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FISCAL IMPACT REPORT

SPONSOR HSEIC **ORIGINAL DATE** 03/11/21 **CS/HB234**
LAST UPDATED 03/18/21 **HB** /aHF1#1/aSIRC
SHORT TITLE Strengthen Guardianship Provider Oversight **SB** _____
ANALYST Klundt

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY21	FY22	FY23	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
NM State Auditor		Unknown, possibly significant	Unknown, possibly significant	Unknown, possibly significant	Recurring	General Fund
DDPC		\$185.0	\$185.0	\$370.0	Recurring	General Fund
NM Supreme Court		\$325.0	\$325.0	\$650.0	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to SB97, SB152, SB189, and SB190.

SOURCES OF INFORMATION

LFC Files

Responses Received From

Developmental Disabilities Planning Council (DDPC)
 New Mexico Attorney General (NMAG)
 Administrative Office of the Courts (AOC)
 New Mexico State Auditor (OSA)

SUMMARY

Synopsis of SIRC Amendment

The Senate Indian, Rural and Cultural Affairs Committee (SIRC) amendment to House State Government, Elections and Indian Affairs Committee (HSEIC) substitute for House Bill 234 as amended, made the following changes:

- Clarifies office of the State Auditor would audit the contents of the conservator's report;
- Clarifies if the office of the State Auditor decides to conduct an audit of the contents in the report, the result of the audit, including the reasons why a full audit of the contents of the conservator's report could not be completed shall be filed with the court; and
- Makes documents, records, and statements in connection with any audit of the contents of

the conservator's report not be considered public records of the office of the State Auditor for the purposes of the Inspection of Public Records Act.

Synopsis of HFI#1 Amendment

The House floor #1 amendment to the House State Government, Elections and Indian Affairs Committee substitute for House Bill 234 (HB234) made the following changes:

- Strikes appropriations to the Developmental Disabilities Planning Council (DDPC) Office of Guardianship and the New Mexico Supreme Court;
- Added that the number of cases in which a professional guardian was removed, and the reason for the removal be also included in the Office of Guardianship's annual report;
- Made compliance with national standards only applicable to professional guardians;
- Required the guardianship annual report review at the Administrative Office of the Courts to review all reports filed by the court appointed guardian;
- Changed the timeframe for when the State Auditor must file audit findings with the court; and
- Created new subpoena powers for the State Auditor to access records for conservator audits.

Synopsis of Original Bill

The House State Government, Elections and Indian Affairs Committee (HSEIC) substitute for House Bill 234 (HB234) authorizes Developmental Disabilities Planning Council (DDPC) Office of Guardianship (OOG) to recruit and train volunteer court visitors and establishes a court visitor pilot program managed by the judiciary to monitor guardianship cases. The bill requires OOG to conduct annual comprehensive service reviews and other monitoring activities of its service providers to ensure protected persons served by OOG are receiving appropriate, high quality services. The bill also requires the head of the Office of Guardianship to be an attorney licensed in New Mexico and requires OOG to publish an annual report. The bill requires consideration of less restrictive options and alternatives to guardianship. The bill requires the courts to forward all conservatorship annual reports of the Office of the State Auditor. Finally, the bill establishes a Working Interdisciplinary Network of Guardianship Stakeholders (WINGS program).

FISCAL IMPLICATIONS

The House floor #1 amendment to House Bill 234 removed the appropriations to DDPC and the New Mexico Supreme Court to implement this bill. The Administrative Office of the Courts (AOC) reported the courts could not absorb the costs to implement this bill. In previous analysis of this bill, AOC reported the funding would be utilized by the judiciary for 3 FTE to assist in review guardianship and conservatorship annual reports, guardianship court visitor reports, and conservatorship audits and to administer the WINGS program.

DDPC reported the department cannot absorb the costs to implement this bill. The appropriation for DDPC previously contained in this bill was \$185 thousand to administer the volunteer court visitor program. The department reported the need to develop court visitor training and recruit, train, and provide technical assistance to a large group of court visitors. DDPC also reported the program goal would be to provide enough court visitors to the courts to review every

guardianship in the state on an annual basis. The department stated without additional resources, it would not have the capacity to fulfill the requirements of this bill.

OSA reported the department's operating budget could not absorb the costs associated with performance of its obligations as contemplated by Paragraph H of Section 10 of HB234, including subpoenas, service of process, filing fees, legal services and likely staff associated with the process. However, OSA was not able to provide an estimate of the potential fiscal implications. The department stated additional staff will be necessary to review conservatorship reports, extract, and analyze data and perform the subsequent audits of the contents of the conservators' reports, given this proposed legislation requires "all" conservators' reports be submitted to OSA. The department reported this could represent thousands of conservators' reports each year, and current dedicated staff may only be able to review a fraction of the total number of reports.

OSA also believes there are also significant costs associated with the subpoena process and the proposed legislation does not include specific appropriation to the OSA for that purpose to the extent the OSA is required to bear such costs.

SIGNIFICANT ISSUES

DDPC reported:

Guardians are charged with protecting the health, safety, welfare, and rights of their protected persons. Guardians make crucial life decisions on behalf of their protected persons, including health/medical, residential, employment, and financial decisions. Guardians are often the protected person's first or last line of defense against abuse, neglect, and exploitation. Guardians and conservators have enormous power over their protected persons, yet state law does not require regular oversight of these cases other than a ten year review by the courts.

This bill establishes a court visitor pilot program to give the courts much-needed resources to monitor guardianships on the ground. Court visitors are typically assigned when a petition for guardianship is filed. Once a guardian is assigned, courts must depend on the guardian's annual reports, online grievances, and other letter or requests for hearing for guardianship issues to be brought to their attention. If an issue is not brought to the court, it cannot be addressed.

This bill creates a volunteer court visitor program within the Office of Guardianship to provide the courts with the resources to monitor guardianships. During the pilot, the courts will select several jurisdictions across the state and assign court visitors to a random sampling of cases. The court visitor will speak to the protected person in their home, review the guardianship, and file a report with the court. They will be the eyes and ears on the ground for the court.

Further, the volunteer court visitor program managed by OOG will focus on recruiting students in higher education institutions, particularly those studying social work and related fields. An additional important goal in this program is to establish a well-trained workforce of court visitors and professional guardians.

The bill requires the consideration of less restrictive options and alternatives to

guardianship. It requires OOG to inform and educate applicants on alternatives to guardianship before petitioning for guardianship. It requires the Guardian ad Litem to report all available less restrictive options to the court. And it requires the guardian to actively seek out and support less restrictive options.

The bill requires New Mexico to implement a WINGS program. This group of stakeholders, led by the judiciary, will include representatives from the legislature and state agencies, from the professional guardianship and conservatorship, aging, and mental health communities, as well as protected persons and family members. Because WINGS is a national program, New Mexico will have access to experts and best practices from across the country as NM WINGS works to improve this state's guardianship system.

On the original analysis of this bill AOC reported the judiciary is in the final stages of developing a database that includes all guardians and conservators certified by the Center for Guardianship Certification. This database will provide judges with information about whether a potential professional guardian or conservator is certified, how many cases are assigned to a company, and how many employees in the company are certified. This database will provide judges with additional information and oversight over professional guardians and conservators.

AOC also provided:

The creation of the volunteer court visitor program is a substantial new endeavor. This new program would be created and managed by the office of guardianship and would provide district court judges with another available resource to review a guardianship case. While this legislation does not necessitate funding to pay the court visitors, as they are volunteers, it will require significant resources for recruitment, training and oversight over the volunteers. This committee substitute would expand the scope and purpose of the office of guardianship into compliance and review of guardianship cases and require the office to embark on a volunteer model to help deliver this new service to the district courts.

This committee substitute would create three new programs in the judicial branch. The first new program is the creation of the working interdisciplinary network of guardianship stakeholders, known by the acronym WINGS. The Third National Guardianship Summit in 2011 concluded that real change in the guardianship system would require an ongoing collective effort by state courts and a range of community stakeholders. The Summit recommended states develop a WINGS group to advance reform and promote less restrictive options to guardianship. Currently, 27 states have convened WINGS or other similar collaborative groups. The Supreme Court created the Guardianship Reform Implementation Steering Committee in 2018, which includes representatives from all three branches of government to work on implementing changes to improve the adult guardianship process in New Mexico. This committee substitute directs the Supreme Court to appoint members representing 19 different categories, making the membership and composition of the WINGS more expansive than the current Steering Committee. This legislation also provides funding to the courts for one full time employee to help staff and support the WINGS group. It is anticipated that the WINGS group would continue the work begun by the Guardianship Steering Committee.

This committee substitute would also create a new division at the Administrative Office of the Courts that would be responsible for reviewing all annual reports submitted by guardians and conservators. This committee substitute provides for three new full time

employees to staff this new division. Statewide, approximately 500 reports are filed each month in adult guardianship and conservatorship cases. These three new employees would screen each report to ensure that all statutory requirements are being fulfilled and would alert the assigned judge as to any issues or concerns with the annual report. This new division would significantly improve the judicial oversight and review of these cases.

This committee substitute also expands the ability of the Office of the State Auditor to review conservator's reports. Conservators are typically responsible for the finances of a protected person. The State Auditor entered into an MOU with the Administrative Office of the Courts in July 2018 to provide a review and audits of cases referred by district court judges. Building upon the success of the MOU, the State Auditor received funding in FY20 for three new FTE positions. This committee substitute would require the State Auditor to review all reports filed by a conservator and decide whether a full audit of the contents of the report is necessary. The most significant obstacle facing the State Auditor's office when reviewing conservator's reports has been the inability to subpoena original financial records from an individual, company or financial institution, relying instead on the compliance of the court-appointed conservator to obtain and forward these records. This legislation provides the State Auditor with the authority to subpoena these records and to be available to testify at any subsequent court hearing concerning the results of the audit. It would be helpful to strengthen the language in this bill granting the office of the state auditor the authority to subpoena records by changing the word "may" on page 22, line 11 to "shall".

This committee substitute would also create a pilot volunteer court visitor program in three judicial districts. This pilot program would allow judges to appoint a volunteer court visitor to more closely review an adult guardianship case. The volunteer court visitors would be recruited, trained and made available to district court judges by the office of guardianship. This post-adjudication review of the guardianship would require the volunteer court visitor to review all reports filed in the case, visit with the protected person where the person resides and to report back to the judge if any information or circumstances have changed since the guardian's last report and make any recommendations if any changes to the guardianship are identified. The success of this pilot will rely heavily on the ability of the office of guardianship to recruit and train volunteers to serve as a court visitor. These cases will be time intensive and require specialized training so volunteers are able to provide judges with the information necessary so they can make informed decisions on what is best for the protected person.

OSA provided:

The proposed amendments included with this analysis would make the legislation more viable as it relates to the OSA, as the OSA's authority is generally limited to agencies and local public bodies as defined in the Audit Act, which causes these private matters to generate more nuanced concerns and further highlights the need for prior involvement of the OSA and interdisciplinary collaboration to get these issues, and this much needed oversight, right.

As drafted, Paragraph H of Section 10 of HB234 does not include a proper mechanism or criteria for evaluating and assessing risk as it relates to protected persons' estates in the context of auditing and the practice of public accountancy. The authority should allow for

risk development/assessment and auditor professional judgment (please see the proposed amendment in this regard). It is highly unlikely an auditor would be able to determine whether or not a full audit is necessary by reviewing the conservator report alone, as suggested in Paragraph H of Section 10 of HB234. Additional support and information would be necessary to fully evaluate a conservator's report. In summary, a conservator's report is comprised of representations of a conservator, without any underlying documentation to support the representations, so merely reviewing a report is not a good way of identifying risk in the context of auditing and public accountancy.

Adjusting the contemplated statutory timeline for filing audit reports is absolutely essential in the context of auditing and the practice of public accountancy as further described in this analysis. (Please see the proposed amendment concerning the timeline for filing audit reports.)

As indicated, the OSA's public funds should not be spent on private matters without specific appropriations for related expenses, which could be significant as further described in this analysis.

Paragraph H of Section 10 of HB234 also contains no confidentiality considerations, which are necessary. These matters related to protected persons' estates consist of private financial information. As it relates to the contemplated audits at issue, under New Mexico's Public Accountancy Act, audit documentation is the property of the responsible certificate holder, and such documentation is confidential, but there is ongoing litigation as to whether audit documentation constitutes public records for purposes of the Inspection of Public Records Act (IPRA), due to the IPRA's definition of public records that includes all documents received or used by any public body, despite controlling authority governing the OSA and the practice of public accountancy. (Please see the proposed amendment concerning confidentiality.)

When Paragraph G of Section 45-5-409 became law in 2018, there was no corresponding authority granted for implementing a process for the contemplated audits of accounts, inventories, reports, or property of protected persons, and unfortunately, HB234 notably continues the trend of failure to allow adequate consideration of meaningful oversight and protection of the assets of some of the most vulnerable New Mexicans. This reality makes the OSA's proposed amendments to Paragraph H of Section 10 of HB234 that much more essential.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

SB97 Guardianship Changes – relationship
SB152 Continuing Care Aging Contracts – relationship
SB189 Financial Exploitation Act – relationship
SB190 Dev Disabilities Planning Council – relationship

TECHNICAL ISSUES

DDPC provided the following technical adjustments:

The agency recommends the following amendments (whereas [brackets] indicate deletion and underline indicates insertion):

- p. 5, line 12, (i) the number of cases where a professional guardian was removed, and the reason for the removal;
- p. 15, line 24-25, “and consistent with the need for supervision[, including compliance with]. Professional guardians shall follow the following standards in the national”
- p. 18, lines 4-9, “G. A guardian for [an adult] a protected person shall seek and support the least restrictive option [for the protected person], consistent with the court’s guardianship order of appointment, including developing adequate supports [for the protected person] and requesting guardianship termination if less restrictive alternatives to guardianship are appropriate [for the protected person].”
- p. 18, lines 22-25, p. 19, line 1, [All reports shall be directed to the guardianship annual report review division at the administrative office of the courts for a compliance and audit review] The guardianship annual report review division at the administrative office of the courts shall review all reports upon their filing
- p. 22, lines 10-11, [of the receipt of the report from the court] of filing an acceptance for an audit
- p. 22, line 11, [may] shall have the authority and power to
- p. 26, line 14, [to]

AOC provided similar but not identical recommendations for technical adjustments:

- Page 5, strike lines 2-3 and replace with “the number of cases where a professional guardian, under contract with the office, were dismissed or terminated, and the reason for the dismissal or termination;”
- Page 8, strike lines 12-13 and replace with “identify and present whether there are viable less restrictive alternatives to guardianship”
- Page 15, line 24 insert a period after supervision. Strike “, including compliance” and insert “Professional guardians should comply”
- Page 18, strike the sentence “All reports shall be directed to the guardianship annual report review division at the administrative office of the courts for a compliance and audit review” and replace with “The guardianship annual report review division at the administrative office of the courts shall review all reports upon their filing”.
- Page 22, strike lines 10 and 11 “of the report from the court” and replace with “of filing an acceptance for an audit.”
- Page 11, line 11 strike “may” and replace with “shall have the authority and power to”
Page 24, line 19 strike “appropriate”
- Page 26, line 14 strike “to”

OSA provided the following recommendations for amendments:

- On page 22, line 3, after “audit”, insert “of the contents of the conservator’s report”.
- On page 22, line 9, after the comma, strike “an audit report” and insert in lieu thereof “the results of the audit of the contents of the conservator’s report”.
- On page 22, line 10, strike “ninety calendar days of ...” (through the end of the sentence), and insert in lieu thereof “sixty calendar days of receipt of all necessary documents, records, and statements to conduct an audit of the contents of a conservator’s report.”
- On page 22, line 14, after the period, insert the following new sentences: “The

conservator shall pay for all fees and costs associated with the production or subpoena of necessary documents, records, or statements. No documents, records, or statements in connection with any audit of the contents of a conservator’s report shall be considered public records of the office of the state auditor for purposes of the Inspection of Public Records Act.”

- On page 22, line 15, after “testify”, insert “telephonically or virtually”.
- On page 22, line 16, after “audit”, strike “report.”, and insert in lieu thereof “of the contents of the conservator’s report.”
- On page 22, line 16, after the period, insert the following new sentence: “The office of the state auditor may exercise professional judgment for risk development and assessment, including with regard to the professional standards applicable to a particular audit under Section 45-5-409 NMSA 1978, and may, at its discretion, accept referrals from district court judges for any other audit contemplated under Paragraph G of Section 45-5-409 NMSA 1978.”
- On page 22, insert subparagraphs throughout Paragraph H of Section 10 to distinguish provisions.

OTHER SUBSTANTIVE ISSUES

Rule 1-142 of the Rules of Civil Procedure defines a professional guardian or conservator as “an individual or entity that serves as a guardian or conservator for more than two individuals who are not related to the guardian or conservator by marriage, adoption, or third degree of blood or affinity.” Sections 45-5-311 and 45-5-410 NMSA 1978 currently requires that all professional guardians and conservators “shall not serve or be appointed . . . unless the professional . . . is certified and is in good standing with a national or state organization recognized by the supreme court that provides professional certification.” The certification requirements for professional guardians and conservators became effective on July 1, 2019. The Center for Guardianship Certification (CGC) is the only national organization that provides this type of certification for guardians and conservators, and there are currently no state organizations that currently provide certification or are approved by the state Supreme Court.

According to the Center for Guardianship Certification, New Mexico and eight other states (Alaska, Idaho, North Dakota, New Hampshire, Nevada, Oregon, and Utah) require national certification. An applicant requesting certification from CGC must have 10-30 hours of approved coursework (depending on the level of higher education of the applicant), pay an \$180 application fee, pay for a criminal background check, pay a \$375 exam fee, not have been convicted of a felony offense, be bonded or eligible to be bonded, and agree to comply with the National Guardianship Association Ethical Principles and the NGA Standards of Practice. An applicant must also pass a test on the NGA ethical principles and standards of practice. CGC currently lists 114 certified guardians in New Mexico.

As of January 2021, there are currently 4,928 active cases statewide where a guardian or conservator for a protected person is appointed. AOC data indicates that 1,167 cases have a professional guardian or conservator listed, or less than 25 percent of the total active cases. According to the office of guardianship, they currently have 971 cases where a professional (nonfamily member) is contracted to serve as the court-appointed guardian and is paid a flat fee of \$325 a month to serve in this role.

ALTERNATIVES

The New Mexico Attorney General’s Office stated n independent licensing board for New Mexico guardians and conservators serving all persons under the UPC, without reference to persons’ ages and/or income, with its only purpose being licensing, might avoid a conflict with the OG’s current legally limited mission of only serving income-eligible persons over the age of 18 under the DDPC.

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