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593-014 – AIDS & the Law  
Fall Semester 2006

UNM School of Law  
Final Examination  
Two /Three Credits

Professor Carol Suzuki  
Tuesday, December 12, 2006  
9:00-12:00 p.m. (3 hours)

Examination Format

**Essay Answers**

1. **Laptop** computer users: Start the Secureexam program entering your examination number, course name, professor's name, & date of examination. Click "proceed" to enter the program. Type START in the next window that is displayed but do NOT press the enter key until the proctor says to begin the exam.

2. **Bluebooks** for writing: write on every-other line and only on the front page of each sheet. On the front of bluebook record the class name, professor's name, date of exam, and your examination number. Make sure to number each bluebook in order. DO NOT WRITE YOUR NAME ON BLUEBOOKS.

A five-minute warning will be given prior to the conclusion of the examination. When time is called, stop immediately. If you are handwriting, lay down your pen & close bluebook immediately. If using a laptop, save & exit the program.

Go to the exam check-in table at the conclusion of the exam & fill out an examination receipt.

Professor's Instructions

This examination consists of three essay questions. It is recommended that you spend 90 minutes on the first question, 30 minutes on the second question, and 60 minutes on the third question. Point values for the examination will be apportioned roughly equal to the recommended time allotments.

The Appendix is contained on pages A1 through A8. The appendix contains the New Mexico Kinship Guardianship Act.

This final examination follows a modified open-book exam policy. You are allowed only the following: the course book, AIDS Cases and Materials; all handouts distributed to the class during the semester; course notes you have taken yourself; and any course outline prepared by you. You are encouraged to refer to these sources in answering the examination questions.

If there are any ambiguities as to law or fact, please state your reasonable assumptions and proceed with your analysis.

You may cite relevant case law of jurisdictions outside of the jurisdiction in which the question is set in discussing your answer.

You will be evaluated in the precision, thoroughness, and organization of your answers. The conclusions you reach are less important than the strength of your analysis.

If you use bluebooks, please **use a separate bluebook for each question**. Some questions have subparts. Different subparts of the same question can be answered in the same bluebook. Use as many bluebooks as you need to answer a question.

If you type, please **start each question at the top of a page**. To start a new page in SecurExam, use the same method as in Word (Ctrl + Enter).

Question 1 (recommended time: 90 minutes):

The following events take place in the state of Freedonia, USA.

Bridget B., the wife of John B., filed an action against John B. in which she contends that John infected her with HIV. She is HIV-positive, but has never been diagnosed with AIDS.

Bridget and John met in 1998 and married in July 2000. During this period, John represented to Bridget that he was healthy, disease-free, and monogamous. They had sexual relations prior to their marriage and, at John's request, discontinued using condoms. The last time that Bridget and John had intercourse was during their honeymoon in July 2000.

Prior to their marriage, John told Bridget about prior relationships he had been in with women. In May or June 2000, someone called claiming to be from a doctor's office, and asked Bridget to tell John that his HIV test results were negative. Bridget alleges that prior to the marriage John was never sick, that he was athletic and active, and that he took medications only for his allergies.

In September 2000, Bridget began to suffer from exhaustion and high fevers. She went to see a doctor, who recommended an HIV test. On October 1, 2000, Bridget learned that she had tested positive for HIV. Bridget took a confirmatory test, which was also positive for HIV. At her doctor's urging, Bridget asked John to be tested. His HIV test and confirmatory test were positive for HIV. At that appointment regarding John's confirmatory test, John's doctor told Bridget that she had "brought HIV into the marriage." The doctor prescribed medications for John that made his viral load virtually undetectable. Bridget, on the other hand, was not offered treatment. She was told that she had "had the illness for a long time." Bridget became depressed because she had infected her husband with HIV.

In September 2001, John began telling others that Bridget had infected him with HIV. The next month, John began to refuse to continue his treatment and was eventually diagnosed with AIDS. In November 2001, Bridget began to doubt that she had been the cause of John's HIV infection. John responded by asking whether she was accusing him of bringing HIV into their lives and advised her that it would not be healthy for their marriage to blame him. The following month, John admitted to Bridget that he had had sexual relations with men before their marriage. In February 2002, a hospice worker told Bridget that it was unlikely that

John got HIV from Bridget on their honeymoon, as he claimed, since his HIV would not have advanced so rapidly to AIDS.

Bridget sues John for negligent infliction of emotional distress, intentional infliction of emotional distress, fraud, and negligence. The negligence claim states that John owed Bridget a duty of care to disclose the fact that he was HIV-positive, that he breached this duty, and that he thereby infected her with HIV. As a result of this wrongful transmission, Bridget states she suffers, and will continue to suffer, many consequences including physical illness, severe emotional distress, loss of enjoyment of life, extreme embarrassment, humiliation, shame, medical expenses, and lost wages and benefits. She will eventually develop AIDS and “suffer a slow, certain, and painful death.”

Bridget claims the tort of negligent transmission of HIV does not depend solely on actual knowledge of HIV infection and would extend at least to those situations where the actor, under the totality of the circumstances, has reason to know of the infection. Bridget accuses John of engaging in sexual relations with men during their marriage. She says that had she known that John had been unfaithful prior to and during their marriage, which put her at risk for sexually transmitted diseases, she would not have engaged in unprotected sexual relations with John.

John claims that Bridget was comparatively at fault for engaging in intimate sexual relations without a condom. He says he did not find out he was HIV-positive until October 13, 2000.

The Freedonia Health and Safety Code section 120291 makes it a felony to intentionally and knowingly infect another with HIV.

The Freedonia Health and Safety Code section 120975 sets forth: “To protect privacy of individuals who are the subject of blood testing for antibodies to the probable causative agent of acquired immune deficiency syndrome (AIDS) the following shall apply: no person shall be compelled in any state, county, city or other local civil, criminal, administrative, legislative, or other proceedings to identify or provide identifying characteristics that would identify any individual who is the subject of a blood test to detect antibodies to the probable causative agent of AIDS.”

The state of Freedonia, the fifty-first state, has not yet developed much common law. The Freedonia Supreme Court has announced that on each newly considered issue the State will adopt the best rule among those currently used by other states.

A. Should John be liable for negligently transmitting the virus based on the argument that he had reason to know that he was infected with HIV? Should there be a claim for negligent transmission of HIV based on a constructive knowledge standard, based on the facts above? Assume the claim is not barred by a statute of limitations defense. You need to discuss elements of negligence only to the extent that they support your policy arguments for arguing that John should be found liable or not.

B. As part of pretrial discovery, Bridget seeks John's medical records. Should John be compelled to disclose his medical records concerning HIV and AIDS?

C. Assume for this subpart only that John asserts that he tested negative for HIV on August 17, 2000, in connection with a life insurance application. He has a copy of the lab report indicating a negative HIV test, which has been furnished to Bridget's lawyers. What legal arguments does Bridget have to question the accuracy or reliability of John's negative HIV test in August 2000?

D. As part of discovery, Bridget served special interrogatories on John. Interrogatories are written questions asked of the opposing party during the pretrial discovery phase of litigation, which are answered under oath. She seeks to have John state:

- 1) The date of his first sexual encounter with a man.
- 2) The date of his last sexual encounter with a man.
- 3) The name of every man who has HIV with whom John had unprotected sex.
- 4) The name of every man who has AIDS with whom John had unprotected sex.
- 5) The number of sexual encounters with men that John had in the five years prior to his relationship with Bridget.
- 6) The number of sexual encounters with men that John had since the time he first met Bridget.

John's lawyers object to having John answer these interrogatories, stating that they are burdensome, oppressive, overly broad and harassing, and an invasion of John's right to privacy. Freedonia case law sets forth that "Under the discovery statutes, information is discoverable if it is unprivileged and is either relevant to the subject matter of the action or reasonably calculated to reveal admissible evidence." Is

Bridget entitled to the information that she seeks in each interrogatory? Please discuss each question separately as it relates to her claims. Consider the relevance of the information sought. For each interrogatory, if there is a narrower question that could be asked that would survive objections by John's lawyers, what is it?

Question 2 (recommended time: 30 minutes):

You are a recent law school graduate. You passed the New Mexico bar examination, were admitted as a member to the bar, and started your own practice. In order to become more involved with the community in which you live and practice, you join the board of directors of Albuquerque HIV/AIDS Project in New Mexico. Before a board of directors meeting one day at the AHAP offices, the executive director of AHAP, Raheem Mahari, asks you for some legal advice about client eligibility for its needle exchange program that it is planning on starting next year, once it receives final department of health approval.

The New Mexico Administrative Code set forth that:

“Enrollment of clients in a department of health approved syringe exchange program.

(1) Eligibility:

(a) Eligibility is limited to citizens of the state of New Mexico who are 18 years of age or older.

(b) People seeking enrollment into syringe exchange programs are required to be current injection drug users.”

The executive director would like to know what the staff should require as proof of eligibility for the AHAP needle exchange program. Specifically, what is necessary to prove citizenship and age? What is acceptable proof? What if a prospective enrollee claims to be homeless with no identification? How does he prove he is a current drug user? What are the goals and policies underlying your answer? How would your answer to Mr. Mahari be affected if a finding of a violation of the Administrative Code could result in a loss of funding for AHAP or if a parent of a minor participating in the needle exchange program had a private right of action against AHAP?



Question 3 (recommended time: 60 minutes):

Refer to the Kinship Guardianship Act attached in the Appendix of this examination packet.

Gracia Gershwin, the 65-year-old maternal grandmother of Casey Gershwin, comes to your law offices to ask for representation. She says that she is raising her grandson, Casey, seven-years-old, and wants to make it “legal.” He’s been living with her since she took him home from the hospital after he was born. His mother, Dee, is Gracia’s daughter. Dee was on drugs when Casey was born and she just walked out of the hospital and left him there. Gracia said that the social worker at the health clinic where Casey goes for check-ups and shots told her to get kinship guardianship.

Gracia further tells you that she is HIV-positive and was diagnosed with AIDS in 1987. She almost died ten years ago, but then she started taking the combination drug therapy that was developed around that time. She is doing pretty well on the therapy. However, there have been times when the drugs make her really sick. It has been happening more often in the last nine months. On those days, she can’t take Casey to the school bus stop to wait with him, so he stays home with her. One time she went to the hospital for six days with pneumonia. Casey stayed with a neighbor during that time, but Gracia doesn’t think that she can bother the neighbor every time she is sick. There isn’t anyone else she thinks she can depend on. Her other daughter, Lee, Dee’s younger sister, is in law school in Colorado and seems too busy to drop her studies to come down to help in an emergency.

Gracia’s daughter, Dee, is homeless. Gracia thinks Dee is using drugs. She sees Dee every other month or so, whenever Dee decides to wander into her and Casey’s lives. Dee says “hi” to Casey, and is nice to him, but isn’t maternal toward him. Dee basically stops by to eat a hot meal and maybe get some clothes and money from Gracia. At the behest of the social worker at Casey’s clinic, Gracia asked Dee to allow her to be guardian the last time Dee stopped by. Dee refused and said that if Gracia takes her to court, that Dee will take Casey away from Gracia. Gracia gets Social Security due to her disability. She once tried to get welfare money for Casey but was told by the welfare worker that his mother was collecting it for him. Dee has never helped Gracia out with any of Casey’s expenses. Dee knows that Gracia has AIDS.

Gracia suspects that Casey’s father is Flint, a local drug dealer whom Gracia blames for getting Dee addicted to drugs. Flint has never said anything to Gracia

about being Casey's father, and has never really acted like a father to Casey. But sometimes when Dee stops by, she brings Flint. Gracia doesn't like Flint, although he sometimes brings a cheap present for Casey. She would like to leave Flint out of the picture.

You agree to represent Gracia. Assume all people named above are residents of New Mexico. Cite to any case law that is relevant, including those outside of New Mexico. Where there is conflicting law or case law, state which law or decision should prevail and why. Focus on HIV/AIDS issues in the context of legal issues in answering the following questions.

A. What problems do you foresee in Gracia's pursuit of kinship guardianship? Does granting Gracia kinship guardianship follow the policies and goals behind the Kinship Guardianship Act? Why or why not? Should Gracia inform the court of her disability? Does Dee need to know Gracia is going to court? Does Flint?

B. If there is a legal plan available to Gracia and Casey that you think is more appropriate for their situation than kinship guardianship, what is it? What other legal forms and papers would you suggest that Gracia complete? What other legal relationships should Gracia pursue between herself and Casey?

C. How would your strategy be affected if Casey were also HIV-positive?

## ARTICLE 10B

### Kinship Guardianship

Sec.

- 40-10B-1. Short title.
- 40-10B-2. Policy; purpose.
- 40-10B-3. Definitions.
- 40-10B-4. Jurisdiction and venue.
- 40-10B-5. Petition; who may file; contents.
- 40-10B-6. Service of petition; notice; parties.
- 40-10B-7. Temporary guardianship pending hearing.
- 40-10B-8. Hearing; elements of proof; burden of proof; judgment; child support.

Sec.

- 40-10B-9. Guardian ad litem; appointment.
- 40-10B-10. Guardian ad litem; powers and duties.
- 40-10B-11. Nomination objection by child.
- 40-10B-12. Revocation of guardianship.
- 40-10B-13. Rights and duties of guardian.
- 40-10B-14. Continuing jurisdiction of the court.
- 40-10B-15. Caregiver's authorization affidavit.

#### 40-10B-1. Short title.

This act [40-10B-1 to 40-10B-15 NMSA 1978] may be cited as the "Kinship Guardianship Act".

**History:** Laws 2001, ch. 167, § 1.

**Cross references.** — For forms approved for use in Kinship Guardianship proceedings, see Civil Forms 4-981 to 4-991 NMRA.

**Compiler's notes.** — The Kinship Guardianship Act, codified as 40-10B-1 to 40-10B-15 NMSA 1978,

was originally-drafted and enacted to be Chapter 45, Article 5 NMSA 1978, but it was recompiled to Chapter 48 NMSA 1978, as the latter seems a more appropriate placement.

#### 40-10B-2. Policy; purpose.

A. It is the policy of the state that the interests of children are best served when they are raised by their parents. When neither parent is able or willing to provide appropriate care, guidance and supervision to a child, it is the policy of the state that, whenever possible, a child should be raised by family members or kinship caregivers.

B. The Kinship Guardianship Act is intended to address those cases where a parent has left a child or children in the care of another for ninety consecutive days and that arrangement leaves the child or children without appropriate care, guidance or supervision.

C. The purposes of the Kinship Guardianship Act [40-10B-1 NMSA 1978] are to:

- (1) establish procedures to effect a legal relationship between a child and a kinship caregiver when the child is not residing with either parent; and
- (2) provide a child with a stable and consistent relationship with a kinship caregiver that will enable the child to develop physically, mentally and emotionally to the maximum extent possible when the child's parents are not willing or able to do so.

**History:** Laws 2001, ch. 167, § 2.

#### 40-10B-3. Definitions.

As used in the Kinship Guardianship Act [40-10B-1 NMSA 1978]:

A. "caregiver" means an adult, who is not a parent of a child, with whom a child resides and who provides that child with the care, maintenance and supervision consistent with the duties and responsibilities of a parent of the child;

B. "child" means an individual who is a minor;

C. "kinship" means the relationship that exists between a child and a relative of the child, a godparent, a member of the child's tribe or clan or an adult with whom the child has a significant bond;

D. "parent" means a biological or adoptive parent of a child whose parental rights have not been terminated; and

E. "relative" means an individual related to a child as a 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.

History: Laws 2001, ch. 167, § 3.

#### **40-10B-4. Jurisdiction and venue.**

A. The district court has jurisdiction of proceedings pursuant to the Kinship Guardianship Act [40-10B-1 NMSA 1978].

B. Proceedings pursuant to the Kinship Guardianship Act shall be in the district court of the county of the child's legal residence or the county where the child resides, if different from the county of legal residence.

History: Laws 2001, ch. 167, § 4.

#### **40-10B-5. Petition; who may file; contents.**

A. A petition seeking the appointment of a guardian pursuant to the Kinship Guardianship Act [40-10B-1 NMSA 1978] may be filed only by:

- (1) a kinship caregiver;
- (2) a caregiver, who has reached his twenty-first birthday, with whom no kinship with the child exists, who has been nominated to be guardian of the child by the child, and the child has reached his fourteenth birthday; or
- (3) a caregiver designated formally or informally by a parent in writing if the designation indicates on its face that the parent signing understands:
  - (a) the purpose and effect of the guardianship;
  - (b) that he has the right to be served with the petition and notices of hearings in the action; and
  - (c) that he may appear in court to contest the guardianship.

B. A petition seeking the appointment of a guardian shall be verified by the petitioner and allege the following with respect to the child:

- (1) facts that if proved will meet the requirements of Subsection B of Section 8 of the Kinship Guardianship Act [40-10B-8 NMSA 1978];
- (2) the date and place of birth of the child, if known, and if not known, the reason for the lack of knowledge;
- (3) the legal residence of the child and the place where he resides, if different from the legal residence;
- (4) the marital status of the child;
- (5) the name and address of the petitioner;
- (6) the kinship, if any, between the petitioner and the child;
- (7) the names and addresses of the parents of the child;
- (8) the names and addresses of persons having legal custody of the child;
- (9) the existence of any matters pending involving the custody of the child;
- (10) a statement that the petitioner agrees to accept the duties and responsibilities of guardianship;
- (11) the existence of any matters pending pursuant to the provisions of Chapter 32A, Article 4 NMSA 1978 and, if so, a statement that the children, youth and families department consents to the relief requested in the petition;
- (12) whether the child is subject to provisions of the federal Indian Child Welfare Act of 1978 and, if so:
  - (a) the tribal affiliations of the child's parents; and
  - (b) the specific actions taken by the petitioner to notify the parents' tribes and the results of the contacts, including the names, addresses, titles and telephone numbers of the persons contacted, and copies of correspondence with the tribe; and
- (13) other facts in support of the guardianship sought.

**History:** Laws 2001, ch. 167, § 5.

**Cross references.** — For the federal Indian Child Welfare Act of 1978, see 25 U.S.C. § 1901 et seq.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Construction and application of Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C.A. § 1901 et seq.) upon child custody determinations, 89 A.L.R.5th 195.

#### **40-10B-6. Service of petition; notice; parties.**

A. At the time of filing the petition, the petitioner shall obtain an order of the court setting a date for hearing on the petition, which date shall be no less than thirty and no more than ninety days from the date of filing the petition.

B. The petition and a notice of the hearing shall be served upon:

(1) the children, youth and families department if there is any pending matter relating to the child pursuant to the provisions of Chapter 32A, Article 4 NMSA 1978;

(2) the child if he has reached his fourteenth birthday;

(3) the parents of the child;

(4) a person having custody of the child or visitation rights pursuant to a court order; and

(5) if the child is an Indian child as defined in the federal Indian Child Welfare Act of 1978, the appropriate Indian tribe and any "Indian custodian", together with a notice of pendency of the guardianship proceedings, pursuant to the provisions of the federal Indian Child Welfare Act of 1978.

C. Service of process required by Subsection A of this section shall be made in accordance with the requirements for giving notice of a hearing pursuant to Subsection A of Section 45-1-401 NMSA 1978.

D. The persons required to be served pursuant to Subsection B of this section have a right to file a response as parties to this action. Other persons may intervene pursuant to Rule 1-024 NMRA.

**History:** Laws 2001, ch. 167, § 6.

**Cross references.** — For the federal Indian Child Welfare Act of 1978, see 25 U.S.C. § 1901 et seq.

For service of process forms, see Civil Forms 4-206, 4-209 and 4-209B NMRA.

#### **40-10B-7. Temporary guardianship pending hearing.**

A. After the filing of the petition, upon motion of the petitioner or a person required to be served pursuant to Subsection B of Section 6 of the Kinship Guardianship Act [40-10B-6 NMSA 1978], or upon its own motion, the court may appoint a temporary guardian to serve for not more than one hundred eighty days or until the case is decided on the merits, whichever occurs first.

B. A motion for temporary guardianship shall be heard within twenty days of the date the motion is filed. The motion and notice of hearing shall be served on all persons required to be served pursuant to Subsection B of Section 6 of the Kinship Guardianship Act.

C. An order pursuant to Subsection A of this section may be entered ex parte upon good cause shown. If the order is entered ex parte, a copy of the order shall be served on the persons required to be served pursuant to Subsection B of Section 6 of the Kinship Guardianship Act. If a person files an objection to the order, the court immediately shall schedule a hearing to be held within ten days of the date the objection is filed. Notice of the hearing shall be given to the petitioner and all persons required to be served pursuant to Subsection B of Section 6 of the Kinship Guardianship Act.

**History:** Laws 2001, ch. 167, § 7.

#### **40-10B-8. Hearing; elements of proof; burden of proof; judgment; child support.**

A. Upon hearing, if the court finds that a qualified person seeks appointment, the venue is proper, the required notices have been given, the requirements of Subsection B of this

section have been proved and the best interests of the minor will be served by the requested appointment, it shall make the appointment. In other cases the court may dismiss the proceedings or make any other disposition of the matter that will serve the best interests of the minor.

B. A guardian may be appointed pursuant to the Kinship Guardianship Act [40-10B-1 NMSA 1978] only if:

(1) a parent of the child is living and has consented in writing to the appointment of a guardian and the consent has not been withdrawn;

(2) a parent of the child is living but all parental rights in regard to the child have been terminated or suspended by prior court order; or

(3) the child has resided with the petitioner without the parent for a period of ninety days or more immediately preceding the date the petition is filed and a parent having legal custody of the child is currently unwilling or unable to provide adequate care, maintenance and supervision for the child or there are extraordinary circumstances; and

(4) no guardian of the child is currently appointed pursuant to a provision of the Uniform Probate Code [45-1-101 NMSA 1978].

C. The burden of proof shall be by clear and convincing evidence, except that in those cases involving an Indian child as defined in the federal Indian Child Welfare Act of 1978, the burden of proof shall be proof beyond a reasonable doubt.

D. As part of a judgment entered pursuant to the Kinship Guardianship Act, the court may order a parent to pay the reasonable costs of support and maintenance of the child that the parent is financially able to pay. The court may use the child support guidelines set forth in Section 40-4-11.1 NMSA 1978 to calculate a reasonable payment.

E. The court may order visitation between a parent and child to maintain or rebuild a parent-child relationship if the visitation is in the best interests of the child.

History: Laws 2001, ch. 167, § 8.

Cross references. — For the federal Indian Child Welfare Act of 1978, see 25 U.S.C. § 1901 et seq.

#### **40-10B-9. Guardian ad litem; appointment.**

A. In a proceeding to appoint a guardian pursuant to the Kinship Guardianship Act [40-10B-1 NMSA 1978], the court may appoint a guardian ad litem for the child upon the motion of a party or solely in the court's discretion. The court shall appoint a guardian ad litem if a parent of the child is participating in the proceeding and objects to the appointment requested.

B. In a proceeding in which a parent of the child has petitioned for the revocation of a guardianship established pursuant to the Kinship Guardianship Act and the guardian objects to the revocation, the court shall appoint a guardian ad litem.

C. The court may order all or some of the parties to a proceeding to pay a reasonable fee of a guardian ad litem. If all of the parties are indigent, the court may award a reasonable fee to the guardian ad litem to be paid out of funds of the court.

History: Laws 2001, ch. 167, § 9.

#### **40-10B-10. Guardian ad litem; powers and duties.**

A guardian ad litem appointed by the court in a proceeding pursuant to the Kinship Guardianship Act [40-10B-1 NMSA 1978] shall:

A. in connection with a petition for guardianship, make a diligent investigation of the circumstances surrounding the petition, including visiting the child in the home, interviewing the person proposed as guardian and interviewing the parents of the child if available;

B. in connection with a petition or motion for revocation of a guardianship, recommend an appropriate transition plan in the event the guardianship is revoked; and

C. at a hearing held in connection with proceedings described in Subsection A or B of this section, report to the court concerning the best interests of the child and the child's position on the requested relief.

History: Laws 2001, ch. 167, § 10.

#### **40-10B-11. Nomination objection by child.**

In a proceeding for appointment of a guardian pursuant to the Kinship Guardianship Act [40-10B-1 NMSA 1978]:

A. the court shall appoint a person nominated by a child who has reached his fourteenth birthday unless the court finds the nomination contrary to the best interests of the child; and

B. the court shall not appoint a person as guardian if a child who has reached his fourteenth birthday files a written objection in the proceeding before the person accepts appointment as guardian.

History: Laws 2001, ch. 167, § 11.

#### **40-10B-12. Revocation of guardianship.**

A. Any person, including a child who has reached his fourteenth birthday, may move for revocation of a guardianship created pursuant to the Kinship Guardianship Act [40-10B-1 NMSA 1978]. The person requesting revocation shall attach to the motion a transition plan proposed to facilitate the reintegration of the child into the home of a parent or a new guardian. A transition plan shall take into consideration the child's age, development and any bond with the guardian.

B. If the court finds that a preponderance of the evidence proves a change in circumstances and the revocation is in the best interests of the child, it shall grant the motion and:

- (1) adopt a transition plan proposed by a party or the guardian ad litem;
- (2) propose and adopt its own transition plan; or
- (3) order the parties to develop a transition plan by consensus if they will agree to do so.

History: Laws 2001, ch. 167, § 12.

#### **40-10B-13. Rights and duties of guardian.**

A. A guardian appointed for a child pursuant to the Kinship Guardianship Act [40-10B-1 NMSA 1978] has the legal rights and duties of a parent except the right to consent to adoption of the child and except for parental rights and duties that the court orders retained by a parent.

B. Unless otherwise ordered by the court, a guardian appointed pursuant to the Kinship Guardianship Act has authority to make all decisions regarding visitation between a parent and the child.

C. A certified copy of the court order appointing a guardian pursuant to the Kinship Guardianship Act shall be satisfactory proof of the authority of the guardian, and letters of guardianship need not be issued.

History: Laws 2001, ch. 167, § 13.

#### **40-10B-14. Continuing jurisdiction of the court.**

The court appointing a guardian pursuant to the Kinship Guardianship Act [40-10B-1 NMSA 1978] retains continuing jurisdiction of the matter.

History: Laws 2001, ch. 167, § 14.

**40-10B-15. Caregiver's authorization affidavit.**

A. A caregiver who executes a caregiver's authorization affidavit substantially in the form contained in Subsection J of this section by completing Items 1 through 4 of the form and who subscribes and swears to it before a notary public, is authorized to enroll the named child in school and consent to school-related medical care for the child.

B. A caregiver who is a relative of the child, who executes a caregiver's authorization affidavit substantially in the form set forth in Subsection J of this section by completing Items 1 through 8 and who subscribes and swears to the affidavit before a notary public, has the same authority to authorize medical care, dental care and mental health care for the child as a guardian appointed pursuant to the Kinship Guardianship Act [40-10B-1 NMSA 1978].

C. A caregiver's authorization affidavit executed pursuant to this section is not valid for more than one year after the date of its execution.

D. The decision of a caregiver to consent to or refuse medical, dental or mental health care pursuant to a caregiver's authorization affidavit is superseded by a contravening decision of a parent or other person having legal custody of the child if the contravening decision does not jeopardize the life, health or safety of the child.

E. No person who acts in good faith reliance on a caregiver's authorization affidavit to provide medical, dental or mental health care to a child without actual knowledge of facts contrary to those stated in the affidavit is subject to criminal culpability, civil liability or professional disciplinary action if the affidavit complies with the requirements of this section. The foregoing exclusions apply even though a parent having parental rights or person having legal custody of the child has contrary wishes as long as the provider of the care has no actual knowledge of the contrary wishes.

F. A person who relies upon a caregiver's authorization affidavit is under no duty to make further inquiry or investigation.

G. If a child stops living with the caregiver, the caregiver shall give notice of that fact to a school, health care provider, mental health care provider, health insurer or other person who has been given a copy of the caregiver's authorization affidavit.

H. A caregiver's authorization affidavit is invalid unless it contains the warning statement set out in the form contained in Subsection J of this section in not less than ten-point boldface type, or a reasonable equivalent thereof, enclosed in a box with three-point rule lines.

I. As used in this section, "school-related medical care" means medical care that is required by the state or a local government authority as a condition for school enrollment.

J. The caregiver's authorization affidavit shall be in substantially the following form:

"Caregiver's Authorization Affidavit

Use of this affidavit is authorized by the Kinship Guardianship Act.

Instructions:

A. Completion of Items 1-4 and the signing of the affidavit is sufficient to authorize enrollment of a minor in school and authorize school-related medical care.

B. Completion of Items 5-8 is additionally required to authorize any other medical care.

Print clearly:

The minor named below lives in my home and I am 18 years of age or older.



- 1. Name of minor: \_\_\_\_\_
- 2. Minor's birth date: \_\_\_\_\_
- 3. My name (adult giving authorization): \_\_\_\_\_
- 4. My home address: \_\_\_\_\_
- 5.  I am a grandparent, aunt, uncle or other qualified relative of the minor (see back of this form for a definition of "qualified relative").
- 6. Check one or both (for example, if one parent was advised and the other cannot be located):
  - I have advised the parent(s) or other person(s) having legal custody of the minor of my intent to authorize medical care, and have received no objection.
  - I am unable to contact the parent(s) or other person(s) having legal custody of the minor at this time, to notify them of my intended authorization.
- 7. My date of birth: \_\_\_\_\_
- 8. My NM driver's license or other identification card number: \_\_\_\_\_

WARNING: Do not sign this form if any of the statements above are incorrect, or you will be committing a crime punishable by a fine, imprisonment or both.

I declare under penalty of perjury under the laws of the state of New Mexico that the foregoing is true and correct.

Signed: \_\_\_\_\_

The foregoing affidavit was subscribed, sworn to and acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_\_, by \_\_\_\_\_.

My commission expires: \_\_\_\_\_  
Notary Public

Notices:

- 1. This declaration does not affect the rights of the minor's parents or legal guardian regarding the care, custody and control of the minor, and does not mean that the caregiver has legal custody of the minor.
- 2. A person who relies on this affidavit has no obligation to make any further inquiry or investigation.
- 3. This affidavit is not valid for more than one year after the date on which it is executed.

## Additional Information:

## TO CAREGIVERS:

1. "Qualified relative", for purposes of Item 5, means a spouse, parent, stepparent, brother, sister, stepbrother, stepsister, half-brother, half-sister, uncle, aunt, niece, nephew, first cousin, godparent, member of the child's tribe or clan, an adult with whom the child has a significant bond or any person denoted by the prefix "grand" or "great", or the spouse or former spouse of any of the persons specified in this definition.
2. If the minor stops living with you, you are required to notify any school, health care provider, mental health care provider, health insurer or other person to whom you have given this affidavit.
3. If you do not have the information requested in Item 8, provide another form of identification such as your social security number or medicaid number.

## TO HEALTH CARE PROVIDERS AND HEALTH CARE SERVICE PLANS:

1. No person who acts in good faith reliance upon a caregiver's authorization affidavit to provide medical, dental or mental health care, without actual knowledge of facts contrary to those stated on the affidavit, is subject to criminal liability or to civil liability to any person, or is subject to professional disciplinary action, for such reliance if the applicable portions of the form are completed.
2. This affidavit does not confer dependency for health care coverage purposes."

History: Laws 2001, ch. 167, § 15.

## ARTICLE 11

### Uniform Parentage Act

<p>Sec. 40-11-1. Short title. 40-11-2. Definition. 40-11-3. Relationship not dependent on marriage. 40-11-4. How parent and child relationship established. 40-11-5. Presumption of paternity. 40-11-6. Artificial insemination. 40-11-7. Determination of father and child relationship; who may bring action; when action may be brought. 40-11-8. Jurisdiction; venue. 40-11-9. Parties. 40-11-10. Pre-trial proceedings. 40-11-11. Pre-trial recommendations.</p>	<p>Sec. 40-11-12. Blood and genetic tests. 40-11-13. Evidence relating to paternity. 40-11-14. Civil action. 40-11-15. Judgment or order. 40-11-16. Costs. 40-11-17. Enforcement of judgment or order. 40-11-18. Modification of judgment or order. 40-11-19. Right to counsel; free transcript on appeal. 40-11-20. Hearings and records; confidentiality. 40-11-21. Action to declare mother and child relationship. 40-11-22. Birth records. 40-11-23. Limitation.</p>
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#### 40-11-1. Short title.

This act [40-11-1 to 40-11-23 NMSA 1978] may be cited as the "Uniform Parentage Act".

History: Laws 1986, ch. 47, § 1.

**Cross references.** — For forms that may be used in paternity proceedings, see Domestic Relations Forms 4A-331 and 4A-332 NMRA.

**Court may grant grandparent's visitation privileges.** — Under the Grandparent's Visitation

Privileges Act (40-9-1 to 40-9-4 NMSA 1978), a court may grant visitation privileges in the rendering of a judgment as to the existence of a parent-child relationship pursuant to this article. *Lucero v. Hart*, 120 N.M. 794, 907 P.2d 198 (Ct. App. 1995).