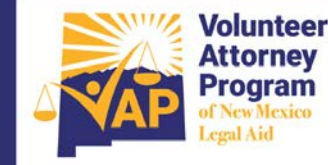


**WELCOME TO THE  
VAP PRO BONO  
COLLABORATIVE  
ECHO CLE SERIES**

**03/05/2024**

**Adult Guardianships 101  
Part 2: Role and  
Responsibilities of the 3  
Professionals and  
Preparing for the Hearing**

# Agenda



**Introductions** - Zac Addison, Esq., VAP Director, New Mexico Legal Aid, Inc.



**Announcements for Session:** Marissa Gonzalez, VAP Paralegal, New Mexico Legal Aid, Inc.



**Topic Presentation: Adult Guardianships 101 – Part 2: Role and Responsibilities of the 3 Professionals and Preparing for the Hearing**



**Topic Presenter:** Patricia Galindo, JD – Supervising Attorney, Administrative Office of the Courts



**Case Analysis and Q&A:** Bella Zayani, VAP Pro Bono Coordinator, New Mexico Legal Aid

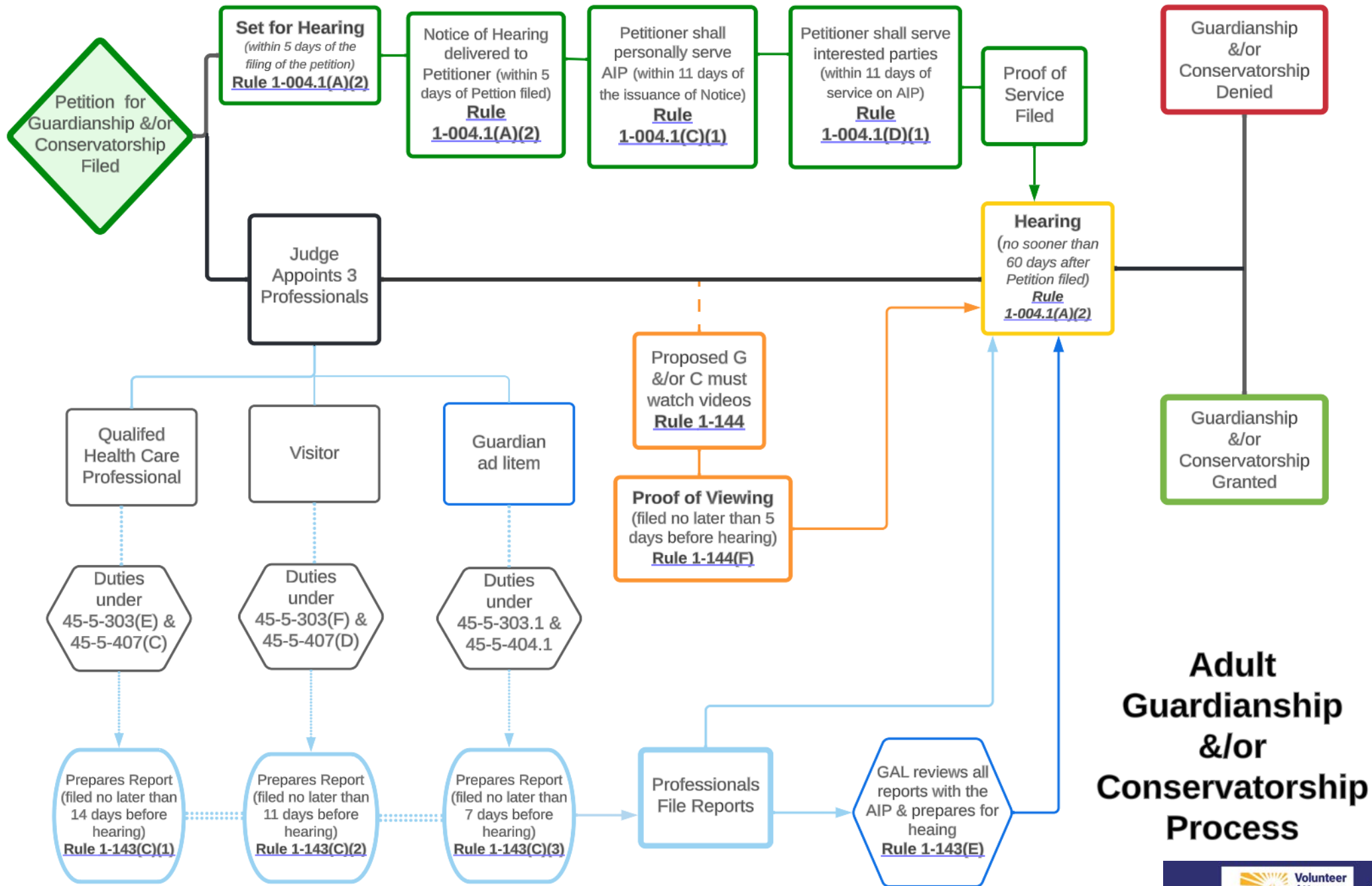


**Overview & Closing Remarks:** Volunteer Attorney Program of New Mexico Legal Aid

# Adult Guardianship 101 – Part 2: Role and Responsibilities of the 3 Professionals and Preparing for the Hearing



**PATRICIA M. GALINDO, JD**  
Supervising Attorney



## Adult Guardianship & or Conservatorship Process

# Court Process



## Adult Guardianship Cases

1

- Petition Filed/Reviewed

2

- Notice of Hearing

3

- Judge Appoints 3 Professionals

4

- Reports Filed by Professionals

5

- Court Hearing (Open to the Public)

6

- Judge Makes Decision - Appoint a Guardian and/or Conservator

## Fourth Step in a Guardianship Case



New Mexico statutes require the appointment of 3 professionals to assist the judge in determining functional limitation and capacity of the AIP.

- ▶ Guardian ad Litem (GAL)
- ▶ Qualified Health Care Professional
- ▶ Court Visitor

# Court Required to Appoint Three Professionals



# Guardian ad Litem

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**NMSA §45-5-303.1 and § 45-5-404.1**



# Statutory Requirements

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The guardian ad litem shall:

- (1) interview in person the alleged incapacitated person prior to the hearing;
- (2) present the alleged incapacitated person's declared position to the court;
- (3) identify and present all available less restrictive alternatives to guardianship

## Guardian ad Litem (cont.)

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- (4) interview the qualified health care professional, the visitor and the proposed guardian;
- (5) review both the medical report submitted by the qualified health care professional and the report by the visitor; and
- (6) obtain independent medical or psychological assessments, or both, if necessary.

# Qualified Health Care Professional

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**NMSA §45-5-303(D)(1) & (2) and § 45-5-407(C)**

# Who Can Serve as a Qualified Health Care Professional?

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- Physician;
- Psychologist,
- Physician Assistant;
- Nurse Practitioner; or
- Other health care practitioner whose training and expertise aid in the assessment of functional impairment.

# Visitor

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**NMSA §45-5-303(E) and § 45-5-407(D)**

# Court Visitor Report

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The report by the court visitor shall include:

- (1) those aspects of personal care that the AIP can manage without supervision or assistance;
- (2) those aspects of personal care that the AIP could manage with the supervision or assistance of support services and benefits; and
- (3) those aspects of personal care that the AIP is unable to manage without the supervision of a guardian.

# Activities of Daily Living

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Six basic Activities of Daily Living (ADLs):

- eating;
- bathing;
- dressing;
- toileting;
- transferring (walking); and
- continence.

# Definition of “Visitor”

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- A person who is an appointee of the court;
- has no personal interest in the proceeding; and
- has been trained or has expertise to appropriately evaluate the needs of the person who is alleged to be incapacitated.



# Who Can Serve as a Court Visitor?

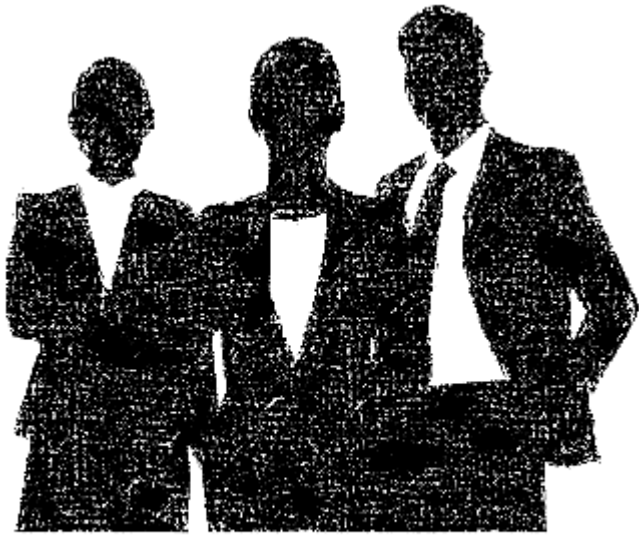
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May include, but is not limited to:

- Psychologist
- Social Worker
- Developmental Incapacity Professional
- Physical or Occupational Therapist
- Educator
- Rehabilitation Worker

# How Professionals Assist in a Guardianship Case

- ◆ Have a specific area of expertise and role in evaluating the needs of the alleged incapacitated person.
- ◆ Provide written reports and opinions on the best interest of the alleged incapacitated person.



## Fifth Step in a Guardianship Case

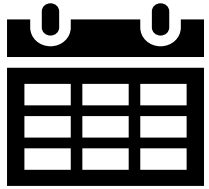


- Reports are submitted to the Court and provided to certain parties prior to the hearing.
- Contents of report often contain confidential information, so these are sealed and only available to certain individuals.

# Rule 1-143

## Rules of Civil Procedure for the District Courts

- *Qualified health care professional* - no later than fourteen (14) days before the hearing on a petition to appoint a guardian or conservator.
- *Visitor* - no later than eleven (11) days before the hearing on a petition to appoint a guardian or conservator.
- *Guardian ad litem* - no later than seven (7) days before the hearing on a petition to appoint a guardian or conservator.



Professional's Reports filed before hearing to determine if a Guardian &/or a Conservator should be appointed

Allows AIP to prepare for hearing

Judge can review before hearing

**QHCP**

14 days



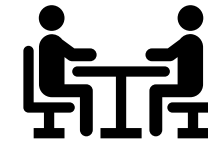
**Visitor**

11 days



**GAL**

7 days



**GAL reviews with AIP**



**Hearing**

# Importance of Deadlines

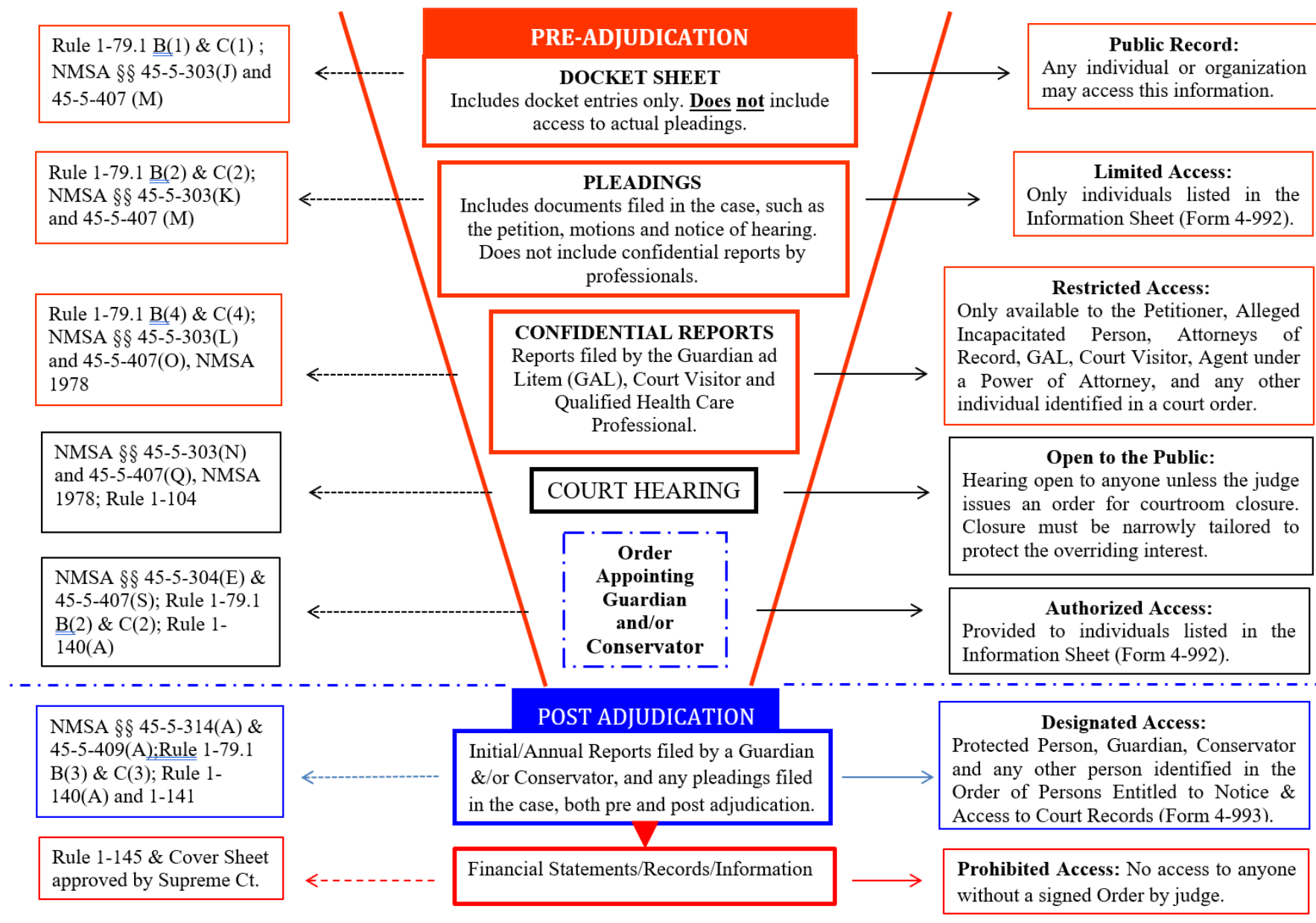
# Confidential Reports



Although individuals listed on the Information Sheet have **LIMITED ACCESS** to court record, it does not include reports filed by:

- Guardian ad Litem,
- Visitor, and
- Qualified Health Care Professional

# ACCESS TO INFORMATION IN ADULT GUARDIANSHIP & CONSERVATORSHIP CASES





# Guardianship Hearings





# Sixth Step in a Guardianship Case



## Hearing on the Petition for Guardianship

- ▶ Legal presumption of capacity
- ▶ Burden of proof on the Petitioner to prove allegations in Petition.
- ▶ Rules of evidence apply
  - No hearsay
  - Clear and convincing standard

# Hearing to Determine Capacity



## Hearings Open to the Public

- ◆ Hearings are open unless good cause is shown to close a hearing.
- ◆ Anyone is allowed to attend a hearing to determine whether a guardian and/or conservator will be appointed (Pre-Adjudication).

# AIP's Presence at the Guardianship Hearing



§45-5-303(G)

A person alleged to be incapacitated **shall be present** at the hearing on the issues raised by the petition and respond to the petition **unless the court determines** by evidence that it is **not in the AIP's best interest** to be present **because of a threat to health or safety.**

# Evidence at the Guardianship Hearing

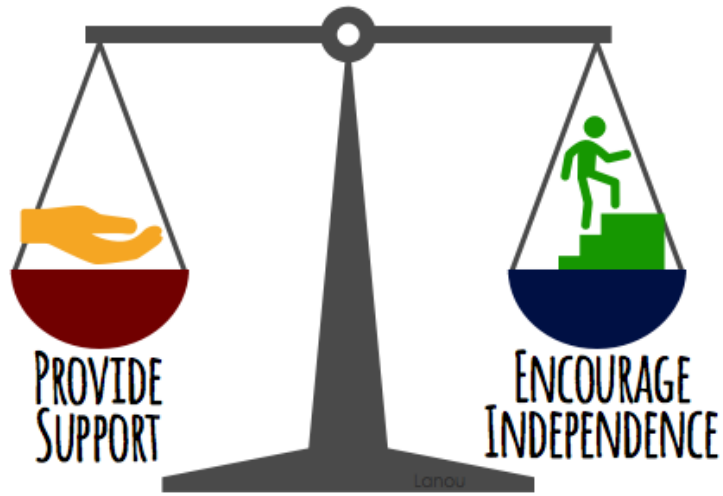


**§ 45-5-303 (G)**

AIP may:

1. Present evidence and subpoena witnesses and documents;
2. Examine witnesses, including GAL, Qualified Health Care Provider and Visitor; and
3. Otherwise participate in the hearing.

# Least Restrictive Option



At a hearing, a judge will make a determination as to whether an individual lacks the legal capacity to make decisions for themselves and/or handle their finances. The **judge's decision** should be the **least restrictive option, giving the incapacitated adult the most autonomy possible.**

# Judge's Findings and Decision



The court, at the hearing on the petition shall:

1. inquire into the nature and extent of the functional limitations of the AIP; and
  2. ascertain the AIP's capacity to care for their own self.
- ▶ If it is determined that the AIP possesses the capacity to care for their own self, the court shall dismiss the petition.



# When Is Guardianship To Be Used?



- ▶ as is necessary to promote and to protect the well being of the person;
- ▶ designed to *encourage the development of maximum self reliance and independence of the person*; and
- ▶ shall be ordered only to the extent necessitated by the person's actual functional mental and physical limitations.

# Protected Person Retains Rights



An adult for whom a guardian or conservator has been appointed retains all legal and civil rights except those which have been expressly limited by court order or have been specifically granted to the guardian and/or conservator by the court.



# Types of Guardianship/Conservatorship

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## LIMITED

Judge determines the adult is able to handle some affairs on their own but could use some assistance and appoints someone with limited duties and responsibilities.

## PLENARY (FULL)

Judge determines the adult is unable to handle any of their own affairs and appoints someone else to make all decisions for them.

# Who Can Be Appointed Guardian?

§ 45-5-311



Any person deemed to be qualified by the court may be appointed guardian or a conservator of an incapacitated person.

# Priority for Appointment



1. Guardian previously appointed by a court of any jurisdiction;
2. A person . . . previously nominated or designated in a writing signed by the incapacitated person prior to incapacity that has not been revoked or terminated by a court;
3. Spouse;
4. Adult Child;

# Priority for Appointment (cont.)



5. Parent;
6. Any relative with whom the AIP has resided with for more than 6 months prior to the filing of the petition;
7. Person nominated by a person who is caring for the AIP or paying benefits to the AIP; and
8. Any other person.

# Not Qualified for Appointment



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 a guardian, except an employee may serve . . . when related by affinity or consanguinity.

## Consent Not Allowed



An AIP shall not be permitted by the court to consent to the appointment of a guardian.

All of the procedural safeguards shall apply in every guardianship proceeding.





## Adult Guardianship

Home > Adult Guardianship

Español

> Guardians and Conservators

Adult Guardian and Conservator

New Forms and Rule Changes

Frequently Asked Questions

Grievance Against A Guardian or Conservator

Supreme Court Commissions

- Americans with Disabilities (ADA)
- Supreme Court Law Library
- Expungement of Records Involving Cannabis
- Self-Help Video Library
- Self-Help Guide
- New Mexico Legal Aid
- Domestic Violence
- Adult Guardianship
- Forms
- Public Access and re:Search@NM
- Guide & File
- Legal Research
- NM dataXchange



## Guardians and Conservators



### The Adult Guardianship and Conservatorship Process

The law dealing with adult guardianship and conservatorship in New Mexico is contained in the **Probate Code**. The **Probate Code** can be found in the New Mexico Statutes, Chapter 45. *You can click on any underlined text in this section and it will take you directly to that portion of the Probate Code.*

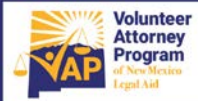
The entire adult guardianship and conservatorship law can be found in [Article 5 – Protection of Persons Under Disability and Their Property](#).

The part of the Probate Code that focuses on Guardianship is [Part 3 – Guardians of Incapacitated Persons](#).

The part of the Probate Code that focuses on Conservatorship is [Part 4 – Protection of Property of Persons Under Disability and Minors](#).

### How is a Guardian and/or Conservator appointed?

There are many legal steps in the adult guardianship and conservatorship process. A person who may need a guardian and/or a conservator appointed is called an **alleged incapacitated person**. While the legal process may seem complex, it is meant to ensure that there are multiple checks and balances in place to protect the **alleged incapacitated person's** legal and civil rights.



# Pre- Adjudication Checklist

## Statutory and Rule Requirements

- Information Sheet (Form 4-992)
- Notice of Hearing and Rights (Form 4-999)
- Personal Service - Alleged Incapacitated Person

### PROFESSIONAL'S REPORTS:

- Qualified Health Care Professional
  - No later than 14 days before hearing
- Visitor
  - No later than 11 days before hearing
- Guardian ad litem
  - No later than 7 days before hearing

### VIDEOS

- Proposed Guardian & Conservator – Certificate of Viewing Training Videos (Rule 1-144 NMRA)



4-999. Notice of hearing and rights.

STATE OF NEW MEXICO  
COUNTY OF \_\_\_\_\_ JUDICIAL DISTRICT

In the matter of \_\_\_\_\_ No. \_\_\_\_\_

NOTICE OF HEARING AND RIGHTS

TO: \_\_\_\_\_ (name and address of alleged incapacitated person)

A hearing will be held at the following date, time, and location on the Petition to Appoint a Guardian and/or Conservator for \_\_\_\_\_ (alleged incapacitated person):

Date: \_\_\_\_\_  
Time: \_\_\_\_\_  
Judicial District: \_\_\_\_\_  
Courthouse: \_\_\_\_\_  
Address: \_\_\_\_\_  
Judge: \_\_\_\_\_

The purpose of the hearing will be to determine whether protection is needed for \_\_\_\_\_ (alleged incapacitated person) and \_\_\_\_\_ (alleged incapacitated person)'s property.

Before the hearing, the Court will appoint a visitor, a qualified health care professional, and if necessary, a guardian *ad litem* to advise the Court about \_\_\_\_\_ (alleged incapacitated person)'s capacity and whether a guardian and/or conservator should be appointed.

If the Court appoints a guardian and/or a conservator, the guardian and/or conservator,

- (1) will have authority to make decisions over some or all of \_\_\_\_\_ (alleged incapacitated person)'s personal and/or financial affairs;
- (2) must use their decision-making authority only when necessary to promote and protect the well being and/or financial interests of \_\_\_\_\_ (alleged incapacitated person); and
- (3) must use their decision-making authority in a manner that encourages the development of maximum self-reliance and independence of \_\_\_\_\_ (alleged incapacitated person).

If the Court appoints a guardian and/or conservator, \_\_\_\_\_ (alleged incapacitated person) retains all legal and civil rights except those which have been expressly limited by court order or have been specifically granted to the guardian and/or conservator by the Court.

NOTICE OF RIGHTS

\_\_\_\_\_ (alleged incapacitated person) has the following rights under Sections 45-5-309(B) and 45-5-303 and/or 45-5-405(B) and 45-5-407 NMSA 1978:

- 1. The right to obtain an attorney of \_\_\_\_\_ (alleged incapacitated person)'s choice;
- 2. The right to object to the individuals appointed as visitor, qualified health care professional, and guardian *ad litem*;
- 3. The right to attend the hearing. If \_\_\_\_\_ (alleged incapacitated person) is unable to be present in court, the Court upon request or its own motion may conduct hearings at \_\_\_\_\_ (alleged incapacitated person)'s location;
- 4. The right to present evidence at the hearing and to subpoena witnesses and documents;
- 5. The right to examine witnesses at the hearing, including a court-appointed guardian *ad litem*, qualified health care professional, and visitor;

- 6. The right to otherwise participate in the hearing; and
- 7. The right to be personally served with a copy of this notice and of the petition filed in this proceeding.

THE COURT SHALL NOT GRANT THE PETITION IF THE PETITION AND THIS NOTICE OF HEARING AND RIGHTS IS NOT PERSONALLY SERVED ON \_\_\_\_\_ (ALLEGED INCAPACITATED PERSON).

BY: \_\_\_\_\_  
TCAA for Judge

A copy of this Notice of Hearing and Rights is being provided as required under Sections 45-5-309(C) and/or 45-5-405(C) NMSA 1978 to the following interested persons who are identified in the information sheet submitted with the Petition under Rule 1-003.2 NMRA:

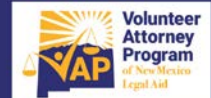
(list names and addresses of all persons identified on the information sheet and of the guardian ad litem, visitor, and qualified health care professional appointed by the court)

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

USE NOTE

This Notice of Hearing and Rights must be used in cases filed on or after October 15, 2018. In a case filed after July 1, 2018 but before October 15, 2018, the alleged incapacitated person must receive notice that substantially complies with the notice-of-rights requirements set forth in NMSA 1978, §§ 45-5-309(B) and 45-5-405(B).

[Provisionally approved by Supreme Court Order No. 18-8300-007, effective for all cases filed on or after October 15, 2018; approved as amended by Supreme Court Order No. 19-8300-001, effective January 14, 2019; as amended by Supreme Court Order No. 19-8300-019, effective December 1, 2019.]



STATE OF NEW MEXICO  
 COUNTY OF \_\_\_\_\_  
 \_\_\_\_\_ JUDICIAL DISTRICT COURT

In the matter of \_\_\_\_\_

Case No. \_\_\_\_\_

**CERTIFICATE OF COMPLETION  
 ADULT GUARDIAN AND CONSERVATOR ORIENTATION PROGRAM**

Pursuant to Rule 1-144 NMRA of the Rules of Civil Procedure for the District Courts, I hereby acknowledge that I have viewed the following required videos on the New Mexico Court’s website ([www.adultguardianship.nmcourts.gov](http://www.adultguardianship.nmcourts.gov)) and/or on the Judiciary’s YouTube Channel (<https://www.youtube.com/NewMexicoCourts>).

**1. Guardians are required to view all six (6) videos.**

VIDEO	DATE VIEWED
Video 1: Introduction	
Video 2: Guardian Orientation	
Video 3: How to Complete the Guardian’s Report	
Video 8: Guide to Filing and Distributing Guardian and Conservator’s Reports	
Video 9: Abuse and Neglect	
Video 10: How to File a Grievance	

**2. Conservators are required to view all eight (8) videos.**

VIDEO	DATE VIEWED
Video 1: Introduction	
Video 4: Conservator Orientation	
Video 5: Overview of the Conservator’s Report and Bonding Requirements	
Video 6: How to Complete the Conservator’s Inventory	
Video 7: How to Complete the Conservator’s Report	
Video 8: Guide to Filing and Distributing Guardian and Conservator’s Reports	
Video 9: Abuse and Neglect	
Video 10: How to File a Grievance	

By filing this certificate, I certify that I understand my duty, role and responsibilities as the guardian and/or conservator in this matter.

PROPOSED GUARDIAN/CONSERVATOR: I recognize that this certificate must be filed with the court clerk at least five (5) calendar days prior to a hearing on the petition to appoint a guardian or conservator in this matter.

EXISTING OR SUCCESSOR GUARDIAN/CONSERVATOR: I have been ordered by the Judge to watch the Adult Guardian and Conservator Orientation Program videos and I understand that I must file this certificate with the court clerk as proof that I have complied with the Judge’s orders.

Dated: \_\_\_\_\_

Respectfully Submitted,

\_\_\_\_\_  
*Signature*

\_\_\_\_\_  
*Printed Name*

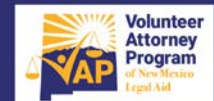
\_\_\_\_\_  
*Street Address*

\_\_\_\_\_  
*City, State and Zip Code*

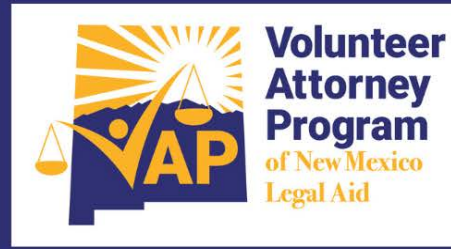
\_\_\_\_\_  
*Phone Number*

\_\_\_\_\_  
*Email Address*

*[Adopted by Supreme Court Order No. 21-8300-0001 and Rule 1-144 NMRA of the Rules of Civil Procedure for the District Courts, effective for all cases filed on or after February 1, 2021.]*



# Case Presentation



**LEGAL ISSUE: Adult Guardianship – Guardian ad Litem Reports/Findings**

# Scenario #1

---

Petitioner/Mother wanted AG over son prior to 18<sup>th</sup> birthday. Son was autistic and almost non-verbal. Son split time between Mother and maternal Grandparents. Biological Father was not involved because parental rights had been terminated. Petitioner and Son enjoyed shooting.

Following the GAL's meeting with Petitioner and the AIP, Petitioner decided to dismiss the Petition because the GAL said she would have to surrender firearms.

## Questions:

1. What alternatives could Petitioner have pursued to proceed to the hearing instead of dismissing the Adult Guardianship Petition?
2. What alternatives could Petitioner have pursued outside of filing a Guardianship petition to assist Son?

# Scenario #2

---

Only Son (“Petitioner”), who was a successful physician, sought to be appointed as Guardian for Father (“AIP”), who had dementia. During the GAL’s visit, the GAL discovered that Petitioner was living beyond his means. To support his lifestyle, Petitioner routinely charged his physician rate of \$700/hour for services provided to the AIP, paid from the AIP’s estate. The GAL, Qualified Healthcare Professional, and Court Visitor reports all indicated Petitioner was still the person most qualified to be appointed Guardian.

## Questions:

1. How do you handle surprises in the appointed professionals’ reports?
2. What steps would you advise Petitioner to take prior to the hearing?

# Scenario #3

---

Father of a disabled adult child (“AIP”) wants to file a Petition to be appointed Guardian. AIP is 22 years old and on SSI, with no savings or other estate assets to pay the 3 professionals appointed by the court.

## Questions:

1. Should you address payment of the 3 professional in your engagement letter with Petitioner?
2. Assuming Petitioner does not have the funds to pay the 3 professionals, what other alternatives exist for proceeding with the Petition?

**Adult Guardianship 101 - Part 3/4:**  
*Dealing with Family Conflict*

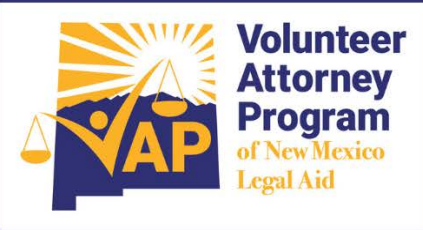
Tuesday, March 19, 2024  
3:30 – 5:00 pm

**Empowering Clients from Income Tax  
Perspective – Part 3 of 3:**  
*Allocating Income Tax Benefits Between  
Parents in a Split-Up*

Tuesday, March 28, 2024  
11:30 am – 1:00 pm

# Next Sessions





# Upcoming Pro Bono Opportunities

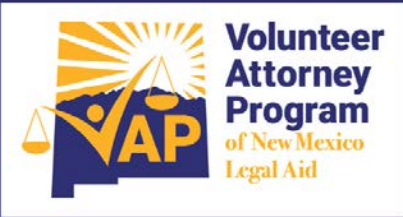
- **Legal Fairs:**
  - **Roswell** - Friday, March 8
  - **Organ** - Saturday, March 16
  - **Socorro** - Friday, April 5
  - **Albuquerque's Peter Johnstone Day** (Family Law) – Saturday, April 13

If you are interested in volunteering at an upcoming legal fair:

Sign-up [here](#) or contact Bella Zayani at [nediaz@nmlegalaid.org](mailto:nediaz@nmlegalaid.org)

## **Direct Representation Cases – Ongoing**

- Contact Meryl Sutton at [meryls@nmlegalaid.org](mailto:meryls@nmlegalaid.org)



# THANK YOU FOR JOINING TODAY'S VAP PRO BONO COLLABORATIVE ECHO SESSION!

SESSION 7  
MARCH 5, 2024

## Topic and Case Presenter:

Patricia Galindo, Supervising Attorney,  
Administrative Office of the Courts

## Facilitated By:

Zac Addison, Esq., VAP Director, NM Legal Aid

Marissa Gonzalez, VAP Paralegal, NM Legal Aid

[vapecho@nmlegalaid.org](mailto:vapecho@nmlegalaid.org)

