was _____.

5. (A) Describe the residence of the Protected Person:

_____ Hospital/medical facility _____ Protected Person's home

_____ Guardian's home _____ Relative's home (explain below)

_____ Nursing home _____ Boarding/Foster/Group Home

_____ Other:

(B) During the past year or 90 days (if first report),

has the Protected Person changed his/her residence? _____

Do you anticipate a change of residence for the protected person in the next year? _____

6. The name and address of any hospital or other institution (if any) where the Protected Person is now admitted:

_____.

7. The Protected Person is under a physician's regular care.

_____ Yes _____ No

Identify the health care providers.

Physician: _____

Dentist (if any): _____

Mental Health Professional (i.e., psychiatrist, counselor):

Other: _____

8. (A) During the past year or 90 days (if initial report),
the Protected Person's physical health:

Remained the same _____

Primary diagnosis: _____

_____ improved _____ deteriorated

(explain) _____

(B) During the past year or 90 days (if initial report),
the Protected Person's mental health: Remained the same _____

Major diagnosis, if any: _____

Improved _____ deteriorated (explain) _____

If physical or mental health has deteriorated, please explain:

9. Describe any significant hospitalizations or mental or
medical events during the past year or 90 days (if initial
report):

10. List the Protected Person's activities and changes, if
any, over the past year or 90 days (if initial report):

Recreational Activities: _____

Educational Activities: _____

Social Activities: _____

List Active Friends and/or Relatives: _____

Occupational activities: _____

Other: _____

11. Describe briefly any contracts entered into and major decisions made on behalf of the Protected Person during the past year or 90 days (if initial report): _____

12. The Protected Person has made the following statements regarding his/her living arrangements and the guardianship over him/her: _____

13. I believe the Protected Person has unmet needs.
_____ Yes (explain) _____ No

If yes, indicate efforts made to meet these needs: _____

14. The Protected Person continues to require the assistance of a guardian: _____ Yes _____ No
Explain why or why not: _____
_____.

15. The authority given to me by the Court should:
_____ remain the same _____ be decreased _____ be increased
Why: _____

16. Additional information concerning the Protected Person or myself (the guardian) that I wish to share with the Court:

17. If the court has granted you the authority to make financial decisions on behalf of the Protected Person, then please describe the decisions you have made for the protected person: _____.

Signature of Guardian: _____ Date: _____

Printed Name: _____."

A. Any guardian may rely on a qualified health care professional's current written report to provide descriptions of the physical and mental conditions required in items 7, 8, 9, 14 and 15 of the annual report as specified in Subsection A of this section.

B. The guardian may be fined five dollars (\$5.00) per day for an overdue annual report. The fine shall be used to fund the costs of visitors, counsel and functional assessments utilized in conservatorship and guardianship proceedings pursuant to the Uniform Probate Code.

C. The court shall not waive the requirement of an annual report under any circumstance but may grant an extension of time not to exceed sixty days. The court may

require the filing of more than one report annually."

Section 42. Section 46A-3-303 NMSA 1978 (being Laws 2003, Chapter 122, Section 3-303) is amended to read:

"46A-3-303. REPRESENTATION BY FIDUCIARIES AND PARENTS.--To the extent there is no conflict of interest between the representative and the person represented or among those being represented with respect to a particular question or dispute:

A. a conservator may represent and bind the estate that the conservator controls;

B. a guardian may represent and bind the protected person if a conservator of the protected person's estate has not been appointed;

C. an agent having authority to act with respect to the particular question or dispute may represent and bind the principal;

D. a trustee may represent and bind the beneficiaries of the trust;

E. a personal representative of a decedent's estate may represent and bind persons interested in the estate; and

F. a parent may represent and bind the parent's minor or unborn child if a conservator or guardian for the child has not been appointed."