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N. M. S. A. 1978, § 45-5-303

West's New Mexico Statutes Annotated Currentness

Chapter 45. Uniform Probate Code

- ▣ Article 5. Protection of Persons Under Disability and Their Property (Refs & Annos)

- ▣ Part 3. Guardians of Incapacitated Persons (Refs & Annos)

→§ 45-5-303. Procedure for court appointment of a guardian of an incapacitated person

A. Any 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, age 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 name and address of the proposed guardian;
- (6) 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;
- (7) the name and address of the person or institution having the care and custody of the alleged incapacitated person;
- (8) the names and addresses of any other incapacitated persons for whom the proposed guardian is acting if the proposed guardian is an individual;
- (9) the reasons the appointment of a guardian is sought and the interest of the petitioner in the appointment;
- (10) the steps taken to find less restrictive alternatives to the proposed guardianship; and
- (11) the qualifications of the proposed guardian.

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 his own choice, the court shall appoint an attorney to represent him. 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

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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 also 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 he 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 his personal care that the alleged incapacitated person can manage without supervision or assistance;
- (2) those aspects of his personal care that the alleged incapacitated person could manage with the supervision or assistance of support services and benefits; and
- (3) those aspects of his 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 his duties upon entry of the order appointing the 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 his 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.

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J. Notwithstanding the provisions of Subsection I of this section, any disclosure of information shall not include any 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.

L. 1989, Ch. 252, § 5; L. 1993, Ch. 301, § 3; L. 1998, Ch. 32, § 3.

## HISTORICAL AND STATUTORY NOTES

### Uniform Law

This section is based upon § 5-303 of the Uniform Probate Code. See Volume 8, Pts. I, II, Uniform Laws Annotated, Master Edition, or ULA Database on Westlaw.

This section is also based upon § 2-203 of the Uniform Guardianship and Protective Proceedings Act. See Volume 8A Uniform Laws Annotated, Master Edition, or ULA Database on Westlaw.

## CROSS REFERENCES

Consent to treatment, adult clients, see § 43-1-15.

Rules of Evidence, see NMRA, Rule 11-101 et seq.

## LIBRARY REFERENCES

Mental Health ⇨ 120 to 148.

Westlaw Key Number Searches: 257Ak120 to 257Ak148.

C.J.S. Insane Persons §§ 130 to 140.

## RESEARCH REFERENCES

### Treatises and Practice Aids

209 Practising Law Institute Tax Law and Estate Planning: Estate Planning and Administration 275.

## NOTES OF DECISIONS

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#### 1. Determination of mental disorder

Where incompetent veteran was a resident and citizen of Socorro County at time he entered the army, and his estate which consisted solely of money paid him by the Federal government had been in custody of the court for many years, and veteran was in the care and control of the Federal government and had been since his enlistment in the army, probate court of Socorro County had authority to appoint a guardian for the veteran without an