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FISCAL IMPACT REPORT

ORIGINAL DATE 2/06/18
 LAST UPDATED 2/14/18

SPONSOR SJC HB _____

SHORT TITLE Uniform Guardianship and Other Arrangements SB 19/SJCS/aHJC

ANALYST Chenier

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY18	FY19	FY20	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
AOC		\$453.0- \$993.0	\$3.0	\$456.0- \$996.0	Recurring	General Fund and Office of Guardianship Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to Appropriation in the 2018 General Appropriation Act

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Attorney General’s Office (NMAG)
 Developmental Disabilities Planning Council (DDPC)
 Children Youth and Families Department (CYFD)
 Department of Health (DOH)

SUMMARY

Synopsis of HJC Amendment

The House Judiciary Committee amendment to Senate Bill 19 strikes the provisions related to the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA) from the bill. In striking these provisions, the amendment reduced the estimated recurring costs of implementing this bill. The amendment would insert some of the language from UGCOPAA into sections of current law including changing all occurrences of “incapacitated person” to “protected person”. The amendment would insert provisions clarifying who should be included on petitions and requiring guardians to comply with the requirements of audits.

The amendment also clarifies how courts would be permitted to authorize persons to protect the financial interests or property of protected persons including establishing eligibility for benefits;

sale, mortgage, lease, or other transfer of property; purchase of an annuity; and entry into contractual arrangements. The amendment clarifies the process by which a court can restrict a person's access to a protected person or their property. The court would also be required to ascertain the protected person's wants.

The amendment would also include a provision requiring hearings for conservatorships be held in open court unless, for good cause, the court determines otherwise.

Lastly, the amendment would require the courts to report to the LFC on the status of the UGCOPAA nationally, feasibility of implementation of the UGCOPAA, and the costs of implementing UGCOPAA.

Synopsis of Original Bill

The Senate Judiciary Committee Substitute for Senate Bill 19 would repeal article 5 of the uniform probate code concerning the protection of persons under disability and their property and would replace it with the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act, with an effective date of July 1, 2020. However, to begin the process of reform immediately, the substitute would also make changes to the current uniform probate code and require the courts to report to the Legislative Finance Committee on progress formulating rules, acquiring computer software, and developing cost estimates, effective July 1, 2018.

The 2018 probate code changes would add provisions to ensure protected person voting rights, add a provision requiring conservators' reports, accountability, and bonding, and change the procedures for appointing guardians and conservators. These changes would also add provisions allowing for protective arrangements, which are meant to be less restrictive than guardianships and conservatorships.

Taking effect in 2020, the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA), would enumerate protections, procedures, rights, powers, duties, and responsibilities for each type of adult and minor guardianship, conservatorship, and newly established and less restrictive protective arrangements.

The UGCOPAA is arranged as follows:

- Article 1:** General Provisions
- Article 2:** Guardianship of Minor
- Article 3:** Guardianship of Adult
- Article 4:** Conservatorship
- Article 5:** Other Protective Arrangements
- Article 6:** Miscellaneous Provisions

The substitute enumerates jurisdictions, court venues, guardianship and conservatorship compensation, delegation of powers, grievance procedures, guardian and conservator temporary substitution, and avenues for third parties to refuse the authority of guardians and conservators.

The substitute establishes qualifications requiring adult guardians to either be nominated by the respondent or an agent appointed by the respondent, a spouse of the respondent, or a family member or other person who has shown special care and concern for the respondent with several exceptions.

The substitute places special limitations such as not restricting the ability of the adult to communicate, visit or interact with others unless restrictions were put in place by a specific court order. There is also the requirement that the adult guardian develop and file a plan for the care of the adult within 60 days of appointment, which shall include living arrangements, social and educational activities, visitation, future goals, and proposed charges for the guardian’s services.

The bill also requires the courts to monitor guardians, conservators, and those with other protective arrangements through various means.

The substitute includes a transition provision allowing for guardians and conservators who were appointed prior to July 1, 2020 to file a guardian’s or conservator’s plan on or before December 31, 2025.

See the significant issues section below for more specifics.

FISCAL IMPLICATIONS

Developmental Disabilities Planning Council fund balances are over \$3 million and the House Appropriations and Finance Committee substitute for House Bill 2 includes a \$1 million contingency appropriation from this fund to the AOC to enact the provisions of this bill.

	Non recurring	recurring
Legislative Project managers	\$ 100.0	
Case Auditors	\$ 300.0	
Eight Contractors to Bring Old Cases Into Compliance	\$ 350.0	
Software Developers	\$ 140.0	
Program Manager	\$ 100.0	
Notice Mailings		\$ 3.0
Total	\$ 990.0	\$ 3.0

Source: AOC

Some of the items in AOC’s cost estimate may not pertain to this bill such as software developers to create financial forms, case auditors, and legislative project managers explaining the lower limit cost estimate.

SIGNIFICANT ISSUES

This bill is based on legislation developed by the Uniform Law Commission (ULC) and is known as the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA). The Supreme Court established the New Mexico Adult Guardianship Study Commission and the commission met throughout much of 2017 to study issues and make appropriate recommendations. This legislation addresses many of the commission’s recommendations including establishing stringent reporting and financial accountability measures and requiring conservators to be bonded or to secure other asset-protection arrangements. One of the commission’s highest priority recommendations was to enact the UGCOPAA and appropriate sufficient funding to fully implement its provisions.

AOC stated that Sections 317 and 423 require the court to establish procedures for monitoring reports filed by a guardian and conservator. The required ongoing monitoring of reports will likely require additional resources by the judicial branch to comply with SB 19. In addition,

sections 317 and 423 also require the court to review each report submitted, at least annually. The annual review, or auditing, of reports by conservators should be conducted by an agency under the executive branch to prevent a potential conflict of interest for the judicial branch.

Sec. 605 would require the court to bring approximately 24,175 existing cases into compliance with the new requirements of SB 19 by December 31, 2019. Even if considerable new resources were added to the judicial branch, this would be a monumental endeavor that would take several years to accomplish.

AOC stated that over the past two years, the New Mexico guardianship and conservatorship system has been subjected to intense media scrutiny. Allegations of misconduct and abuse by guardians have been explored in newspaper series by the Albuquerque Journal “Who Guards the Guardians”, <https://www.abqjournal.com/898385/who-guards-the-guardians-a-5-part-series-by-diane-diamond.html>. In large part, the media and affected family members expressed concerns that guardians have misused funds of protected persons contrary to the wishes of family members, failed to provide effective, adequate care, and isolated protected persons from family and friends. In addition, other recent New Mexico cases involved overt criminal activity through embezzlement of funds from vulnerable persons by court-appointed guardians. (<https://www.justice.gov/usao-nm/ayudando-guardians>; <https://www.abqjournal.com/1098421/desert-life-ceo-pleads-guilty-to-fraud-money-laundering.html>).

DOH stated that there does not appear to be a clear reconciliation with the Mental Health and Developmental Disabilities Code, especially as it relates to Treatment Guardians. See, Section 43-1-15 NMSA 1978, describing a guardian’s role in seeking mental health treatment. Guardians in New Mexico can only present someone for admission if they cannot commit or otherwise place “their ward” into such treatment. See, Section 43-1-14 B NMSA 1978.

The bill’s discussion of foreign orders is silent on tribal orders.

According to the ULC’s website, New Mexico is the first state to introduce this legislation. The goals of the legislation are to make guardianships and conservatorships more person centered, to ensure the least restrictive means are used to protect individuals, to provide better guidance to guardians and conservators, to help courts more effectively monitor guardians and conservators, and to make it easier for all involved to achieve these objectives.

According to ULC, the act encourages the use of, less restrictive alternatives, including supported decision-making and single-issue court orders instead of guardianship and conservatorship. The act provides that neither guardianship nor conservatorship is appropriate where an adult’s needs can be met with technological assistance or supported decision-making. It also provides for protective arrangements instead of guardianship or conservatorship and has the potential to reduce the extent to which individuals in need of protection are deprived of liberties. They can also reduce the time and cost associated with meeting individuals’ needs. The act also provides for enhanced monitoring of guardians and conservators to ensure compliance with fiduciary duties and to protect against exploitation. The act also allows the court to identify people who are to be given notice of certain key changes or suspect actions, and who can serve as an extra set of eyes and ears for the court. The bill also includes limitations on a guardian’s ability to curtail communications, visits, or interactions between an adult subject to guardianship and third parties. It establishes a default that the adult children and spouse of an

adult subject to guardianship or conservatorship are entitled to notice of key events, including a change in the adult's primary residence, the adult's death, or a significant change in the adult's condition.

AOC provided an analysis of the bill and pointed out many of their concerns. Here are some excerpts from the AOC analysis:

The uniform act will considerably alter the courts' processes for handling guardianship and conservatorship proceedings. Some of the changes in the uniform act that will impact the judicial branch's processes include: requiring the appointment of an attorney for the person alleged to be in need of a guardianship and/or conservatorship, eliminating the statutory requirement that a guardian ad litem be appointed to represent the best interest of the person alleged to be in need of a guardian and/or conservator, replacing the functional impairment standard for considering whether a person is in need of a guardian and/or conservator, eliminating the requirement that a qualified health care professional be appointed in every case, expanding the role of the court appointed visitor, focusing on protective arrangements and least restrictive means over plenary (full) guardianship/conservatorship, removing the confidentiality provisions of the proceedings, requiring a bill of rights to be provided to an individual subject to guardianship/conservatorship, requiring the courts to have a more active role in ongoing monitoring and review of cases, requiring judicial approval of fees charged, and requiring judicial approval before a change in residence or the sale of residence of the individual subject to guardianship/conservatorship. The changes the judiciary will be required to make to adhere to the uniform act will require additional funding for compliance officers, special masters, a program manager, and other technical staff.

The provision which requires the appointment of a respondent's attorney, who "shall advocate for the respondent's wishes" or if the respondent's wishes are not reasonably ascertainable, "advocate for the result that is the least restrictive in type, duration and scope, consistent with the respondent's interests" is likely to have a significant impact upon the judicial branch and would require additional resources. The judicial branch would require additional funding for the court-appointed attorney fund to cover the required respondent's attorney appointment under this new section.

Another of the revisions in SB 19, include requiring explicit judicial findings be made before an individual's fundamental rights are removed. The requirement of explicit judicial findings will likely have a significant impact on the judicial branch by increasing the length of the hearings and requiring judges to spend significantly more time drafting court orders that include explicit judicial findings. For these reasons, additional resources for the judicial branch will be necessary.

- **Sec. 115** makes the appointment of a guardian ad litem (GAL) optional, at the court's discretion, changing the mandatory requirement of a GAL under the current probate code. This section allows the court to appoint a GAL at any time if the court "determines the individual's interest otherwise would not be adequately represented. The guardian ad litem shall not be the same individual as the attorney representing the respondent." There is no mention in this section as to who is responsible for paying for the GAL's fees although Sec. 119 B states, "unless otherwise compensated or reimbursed, an attorney or other person whose service resulted in an order beneficial to an individual subject to guardianship or conservatorship . . . is entitled to reasonable compensation for services

and reimbursement of reasonable expenses from the property of the individual.”

- **Section 302** expands the current requirements for filing a petition under the probate code to enable the judge to have additional information to make appropriate decisions. Subsection A allows the “adult for whom the order is sought” to “petition for appointment of a guardian”. There is no guidance provided, however, as to the procedure to be followed when the adult is possibly lacking the capacity to do so. (See the Adult Guardianship Study Commission’s recommendations @ <https://supremecourt.nmcourts.gov/uploads/files/Summary%20of%20Final%20Recommendations.pdf>)
- **Section 305** Subsection A states, “Unless the respondent in a proceeding . . . is represented by an attorney, the court shall appoint an attorney to represent the respondent, regardless of the respondent’s ability to pay.” Currently, the Office of Guardianship pays for a best interest attorney, identified in the probate code as a guardian ad litem, for individuals who qualify under stringent income requirements. It is unclear whether the Office of Guardianship would be able to pay for a respondent’s attorney if the individual exceeds their program’s income guidelines, or whether the judicial branch would require additional funding to the current court appointed attorney fund to cover the costs of the respondent’s attorney. The uniform law’s system could present a conflict of interest for the judicial branch that is responsible for both adjudicating whether an individual needs a guardian or conservator while also having to pay for the services of an attorney that must advocate on behalf of his client.
- **Section 408** strengthens the requirement that a respondent must attend the hearing unless attendance is not feasible. If the physical appearance at the hearing by the respondent is not feasible, Subsection A requires that the court “make reasonable efforts to hold the hearing at an alternative location convenient to the respondent or using real-time audio-visual technology.” This additional requirement, not found in the current probate code, could have a fiscal impact on the judicial branch for the purchase of “real-time audio-visual technology” and staff to ensure compliance with this new section. Subsection D states, “The respondent has a right to choose an attorney to represent the respondent at a hearing under Sec. 403” but it is unclear whether this is the same as the court appointed respondent’s attorney identified in Section 406 or whether it must be another attorney chosen by the respondent. Also, it is unclear who would bear the costs of an attorney chosen by the respondent, especially if the respondent is unhappy with the attorney appointed by the court.

Office of Guardianship said that the uniform law removes the stipulation that a guardian ad litem is required. Current New Mexico law requires “Unless an alleged incapacitated person already has an attorney of the alleged incapacitated person's own choice, the court shall appoint an attorney to represent the alleged incapacitated person. The court-appointed attorney in the proceeding shall have the duties of a guardian ad litem, as set forth in Section 45-5-303.1 NMSA 1978.” See NMSA 1978, § 45-5-303(C). Most attorneys in New Mexico who serve as GAL’s represent what is in the best interest of the person who may need a guardian. The uniform law proposes requiring an attorney that would serve as an advocate, but allows appointment of a GAL to be optional.

TECHNICAL ISSUES

In various sections it may be helpful to change “shall” to “may” to alleviate some of the projected costs associated with this bill.

AOC provided the following technical issues:

- 1) Section 102(J) – There is a question whether the definition of a “guardian ad litem” needs to specify that the person appointed be an attorney.
- 2) Section 118 – This section may benefit from including language that the court may consider whether the latest nomination was made when the individual had capacity to make such a decision and was not made under false pretenses, fraud or undue influence.
- 3) Including a definition for domestic partner – Section 309, 410, 310(F), and 411(F). The AGSC also supports this change.

ALTERNATIVES

Instead of creating a program for managing guardianship in the judiciary, assigning the program to an executive agency could be considered.

EC/sb/al