

Guardianship, Conservatorship, Growing Pains and More to Come



*Justice Shannon Bacon
New Mexico Supreme Court*

*Judge Nancy Franchini
Second Judicial District Court*

**GUARDIANSHIP AND CONSERVATORSHIP
BENCH BOOK OUTLINE**

TOPIC	STATUTE or RULE or FORM	NOTES
Information Sheet	Rule 1-003.2 Form 4-992	-must be submitted to the Court at the time the Petition is filed. - is filed, but not docketed. -cannot be seen by the public.
Petition	45-5-303-Guardianship 45-5-404 A petition for C can be brought by G or a person interested in the estate, financial affairs or welfare of an individual	Petition shall contain: -contact information for AIP -interest of G/C being appointed -listing of interested parties, fiduciaries, trustees -why G/C needed
Notice of Hearing and Rights	45-5-309 45-5-405(B) & (C) Rule 1-004.1 Form 4-999	Court shall issue NOH within 5 days of the filing of the petition. AIP must be personally served with NOH, if not, the Court <u>shall not</u> grant the petition Persons named in petition shall be served with the NOH within 11 days of the AIP being served in accordance with Rule 1-005
Firearm Restriction	Rule 1-131	Send PJ letter and Notice to GAL. If full G or C is approved, file Notice of Federal Restriction on Right to Possess or Receive a Firearm or Ammunition.
The Big 3 Reports	G:45-5-303 45-5-303.1 C: 45-5-407 45-5-404.1	Order appointing Qualified Healthcare Provider (QHCP), Visitor and Guardian ad Litem.

<p>Filing and Timing of Big 3 Reports</p>	<p>G: 45-5-303.1(A)(6)- GAL Report</p> <p>45-5-303(E) and (F) - QHCP and Visitor Reports.</p> <p>C: 45-5-404.1(A)(6)- GAL Report</p> <p>45-5-407(C) and (D) - QHCP and Visitor Reports.</p> <p>Rule 1-143-Timing of Filing Reports</p>	<p>All three reports must be filed with the Court.</p> <p>QHPC Report due fourteen (14) calendar days before hearing</p> <p>Visitor Report due eleven (11) calendar days before hearing.</p> <p>GAL Report due seven (7) calendar days before hearing.</p>
<p>Hearing</p>	<p>G: 45-5-304 C: 45-5-407I</p> <p>G: 45-5-303(G) C: 45-5-407(E)</p> <p>45-5-303(N); Rule 1-104 45-5-407(Q); Rule 1-104</p>	<p>Clear and Convincing Evidence: -to what extent AIP is incapacitated -need G/C to care for AIP -G/C is least restrictive means -G/C is qualified and suitable</p> <p>AIP needs to be present at hearing unless evidence that presence of AIP would threaten health or safety of AIP.</p> <p>Upon request or own motion, Court may hold hearing where AIP located.</p> <p>AIP cannot consent to G or C</p> <p>HEARING IS OPEN-a motion must be filed if a party wants the hearing to be closed.</p>

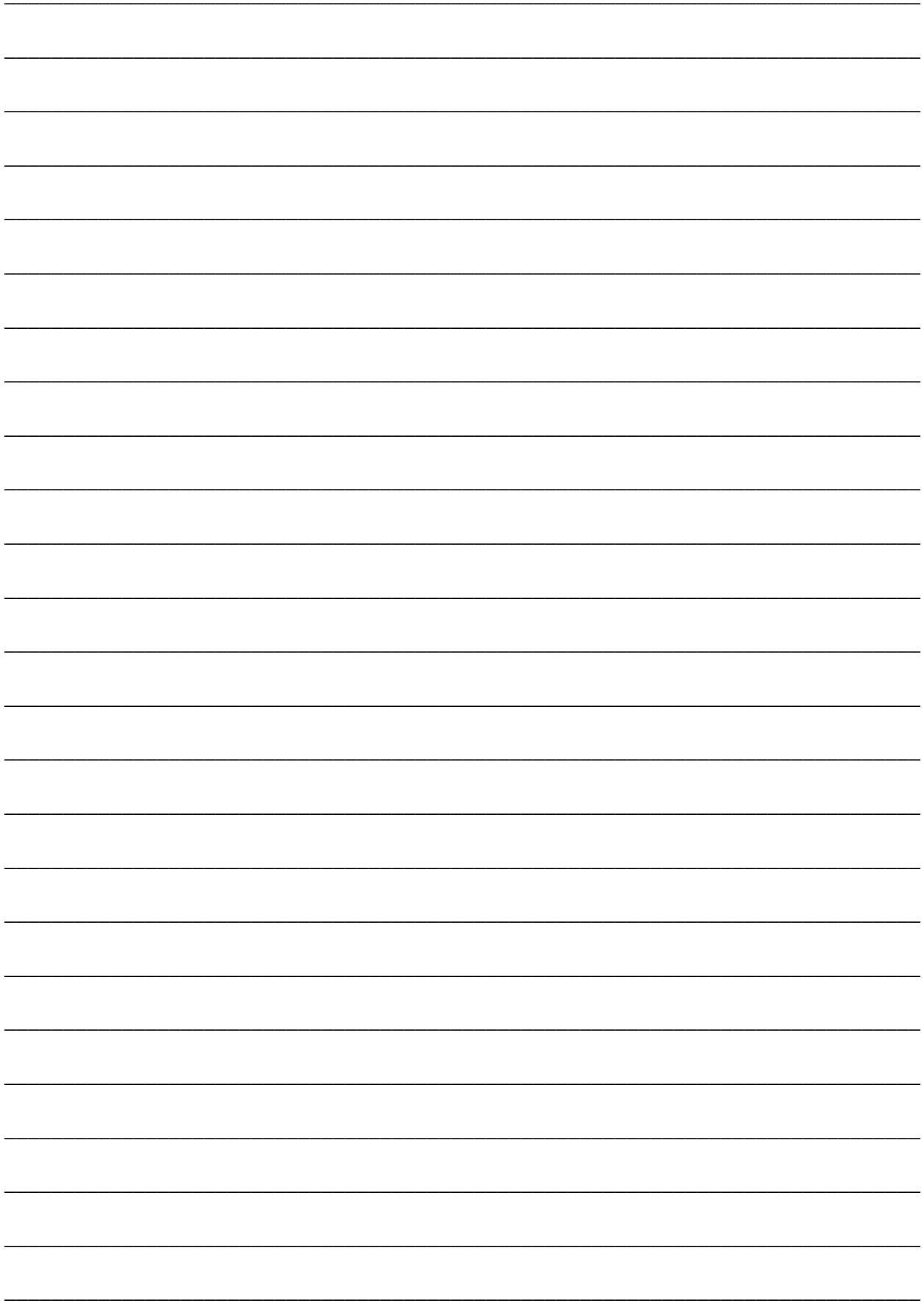
<p>Order Identifying Persons Entitled to Notice and Access to Court Records</p>	<p>Rule 1-141; Form 4-993</p>	<p>When enter an order appointing a G or C, you must enter an order listing who has a right to notice and access to the Court Record.</p>
<p>Proof of Certification of Professional G and C</p>	<p>Professional G defined: 45-5-101(S) Professional C defined: 45-5-101(T)</p> <p>Certification requirements: 45-5-311(D) 45-5-410(D)</p> <p>Rule 1-142</p>	<p>G or C who serves more than two individuals who are not related to G or C.</p> <p>Certification and good standing required by national or state organization recognized by the Supreme Court.</p> <p>An order appointing a professional G or C shall include a provision that requires proof of certification and in good standing with Center for Guardianship Certification.</p>
<p>Bonding- Conservatorship Only</p>	<p>45-5-411</p> <p>Form 4-994-Order to Secure or Waive Bond</p> <p>4-995-Conservator's Notice of Bonding</p> <p>4-995.1-Corporate Surety Statement</p> <p>45-5-411(B)-explains how amount of bond determined.</p>	<p>·Court shall require a conservator to be bonded.</p> <p>·Court can waive bonding if Court finds that bond is not necessary to protect the interests of PP</p> <p>·Unless the conservator is exercising general trust powers, the Court shall not waive bonding requirement for corporate conservators</p>

<p>Access to Court Record Pre-Adjudication</p>	<p>45-5-303(K), 45-5-407(N) and Rule 1-079.1</p>	<p>The following individuals have access to the Order Appointing a G/C and to all court records filed before that Order:</p> <ul style="list-style-type: none"> ·AIP/PP and their attorney ·Persons listed in the petition ·Others who the Court determines
<p>Access to Court Record Post-Adjudication</p>	<p>45-5-309(D), 45-5-405(D) and Rule 1-079.1</p>	<p>The following individuals have access to court records filed after the Order Appointing the G/C, including the G/C report:</p> <ul style="list-style-type: none"> ·PP ·G/C ·Any other person the court determines
<p>Access to Professional Reports-(Big 3)</p>	<p>45-5-303(L); 45-5-407(O) and Rule 1-079.1</p>	<p>The following individuals have access to the guardian ad litem report, the visitor report and the qualified health care provider report:</p> <ul style="list-style-type: none"> ·Court ·AIP/PP ·Petitioner ·Visitor and Guardian ad Litem ·Attorney of record ·POA unless the court orders otherwise ·Any other person the court determines
<p>Public Record</p>	<p>45-5-303(J) 45-5-407(M)</p> <p>Rule 1-079.1</p>	<p>Existence of a G/C proceeding, is a matter of public record UNLESS:</p> <ol style="list-style-type: none"> 1.AIP/PP requests that the record be sealed AND 2. The original petition is dismissed or G/C terminated. <p>Docket sheet is open to public access as long as Court does not disclose diagnostic, treatment or other medical/psychological info.</p>

<p>Temporary G Temporary C</p>	<p>45-5-310 45-5-408</p>	<p>BE ON HIGH ALERT</p> <p>Ex Parte temporary appointment of G/C: ONLY if shown by affidavit or sworn testimony that immediate and irreparable harm will result to AIP before a hearing can be held.</p> <p>Temporary G/C only lasts 60 days. By Court order only, can be extended for no more than an additional 30 days.</p>
<p>Mandatory Reports</p>	<p>90-Day and G's Annual Report-Form 4-996 Conservator's Inventory-Form 4-997 Conservator's Annual Report-Form 4-998</p>	<p>Should receive Odyssey Reports letting you know that reports have come in. If overdue, need to send a letter to G/C.</p> <p>Each judge should keep own record of reports that have come in, reports that have been reviewed and reports that are past due.</p>
<p>10 Year Reviews</p>	<p>45-5-307(G)</p>	<p>No more than 10 years after initial appointment-</p> <ol style="list-style-type: none"> 1. Court hold status hearing or 2. Appoint a Court investigator to do a report. <p>Purpose: To review the status of the PP's capacity and continued need for a G.</p> <p>Persons entitled to notice of hearing or copy of report:</p> <ul style="list-style-type: none"> ·PP ·G/C ·Interested parties known by the Court. The filed Form 4-993 is your starting point.

<p>Visitation</p>	<p>45-5-312(F)</p>	<p>G shall not restrict PP's interaction, communication or visitation with others unless:</p> <ol style="list-style-type: none"> 1. Authorized by Court Order. 2. A less restrictive alternative is already in effect or 3. G has good cause to believe the restriction is necessary to protect the PP and the restriction is: <ol style="list-style-type: none"> a. no more than 7 days if person is a family member or has preexisting social relationship with PP, or b. no more than 60 days if no such relationship exists.
<p>Audits</p>	<p>45-5-409(G)</p>	<p>C shall comply with the requirements of any audit of an account, inventory, report or property of PP.</p>
<p>Powers of Attorney</p>	<p>45-5-312(D)</p> <p><i>See 45-5B-108(B)-for similar language on C's and POA's</i></p>	<p>G shall not revoke or amend a POA for healthcare or finances.</p> <p>Medical or financial decisions of POA agent takes precedence over G's decisions and G shall cooperate with POA agent.</p>

<p>Grievance Procedure</p>	<p>Section 14 of SB 395</p> <p>Rules Committee has drafted a Grievance Form, but not out for publication yet as of 5/28/2019.</p>	<p>Filed by PP or any interested person.</p> <p>Grievance against G, C or representative payee re: breach of fiduciary duty or inconsistent with Probate Code.</p> <p>Court must:</p> <ol style="list-style-type: none">1. Review Grievance2. Set a hearing if reasonable belief that removal, appointment of successor, termination or transfer appropriate3. Take action supported by evidence. <p>Court may decline to take action if a similar grievance has been filed within six (6) months of last grievance and Court took action on previous grievance.</p>
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How to Avoid Myriad Landmines (Growing pains based on a year of trial and tribulation)

1. Every guardianship and conservatorship order must clearly state whether the powers are plenary or limited. This is critical, because all plenary guardianships and conservatorships must include the firearm prohibition.
2. Every guardianship and conservatorship case should be reviewed, by way of a hearing or interview, every 10 years. This requirement was created in 2009, so any case that is older than 2009 must have a 10-year review hearing in 2019 to bring into compliance with this statutory requirement. But the best practice is to conduct a review for all cases that are 10 years old or older. This review can reveal the need for changing orders or services. For example:
 - A. Terminating conservatorship where there are no assets to protect.
 - B. Changing G/C to a limited G/C due to protected person's ability to manage some aspect of their affairs.
 - C. Issuing new G/C letters identifying powers granted.
 - D. Notifying G/C of responsibilities of filing an annual report and using new forms
 - E. Notifying professional G/C that they must be certified.
3. Absent some significant reason to excuse the AIP from the hearing, the appearance of the AIP (or PP) at hearings (including 10-year review) is required. If an AIP or PP is not mobile, judges have the option of holding the hearing in the hospital or nursing home. Too many times, judges are waiving the AIP or PP's appearance merely because they are in a facility.
4. Guardianship and conservatorship cases cannot be consolidated. While it may feel like a kindness for a guardian with responsibility for more than one Protected Person to only have one case number, this ignores the fact that each Protected Person is entitled to their own case, case review and case management. Further, consolidation thwarts tracking of cases.
5. Each judge should develop a mechanism to track the filing of all reports and noting that the judge has reviewed the contents of the reports. This is important with the implementation of more rigorous data standards and to avoid questions regarding whether the judge is discharging their duties. If the reports raise any questions or red flags, judges should hold a hearing to make inquiry.
6. Judges have the ability to refer cases to the Office of State Auditor for review. When you send a case for review to the OSA, be sure that any response from the OSA is docketed and that the record reflects any actions the judge takes in response to the OSA letter.

7. Do not be hesitant to terminate a conservatorship. In many instances you will find that the Protected Person does not have any assets to conserve (income is limited to SSI). A judge can, sua sponte, terminate the conservatorship, which assists the Guardian with annual reporting.

8. The statewide case review and clean-up will continue into 2020. As a result of the review and clean-up each judge has received a JFIS. The JFIS is the judge's to-do list. The assigned judge needs to ensure that there is follow-up to any items identified in this document. The case review staff is not responsible for addressing issues identified in the JFIS, that is the responsibility of the judge and his/her TCAA.

GUARDIANSHIP RULES
RULE 1-143
[NEW MATERIAL]

Committee Final Approval
April 25, 2019

1 hearing on a petition to appoint a guardian or conservator.

2 (3) **Guardian ad litem.** A guardian *ad litem* shall file the report
3 required under Section 45-5-303.1(A)(6) or 45-5-404.1(A)(6) NMSA 1978] ~~a report~~ no
4 later than seven (7) days before the hearing on a petition to appoint a guardian or
5 conservator.

6 **D. Provision of reports.** Within three (3) days of the filing of a report
7 required under Paragraph C of this rule, the petitioner shall provide a copy of the report to
8 the alleged incapacitated person, the visitor, the guardian *ad litem*, any attorney of record,
9 any agent under a power of attorney unless the court orders otherwise, and any other
10 person the court determines under Rule 1-079.1(B)(4) or (C)(4) NMRA. The report may
11 be provided to such persons in any manner reasonably calculated to afford a meaningful
12 opportunity to review the report before the hearing on the petition to appoint a guardian
13 or conservator.

14 [E. Review.] Prior to the hearing, the guardian *ad litem* shall review the
15 reports with the alleged incapacitated person [by making the alleged incapacitated person
16 aware of the contents of the reports and their significance].

17 [Approved by Supreme Court Order No. _____, effective
18 _____.]

19 **Committee commentary.** — The time limits and review requirements set forth in

GUARDIANSHIP RULES
RULE 1-143
[NEW MATERIAL]

Committee Final Approval
April 25, 2019

1 this rule are intended to provide a ~~an meaningful~~ opportunity [for meaningful
2 communication about the content and recommendations contained in] ~~to review~~ the
3 reports before the hearing on the petition for the alleged incapacitated person and any
4 other person entitled to access the reports under Rule 1-079.1 NMRA.

5 [Approved by Supreme Court Order No. _____, effective_____.]

1-142. Guardianship and conservatorship proceedings; proof of certification of professional guardians and conservators. (Effective July 1, 2019.)

A. **Scope.** *This rule establishes qualification requirements under Sections 45-5-311 and 45-5-410 NMSA 1978 for an individual or entity who may be appointed as a professional guardian or conservator.*

B. **Definition.** *For purposes of this rule, a “professional guardian or conservator” means an individual or entity that serves as guardian or conservator for more than two individuals who are not related to the guardian or conservator by marriage, adoption, or third degree of blood or affinity.*

C. **Proof of certification.** *An order appointing a professional guardian or conservator under Chapter 45, Article 5, Parts 3 or 4 NMSA 1978, shall include a provision that requires the professional guardian or conservator to submit proof that the individual who has been assigned the duties of guardian or conservator for the protected person is certified and in good standing with the Center for Guardianship Certification. The proof required under this paragraph shall be submitted to the court not later than the first to occur of the following:*

(1) *Ninety (90) days after the filing of the order of appointment; or*

(2) *The filing of the initial report required under Section 45-5-314(A) NMSA 1978 or the inventory required under Section 45-5-418(A) NMSA 1978.*

D. **Continuing duty.** *A professional guardian or conservator must submit proof annually that the certification required under Paragraph C of this Rule is in good standing.*

E. **Applicability.** *This rule shall apply to all professional guardians and conservators appointed on or after the effective date of this rule. Professional guardians or conservators appointed before the effective date of this rule shall provide the proof required under Paragraph C of this rule within six months of the effective date of this rule and as further required by Paragraph D.*

[Adopted by Supreme Court Order No. 19-8300-001, effective for all cases on or after July 1, 2019.]

Annotations

Committee commentary. — *The definition of a professional guardian or conservator focuses on the number of non-relatives who are under the care of the guardian or conservator. The definition therefore excludes, for example, a guardian or conservator*

appointed to care only for relatives, regardless of number. Similarly, the definition excludes a guardian or conservator appointed to care for one or two non-relatives. The definition limits relatives by blood or affinity to the third degree of relationship to the guardian or conservator, which includes the guardian's or conservator's spouse, parent, stepparent, brother, sister, stepbrother, stepsister, half-brother, half-sister, uncle, aunt, niece, nephew, first cousin, or any person denoted by the prefix "grand" or "great," or the spouse or former spouse of the persons specified. Accord NMSA 1978, § 40-10B-3(E).

The Center for Guardianship Certification (CGC) provides certification to guardians and conservators who demonstrate "sufficient skill, knowledge and understanding of the universal guardianship principles to be worthy of the responsibility entrusted to him or her." Center for Guardianship Certification, <https://guardianshipcert.org/about-us/>. Certification by the CGC demonstrates that the guardian or conservator has met certain professional and ethical standards, including the following:

Certification entitles the guardian [or conservator] to represent to the courts and the public that he or she is eligible to be appointed, is not disqualified by prior conduct, agrees to abide by universal ethical standards governing a person with fiduciary responsibilities, submits to a disciplinary process, and can demonstrate through a written test an understanding of basic guardianship principles and laws.

Id. To view the CGC's certification requirements, visit <https://guardianshipcert.org/certification-requirements/>.

Under Paragraph C of this rule, an order appointing a professional guardian or conservator shall require the professional guardian or conservator to submit proof within ninety (90) days that the person who has been assigned the duties of a guardian or conservator has been certified with the CGC. A person assigned the duties of a guardian or conservator is the individual who makes decisions on behalf of the protected person, including but not limited to the professional guardian's or conservator's employee, subcontractor, agent, case manager, guardianship coordinator, or an individual who signs a report submitted under NMSA 1978, Sections 45-5-314, 45-5-409, or 45-5-418. If a corporate entity is appointed as a guardian or conservator, the identity of the person who will be assigned the duties of a guardian or conservator may not be known at the time that the order of appointment is issued. The ninety (90) day time limit set forth in Paragraph C is intended to provide a reasonable amount of time for a corporate entity to assign the duties of a guardian or conservator to a specific individual and to submit proof that the individual is certified.

[Adopted by Supreme Court Order No. 19-8300-001, effective for all cases on or after July 1, 2019.]



Notice of Hearing and Rights

- Form 4-999
- Court shall issue NOH within 5 days of Petition being filed
- AIP MUST BE SERVED, otherwise Court shall not grant petition.

Filing and Timing of Big 3 Reports

- GAL report required and must be filed.
- QHPC Report due fourteen (14) calendar days before hearing
- Visitor Report due eleven (11) calendar days before hearing.
- GAL Report due seven (7) calendar days before hearing.

Certification

**Professional G and C,
45-5-101(S) and (T)**

- G or C who serves more than two individuals who are not related to G or C.

Certification (cont.)

**Certification Requirements
45-5-311(D);45-5-410(D);
Rule 1-142**

- Certification and good standing required by national or state organization recognized by the Supreme Court

Certification (cont.)

**Order Requirements
Rule 1-142**

- An order appointing a professional G or C shall include a provision that requires proof of certification and in good standing with the Center for Guardianship Certification.

Certification (cont.)

Timing of Proof of Certification

- First to occur:
 - Ninety (90) days after Order of Appointment
 - Filing of Guardian's initial Report or Conservator's Inventory.

10 Year Reviews

**NMSA § 45-5-307(G)
(Guardianship)**

No More than 10 years after initial appointment:

1. Court hold Status Hearing
2. Appoint a Court Investigator to do a report.

10 Year Reviews (cont.)

Purpose

- To review the status of the PP's capacity and continued need for a G.
 - Status of PP
 - Appropriateness of G/C
 - Housing, DD Waiver, Issues of Concern
 - Updated Contact Information

10 Year Reviews (cont.)

Possible need to Change Orders

- Terminating C-no assets
- Changing G/C to limited
- Issuing new letters
- Notifying G/C about new reports
- Notifying Professional G/C of Certification requirements.

10 Year Reviews (cont.)

Persons Entitled to Notice of Hearing/Copy of Report

- PP
- G/C
- Interested parties known by the Court. (The filed Form 4-993 is your starting point.)

Terminating Conservatorships

No Assets to Conserve

- PP's income limited to SSI
- A judge can, sua sponte, terminate the conservatorship
- Assists the Guardian with annual reporting.

Grievance Procedure

Section 14 of SB 395

- Filed by PP or any interested party
- Grievance against G, C or Representative Payee
- Breach of fiduciary duty or inconsistent with Probate Code.

Grievance Procedure(cont.)

Court Must

1. Review Grievance
2. Set a hearing if reasonable belief that change needs to occur.
3. Take action supported by evidence.

Grievance Procedure(cont.)

Court may decline to take action if:

1. Similar action filed within six (6) months of last grievance.
2. Court took action on previous grievance.

GROWING PAINS NO. 1

Plenary vs. Limited

Every G/C Order must clearly state whether the powers are PLENARY or LIMITED.

CRITICAL: Plenary G/C must include firearm prohibition.

Growing Pains No. 2

AIP/PP Must Be Present

- At hearings and 10 year reviews
- Hearing can be held at facility
- Too many times, Judges are waiving appearance merely because the AIP/PP is in a facility.

Growing Pains No. 3

DO NOT CONSOLIDATE CASES

- G/C cases cannot be consolidated.
- Each PP is entitled to their own case, case review and case management.
- Consolidation thwarts tracking of cases.

Growing Pains No. 4

KEEP TRACK OF YOUR CASES

- Each judge should develop a mechanism to track the filing of reports and whether they have been reviewed.
- If reports raise any questions or red flags, hold a hearing.

Growing Pains No. 5

Office of the State Auditor

- Judges can refer cases to OSA after holding a hearing.
- File any correspondence from OSA
- File any actions you have taken in response to OSA letter.

Growing Pains No. 6

Case Review and Clean Up to Continue into 2020

- Judge Information Follow Up Sheet (JFIS)= Judge's To Do List
- Each Judge/TCAA must follow-up to issues raised in JFIS.

**Where to Find
Rules & Forms**

- All new, approved Supreme Court Forms can be found at:

www.AdultGuardianship.nmcourts.gov

- Rules of Civil Procedure for the District Courts (after publication cut-off for 2018) can be found at the Compilation Commission website:

www.nmcompcomm.us/nmrules/nmruleset.aspx?rs=1

Presentation is only a general overview of the current state of Adult Guardianship and Conservatorship law. Please review the Probate Code and Supreme Court Rules & Forms as more changes may continue occur.
