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VIA ELECTRONIC MAIL ONLY -- englishda@missouri.edu
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Dear David:

In connection with my role as an observer to the Drafting Committee for the Uniform Guardianship and Protective Proceedings Act (Act), I have provided a copy of the Act to certain New Mexico practitioners active in guardianship, the New Mexico Guardianship Association and a Task Force created by the Albuquerque-based Senior Citizen's Law Office, Inc. and sought their collective feedback.

By way of background, the referenced Task Force first convened as a result of a November 2013 forum in Albuquerque to discuss reform in guardianship legislation. That forum was co-sponsored by entities providing services statewide including the Senior Citizens Law Office; Lawyer Resources for the Elderly Program; New Mexico Office of Guardianship; Disability Rights New Mexico; and the Elder Law Section of the New Mexico State Bar and had many participants from multiple disciplines. All of the referenced organizations are represented on the Task Force. Beginning in January of 2014 and since that time, the Task Force regularly met and addressed a number of concerns with the current guardianship process with an eye toward suggesting legislative reform. On the Task Force sit some of New Mexico's most qualified attorneys in this practice area, as well as professional guardians, visitors and other stakeholders.

As you know, New Mexico is a Uniform Probate Code (UPC) state. The UPC was first adopted here in 1976 and, since that time, Article 5 has seen a number of revisions. Those revisions include, but are not limited to, modifications to the role of the guardian *ad litem* (GAL), the requirements for guardianship petitions, guardianship powers (including limited financial powers where there is

no conservator) and guardian reporting requirements, among other provisions. Some of these provisions followed the work of other task forces convened to look at these issues. In short, the New Mexico guardianship community tends to be studied, involved and well-informed. We are debating here the same issues the guardianship community debates nationally and have experienced the same pressures as practitioners in other states from grass-roots organizations seeking legislative changes in this arena.

Based on a detailed review of the Act by the practitioners I have consulted generally and the Task Force specifically, I am providing you with a summary of their comments, as follows:

SUCCESSOR GUARDIAN APPOINTMENTS IN INITIAL ORDER

Section 110 of the Act would allow the Court to identify a successor guardian in the initial appointment order. There are many situations one can envision in which a proposed successor guardian is presently qualified to fill that position but, by the time the position is to be filled, that individual is no longer qualified. The named successor could move, become ill, become disinterested or suffer cognitive impairment. We, therefore, do not believe that succession should be established at the time of the initial appointment.

ROLES OF THE GAL AND VISITOR

The suggestion of the possible elimination of the role of the GAL as recommended by the Act has elicited a very strong reaction from Task Force members.

There is an understanding of the need to control costs in guardianship proceedings. There is also a recognition of the differences between complicated, contested and "simple" guardianships. An example of the latter type of case is the developmentally delayed or special needs youth who has historically been cared for by her parents but who is turning the age of majority, is unable to manage her own affairs as an adult and requires such ongoing support. There is also recognition that in such cases, the appointment of a GAL, visitor and qualified health care professional can be unnecessarily expensive and at times cost prohibitive. We commend the Drafting Committee for recognizing the need to contain costs in such cases.

Some members of the Task Force support separate procedural tracks to be recognized in the Act which would provide for the early judicial designation of the "simple" cases and a cost efficient path to resolve those cases, possibly without a GAL. However, you should note that there is no consensus in the Task Force as to this dual track concept.

While the Task Force members in whole agree that containing costs of protective proceedings is generally a goal that all legislative reforms should aspire to achieve and, specifically, as to routine cases an extremely important objective, a principle division in how to accomplish this goal arose over the elimination of the GAL as a mandatory role in the pre-adjudication process. This is significant in that it is a preview of the debate the commission can expect to occur when the final version of the Act is presented to the New Mexico legislature.

One school of thought is that the GAL should be appointed in every protective proceeding in which the capacity of an allegedly incapacitated adult is at issue and that this role is simply too important to eliminate. While the Act aspires to be more protective of the civil rights of Respondents, "Alternative A" in § 305 actually weakens the protections of the current regime found in NMSA 1978 § 45-5-303 (C) (2009) by not requiring legal representation in all cases. The other school of thought is that the GAL should only be "optional" in the most routine of cases such as those mentioned above.

I was unable to reconcile the two positions for the purposes of this letter. Clearly, there will be a need for guidance on this issue in the official comments.

While there is definitive division in the Task Force over the elimination of the GAL as a mandatory position, there is a unanimous hostility among its members as to the manner in which the Act expands the role of the visitor. The Act attempts to mitigate the damage caused by removing mandatory GAL appointments in all cases by expanding the role of the visitor in § 304. In particular, § 304 (b) (1) would require the visitor to explain the substance of the petition to the alleged incapacitated person, his rights at the hearing and the general powers and duties of a guardian.

The visitor has additional duties pursuant to § 304 (b). In sum, these provisions expand the visitor's existing responsibilities as found in NMSA 1978 § 45-5-303 (E). The visitor duties specified in existing New Mexico law are largely restated in § 304 (c). There is significant concern as to whether this expansion of the visitor's role is appropriate for New Mexico, a state with large rural and poor areas not served by well-qualified visitors generally. Of further concern along these lines is the omission of a definition of the term "visitor" in § 102. The current NMSA 1978 § 45-5-101 (V) (2011) defines "visitor" as: "a person who is an appointee of the Court who has no personal interest in the proceeding and who has been trained or has the expertise to appropriately evaluate the needs of the person who is allegedly incapacitated. A "visitor" may include, but is

not limited to, a psychologist, a social worker, a developmental incapacity professional, a physical or occupational therapist, an educator and a rehabilitation worker."

There is concern that expanding the duties of a visitor without defining his or her qualifications or requiring some sort of certification process is very problematic, especially to the extent that the Act requires the visitor to advise the Respondent as to his or her legal rights. Several members of the Task Force questioned whether the visitor's expanded duties encroached upon the practice of law. Shifting the responsibilities of advising an allegedly incapacitated person of his or her legal rights to a visitor (whose qualifications are not defined) does not create an appropriate substitute for the important function of a GAL in cases which are not of the "simple" type. The visitor should not replace the GAL (only with the possible exception of guardianship cases in simple case tracks – but note, the Task Force members do not agree among themselves over eliminating the GAL in favor of a visitor even in "simple" guardianship cases).

There is concern that increasing the role of the visitor and diminishing the role of the GAL and qualified health care professional (QHCP) may allow for only a single opinion to be heard in a protective proceeding – that of the visitor (whose qualifications are not defined). In our experience, the current requirement of the three professionals leads to a healthy multi-disciplinary "checks and balances" which is especially useful in cases which are not "simple."

There is concern that the language of §§ 305 (b) and (c) is impractically restrictive. The GAL should be required not only to present the position of the allegedly incapacitated person but also to advocate for a result that is least restrictive, consistent with the Respondent's interests. A person who is incapacitated may lack the capacity to direct the actions of counsel and requiring a lawyer to advocate on that basis alone as required by § 305 (b) may actually run counter to the individual's best interests and provide the basis for a fee-interested counsel to unnecessarily churn the file. New Mexico has struggled with this dichotomy in roles for many years, and the better practice has developed in this jurisdiction whereby the guardian ad litem presents both views to the Court. Having labored over this issue for a considerable period of time and recognizing the important need for clarity on this subject, the Task Force recommends inclusion of the following language:

> **The role of the GAL is to protect the civil liberties of the alleged incapacitated person by promoting least restrictive alternatives to [guardianship] [conservatorship], ensuring the process for appointment of a guardian is followed and that all the statutory elements of a [guardianship] [conservatorship] are met. The GAL shall present the alleged incapacitated person's preferences to the Court to the extent those preferences can be**

determined. The GAL shall also make its recommendations to the Court regarding the alleged incapacitated person's best interests.

New Mexico has seen some litigation involving the GAL, and it is suggested that the Drafting Committee consider an immunity provision. *See e.g.,* ***Collins on Behalf of Collins v. Tabet,*** 1991-NMSC-013, 111 N.M. 391, 395, 806 P.2d 40, 44 (GAL absolutely immune from liability for his or her actions when acting as arm of the Court); ***Kimbrell v. Kimbrell,*** 2014-NMSC-027, 331 P.3d 915, 920-21 (discussing standing of parent to sue GAL).

PROFESSIONAL EVALUATIONS

In New Mexico, an examination by a QHCP (def. NMSA 1978, § 45-5-101 (U)) is required in all cases pursuant to § 45-5-303 (D). Section 306 of the Act renders such an evaluation non-mandatory unless the Respondent (who may or may not have legal representation) requests one. The Respondent may or may not be capable of making such a demand. By rendering the evaluation non-mandatory, the Act interposes another issue the Court may need to decide thereby increasing the cost of the proceeding and the judicial burden. In our experience, in most cases, the qualified health care evaluation yields important information and such an evaluation should be required in all cases.

New Mexico defines a "qualified health care professional" as "a physician, psychologist, physician assistant, nurse practitioner or other health care practitioner whose training and expertise aid in the assessment of functional impairment." NMSA 1978 § 45-5-101 (U). There is concern that by expanding the type of individuals who may perform such an evaluation to "physician, psychologist, social worker or other individual appointed by the Court who is qualified to evaluate the Respondent's alleged cognitive and functional abilities and limitations" (Act § 306 (B)), the quality of the reports tendered to the Court may suffer -- thereby running counter to the overall objective of providing a framework that is more protective to the rights of allegedly incapacitated persons.

CONFIDENTIALITY

The Act § 307 limits confidentiality of the proceedings to the visitor report and the professional evaluation, if any. We recognize the criticism that the current confidentiality requirements have engendered. However, it is the strong feeling that virtually discarding confidentiality as proposed in the Act runs counter to protecting the rights of the alleged incapacitated person which the Act

otherwise strives so assiduously to do. There are numerous problems with the Act as it relates to confidentiality.

The New Mexico experience is that the filings in these cases can involve extremely private health and financial data not only in the pre-adjudicatory phase but also in the annual reports which are filed after incapacity is adjudicated.

Allowing public intrusion into these files can lead to embarrassment for the protected person. In the case of an individual whose capacity is later restored, lifting confidentiality may allow employers, media and others to discover the facts of that person's incapacity (which can include not only mental illness but also substance abuse) even though the person's incapacity may be resolved. In such cases, relieving confidentiality can actually hinder an individual's rehabilitation. There is little question that doing so will chill the candid disclosure of private facts in Court filings – presently a robust practice which New Mexico Courts find beneficial.

In the case of elderly successful business persons who may find themselves a respondent in protective proceedings, allowing the media access to his or her file could also have an economic impact on his or her business interests. Further economic harm could come to those respondents targeted by exploiters who could learn volumes of information based on a review of the Court file.

Section 308 (g) allows the incapacitated person (who may or may not be represented) to request the sequestration of his or her case. However, that person may simply be incapable of making that request and, in the case of those susceptible to undue influence, may be prompted to make such a request to satisfy the demands of those with inappropriate motivations.

Further, allowing "any person" to attend the adjudicatory hearing as provided in § 308 (h) by an order of the Court which can be entered without a hearing may lead to the attendance of individuals at such a hearing who have improper motives, including those who may be financially motivated. The Act should allow a procedure whereby the parties argue to the Court why a certain person falling in the category of "any person" should be allowed to attend. The Act should not allow an *ex parte* procedure.

There is a consensus that the Court should be charged with respecting the person's privacy rights which include protecting the person from exploitation (including media exploitation).

It is suggested that a compromise to the current tension caused over the existing confidentiality protocol be measured against the best interests of the allegedly incapacitated person (see Act, §

308 (h)) and that the Court have the discretion to allow the release of certain portions of the file and the attendance of "any" person at the hearing only if the Court concludes that the reasons for allowing the intrusion outweigh the privacy interests of the allegedly protected person. The individual moving for access should have the burden to prove his entitlement under this standard.

Perhaps the official comments could state the concern over the need to monitor and oversee guardianships generally and that the Court consider these important objectives when deciding whether to allow the release of otherwise confidential case records and possibly create a system whereby data can be released without providing information identifying the respondent.

LIMITED GUARDIANSHIP

Continuing the preference for limited guardianships is prudent and favored. There is concern, however, over the liberal definition of "decision-making support" and the application of that definition to the least restrictive means section of § 310 (a) (1). If a respondent has the ability to select an individual to provide "decision-making support" as defined in § 102 (4), then it seems that this individual would have the capacity to sign a Power of Attorney for Health Care thereby obviating, in most cases, the need for a guardianship. It is unclear how this least restrictive method of "decision-making support" outlined as a basis for avoiding a guardianship order under § 310 (a)(1) is a method – without a power of attorney – which would be recognized by third parties such as hospitals, health care providers, etc.

I understand that the next draft will restate this section and will defer providing further comments on limited guardianship provisions until we see those revisions.

The concept of specifically identifying the rights affected by guardianship adjudications, whether in a checklist form or otherwise, is well received.

GUARDIANSHIP PLAN

Preparing a forward-looking guardianship plan is a best practice and mandating this (§ 318 (a)) is likely to improve the quality of the work guardians do. However, there is concern that mandating Court approval of the plan as required in §§ 318 (b), (c) will add to the judicial burden in administering these cases by requiring another judicial proceeding and possibly creating another issue for families to litigate, thereby harming the efficiency of the system and increasing the resources needed by the guardian to obtain Court approval. It is recommended that the filing of such a plan be required but that the requirement of Court approval be removed.

MONITORING

Section 319 (a) requires that a guardian report to the Court in 30 days. It is unlikely that a guardian will have developed sufficient information about the guardianship in just 30 days in order to make a complete initial report to the Court. It is recommended that this period be expanded to 60 or 90 days. New Mexico requires such a report at the 90-day interval, and that time duration seems to work well. NMSA 1978 § 45-5-314 (A) (2009).

TERMINATION

Section 320 provides that a guardian may file a report in respect of a termination proceeding. The guardian should be required to file such a report and provide all other information relevant to the termination of a guardianship and appear as the Court may require. In most cases, a guardian is likely to have information that a Court should consider when making a termination decision. Aside from the concerns over an incapacitated person having to contend with a well-funded and self-interested fiduciary at the termination stage, by allowing a guardian discretion to file such a report, the Act minimizes the important information a guardian is likely to have in these proceedings. In addition, this provision could be used in contested family situations to seek a termination but also to silence the ability of the fiduciary to respond.

We will continue to assess the Act and make comments where appropriate. For now, please consider these comments and let me know if you would like to discuss.

We are grateful for the opportunity to participate in this process.

Very truly yours,

HURLEY TOEVS STYLES HAMBLIN
& PANTER, P.A.

By: _____
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