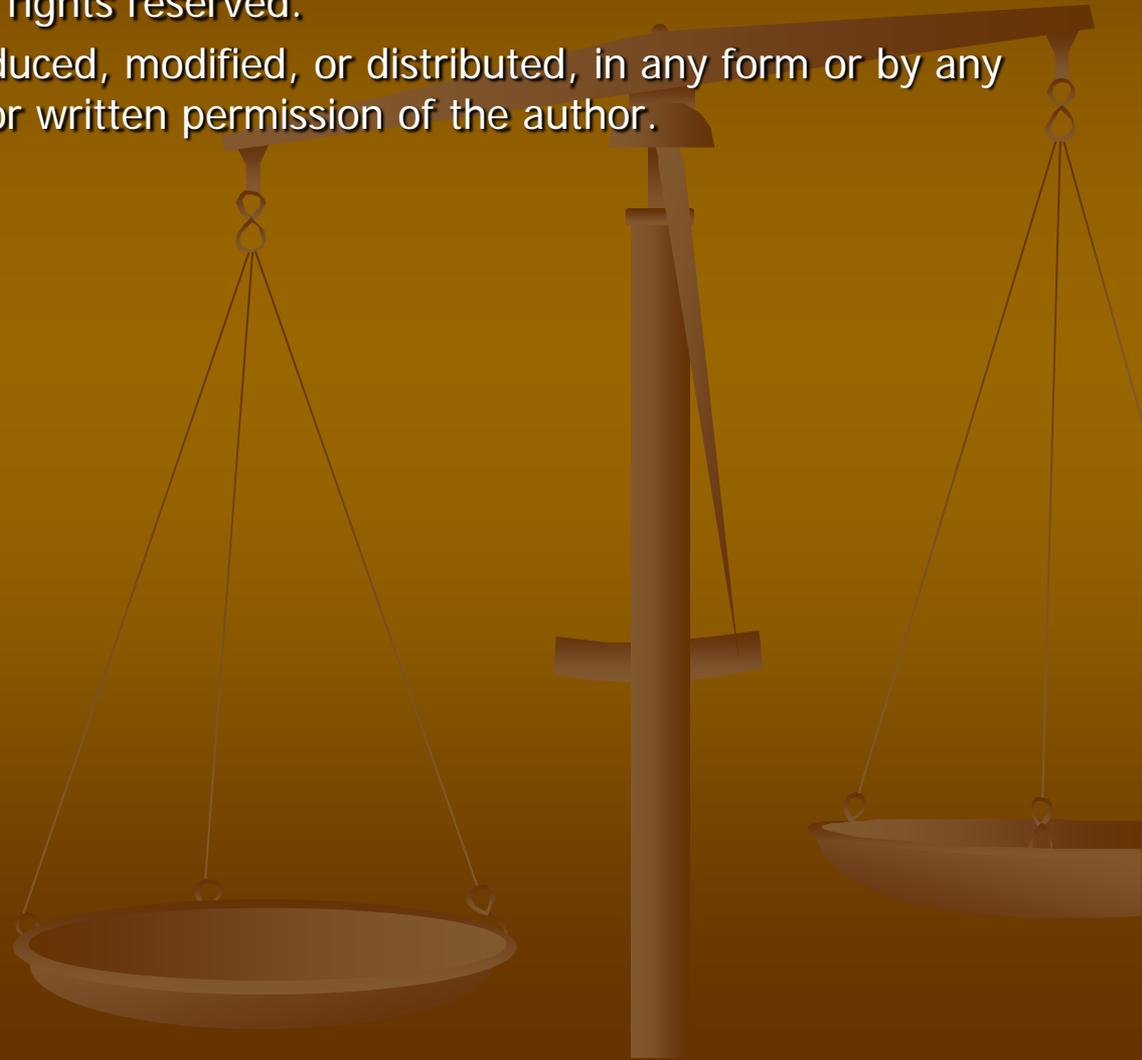


**MARICOPA COUNTY PUBLIC FIDUCIARY
GUARDIANSHIP/CONSERVATORSHIP LAW
AND PRACTICE**

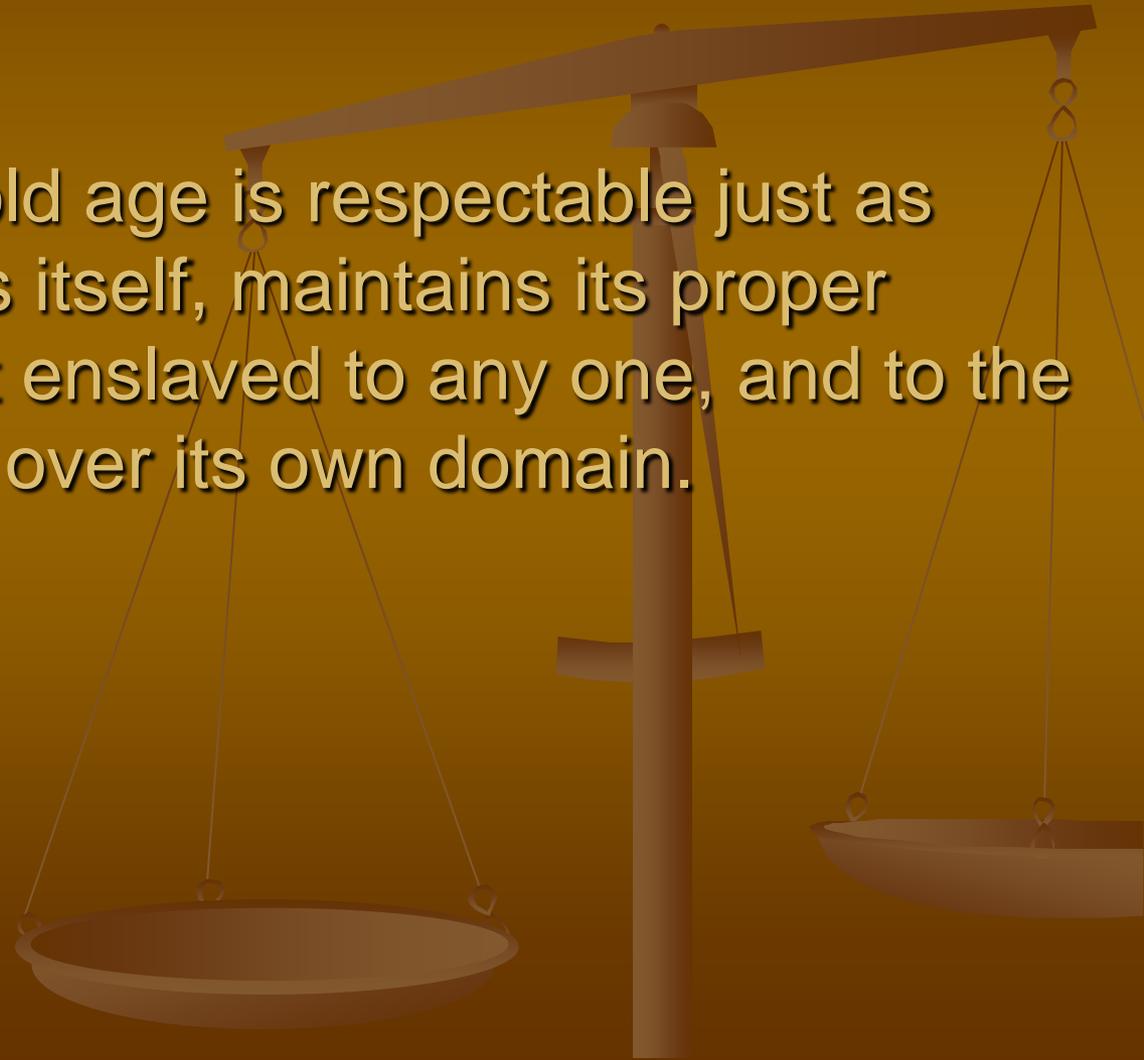
**Gary B. Strickland
Maricopa County Public Fiduciary**

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Cicero, *De Senectute*, xi

- The fact is that old age is respectable just as long as it asserts itself, maintains its proper rights, and is not enslaved to any one, and to the last breath rules over its own domain.



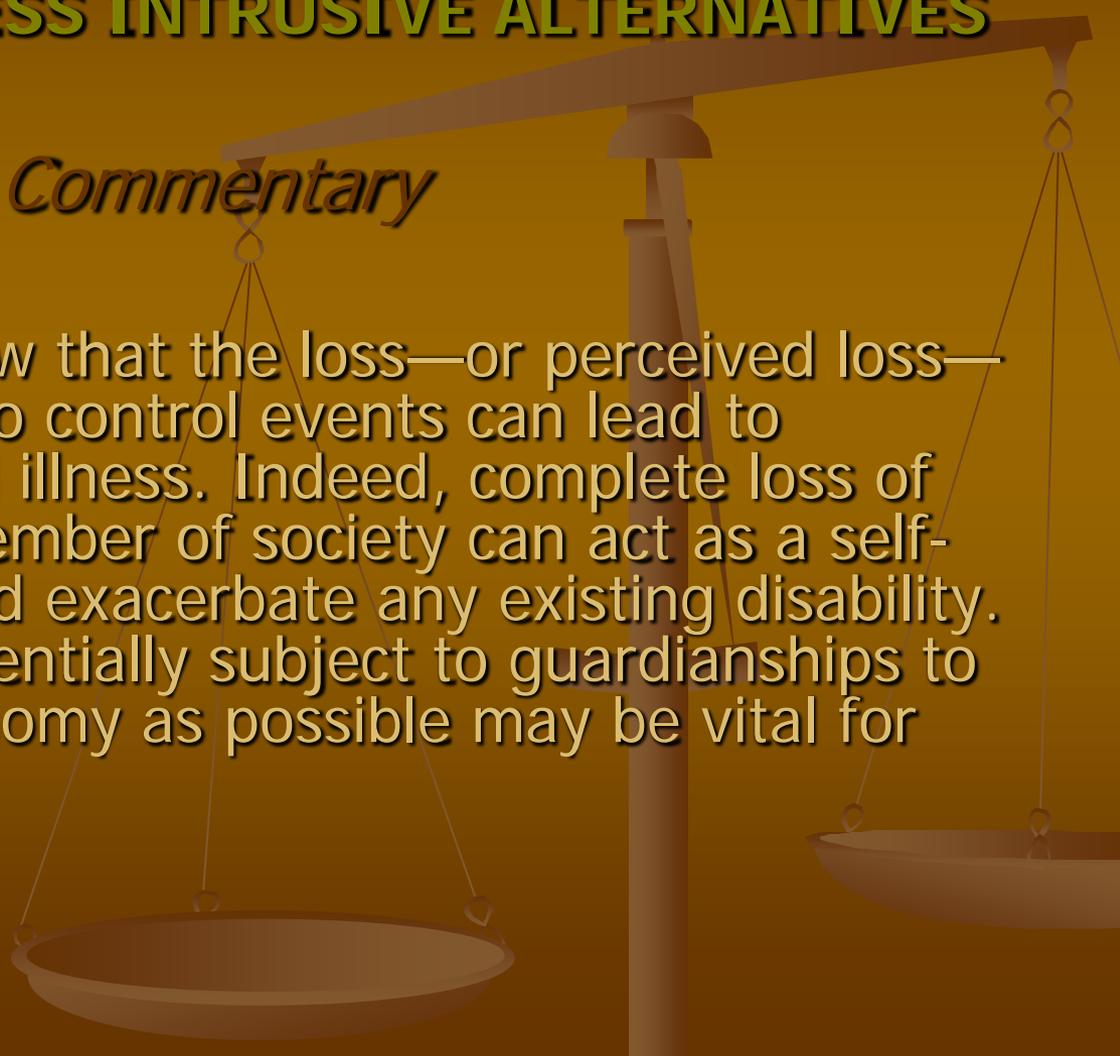
National Probate Court Standards

STANDARD 3.3.10 LESS INTRUSIVE ALTERNATIVES



■ *Commentary*

- Scientific studies show that the loss—or perceived loss—of a person's ability to control events can lead to physical or emotional illness. Indeed, complete loss of status as an adult member of society can act as a self-fulfilling prophecy and exacerbate any existing disability. Allowing persons potentially subject to guardianships to retain as much autonomy as possible may be vital for their mental health.





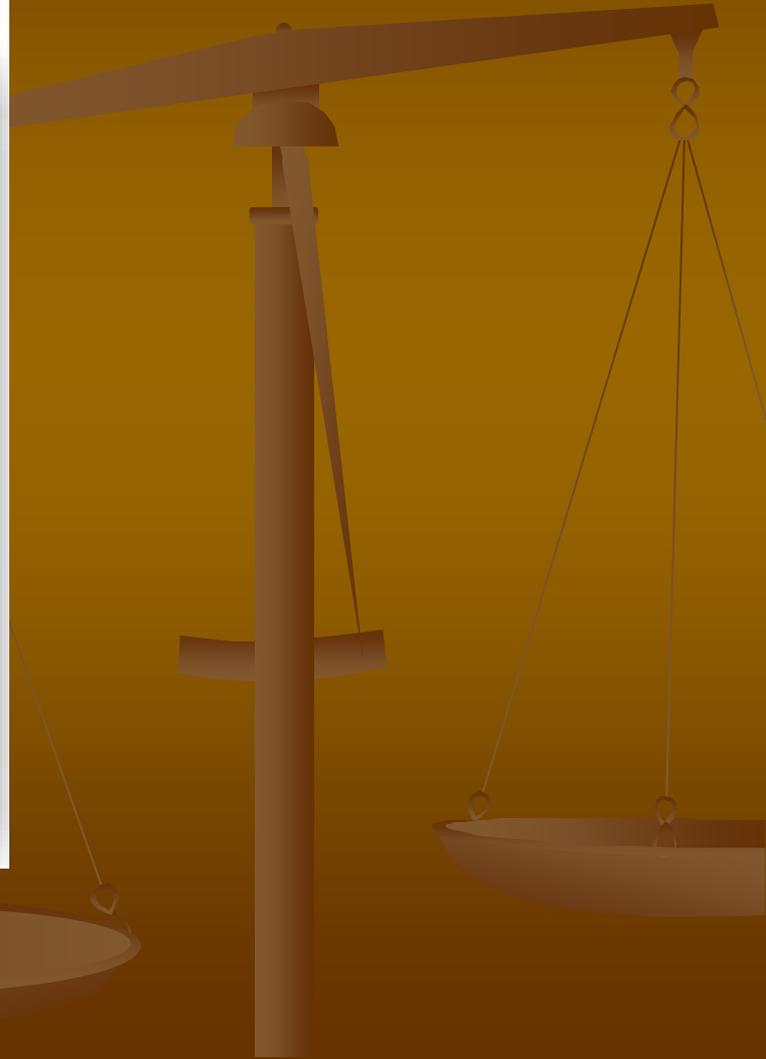
Source of Law

- U.S. and Arizona Constitutions
- A.R.S. Title 14
- A.R.S. Title 36
- National Probate Court Standards
- Administrative Code of Judicial Administration (A.C.J.A.)
- Local Rules of Practice for the Superior Courts
- Case Law

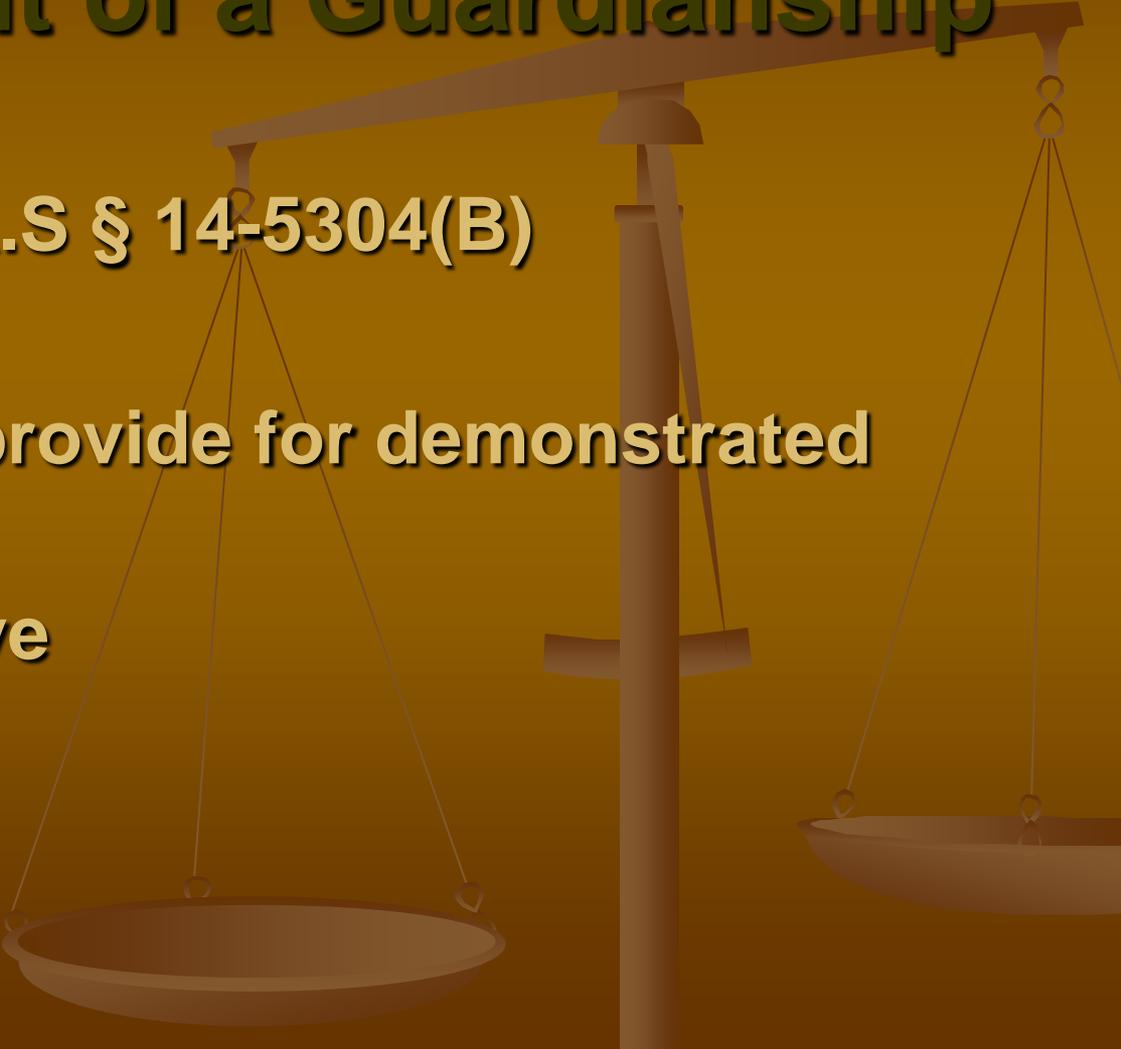


Types of Guardianships

- Minors
- Adults
- Testamentary
- Emergency
- Temporary
- Limited
- Permanent



Requirements for Establishment of a Guardianship

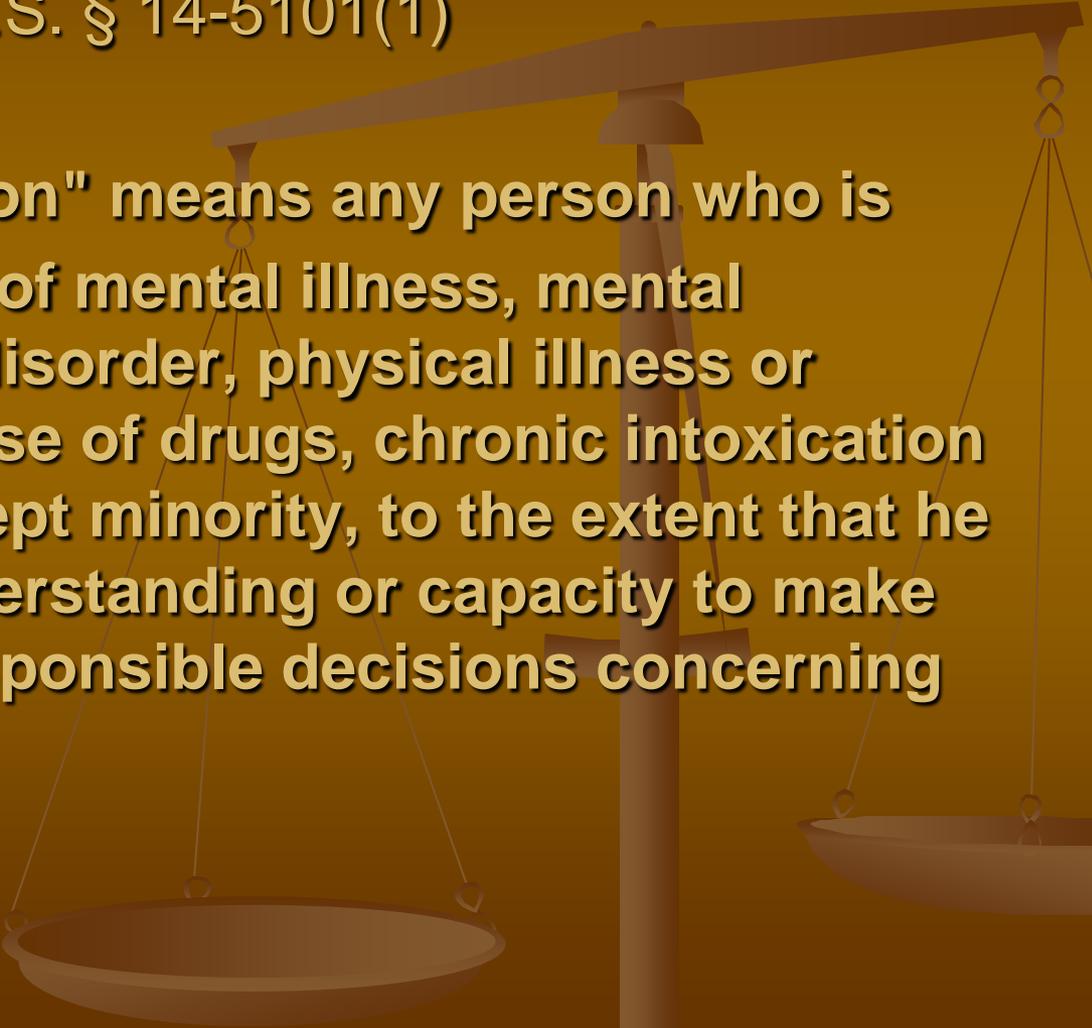


- **A.R.S § 14-5304(B)**
 - **Necessary to provide for demonstrated need**
 - **Least restrictive**
 - **Incapacity**

The Sine Qua Non

A.R.S. § 14-5101(1)

"Incapacitated person" means any person who is impaired by reason of mental illness, mental deficiency, mental disorder, physical illness or disability, chronic use of drugs, chronic intoxication or other cause, except minority, to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person.



Priorities in the Appointment

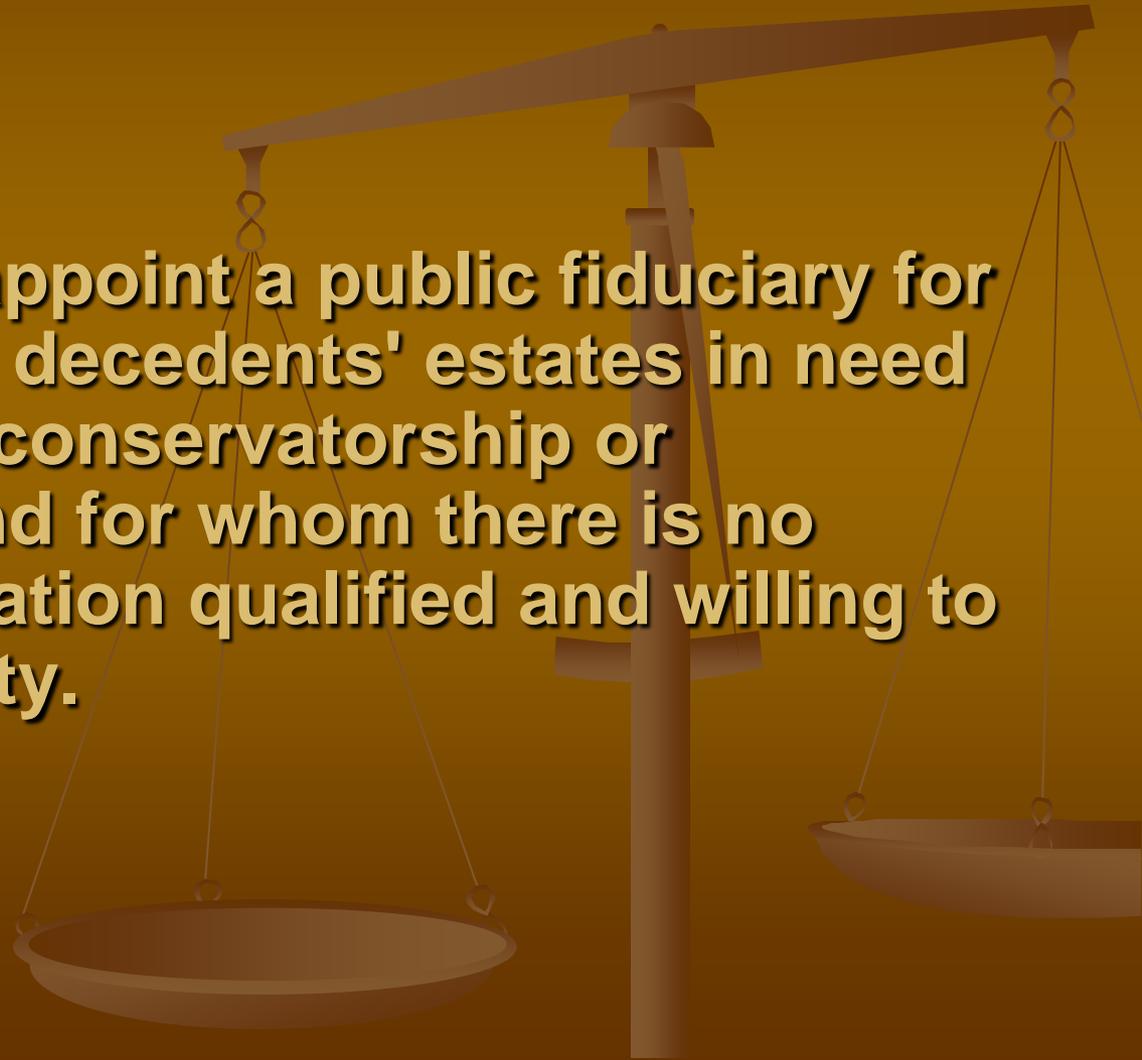
A.R.S. § 14-5311 :

- A. Any qualified person may be appointed guardian of an incapacitated person, subject to the requirements of section 14-5106.
- B. The court may consider the following persons for appointment as guardian in the following order:
 - A guardian or conservator of the person
 - An individual or corporation nominated by the incapacitated person
 - The person nominated in the incapacitated person's most recent durable power of attorney
 - The spouse of the incapacitated person
 - An adult child of the incapacitated person
 - A parent of the incapacitated person, including a person nominated by will or other writing signed by a deceased parent
 - Any relative of the incapacitated person with whom he has resided for more than six months
 - The nominee of a person who is caring for or paying benefits to the incapacitated person.
 - The department of veterans' services.
 - A fiduciary, guardian or conservator.
 - If of equal priority, the court shall select the one best qualified to serve.
 - For good cause, the court may disregard prioritization.

Priorities in the Appointment -A Public Fiduciary as Last Resort-

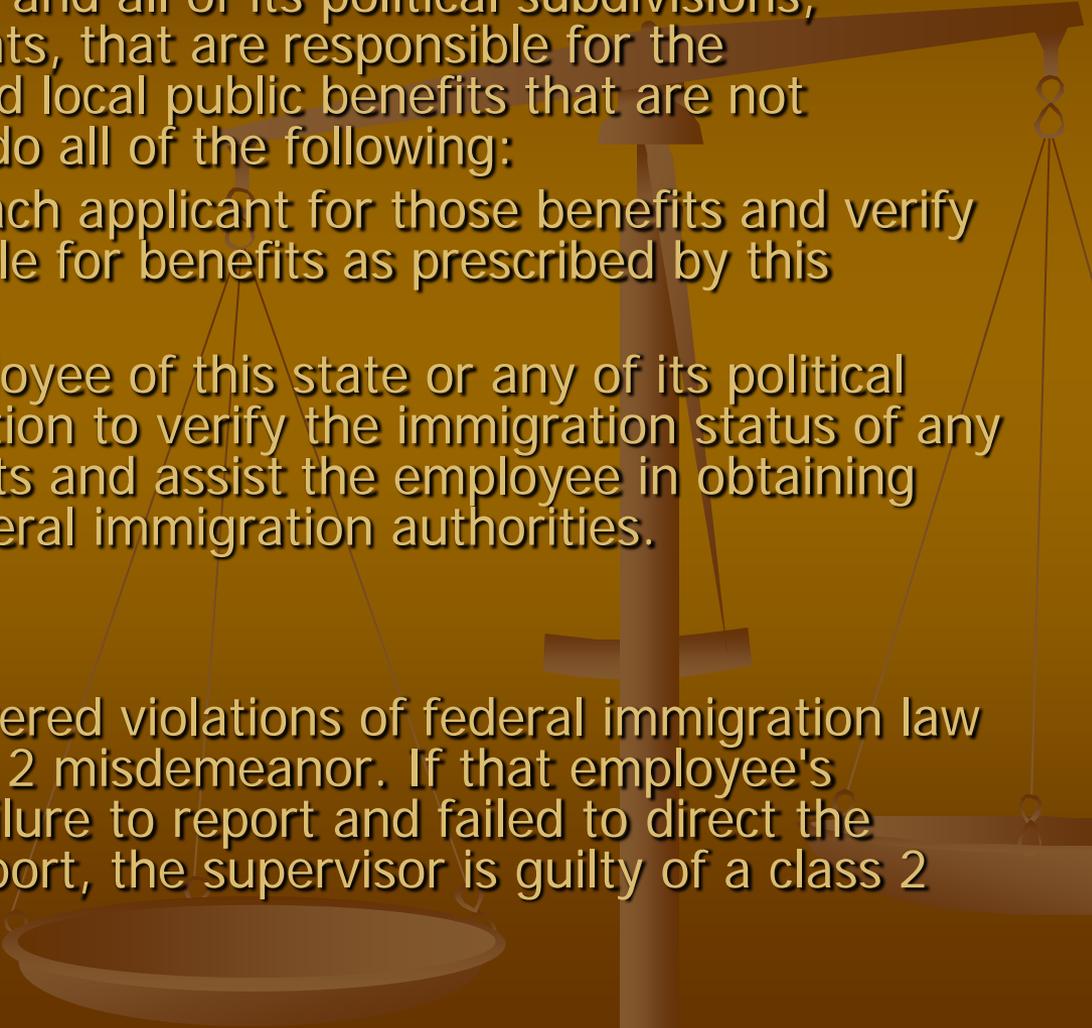
A.R.S. § 14-5602 :

A. The court shall appoint a public fiduciary for those persons or decedents' estates in need of guardianship, conservatorship or administration and for whom there is no person or corporation qualified and willing to act in that capacity.



A.R.S. § 46-140.01

-Legal Resident Status-

- A. An agency of this state and all of its political subdivisions, including local governments, that are responsible for the administration of state and local public benefits that are not federally mandated shall do all of the following:
 - 1. Verify the identity of each applicant for those benefits and verify that the applicant is eligible for benefits as prescribed by this section.
 - 2. Provide any other employee of this state or any of its political subdivisions with information to verify the immigration status of any applicant for those benefits and assist the employee in obtaining that information from federal immigration authorities.
 - ...
 - B. Failure to report discovered violations of federal immigration law by an employee is a class 2 misdemeanor. If that employee's supervisor knew of the failure to report and failed to direct the employee to make the report, the supervisor is guilty of a class 2 misdemeanor.
- 

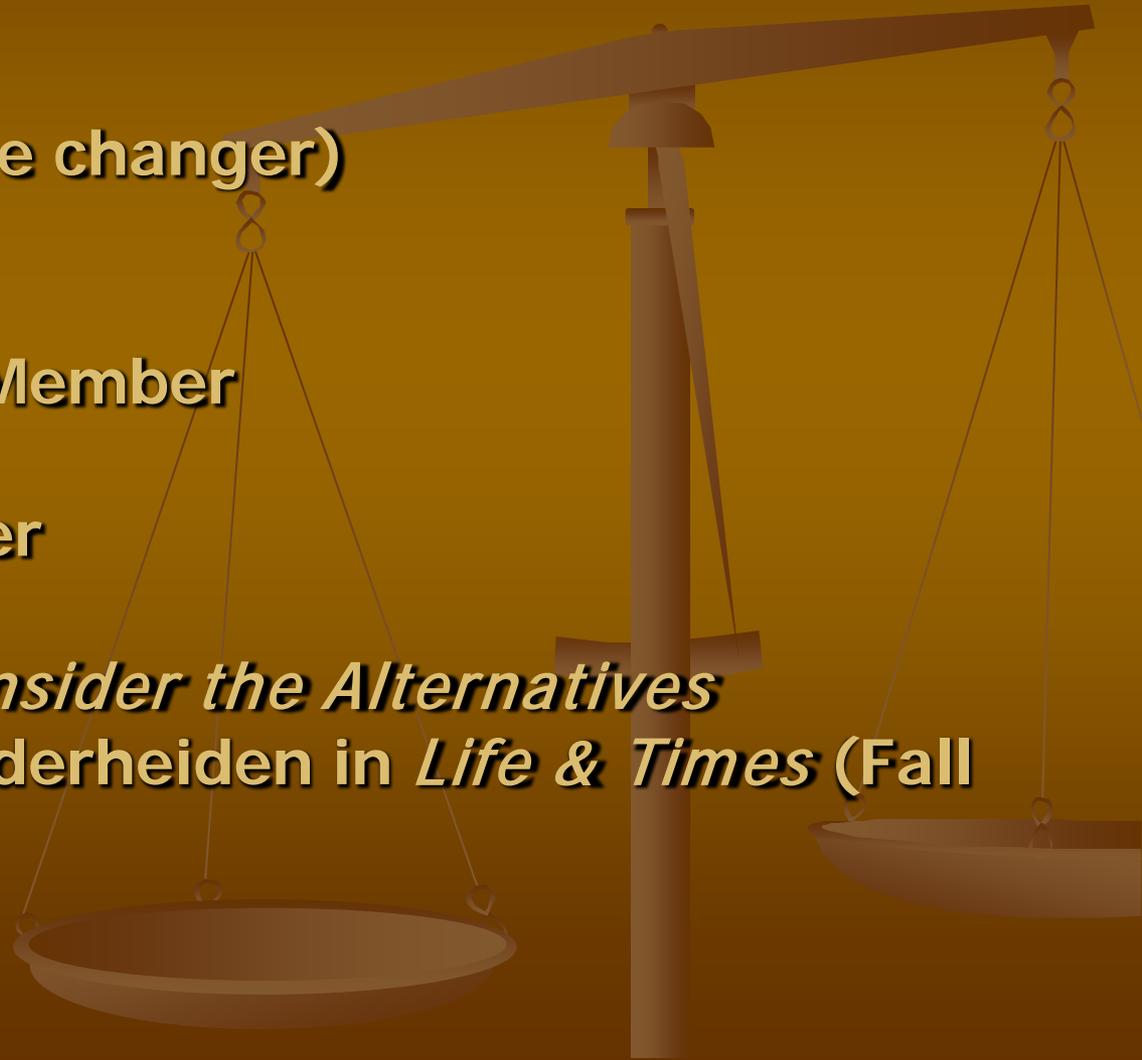


What a Guardian is Not

- Companion
- Therapist
- Reformer (life-style changer)
- Warden
- Savior
- Surrogate Family Member
- Caregiver
- Healthcare Provider

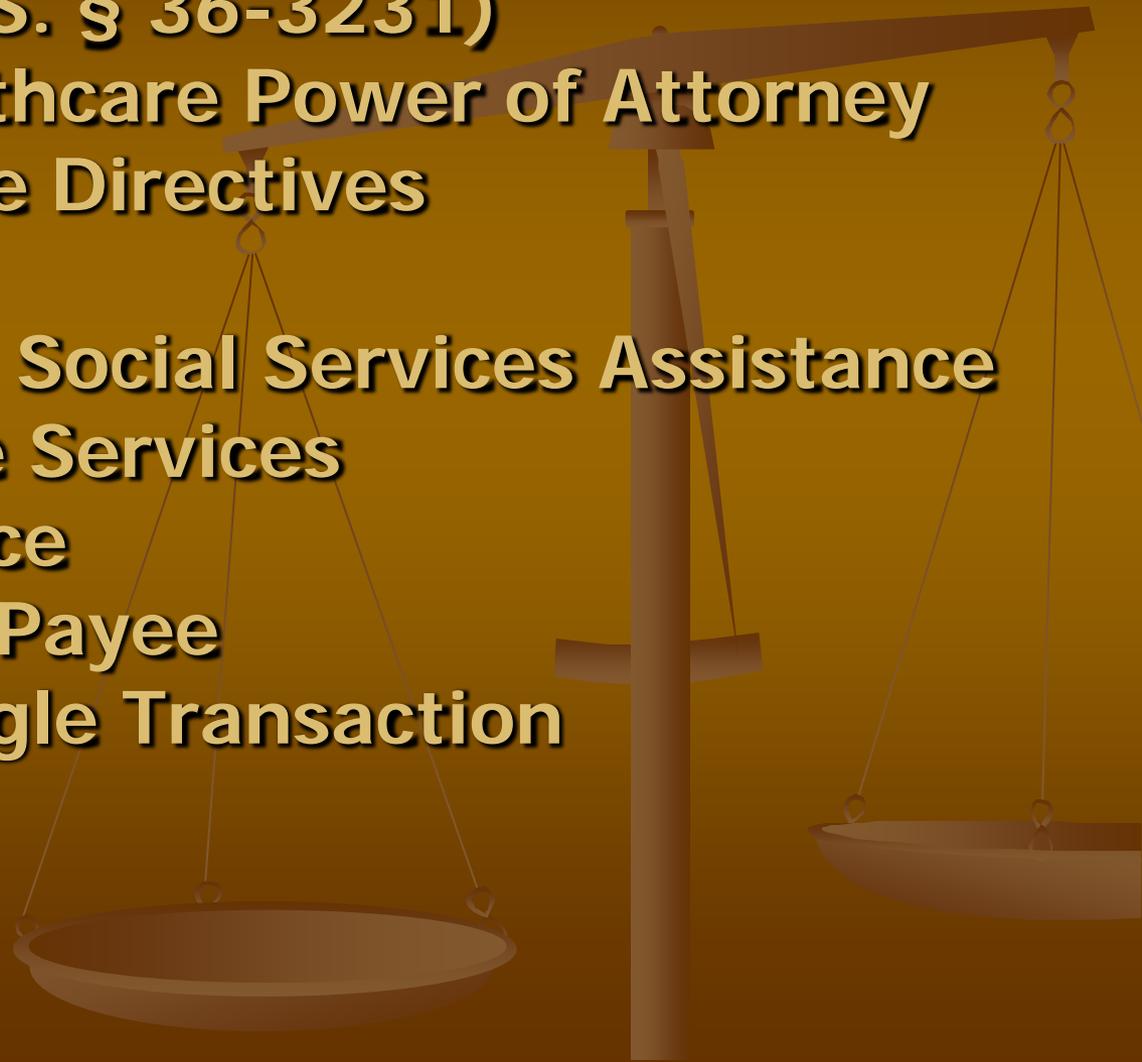
- *Guardianship Consider the Alternatives*

Richard T. Vanderheiden in *Life & Times* (Fall 2003)



Alternatives to a Guardianship

- **Surrogate (A.R.S. § 36-3231)**
- **Medical or Healthcare Power of Attorney**
- **Medical Advance Directives**
- **Living Will**
- **Community and Social Services Assistance**
- **Adult Protective Services**
- **Family Assistance**
- **Representative Payee**
- **Limited and Single Transaction Guardianship**

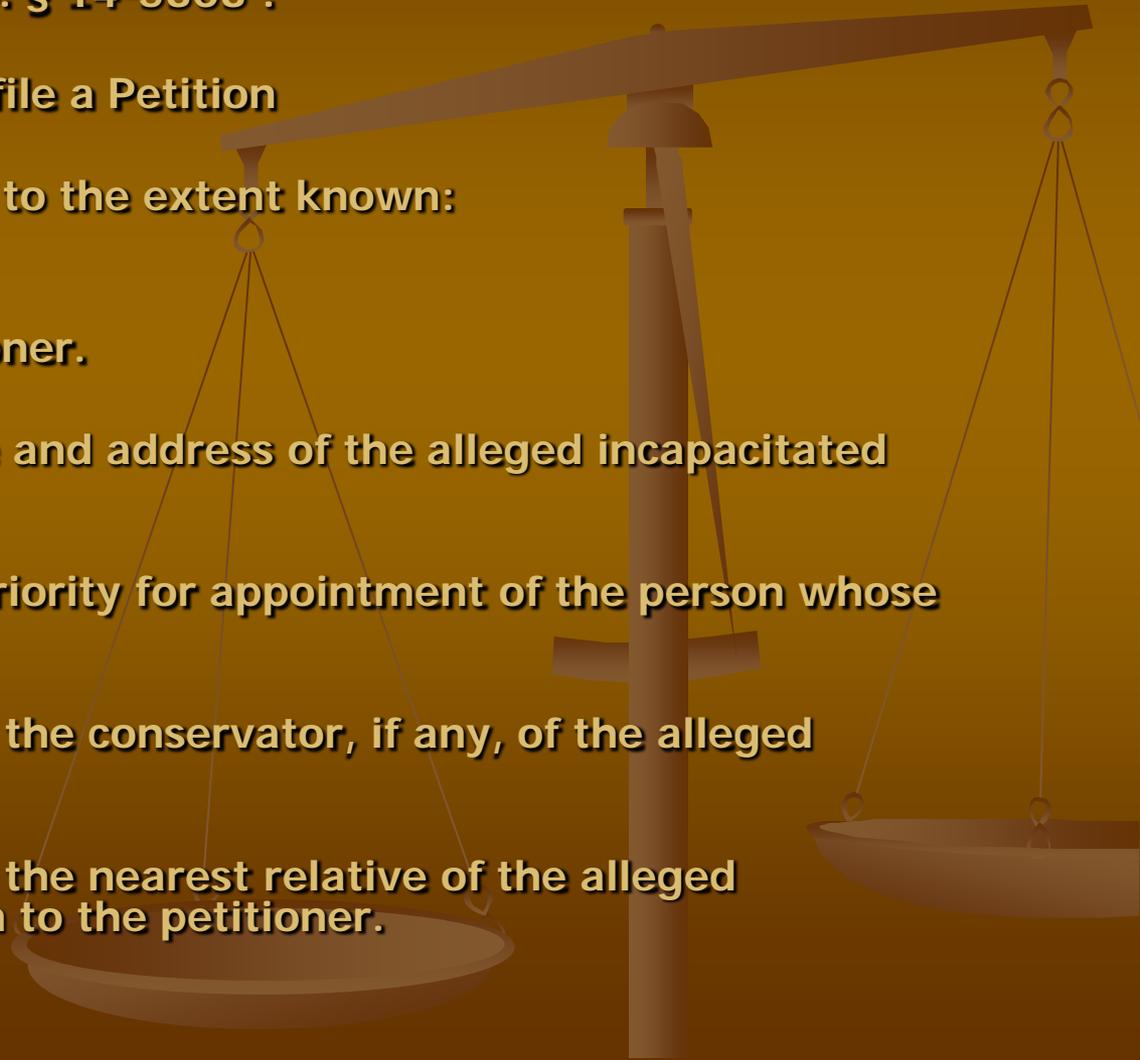




The Petition

A.R.S. § 14-5303 :

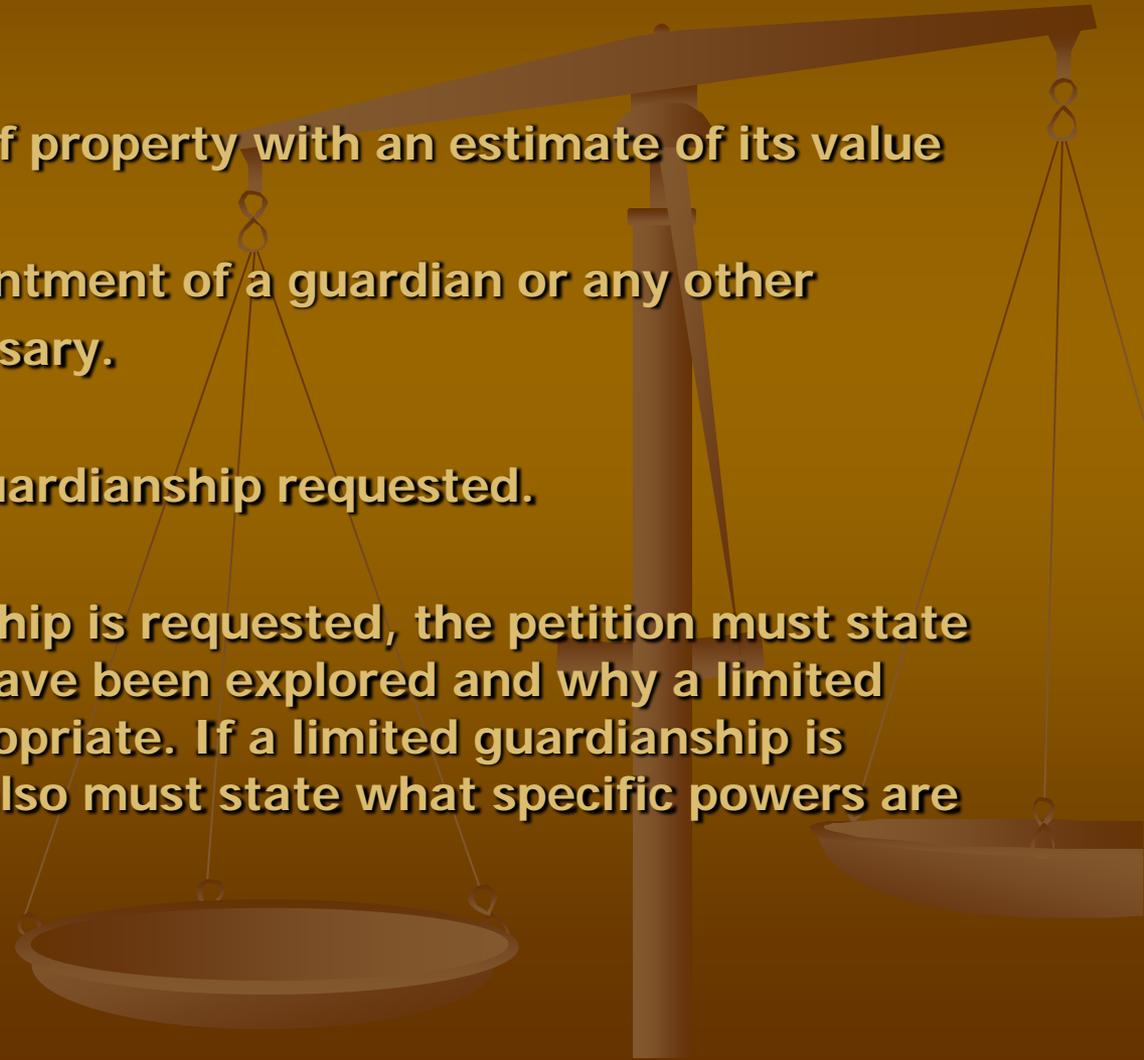
- Any interested person may file a Petition
- The Petition must set forth, to the extent known:
 - 1. The interest of the petitioner.
 - 2. The name, age, residence and address of the alleged incapacitated person.
 - 3. The name, address and priority for appointment of the person whose appointment is sought.
 - 4. The name and address of the conservator, if any, of the alleged incapacitated person.
 - 5. The name and address of the nearest relative of the alleged incapacitated person known to the petitioner.





The Petition Continued

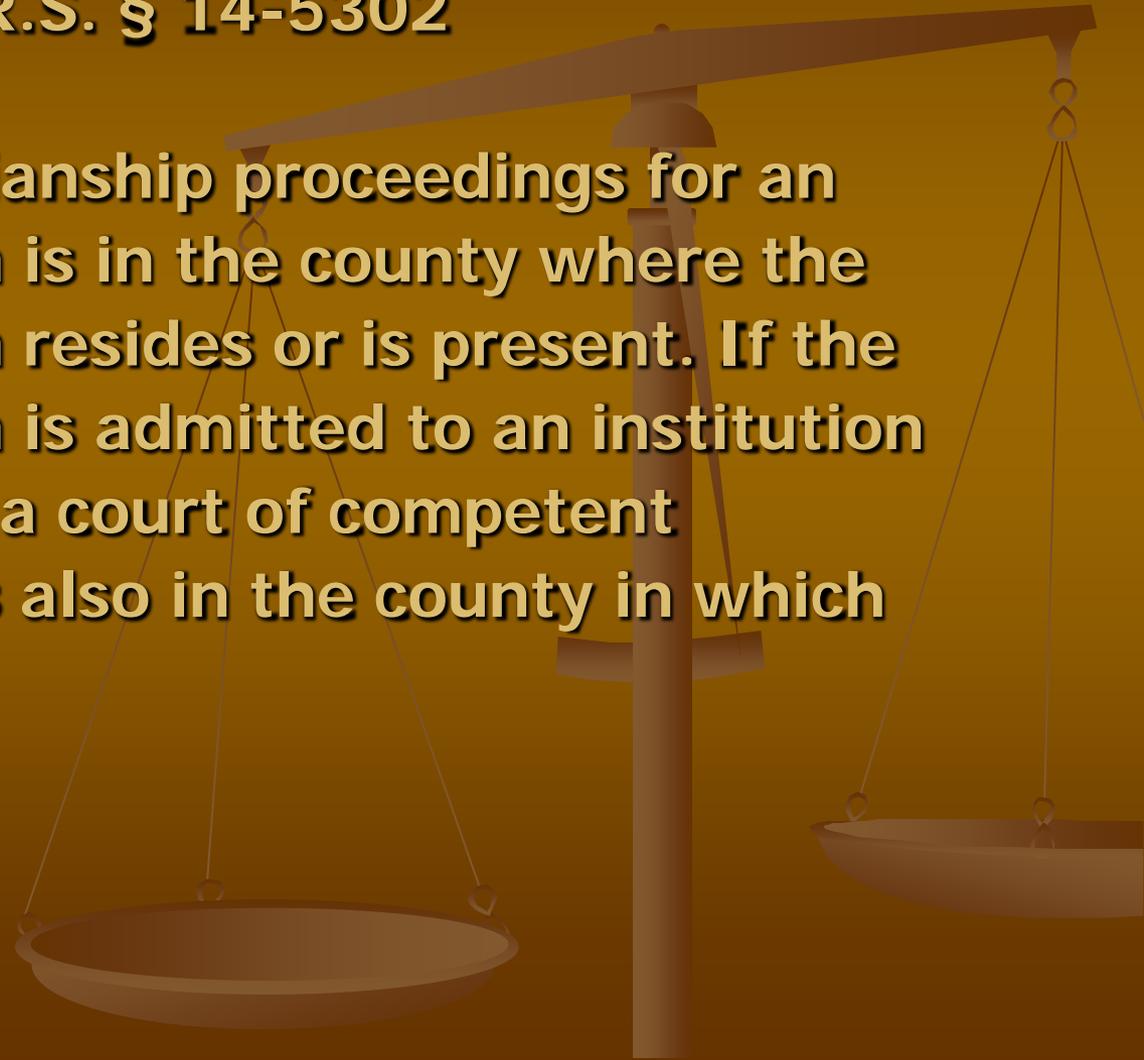
- 6. A general statement of property with an estimate of its value
- 7. The reason why appointment of a guardian or any other protective order is necessary.
- 8. Identify the type of guardianship requested.
- 9. If a general guardianship is requested, the petition must state that other alternatives have been explored and why a limited guardianship is not appropriate. If a limited guardianship is requested, the petition also must state what specific powers are requested.



Venue

A.R.S. § 14-5302

The venue for guardianship proceedings for an incapacitated person is in the county where the incapacitated person resides or is present. If the incapacitated person is admitted to an institution pursuant to order of a court of competent jurisdiction, venue is also in the county in which that court sits.

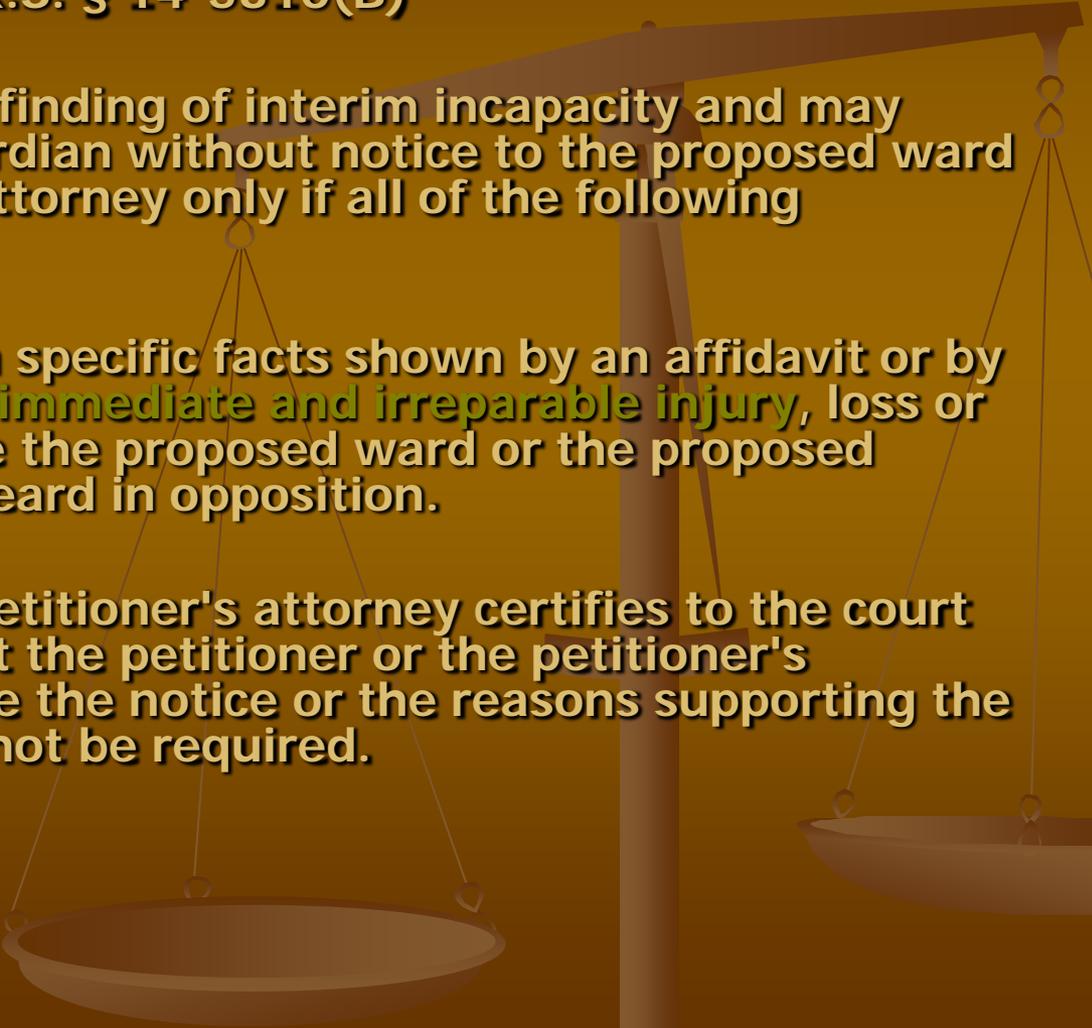


Notice Issues

- **Fourteen (14) days prior to Hearing to the persons designated in A.R.S. § 14-5309**
- **Method and time of notice; A.R.S. § 14-1401**
- **Exceptions to Notice**
 - **Waiver; A.R.S. 14-1402**
 - **Emergency Petition A.R.S. § 14-5310**
 - **Must allege immediate and irreparable injury; A.R.S. § 14-5310(B)**

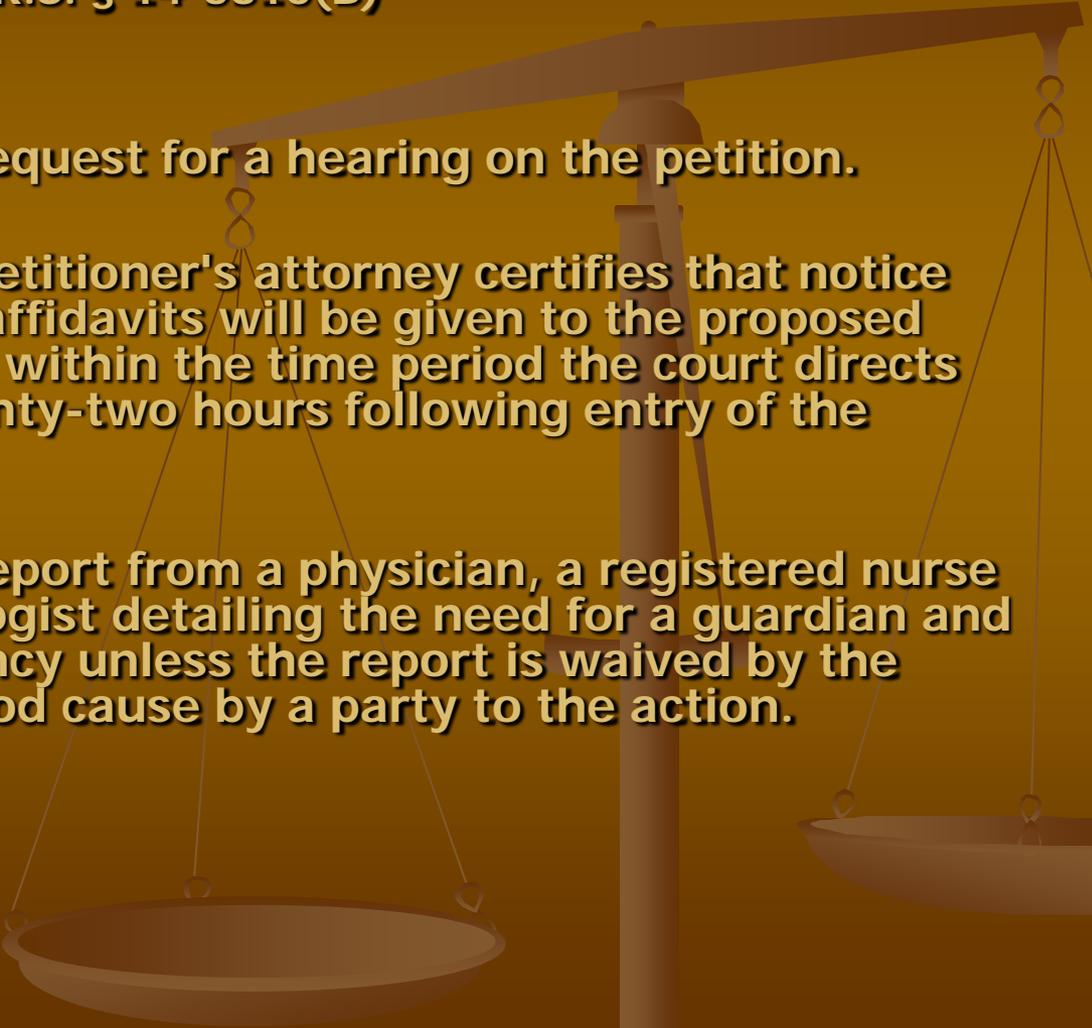
Waiver of Notice for Temporary Guardianship Appointment

A.R.S. § 14-5310(B)

- B. The court may enter a finding of interim incapacity and may appoint a temporary guardian without notice to the proposed ward or the proposed ward's attorney only if all of the following conditions are met:
 - 1. It clearly appears from specific facts shown by an affidavit or by the verified petition that **immediate and irreparable injury**, loss or damage will result before the proposed ward or the proposed ward'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 petitioner's attorney has made to give the notice or the reasons supporting the claim that notice should not be required.
- 

Waiver of Notice for Temporary Guardianship Appointment Continued

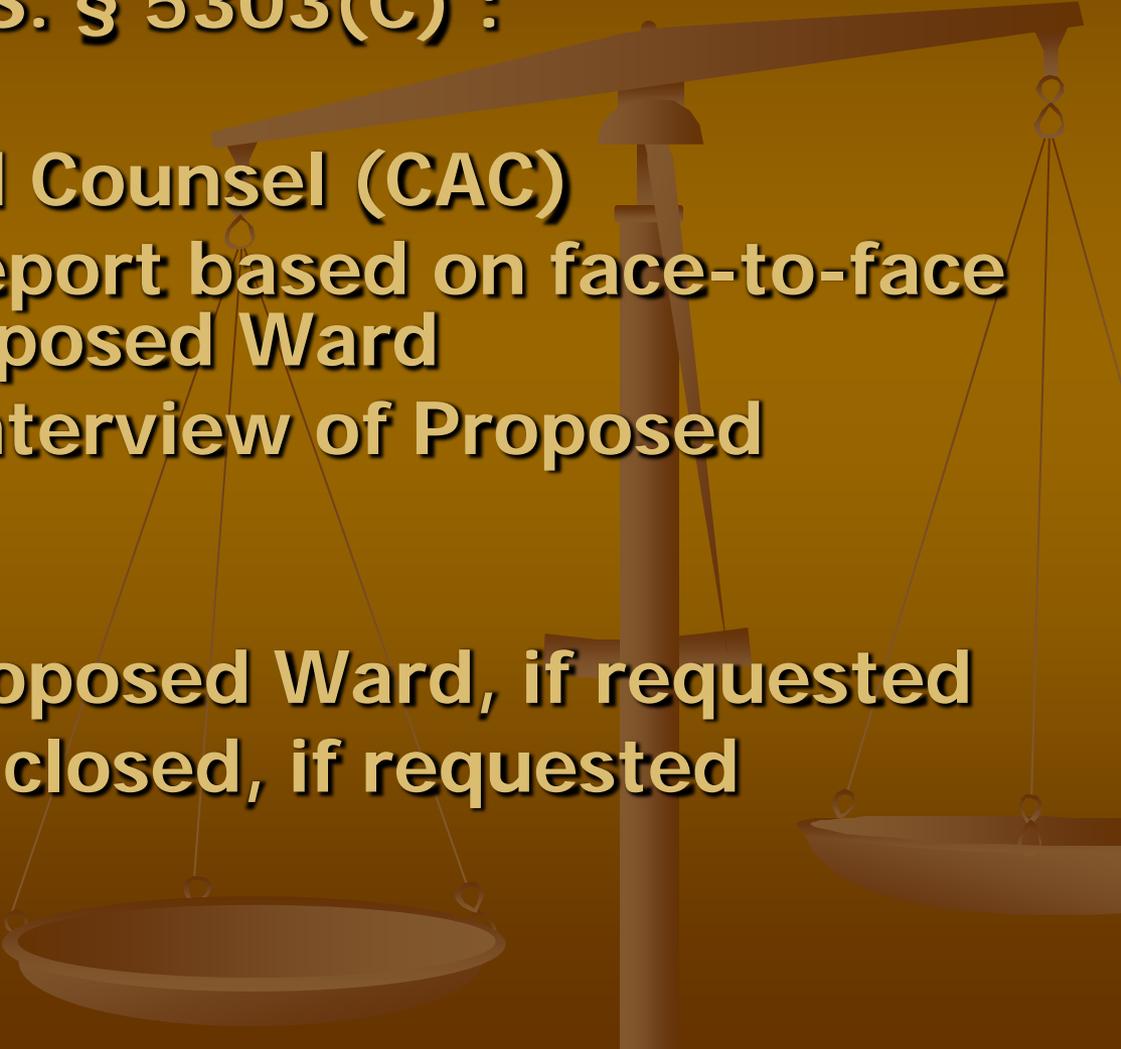
A.R.S. § 14-5310(B)

- 3. The petitioner files a request for a hearing on the petition.
 - 4. The petitioner or the petitioner's attorney certifies that notice and all filed reports and affidavits will be given to the proposed ward by personal service within the time period the court directs but not in excess of seventy-two hours following entry of the order.
 - 5. The petitioner files a report from a physician, a registered nurse practitioner or a psychologist detailing the need for a guardian and the basis for the emergency unless the report is waived by the court on a showing of good cause by a party to the action.
- 

The Hearing

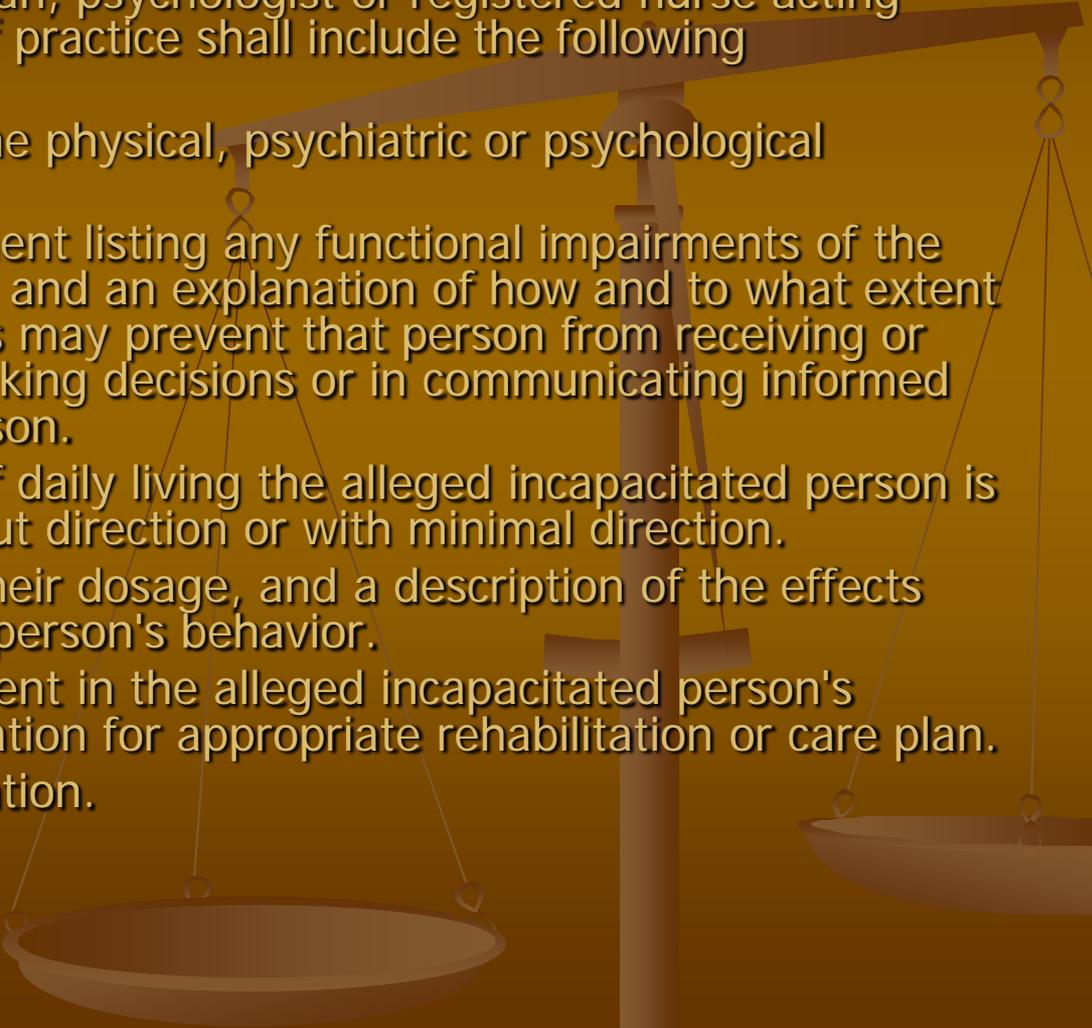
Evidence Required in Support of the Petition

A.R.S. § 5303(C) :

- Court-appointed Counsel (CAC)
 - Investigative Report based on face-to-face interview of Proposed Ward
 - Investigator's interview of Proposed Guardian
 - Medical Report
 - Testimony of Proposed Ward, if requested
 - Hearing may be closed, if requested
- 

Evidence Required in Support of the Petition

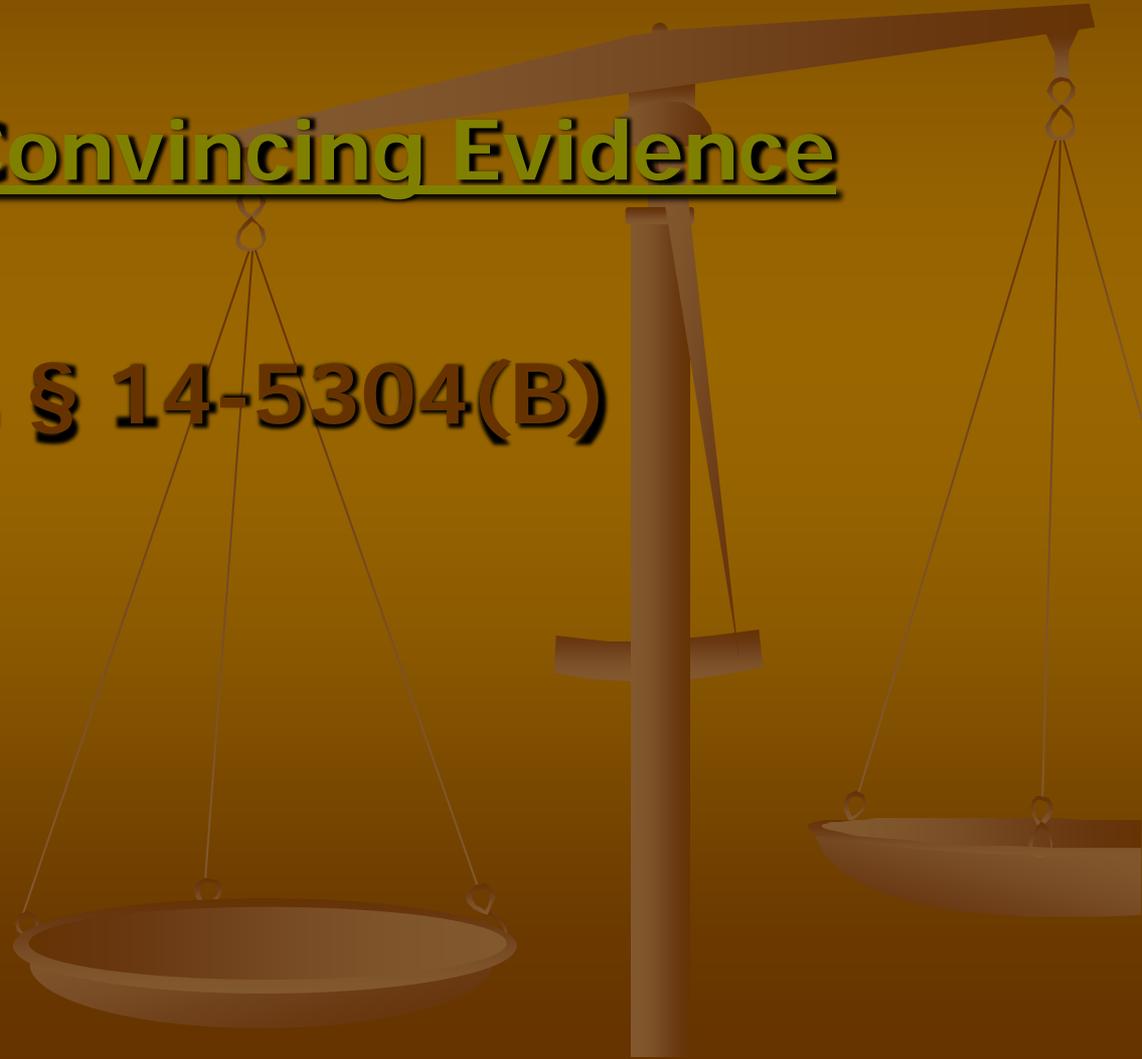
-The Medical Report-

- D. A report filed by a physician, psychologist or registered nurse acting within that person's scope of practice shall include the following information:
 - 1. A specific description of the physical, psychiatric or psychological diagnosis of the person.
 - 2. A comprehensive assessment listing any functional impairments of the alleged incapacitated person and an explanation of how and to what extent these functional impairments may prevent that person from receiving or evaluating information in making decisions or in communicating informed decisions regarding that person.
 - 3. An analysis of the tasks of daily living the alleged incapacitated person is capable of performing without direction or with minimal direction.
 - 4. A list of all medications, their dosage, and a description of the effects each medication has on the person's behavior.
 - 5. A prognosis for improvement in the alleged incapacitated person's condition and a recommendation for appropriate rehabilitation or care plan.
 - 6. Other appropriate information.
- 

The Hearing Standard of Proof

Clear and Convincing Evidence

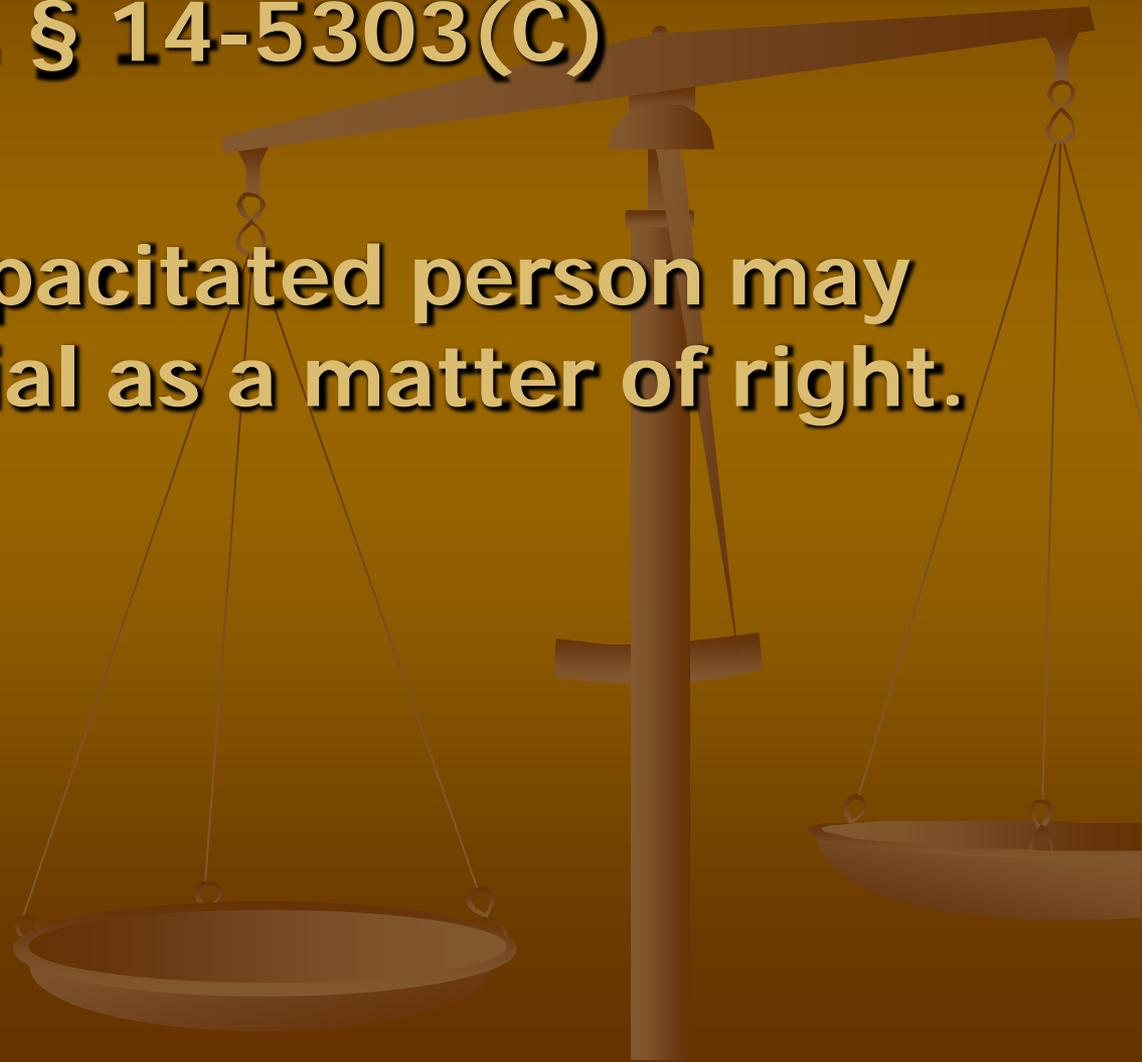
A.R.S. § 14-5304(B)



Trial by Jury

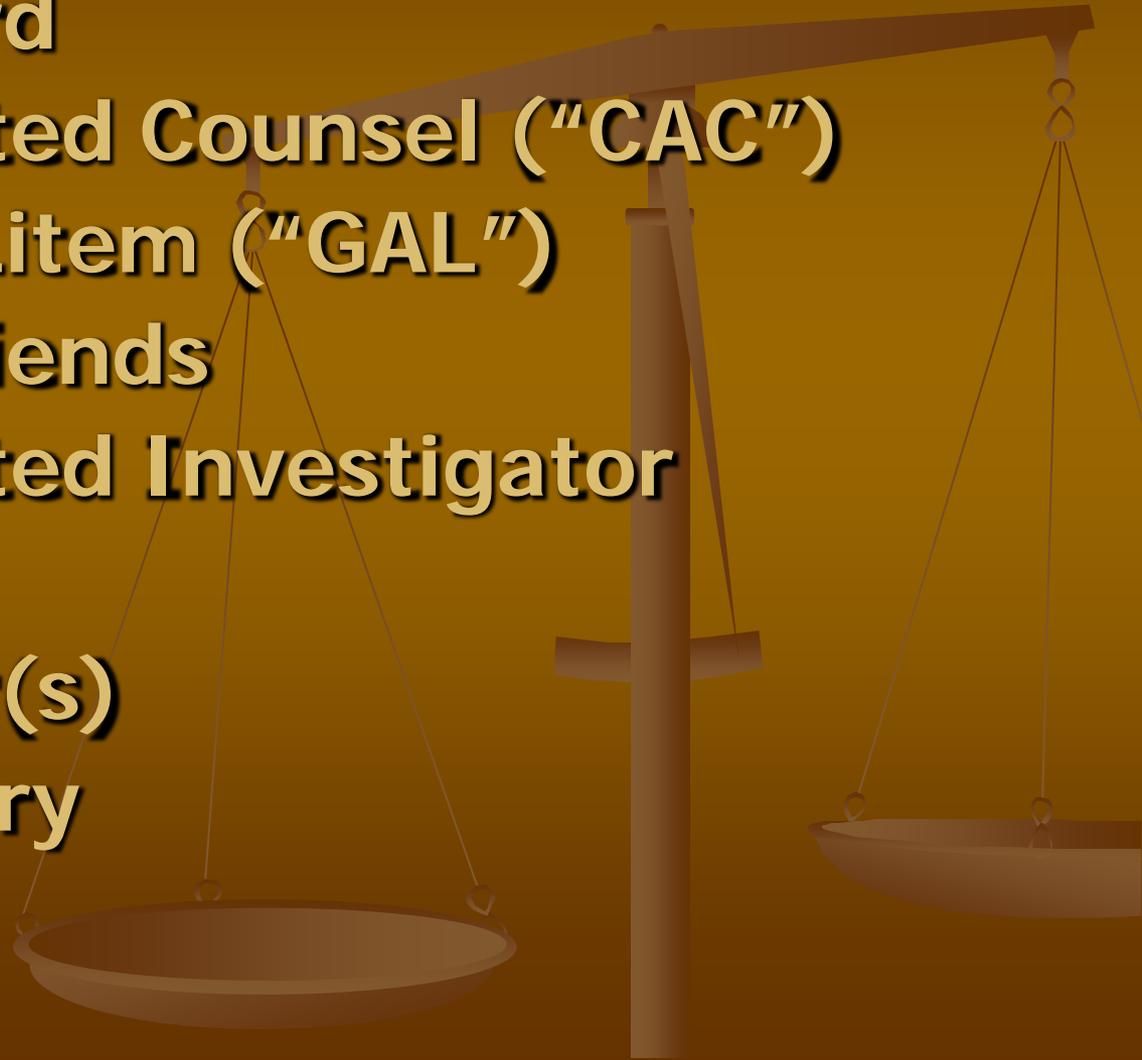
A.R.S. § 14-5303(C)

**An alleged incapacitated person may
have a jury trial as a matter of right.**



The Hearing Participants

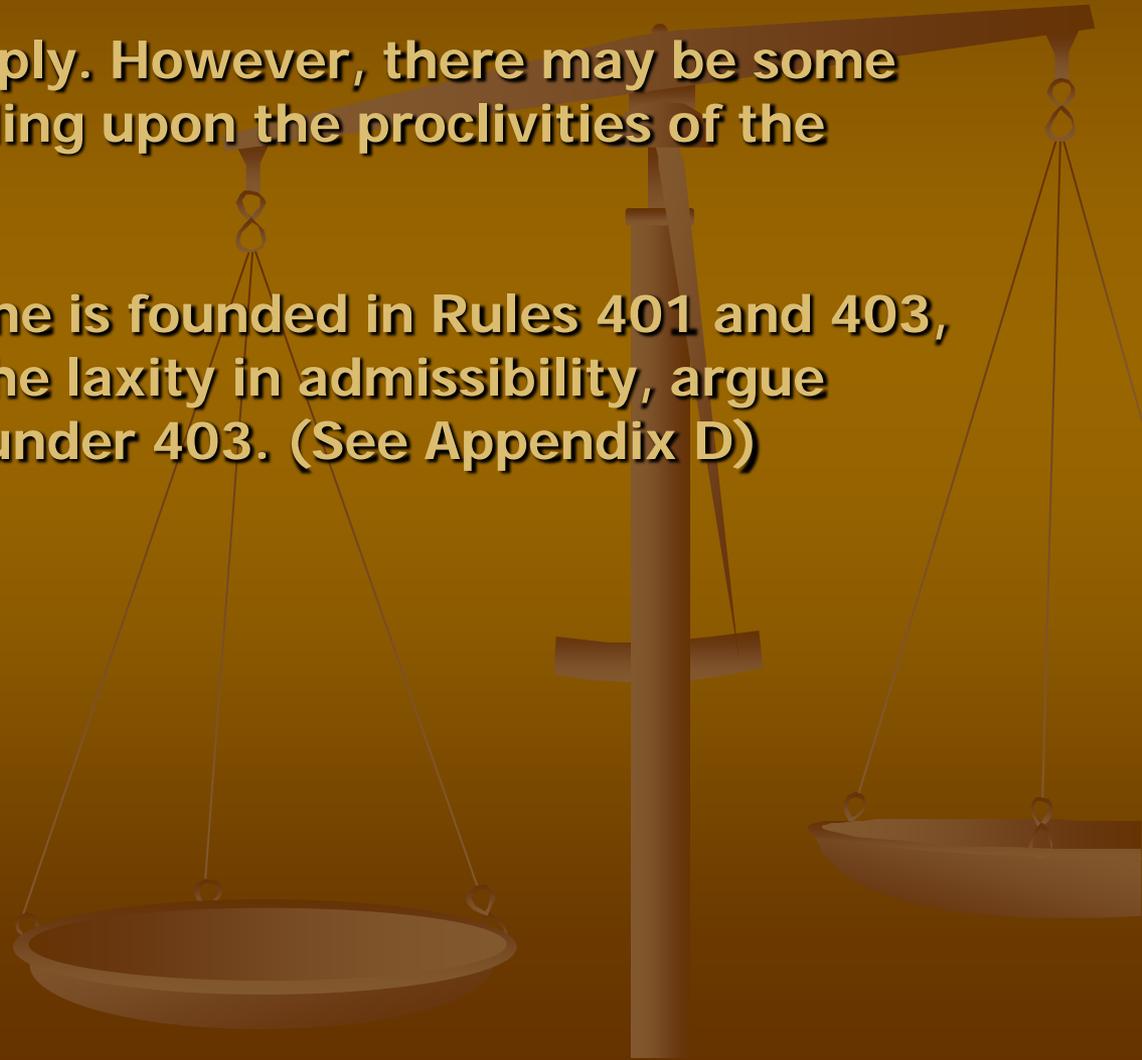
- **Proposed Ward**
- **Court-Appointed Counsel ("CAC")**
- **Guardian Ad Litem ("GAL")**
- **Family and Friends**
- **Court-Appointed Investigator**
- **Physician(s)**
- **Social Worker(s)**
- **Public Fiduciary**



The Hearing: Evidentiary Considerations

The Rules of Evidence apply. However, there may be some laxity in Probate, depending upon the proclivities of the Judge/Commissioner.

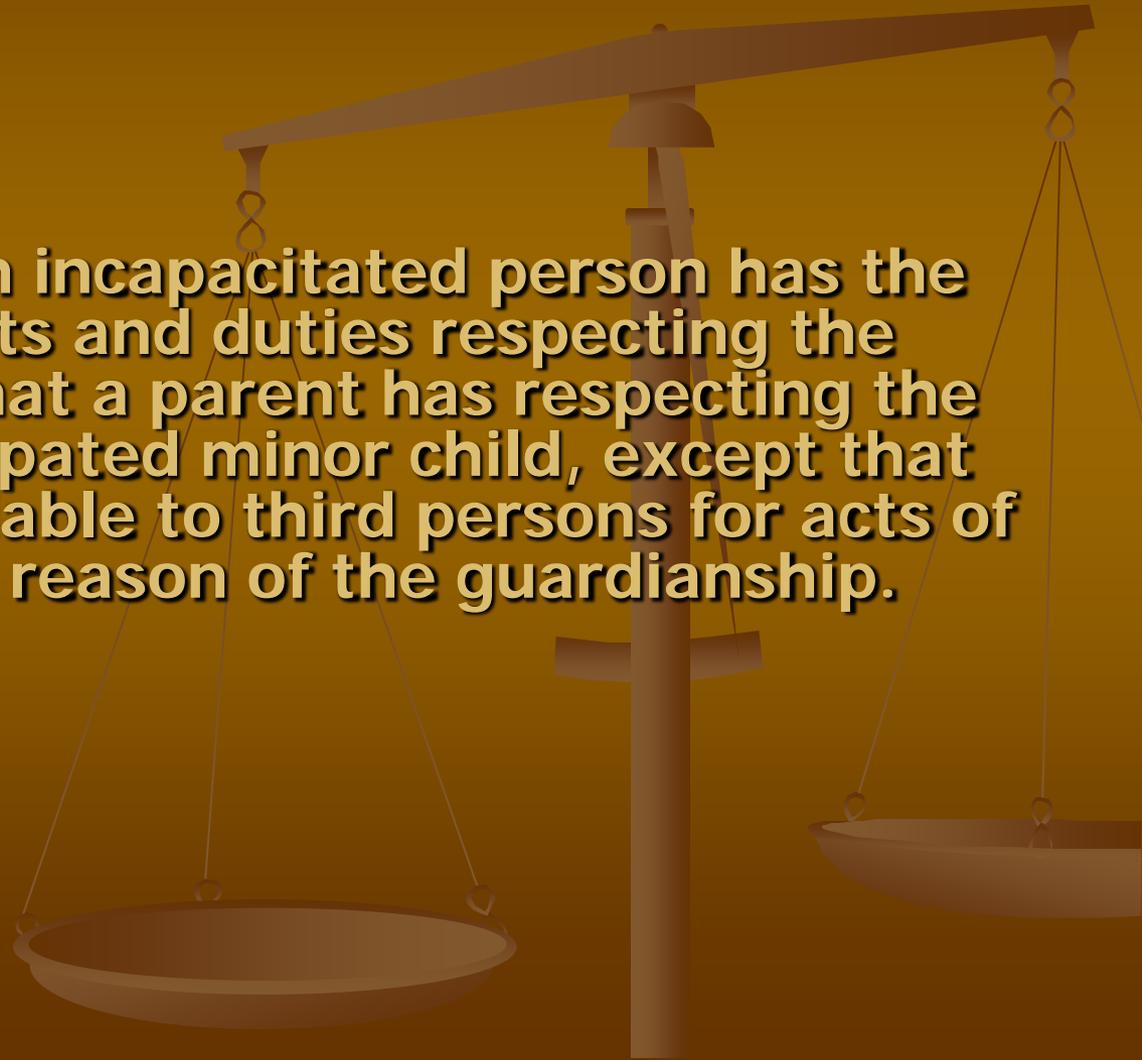
As always, the cornerstone is founded in Rules 401 and 403, Ariz.R.Evid. Regardless the laxity in admissibility, argue diminishment in weight under 403. (See Appendix D)



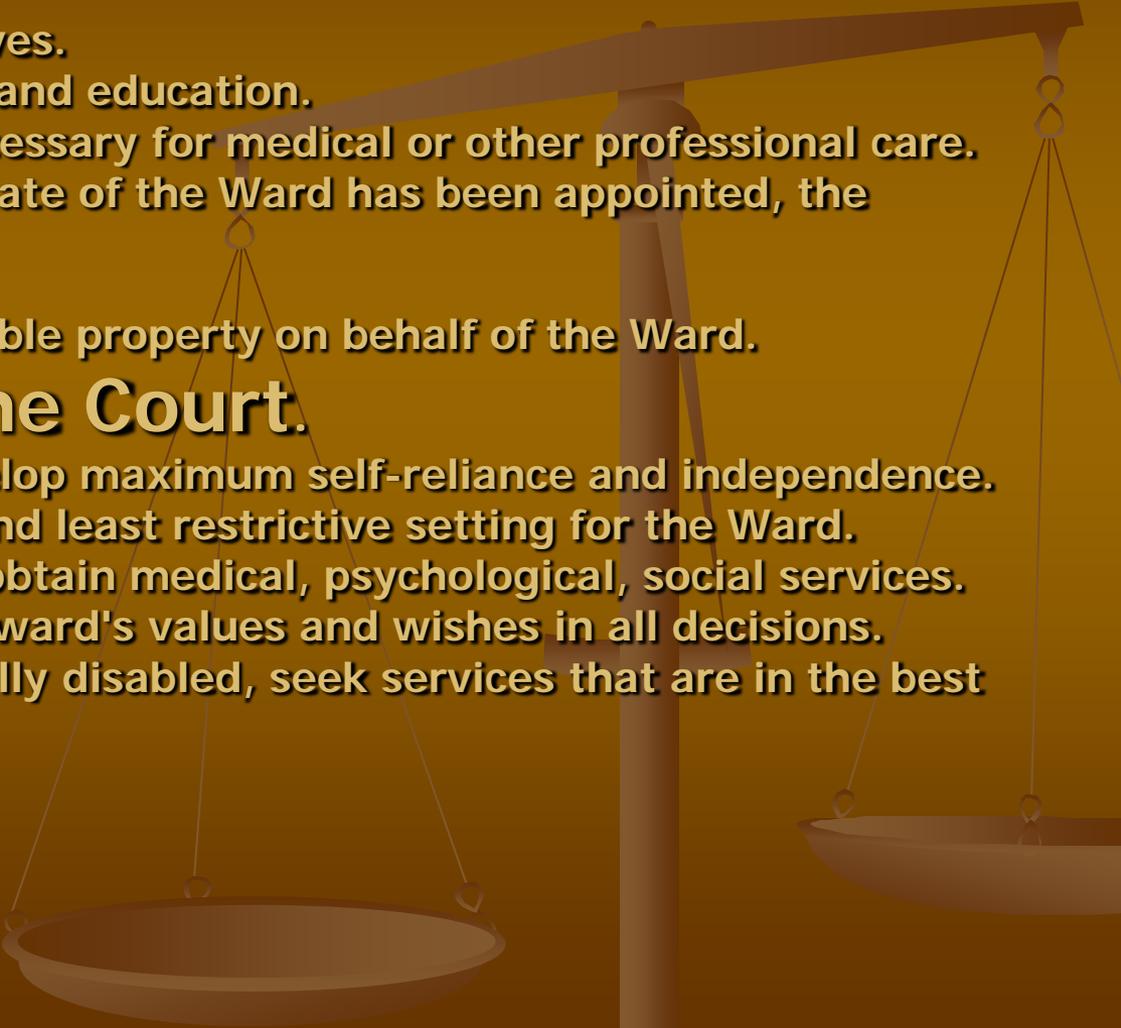
Guardianship Administration Duties and Responsibilities

A.R.S. § 5312 :

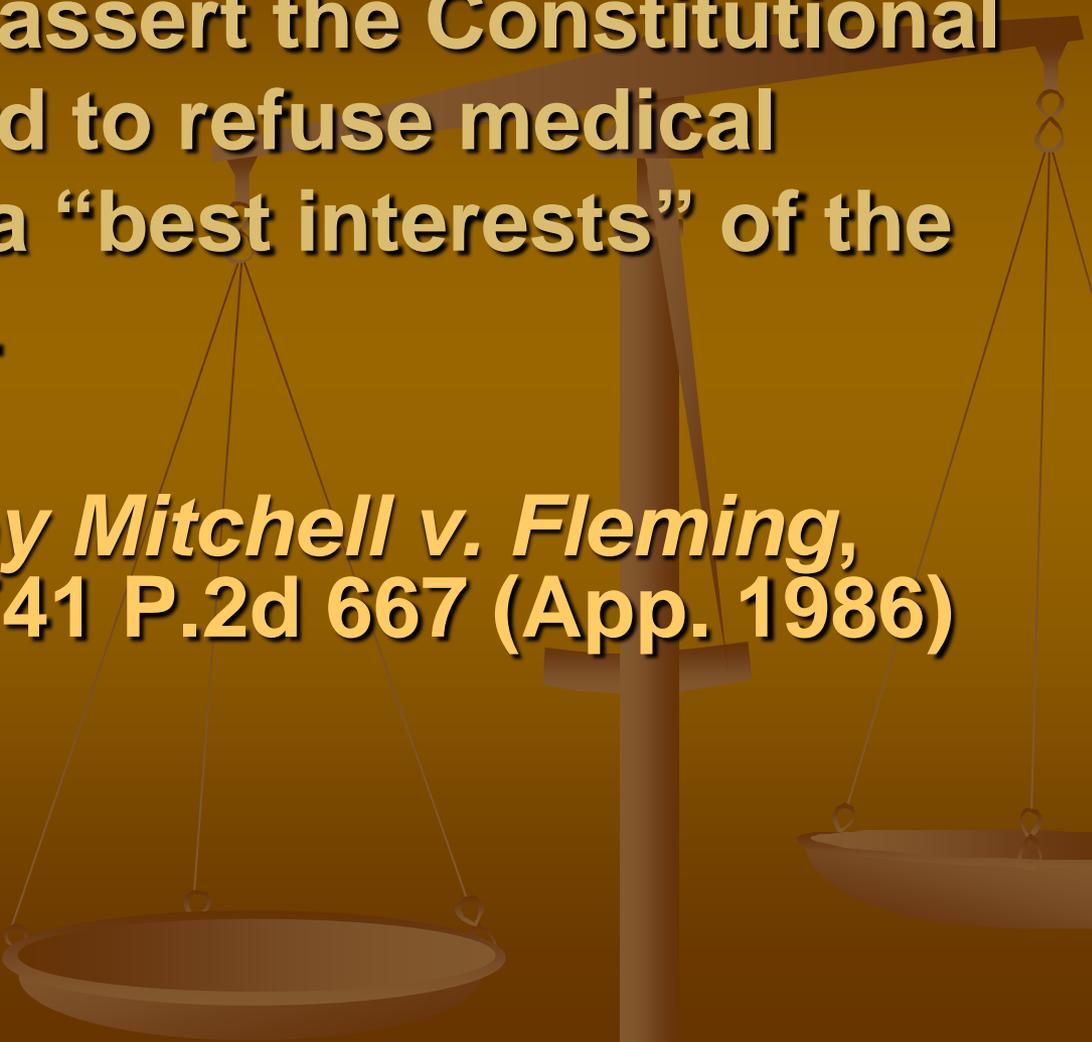
A. A guardian of an incapacitated person has the same powers, rights and duties respecting the guardian's ward that a parent has respecting the parent's unemancipated minor child, except that a guardian is not liable to third persons for acts of the ward solely by reason of the guardianship.



Guardianship Administration Duties and Responsibilities - Continued

- Establish where the Ward lives.
 - Arrange for Ward's training and education.
 - Give consents approvals necessary for medical or other professional care.
 - If no conservator for the estate of the Ward has been appointed, the Guardian may:
 - (a) obtain public benefits.
 - (b) receive money and tangible property on behalf of the Ward.
 - **File reports to the Court.**
 - Encourage the Ward to develop maximum self-reliance and independence.
 - Find the most appropriate and least restrictive setting for the Ward.
 - Make reasonable efforts to obtain medical, psychological, social services.
 - Take into consideration the ward's values and wishes in all decisions.
 - If the ward is developmentally disabled, seek services that are in the best interest of the Ward
- 

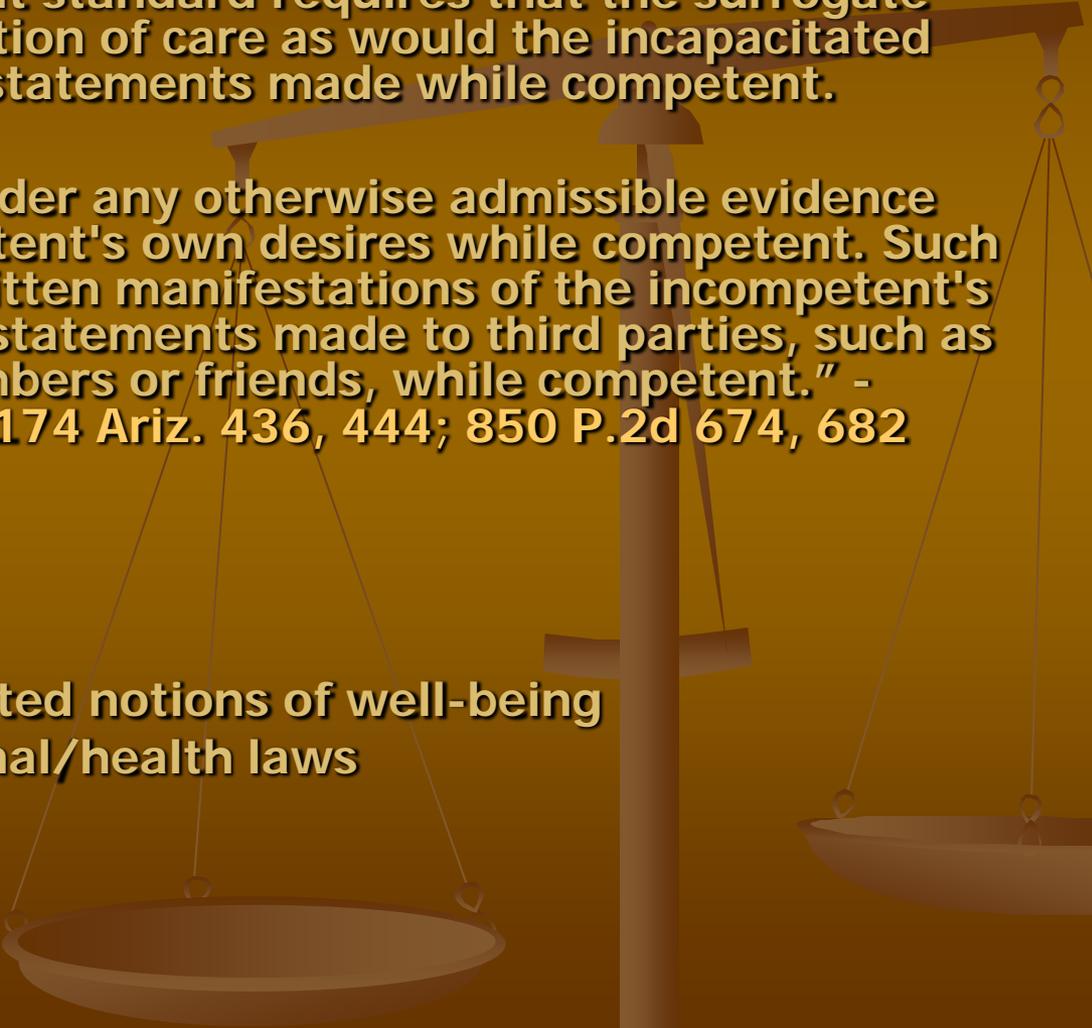
Guardianship Administration



A Guardian may assert the Constitutional rights of the Ward to refuse medical treatment using a “best interests” of the patient standard.

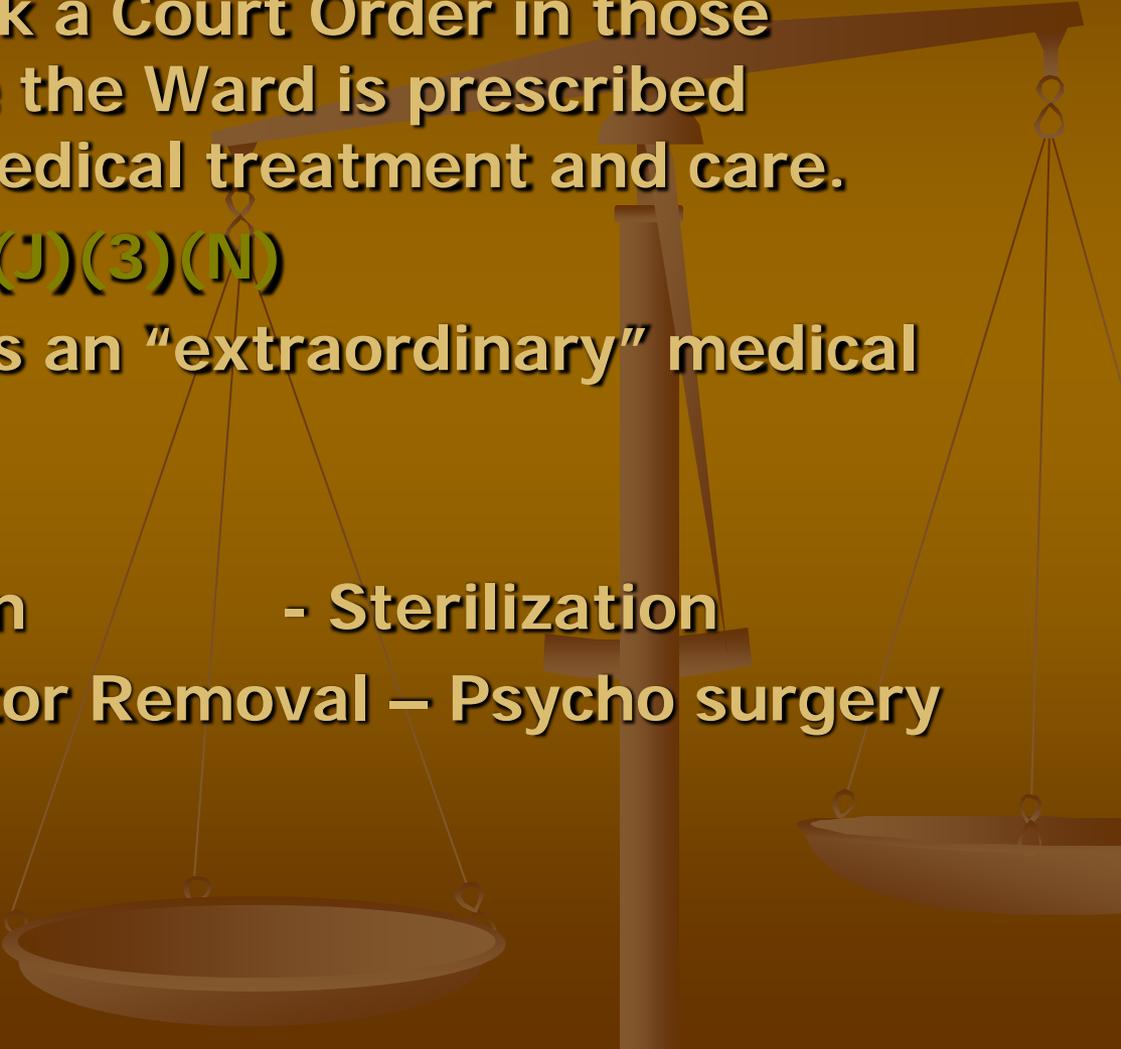
- *Rasmussen by Mitchell v. Fleming*,
154 Ariz. 200, 741 P.2d 667 (App. 1986)

Substituted Judgment



- The Substituted Judgment standard requires that the surrogate attempt to decide a question of care as would the incapacitated person if able; based on statements made while competent.
- “[A] trial court may consider any otherwise admissible evidence manifesting the incompetent's own desires while competent. Such evidence may include written manifestations of the incompetent's intent . . . as well as any statements made to third parties, such as the guardian, family members or friends, while competent.” - *Ruvalcaba v. Ruvalcaba*, 174 Ariz. 436, 444; 850 P.2d 674, 682 (App. Div. 1,1993)
- Limitations:
 - Not contrary to accepted notions of well-being
 - Not violative of criminal/health laws

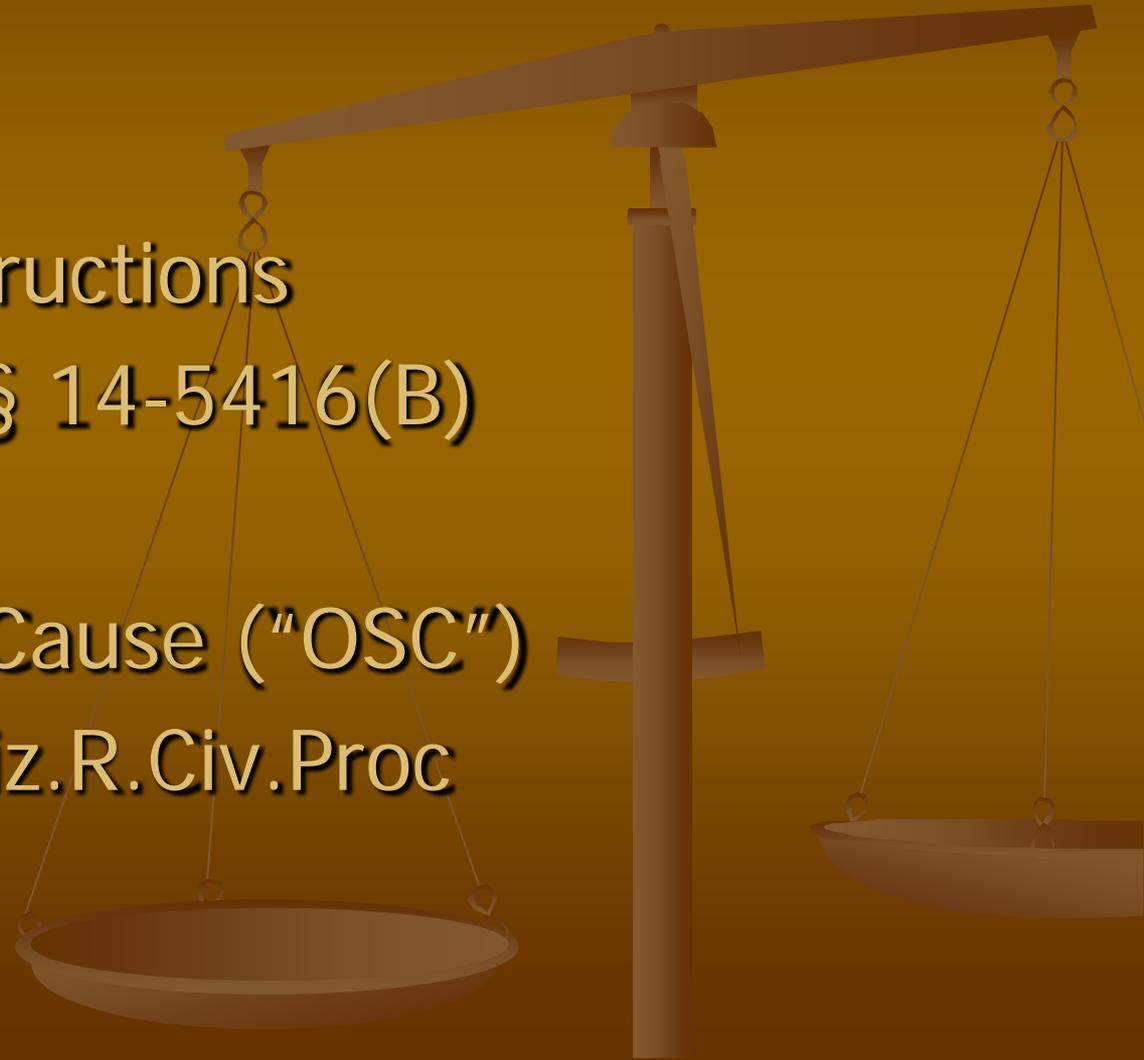
Extraordinary Medical Procedures



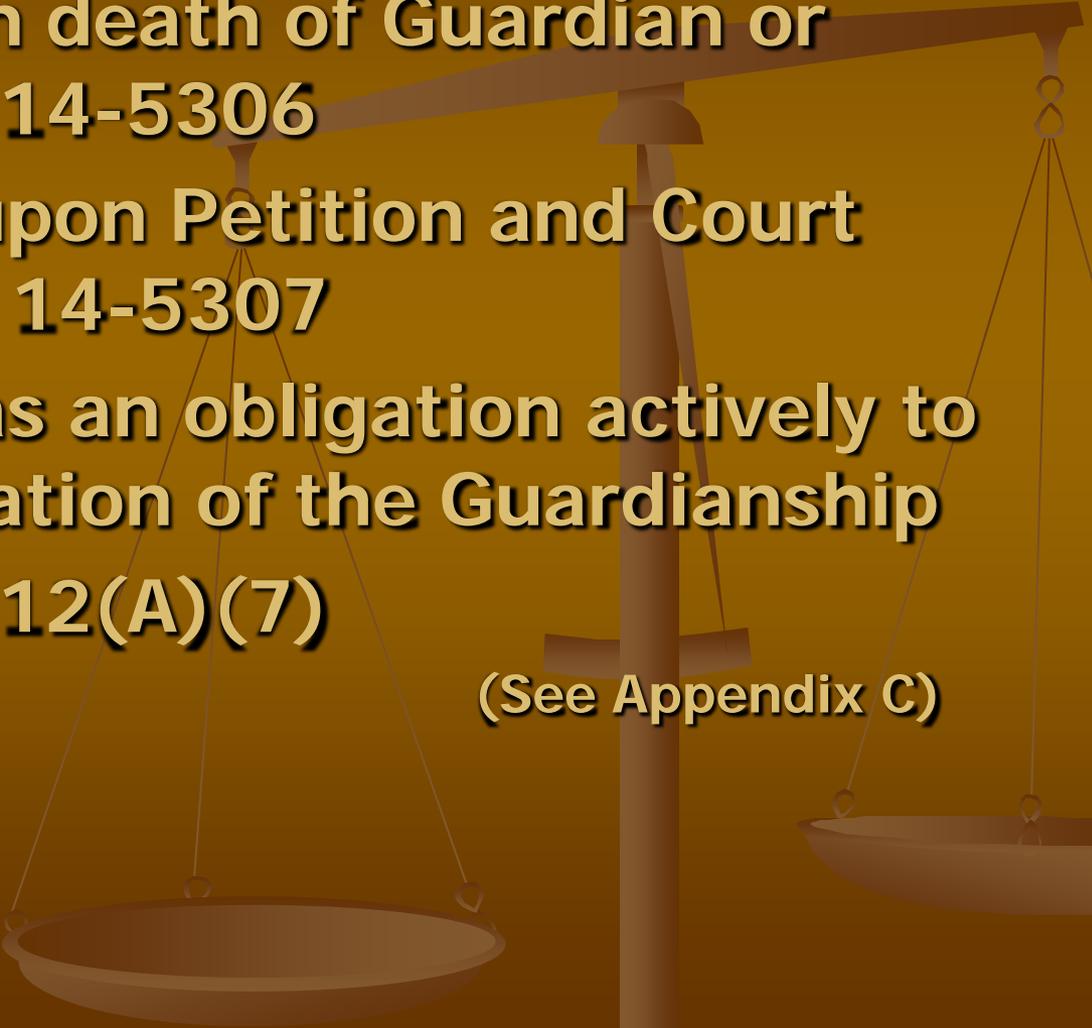
- Necessity to seek a Court Order in those instances where the Ward is prescribed extraordinary medical treatment and care.
- **A.C.J.A. § 7-202(J)(3)(N)**
- What constitutes an "extraordinary" medical procedure?
- Examples:
 - Abortion
 - Sterilization
 - Ventilator Removal – Psycho surgery

Alternative Procedures for Getting a Question Before the Court

- Petition for Instructions
A.R.S. § 14-5416(B)
- Order to Show Cause ("OSC")
6(d) Ariz.R.Civ.Proc



Terminating a Guardianship



- Terminates upon death of Guardian or Ward – A.R.S. § 14-5306
- May terminate upon Petition and Court Order – A.R.S. § 14-5307
- The Guardian has an obligation actively to work for termination of the Guardianship – A.R.S. § 14-5312(A)(7)

(See Appendix C)



Title 36 Guardianships

A.R.S. § 35-540

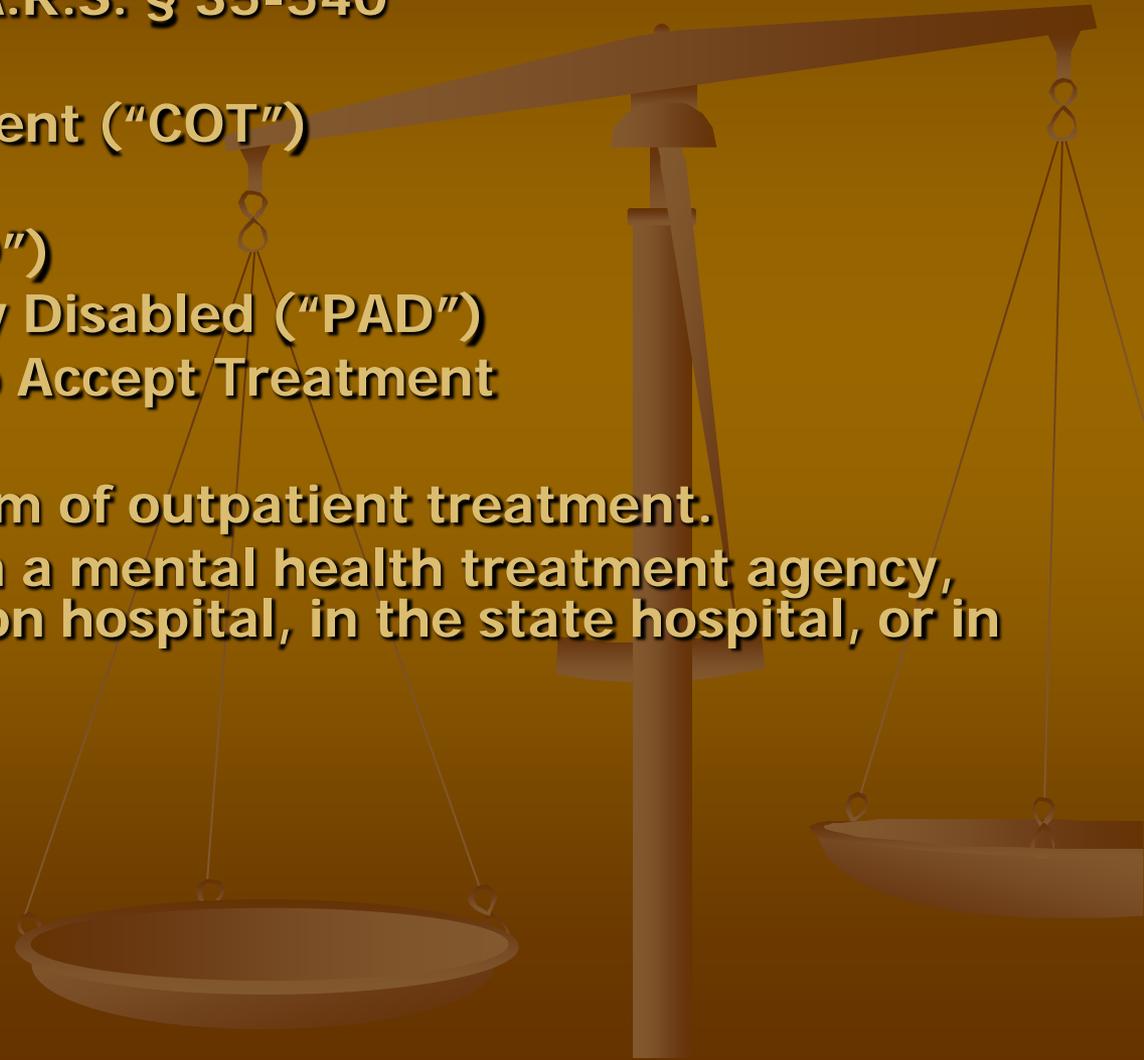
- **Court Ordered Treatment (“COT”)**

Gravely Disabled (“GD”)

Persistently or Acutely Disabled (“PAD”)

Unwilling or Unable to Accept Treatment

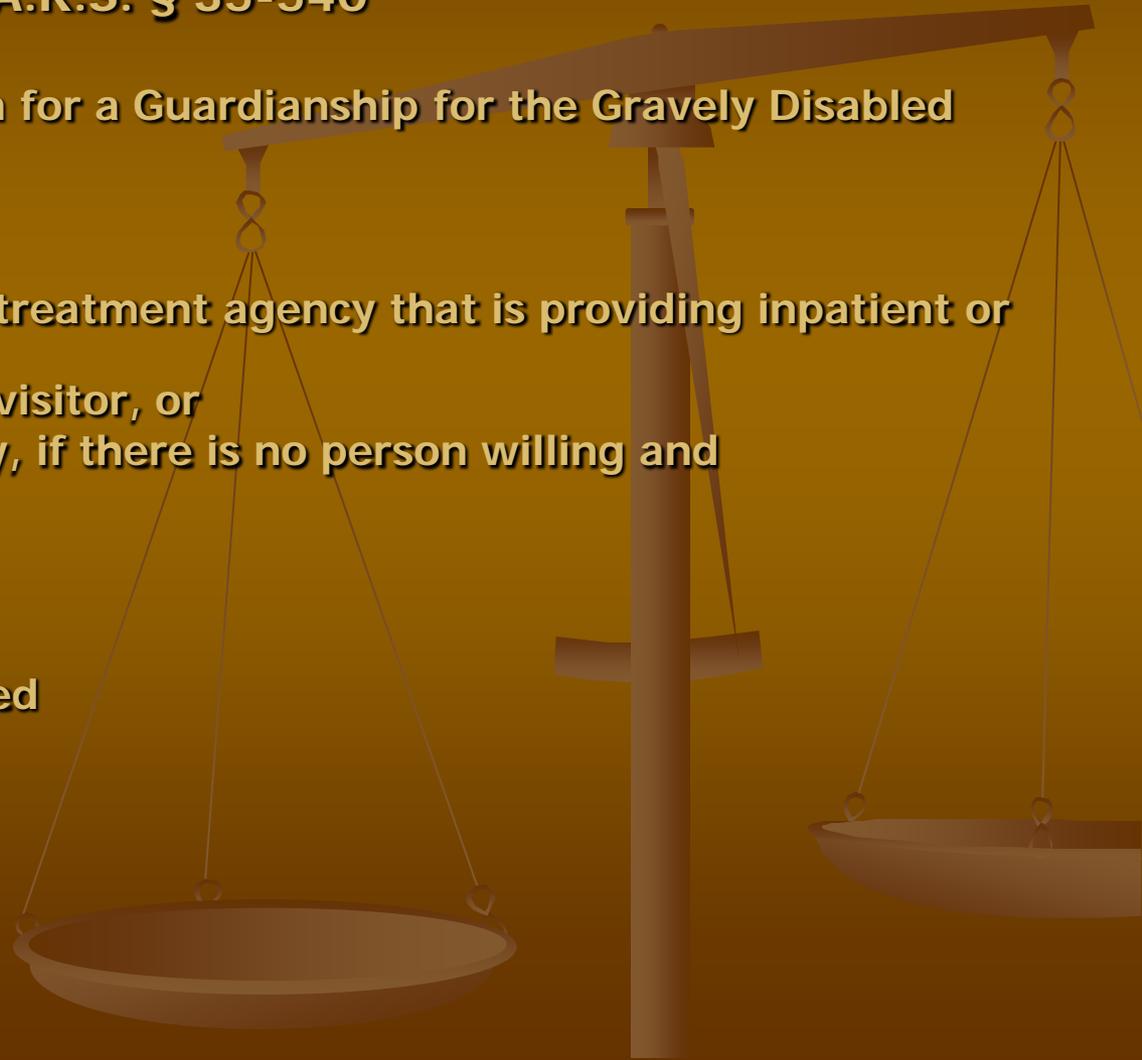
- **Treatment in a program of outpatient treatment.**
- **Inpatient treatment in a mental health treatment agency, veterans administration hospital, in the state hospital, or in a private hospital**



Title 36 Guardianships - Continued

A.R.S. § 35-540

- Court-ordered Investigation for a Guardianship for the Gravely Disabled
- Qualified appointees:
 - (a) the mental health treatment agency that is providing inpatient or outpatient treatment,
 - (b) a court appointed visitor, or
 - (c) the public fiduciary, if there is no person willing and qualified to act
- Notice required.
- Investigative Report required
- Petition Required



Title 36 Guardianships -Continued

A.R.S. § 36-540

- H. If, on finding that a patient is gravely disabled, the court also finds that the patient is in need of immediate guardianship for the purpose of protection of the patient or for the purpose of carrying out alternatives to court-ordered treatment, the court may appoint as a temporary guardian a suitable person or the public fiduciary, if there is no person qualified and willing to act in that capacity.
- I. If, on finding that a patient is gravely disabled, the court also learns that the patient has a guardian appointed under title 14, the court may with notice impose on the existing guardian additional duties pursuant to section 14-5312.01.

