HOUSE BILL 234

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

INTRODUCED BY

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AN ACT

RELATING TO GUARDIANSHIP; REQUIRING THE OFFICE OF GUARDIANSHIP TO STRENGTHEN OVERSIGHT OF GUARDIANSHIP SERVICE PROVIDERS; AUTHORIZING THE OFFICE OF GUARDIANSHIP TO LICENSE PROFESSIONAL GUARDIANS; REQUIRING LICENSURE FOR PROFESSIONAL GUARDIANS; MAKING AN APPROPRIATION.

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

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

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

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

.219240.2SA
B. An applicant for a license pursuant to this section shall:

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

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

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

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

(2) establish qualifications for obtaining and maintaining licensure;

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

(4) provide that a license expires on the last day of the month in which the second anniversary of the date the license was issued occurs unless renewed on or before that day;
(5) prescribe procedures for accepting complaints and conducting investigations of alleged violations of the minimum standards required by the national or state organization recognized by the supreme court that provides professional certification for guardians and conservators, or other terms of the licensure by license holders; and

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

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

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

F. As used in this section:

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

(2) "professional guardian" means an individual or entity that serves as a guardian for more than two individuals who are not related to the guardian by marriage, adoption or third degree of blood or affinity; and
(3) "protected person" means a person eighteen years of age or older for whom a guardian or conservator has been appointed or other protective order has been made."

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

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

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

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

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

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

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

A. The office of guardianship may:

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

(2) enter into agreements with other state or
federal agencies to provide guardianship services and to provide or receive payment for such services.

B. The office of guardianship shall:

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

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

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

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

(5) [contract for attorneys] provide legal services, including petitioning attorney, guardian ad litem and court visitor services, to petition the district court for guardianship of persons believed to be incapacitated or to seek amendment or termination of existing guardianship orders if the needs or situation of protected persons have changed; provided that the selection of persons [to be served under such contracts] to receive guardianship and legal services shall be
made by the office based on selection criteria established by rule; and

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

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

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

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

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

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

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

(3) conduct annual comprehensive service
reviews to ensure service providers comply with service agreements and statutory duties;

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

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

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

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

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

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

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

(1) a requirement that service providers be certified and in good standing with a national or state organization recognized by the supreme court that provides
professional certification for guardians;

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

(B) (3) a requirement for adoption and
compliance with a code of ethics for guardians;

(E) (4) the maximum caseload for guardians;

(D) (5) the fee schedule for services
provided;

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

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

(G) (8) minimum financial accounting and
reporting requirements.

B. As used in this section, "protected person"
means a person eighteen years of age or older for whom a
[bracketed material] guardian or conservator has been appointed or other protective
[bracketed material] order has been made."

SECTION 6. Section 45-5-311 NMSA 1978 (being Laws 1975,
Chapter 257, Section 5-311, as amended) is amended to read:
"45-5-311. WHO MAY BE APPOINTED GUARDIAN--PRIORITIES--QUALIFICATIONS.--

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

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

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

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

(3) the spouse of the incapacitated person;

(4) an adult child of the incapacitated person;
(5) a parent of the incapacitated person, including a person nominated by will or other writing signed by a deceased parent;

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

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

(8) any other person.

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

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

(2) the geographic location of the proposed guardian;

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

(4) the ability of the proposed guardian to
carry out the powers and duties of the guardianship; and

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

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

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

(2) licensed by the office of guardianship."

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

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

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

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

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

(3) the spouse of the incapacitated person;
(4) an adult child of the incapacitated
person;
(5) a parent of the incapacitated person or a
person nominated by the will of a deceased parent;
(6) any relative of the incapacitated person
with whom the incapacitated person has resided for more than
six months prior to the filing of the petition;
(7) a person nominated by the person who is
caring for the incapacitated person or paying benefits to the
incapacitated person; and
(8) any other person.

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

C. The court, for good cause, may pass over a
person having priority and appoint a person having lesser
priority under this section and shall take into consideration:
(1) the preference of the incapacitated person;

(2) the geographic location of the proposed conservator;

(3) the relationship of the proposed conservator to the incapacitated person;

(4) the ability of the proposed conservator to carry out the powers and duties of the conservatorship; and

(5) potential financial conflicts of interest between the incapacitated person and the proposed conservator.

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

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

(2) licensed by the office of guardianship.

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

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