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FISCAL IMPACT REPORT

ORIGINAL DATE 2/15/19

SPONSOR White/Ely LAST UPDATED _____ HB _____

SHORT TITLE Uniform Probate Code Changes SB 395

ANALYST Glenn

REVENUE (dollars in thousands)

| Estimated Revenue | | | Recurring or Nonrecurring | Fund Affected |
|-------------------|--|--|---------------------------------|------------------------|
| FY19 | FY20 | FY21 | | |
| | Indeterminate/See Fiscal Implications | Indeterminate/See Fiscal Implications | Recurring | Current School Fund |
| | (Indeterminate)/See Fiscal Implications | (Indeterminate)/See Fiscal Implications | Recurring | General Fund |

(Parenthesis () Indicate Revenue Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

| | FY19 | FY20 | FY21 | 3 Year Total Cost | Recurring or Nonrecurring | Fund Affected |
|--------------|------|---------------|---------------|----------------------|------------------------------|----------------------------|
| Total | | Indeterminate | Indeterminate | | Recurring | See Fiscal Implications |

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 State Auditor's Office (OSA)
 Office of the Attorney General (NMAG)
 Developmental Disabilities Planning Council (DDPC)
 Aging & Long-Term Services Department (ALTSD)
 Children, Youth & Families Department (CYFD)

SUMMARY

Synopsis of Bill

Senate Bill 395 amends provisions of the Uniform Probate Code pertaining to adult guardianship and conservatorship cases. The bill's more substantive amendments:

- add definitions of “professional guardian” and “professional conservator”;
- provide that an alleged incapacitated person may present evidence, examine witnesses and otherwise participate at a hearing on a petition to appoint a guardian or conservator;
- provide that reports of qualified health care professionals and court-appointed visitors, and annual guardian and conservator reports filed with the court are confidential;
- require a guardian ad litem (GAL) to submit a written report to the court prior to a hearing on a petition to appoint a guardian or conservator;
- allow the court to appoint a court investigator to assess a protected person's capacity no later than 10 years after the initial appointment and every 10 years after that. The bill requires the court investigator to prepare a detailed report regarding the status of the protected person's capacity and the continued need for a guardian;
- specify criteria for writings executed by an incapacitated person prior to incapacity that give a guardian priority for appointment;
- require that professional guardians and professional conservators be certified and in good standing with a national or state organization that provides professional certification for guardians or conservators;
- delete the annual report formats for annual guardian and conservator reports to the appointing court. In place of the form, SB 395 provides that the reports must substantially comply with forms approved by the supreme court;
- increase fines for an overdue interim or annual guardian and conservator reports from \$5 a day to \$25 a day, and provide for payment of the fines to the current school fund; and
- prohibit waivers of a conservator's liability under Section 45-5-429 NMSA 1978, or of an agent, an affiliate, a designee or any other third party acting on behalf of a conservator.

SB 395 creates a grievance process allowing a protected person or person interested in the protected person's welfare to file a grievance with the court if the person believes a guardian, conservator, or representative payee, as defined by the bill, is breaching their fiduciary duty or otherwise acting inconsistently with the Uniform Probate Code or orders of appointment. The court is required to review the grievance, schedule a hearing if appropriate, and take any action supported by the evidence.

The bill repeals Section 45-5-405.1 NMSA 1978, which allows a court to issue an order for a protective arrangement instead of a conservator.

The effective date of SB 395 is July 1, 2019.

FISCAL IMPLICATIONS

AOC states that there will be minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the enforcement of the bill, if enacted.

OSA states that the fiscal impact of SB 395's requirement that fines for late reports be paid to the "current school fund," rather than applied to the costs of visitors, counsel, and functional assessments utilized in conservatorship and guardianship proceedings, is unclear.

SIGNIFICANT ISSUES

AOC notes that:

- SB 395's provisions expressly allowing alleged incapacitated persons to participate at hearings on petitions to appoint a guardian or conservator are important for the person alleged to be incapacitated to adequately defend themselves and present evidence at the hearings.

- The bill's language specifying that reports filed with the court by health care professionals, visitors, guardians and conservators are confidential ensures that the reports, which often include sensitive personal, health care and medical information, are protected and available only to specified persons with a direct interest in the proceedings.

- The bill's requirement that a GAL submit a written report to the judge prior to a hearing on the petition for appointment allows the judge and others involved with the case to review the recommendations ahead of time.

- SB 395's provisions allowing a judge to appoint a court investigator to review the status of the protected person's capacity and continued need for a guardianship is a good alternative to the existing law which provides only for a status conference. A court investigator can visit the protected person in the community, personally observe the protected person's living conditions, and report observations back to the court. This would provide the court with more information when re-evaluating the continuing need for a guardianship.

- The bill's provisions deleting the form annual guardian and conservator reports and requiring that the reports comply with forms approved by the supreme court conform the law to recent Supreme Court rules promulgating and revising the annual report forms. *See* Rules 4-996 (guardian report) and 4-998 (conservator report) NMRA.

- The requirement that fines for overdue interim or annual guardian and conservator reports be paid to the current school fund is evidently intended to comply with Article XII, Section 4 of the New Mexico Constitution, which states that "all fines collected under general laws" are part of the current school fund.

Regarding the bill's requirement that professional guardians and professional conservators be certified by either a state or national organization, AOC states that only seven states - Alaska, Illinois, North Dakota, New Hampshire, Nevada, Oregon and Utah - currently require court appointed guardians to be certified. AOC notes that there is no state organization in New Mexico at this time that provides certification for professional guardians and conservators.

Nationally, according to AOC, the Center for Guardianship Certification (CGC) in Harrisburg, Pennsylvania is the only entity able to certify the competency of professional guardians in the

United States. *See* CGC website at <https://guardianshipcert.org>. The CGC requires 10 to 30 hours of approved coursework within two years of submitting an application to take the National Certified Guardian test. AOC reports that, in January of this year, the Central New Mexico Community College's Ingenuity Course Series began offering guardianship and conservatorship courses through its Ethics and Fundamentals of Guardianship and Conservatorship program. The National Certified Guardian test is administered at five locations in New Mexico.

AOC points out that, as with the forms for annual guardian and conservator reports, the Supreme Court recently promulgated a rule that coincides with SB 395's provisions requiring that professional guardians and conservators be certified. Under Rule 1-142 NMRA, professional guardians and conservators must submit proof that they are certified and in good standing with CGC.

ALTSD states that SB 395's requirement for the certification of professional guardians and conservators is an important safeguard from potential abuse, neglect or financial exploitation of protected persons by their guardians and conservators. ALTSD also states that the bill's requirement that a GAL file a written report with the court before the hearing on a petition for appointment of a guardian or conservator is helpful, and notes that, historically, GALs have been expected to provide written reports in protected proceedings even though there has not been a legal requirement for them to do so.

OSA states that, in general, the amendments proposed by the bill should support the underlying purposes of OSA's ongoing financial and compliance audits and reviews of guardians and conservators. OSA notes that it is currently conducting financial and compliance audits to assess the accuracy of reports as part of a pilot project and pursuant to a MOU between AOC and OSA. OSA believes that, in any event, the annual review, or auditing of reports by guardians and conservators, should be conducted by an agency under the executive branch to prevent a potential conflict of interest for the judicial branch.

DDPS notes that the bill makes guardians and conservators more accountable, particularly the provisions increasing fines for late reports and prohibiting waivers of liability for conservators and their agents. DDPS also states that the increased fines should mean that reports will be filed in a more timely and efficient manner.

ADMINISTRATIVE IMPLICATIONS

AOC notes that SB 395's provisions for filing grievances in court against guardians and conservators allow a court to decline to consider a grievance if a similar grievance has been filed within the preceding six months and acted on by the court. Despite this, AOC states that the grievance procedure would likely significantly increase the number of hearings in guardianship and conservatorship cases and the workload of judges handling those cases.

AOC also states that new procedures will be required for handling a grievance that is filed in a guardianship or conservatorship case and to track whether professional guardians and conservators are properly certified.

ALTSD states that, although the bill's requirement for a written GAL report prior to the hearing on a petition for appointment is critical to the proceedings, it creates one more obligation for the GAL. According to ALTSD, the additional obligation may exacerbate ALTSD's difficulties in finding GALs willing to represent a proposed protected person with the current reimbursement rate set by AOC.

TECHNICAL ISSUES

In Section 14(A), the words “guardian” and “conservator” in line 24 should be “guardian’s” and “conservator’s”, and the word “acing” in line 25 should be “acting.”

OTHER SUBSTANTIVE ISSUES

AOC suggests that Section 11 of the bill include an amendment to Section 45-4-410(A)(2) so the requirements for a “writing” nominating a person to serve as conservator signed by an incapacitated person prior to the person’s incapacity are the same as those that apply to writings for nominating guardians under Section 5’s amendment to Section 45-5-311(B).

AOC and ALTSD suggest that the bill include a provision for conservatorship proceedings, similar to that applicable to guardianship proceedings in Section 4(G), that allows a court, after the appointment of a conservator, to hold a status hearing to review the status of the protected person’s capacity or appoint a court investigator to assess the protected person’s capacity.

ALTSD and OSA suggest that the bill define the qualifications of a “court investigator” for purposes of Section 4(G)(2). ALTSD states that the definition could be similar to the definition of court “visitor” in current Section 45-5-101(V) NMSA 1978.

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