



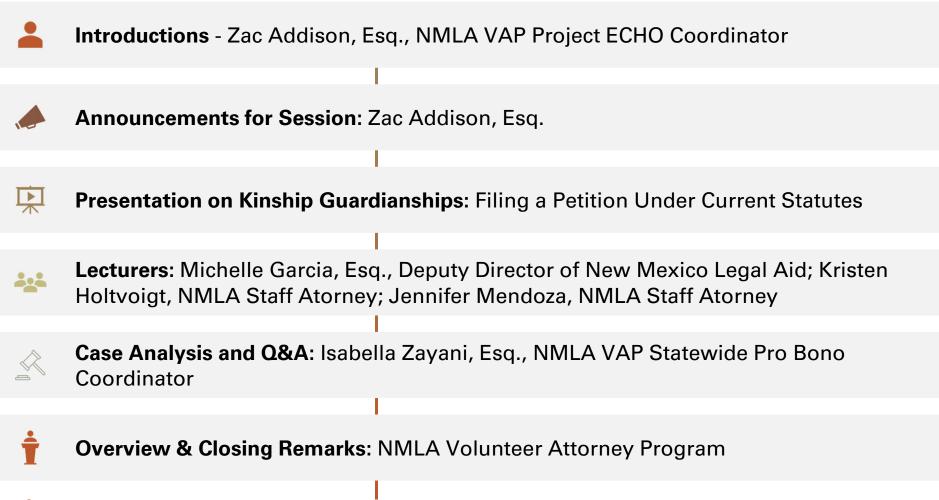


WELCOME TO THE VAP PRO BONO COLLABORATIVE ECHO

SESSION 1 09/28/2023 **Kinship Guardianship:** Filing a Petition Under Current Statutes

Agenda





Introduction <u>Kinship Guardianship</u> 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:

- <u>Who is the client in it for</u>?
 - <u>The child</u> Are temporary solutions adequate to resolve temporary problems?
 - <u>The biological parent</u> Trying to avoid a coercive kinship guardianship or foster care placement?
 - <u>Themselves</u> Satisfaction of knowing child is cared for, preserving relationship, securing benefits to help support the child?
- <u>Are Alternatives to a Kinship Guardianship for permanent</u> 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: <u>45-5B-301.</u> Statutory form power of attorney. (nmcourts.gov)



Alternatives to Kinship Guardianship

- <u>Caregiver's Authorization Affidavit</u>: NMSA §40-10B-15
- Used by caregiver whom child lives with (any amount of time)
 - <u>Ány caregiver</u>: enroll a child in school and consent to medical care, including schoolrelated medical care (required: immunizations, sports physical exams, etc.)
 - <u>Only "classified relatives</u>," 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

- <u>Caregiver's Authorization Affidavit (continued)</u>: 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: <u>40 10B 15 (nmcourts.gov)</u>



<u>Kinship</u> <u>Guardianship</u> <u>Petition</u>



Key Considerations:

- <u>Permanent</u>: No easy provision for ending it, though successor can be appointed
- <u>Purpose</u>: 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
- <u>Where to File</u>: County district court where
 - child has legal residence OR
 - where child currently resides



Kinship Guardianship Petition

Key Considerations (cont.):

- <u>Who Can File</u>: 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
- <u>Self-Help Guide & Forms</u>: <u>SRL_Guide-eng.pdf (rtsclients.com)</u> pp. 15 17.



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

<u>D.W. v. B.C.</u>, 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:
 - o **close relationship** with child **since birth**
 - o 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
- **<u>Finding</u>**: 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 <u>with Petitioner</u> & <u>without parent</u> 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
- <u>NOTE</u>: **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:

- $\circ~$ 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)
- o 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:

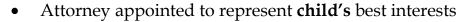
- Must be served with Kinship Guardianship Petition
- Must have their opinions considered by Court re: who should be their permanent kinship caregiver and parent
- If child refuses Petitioner as permanent parent/caregiver:
 - Court generally must deny Petition
 - Power of Attorney and Caregivers Affidavit 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 <u>New Mexico Statutes Chapter 40. Domestic Affairs § 40-10B-9 | FindLaw</u>)



- Investigates, issues report of findings/recommendations
- Responsibilities:
 - o 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 – 12th JD, Legal Fair, Lincoln County

November 4, 2023 – Las Cruces Legal Fair

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

November 11, 2023 – 12th JD, Otero County Legal Fair (Alamogordo)

November 20, 2023 – Statewide Teleclinic (telephonic consultations)







THANK YOU FOR JOINING THE VAP PRO BONO COLLABORATIVE ECHO!

SESSION 1 09/28/2023

Didactic Presenters:

Michelle Garcia, Esq., Deputy Director, NM Legal Aid Kristen Holtvoigt, Staff Attorney, NM Legal Aid Jennifer Mendoza, Staff Attorney, NM Legal Aid

<u>Case Presenter</u>: Isabella Zayani, Esq., VAP Statewide Pro Bono Coordinator, NM Legal Aid

<u>Facilitated By</u>: Zac Addison, Esq., VAP Project ECHO Coordinator, NM Legal Aid <u>vapecho@nmlegalaid.org</u> Marissa Gonzales, VAP Paralegal, NM Legal Aid