2012 Updates to

Arizona Probate and Trust Law:

A Comprehensive Review

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Table of Contents

Part I. Controlling Unnecessary Litigation (and Fees)

A. Unreasonable or Vexatious Conduct

§ 14-1105. [New**] Remedies for unreasonable or abusive conduct; definitions**

A. If the court finds that a decedent's estate or trust has incurred professional fees or expenses as a result of unreasonable conduct, the court may order the person who engaged in the conduct or the person's attorney, or both, to pay the decedent's estate or trust for some or all of the fees and expenses as the court deems just under the circumstances.

B. In a guardianship or conservatorship case, if the court finds that a ward or protected person has incurred professional fees or expenses as a result of unreasonable conduct, the court may order the person who engaged in the conduct or the person's attorney, or both, to pay the ward or protected person for some or all of the fees and expenses as the court deems just under the circumstances.

C. The remedies permitted pursuant to this section are in addition to any other civil remedy or any other provision of law. The remedies permitted pursuant to this section may be invoked to mitigate the financial burden on a ward, protected person, decedent's estate or trust incurred as a result of unjustified court proceedings or unreasonable or excessive demands made on a fiduciary, fiduciary's attorney, court-appointed attorney or representative.

D. For the purposes of this section:

1. "Court-appointed attorney" means an attorney appointed pursuant to section 14-5303, subsection C, section 14-5310, subsection C, section 14-5401.01, subsection C or section 14-5407, subsection B.
2. "Fiduciary" means an agent under a durable power of attorney, an agent under a health care power of attorney, a guardian, a conservator, a personal representative, a trustee or a guardian ad litem.
3. "Person who engaged in the conduct" includes a fiduciary, an attorney or a guardian ad litem.
4. "Professional" means an accountant, an attorney, a fiduciary, a physician, a psychologist, a registered nurse, a guardian ad litem or an expert witness.
5. "Professional fees or expenses" includes the fiduciary's fees and expenses and the fiduciary's attorney fees and expenses, as well as the fees and expenses of any other professionals hired by the fiduciary or the fiduciary's attorney.

§ 14-1109. [New**] Repetitive filings; summary denial**

If an interested person files a motion or petition that requests the same or substantially similar relief to the relief requested in another motion or petition filed by the same interested person within the preceding twelve months and if the later filed motion or petition does not describe in detail a change in fact or circumstance that supports the requested relief, the court may summarily deny the motion or petition without a response or objection being filed and without a hearing or oral argument being set.

[SB 1499]

Rule 10. Duties Owed by Counsel, Fiduciaries, Unrepresented Parties, and Investigators

. . . .

G. [New**] Remedies for Vexatious Conduct; Definitions**

1. If the court finds that a person engaged in vexatious conduct in connection with a probate case, the court may do either or both of the following:

a. Order that the person shall obtain the court's permission to file future pleadings and other papers in the probate case or in other cases. If the court enters such an order, no party is required to respond to the person's future filings until ordered to do so by the court.

b. Order that a fiduciary, fiduciary's attorney, court-appointed attorney, guardian ad litem, trustee or personal representative shall not be required to respond to future requests for information made by the person related to the probate case unless required by subsequent court order.

2. The remedies permitted pursuant to this section are in addition to any other civil remedy or any other provision of law.

3. For the purposes of this section:

a. "Court-appointed attorney" means an attorney appointed pursuant to Section 14-5303, Subsection C, Section 14-5310, Subsection C, Section 14-5401.01, Subsection C or Section 14-5407, Subsection B.

b. "Fiduciary" means an agent under a durable power of attorney, an agent under a health care power of attorney, a guardian, a conservator, a personal representative, a trustee, a guardian ad litem, or a special conservator appointed under Section 14-5409.

c. "Vexatious conduct" means habitual, repetitive conduct undertaken solely or primarily to harass or maliciously injure another party or that party's representative, cause unreasonable delay in proceedings, cause undue harm to the ward or protected person, or cause unnecessary expense. It does not include conduct undertaken in good faith.

Rule 18. Motions [Amended]

. . . .

B. Motions for Appointment of Counsel. A party requesting the appointment of counsel shall make such request in a motion that sets forth why the appointment is necessary or advisable and what, if any, special expertise is required of counsel. [This section unchanged, except "guardian ad litem" references were struck.]

C. [New] If a party has a good faith belief that an interested person has filed a motion or petition that requests the same or substantially similar relief to the relief requested in an earlier motion or petition filed by the same interested person within the preceding twelve months, and if the later-filed motion or petition does not describe in detail a change in fact or circumstance that supports the requested relief, the party may file a notice of repetitive filing. This notice shall be filed no later than the response or objection deadline for the allegedly repetitive filing and shall include the title and date of the alleged repetitive filing, the title and date of the earlier filing, and the date of the court's ruling on the earlier filing. A notice of repetitive filing shall have the effect of staying the deadline to respond or object to the alleged repetitive filing until further order of the court. The court may summarily strike a repetitive motion, without hearing, on its own initiative or following receipt of a notice of repetitive filing.

Considering the four statutes/rules above:
A. In 14-1105, a party/their attorney, engages in "unreasonable conduct," that person OR THAT PERSON'S ATTORNEY, may be ordered to pay some or all of the fees or expenses.
B. In Rule 10(G), the Court may require a "vexatious" litigant to get permission to file documents in that, or other, cases.
C. Rule 10(G)(3)(c) defines "vexatious conduct," but 14-1105 has no definition of "unreasonable conduct."
D. The concern is that opposing parties often both believe they are completely in the right and that the other party is not only unreasonable and vexatious, but completely so. So this may lead to another layer of litigation as both sides make their cases that the other is unreasonable and should pay all the fees. That can also be seen as encouraging parties involved in the litigation to keep going "double or nothing" as their own responsibility of fees may increase. There certainly are cases where the court may find one side's position so absolutely bizarre that they will have no trouble making this distinction, but there are many others that are far less black and white.
E. 14-1109/Rule 18. Allow the court to deny a pleading without a hearing or objection if a similar pleading has been filed within 12 months, without justification for a change. The purpose is similar, but it provides a more objective standard for the court to enforce. [SB 1499]

B. Alternatives to Litigation for Dispute Resolution

§ 14-1108. [New**] Arbitration of disputes; alternative dispute resolution**

In a proceeding brought pursuant to this title, after the initial appointment of a fiduciary, the court may require arbitration of a dispute pursuant to the requirements of section 12-133, subsections B through K, or order alternative dispute resolution.

[SB 1499]

Rule 29. Alternative Dispute Resolution ['Arbitration' rule struck & replaced]

A. The parties to a contested matter shall not be subject to compulsory arbitration as set forth in Rules 72 through 77, Arizona rules of civil procedure. However, the court is authorized by Arizona revised statutes Section 14-1108, to order alternative dispute resolution, including arbitration. If the court orders arbitration, the arbitration shall be governed by Rules 73 through 77, Arizona rules of civil procedure.

B. Upon motion of any party or upon its own initiative, the court may direct the parties to participate in one or more alternative dispute resolution processes, including but not limited to arbitration, mediation, settlement conference, open negotiation, or a private dispute resolution process agreed upon by the parties.

C. No later than thirty (30) days after a probate proceeding becomes contested as defined by Rule 27, the parties shall confer, either in person or by telephone, about:

1. The possibilities for a prompt settlement or resolution of the case; and
2. Whether the parties might benefit from participation in some alternative dispute resolution process, the type of process that would be most appropriate in their case, the selection of an alternative dispute resolution service provider, and the scheduling of the proceedings.

D. The parties shall be responsible for attempting in good faith to agree on an alternative dispute resolution process and for reporting the outcome of their conference to the court. Within fifteen (15) days after their conference, the parties shall inform the court of the following:

1. If the parties have agreed to use a specific alternative dispute resolution process, the type of alternative dispute resolution process to be used, the name and address of the alternative dispute resolution service provider they will use, and the date by which the alternative dispute resolution proceedings are anticipated to be completed;
2. If the parties have not agreed to use a specific alternative dispute resolution process, the position of each party as to the type of alternative dispute resolution process appropriate for the case or, in the alternative, why alternative dispute resolution is not appropriate; and
3. If any party requests that the court conduct a conference to consider alternative dispute resolution.

E. During the alternative dispute resolution process, the parties shall have a duty to participate in good faith.

Parties to a contested matter are not subject to compulsory arbitration, but the Court, pursuant to ARS 14-1108, may order the parties to participate in alternative dispute resolution processes.

Part II. Controlling Costs (and Fees)

A. Mandatory Prudence

§ 14-1104. [New**] Prudent management of costs**

In a proceeding brought pursuant to this title:

1. The fiduciary must prudently manage costs, preserve the assets of the ward or protected person for the benefit of the ward or protected person and protect against incurring any costs that exceed probable benefits to the ward, protected person, decedent's estate or trust, except as otherwise directed by a governing instrument or court order.
2. A guardian ad litem, fiduciary, fiduciary's attorney and attorney for the ward or protected person have a duty to:
   (a) Act in the best interest of the ward or protected person.
   (b) Avoid engaging in excessive or unproductive activities.
   (c) Affirmatively assess the financial cost of pursuing any action compared to the reasonably expected benefit to the ward or protected person.
3. Market rates for goods and services are a proper, ongoing consideration for the fiduciary and the court during the initial court appointment of a fiduciary or attorney and relating to a request to substitute a court-appointed fiduciary or attorney.

A. A fiduciary must prudently manage costs and preserve assets, and protect against costs that exceed probable benefits to the ward/beneficiaries, etc.
B. Guardian ad litem, fiduciary, fiduciary's attorney, and court-appointed attorney must avoid excessive or unproductive activities, and affirmatively assess financial cost of pursuing any action and compare to the reasonably expected benefit.
C. This is in line with the case *In re Guardianship of Sleeth*, 226 Ariz. 171, 244 P.3d 1169 (Ariz. App. Div. 1, 2010), and in that case the Court of Appeals stated: "We endorse these suggestions and encourage fiduciaries and attorneys to diligently search for ways to increase efficiency and to employ cost-reducing measures that will preserve as much as possible the protected person's estate. Obviously, fiduciaries and their attorneys must avoid the pursuit of pyrrhic victories that accomplish little but to bankrupt the protected person."
D. Market rates are proper "consideration" for court and fiduciary during initial appointment. (Probably means that the court should take into account fees and costs during appointment.).
[SB 1499]

Rule 10.1. [New] **Prudent Management of Costs**

In a proceeding brought pursuant to Title 14:

A. The fiduciary shall prudently manage costs, preserve the assets of the ward or protected person for the benefit of the ward or protected person, and protect against incurring any costs that exceed probable benefits to the ward, protected person, decedent's estate or trust, except as otherwise directed by a governing instrument or court order.

B. The guardian ad litem, guardian or conservator, guardian or conservator's attorney, attorney for the ward or protected person shall timely disclose to the court and all persons entitled to notice if the person has a reasonable belief that projected costs of complying with a court order may exceed the probable benefits to the ward, protected person, decedent's estate or trust. If appropriate, consistent with due process, the court shall enter or modify the orders as may protect or further the best interest of the ward, protected person, decedent's estate or trust against projected costs that exceed probable benefits.

C. Market rates for goods and services are a proper, ongoing consideration for the fiduciary and the court during the initial court appointment of a fiduciary or attorney, a hearing on a budget objection and a request to substitute a court-appointed fiduciary or attorney. At any stage of the proceedings, the court may order that competitive bids for goods or services be obtained.

A. This rule parallels the *Sleeth* case and the new statutes.
B. Section A deals with the same cost-benefit analysis required in *Sleeth*; i.e, you don't spend $10,000 litigating to reclaim a $100 bracelet. This includes not only conservatorships, but trusts and decedent's estates as well.
C. Section B requires that you disclose to the court if complying with a court order shall exceed the benefits.
D. There's also a word as to the consideration of the general market in determining fees, and allow the court to obtain bids.

B. Other Attempts to Rein in Costs

Rule 15.1. Appointment of Guardian Ad Litem

A. A Party requesting the appointment of a guardian ad litem shall make the request in a motion that sets forth why the appointment is necessary or advisable and what, if any, special expertise is required of the guardian ad litem.

B. The order appointing a guardian ad litem pursuant to this section shall clearly set forth the scope of the appointment, including the reasons for and duration of the appointment, rights of access as authorized by this rule, and the applicable terms of compensation.

C. Upon appointing a guardian ad litem, the court may enter an order authorizing the guardian ad litem to have immediate access to the person for whom the guardian ad litem has been appointed and all medical and financial records pertaining to such person, including records and information that are otherwise privileged or confidential. Upon receipt of a certified copy of such order, the custodian of any relevant record relating to a person for whom a guardian ad litem has been appointed shall provide the guardian ad litem with access to such record as authorized by the court's order.

A. This rule asks any party asking for a Guardian ad Litem to explain why it is necessary, and for any court appointment of such GAL to set forth the scope, duration, and compensation for this appointment. B. Also: It specifically lets the court order access for the GAL to any financial or medical records of the party represented.

Rule 10. Duties Owed by Counsel, Fiduciaries, Unrepresented Parties, and Investigators

. . . .

C. Duties of Court-Appointed Fiduciaries.

. . . .

4. [New] Duties regarding minor's death, adoption, marriage or emancipation. the court-appointed guardian of a minor ward who dies, is adopted, marries or attains majority shall notify the court in writing within ten days of such event. If the minor does not have a conservator at the time the guardianship terminates, the guardian shall provide the court and former minor ward with a written list of any known assets or monies beyond personal effects believed to be owned by the former minor ward.

D. Duties Relating to Counsel for Fiduciaries

1. [New] To minimize legal expenses, a fiduciary's attorney shall encourage the fiduciary to take those actions the fiduciary is authorized to perform and can perform competently on the fiduciary's own to fulfill the fiduciary's duties rather than having the attorney take such actions on the fiduciary's behalf.

A. 10(D)(1) aims to minimize expenses. It could be seen as simply tautological, that the fiduciary shouldn't pay the attorney (more, presumably, although that may not be the case (See Fee Guidelines, Part IV, and Appendix 2) for doing what the fiduciary can do him or herself, as long as it is appropriate. B. Will each attorney feel constrained to consider every request from the fiduciary client and whether to tell them, "Well, I think you should do that yourself"?

Rule 30. Guardianships/Conservatorships-Specific Procedures [Amended]

A. Inventory.

1. Unless otherwise ordered by the court, the conservator shall file the inventory of the protected person's estate, as required by A.R.S. Section 14-5418(A), within 90 days after the conservator's letters of conservator, whether temporary or permanent, are first issued. The inventory shall list all property owned by the protected person as of the date the conservator's letters of conservator, whether temporary or permanent, were first issued, and shall provide the values of such assets as of the date of the conservator's first appointment.

2. If the conservator is unable to file the inventory within 90 days after the conservator's letters of conservator, whether temporary or permanent, are first issued, the conservator shall, before the deadline, file a motion that requests additional time to file the inventory. Such motion shall state why additional time is required and how much additional time is required to file the inventory.

3. If, after filing the inventory but before filing the conservator's first account, the conservator discovers an additional asset or discovers that the value of an asset on the inventory, whether appraised or not, is erroneous or misleading, the conservator shall file an amended inventory. If the conservator files an amended inventory because the conservator has discovered an additional asset and if the additional asset is not already subject to a court-ordered restriction, the conservator shall, with the amended inventory, file a petition requesting the court to either increase the amount of the conservator's bond or enter an order restricting the sale, conveyance, or encumbrance of the additional asset.

4. Unless permitted by the court, after a conservator has filed the conservator's first account with the court, the conservator shall not amend the inventory. If the conservator discovers any assets after the filing of the conservator's first account or if the conservator discovers that the value of an asset listed on the inventory is erroneous or misleading, the conservator shall make the appropriate adjustments on the conservator's subsequent accounts.

B. Conservator's Accounts [Effective September 1, 2012] [changes "accounting" to "account," otherwise . . .]

. . . .

3. Unless otherwise ordered by the court, the conservator's account shall be filed in the format set forth in the Arizona Code of Judicial Administration.

. . . .

Use of the provided forms is mandatory.

C. Budgeting for Sustainability

Rule 30.1. Financial Order [New, effective September 1, 2012]

A. Following the appointment of a conservator for an adult, the conservator shall institute and follow a budget, as set forth in Rule 30.3, unless otherwise ordered by the court, and the court may enter one or more of the following orders:

1. Limiting expenditures from the estate of the protected person as the court finds is in the protected person's best interest; or,

2. Requiring the conservator to proceed in any other lawful manner the court finds is in the protected person's best interest.

B. After a conservator is appointed for an adult, the court may discharge the protected person's attorney if the court finds that the cost of the continued representation exceeds the probable benefit to the protected person. Until discharged, the protected person's attorney has a continuing duty to review the conservator's inventory, budgets and accounts and to notify the court of any objections or concerns the attorney identifies with respect to the conservator's inventory, budgets and accounts.

A. A conservator for an adult will generally be required to follow the budget. B. The Court may discharge the protected person's attorney if it finds that the cost of continued representation exceeds the probable benefit to the protected person.

Rule 30.2. Sustainability of Conservatorship [New, effective September 1, 2012] [***emphasis added***]

A. The conservator shall disclose whether the annual expenses of the conservatorship exceed income and, if so, whether the assets available to the conservator less liabilities are sufficient to sustain the conservatorship ***for the duration of time the protected person needs care or fiduciary services.***

B. The estate sustainability shall be calculated as follows:

[Available assets minus liabilities of the estate] *divided by* [Annual expenditures minus annual income] *equals* estate sustainability

C. If the assets are not sufficient to sustain the estate, the conservator shall also disclose the ***management plan for the non-sustainable conservatorship***.

D. The information required by this rule shall be a ***good faith projection*** based upon the information that is reasonably available to the conservator concerning the subject person. This information may be considered by the court when entering orders.

E. ***Unless otherwise ordered by the court***, the conservator shall disclose the information required by this rule, including the conservator's assumptions and calculation, when filing an inventory, any conservator's account, and following any material change of circumstances.

F. ***Unless otherwise ordered by the court***, the sustainability disclosure shall be filed in the format set forth in the Arizona code of judicial administration.

G. The disclosure required by this rule ***is not required in the conservatorship for a minor*** unless otherwise ordered by the court.

COMMENT

The purpose of the disclosure required by this rule is to provide the court and parties with a ***general idea*** as to whether the ***assets and income*** of the conservatorship estate are ***sufficient*** to pay for the protected person's expenses for the ***duration*** of time the protected person needs care and fiduciary services. Thus, the disclosure required by this rule is intended to serve solely as a ***management tool***; The court does not

intend that a good faith projection will form the basis for a claim of liability against the conservator.

The following example describes how the required disclosure is calculated: Assume a protected person's estate consists of $20,000 in bank accounts and a residence with a fair market value of $120,000 and a $65,000 mortgage. Further, assume that same protected person has an annual income of $20,000 and annual expenses (including fiduciary and attorney fees) of $45,000. the conservatorship's sustainability is calculated as follows:

$$\frac{(\$120{,}000 + \$20{,}000 - \$65{,}000)}{(\$45{,}000 - 20{,}000)} = \text{Estate Sustainability}$$

$$\frac{\$75{,}000}{\$25{,}000} = \text{Estate Sustainability of 3 years}$$

Thus, if based on the conservator's knowledge of the protected person's ***medical condition and age***, the conservatorship is not sustainable, the conservator shall explain ***how the protected person's expenses will be managed*** after three years.

A. Schedule 3 on new accounting forms (Form 6 and Form 7)
B. How can you determine duration of conservatorship without using life expectancy? Most adult conservatorships will last a person's lifetime.
Current rules simply ask you to conclude if the years determined will last over the time the person is expected to need fiduciary services.
C. Should be able to demonstrate shorter life expectancy for many protected persons than IRS. Many protected persons are either disabled or have some sort of health issues that likely will reduce actual life expectancy. However, good care and resources frequently extend that life.
D. Longevity Curve Report (LCR) or Life Expectancy (LE) Analysis (actual life expectancy projection for an individual) based on individual's health, lifestyle, etc.
E. LCR or LE has been used in financial/life insurance planning.
F. Sustainability formula does not account for capital appreciation.
G. Formula does not account for variability in returns (volatility).
H. Does not account for change in circumstances at different ages.
I. Takes current year and projects in a linear manner to future years.
J. What sort of "management plan" is accepted for remaining life expectancy after funds are projected to run out?
    1. Change in lifestyle (reduced).
    2. Medicaid (ALTCS/AHCCCS).
    3. Long term care insurance.
    4. Consider explaining why sustainability may not be accurate.

Rule 30.3. Conservatorship Estate Budget [New, effective September 1, 2012] [***emphasis added***]

A. ***Unless otherwise ordered by the court,*** the conservator shall file a budget not later than the date the inventory is due and thereafter with each conservator's account, following consultation with any attorney or guardian ad litem for the protected person. The first budget shall cover the date of the conservator's initial appointment through and including the end date of the conservator's first account.

B. ***Unless otherwise ordered by the court***, the budget shall be filed in the format set forth in the appropriate form prescribed in the Arizona Code of Judicial Administration.

C. The conservator must provide a copy of the budget to all persons entitled to notice of the conservator's accounts pursuant to Arizona Revised Statutes Section 14-5419(C).

D. The conservator shall file an amendment to the budget and provide notice in the same manner as the initial budget within thirty days after ***reasonably projecting*** that the expenditures for ***any specific category*** will exceed the approved budget by a ***threshold prescribed by the Arizona judicial council and as set forth in the instructions for the conservator's budget as adopted in the Arizona Code of Judicial Administration***.

E. An interested person may file a written objection to the budget or amendment within fourteen days after the filing date of the budget or amendment. On the filing of a written objection, the court may overrule all or part of the objection, order a reply by the conservator or set a hearing on the objection. ***The court may also set a hearing in the absence of an objection.*** At a hearing, the ***conservator has the burden to prove that a contested budget item is reasonable***, necessary and in the best interest of the protected person. If an interested person fails to object to a budget item within fourteen days after the filing date of the budget or amendment, the budget item shall be deemed presumptively reasonable at the time of the conservator's account.

F. The court may order that a budget is accepted in the absence of an objection. On the court's own motion or upon the filing of a written objection, the court shall ***approve, disapprove or modify*** the budget to further the protected person's best interest.

Note: Section 14-5419(C) notices 1) The protected person, 2) A guardian, 3) If no guardian has been appointed, a spouse or, if the spouse is the conservator, there is no spouse, or the spouse is incapacitated, a parent or an adult child who is not serving as a conservator, and 4) A representative appointed for the protected person, if the court determines in accordance with section 14-1408 that representation of the interest of the protected person would otherwise be inadequate.

A How does the fiduciary approach this? Is the best result for the protected party to estimate high on all expenditures?
B. No real guidance on method of "estimates," but in any years after an accounting has been filed, estimates will be compared with prior expenditures.
C. Easier cases are those with assisted living or homebound protected party with very stable expenses.
D. Difficult cases with volatility in need, spending, medical care, etc.

D. Forms (Appendix 1; available at http://www.azcourts.gov/probate/Probate.aspx)

Rule 38. Forms [Amended, effective September 1, 2012]

A. Forms 1 through 4 included in the Arizona Code of Judicial Administration are the preferred forms and meet the requirements of these rules. Whenever these rules require the use of a form that is "substantially similar" to a form contained in this rule, such language means that the content of these forms may be adapted to delete information that does not apply to a particular case or add other relevant information, provided that all information contained in the preferred form and applicable to the case is included. The deletion of information contained in the preferred form or the failure to complete a portion of the preferred form constitutes a representation to the court and adverse parties that the omitted or unanswered questions or items are not applicable. Any form may be modified for submission at times and under circumstances provided for by an Administrative Order of the Supreme Court of Arizona.

Forms 1 through 4 in the Arizona Code of Judicial Administration shall not be the exclusive method for presenting such matters in the superior court.

B. Forms 5 through 9 prescribed in the Arizona code of judicial administration meet the requirements of these rules. Unless otherwise ordered by the court, forms 5 through 8 shall be the exclusive method for presenting such matters in the superior court. Form 9 may be used by a conservator only if authorized by the court to do so. The instructions included with forms 5 through 9 supplement the rules and have the same force and effect as the rules.

COMMENT

Forms 1 through 4 contained in the Arizona Code of Judicial Administration are sufficient under the rules and are intended to indicate the simplicity and brevity of statement that these rules contemplate. Although use of these forms is encouraged, the forms are not the exclusive means for addressing the court in writing.

Forms 5 through 8, however, must be used in their exact form as they are the exclusive means for addressing the court in writing. Form 9 is a simplified form that may only be used by the conservator if the court so authorizes. The requirement of using these forms is imposed in an effort to increase judicial oversight of conservatorships. These forms will bring uniformity and comparability to judicial oversight of conservatorships.

Notable Forms Items

- First budget due in 90 days is stand-alone form (Form 5).
- At first accounting, next budget due (Form 6), incorporated into accounting.
- Each subsequent accounting (Form 7) has budget incorporated into form.

Income Categories on Budget

- Retirement and disability income (pension, not IRA or 401(k), misc.)

- Annuities
- Wages/earned income
- Investment and business income (interest, dividends, rent)
- OTHER-401(k) or IRA distributions, sales proceeds
- Income as liability (Line 9) reduces income by amount included above that is proceeds from sale or result of a loan

Expenditure Categories (Non-Administrative)
- Food, clothing, shelter
- Medical costs
- Personal allowance
- Debt
- Discretionary expenses ("not essential for survival but are meant to improve or prolong the quality and enjoyment of life.")
- Other expenses, including purchases (legal expenses not related to administration, like DUI or divorce attorney?)

Administrative
- Fiduciary fees and costs
- Fiduciary's attorney's fees and costs
- Protected person's attorney's fees and costs
- Other administrative fees and costs (appraiser, financial adviser, accountant, etc.)

Considering the requirement of A.R.S. 14-1104 to "protect against incurring any costs that exceed probable benefits," are there times when it would be appropriate to ask the court to waive the requirement of the budget and/or sustainability report?
Or simply the form or method of reporting?

Part III: Attempting to Control Fees Directly

A. How Much Compensation is Too Much?

§ 14-1201. Definitions

In this title, unless the context otherwise requires:
. . . .
3. "Basis for compensation" means hourly rate, a fixed fee or a contingency fee agreement and reimbursable costs.
. . . .
24. "Guardian ad litem" includes a person who is appointed pursuant to section 14–1408.
. . . .

For fiduciaries who charge a percentage fee for their services, this change is a helpful if slim recognition of that method. *See* Fee Guidelines, Part IV. [SB 1499]

§ 14-5109. [New**] Disclosure of compensation; determining reasonableness and necessity**

A. When a guardian, a conservator, an attorney or a guardian ad litem who intends to seek compensation from the estate of a ward or protected person first appears in the proceeding, that person must give written notice of the basis of the compensation by filing a statement with the court and providing a copy of the statement to all persons entitled to notice pursuant to sections 14-5309 and 14-5405. The statement must provide a general explanation of the compensation arrangement and how the compensation will be computed.

B. If during the pendency of the action the basis for compensation changes, the guardian, conservator, attorney or guardian ad litem must provide notice of the change to all persons entitled to notice pursuant to this subsection not less than thirty days before the change becomes effective.

C. Compensation paid from an estate to a guardian, conservator, attorney or guardian ad litem must be reasonable and necessary. To determine the reasonableness and necessity of compensation, the court must consider the best interest of the ward or protected person. The following factors may be considered to the extent applicable:

1. Whether the services provided any benefit or attempted to advance the best interest of the ward or protected person.
2. The usual and customary fees charged in the relevant professional community for the services.
3. The size and composition of the estate.
4. The extent that the services were provided in a reasonable, efficient and cost-effective manner.
5. Whether there was appropriate and prudent delegation to others.
6. Any other factors bearing on the reasonableness of fees.

D. The person seeking compensation has the burden of proving the reasonableness and necessity of compensation and expenses sought.

A. When any fiduciary, GAL, or attorney appears in a proceeding and expects to get paid from estate in a G or C, that person must give written notice of the basis of compensation and give notice to all interested parties. B. If the basis of compensation changes, notice must be given at least 30 days before the change begins. All compensation must be reasonable and necessary. C. Factors include whether services provide any benefit or attempt to advance the best interests of the ward. D. The party charging has the BURDEN of providing reasonableness. Consider in light of Rule 33 and its appendix. [SB 1499]

§ 14-5110. [New**] Claim deadline for compensation; definitions**

A. In a guardianship, conservatorship or protective proceeding, unless a later claim deadline is established in advance by the court, a claim for compensation by attorneys or guardians ad litem who intend to be paid by the ward or protected person's estate is waived if not submitted to the fiduciary in writing within four months after either rendering the service, incurring the cost, initial appointment of the fiduciary or the effective date of this section, whichever is later. A claim is deemed submitted on delivery, mailing or electronic transmission to the fiduciary. A subsequent appointment of a substitute fiduciary does not renew the claim period.

B. This section does not apply to an attorney seeking compensation based on a contingency fee agreement.

C. For the purposes of this section:

1. "Compensation" includes fees, costs and reimbursable expenses.
2. "Estate" includes any estate established pursuant to this title except a trust unless the trust is supervised by the court and the ward or protected person is a beneficiary.

A. This statute makes timely billing critical. A fee is WAIVED unless a claim is submitted to the fiduciary in writing within four months of the date the services were provided or your appointment, WHICHEVER IS LATER. B. This creates a question for the fiduciary as to whether he/she has any discretion to pay a late filed claim. Would they be violating their duty to do so? [SB 1499]

Rule 33. <u>Compensation for Fiduciaries and Attorneys;</u> Statewide Fee Guidelines [Fee guidelines new, effective September 1, 2012]

A. A guardian, conservator, attorney or guardian ad litem who intends to be compensated by the estate of a ward or protected person shall give written notice of the basis of any compensation as required by Arizona Revised Statutes Section 14-5109.

. . . .

F. When determining reasonable compensation, the superior court shall follow the statewide fee guidelines set forth in the Arizona Code of Judicial Administration.

. . . .

H. Compensation payable to attorneys or guardians ad litem from the estate of a ward or protected person is waived if not submitted in compliance with Arizona Revised Statutes, Section 14-5110.

The size of the changes to Rule 33 itself appear slight. However, the ACJA guidelines offer a great deal of discussion. Some of the guidelines seem either straight forward or common sense, such as the appropriate apportionment of travel time between multiple clients, etc. If the court always looks at the beginning of this rule as the guiding principle, it will be in the best interest of the professionals, clients, and protected persons. Yet there are certainly a number of concerns and questions that can arise. See Part IV for a discussion of the major issues.

<u>Part IV. Fee Guidelines – Issues that May Arise, According to Craig Wisnom</u>

<u>A. "Block billing is not permitted"</u>

(*See* ACJA 3-303(D)(2)(c); full text of regulations Appendix 2).

Sleeth clearly deals with this issue, but it seems to focus on the most appropriate element: whether billable time is reported in a way in which it can be determined whether the time is reasonable. Hopefully, the courts will not look overly minutely at what constitutes a "task." For instance, for a related set of pleadings, must every separate document have a separate billing entry? In simple situations, it is easy to imagine that the "block time" to prepare 4 or 5 related and simple documents takes .3 of an hour, and yet,

if "lumping" them into "block billing" is completely prohibited, segregating them into separate tasks, even at a .1 minimum, will increase the billable time charged over what was actually spent and also add a great deal of length to the already detailed accountings and fee affidavits.

It would be helpful if there were a filter to this that tasks that prohibited unreasonable block billing, but focused on "whether each entry of block-billing provides sufficient detail to support an award for that entry," as the court indicated in *Sleeth*. So long as that requirement is met, it seems unnecessary to insist that a .3 or .4 block of time, reasonable in itself, for a group of documents, be split down into subcomponents.

B. "The hourly rate charged for any given task shall be at the authorized rate, commensurate with the task performed . . . ." (ACJA 3-303(D)(2)(g)).

This makes sense, although "authorized rate" seems like a defined term not specified elsewhere. As that section expands, it explains that an attorney may not charge for fiduciary work at attorney's rates, and certainly one can imagine where this will raise issues.

First, of course, is practicality; if an attorney is serving appropriately as a fiduciary, much of his or her work may be attorney work, based on legal requirements. Beyond that, it seems that the scope of a fiduciary or attorney can vary wildly. Common sense, existing law, *Sleeth*, and the beginning of this paragraph indicate that a partner in a major law firm should not be charging $500 per hour to clean out a garage. However, if an attorney or CPA is supervising the management and administration of a complex multi-million dollar estate, similar rates for the supervisory services may be absolutely appropriate. Those responsibilities may certainly be greater, based on all the factors enumerated in this very rule than an attorney handling a very simple guardianship proceeding.

C. "The judicial officer shall consider the following general compensation factors . . ." (ACJA 3-303(D)(3)).

While there is a great deal of disclaimers that the estimated time expenditures for various tasks is only an estimate, each case is so individual that these things will vary wildly, and wonder what goal the "default" times will serve.

The "non-traditional" fee arrangements offers an opportunity for fiduciaries and attorneys to step outside the typical hourly fee method for charging for cases, and consider alternatives, such as a percentage fee for a variety of bundled services, which offers the sustainability, transparency, and consistency that are one of the goals of this situation.

"Non-traditional Compensation Arrangements" **(ACJA 3-303(D)(4)).** "Non-traditional" may apply only to particular probate courts. Corporate Trustees have long "traditionally" billed for their trust services by charging a percentage of the assets under management, usually starting at about 1.25% of an annual fee. A Conservator's duties include by law all of those that are required of a Trustee, with the additional requirements and complexities of court oversight. (Perhaps because of this, generally many of the major corporate Trustees will no longer serve as a Conservator, or, if they do, under very limited circumstances.) One Corporate Trustee has an expanded Elder Services arrangement where they charge a slightly higher percentage, starting at 2% of the trust assets, to provide additional care management and similar services more inclusive of what a guardian and even conservator may be tasked with.

Because of the similarity in duties, courts, attorneys, and fiduciaries may look toward getting approval to

serve in cases with similar models, if it can be shown that the compensation for the services is still reasonable and the benefits of sustainability, predictability, and transparency will address some of the greatest concerns of the public and the courts. It offers a chance for positive solutions in the midst of much controversy.

Part V: Guardianships/Conservatorships

A. Easier to Appoint and Extend

§ 14-5301. [New] **Appointment of guardian by will or other writing; objections; notice**

A. A parent, by will or other signed writing, may appoint a guardian for an unmarried child who the parent believes is an incapacitated person, specify desired limitations on the powers to be given to the guardian and revoke or amend the appointment before confirmation by the court. Appointments become effective only as prescribed pursuant to section 14-5301.01, subsection A.

B. An individual, by will or other signed writing, may appoint a guardian for the individual's spouse who the appointing spouse believes is an incapacitated person, specify desired limitations on the powers to be given to the guardian and revoke or amend the appointment before confirmation by the court. An appointment pursuant to this subsection becomes effective only as prescribed pursuant to section 14-5301.01, subsection A.

C. Unless the court has confirmed the appointment pursuant to subsection D of this section, the incapacitated person, the person having care or custody of the incapacitated person if other than the appointing parent or spouse or the adult nearest in kinship to the incapacitated person may file a written objection to an appointment. The filing of the written objection terminates the appointment. An objection may be withdrawn and, if withdrawn, has no effect. The objection does not preclude judicial appointment of the person selected by the appointing parent or spouse. Notice of the objection must be given to the guardian and any other person entitled to notice of the acceptance of the appointment. The court may treat the filing of an objection as a petition for the appointment of a temporary guardian pursuant to section 14-5310 or for the appointment of a limited or general guardian pursuant to section 14-5303 and proceed accordingly.

D. On petition of the appointing parent or spouse and a finding that the appointing parent or spouse will likely become unable to care for the incapacitated person within two years, before the appointment becomes effective, the court may confirm the appointing parent's or spouse's selection of a guardian and terminate the rights of others to object. Notice must be given to the guardian and any other person entitled to notice of the acceptance of the appointment.

Provides for testamentary appointment for an incapacitated adult child or spouse, as in prior version, but adds ability to designate limitations, pre-emptive appointment if expected to be necessary within two years, and the ability to do so by non-testamentary instrument. [SB 1081]

§ 14-5301.01. [New] **Appointment of guardian by will or other writing; effectiveness; acceptance; confirmation**

A. The appointment of a guardian pursuant to section 14-5301 is effective on the death of the appointing parent or spouse, the adjudication of incapacity of the appointing parent or spouse or a written determination by a physician who has examined the appointing parent or spouse that the appointing parent or spouse is no longer able to care for the incapacitated person, whichever first occurs.

B. A guardian appointed pursuant to section 14-5301 is eligible to act on the filing of an acceptance of appointment, which must be filed within thirty days after the guardian's appointment becomes effective. The guardian must:

1. File the notice of acceptance of appointment and a copy of the will with the court in the county in which the will was or could be probated or, in the case of a signed writing created pursuant to section 14-5301, file the acceptance of appointment and the signed writing with the court in the county in which the incapacitated person resides or is present.
2. Give written notice of the acceptance of appointment to the appointing parent or spouse, if living, the incapacitated person, a person having care or custody of the incapacitated person other than the appointing parent or spouse, and the adult nearest in kinship. Unless the appointment was previously confirmed by the court, the notice given pursuant to this paragraph must include a statement of the right of those notified to terminate the appointment by filing a written objection as provided in section 14-5301.

C. An appointment effected by filing the guardian's acceptance under a will probated in the state of the testator's domicile is effective in this state.

D. Unless the appointment was previously confirmed by the court, within thirty days after filing the notice and the will or signed writing, a guardian appointed pursuant to section 14-5301 must file a petition in the court for confirmation of the appointment. Notice of the filing must be given in the manner as prescribed in section 14-5309.

E. The authority of a guardian appointed under section 14-5301 terminates on the appointment of a guardian by the court or the giving of written notice to the guardian of the filing of an objection pursuant to section 14-5301, whichever first occurs.

F. The appointment of a guardian under this section is not a determination of incapacity.

G. The powers of a guardian who timely complies with the requirements of subsections B and D of this section give acts by the guardian that are of benefit to the incapacitated person and that occurred on or after the date the appointment became effective the same effect as those that occurred after the filing of the acceptance of appointment.

Provides that a parent/spouse's appointment is effective at appointing-spouse/parent's death OR incapacity, but that appointee must seek "confirmation" of appointment within 30 days. [SB 1081]

§ 14-5301.02. [New] **Appointment and status of guardian**

A person becomes a guardian of an incapacitated person by a parental or spousal appointment or on appointment by the court. The guardianship continues until it is terminated, without regard to the location of the guardian or the ward.

[SB 1081]

§ 14-5301.03. [New**] Judicial appointment of guardian; special provision for incapacitated minors approaching adulthood**

A. A party that is interested in the welfare of a minor who is at least seventeen years six months of age and who is alleged to be incapacitated may initiate guardianship proceedings pursuant to this article and request that any guardianship order take effect immediately on the minor's eighteenth birthday.

B. The petitioner may provide with the petition a report of an evaluation of the minor by a physician, psychologist or registered nurse that meets the requirements of section 14-5303, subsection D. If the evaluation was conducted within six months after the date the petition is filed with the court, the petitioner may ask in the petition that the court accept this report in lieu of ordering any additional evaluation pursuant to section 14-5303, subsection C, and the court may grant the request.

This provision allows guardianship proceedings for anyone over 17½ to be initiated, and effective upon turning age 18. [SB 1081]

§ 14-5301.04. [New**] Judicial appointment of conservator or protective order; special provision for incapacitated minors approaching adulthood**

A party that is interested in the welfare of a minor who is at least seventeen years six months of age and who is alleged to be in need of protection may petition the court for appointment of a conservator or request an appropriate protective order pursuant to section 14-5404 and request that any conservatorship order or protective order take effect immediately on the minor's eighteenth birthday.

Same as 5301.03, as to a conservatorship for the minor-about-to-be-adult. [SB 1081]

§ 14-5303. Procedure for court appointment of a guardian of an alleged incapacitated person [Amended**]**

. . . .

B. The petition shall contain a statement that the authority granted to the guardian may include the authority to withhold or withdraw life sustaining treatment, including artificial food and fluid, and shall state, at a minimum, to the extent known, all of the following:

. . . .

9. If a custodial order was previously entered regarding an alleged incapacitated person in a child custody action or similar proceeding in this state or another jurisdiction and the petitioner or proposed guardian is a parent or nonparent custodian of the alleged incapacitated person, the court and case number for that action or proceeding.

. . . .
C. On the filing of a petition, the court shall set a hearing date on the issues of incapacity. Unless the alleged incapacitated person is represented by independent counsel, the court shall appoint an attorney to represent that person in the proceeding. The alleged incapacitated person shall be interviewed by an investigator appointed by the court and shall be examined by a physician, psychologist or registered nurse appointed by the court. If the alleged incapacitated person has an established relationship with a physician, psychologist or registered nurse who is determined by the court to be qualified to evaluate the capacity of the alleged incapacitated person, the court may appoint the alleged incapacitated person's physician, psychologist or registered nurse pursuant to this subsection. The investigator and the person conducting the examination shall submit their reports in writing to the court. In addition to information required under subsection D, the court may direct that either report include other information the court deems appropriate. . . .

Codifies that the court may appoint the existing physician, RN or psychologist of the alleged incapacitated person, which is already the practice. [SB 1081, SB 1499]

§ 14-5304. Findings; order of appointment; limitations; filing [Amended**]**

A. In exercising its appointment authority pursuant to this chapter, the court shall encourage the development of maximum self-reliance and independence of the incapacitated person.

B. The court may appoint a general or limited guardian as requested if the court finds by clear and convincing evidence that:

1. The person for whom a guardian is sought is incapacitated.
2. The appointment is necessary to provide for the demonstrated needs of the incapacitated person.
3. The person's needs cannot be met by less restrictive means, including the use of appropriate technological assistance.

C. In conformity with the evidence regarding the extent of the ward's incapacity, the court may appoint a limited guardian and specify time limits on the guardianship and limitations on the guardian's powers.

D. The guardian shall file an acceptance of appointment with the appointing court.

[SB 1499]

B. Allowed to Take the Wheel?

§ 14-5304.01. Effect of appointment of guardian on privilege to operate a motor vehicle [New]

A. On the appointment of a guardian, the court may determine that the ward's privilege to obtain or retain a driver license should be suspended and issue an order suspending the privilege.

B. If the court is presented with sufficient medical or other evidence to establish that the ward's incapacity does not prevent the ward from safely operating a motor vehicle, it may decline to suspend the ward's privilege to obtain or retain a driver license and issue an order allowing the ward to obtain or retain a

driver license.

C. The finding of interim incapacity pursuant to section 14-5310 does not cause the suspension of the ward's privilege to obtain or retain a driver license or to operate a motor vehicle pursuant to section 28-3153 unless the court also finds that the interim incapacity affects the ward's ability to safely operate a motor vehicle and that the privilege should be immediately suspended. In lieu of ordering the ward's driver license suspended, the court may order the ward not to drive a motor vehicle until the ward presents sufficient medical or other evidence to establish that the ward's interim incapacity does not affect the ward's ability to safely operate a motor vehicle. The ward may present the medical or other evidence by motion to the court. The court may rule on the motion without hearing if there are no objections to the motion.

D. A ward whose privilege to obtain or retain a driver license has been suspended or revoked by court order may file a request to terminate the suspension or revocation and reinstate the privilege. In reaching its decision the court shall consider medical evidence that the ward's incapacity does not prevent the ward from safely operating a motor vehicle and may consider other evidence, including a certificate of graduation from an accredited driving school with a recommendation that the ward should be extended driving privileges. If the court grants the order terminating the suspension or revocation and reinstating the privilege, the ward may apply to the department of transportation for the issuance or reinstatement of a driver license and must comply with all applicable department rules.

E. An order terminating a temporary or permanent guardianship is an order terminating any incapacity previously adjudicated and vacates any previous orders suspending or revoking the person's privilege to obtain or retain a driver license. The person may apply to the department of transportation for the issuance or reinstatement of a driver license and must comply with all applicable department rules.

A. This statute clarifies the right of a ward to drive when there is a guardian. The court may suspend the right to drive, but it can also decide it is not necessary upon medical evidence that the basis of the guardianship doesn't impact the ability to safely drive. If there is a temporary guardian, the court has to specifically determine that it is unsafe to drive to suspend driving, but the court can order the ward not to drive as an alternative.
B. It appears that every guardianship order should specifically state whether the right to drive is suspended.
[Added by HB 2402]

C. Who May Serve and for How Long

§ 14-5306. Termination of guardianship for incapacitated person [Amended]

The authority and responsibility of a guardian for an incapacitated person terminates on the death of the guardian or ward, a determination of incapacity of the guardian, or substitution or resignation as provided in section 14-5307. Testamentary appointment under an informally probated will terminates if the will is later denied probate in a formal proceeding. Termination does not affect the guardian's liability for prior acts or the guardian's obligation to account for funds and assets of the guardian's ward.

[SB 1499]

§ 14-5307. Substitution or resignation of guardian; termination of incapacity [Amended; most of A, B, C & D are new**]**

A. On petition of the ward or any person interested in the ward's welfare, or on the court's own initiative, the court shall substitute a guardian and appoint a successor if it is in the best interest of the ward. The court does not need to find that the guardian acted inappropriately to find that the substitution is in the ward's best interest. The guardian and the guardian's attorney may be compensated from the ward's estate for defending against a petition for substitution only for the amount ordered by the court and on petition by the guardian or the guardian's attorney. When substituting a guardian and appointing a successor, the court may appoint an individual nominated by the ward if the ward is at least fourteen years of age and has, in the opinion of the court, sufficient mental capacity to make an intelligent choice. On petition of the guardian, the court may accept a resignation and make any other order that may be appropriate.

B. [New**]** The ward may petition the court for an order that the ward is no longer incapacitated or petition for substitution of the guardian at any time. A request for this order may be made by informal letter to the court or judge. A person who knowingly interferes with the transmission of this request may be found in contempt of court.

C. [New] An interested person, other than the guardian or ward, shall not file a petition for adjudication that the ward is no longer incapacitated earlier than one year after the order adjudicating incapacity was entered unless the court permits it to be made on the basis of affidavits that there is reason to believe that the ward is no longer incapacitated.

D. [New] An interested person, other than the guardian or ward, shall not file a petition to substitute a guardian earlier than one year after the order adjudicating incapacity was entered unless the court permits it to be made on the basis of affidavits that there is reason to believe that the current guardian will endanger the ward's physical, mental or emotional health if not substituted.

E. Before substituting a guardian, accepting the resignation of a guardian or ordering that a ward's incapacity has terminated, the court, following the same procedures to safeguard the rights of the ward as apply to a petition for appointment of a guardian, may send an investigator to the residence of the present guardian and to the place where the ward resides or is detained to observe conditions and report in writing to the court.

A. Begins introducing the concept of "substitution" of a guardian, and clarifies that a guardian can be substituted without showing he or she did anything wrong, if it is in the best interest of the ward. (Section 14-5515 does the same for conservators.)
B. Limits the ability to be compensated for defending against such a substitution.
C. Prohibits any third party from filing that the ward is no longer incapacitated or substituting guardian within one year without affidavits.
[SB 1499]

§ 14-5308. Court appointed investigators; qualifications; duties [Amended**;** F added**]**

. . . .

F. An investigator appointed by the court pursuant to sections 14-5303 and 14-5407, and any person or entity closely related to the investigator, shall not be appointed as a fiduciary, attorney or professional in the same case or for the same person who was the subject of the prior investigation unless otherwise ordered by the court for good cause. For the purposes of this subsection, "closely related" includes a spouse, child, parent, sibling, grandparent, aunt, uncle or cousin of the investigator and any business, partnership, corporation, limited liability company, trust or other entity that the investigator or a closely related person has a financial interest in, is employed by or receives compensation or financial benefit from.

The court appointed investigator or related party cannot be appointed as attorney, fiduciary, or other professional. [SB 1499]

§ 14-5309. Notices in guardianship proceedings [Amended**]**

A. In a proceeding for the appointment or substitution of a guardian of a ward or an alleged incapacitated person other than the appointment of a temporary guardian or temporary suspension of a guardian, notice of a hearing shall be given to each of the following: . . .

[SB 1499]

§ 14-5310. Temporary guardians; appointment; notice; court appointed attorney hearings; duties [Amended; G added**]**

. . . .

G. If the ward objects to the person who is temporarily appointed, the court may appoint an individual nominated by the proposed ward if the ward is at least fourteen years of age and has, in the opinion of the court, sufficient mental capacity to make an intelligent choice. The court shall appoint an alternative guardian if available and after finding that the appointment is in the best interest of the ward.

. . . .

[SB 1499]

§ 14-5311. Who may be guardian; priorities [Amended**]**

. . . .

B. The court may consider the following persons for appointment as guardian in the following order:

. . . .

3. The person nominated to serve as guardian in the incapacitated person's most recent durable power of attorney or health care power of attorney.

. . . .

10. A fiduciary~~,~~ who is licensed pursuant to section 14-5651, other than a public fiduciary.

11. A public fiduciary who is licensed pursuant to section 14-5651.

C. A person listed in subsection B, paragraph 4, 5, 6, 7 or 8 of this section may nominate in writing a

person to serve in that person's place. With respect to persons who have equal priority, the court shall select the one the court determines is best qualified to serve.

D. For good cause the court may pass over a person who has priority and appoint a person who has a lower priority or no priority. For the purposes of this subsection, "good cause" includes a determination that:

1. The incapacitated person's durable power of attorney or health care power of attorney is invalid.
2. Honoring the incapacitated person's durable power of attorney or health care power of attorney would not be in the physical, emotional or financial best interest of the incapacitated person.
3. The estimated cost of the fiduciary and associated professional fees would adversely affect the ability of the incapacitated person's estate to provide for the incapacitated person's reasonable and necessary living expenses.

E. On a request by a person who was passed over by the court pursuant to subsection D of this section, the court shall make a specific finding regarding the court's determination of good cause and why the person was not appointed. The request must be made within ten days after the entry of the order.

A. Puts qualification on priority for guardian of person nominated under POA (must be nominated "to serve as guardian" and may be in either durable power of attorney or health care power of attorney).
B. Puts in cost of a professional fiduciary as reason to pass them over.
C. Requires court to make a finding concerning why someone with higher priority was passed over.
14-5410 makes this same change for a conservator (nominated "to serve as conservator" but limits nomination to durable power of attorney).
D. This clears up the prior language, which gave priority to the person "nominated in a Power of Attorney"; it now clearly cannot be whoever is named in the document as the agent, but must be specifically nominated to act as guardian/conservator.
[SB 1499]

D. Help for Those with Mental Health Powers

§ 14-5312.01. Inpatient treatment; rights and duties of ward and guardian [Amended]

A. Except as provided in subsection B of this section, a guardian of an incapacitated person may consent to psychiatric and psychological care and treatment, including the administration of psychotropic medications, if the care and treatment take place outside a level one behavioral health facility licensed by the department of health services.

B. On clear and convincing evidence that the ward is incapacitated as a result of a mental disorder as defined in section 36-501, and is likely to be in need of inpatient mental health care and treatment within the period of the authority granted pursuant to this section, the court may authorize a guardian appointed pursuant to this title to give consent for the ward to receive inpatient mental health care and treatment, including placement in a level one behavioral health facility licensed by the department of health services and medical, psychiatric and psychological treatment associated with that placement. The evidence shall be supported by the opinion of a mental health expert who is either a physician licensed pursuant to title 32, chapter 13 or 17 and who is a specialist in psychiatry or a psychologist who is licensed pursuant to

title 32, chapter 19.1.

. . . .

I. The ward's guardian shall place the ward in a least restrictive treatment alternative within five days after the guardian is notified by the medical director of the inpatient facility that the ward no longer needs inpatient care. The ward, a representative of the inpatient treatment facility, the ward's attorney, the ward's physician or any other interested person may petition the court to order the facility to discharge the ward to a least restrictive treatment alternative if the guardian does not act promptly to do so.

. . . .

P. A guardian who is authorized by the court to consent to inpatient mental health care and treatment pursuant to this section shall file with the annual report of the guardian required pursuant to section 14-5315 an evaluation report by a physician or a psychologist who meets the requirements of subsection B of this section. The evaluation report shall indicate if the ward will likely need inpatient mental health care and treatment within the period of the authority granted pursuant to this section. If the guardian does not file the evaluation report or if the report indicates that the ward will not likely need inpatient mental health care and treatment, the guardian's authority to consent to this treatment ceases on the expiration of the period specified in the prior court order. If the report supports the continuation of the guardian's authority to consent to inpatient treatment, the court may order that the guardian's authority to consent to this treatment continues. If the report supports the continuation of the guardian's authority to consent to this treatment, the ward's attorney shall review the report with the ward. The ward may contest the continuation of the guardian's authority by filing a request for a court hearing within ten business days after the report is filed. The court shall hold this hearing within thirty calendar days after it receives the request. The guardian's authority continues pending the court's ruling on the issue. At the hearing the guardian has the burden of proving by clear and convincing evidence that the ward is likely to be in need of inpatient mental health care and treatment within the period of the authority granted pursuant to this section.

. . . .

This statute requires that inpatient mental health treatment be ***likely to be*** necessary during the following year. The previous statute required that such treatment be "currently" necessary, which didn't really make sense because the person would be inpatient at this time.
[HB 2211 and HB 2402]

§ 14-5312.02. [New**] Admission for evaluation or treatment by guardian; duties of physician or mental health care provider**

A. Notwithstanding the procedures and requirements prescribed in title 36, chapter 5, articles 4 and 5 relating to involuntary court-ordered evaluation or treatment, if the guardian who is granted the authority to consent to inpatient mental health care or treatment pursuant to section 14-5312.01 has reasonable cause to believe that the ward is in need of evaluation or treatment, the guardian may apply for admission of the ward for evaluation or treatment at any level one behavioral health facility. The guardian must present the facility with a certified copy, or a photocopy of the certified copy, of the guardian's letters of guardianship and with a sworn statement under penalty of perjury that the guardian has presented to the facility a certified copy, or a true and correct copy of a certified copy, of letters of guardianship with mental health authority that authorize the guardian to admit the ward to a level one behavioral health facility issued pursuant to 14-5312.01, subsection B and that the letters of guardianship are currently effective and have not been revoked, terminated or rescinded.

B. If the guardian requests admission, the facility to which the guardian applies may admit the person if prior to admission a physician who is licensed pursuant to title 32, chapter 13 or 17 does all of the following:

1. Conducts an investigation that carefully probes the ward's psychiatric and psychological history, diagnosis and treatment needs.
2. Conducts a thorough interview with the ward and the guardian.
3. Obtains the guardian's informed consent. For the purposes of this paragraph, "informed consent" has the same meaning prescribed in section 36-501.
4. Makes a written determination that the ward needs an evaluation or will benefit from inpatient care and treatment of a mental disorder or other personality disorder or emotional condition and that the evaluation or treatment cannot be accomplished in a less restrictive setting.
5. Documents in the ward's medical chart a summary of the doctor's findings and recommendations for treatment.

C. After admission, if the ward refuses treatment or requests discharge and the treating physician believes that further inpatient treatment is necessary or advisable, the facility may rely on the consent of the guardian for treatment, release and discharge decisions pursuant to the guardian's authority under the guardianship.

This statute provides some guidance and assistance for a guardian who has specifically received the "extra" powers to consent to the ward's mental health-care treatment in a level-one facility, as well as for an agent under a mental health care power of attorney authorizing similar treatment. [HB 2211]

E. Related Provisions in Title 36

36-540. Court options [Amended; G altered, and H, I & most of J are new]

. . . .

G. If, on finding that the patient meets the criteria for court-ordered treatment pursuant to subsection A of this section, the court also finds that there is reasonable cause to believe that the patient is an incapacitated person as defined in section 14-5101 or is a person in need of protection pursuant to section 14-5401 and that the patient is or may be in need of guardianship or conservatorship, or both, the court may [instead of "shall"] order an investigation concerning the need for a guardian or conservator, or both, and may appoint a suitable person or agency to conduct the investigation. The appointee may include a court appointed guardian ad litem, an investigator appointed pursuant to section 14-5308 or the public fiduciary if there is no person willing and qualified to act in that capacity. The court shall give notice of the appointment to the appointee within three days of the appointment. The appointee shall submit the report of the investigation to the court within twenty-one days. The report shall include recommendations as to who should be guardian or who should be conservator, or both, and a report of the findings and reasons for the recommendation. If the investigation and report so indicate, the court shall order the appropriate person to submit a petition to become the guardian or conservator, or both, of the patient.

H. [All new] In any proceeding for court-ordered treatment in which the petition alleges that the patient is in need of a guardian or conservator and states the grounds for that allegation, the court may appoint an emergency temporary guardian or conservator, or both, for a specific purpose or purposes identified in its order and for a specific period of time not to exceed thirty days if the court finds that all of the following are true:

1. The patient meets the criteria for court-ordered treatment pursuant to subsection A of this section.
2. There is reasonable cause to believe that the patient is an incapacitated person as defined in section 14-5101 or is in need of protection pursuant to section 14-5401, paragraph 2.
3. The patient does not have a guardian or conservator and the welfare of the patient requires immediate action to protect the patient or the ward's property.
4. The conditions prescribed pursuant to section 14-5310, subsection B or section 14-5401.01, subsection B have been met.

I. [New] The court may appoint as a temporary guardian or conservator pursuant to subsection H of this section a suitable person or the public fiduciary if there is no person qualified and willing to act in that capacity. The court shall issue an order for an investigation as prescribed pursuant to subsection G of this section and, unless the patient is represented by independent counsel, the court shall appoint an attorney to represent the patient in further proceedings regarding the appointment of a guardian or conservator. The court shall schedule a further hearing within fourteen days on the appropriate court calendar of a court that has authority over guardianship or conservatorship matters pursuant to this title to consider the continued need for an emergency temporary guardian or conservator and the appropriateness of the temporary guardian or conservator appointed, and shall order the appointed guardian or conservator to give notice to persons entitled to notice pursuant to section 14-5309, subsection A or section 14-5405, subsection A. The court shall authorize certified letters of temporary emergency guardianship or conservatorship to be issued on presentation of a copy of the court's order. If a temporary emergency conservator other than the public fiduciary is appointed pursuant to this subsection, the court shall order that the use of the money and property of the patient by the conservator is restricted and not to be sold, used, transferred or encumbered, except that the court may authorize the conservator to use money or property of the patient specifically identified as needed to pay an expense to provide for the care, treatment or welfare of the patient pending further hearing. This subsection and subsection H of this section do not:

1. Prevent the evaluation or treatment agency from seeking guardianship and conservatorship in any other manner allowed by law at any time during the period of court-ordered evaluation and treatment.
2. Relieve the evaluation or treatment agency from its obligations concerning the suspected abuse of a vulnerable adult pursuant to title 46, chapter 4.

J. If, on finding that a patient meets the criteria for court-ordered treatment pursuant to subsection A of this section, the court also learns that the patient has a guardian appointed under title 14, the court with notice may impose on the existing guardian additional duties pursuant to section 14-5312.01. If the court imposes additional duties on an existing guardian as prescribed

in this subsection, the court may determine that the patient needs to continue treatment under a court order for treatment and may issue the order or determine that the patient's needs can be adequately met by the guardian with the additional duties pursuant to section 14-5312.01 and decline to issue the court order for treatment. If at any time after the issuance of a court order for treatment the court finds that the patient's needs can be adequately met by the guardian with the additional duties pursuant to section 14-5312.01 and that a court order for treatment is no longer necessary to assure compliance with necessary treatment, the court may terminate the court order for treatment. If there is a court order for treatment and a guardianship with additional mental health authority pursuant to section 14-5312.01 existing at the same time, the treatment and placement decisions made by the treatment agency assigned by the court to supervise and administer the patient's treatment program pursuant to the court order for treatment are controlling unless the court orders otherwise.

. . . .

This statute allows the court in a Title 36 proceeding to appoint a temporary guardian or conservator. [HB 2402]

§ 36-3284. Operation of mental health care power of attorney; admission for evaluation and treatment by agent; duties of physician or mental health care provider [Amended**]**

. . . .

B. Notwithstanding the procedures and requirements prescribed in chapter 5, articles 4 and 5 of this title relating to involuntary court-ordered evaluation or treatment, if the mental health care power of attorney specifically authorizes the agent to admit the principal to a level one behavioral health facility and the agent has reasonable cause to believe that the principal is in need of an evaluation or treatment, the agent may apply for admission of the principal for evaluation or treatment at a level one behavioral health facility. The agent must present the facility with a copy of the power of attorney that specifically authorizes the agent to admit the principal to a level one behavioral health facility and execute a sworn statement under penalty of perjury that the agent has presented to the facility a true and correct copy of a current power of attorney that specifically authorizes the agent to admit the principal to a level one behavioral health facility pursuant to this section and that the power of attorney is currently effective and has not been revoked, terminated or rescinded. If admission is requested by the agent, the facility to which the agent applies may admit the principal if prior to admission a physician who is licensed pursuant to title 32, chapter 13 or 17 does all of the following:

1. Conducts an investigation that carefully probes the principal's psychiatric and psychological history, diagnosis and treatment needs.
2. Conducts a thorough interview with the principal and the agent.
3. Obtains the agent's informed consent, as defined in section 36-501.
4. Makes a written determination that the principal needs an evaluation or will benefit from inpatient care and treatment of a mental disorder or other personality disorder or emotional condition and that the evaluation or treatment cannot be accomplished in a less restrictive setting.
5. Documents in the principal's medical chart a summary of the doctor's findings and recommendations for treatment.

C. After admission, if the patient refuses treatment or requests discharge and the treating physician believes that further inpatient treatment is necessary or advisable, the facility may rely on the consent of

the agent for treatment, release and discharge decisions pursuant to the agent's authority under the power of attorney.

. . . .

[HB 2211]

F. Substitution Situations

§ 14-5313. Proceedings subsequent to appointment; venue [Amended**]**

A. The court at the place where the ward resides has concurrent jurisdiction with the court that appointed the guardian or in which acceptance of a parental or spousal appointment was filed, over resignation, substitution, accounting and other proceedings relating to the guardianship including proceedings to limit the authority previously conferred on a guardian or to remove limitations previously imposed.

B. If the court located at the place where the ward resides is not the court in which acceptance of appointment is filed, the court in which proceedings subsequent to appointment are commenced shall in all appropriate cases notify the other court, in this or another state, and after consultation with that court shall determine whether to retain jurisdiction or transfer the proceedings to the other court, whichever may be in the best interests of the ward. A copy of any order accepting a resignation, substituting a guardian or altering authority shall be sent to the court in which acceptance of appointment is filed.

[SB 1499]

§ 14-5315. Guardian reports; contents

A. A guardian shall submit a written report to the court on each anniversary date of qualification as guardian, on resignation or substitution as guardian and on termination of the ward's disability.

. . . .

[SB 1499]

G. Conservatorship Provisions

§ 14-5401. Protective proceedings [Amended**]**

A. On petition and after notice and a hearing pursuant to this article, the court may appoint a conservator or make another protective order for cause as follows:

1. Appointment of a conservator or other protective order may be made in relation to the estate and affairs of a minor if the court determines that a minor owns money or property that requires management or protection that cannot otherwise be provided or has or may have affairs that may be jeopardized or prevented by minority or that funds are needed for the minor's support and education and that protection is necessary or desirable to obtain or provide funds.
2. Appointment of a conservator or other protective order may be made in relation to the estate and affairs of a person if the court specifically finds on the record both of the following:
    (a) The person is unable to manage the person's estate and affairs effectively for reasons such as mental illness, mental deficiency, mental disorder, physical illness or disability,

chronic use of drugs, chronic intoxication, confinement, detention by a foreign power or disappearance.

(b) The person has property that will be wasted or dissipated unless proper management is provided, or that funds are needed for the support, care and welfare of the person or those entitled to be supported by the person and that protection is necessary or desirable to obtain or provide funds.

B. On petition and after notice and a hearing pursuant to this article, the court may continue a conservatorship or other protective order entered pursuant to subsection A, paragraph 1 of this section beyond the minor's eighteenth birthday if the court determines that the order is appropriate pursuant to subsection A, paragraph 2 of this section. The petition shall comply with the requirements of section 14-5404, subsection B and must be filed after the minor's seventeenth birthday and before termination of the conservatorship by court order.

Allows court to continue an existing minor conservatorship into an adult conservatorship, after the minor has reached age 17. [SB 1081, SB 1499]

§ 14-5401.01. Temporary conservators; appointment; notice; hearings

A. If a person allegedly in need of protection has no conservator and an emergency exists or if an appointed conservator is not effectively performing the duties of a conservator and the estate or affairs of the protected person are found to require immediate action, the person allegedly in need of protection, the protected person or any person interested in that person's estate or affairs may petition for a finding of a need for interim protection and for the appointment of a temporary conservator. A finding and appointment may not be made without notice, pursuant to section 14-5405, except as provided in subsection B of this section.

B. The court may enter a finding of a need for interim protection and may appoint a temporary conservator without notice to the person allegedly in need of protection or that person's attorney if all of the following conditions are met:

1. It clearly appears from specific facts shown by affidavit or by the verified petition that immediate and irreparable injury, loss or damage will result before the person allegedly in need of protection or that person's attorney can be heard in opposition.
2. The petitioner or the petitioner's attorney certifies to the court in writing any efforts that the petitioner or the attorney has made to give the notice or the reasons supporting the claim that notice should not be required.
3. The petitioner files with the court a request for a hearing on the petition for the appointment of a temporary conservator.
4. The petitioner or the petitioner's attorney certifies that notice of the petition, order and all filed reports and affidavits will be given to the person allegedly in need of protection by personal service within the time period the court directs but not more than seventy-two hours after entry of the order of appointment.

C. Unless the person allegedly in need of protection is represented by independent counsel, the court shall appoint an attorney to represent that person in the proceeding on receipt of the petition for temporary appointment. The attorney shall visit the person allegedly in need of protection as soon as practicable and shall be prepared to represent that person's interests at any hearing on the petition.

D. Every order finding a need for interim protection and appointing a temporary conservator granted without notice expires as prescribed by the court but within a period of not more than thirty days unless within that time the court extends it for good cause shown for the same period or unless the attorney for the person allegedly in need of protection consents that it may be extended for a longer period. The court shall enter the reasons for the extension on the record.

E. The court shall schedule a hearing on the petition for a finding of the need for interim protection and the appointment of a temporary conservator within the time specified in subsection D of this section. If the petitioner does not proceed with the petition the court, on the motion of any party or on its own motion, may dismiss the petition.

F. If the court orders the appointment of a temporary conservator without notice, the person allegedly in need of protection may appear and move for its dissolution or modification on two days' notice to the petitioner and to the temporary conservator, or on such shorter notice as the court prescribes. The court shall proceed to hear and determine that motion as expeditiously as possible. If the person allegedly in need of protection objects to the person who is temporarily appointed, the court may appoint an individual nominated by the person allegedly in need of protection if the person allegedly in need of protection is at least fourteen years of age and has, in the opinion of the court, sufficient mental capacity to make an intelligent choice. The court shall appoint an alternative conservator if available and after finding that the appointment is in the best interest of the person allegedly in need of protection.

. . . .

§ 14-5404. Original petition for appointment or protective order [Amended**]**

A. The person allegedly in need of protection, any person who is interested in that person's estate or affairs, including that person's parent, guardian or custodian, or any person who would be adversely affected by lack of effective management of that person's estate and affairs may petition for the appointment of a conservator or for any other appropriate protective order.

B. The petition shall set forth, at a minimum and to the extent known**,** all of the following:

1. The interest of the petitioner.
2. The name, age, residence and address of the person allegedly in need of protection.
3. The name, address and priority for appointment of the person whose appointment is sought.
4. The name and address of the guardian, if any, of the person allegedly in need of protection.
5. The name and address of the nearest relative of the person allegedly in need of protection known to the petitioner.
6. A general statement of the estate of the person allegedly in need of protection with an estimate of its value, including any compensation, insurance, pension or allowance to which the person is entitled.
7. The reason why appointment of a conservator or any other protective order is necessary.

[SB 1499]

§ 14-5405. Notice in conservatorship proceedings [Amended**]**

A. In a proceeding for the appointment or substitution of a conservator of a protected person or person allegedly in need of protection, other than the appointment of a temporary conservator or temporary suspension of a conservator, and in a proceeding to continue a conservatorship or other protective order pursuant to section 14-5401, subsection B, notice of the hearing shall be given to each of the following:

1. The protected person or the person allegedly in need of protection if that person is fourteen years of age or older.
2. The spouse, parents and adult children of the protected person or person allegedly in need of protection, or if no spouse, parents or adult children can be located, at least one adult relative of the protected person or the person allegedly in need of protection, if such a relative can be found.
3. Any person who is serving as guardian or conservator or who has the care and custody of the protected person or person allegedly in need of protection.
4. Any person who has filed a demand for notice.

. . . .

[SB 1081, SB 1499]

§ 14-5407. Procedure concerning hearing and order on original petition [Amended**]**

. . . .

B. On the filing of a petition for appointment of a conservator or any other protective order for reasons other than minority, or on the filing of a petition for continuation of a conservatorship or other protective order pursuant to § 14-5401, subsection B, the court shall set a hearing date. Unless the person to be protected has counsel of the person's own choice, the court shall appoint an attorney to represent that person. If the alleged disability is mental illness, mental deficiency, mental disorder, physical illness or disability, chronic use of drugs, or chronic intoxication, the court shall appoint an investigator to interview the person to be protected. On petition by an interested person or on the court's own motion, the court may direct that an appropriate medical or psychological evaluation of the person be conducted. The investigator and the person conducting the medical or psychological evaluation shall submit written reports to the court before the hearing date.

. . . .

E. After the hearing, and after making specific findings on the record that a basis for the appointment of a conservator or any other protective order has been established, the court shall make an appointment or other appropriate protective order.

[SB 1081, SB 1499]

§ 14-5410. Who may be appointed conservator; priorities [Amended**]**

A. The court may appoint an individual or a corporation, with general power to serve as trustee, as conservator of the estate of a protected person subject to the requirements of section 14-5106. The following are entitled to consideration for appointment in the order listed:

. . . .

3. The person nominated to serve as conservator in the protected person's most recent durable power of attorney.

. . . .

10. A fiduciary~~,~~ who is licensed pursuant to section 14-5651, other than a public fiduciary.
11. A public fiduciary who is licensed pursuant to section 14-5651.

B. A person listed in subsection A, paragraph 4, 5, 6, 7 or 8 of this section may nominate in writing a person to serve in that person's place. With respect to persons having equal priority, the court shall select the one it determines is best qualified to serve. The court, for good cause, may pass over a person having priority and appoint a person having a lower priority or no priority. For the purposes of this subsection, "good cause" includes a determination that:

1. The protected person's durable power of attorney is invalid.

2. Honoring the protected person's durable power of attorney would not be in the physical, emotional or financial best interest of the protected person.

3. The estimated cost of the fiduciary and associated professional fees would adversely affect the ability of the person's estate to provide for the protected person's reasonable and necessary living expenses.

C. On the request of a person who was passed over by the court pursuant to subsection B of this section, the court shall make a specific finding regarding the court's determination of good cause and why the person was not appointed. The request must be made within ten days after the entry of the order.

A. Puts qualification on priority for guardian of person nominated under POA (must be nominated "to serve as conservator" and limits nomination to durable power of attorney).
B. Puts in cost of a professional fiduciary as reason to pass them over.
Requires court to make a finding concerning why someone with higher priority was passed over.
C. 14-5311 makes this same change for a guardians (nominated "to serve as guardian" and may be in either durable power of attorney or health care power of attorney).
D. This clears up the prior language, which gave priority to the person "nominated in a Power of Attorney"; it now clearly cannot be whoever is named in the document as the agent, but must be specifically nominated to act as guardian/conservator.
[SB 1499]

§ 14-5415. [New**] Resignation or substitution of conservator**

A. On petition of the protected person or any person interested in the protected person's welfare, or on the court's own initiative, the court shall substitute a conservator and appoint a successor if the substitution is in the best interest of the protected person. The court does not need to find that the conservator acted inappropriately to find that the substitution is in the protected person's best interest. The conservator and the conservator's attorney may be compensated from the protected person's estate for defending against a petition for substitution only for the amount ordered by the court and on petition by the conservator or the conservator's attorney. When substituting a conservator and appointing a successor, the court may appoint an individual nominated by the protected person if the person is at least fourteen years of age and has, in the opinion of the court, sufficient mental capacity to make an intelligent choice. On petition of the conservator, the court may accept a resignation and make any other order that may be appropriate.

B. The protected person may petition the court for an order that the protected person is no longer in need of protection or petition for substitution of the conservator at any time. A request for this order may be made by informal letter to the court or judge. A person who knowingly interferes with the transmission of this request may be found in contempt of court.

C. An interested person, other than the conservator or protected person, shall not file a petition for adjudication that the protected person is no longer in need of protection earlier than one year after the entry of a protective order unless the court permits the person to file the petition on the basis of affidavits that there is reason to believe that the protected person is no longer in need of protection.

D. An interested person, other than the conservator or protected person, shall not file a petition to substitute a conservator earlier than one year after the entry of a protective order, unless the court permits the person to file the petition on the basis of affidavits that there is reason to believe that the current conservator will endanger the protected person's estate if the conservator is not substituted.

E. Before it orders that need for protection no longer exists, substituting a conservator or accepting the resignation of a conservator, the court, following the same procedures to safeguard the rights of the protected person that apply to a petition for appointment of a conservator, may require appropriate accounts and enter appropriate orders to preserve and protect the assets of the estate, to require reimbursement or payment as needed and to transfer assets or title thereto to appropriate successors.

A. Clarifies that a conservator can be substituted without showing he or she did anything wrong, if it is in the best interest of the ward. (Like 14-5307, for guardians.)
B. Limits the ability to be compensated for defending against such a substitution.
C. Prohibits any third party from filing that the ward is no longer incapacitated or substituting guardian within one year without affidavits.
[SB 1499]

§ 14-5416. Petitions for orders subsequent to appointment [Amended**]**

A. Any person interested in the estate or affairs of a person for whom a conservator has been appointed may file a petition in the appointing court for an order:

. . . .

5. Continuing the conservatorship pursuant to section 14–5401, subsection B.

. . . .

Amended by SB 1081.

§ 14-5418. Inventory and records [Amended; C, is new**]**

A. Within ninety days after appointment, a conservator shall prepare and file with the court an inventory of the assets of the protected person on the date of the conservator's appointment, listing it with reasonable detail and indicating the fair market value of each asset as of the date of appointment. The conservator shall attach to the inventory a copy of the protected person's consumer credit report from a credit reporting agency that is dated within ninety days before the filing of the inventory.

B. The conservator shall provide a copy of the inventory to the protected person if the protected person can be located, has attained fourteen years of age, and has sufficient mental capacity to understand these matters, and to any parent or guardian with whom the protected person resides. The conservator shall keep suitable records of the conservator's administration and exhibit the records on request of any interested person.

C. [New] Unless otherwise ordered by the court, a person who is entitled to notice of the conservator's

annual account pursuant to section 14-5419, subsection C may request in writing that the conservator do one of the following not more than once every thirty days:

1. Allow the person to view the protected person's financial records, the conservator's billing statements, the billing statements of the conservator's attorney or other records related to the protected person under the conservator's control.
2. Provide the requesting person with copies of these documents. Unless otherwise ordered by the court, the conservator shall allow the person to view or provide copies of the requested documents to the person as soon as practicable but no later than thirty days after receiving the request. The requesting party must pay reasonable copying costs.
3. Provide a report of receipts and dispersements of the conservatorship.

A. Requires a conservator to attach to inventory the protected party's credit report. (It will be interesting to determine how easy this will be to acquire.) B. Anyone entitled to see annual account may request the following once every 30 days: view or receive copies of billing reports, financial records, attorney's billing records, and copies of receipts and disbursements. [SB 1499]

§ 14-5419. Accounts; definition [Amended**]**

A. Except as provided pursuant to subsection F of this section, every conservator must account to the court for the administration of the estate not less than annually on the anniversary date of qualifying as conservator and also on resignation or <u>substitution</u>, and on termination of the protected person's minority or disability, except that for good cause shown on the application of an interested person, the court may relieve the conservator of filing annual or other accounts by an order entered in the minutes.

. . . .

[SB 1499]

<u>Rule 15.2.</u> [New] **Involuntary Termination of Appointment; Other Remedies for Non-Compliance; Dismissal; Sanctions**

. . . . .

B. Termination of a Minor Guardianship Case. Consistent with the provisions of A.R.S. § 14-5210, the clerk of the court or court administrator, whoever is designated by the presiding judge, shall close a minor guardianship case filed pursuant to §§ 14-5201 to -5212 upon the minor reaching the age of majority, the minor's adoption, marriage, emancipation, or death. If the court has reason to believe that the minor has a disability or impairment that may necessitate the appointment of a guardian after the minor's eighteenth birthday, and a petition has not been filed pursuant to A.R.S. § 14-5303, the court shall set a status hearing not less than 90 days prior to the minor's eighteenth birthday to determine whether a petition for appointment of a guardian for an adult should be filed.

C. Remedies for Non-Compliance by a Guardian or Conservator for an Adult. In the event a guardian or conservator fails to comply with any requirements of A.R.S. Title 14, court rules, or a court order, the court may enter any order appropriately designed to ensure compliance with legal requirements or protect the best interest of the ward or protected person, including:

1. An order to the guardian or conservator to comply within a time certain;
2. An order to show cause pursuant to Rule 35 requiring the guardian or conservator to show cause why appropriate actions should not be taken by the court;
3. An order appointing a court investigator to investigate the reasons for the guardian's or conservator's non-compliance and report to the court regarding the investigator's findings and proposed recommendations;
4. An order terminating the guardianship or conservatorship proceeding if the court determines that dismissal is appropriate. The court shall not terminate a guardianship or conservatorship case if the court has reason to believe the ward remains incapacitated or the protected person remains in need of protection and such person continues to reside in Arizona;
5. An order immediately suspending or terminating the authority of the guardian or conservator to take any further action on behalf of the ward or the estate and appoint a successor or temporary fiduciary;
6. An order initiating proceedings that may result in issuance of a fiduciary arrest warrant pursuant to A.R.S. § 14-5701; or
7. Such other order as may be appropriate in the circumstances of the case.

D. General Involuntary Termination. If no action or hearing occurs within six months after a case is initiated under A.R.S. Title 14, the court shall issue a notice that the case will be administratively terminated in 90 days without hearing, unless before that date the initiating party files with the court a request for action or a status report that describes matters remaining for resolution. The notice shall be provided to all parties, persons entitled to notice of the commencement of the case, and any person who filed a demand for notice.

E. Effect of Dismissal. Unless otherwise ordered by the court, the entry of an order dismissing a case serves to dismiss all pending matters in the case without prejudice but does not dismiss, vacate, or set aside any final order approving accountings or other actions of a person appointed pursuant to A.R.S Title 14.

F. Dismissal Authority. The authority of the court to issue notices, dismiss cases and terminate appointments under this rule may be performed by court administration or by an appropriate electronic process under supervision of the court.

Rule 19. Appointment of Attorney, Medical Professional, and Investigator [Amended]

. . . .

B. Absent good cause, a party who seeks the appointment of a guardian or conservator shall not nominate a specific attorney to represent the subject person unless the attorney has an existing or prior attorney-client relationship with the subject person. If a party nominates a specific attorney to represent the subject person, the party shall, in the petition for appointment of guardian or conservator, describe the attorney's prior relationship, if any, with the petitioner and the subject person. [some language struck]

C. [New] Unless otherwise ordered by the court, an attorney shall not be appointed, accept an appointment, or remain appointed as the attorney or guardian ad litem for the subject person if the attorney has an existing attorney-client relationship with the nominated or appointed fiduciary.

A. Attorneys who frequently represent private fiduciaries take note: you cannot be appointed, accept an appointment, or remain appointed as attorney for the subject person if you have an existing attorney-client relationship with the nominated or appointed fiduciary.
B. Having a ***former*** attorney-client relationship is not a conflict of interest per se, but it could be depending on the circumstances.
C. Also: a specific attorney cannot be nominated to represent the alleged incapacitated or protected person, unless the attorney and client have an existing or prior attorney-client relationship.

Part VI. Fiduciaries (See Fiduciary Regulations, Appendix 3)

§ 14-5651. Fiduciaries; licensure; qualifications; conduct; removal; exemption; definitions [Amended**]**

A. Except as provided by subsection G of this section, the superior court shall not appoint a fiduciary unless that person is licensed by the supreme court. . . . At a minimum the rules adopted pursuant to this subsection shall include the following:

. . . .

3. A requirement that on appointment a fiduciary who is serving as a guardian or conservator must provide written information to the ward or protected person and all persons entitled to notice pursuant to section 14-5309 or 14-5405 that the fiduciary is licensed by the supreme court and subject to regulation by the supreme court. The language of the written information provided by the fiduciary shall be prescribed by the supreme court and shall include reference to the code of conduct that all licensed fiduciaries must follow.

Requires any licensed fiduciary to give written information to the ward and any parties entitled to notice that the fiduciary is licensed by the Arizona Supreme Court and subject to the Code of Conduct.
[SB 1499]

§ 14-5652. Attorneys; fiduciary duties [Amended**]**

A. Except as prescribed pursuant to section 14-1104 and absent an express agreement to the contrary, the performance by an attorney of legal services for a fiduciary, settlor or testator does not by itself establish a duty in contract or tort or otherwise to any third party. For the purposes of this subsection, third party does not apply to the personal representative, settlor or testator.

Clarifies that 14-1104 prudent management of costs trumps our anti-*Fogleman* statute; thus there may be a duty to third parties on prudent management of costs. [SB 1499]

Rule 31(d)(30), Rules of the Supreme Court

A person licensed as a fiduciary pursuant to A.R.S. § 14-5651 may perform services in compliance with Arizona code of judicial administration, Part 7, Chapter 2, Section 7-202. Notwithstanding the foregoing

provision, the court may suspend the fiduciary's authority to act without an attorney whenever it determines that lay representation is interfering with the orderly progress of the proceedings or imposing undue burdens on other parties.

Part VII Training (See specific guidelines in Appendix 4)

§ 14-1101. [New**] Training**

A judicial officer presiding over proceedings brought pursuant to this title must participate in training as prescribed by the supreme court.

[SB 1499]

Rule 10. Duties Owed by Counsel, Fiduciaries, Unrepresented Parties, and Investigators

. . . .

E. Duties of Counsel for Subject Person of Guardianship/Conservatorship Proceeding; Duties of Guardian Ad Litem

1. [New] Initial Training. Any attorney who serves as a court appointed attorney or guardian ad litem for a proposed adult ward or adult protected person shall first complete a training course prescribed by the supreme court, which shall issue a certificate of completion. The attorney shall file a copy of the certificate of completion with the court making the appointment. Any attorney who, at the time this rule becomes effective, is serving as a court appointed attorney or guardian ad litem for an adult ward or protected person shall complete a training course prescribed by the supreme court as soon as practicable and thereafter shall file a certificate of completion with the court making the appointment.
2. [New] Subsequent Training. Any attorney who continues to serve as a court appointed attorney or guardian ad litem for an adult ward or protected person shall complete an additional training course prescribed by the supreme court every five years and file a certificate of completion as set forth in subsection 1.

. . . .

F. Duties of Investigators.

1. [New] Before being appointed as an investigator pursuant to A.R.S. §§ 14 5303(c), 14 5407(b), or 36 540(g), a person shall first complete a training course prescribed by the supreme court, which shall issue a certificate of completion. The investigator shall file a copy of the certificate of completion with the court making the appointment.
2. [New] Any person who continues to serve as a court appointed investigator shall complete an additional training course prescribed by the supreme court every five years and file a certificate of completion as set forth in subsection A.

Rule 27.1. [New] **Training for Non Licensed Fiduciaries**

A. Any person who is neither a licensed fiduciary under A.R.S. § 14-5651 nor a financial institution shall complete a training program approved by the supreme court before letters to serve as a guardian,

conservator, or personal representative are issued unless the appointment was made pursuant to Sections 14-5310(a), 14-5401.01(a) or 14-5207(c) or unless otherwise ordered by the court.

B. If the appointment was made because an emergency existed, the fiduciary shall complete the training program within thirty days of appointment or before the permanent appointment of the fiduciary, whichever is earlier. for good cause, the court may extend the time period for the fiduciary to complete the training program.

C. For purposes of this rule, "financial institution" means a bank that is insured by the federal deposit insurance corporation and chartered under the laws of the United States or any state, a trust company that is owned by a bank holding company that is regulated by the federal reserve board, or a trust company that is chartered under the laws of the United States or this state.

These rules require that any court-appointed attorney, guardian ad litem, or investigator is required to attend the Supreme Court's prescribed training session, which will issue a certificate of completion that must be filed with the administrative office of the court within 10 days of appointment. Any attorneys who are court appointed in a case at the time the rule becomes effective must within a "reasonable" time attend a course and file a certificate.

Part VIII. Additional Related Statutes/Rules

§ 14-10706. Removal of trustee [Amended, D added**]**

. . . .

D. On petition of a beneficiary who is also a settlor of a trust, including a beneficiary for whom a guardian or conservator has been appointed, the court shall substitute a trustee and appoint a successor if the substitution is in the best interest of the beneficiary. The trustee and the trustee's attorney may be compensated from the trust for defending against a petition for substitution only for the amount ordered by the court and on petition by the trustee or the trustee's attorney. When substituting a trustee and appointing a successor, the court may appoint an individual nominated by the beneficiary if the beneficiary has, in the opinion of the court, sufficient mental capacity to make an intelligent choice.

Adds to Trustee removal provisions the concept of substitution and limitation against a defense where petitioned by Settlor or representative of Settlor. [SB 1499]

§ 14_1201. Definitions

In this title, unless the context otherwise requires:

. . . .

24. "Guardian ad litem" includes a person who is appointed pursuant to section 14_1408.

GAL now includes representative under A.R.S. §14-1408, for minor, incapacitated person, unborn child or person whose identity or location is unknown, which was exactly what it sounded like.

§ 14-5108. Guardianship of foreign citizens [Amended**]**

The court may appoint a guardian of an adult foreign citizen if all of the following are true:

1. The foreign citizen is under twenty-one years of age.
2. The foreign citizen has a temporary visa issued by the United States or is a legal permanent resident.

[SB 1499]

Rule 7. Confidential Documents and Information

A. Definitions.

1. For purposes of this rule, "confidential document" means the following:

. . . .

c. Budgets filed pursuant to Rules 30.2 and 30.3 of these rules.

. . . .

[Relevant] Comment: Section A(1)(c) and (d) apply only to budgets and inventories filed in connection with conservatorship estates. Because protected persons are typically vulnerable to exploitation, budgets and inventories in such cases are maintained as confidential documents to safeguard the financial information from those who might take advantage of the vulnerable adults. These same considerations do not apply in decedents' estates; therefore, inventories for decedents' estates do not fall within the definition of "confidential document." As to budgets and inventories in conservatorship cases, only the budget and inventory themselves should be treated as confidential; any cover sheet should not be treated as confidential. Thus, only the budget and inventory, including any appraisals or financial documents, should be filed as confidential.

Clarifies that Risk Assessments, Good Faith Estimates, and Budgets are all confidential documents.

Rule 8. Service of Court Papers

A. Whenever A.R.S. Title 14 requires that notice of a hearing or other document be served personally, service shall be conducted pursuant to Rules 4(d), 4.1, and 4.2 of the Arizona Rules of Civil Procedure.

B. [New] If service of a notice and petition that commences a probate case is not made upon all persons required in the manner prescribed by A.R.S. Title 14 within 120 days after the filing of the initial petition, the court, upon motion or its own initiative after notice to the petitioner, may dismiss the petition without prejudice or direct that service be effected within a specified time; provided that if the petitioner shows good cause for the failure prior to the expiration of time allowed for service, the court shall extend the time for service for an appropriate period.

If service is not made to all required parties, this rule gives court discretionary ability to dismiss the application or petition, or order

Rule 15.2. [New] **Involuntary Termination of Appointment; Other Remedies for Non-Compliance; Dismissal; Sanctions**

A. Dismissal of Probate, Special Administration or Subsequent Administration Proceedings for Lack of Prosecution.

1. Two years after initiation of a case filed pursuant to Title 14, Chapter 3, A.R.S., the court shall issue a notice of impending dismissal of the case unless at least one of the following has been filed in the case:

a. A closing statement authorized by § 14-3933;

b. A Petition to settle the estate authorized by §§ 14-3931 and -3932;

c. An order terminating the appointment of a special administrator pursuant to § 14-3618; or

d. An order setting the case for future trial, hearing, or conference or an order extending the administration of the estate beyond two years.

2. The clerk of the court or court administrator, whoever is designated by the presiding judge, shall promptly notify parties, those heirs and devisees whose address is contained in the file, and all who demand notice in the case of the impending dismissal of the case. At the expiration of 90 days after issuance of the notice, the court shall dismiss the case without prejudice and terminate the appointment of the personal representative or special administrator without a hearing unless at least one of the following has been filed in the case:

a. Any of the four documents described above in Rule 15.2(a)(1)(d);

b. A request for hearing or conference;

c. A petition to terminate the appointment of the personal representative or special administrator; or

d. A status report describing matters that remain to be resolved.

Any termination of the appointment of the personal representative or special administrator under this rule shall not discharge the fiduciary from liability or exonerate any bond. The court may extend the periods set forth in this rule prior to their expiration for good cause shown.

. . . . .

B. Termination of a Minor Guardianship Case. Consistent with the provisions of A.R.S. § 14-5210, the clerk of the court or court administrator, whoever is designated by the presiding judge, shall close a minor guardianship case filed pursuant to §§ 14-5201 to -5212 upon the minor reaching the age of majority, the minor's adoption, marriage, emancipation, or death. If the court has reason to believe that the minor has a disability or impairment that may necessitate the appointment of a guardian after the minor's eighteenth birthday, and a petition has not been filed pursuant to A.R.S. § 14-5303, the court shall set a status hearing not less than 90 days prior to the minor's eighteenth birthday to determine whether a petition for appointment of a guardian for an adult should be filed.

C. Remedies for Non-Compliance by a Guardian or Conservator for an Adult. In the event a guardian or conservator fails to comply with any requirements of A.R.S. Title 14, court rules, or a court order, the court may enter any order appropriately designed to ensure compliance with legal requirements or protect the best interest of the ward or protected person, including:

1. An order to the guardian or conservator to comply within a time certain;

2. An order to show cause pursuant to Rule 35 requiring the guardian or conservator to show cause why appropriate actions should not be taken by the court;

3. An order appointing a court investigator to investigate the reasons for the guardian's or conservator's non-compliance and report to the court regarding the investigator's findings and proposed recommendations;
4. An order terminating the guardianship or conservatorship proceeding if the court determines that dismissal is appropriate. The court shall not terminate a guardianship or conservatorship case if the court has reason to believe the ward remains incapacitated or the protected person remains in need of protection and such person continues to reside in Arizona;
5. An order immediately suspending or terminating the authority of the guardian or conservator to take any further action on behalf of the ward or the estate and appoint a successor or temporary fiduciary;
6. An order initiating proceedings that may result in issuance of a fiduciary arrest warrant pursuant to A.R.S. § 14-5701; or
7. Such other order as may be appropriate in the circumstances of the case.

D. General Involuntary Termination. If no action or hearing occurs within six months after a case is initiated under A.R.S. Title 14, the court shall issue a notice that the case will be administratively terminated in 90 days without hearing, unless before that date the initiating party files with the court a request for action or a status report that describes matters remaining for resolution. The notice shall be provided to all parties, persons entitled to notice of the commencement of the case, and any person who filed a demand for notice.

E. Effect of Dismissal. Unless otherwise ordered by the court, the entry of an order dismissing a case serves to dismiss all pending matters in the case without prejudice but does not dismiss, vacate, or set aside any final order approving accountings or other actions of a person appointed pursuant to A.R.S Title 14.

F. Dismissal Authority. The authority of the court to issue notices, dismiss cases and terminate appointments under this rule may be performed by court administration or by an appropriate electronic process under supervision of the court.

Rule 22. Orders Appointing Conservators, Guardians, and Personal Representatives; Bonds and Bond Companies; Restricted Assets [Amended]

A. Orders. Every order appointing a conservator or a personal representative shall plainly state the amount of bond required. Neither letters of conservator nor letters of personal representative shall be issued to any person until any required bond has been has filed with the clerk of court. Every order appointing a conservator, guardian, or personal representative shall include the following language: "Warning: This appointment is not effective until the letters of appointment have been issued by the clerk of the superior court."

. . . .

C. [New] **Restricted Accounts**

1. Every order appointing a conservator or personal representative, or that authorizes a single transaction or other protective arrangement pursuant to A.R.S. § 14-5409, shall plainly state any restrictions on the fiduciary's authority to manage assets of the estate.

2. If the restriction affects the fiduciary's ability to manage monetary assets of the estate, the order and, unless otherwise ordered by the court, any letters that issue shall contain the following language: "Funds shall be deposited into an interest-bearing, federally insured restricted account

at a financial institution engaged in business in Arizona. No withdrawals of principal or interest may be made without certified order of the superior court. Unless otherwise ordered by the court, reinvestment may be made without further court order so long as funds remain insured and restricted in this institution at this branch."

3. Unless otherwise ordered by the court, the fiduciary shall file a proof of restricted account for every account ordered restricted by the court within 30 days after the order or letters, whether temporary or permanent, are first issued.

4. Unless otherwise ordered by the court, an attorney who represents the fiduciary, the ward, protected person, or insurance company and who is the recipient of any proceeds to be restricted for the benefit of a minor, incapacitated person or protected person, shall ensure the establishment of the restricted account, proper titling of the same, and safe deposit of the restricted funds. The attorney shall file a properly executed proof of restricted account form executed by an authorized representative of the financial institution within 30 days after the issuance of letters or entry of a single transaction order.

D. [New] **Restricted Real Property**

1. Every order appointing a conservator or a personal representative, or that authorizes a single transaction or other protective arrangement pursuant to A.R.S. § 14-5409, shall plainly state any restrictions on the authority to sell, lease, encumber or convey real property of the estate. Neither letters of conservator nor personal representative shall be issued by the clerk of the court to any person unless the language restricting the fiduciary's authority is contained in the letters.

2. If the restriction limits the fiduciary's authority to manage real property, unless otherwise ordered by the court, the order appointing the conservator or personal representative, or that authorizes or ratifies the transaction, shall contain the following language: "No realty shall be leased for more than one year, sold, encumbered or conveyed without prior court order."

A. Rule 22 imposes a duty on the attorney to ensure the establishment of the restricted account, proper titling and safe deposit of the restricted funds. B. Note the potential exposure to liability in this situation.

<u>Rule 26. Issuance</u> and Recording <u>of Letters</u> [<u>Amended</u>]

. . . .

B. If the court restricts the authority of a conservator, guardian or personal representative, the clerk of the court shall not issue letters of conservator, guardian, or personal representative unless the language restricting the fiduciary's authority in the court's order is contained in the letters of appointment. [Previous language struck; this is all new.]

. . . .

E. [New] A Conservator shall file and record a certified copy of the letters with the office of the county recorder in all counties in any state where the estate owns real property. The conservator shall file a copy of the recorded letters with the court in which the conservator was appointed within 30 days after the county recorder has issued the recorded conservator's letters.

A. Requires the clerk of the court to ensure letters contain restrictions on a fiduciary's authority.
B. Requires a conservator to file and record certified copy of the Letters with the county recorder in ***all*** counties in any state where the estate owns real property, and then file a copy of the recorded Letters with the Court in which the conservator was appointed within 30 days after the county recorder has issued the recorded Letters.

Rule 26.1. [New] **Written Findings on Appointment**

Following a written request by a person with higher priority for appointment as a guardian or conservator but who was passed over by the court in favor of appointing a person with lower priority, the court shall make a specific finding regarding the court's determination of good cause and why the person was not appointed. The request must be made within ten days after the entry of the order.

If the Court passes over a person with higher priority for appointment as guardian or conservator, the Court, upon request, must make a specific finding regarding the determination of good cause and state why the person was not appointed.

Rule 28. Pretrial Procedures [Amended]

A. Initial Procedures; Scheduling Conference.

1. If a matter is contested, unless the parties agree otherwise, the court shall set a scheduling conference . . . . At the scheduling conference, the court and the parties shall address the following issues:

. . . .

b. the deadline for filing a joint alternative dispute resolution statement pursuant to Rule 29 of these rules;

. . . .

2. Unless inconsistent with these rules, Rule 16(b), Rules of Civil Procedure, shall apply to all pretrial conferences.

. . . .

Part IX. Notable Technical Corrections [HB 2403]

§ 14-10202. Jurisdiction over trustee and beneficiary

A. By accepting the trusteeship of a trust having its principal place of administration in this state or by moving the principal place of administration to this state, or until otherwise declared by the trustee if a proceeding regarding a matter involving the trust is not pending in a court of this state, by declaring that the trust is subject to the jurisdiction of the courts of this state, the trustee submits personally to the jurisdiction of the courts of this state regarding any matter involving the trust.

. . . .

Allows Arizona law to apply to a trust if the trustee declares it to be. This is especially valuable to take advantage of beneficial Arizona law such as spendthrift protection, as well as flexibility for powers such as decanting.

§ 14-10505. Creditor's claim against settlor

A. Whether or not the terms of a trust contain a spendthrift provision, the following rules apply:

. . . .

3. After the death of a settlor, and subject to the settlor's right to direct the source from which liabilities will be paid, the property of a trust that was revocable at the settlor's death is subject to claims of the settlor's creditors, costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains and statutory allowances to a surviving spouse and children to the extent the settlor's probate estate is inadequate to satisfy those claims, costs, expenses and allowances, except to the extent that state or federal law exempts any property of the trust from these claims, costs, expenses or allowances. If a trust has more than one settlor or contributor, the amount the creditor or assignee of a particular settlor may reach may not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution. This paragraph does not abrogate otherwise applicable laws relating to community property.

B. For the purposes of this section:

. . . .

2. On the lapse, release or waiver of a power of withdrawal, the holder is not, by reason of any such lapse, release or waiver, treated as the settlor of the trust.

. . . .

E. For the purposes of this section, amounts and property contributed to the following trusts are not deemed to have been contributed by the settlor, and a person who would otherwise be treated as a settlor or a deemed settlor of the following trusts shall not be treated as a settlor:

. . . . .

4. An irrevocable trust for the benefit of a person, the settlor of which is the person's spouse, regardless of whether or when the person was the settlor of an irrevocable trust for the benefit of that spouse.

5. An irrevocable trust for the benefit of a person to the extent that the property of the trust was subject to a general power of appointment in another person.

. . . .

A. Provides that ANY lapse or waiver of a power of withdrawal does not make you a Settlor, and this was previously limited to the 5 x 5 power, or an annual exclusion power, or the 2503(c) power.
B. Simplifies the spousal asset protection trust, so that for creditor protection purposes, a spousal trust is not deemed settled by the beneficiary, even if there is a reciprocal trust argument.

§ 14-10819. Trustee's special power to appoint to other trust

A. Unless the terms of the instrument expressly provide otherwise, a trustee who has the discretion under the terms of a testamentary instrument or irrevocable inter vivos agreement to make distributions, regardless of whether a standard is provided in the instrument or agreement, for the benefit of a beneficiary of the trust may exercise without prior court approval the trustee's discretion by appointing

part or all of the estate trust in favor of a trustee of another trust if the exercise of this discretion:

. . . .

E. The trustee may exercise the discretion to appoint all of the trust estate pursuant to this section by restating the trust.

Specifically says that a Decanting Power can be exercised mechanically through a Restatement.

§ 33-1126. Money benefits or proceeds; exception

. . . .

B. Any money or other assets payable to a participant in or beneficiary of, or any interest of any participant or beneficiary in, a retirement plan under section 401(a), 403(a), 403(b), 408, 408A or 409 or a deferred compensation plan under section 457 of the United States internal revenue code of 1986, as amended, whether the beneficiary's interest arises by inheritance, designation, appointment or otherwise, is exempt from all claims of creditors of the beneficiary or participant. This subsection does not apply to any of the following:

1. An alternate payee under a qualified domestic relations order, as defined in section 414(p) of the United States internal revenue code of 1986, as amended. The interest of any and all alternate payees is exempt from any and all claims of any creditor of the alternate payee.
2. Amounts contributed within one hundred twenty days before a debtor files for bankruptcy.
3. The assets of bankruptcy proceedings filed before July 1, 1987.

. . . .

Specifically answers the question of whether an INHERITED IRA or other retirement plan is exempt from creditors. It is now for purposes of Arizona law.

Part X. Creation of Advisory Panel

§ 14-1110. [New**] Probate advisory panel; report** (Rpld. 7/1/16)

A. The probate advisory panel is established consisting of the following members appointed to staggered three year terms:

1. Two public members who are guardians of an adult child or a sibling who is a ward. The president of the senate and the speaker of the house of representatives shall each appoint one member.
2. Two public members who are conservators of a parent who is a protected person. The president of the senate and the speaker of the house of representatives shall each appoint one member.
3. One public fiduciary who is licensed pursuant to section 14-5651 and who is from a county with a population of less than five hundred thousand persons. The governor shall appoint this member.
4. One fiduciary, other than a public fiduciary, who is licensed pursuant to section 14-5651 and who is from a county with a population of more than five hundred thousand persons. The governor shall appoint this member.
5. One attorney who has a minimum of four years' experience in guardianship and conservatorship proceedings. The governor shall appoint this member.

6. One judicial officer who has a minimum of two years' experience presiding over guardianship and conservatorship proceedings and who is from a county with a population of more than five hundred thousand persons. The chief justice of the supreme court shall appoint this member.
7. One clerk of the superior court. The chief justice of the supreme court shall appoint this member.

B. The panel shall:

1. Select a chairperson at its first annual meeting.
2. Hold a public hearing at least once each year, or at the call of the chairperson, on how to improve the guardianship and conservatorship laws through statutory changes.
3. Submit a report of its findings and recommendations to the governor, the speaker of the house of representatives, the president of the senate and the chief justice of the supreme court on or before November 15 of each year. The panel shall provide a copy of each report to the secretary of state.

C. Panel members are not eligible for compensation or reimbursement of expenses.

D. The legislature shall provide staff support for the panel.

A. Creates the Probate Advisory Panel, two public members who are guardians of adult children, two public members who are conservators of parents, one public fiduciary from a small county, one private fiduciary from large county (more than 500,000 persons in county), one attorney, one judge, one Superior Court Clerk.
B. Will hold a public hearing, make a report of findings and recommendations each year.
C. No mention of this in the proposed probate rules.
[Renumbered; it was 14-1104 when added by HB 2424]