




# WELCOME TO THE VAP PRO BONO COLLABORATIVE ECHO

**SESSION 1**  
**09/28/2023**

**Kinship Guardianship:**  
Filing a Petition Under  
Current Statutes


# Agenda




 **Introductions** - Zac Addison, Esq., NMLA VAP Project ECHO Coordinator

 **Announcements for Session:** Zac Addison, Esq.

 **Presentation on Kinship Guardianships:** Filing a Petition Under Current Statutes

 **Lecturers:** Michelle Garcia, Esq., Deputy Director of New Mexico Legal Aid; Kristen Holtvoigt, NMLA Staff Attorney; Jennifer Mendoza, NMLA Staff Attorney

 **Case Analysis and Q&A:** Isabella Zayani, Esq., NMLA VAP Statewide Pro Bono Coordinator

 **Overview & Closing Remarks:** NMLA Volunteer Attorney Program

# Introduction

## Kinship Guardianship

### Petition:

*NMSA §40-10B-1 through 40-10B-15 (2021)*

Used to establish a legal relationship between:

- a minor child and
- the adult caring for that child.



## Kinship Caregiver:

Any individual who is a

- relative
- godparent
- member of a child's tribe or clan
- an adult with a significant bond (fictive kin)

who is raising a child or youth because the biological parents are unable or unwilling to do so.

*NMSA §40-10B-3 A. and H.*



# Kinship Guardianship – Key Questions:

- Who is the client in it for?
  - The child - Are temporary solutions adequate to resolve temporary problems?
  - The biological parent – Trying to avoid a coercive kinship guardianship or foster care placement?
  - Themselves – Satisfaction of knowing child is cared for, preserving relationship, securing benefits to help support the child?
- Are Alternatives to a Kinship Guardianship for permanent placement (a mini-trial) adequate to meet Client's needs?

# Kinship Guardianship Alternative: Power of Attorney

- Signed by a parent before a notary public
- Can limit which authority is delegated (school, health, etc.)
- Powers can be delegated except power to authorize marriage or adoption
- Must be renewed every **six months**
- **Revocable** at will of the parent(s)
- Assists in accessing some resources for the child
- Insufficient to secure some benefits (i.e., SS Survivor's Benefits)
- Evidence of caregiver's history and decision-making capacity for child with parental consent in a subsequent Kinship Guardianship
- Self-Help Form: [45-5B-301. Statutory form power of attorney. \(nmcourts.gov\)](#)



# Alternatives to Kinship Guardianship

- Caregiver's Authorization Affidavit: *NMSA §40-10B-15*
- Used by caregiver whom child lives with (any amount of time)
  - Any caregiver: enroll a child in school and consent to medical care, including school-related medical care (required: immunizations, sports physical exams, etc.)
  - Only "classified relatives," including adults with whom children have a significant bond, can authorize other medical, dental and mental health care
  - Caregiver's decision superseded by a decision of a parent if child's wellbeing not jeopardized
- Valid for maximum of 1 year
- Liability protection for providers
- Use for authority beyond limitations in POA



# Alternatives to Kinship Guardianship

- Caregiver's Authorization Affidavit (continued): *NMSA §40-10B-15*
  - Must be **signed by the caregiver** before a notary public
  - Does not need to be signed by the biological parents
  - Insufficient to secure some benefits (i.e., Social Security Survivor's Benefits)
  - Useful when unable to locate parent but caregiver needs documentation stating they care for the child
  - Not filed in court by itself, but can be evidence of history in Kinship Guardianship
  - Self-Help Form: [40 10B 15 \(nmcourts.gov\)](http://nmcourts.gov)



# Kinship Guardianship Petition



## Key Considerations:

- Permanent: No easy provision for ending it, though **successor** can be appointed
- Purpose: Establishes a **legal relationship** between child and kinship caregiver, providing the child with a stable and consistent relationship with a kinship caregiver so the child can develop
- Where to File: County district court where
  - child has legal residence OR
  - where child currently resides





# Kinship Guardianship Petition

## Key Considerations (cont.):

- **Who Can File:** A caregiver with whom the child has resided for 90+ days without the parent
  - Kinship caregiver
  - If child is 14+, a caregiver 21+ with whom no kinship exists but who has been nominated by the child to be guardian
  - Caregiver designated by a parent in writing - designation must state that parent understands:
    - Purpose and effect of guardianship
    - Parent has right to service and notices
    - Parent may appear to contest guardianship
- **Self-Help Guide & Forms:** [SRL Guide-eng.pdf \(rtsclients.com\)](http://rtsclients.com/SRL_Guide-eng.pdf) pp. 15 - 17.



## Extraordinary Circumstances for Waiving 90+ Day Requirement When Harm Likely:

D.W. v. B.C., 2022-NMCA-006

- Child living with Grandmother for **14 days** since mother was injured
- **Petitioner/Grandmother resided in another house on same property** and alleged:
  - **close relationship** with child **since birth**
  - child's **mental illness** predating mother's death
  - **Father's unwillingness to engage** in therapy and parenting instruction **per divorce court order**, resulting in **order denying access to child** in prior year due to **likely detriment to child's health**
- **Finding:** Given legislative intent, Petition adequately stated a claim and extraordinary circumstances. Dismissal without a full hearing was inappropriate.

[2022-NMCA-006: No. A-1-CA-37797: D.W. v. B.C - Issuu](#)



# Permanent Kinship Guardianship

## Permanent Kinship Guardian May be Appointed Only if:

- A living parent consented in writing
- A living parent has had all parental rights regarding the child terminated or suspended
- Child **resided with Petitioner & without parent for 90+ days** immediately preceding Petition filing date AND
- A parent with legal custody of the child is unwilling/unable to provide adequate care, maintenance, and supervision for the child or there are extreme circumstances; and
- No guardian currently appointed
- **NOTE: 90 day requirement can be waived** by Judge if Petitioner demonstrates during a preliminary hearing that **extraordinary circumstances** make it **substantially likely** that **the child will be seriously harmed**. (NMSA §40-10B-8; See D.W. v. B.C. from 2022-NMCA-006 )



# Permanent Kinship Guardianship Petition with Motion for Temporary Guardianship:

- **Draft and File or Submit:**

- Petition to Appoint Kinship Guardian(s) (Form 4A-501) -
  - Caption should list children only by initials
  - Petitioner must EITHER
    - List personal address, or
    - File Motion to Seal Petitioner's Address for safety reasons
  - May request or waive child support
- Order Appointing Kinship Guardian (Form 4A-511)
- Ex Parte Motion to Appoint Temporary Kinship Guardian(s) (Form 4A-507)
- Ex Parte Order Appointing Temporary Kinship Guardian(s) and Notice of Hearing (Form 4A-508)
- Order Appointing Guardian Ad Litem (Form 4A-515) - for contested cases
- Kinship Guardianship Information Sheet (Form 4A-517) - submitted but not filed
- Summons & Return (Form 4-206) - for each parent not consenting and for children age 14 and over
- Notice of Pendency of Action (Form 4A-503)



# Permanent Kinship Guardianship

## Steps for Petitioner to Consider Before Filing:

- Obtain these from parent to speed the guardianship process and avoid necessity of appointing Guardian Ad Litem for child (if safe to do so):
  - Power of Attorney - for each child
  - Consent to Appointment of Guardian (Form 4A-505)
  - Visitation Plan in Writing - Supervised or Unsupervised
  - Agreement Regarding Child Support (or Waiver of Child Support)
- Caregiver's Authorization Affidavit – Sign & have notarized



# Permanent Kinship Guardianship Petition with Motion for Temporary Guardianship:

- **And if Applicable, File or Submit:**
  - Parental Consent to Appointment of Kinship Guardian and Waiver of Service of Process (Form 4A-505) – attach to Petition
  - Motion for Service by Publication (Form 4A-502)
    - Order for Service of Process by Publication (Form 4A-504)
  - Nomination of Kinship Guardian(s) (Form 4A-506) – for use by minor child who has reached at least age 14
  - Application for Free Process and Affidavit of Indigency (Form 4-222)
    - Attach copies of any public assistance statements to expedite processing
  - Order on Application for Free Process (Form 4-223)
  - Request for Court Interpreter (Form 4-115)



# Permanent Kinship Guardianship Petition

## Special Considerations re: Children 14 and Over:

- Must be served with Kinship Guardianship Petition
- Must have their opinions considered by Court re: who should be their permanent kinship caregiver and parent
- If child refuses Petitioner as permanent parent/caregiver:
  - Court generally must deny Petition
  - Power of Attorney and Caregivers Affidavit may still be used
  - Temporary Kinship Guardian may be appointed
- May sign a Nomination of Child Form before a notary public to name Petitioner as guardian
- Should not be coerced, bribed or pressured re: nomination of guardian



# Contested Kinship Guardianship Petition

## Guardian Ad Litem (GAL) in Contested Cases:

*(NMSA §40-10B-9 and 10B-10 [New Mexico Statutes Chapter 40. Domestic Affairs § 40-10B-9 | FindLaw](#) )*



- Attorney appointed to represent **child's** best interests
- **Investigates**, issues report of findings/recommendations
- Responsibilities:
  - **Interviews** caregivers and child
  - **Reviews** medical and school **records**
  - Conducts **on-site home visits** of potential homes
- Fees for appointment and attorney's fees must be paid
  - Petitioner can request that costs:
    - be shifted to Respondent
    - be paid from any existing State resources
  - GAL may not complete investigation/report if not paid



# Contested Kinship Guardianship Petition

## Guardian Ad Litem (continued):

### Petitioner should:

- Fully cooperate and be friendly
- Respond timely to all GAL requests
- Open home for site visit
- Focus on positive reasons why the child's physical and legal custody with Petitioner is in the child's best interests
- Avoid **excessive** discussion of bad conduct, neglect, abuse by Respondent(s)





# The Next Monthly Session

Thursday, October 26, 2023

11:30 am-1:00 pm

Session #2

Topic: Pro Bono Month  
Presentation



# Upcoming Pro Bono Opportunities

**October 6, 2023** – Las Vegas Legal Fair

**October 20, 2023** – Silver City Legal Fair

**October 21, 2023** – 12<sup>th</sup> JD, Legal Fair, Lincoln County

**November 4, 2023** – Las Cruces Legal Fair

**November 8, 2023** – Portales Ask-A-Lawyer Legal Fair

**November 11, 2023** – 12<sup>th</sup> JD, Otero County Legal Fair (Alamogordo)

**November 20, 2023** – Statewide Teleclinic (telephonic consultations)



# THANK YOU FOR JOINING THE VAP PRO BONO COLLABORATIVE ECHO!

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## Didactic Presenters:

Michelle Garcia, Esq., Deputy Director, NM Legal Aid

Kristen Holtvoigt, Staff Attorney, NM Legal Aid

Jennifer Mendoza, Staff Attorney, NM Legal Aid

## Case Presenter:

Isabella Zayani, Esq.,

VAP Statewide Pro Bono Coordinator, NM Legal Aid

## Facilitated By:

Zac Addison, Esq., VAP Project ECHO Coordinator,

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