

## DISABILITY RIGHTS NEW MEXICO

### RECOMMENDATIONS FOR FURTHER GUARDIANSHIP REFORM

August 2018

1. *Enact Article 5 of the original reform proposal, authorizing courts to order alternatives to guardianship or conservatorship. In the introduced version of SB 19, Article 5 included Sections 501 through 512 and was found on pages 163-185.*

These provisions would be particularly beneficial to the individuals Disability Rights New Mexico (DRNM) typically represents in guardianship proceedings: non-elderly persons with disabilities whose decision-making capacity is questioned due to developmental disability, brain injury, mental illness or other disability. Court-approved alternatives could allow/require some adults with disabilities to get advice and assistance from other trusted individuals, such as parents, other family members, or friends when important decisions are to be made, without having most or all of their rights taken away in a guardianship proceeding. It could provide parents of special education students age 18-21, many of whom are still in public school at that age, the opportunity to remain involved in planning educational services and transitions to work or further education without a full guardianship arrangement. These types of alternative arrangements – generally referred to as “supported decision-making” - are increasingly favored in the disability community, but generally require authority in state law.

2. *Assure adequate legal representation for allegedly incapacitated individuals in these processes by converting the function of the court appointed attorney from a guardian ad litem (GAL) to an attorney representing the allegedly incapacitated person. This could be done by enacting Section 305 of the original SB 19 (pages 61-62), and repealing or amending existing provisions that refer to the guardian ad litem.*

A fundamental legal right is at stake in guardianship proceedings – the right as an adult to make one’s own decisions about where to live, what to do, whether and whom to marry, etc. In spite of the potential for losing all such rights, an individual who is the subject of a petition for guardianship typically does not have their own lawyer. Under our current system, each respondent gets a court-appointed GAL (unless they already have their own attorney, which is rarely the case). Although the role of the GAL in such proceedings, as spelled out in Section 45-5-303.1, does not refer to the respondent’s best interest, the typical practice of GAL’s is to both convey the respondent’s wishes to the court and also present what the GAL thinks is in the person’s “best interest”. DRNM believes that in the context of adult guardianship proceedings, an allegedly incapacitated person deserves to have true legal representation – an attorney to advocate for the person’s wishes and, if those wishes are not clear, to advocate for the arrangement that is the least restrictive method for meeting the person’s needs. The Court Visitor in these cases can make the independent professional recommendation to the court as to whether guardianship would be in the respondent’s best interest.

Since current New Mexico law requires the appointment of a GAL for every individual respondent in an adult guardianship proceeding, and requires the GAL to be an attorney, we believe that making this adjustment in the law affecting the function of the appointed attorney would not significantly increase court costs.

3. *Require “neutral” appointment of an appropriately qualified Court Visitor by inserting the following new language into Section 45-5-303(F) NMSA 1978: “The visitor shall be an individual with training or experience in the type of abilities, limitations and needs alleged in the petition. The visitor shall not be a person nominated or recommended for appointment by the petitioner.”*

In the current system, it is quite common for the petitioning attorney to recommend the individuals whom the court would appoint to serve as GAL, Court Visitor and Medical Professional. This fosters the perception – at least - of a “stacked deck” in favor of the petitioner. DRNM requests the adoption of a new provision that would resolve this perception of conflict of interest, at least with respect to the Court Visitor.

We are aware of the concern of some practitioners in this area of law that a neutral, rotating list of Visitors might result in the appointment of a neutral Visitor unfamiliar with the particular type of medical condition and circumstances of a respondent. We therefore also recommend the above language about the required expertise of a Visitor. That language was included in the original language of SB 19 (page 59, lines 6-8).

In the event that our suggestion #2, changing the function of a GAL, is not adopted, we recommend the adoption of language requiring the GAL to have appropriate training or experience and to not be a person nominated or recommended by the petitioner.

4. *Clarify the scope of a guardian’s authority by amending Section 45-5-312(B) as follows:*

*~~B. A guardian of an incapacitated person has the same powers, rights and duties respecting the incapacitated person that a parent has respecting an unemancipated minor child, except that a A guardian is not legally obligated to provide from the guardian's own funds for the incapacitated person and is not liable to third persons for acts of the incapacitated person solely by reason of the guardianship. In particular and without qualifying the foregoing, a A guardian or the guardian's replacement has the following powers and duties, except as modified by order of the court:~~*

We are aware of a recent court case in which the language we propose to strike was used to “trump” other provisions of the Probate Code that provide limitations on the powers and authority of a guardian. Our suggestion would help clarify that a guardian may exercise whatever powers are granted in the guardianship order, but not exercise authority over issues that are outside the scope of the order.

Although it is not an issue of statutory language, DRNM also encourages the legislature as a whole to assure that the courts receive financial support sufficient to provide on-going supervision of their guardianship and conservatorship caseload. Reviewing the current caseload to determine which cases are still active and to assure that annual reports are being received is an excellent first step. However, courts must have the capacity to thoroughly review reports and to conduct occasional site visits and interviews to assure the health, safety and welfare of protected persons.

For more information:

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