

Update on Special Needs Planning 2019

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WATCH THE VIDEO ON FACEBOOK OR YOUTUBE!

Live streaming on Facebook during the Albuquerque seminar:

<https://www.facebook.com/PBWSLaw/>

The seminar video will be posted on the PBWS Facebook wall
and YouTube by July 1, 2019.

Email info@pbwslaw.com for a link to the YouTube video and
PDF of the seminar handouts.

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DYLAN ALCOTT, FRENCH OPEN CHAMPION 2019 QUAD WHEELCHAIR



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TYPES OF ACCOUNTS FOR PEOPLE WITH DISABILITIES

- ▶ Revocable or irrevocable trusts created by beneficiary
- ▶ Discretionary support trusts created by third party
- ▶ Testamentary trusts
- ▶ Conservatorship
- ▶ Custodial account
- ▶ UTMA account
- ▶ Special Needs Trusts
- ▶ ABLE accounts

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KNOW THE BENEFITS THE PERSON WITH DISABILITIES RECEIVES

- ▶ SSDI (Social Security Disability Income)
- ▶ SSI (Supplemental Security Income)
- ▶ Veterans' Benefits
- ▶ Medicare
- ▶ Medicaid, includes ACA eligibility
- ▶ Food Stamps
- ▶ Housing Subsidy
- ▶ Health Insurance

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KNOW THE RULES

- ▶ Federal Statutes
- ▶ CMS Regulations
- ▶ IRS Regulations
- ▶ SSA POMS
- ▶ Case Law
- ▶ New Mexico Regulations

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Comparison of Three Social Security Programs

SSI	SSA	SSDI
Supplemental <u>Security Income</u>	<u>Social Security</u>	<u>Social Security Disability Income</u>
Disability	Retirement	Disability
Cash + Medicaid	Cash	Cash + Medicare (After 2 years)
No work history	Work history	Work history
Income Cap - \$771/month in 2019	Income Cap - \$17,640/yr in 2019, if under age 66	Income Cap - \$1,220/month in 2019
Earned & unearned income	Earned income	Earned income
Resource cap - \$2000.00	No resource cap	No resource cap
Minimum cash benefit	Insurance	Insurance
Food and shelter	Unrestricted	Unrestricted
State supplements (Not NM)	Uniform in all states	Uniform in all states
US citizens only	All workers	All workers
May also have SSDI	May not have SSI or SSDI	May also have SSI
No dependent coverage	Covers dependents	Covers dependents
May have ABLE acct up to \$15,000 per year		May have ABLE acct up to \$15,000 per year

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Comparison of Medicaid and Medicare

	Medicaid	Medicare
Program:	Health Care	Health Insurance A Hospital B Doctor Visits C HMO plans D Prescriptions
Administered by:	States	Federal
Eligibility:	Must Qualify Financially	Entitlement by age or disability
Financial and Disability Qualifications:	ACA Expansion health coverage; disability not required Income of Household only Disability Services Income and Resources	Age <u>or</u> Disability if a disabled worker receiving SSDI
Covers:	Basic Medical Care Some in-home care programs; Skilled nursing care; Long Term care; Prescriptions	Hospitalization; Doctor visits; 100 days maximum rehabilitation; Prescriptions
Contribution:	Reimbursement required	Premiums and co-pay
Estate Recovery:	Yes	No

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TYPES OF SPECIAL NEEDS TRUSTS (SNT)

- ▶ Self-Settled SNT
- ▶ Self-Settled Pooled SNT
- ▶ Third-Party Settled SNT
 - ▶ Third Party Pooled SNT
 - ▶ Testamentary SNT

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REQUIREMENTS OF SNTs

- ▶ Written;
- ▶ Distributions discretionary by the trustee;
- ▶ Beneficiary not entitled to receive income or principal;
- ▶ Trustee prohibited from making any distributions that would jeopardize beneficiary's eligibility for benefits;
- ▶ Disabled individual must be the sole beneficiary of the trust during his/her lifetime; and
- ▶ Irrevocable

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THIRD PARTY-SETTLED SNTs

- ▶ Either an inter vivos trust or a testamentary trust;
- ▶ Irrevocable;
- ▶ Should be approved by SS and/or Medicaid;
- ▶ Can direct corpus at death of beneficiary to any remainder beneficiaries;
- ▶ Not described in federal statute

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SELF-SETTLED SNT 42 U.S.C § 1396p(d)(4)(A)

To not be counted as a resource, the trust must:

- ▶ Be established by the beneficiary, a parent, grandparent, court, or guardian;
- ▶ Be for the benefit of a disabled beneficiary, as defined in 42 U.S.C. § 1382c(a)(3);
- ▶ Have a beneficiary who is younger than 65 years old; and
- ▶ Provide that at the death of the beneficiary, the state must receive all amounts remaining in the trust up to the amount equal to medical assistance provided to the beneficiary by the state.

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SELF-SETTLED POOLED SNTs 42 U.S.C. § 1396p(d)(4)(C)

- ▶ Beneficiary transfers his/her own funds to a non-profit 501(c)(3) organization as Trustee;
- ▶ Trustee manages the funds as part of a pooled trust for disabled persons;
- ▶ Must be irrevocable;
- ▶ Trust can be created by the beneficiary, by a parent, grandparent, court or guardian;
- ▶ Beneficiary may be over 65 depending on the state;
- ▶ At the death of beneficiary, the non-profit organization may retain a portion of the trust fund

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ACA PROVIDES HEALTH INSURANCE COVERAGE FOR PEOPLE WITH DISABILITIES

- ▶ No exclusion for pre-existing conditions
- ▶ No lifetime caps of coverage
- ▶ No annual caps of coverage
- ▶ Cannot rescind coverage
- ▶ Monitoring increases in premiums by health insurance companies
- ▶ Closes the “doughnut hole” in Medicare

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ACA ESSENTIAL HEALTH BENEFITS

- ▶ Hospitalization
- ▶ Prescription drug coverage
- ▶ Rehabilitation
- ▶ Mental Health Services
- ▶ Substance Abuse Treatment
- ▶ Preventative and Wellness Health Coverage
- ▶ Chronic Disease Management
- ▶ Pediatric Coverage (including dental and vision)
- ▶ Maternity Coverage

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EXPANSION OF MEDICAID COVERAGE

- ▶ Based on Modified Adjusted Gross Income (MAGI) of household
- ▶ 138% of Federal Poverty Level
- ▶ No resource criteria
- ▶ No other health insurance coverage
- ▶ Persons age 19 up to 65
- ▶ No disability requirement; similar to New MexiKids

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LICENSING REQUIRED OF POOLED TRUST ADMINISTRATORS IN NEW MEXICO

- ▶ Fraud committed by Ayudando Guardians Inc. and Desert States discovered in 2017
- ▶ Financial Institutions Division of New Mexico
- ▶ Amended statute in 2018 attempts to include non-profit trustees of pooled trusts
- ▶ Two pooled trusts required to be licensed, ARCA and The Arc of New Mexico

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ABLE: ACHIEVING A BETTER LIFE EXPERIENCE ACT OF 2014

- ▶ Amendment of Section 529 of Internal Revenue Code
- ▶ Income tax deferred account
- ▶ Anyone including beneficiary can contribute funds
- ▶ Qualified disabled beneficiary requirement
- ▶ Beneficiary can control account
- ▶ Qualified disability distributions allowed including housing

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LIMITATIONS OF ABLE ACCOUNTS

- ▶ One account per beneficiary
- ▶ Total contributions from everyone limited to \$15,000 per year
- ▶ Disability must have been evident prior to age 26
- ▶ Maximum account balance \$100,000 for SSI eligibility
- ▶ At death of beneficiary, balance goes to Medicaid

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NEW BENEFITS FOR ABLE ACCOUNTS

2017 Tax Act added:

- ▶ Earned income of beneficiary can be added to ABLE over \$15,000 limit up to federal poverty amount (\$12,490 in 2019) and grow income tax deferred like an IRA
 - ▶ Beneficiary may not have another IRA
 - ▶ Amount of wages still subject to limitations depending on Social Security benefit being received
- ▶ 529 plan can be rolled over into ABLE account

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ABLE

- ▶ States must pass enabling legislation
- ▶ New Mexico Legislature passed the bill in 2016; Governor signed March 3, 2016
- ▶ Many other states have implemented ABLE accounts
- ▶ New Mexico created portal in January 2018

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STATE OF NEW MEXICO
ABLE PROGRAM

OPEN AN ACCOUNT LOGIN RESOURCES HELP

STABLE ACCOUNTS BENEFITS ELIGIBILITY QUALIFIED EXPENSES

ABLE
NEW MEXICO

- ✓ Offering ABLE Accounts to New Mexicans with disabilities
- ✓ Tax-free savings plan for disability-related expenses
- ✓ Save and invest without losing federal needs-based benefits

OPEN AN ACCOUNT

Already Have An Account? LOGIN

<https://ablnewmexico.com/>

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ABLE NATIONAL RESOURCE CENTER
ACHIEVING A BETTER LIFE EXPERIENCE ACT

Home What is ABLER? How To Get Started Managing My Account Choose a State Resources Webinars News

Meet our 2019
ABLE NRC Ambassadors

Click here to learn how these individuals from across the country are using ABLER accounts as a down payment on independence and freedom. [MORE](#)

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BEFORE WE WORRY ABOUT A GUARDIANSHIP- ALTERNATIVES

- ▶ Powers of Attorney
 - ▶ Health Care
 - ▶ Finance (Durable)
- ▶ Health Care Surrogate

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HEALTH CARE POA

- ▶ Health Care Power of Attorney and Advanced Directive
 - ▶ Agent has power of attorney for health care to make health care decisions including:
 - ▶ selection and discharge of health care providers,
 - ▶ approval and disapproval of diagnostic tests, surgical procedures, programs of medication,
 - ▶ orders not to resuscitate, and directions to provide, withhold or withdraw artificial nutrition and hydration
 - ▶ and all others forms of treatment or health care which maintains, diagnoses, or otherwise affects an individual's mental or physical condition.

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FINANCIAL (DURABLE) POA

- ▶ Financial Power of Attorney
 - ▶ Agent has power of attorney for finances to make financial decisions including:
 - ▶ Real estate transactions
 - ▶ Legal proceedings
 - ▶ Personal maintenance
 - ▶ Taxes
 - ▶ Personal property
 - ▶ Business operation
 - ▶ Retirement plans
 - ▶ Benefits

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POWERS OF ATTORNEY

▶ Legal Requirements:

- ▶ Must be:
 - ▶ (1) Adult or emancipated minor having capacity;
 - ▶ (2) in writing;
 - ▶ (3) signed by principal;
 - ▶ (4) may include individual instructions;
 - ▶ (5) effective upon determination that principal lacks capacity.

▶ How to Revoke:

- ▶ Individual with capacity may revoke by:
 - ▶ (1) signed writing;
 - ▶ (2) personally informing supervising health care provider;
 - ▶ (3) in any manner that communicates intent to revoke;
 - ▶ (4) filing for divorce or legal separation revokes designation of spouse as agent (revived by remarriage);
 - ▶ (5) conflicting earlier health care directive (to the extent of the conflict)

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HEALTH CARE SURROGATE

▶ If an adult or emancipated minor is determined to lack capacity to make healthcare decisions through the provisions of the Uniform Healthcare Decisions Act (§24-7A- 1 et seq).

- ▶ a surrogate healthcare decision maker is identified to act for them.
- ▶ two qualified healthcare professionals must make an assessment that the person lacks capacity to make their own healthcare decisions.
- ▶ One of these professionals shall be the primary care physician.
- ▶ For individuals with developmental disabilities, the second professional shall be a person whose training and expertise aid in the assessment of functional impairment (physician, physician assistant, social worker, psychologist, nurse).
- ▶ If the individual is assessed to lack capacity to make healthcare decisions, a surrogate healthcare decision maker may be required if there is no agent (i.e. Power of Attorney) or court appointed guardian in place or if the agent or guardian is not reasonably available. The Uniform Health Care Decisions Act contains specific provisions identifying who may or may not serve as a surrogate.

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WHAT CAN A HC SURROGATE DO?

- ▶ By law, surrogates can make decisions regarding:
 - ▶ the selection and discharge of health-care providers and institutions,
 - ▶ approval or disapproval of diagnostic tests, surgical procedures, programs of medication and orders not to resuscitate,
 - ▶ directions relating to life-sustaining treatment, including withholding or withdrawing life-sustaining treatment, and termination of life support; and
 - ▶ directions to provide, withhold or withdraw artificial nutrition and hydration and all other forms of healthcare.

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DUTIES AND RESPONSIBILITIES OF HC SURROGATE

- ▶ 1. HC shall communicate the assumption of authority as promptly as practicable to the patient/client, to members of the patient's family (including patient's spouse, significant others, adult children, parents, siblings and grandparents) who can be readily contacted and to the supervising health care provider.
- ▶ 2. HC shall make a health care decision in accordance with the patient's individual instruction, if any, and other wishes to the extent known to the HC. Otherwise, make the decision in accordance with the HC's determination of the patient's best interest. In determining the patient's best interest, the HC shall consider the patient's personal values to the extent the HC is aware of such values.
- ▶ 3. HC shall not make a decision based solely on the patient's preexisting psychological or medical condition or preexisting or projected disability.
- ▶ 4. Once the HC has assumed authority the HC's decision is effective without judicial approval
- ▶ 5. The patient/client may disqualify the HC from acting as surrogate at any time, or may regain capacity to make his/her own health care decisions.
- ▶ 6. The patient/client may challenge the finding of their incapacity at any time.
- ▶ 7. The HC does not have the authority to consent to the patient's/client's admission to a mental hospital facility.

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CHANGES TO GUARDIANSHIP STATUTE – IMPLEMENTING SB 19 and SB 395

- ▶ Attempts to include more interested parties in the proceedings
- ▶ Attempts to contain isolation of protected person
- ▶ Provide greater protection for property of protected person
- ▶ Impact on persons with disabilities

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APPLICABILITY OF SENATE BILL 19 AND 395

- ▶ Applies to all guardianship and conservatorship (“G&C”) proceedings commenced on or after July 1, 2018. Section 16 SB 19.
- ▶ Applies to all G&C proceedings in existence on June 30, 2018 unless the Court finds that application would substantially interfere with the proceeding or prejudice rights of party. Section 16 SB 19.

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FAVORS ALTERNATIVES

- ▶ POA for healthcare and finance. §24-7A-101; §45-5B-101.
- ▶ Decisions by surrogate. §24-7A-5
- ▶ Limited guardianships. §45-5-303(B)(6)
- ▶ Protective arrangements. §45-5-405.1
- ▶ Limited conservatorships. §45-5-404(B)(7)

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§45-5-303(M); §45-5-404(P)

Petition **should not** include any:

- ▶ Diagnostic information
- ▶ Treatment information
- ▶ Medical information
- ▶ Psychological information
- ▶ Protected financial information

Do not attach the report of the QHCP to the Petition.

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MANDATORY FORMS

New Rule 1-140 NMRA 2018

- ▶ Mandatory forms are now required in all G & C proceedings
- ▶ Mandatory forms are, or will be, posted on the NM Courts website
- ▶ Find them under the Self-Help Tab – Adult Guardianship or through New Mexico Compilation Commission.
- ▶ Forms 4-992, 4-993, 4-994, 4-995, 4-995.1, 4-996, 4-997, 4-998, 4-999

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PROCESS: ADULT GUARDIANSHIP RULE 1-004.1(A)(2), (B)

- ▶ Process in Adult Guardianship
- ▶ Within 5 days of the filing of the Petition, Court shall
 - ▶ Set a hearing on the Petition
 - ▶ Issue a Notice of Hearing and Rights - Form 4-999
 - ▶ Deliver copy of Notice to Petitioner for service upon AIP
 - ▶ Notice of Hearing and Rights shall be in lieu of a Summons

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SERVICE : ADULT GUARDIANSHIP RULE 1-004.1(C)

- ▶ Service in Adult Guardianship
- ▶ The Notice and Petition shall be served together on the AIP
- ▶ Within 11 days of the issuance of the Notice
- ▶ The Court shall not grant the Petition if AIP is not served personally
- ▶ Service on AIP - 1-004.1(C)(2)(3)
- ▶ Personal service may be made by Guardian *ad Litem* or any person over age 18, not a party or interested person
 - ▶ If AIP will not accept personal service, leave process at location where AIP is found
 - ▶ Even if AIP refuses to accept copies, such action shall constitute valid service on AIP

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COURTROOM CLOSURE

Amended Rule 1-104 NMRA 2018

- Prior to July 1, 2018
- Rule 1-104 (B) (1) required automatic court closure in G&C proceedings
- This rule was amended in 2018 to remove G&C proceedings from the list of sequestered proceedings

§45-5-303(N) and §45-5-407(Q)

- After July 1, 2018, hearings are open unless good cause is shown for closure.
- Amended Rule 1-104 requires that a motion to close a hearing identify any:
 - Statute
 - Regulation
 - Rule
 - **Other source of law** that addresses courtroom closure in the particular type of proceeding.

§45-5-303(J); §45-5-407(M)

- After July 2018, the existence of a proceeding is a matter of public record UNLESS:
- The Alleged Incapacitated Person requests the record be sealed; AND
- The Petition is dismissed or terminated.

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NOTICE OF HEARING AND RIGHTS

§45-5-309 (B); §45-5-405 (B)

- ▶ AIP must be personally served with the Petition and Notice of Hearing and Rights. Form 4-999 (to be approved by NMSC)
- ▶ Notice must inform AIP of rights and right to attend the hearing
- ▶ NOH must include a description of nature, purpose and consequences if petition granted
- ▶ The Court SHALL NOT grant the Petition if the Notice of Hearing does not substantially comply with these requirements

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AIP'S RIGHTS AT THE HEARING

**§45-5-303(G)(1) – (3); §45-5-407(E)(1) – (3)
as amended by SB 395**

- ▶ AIP may:
 - ▶ Present evidence and subpoena witnesses and documents.
 - ▶ Examine witnesses, including a court-appointed GAL, GHCP, and Visitor.
 - ▶ Otherwise participate in the Hearing.

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WHAT CAN THE PUBLIC ACCESS?

- ▶ Docket sheet – Open to the Public
- ▶ Persons Entitled To Notice Only
 - ▶ Order Appointing G&C
 - ▶ All court records filed BEFORE the Order is entered
 - ▶ All court records filed AFTER the Order is entered
- ▶ Public Cannot Access
 - ▶ Reports of the GAL, Court Visitor and Qualified Health Care Professional

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REPORTS REQUIRED

New Rule 1-143

- ▶ QHCP shall file report no later than 14 days before hearing. Rule 1-143(C)(1)
- ▶ CV shall file report no later than 11 days before hearing. Rule 1-143(C)(2)
- ▶ GAL shall file report no later than 7 days before hearing. Rule 1-143(C)(3)
- ▶ GAL shall review content of GAL, CV and QHCP reports with AIP, prior to capacity hearing. Rule 1-143(D)
- ▶ PA shall provide copies of QHCP, CV and GAL Reports to those entitled to receive them under Rule 1-079.1(B)(4) or (C)(4), within 3 days of the filing of the reports. Rule 1-143(D)

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MANDATORY BONDING – EVEN FAMILY GUARDIANS!!

§45-5-411

- ▶ All Conservators are required to post a bond to secure their performance, with very limited exceptions. Forms 4-995, 4-995.1
- ▶ The Court must issue an order securing or waiving bond. Forms 4-994
- ▶ If the Court waives the bond, the Court must make specific findings that a bond “is not necessary to protect the interest of” the Protected Person.

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SEPARATE ACCOUNTS AND RECORDS

§45-5-107

- ▶ Protected Person’s accounts must be kept separate from G’s and/or C’s accounts
- ▶ Court may require G to bring a conservatorship proceeding at any time to preserve PP’s property
- ▶ G and/or C shall maintain books and records for seven (7) years

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NEW REPORTS

- ▶ 90-Day and Annual Guardian's Report - Form 4-996
- ▶ Conservator's Inventory - Form 4-997
- ▶ Conservator's Report - Form 4-998

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POWERS OF ATTORNEY AND GUARDIANSHIP/CONSERVATORSHIP

§45-5-312(D)

Unless authorized by the Court by specific order:

- ▶ G shall not revoke or amend a POA for healthcare or finances
- ▶ Medical or financial decisions of agent takes precedence over G's decisions and G shall cooperate with agent
- ▶ See §45-5B-108(B) for POA and C's decisions
- ▶ Include specific language revoking POA's especially if the POA is the problem!!

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NEW VISITATION RESTRICTION RULES

§45-5-312(F)

G shall not restrict PP's interaction, communication or visitation with others unless:

- ▶ Authorized by specific Court order; or
- ▶ A less restrictive alternative in place limiting contact; or
- ▶ G has good cause to believe restriction is necessary to protect PP and the restriction is:
 - ▶ for no more than seven (7) days if person has a family or preexisting social relationship with the PP; or
 - ▶ for a period for no more than sixty (60) days if the person does not have a family or preexisting social relationship with the PP

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PROFESSIONAL GUARDIANS AND CONSERVATORS

§45-5-311(D); §45-5-410(D)

- ▶ As of July 1, 2019, all professional G/Cs must be certified and in good standing with an organization approved by NMSC. **§45-5-311(D); §45-5-410(D), as amended by SB 395; Rule 1-142.**
- ▶ A professional C/C is defined as a “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.” **§45-5-101 (S), (T), as amended by SB 395**

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GRIEVANCES

NMUPC New Section 14 (SB 395)

- ▶ A grievance may be filed by the PP or any interested person who believes the G/C is breaching a fiduciary duty or acting inappropriately. Section 14 (A).
- ▶ When a grievance is filed, the Court shall review the grievance and any other necessary materials, and “if the grievance supports a reasonable belief” that a problem exists, shall schedule a hearing. Section 14 (B).
- ▶ The Court may decline to take action if a similar grievance had been filed within the previous 6 months and the Court took appropriate action. Section 14 (C).

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