

1 HOUSE BILL 234

2 **55TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2021**

3 INTRODUCED BY

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5 and Linda M. Lopez and Katy Duhigg
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10 AN ACT

11 RELATING TO GUARDIANSHIP; REQUIRING THE OFFICE OF GUARDIANSHIP
12 TO STRENGTHEN OVERSIGHT OF GUARDIANSHIP SERVICE PROVIDERS;
13 AUTHORIZING THE OFFICE OF GUARDIANSHIP TO LICENSE PROFESSIONAL
14 GUARDIANS; REQUIRING LICENSURE FOR PROFESSIONAL GUARDIANS;
15 MAKING AN APPROPRIATION.
16

17 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

18 SECTION 1. A new section of the Office of Guardianship
19 Act is enacted to read:

20 "[NEW MATERIAL] PROFESSIONAL GUARDIAN AND CONSERVATOR
21 LICENSING.--

22 A. On or after January 1, 2022, to provide
23 guardianship or conservatorship services in New Mexico,
24 professional guardians and conservators shall hold a license
25 issued pursuant to this section.

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1 B. An applicant for a license pursuant to this
2 section shall:

3 (1) apply to the office of guardianship on a
4 form prescribed by the office; and

5 (2) submit with the application a
6 nonrefundable application fee in an amount determined by the
7 office of guardianship.

8 C. The office of guardianship shall adopt rules and
9 procedures for issuing a license and for renewing, suspending
10 or revoking a license issued pursuant to this section. Any
11 rules adopted by the office of guardianship under this section
12 shall:

13 (1) require that professional guardians and
14 conservators are certified and in good standing with a national
15 or state organization recognized by the supreme court that
16 provides professional certification for guardians and
17 conservators;

18 (2) establish qualifications for obtaining and
19 maintaining licensure;

20 (3) provide that the office issue licenses
21 pursuant to this section;

22 (4) provide that a license expires on the last
23 day of the month in which the second anniversary of the date
24 the license was issued occurs unless renewed on or before that
25 day;

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1 (5) prescribe procedures for accepting
2 complaints and conducting investigations of alleged violations
3 of the minimum standards required by the national or state
4 organization recognized by the supreme court that provides
5 professional certification for guardians and conservators, or
6 other terms of the licensure by license holders; and

7 (6) prescribe procedures by which the office,
8 after notice and hearing, may suspend or revoke the license of
9 a holder who fails to substantially comply with appropriate
10 standards or other terms of the licensure.

11 D. An employee of the office of guardianship who is
12 applying for a license under this section is exempt from
13 payment of an application fee as required by this section.

14 E. An application fee or other fee collected under
15 this section shall be deposited by the executive director of
16 the developmental disabilities planning council into the office
17 of guardianship fund.

18 F. As used in this section:

19 (1) "conservator" means a person who is
20 appointed by a court to manage the property or financial
21 affairs or both of a protected person;

22 (2) "professional guardian" means an
23 individual or entity that serves as a guardian for more than
24 two individuals who are not related to the guardian by
25 marriage, adoption or third degree of blood or affinity; and

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1 (3) "protected person" means a person eighteen
2 years of age or older for whom a guardian or conservator has
3 been appointed or other protective order has been made."

4 **SECTION 2.** Section 28-16B-2 NMSA 1978 (being Laws 2003,
5 Chapter 280, Section 2) is amended to read:

6 "28-16B-2. OFFICE OF GUARDIANSHIP--CREATED--STAFF.--

7 A. The "office of guardianship" is created in the
8 developmental disabilities planning council.

9 B. The executive director of the developmental
10 disabilities planning council shall employ a head of the office
11 who shall be an attorney licensed in New Mexico who is hired on
12 the basis of ability, experience and knowledge of guardianship
13 issues under the Uniform Probate Code. The position shall be
14 classified pursuant to the Personnel Act.

15 C. Subject to appropriations, the executive
16 director may hire such other professional and clerical staff as
17 necessary to carry out the purposes of the office."

18 **SECTION 3.** Section 28-16B-3 NMSA 1978 (being Laws 2003,
19 Chapter 280, Section 3, as amended) is amended to read:

20 "28-16B-3. OFFICE--POWERS AND DUTIES.--

21 A. The office of guardianship may:

22 (1) promulgate rules in accordance with the
23 State Rules Act to carry out the provisions of the Office of
24 Guardianship Act; and

25 (2) enter into agreements with other state or

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1 federal agencies to provide guardianship services and to
2 provide or receive payment for such services.

3 B. The office of guardianship shall:

4 (1) contract for the provision of probate
5 guardianship services to income-eligible incapacitated persons,
6 including temporary guardianship as provided in Section
7 45-5-310 NMSA 1978;

8 (2) provide for the recruitment and training
9 of persons interested and willing to serve as mental health
10 treatment guardians;

11 (3) provide training and information to
12 interested persons on the duties and responsibilities of
13 guardians, including alternatives to guardianship and mental
14 health treatment guardianship;

15 (4) establish procedures for the investigation
16 and resolution of complaints against ~~[contractors]~~ guardianship
17 and legal services providers;

18 (5) ~~[contract for attorneys]~~ provide legal
19 services, including petitioning attorney, guardian ad litem and
20 court visitor services, to petition the district court for
21 guardianship of persons believed to be incapacitated or to seek
22 amendment or termination of existing guardianship orders if the
23 needs or situation of protected persons have changed; provided
24 that the selection of persons ~~[to be served under such~~
25 ~~contracts]~~ to receive guardianship and legal services shall be

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1 made by the office based on selection criteria established by
2 rule; and

3 (6) serve as an interested person as defined
4 in Subsection I of Section 45-5-101 NMSA 1978."

5 SECTION 4. Section 28-16B-4 NMSA 1978 (being Laws 2003,
6 Chapter 280, Section 4, as amended) is amended to read:

7 "28-16B-4. [~~CONTRACT~~] SERVICE AGREEMENT MONITORING AND
8 ENFORCEMENT.--

9 A. The office of guardianship shall monitor [~~and~~
10 ~~enforce all guardianship contracts~~] professional guardians
11 providing services to income-eligible protected persons and
12 enforce all agreements the office has executed with
13 guardianship and legal services providers. In carrying out
14 this duty, the office [~~may~~] shall:

15 (1) have access to case records, copies of
16 court filings and reports, financial records and other records
17 maintained by [~~contractors related to contract services~~
18 ~~provided~~] guardianship and legal services providers related to
19 the services provided to income-eligible protected persons,
20 unless specifically sequestered by the court;

21 (2) petition the court of jurisdiction for
22 access to records that have been sequestered;

23 [~~(3) arrange visits with protected persons who~~
24 ~~are served by contract guardians~~]

25 (3) conduct annual comprehensive service

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1 reviews to ensure service providers comply with service
2 agreements and statutory duties;

3 (4) visit protected persons to evaluate the
4 adequacy of guardianship services provided and determine if the
5 guardianship should be amended or terminated; and

6 ~~[(4)]~~ (5) pursue legal and other remedies
7 against [contractors for noncompliance with contract
8 provisions] service providers for noncompliance with service
9 agreements and statutory duties.

10 B. The office shall protect and maintain the
11 confidentiality of all client-specific information and records
12 obtained to the same extent as required for the ~~[contractor]~~
13 service providers and to any extent otherwise required by state
14 or federal law."

15 SECTION 5. Section 28-16B-5 NMSA 1978 (being Laws 2003,
16 Chapter 280, Section 5, as amended) is amended to read:

17 "28-16B-5. ~~[CONTRACTS]~~ SERVICE AGREEMENTS.--

18 A. A ~~[contract]~~ service agreement for guardianship
19 services shall include:

20 ~~[A. a requirement that contractors and their staff~~
21 ~~meet nationally recognized standards for guardianship~~
22 ~~services;]~~

23 (1) a requirement that service providers be
24 certified and in good standing with a national or state
25 organization recognized by the supreme court that provides

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1 professional certification for guardians;

2 (2) a requirement that service providers be
3 licensed by the office of guardianship;

4 [~~B.~~] (3) a requirement for adoption and
5 compliance with a code of ethics for guardians;

6 [~~C.~~] (4) the maximum caseload for guardians;

7 [~~D.~~] (5) the fee schedule for services
8 provided;

9 [~~E.~~] (6) assurance that the civil rights of
10 protected persons served by the [~~contractor~~] service provider
11 shall be met, including the right to be served in the most
12 integrated setting appropriate to the needs of the protected
13 person;

14 [~~F.~~] (7) provisions for access by the office
15 of guardianship to records, protected persons and [~~contractor~~]
16 service provider staff as needed to monitor and enforce
17 contract compliance and for quality assurance purposes; and

18 [~~G.~~] (8) minimum financial accounting and
19 reporting requirements.

20 B. As used in this section, "protected person"
21 means a person eighteen years of age or older for whom a
22 guardian or conservator has been appointed or other protective
23 order has been made."

24 SECTION 6. Section 45-5-311 NMSA 1978 (being Laws 1975,
25 Chapter 257, Section 5-311, as amended) is amended to read:

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1 "45-5-311. WHO MAY BE APPOINTED GUARDIAN--PRIORITIES--
2 QUALIFICATIONS.--

3 A. Any person deemed to be qualified by the court
4 may be appointed guardian of an incapacitated person, except
5 that no individual who operates or is an employee of a boarding
6 home, residential care home, nursing home, group home or other
7 similar facility in which the incapacitated person resides may
8 serve as guardian for the incapacitated person, except an
9 employee may serve in such capacity when related by affinity or
10 consanguinity.

11 B. Persons who are not disqualified have priority
12 for appointment as guardian in the following order:

13 (1) a guardian or other like fiduciary
14 appointed by the appropriate court of any other jurisdiction;

15 (2) a person, as far as known or as can be
16 reasonably ascertained, previously nominated or designated in a
17 writing signed by the incapacitated person prior to incapacity
18 that has not been revoked by the incapacitated person or
19 terminated by a court. This includes writings executed under
20 the Uniform Health-Care Decisions Act, the Mental Health Care
21 Treatment Decisions Act, the Uniform Power of Attorney Act, the
22 Uniform Probate Code and the Uniform Trust Code;

23 (3) the spouse of the incapacitated person;

24 (4) an adult child of the incapacitated
25 person;

.219240.2SA

1 (5) a parent of the incapacitated person,
2 including a person nominated by will or other writing signed by
3 a deceased parent;

4 (6) any relative of the incapacitated person
5 with whom the incapacitated person has resided for more than
6 six months prior to the filing of the petition;

7 (7) a person nominated by the person who is
8 caring for the incapacitated person or paying benefits to the
9 incapacitated person; and

10 (8) any other person.

11 C. With respect to persons having equal priority,
12 the court shall select the person it considers best qualified
13 to serve as guardian. The court, acting in the best interest
14 of the incapacitated person and for good cause shown, may pass
15 over a person having priority and appoint a person having a
16 lower priority under this section and shall take into
17 consideration:

18 (1) the preference of the incapacitated
19 person, giving weight to preferences expressed in writing by
20 the person while having capacity;

21 (2) the geographic location of the proposed
22 guardian;

23 (3) the relationship of the proposed guardian
24 to the incapacitated person;

25 (4) the ability of the proposed guardian to

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1 carry out the powers and duties of the guardianship; and

2 (5) potential financial conflicts of interest
3 between the incapacitated person and proposed guardian.

4 D. A professional guardian shall not serve or be
5 appointed as a guardian of the incapacitated person unless the
6 professional guardian is:

7 (1) certified and is in good standing with a
8 national or state organization recognized by the supreme court
9 that provides professional certification for guardians; and

10 (2) licensed by the office of guardianship."

11 SECTION 7. Section 45-5-410 NMSA 1978 (being Laws 1975,
12 Chapter 257, Section 5-410, as amended) is amended to read:

13 "45-5-410. WHO MAY BE APPOINTED CONSERVATOR--
14 PRIORITIES.--

15 A. The court may appoint an individual, or a
16 corporation with general power to serve as trustee, as
17 conservator of the incapacitated person. The following are
18 entitled to consideration for appointment in the order listed:

19 (1) a conservator, guardian of property or
20 other like fiduciary appointed or recognized by the appropriate
21 court of any other jurisdiction in which the incapacitated
22 person resides;

23 (2) a person, as far as known or as can be
24 reasonably ascertained, previously nominated or designated in a
25 writing signed by the incapacitated person prior to incapacity

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1 that has not been revoked by the incapacitated person or
2 terminated by a court. This includes writings executed under
3 the Uniform Health-Care Decisions Act, the Mental Health Care
4 Treatment Decisions Act, the Uniform Power of Attorney Act, the
5 Uniform Probate Code and the Uniform Trust Code;

6 (3) the spouse of the incapacitated person;

7 (4) an adult child of the incapacitated
8 person;

9 (5) a parent of the incapacitated person or a
10 person nominated by the will of a deceased parent;

11 (6) any relative of the incapacitated person
12 with whom the incapacitated person has resided for more than
13 six months prior to the filing of the petition;

14 (7) a person nominated by the person who is
15 caring for the incapacitated person or paying benefits to the
16 incapacitated person; and

17 (8) any other person.

18 B. A person under the priorities of Paragraph (1),
19 (2), (3), (4), (5) or (6) of Subsection A of this section may
20 nominate in writing a person to serve in the person's stead.
21 With respect to persons having equal priority, the court shall
22 select the one who is best qualified of those willing to serve.

23 C. The court, for good cause, may pass over a
24 person having priority and appoint a person having lesser
25 priority under this section and shall take into consideration:

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- 1 (1) the preference of the incapacitated
- 2 person;
- 3 (2) the geographic location of the proposed
- 4 conservator;
- 5 (3) the relationship of the proposed
- 6 conservator to the incapacitated person;
- 7 (4) the ability of the proposed conservator to
- 8 carry out the powers and duties of the conservatorship; and
- 9 (5) potential financial conflicts of interest
- 10 between the incapacitated person and the proposed conservator.

11 D. A professional conservator shall not serve or be
12 appointed as a conservator of the protected person unless the
13 professional conservator is:

- 14 (1) certified and is in good standing with a
- 15 national or state organization recognized by the supreme court
- 16 that provides professional certification for conservators; and
- 17 (2) licensed by the office of guardianship."

18 SECTION 8. APPROPRIATION.--Two hundred eighty-five
19 thousand dollars (\$285,000) is appropriated from the general
20 fund to the office of guardianship fund for expenditure in
21 fiscal year 2022 for the purposes of establishing a
22 guardianship licensure program. Any unexpended or unencumbered
23 balance remaining at the end of fiscal year 2022 shall revert
24 to the general fund.

25 SECTION 9. EFFECTIVE DATE.--The effective date of the
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provisions of this act is July 1, 2021.

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