

SENATE MEMORIAL 94
TASK FORCE REPORT

For Submission to:

Legislative Health and Human Services Committee
Legislative Finance Committee
Courts, Corrections and Justice Committee

October 28, 2013

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Developmental Disabilities Planning Council

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EXECUTIVE SUMMARY

Senate Memorial 94

Senate Memorial 94, sponsored by Senator Jerry Ortiz y Pino, passed the New Mexico State Senate in the regular 2013 session by a vote of 37 to 0. SM 94 requested the Developmental Disabilities Planning Council (DDPC) to convene a work group to consider potential changes to the Uniform Probate Code to address three issues related to guardianship or conservatorship of incapacitated adults and the families of such individuals, and to report its recommendations to the Legislative Health and Human Services Committee, the Legislative Finance Committee, and the Courts, Corrections and Justice Committee by October 31, 2013.

The issues to be addressed by the work group, pursuant to SM 94, included potential changes to the Probate Code that would:

1. allow greater access by family members to information about decisions and actions of guardians or conservators that they could use to evaluate the performance of the guardian or conservator;
2. provide greater accountability to family members for the decisions that guardians and conservators make; and
3. clarify decision-making authority, and notice regarding decision-making, upon the death of a protected person

The Task Force

Pursuant to SM 94, a task force was appointed in June 2013 by Agnes Maldonado, who was Executive Director of the DDPC at that time. The task force membership included representatives of the following agencies, organizations and individuals:

Administrative Office of the Courts
Aging and Long Term Services Department
The Arc of New Mexico
Attorney General of New Mexico Office
Jack Burton, Esq.
Fletcher Catron, Esq.
Decades, LLC (guardianship provider agency)
Department of Health
Disability Rights New Mexico
Governor of New Mexico Office
Judge Clay Campbell, 2nd Judicial District
Legislative Council Service staff
New Mexico Guardianship Association
Office of Guardianship, DDPC
Senator Jerry Ortiz y Pino
Senator Peter Wirth

The task force met four times from June through October 2013 to discuss the issues raised by SM 94, determine its recommendations, and to develop and review this report.

Recommendations

The Task Force was able to achieve consensus on the following recommendations:

I. The legislature should *not* adopt amendments to the Uniform Probate Code that would expand access to protected information. Existing provisions of the Code provide reasonable opportunity for interested family members to arrange for access to information. Broader disclosure provisions would compromise confidentiality and the privacy of the protected person.

II.A. The legislature should appropriate additional funds to the state courts, earmarked as necessary, so that they will have the staff capacity to more effectively review annual reports, monitor the status of the protected person, and take remedial action as needed.

The Task Force acknowledges that some courts have not been able to provide the level of review and monitoring needed to assure the protection of the interests of protected persons.

II.B. The legislature should *not* adopt amendments to the Uniform Probate Code that would make guardians or conservators more directly accountable to family members.

The Code provides for a system of review and accountability to the court. While that system may need more staff support as noted above, it supports the independent judgment of the guardian on behalf of the protected person. Not all family members will have the best interests of the protected person in mind and each situation should be handled individually by the court that establishes the guardianship order.

III.A. The legislature should amend the Uniform Probate Code to narrowly address decision-making authority upon the death of a protected person.

Under current law, the guardian's authority terminates upon the death of the protected person. The Task Force recommends that the Code require that a guardian provide notice of the protected person's death to immediate family members of which the guardian has knowledge or can readily ascertain. Guardians should provide such family members with basic information about the process of becoming a Personal Representative. The Task Force further recommends that the Code provide, in the absence of a will or probate, short-term authority for someone from a prioritized list of categories of family members, significant others, or the former guardian (if they agree to do so) to make decisions about funeral arrangements, including burial or cremation, authorization of autopsies, and other decisions directly associated with the passing of the protected person, and authority for the former guardian or conservator to pay reasonable sums for such services from funds available from the estate. The Task Force also recommends that such amendments to the Code provide that, if no Personal Representative has been appointed within three weeks of the death of the protected person, the guardian or conservator be allowed to liquidate a small estate. No further amendment is needed with respect to the disposition of the protected person's estate as the Code already provides quick and simple procedures for such disposition.

III.B. The legislature should amend the Uniform Health-Care Decisions Act to allow a health care agent or surrogate, in the absence of an appointed Personal Representative and for a period of no more than 30 days after an incapacitated person's death, to obtain medical records related to the decedent. If a Personal Representative has not been appointed, there is no one clearly authorized under current law to request and receive such records.

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3. clarify decision-making authority, and notice regarding decision-making, upon the death of a protected person

The membership of the Task Force was appointed in June 2013 by Agnes Maldonado, who was Executive Director of the Developmental Disabilities Planning Council at that time. The task force included representatives of the following agencies, organizations and individuals:

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- Judge Clay Campbell, 2nd Judicial District
- Legislative Council Service staff
- New Mexico Guardianship Association
- Office of Guardianship, DDPC
- Senator Jerry Ortiz y Pino
- Senator Peter Wirth

The Task Force met four times: on June 28th, July 23rd, August 20th, and October 2, 2013. At the request of Ms. Maldonado, the meetings were facilitated by Jim Jackson, Executive Director of Disability Rights New Mexico. Mr. Jackson is a member of the DD Planning Council and has

also been a member of the Guardianship Advisory Committee of the Council's Office of Guardianship for a number of years.

Analysis and recommendations

Background

The Uniform Probate Code, which is Chapter 45 of the NMSA 1978, is the section of New Mexico law that provides procedures for the appointment of a guardian for an incapacitated adult, and/or the appointment of a conservator for an adult who is incapacitated or otherwise unable to manage his or her estate or financial affairs. The person for who a guardian or conservator is appointed is now referred to in law as a "protected person".

SB 112, introduced in the 2013 session by Senator Jerry Ortiz y Pino, proposed amendments to the Code to authorize the guardian of a protected person to make decisions and take action needed to wrap up the affairs of a protected person upon the protected person's death. Concerns were raised during the session that the bill, as drafted, might circumvent certain important provisions of the Code that would typically apply to such situations and appeared to disregard the distinction in the role of guardian and conservator.

In addition, concerns were communicated to the sponsor of SB 112 by a few family members and others that New Mexico's guardianship laws prevented interested family members from getting information about actions or decisions made by a guardian and did not make the guardian accountable to family members for those actions or decisions. The implication was that the protected person might be neglected or exploited by the guardian without family members having the opportunity to learn what was being reported to the court or to take action on behalf of the protected person

For these reasons, SB 112 did not move forward during the 2013 session. Instead, Senator Ortiz y Pino introduced SM 94, calling for a work group to address these issues.

The SM 94 Task Force reviewed and analyzed the issues raised in SM 94 and adopted recommendations to the legislature regarding each one, as noted below. In addressing these issues, the Task Force members generally agreed that, while there may be problems or concerns at times with the way the Code is applied or administered, it is based on a well-respected national model and therefore amendments should be approached with caution.

The Task Force also acknowledged in its meetings that there are issues related to guardianship of protected persons, other than those raised in SM 94, that are of concern to some advocates and practitioners in the field. Examples of such other issues include the question of whether the guardian ad litem should more clearly serve as the attorney for the alleged incapacitated person rather than as someone to promote the best interest of that person, and the question of whether a petitioning attorney should be able to arrange for a guardian ad litem, visitor, and medical professional, since this creates an appearance of a "stacked deck" or conflict of interest. However, the Task Force determined that these and other issues were beyond the purview of the SM 94 Task Force, and therefore concentrated on the following three issues specific to SM 94.

SM 94 Issues

I. Lack of access by family members to information about actions taken by guardian

Some family members and other interested individuals contend that once a hearing has been held on a petition for guardianship or conservatorship and a guardian or conservator has been appointed, family members or interested others who are not the guardian do not have access to the court records because they are sequestered files. They do not have access to the guardian's annual reports (which may or not be filed as required) without a court order since the reports become part of the confidential file. The guardian may be imposing restrictions on who can visit with the protected person. From this perspective, if family members are not getting information from the guardian (or don't trust the information they get), and don't have access to the protected person, they have no way to gain access to information about decisions or actions by the guardian or about the status of the protected person without hiring an attorney and going to court.

Analysis: The Task Force acknowledges that access to information about the protected person and the actions of a guardian are limited under the Code, and must generally be granted through the court. However, the Task Force also notes that there is ample opportunity under the Code for family involvement and access to information.

For example, the Code provides that notice to close family members is required by law in advance of any hearing on a proposed guardianship. NMSA 1978, §45-5-309. The same is true for a proposed conservatorship. §NMSA 1978, 45-5-405. Family members may appear at such a hearing without counsel, and may request that accounting be made or information be provided to family members or that they be allowed access to reports and records. Appearing at a hearing for this purpose does not impose a significant burden upon family members. Any other interested person may ask the court to require advance notice of any order in a guardianship proceeding. NMSA 1978, §45-5-406.

When selecting an individual for appointment as guardian, the court must follow the priorities established under the Code. First priority, after any guardian who may have already been appointed by another court, is for a person selected for this purpose by the incapacitated person while they were competent to do so. The next priorities for appointment are various close family members. Only if a court determines that family members are not appropriate or less appropriate than others or not available would a non-family member be appointed as guardian. NMSA 1978, §45-5-311.

Once a guardian has been appointed, any family member can ask for the court to consider a change of guardian or the modification of a guardianship order. NMSA 1978, §45-5-307.

The Task Force believes that the privacy of the protected person is of great importance. While the above-cited provisions of the Code allow for notice to and the potential involvement of family members, the Code also provides that records and reports of guardianship proceedings are confidential, with disclosure to the public only of the most basic information, such as identification of the protected person, the date of the proceeding, and the duration of the guardianship. The hearing on a petition for guardianship is closed unless requested to be open by the allegedly incapacitated person. NMSA 1978, §45-5-303. The Task Force supports these privacy provisions and believes that confidential information about the protected person should

not be *automatically* provided or available to others simply because they are related to the protected person, as such disclosure may not be in the best interests of the protected person.

Recommendation I:

The legislature should not approve amendments to the Uniform Probate Code that would expand access to protected information.

II. Lack of accountability for guardian action (or inaction)

SM 94 also reflects a concern that guardians are not accountable to family members or others connected to the protected person for the decisions they make; they are accountable only to the court. They don't have to listen to or act on anyone else's advice or concerns.

In addition, oversight of guardianship arrangements by the state courts varies considerably and in some cases is limited at best. Annual reports are not always filed as required, and even if submitted they might not be read by the judge or other court personnel. Annual reports filed by guardians may not reflect the actual situation of the protected person. There is no system of periodic site visits, record reviews or other oversight of guardians once appointed. Some monitoring or oversight is done by the state Office of Guardianship at the DD Planning Council, but only with respect to the contracts for guardianship services established through that office. Because of the lack of oversight there may be undetected abuse, neglect or exploitation of protected persons.

Analysis: The Task Force acknowledges that some courts have not been able to provide the level of review and monitoring needed to assure the protection of the interests of protected persons. However, the Task Force supports the intent of the Code for guardians to be accountable to the court for carrying out their responsibilities to the protected person, and does not believe that it would be consistently in the best interests of protected persons for guardians appointed by the court to be accountable to other family members who were not sufficiently interested or appropriate to have been appointed as guardians themselves by the court.

The Uniform Probate Code requires guardians to file an annual report with the court, and the court is required to review such reports. NMSA 1978, §45-5-314. At least every ten years, the court must review the on-going need for a guardianship arrangement. NMSA 1978, §45-5-307. Conservators are also required to file annual reports and to keep proper accounts.

The specific extent of the workload on the judiciary created by the responsibility to review these reports is not clear but appears to be significant. The Office of Guardianship alone accounts for over 1,000 active guardianship cases in the state, and there are likely to be at least 5 to 10 times as many guardianships and conservatorships active in the state courts that are not connected to the Office of Guardianship. Since many if not most of the guardianship or conservatorship orders that remain extant were entered prior to the implementation of the computerized data base now used by the state court system, it is not currently possible to determine the total specific number of reports that should be filed annually. Careful review of annual reports submitted by guardians and conservators takes time and requires some expertise. Assuring such review of all reports is an important responsibility for the courts but creates a significant administrative burden.

The lack of consistent court oversight has been noted by previous task forces commissioned by legislative action in 2008 and 2009 to address issues related to guardianship¹. Just last year, HM 61, sponsored by Rep. Gail Chasey and passed in the 2012 legislative session, also recognized the lack of consistent oversight by the courts and called upon the Administrative Office of the Court to identify the resources that would be needed to provide such oversight.

The SM 94 Task Force concurs that the state courts do not consistently provide the level of oversight needed. While we lack the data needed to recommend specific levels of additional financial support for each district court, we believe that the legislature should appropriate and earmark sufficient funds so that each district court can maintain adequate staff to assure that all required annual reports are filed, that they are reviewed by the court, that the status and living arrangements of protected persons are periodically reviewed by the court, and that remedial action is taken where necessary. The Task Force notes very approvingly that the 2nd Judicial District is hiring a staff person who will have specific responsibility for assuring that such review occurs. However, most of the districts lack the resources and infrastructure to replicate this effort without additional state support.

While the courts may need more financial support to carry out their responsibility for oversight, the Task Force believes that court oversight remains the best way to safeguard the interests of protected persons. Making guardians accountable to family members of a protected person in addition to (or in place of) the court would undermine the independent judgment of the guardian on behalf of the protected person and would not necessarily add a layer of protection that would benefit the protected person. Not all family members will have the best interests of the protected person in mind, particularly when such family members may stand to gain from the estate of the protected person upon his or her death. Each situation should be handled individually by the court that establishes the guardianship order, taking into account existing and previous relationships, the privacy of the protected person, and other relevant factors.

Recommendation II.A:

The legislature should appropriate additional funds to the state courts, earmarked as necessary, so that they will have the staff capacity to more effectively review annual reports, monitor the status of the protected person, and take remedial action as needed.

Recommendation II.B:

The legislature should not approve amendments to the Uniform Probate Code that would make guardians or conservators more directly accountable to family members.

III. Decisions after the death of protected person

Under current law, no one has clear legal authority to make decisions prior to, or in lieu of the appointment of, a Personal Representative, with respect to a deceased protected person who has been under guardianship. Corporate guardians under contract to the DD Planning Council Office of Guardianship have reported encountering problems when attempting to wrap

¹ See for example the reports submitted by task forces created pursuant to HJM 34 (2008 session) and HM 6 (2009 session).

up the affairs of a deceased protected person, especially when no family member comes forward to assume responsibility at that time. They report that entities such as banks and funeral homes question or even challenge their authority to act in such circumstances. In some cases, family members do not volunteer to serve as Personal Representative, but may complain that a guardian has acted in ways not consistent with the wishes of the family or of the protected person.

Analysis: The authority of a guardian terminates upon the death of the protected person. NMSA 1978, §45-5-306. The guardian must file a notice with the court of the death of a protected person. Notice to family members or other interested individuals is not currently required. The Code allows for the usual possibility that someone, typically a family member, will step forward to become the Personal Representative of the estate of the protected person. The Code establishes a priority list of persons who might serve as Personal Representative, and the (former) guardian of the protected person is included as an option if immediate family members do not step into this role. NMSA 1978, §45-3-203.

However, serving as Personal Representative does impose various responsibilities and duties. If no family member comes forward to serve in this capacity, the (former) guardian may also decline to do so. In such circumstances, there is no provision in the Code for a priority sequence of who can and should make the decisions that need to be made in the immediate aftermath of the protected person's death (as there is, for instance, under the Uniform Health-care Decisions Act, for making health care decisions for a person who lacks capacity). Whoever does end up making these decisions, despite what may be a lack of legal authority for doing so under the current Code, is under no obligation to consult with other family members.

The Task Force acknowledges the confusion and uncertainty regarding decision-making authority upon the death of a protected person when no one has been appointed Personal Representative. However, the Task Force does not wish to ignore or circumvent the general provisions of the Code related to the disposition of estates and the handling of the affairs of individuals upon their death, since the processes provided for under the Code address these circumstances in a way that is generally very satisfactory.

Recommendation III.A:

The legislature should amend the Uniform Probate Code to narrowly address decision-making authority upon the death of a protected person. The Task Force recommends that the Code be amended to require that a guardian provide notice of the protected person's death to immediate family members of which the guardian has knowledge or whose identity and contact information can readily be ascertained. When doing so, guardians could provide such family members with basic information about the process of becoming a Personal Representative. The Task Force further recommends that the Code provide, in the absence of a will or probate, authority for a brief period of time for someone from a prioritized list of categories of family members, significant others, or the former guardian (subject to their consent) to make decisions about issues such as funeral arrangements, including burial or cremation, authorization of autopsies, and other decisions directly associated with the passing of the protected person, and authority for the former guardian or conservator to pay reasonable sums for such services from funds available from the estate. This approach avoids imposing the full range of responsibilities of a Personal Representative on someone who does not wish to assume that role. The Task Force also recommends that such amendments to the Code provide that, if no Personal Representative has been appointed within three weeks of the death of the

protected person, the former guardian or conservator be allowed to liquidate a small estate. No further amendment is needed with respect to the disposition of the protected person's estate as the Code already provides quick and simple procedures for such disposition.

Recommendation III.B:

The legislature should amend the Uniform Health-Care Decisions Act to allow a health care agent or surrogate, in the absence of an appointed Personal Representative and for a period of no more than 30 days after an incapacitated person's death, to obtain medical records related to the decedent. The Task Force believes that this related issue - a lack of legal authority in some situations for someone to obtain access to medical records, particularly where there is a question regarding the circumstances of the protected person's death - would be best addressed by amending the Uniform Health-care Decisions Act rather than amending the Uniform Probate Code.