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FISCAL IMPACT REPORT

SPONSOR SJC ORIGINAL DATE 2/8/22
LAST UPDATED _____ HB _____
SHORT TITLE Appointment of Temporary Guardians SB 35/SJCS
ANALYST Klundt

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY22	FY23	FY24	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		NFI				

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Not Received From

New Mexico Attorney General (NMAG)
Administrative Office of the Courts (AOC)
Developmental Disability Council (DDC)

SUMMARY

Synopsis of Substitute Bill

Senate Judiciary Committee substitute with Senate Bill 35 (SB35) amends Section 45-5-310 NMSA 1978, relating to temporary guardianships, and Section 45-5-408 NMSA 1978, relating to temporary conservatorships. These changes include:

- Expanding the reasons for a temporary guardianship and/or conservatorship to include serious harm to the safety or welfare of the alleged incapacitated person, requiring a hearing is held no later than 10 business days from the date the motion is filed and requiring the court to appoint some guardian ad litem for the alleged incapacitated person.
- Limiting the temporary guardianship/conservatorship to 30 days, with one extension for no more than an additional 60 days.
- Requiring the alleged incapacitated person and their attorney to be personally served within 24 hours of the appointment of a temporary guardian and/or conservator.
- Prohibiting a temporary guardian and/or conservator from selling or disposing of any property belonging to the alleged incapacitated person without specific court authorization.
- Requiring the temporary guardian and/or conservator to file an initial report within 15 days after appointment and a final report within 15 days of the termination of the temporary guardianship and/or conservatorship.

FISCAL IMPLICATIONS

On a previous version of this bill, AOC reported there will be a minimal administrative cost for statewide update, distribution, and documentation of statutory changes. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase. The expedited hearing, within 10 business days of the appointment of a temporary guardian/conservator, may require additional resources. However, AOC did not provide an estimate and therefore LFC believes the fiscal impact may be minimal.

SIGNIFICANT ISSUES

On a previous version of this bill, the Attorney General's Office reported, "Section 2 replaces all instances of "person to be protected" with "alleged incapacitated person." This could be a significant issue because the temporary conservatorship statute applies not only to AIPs, but also adults who are confined or have disappeared as well as minors; the statute currently uses the term "person to be protected" to include these groups. *See* NMSA 1978, § 45-5-401(A) and (B) (1993) (permitting conservatorships to be used for minors, incapacitated persons, or absent persons); § 45-5-101(V) (2019) (defining protected person as "a minor or other person for whom a guardian or conservator has been appointed or other protective order has been made"). Replacing that term with "alleged incapacitated person" could bar the use of temporary conservators for minors or absent adults. It is unclear if this result was intended by the drafters."

AOC previously reported, "Senate Bill 35 tightens up the statutory requirements for petitioning and granting a temporary guardianship and/or conservatorship for another adult that is alleged to be incapacitated. Currently, a temporary guardianship or conservatorship is granted on an expedited basis when a petitioner demonstrates exigent or urgent circumstances possibly resulting in harm to the protected person in an affidavit. Sections 45-5-310 and 45-5-408 currently allow the court to grant a petition for a temporary guardianship/conservatorship without notice to the alleged incapacitated person or to their attorney. This bill would require that an affidavit or sworn testimony containing specific facts alleging that "serious, immediate and irreparable harm to the health, safety or welfare" of the alleged incapacitated person would result if the court were to wait to appoint the guardian and/or conservator at a hearing.

Traditional Guardianship/Conservatorship Process

1. Court Appointed Professionals. The Probate Code requires the appointment of three professionals in all adult guardianship/conservatorship cases who have varying statutory obligations, such as meeting with the person alleged to need a guardian/conservator, reviewing medical records, and submitting a written report prior to the hearing. These professionals provide the court with specific information regarding the alleged incapacitated person that is used to help determine the extent of their incapacity and whether the person needs a guardian and/or conservator appointed.

2. Hearing set no sooner than 60 days after petition filed. Rule 1-004.1 NMRA states that the hearing "on the petition shall be set for no sooner than sixty (60) days after the filing of the petition" to allow the court appointed professionals sufficient time to submit written reports and to allow the guardian ad litem to review the contents of the professionals' reports and discuss them with the alleged incapacitated person.

Family Complaints about the Temporary Guardianship/Conservatorship Process

Since 2016, family members have voiced concerns about being unaware that the court had appointed a temporary guardian and/or conservator and actions temporary guardians and conservators took over the alleged incapacitated person. See <https://www.abqjournal.com/896535/guardians.html> and <https://www.lcsun-news.com/story/news/2019/09/25/las-cruces-educator-dorris-hamilton-placed-under-guardianship-court/2418353001/>.

SB35 Changes to the Temporary Guardianship/Conservatorship Process

1. Expedited 10-day hearings; maximum time allowed is 90 days. The appointment of a guardian and/or conservator limits the civil rights and liberties of the alleged incapacitated person and this legislation requires a hearing on the temporary guardianship/conservatorship “no later than 10 business days from the date the motion is filed”. This expedited hearing ensures the alleged incapacitated person is able to appear before a judge, with their guardian ad litem (attorney), and present any evidence concerning the temporary appointment of a guardian and/or conservator rather than allow significant time to elapse before appearing in court. In addition, SB35 limits the duration of a temporary guardianship/conservatorship to a period of 30 days, with an extension of no more than an additional 60 days. These changes are designed to ensure that procedural safeguards are in place to limit temporary guardianships/conservators and require a full evidentiary hearing is held as soon as possible.

2. Personal service; expedited time frame to dissolve court’s order. SB35 also requires the alleged incapacitated person and their attorney to be personally served within 24 hours of the appointment of a temporary guardian and/or conservator and allows the alleged incapacitated person, their attorney, or any interested person to move for dissolution or modification of the court’s order. If a motion is made to dissolve the temporary guardianship/conservatorship, SB35 requires a hearing set no later than 10 business days from when the motion is made. These changes to the Probate Code will ensure that an alleged incapacitated person is promptly notified of the appointment of a temporary guardian and/or conservator and requires an expedited hearing if a motion is filed asking the court to terminate the appointment.

3. Prohibiting sale or disposal of property. SB35 includes a new provision that bars the temporary guardian and/or conservator from selling or disposing of “any property belonging to the alleged incapacitated person without specific authorization from the court.” This change ensures that there is judicial oversight over the temporary guardian/conservator’s management of the alleged incapacitated person’s property and protects the property of the alleged incapacitated person.

4. Reports required for temporary guardians and/or conservators. SB35 also requires that a temporary guardian and/or conservator file two reports. The first report must be filed within 15 days of appointment and the second within 15 days of termination of the temporary guardianship/conservatorship. These reports will ensure the temporary guardian/conservator is documenting actions taken and keeps the court apprised of the situation involving the alleged incapacitated person.

5. Specific limiting language. Finally, SB35 includes language throughout that clearly identifies that the temporary appointment of a guardian and/or conservator should be reserved for situations where immediate and irreparable harm will be caused if the regular process is followed. This bill

also explicitly states that the appointment of a temporary guardian and/or conservator “shall have the temporary effect of limiting the legal rights of the alleged incapacitated person as specified in the court order.”

OTHER SUBSTANTIVE ISSUES

The Attorney General’s Office stated SB35 suggests that a court may only extend the deadline for 60 days once (“a court may extend...for no more than an additional sixty days”) but does not expressly forbid a court from granting an additional 60 days multiple times. If the bill is intended to limit courts to granting a single 60-day extension, clarification may be necessary, for example, amending lines 18 through 20 on page 2 to read: “The court may, for good cause shown at a hearing, extend the duration of the temporary guardianship for no more than an additional sixty days, provided that the total duration of the temporary guardianship does not exceed 90 days.”

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