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FISCAL IMPACT REPORT

SPONSOR Trujillo **ORIGINAL DATE** 1/26/08
LAST UPDATED 1/31/08 **HM** 6/aHCPAC
SHORT TITLE Study Developmental Disabilities Guardianship **SB** _____
ANALYST Wilson

Relates to SB 169

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY08	FY09	FY10	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total	\$0.1	\$0.1	\$0.1	\$0.1	Non- Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
Aging & Long-Term Services Department (ALSD)
Department of Health (DOH)

SUMMARY

Synopsis of HCPAC Amendment

The House Consumer and Public Affairs Committee amendment to HM 6 adds the Attorney General's Office to the task force. The amendment adds that the recommendations of the task force shall also be sent the courts, corrections and justice interim committee.

Synopsis of Original Bill

House Memorial 6 directs the Developmental Disabilities Planning Council (DDPC) to convene a task force to review the processes by which guardians of adults under the Uniform Probate Code are appointed, trained, supervised and reviewed.

HM 6 provides that the task force be composed of representatives from the DDPC, the AOC, the Adult Protective Services Division of the ALTSD, the DOH, other appropriate state agencies, New Mexico district court judges, the New Mexico guardianship association, the protection and advocacy system, the senior citizens law office, individual and corporate guardians, elders, individuals with disabilities, advocates or other representatives of elders or adults with disabilities and other interested individuals. The representatives of state agencies should constitute less than fifty percent of the membership of the task force.

The task force should consider potential statutory or regulatory changes, training requirements, identification and dissemination of best practices and other recommendations that would improve New Mexico's system for qualification, appointment and oversight of guardians of adults with limited capacity.

The recommendations of the task force should be presented to the interim legislative health and human services committee no later than October 31, 2008.

Copies of this memorial are to be transmitted to the DDPC.

FISCAL IMPLICATIONS

There will be a fiscal impact on the participating agencies associated with time spent by staff to participate on the task force.

SIGNIFICANT ISSUES

This memorial is a continuation of HJM 34 from the 2007 Session. Recommendation 14 from the Task Force was to extend the current task force for one additional year.

AOC provided the following summary of the principal issues and concerns addressed by the Task Force:

Oversight and Accountability of Guardians (Paid and Volunteer)

Despite the reach and ramifications of a guardianship order, there are no uniform systems in place in New Mexico that provide for the effective oversight and monitoring of all court-appointed guardians. A majority of guardians are not filing the required annual report, often because they are not aware of the requirement to do so and individual follow-up or on-site monitoring of guardians and the adult for whom they are guardian is rarely if ever pursued. The lack of an effective system for monitoring guardianship arrangements is compounded by the lack of data in the current guardianship system. For instance, there is no information readily available regarding how many guardianships are limited and how many are plenary, or even how many total guardianship orders are in effect today. The lack of available training and support to guardians is also a major concern; for example, there is no consistent orientation or training provided to newly appointed guardians on a statewide basis.

Maximizing Autonomy and Self-determination

Guardianship involves taking away the legal rights of adults to make their own decisions about where to live, whether to buy something, with whom they might visit, and other critical day-to-day decisions. Throughout the guardianship process, the adult's autonomy and self-determination should be maximized to the greatest possible level consistent with the person's capacity. The current system does not meet this standard.

The Task Force believes that other methods should be considered and perhaps tried before guardianship is sought. Alternatives to guardianship include a power of attorney, advance directive, representative payee, informal arrangements with family members or others, etc.

When guardianship does become necessary, legal practice in New Mexico is not always consistent with the “least restrictive” philosophy of the Probate Code, and the Task Force considered a variety of ways to better align practice with philosophy. The Task Force suggests that individuals under guardianship should be encouraged and assisted to exercise and improve their decision-making skills whenever possible, and guardians should be encouraged to involve them in decision-making to the extent feasible.

Periodic Review of the Need for Guardianship

Once established, guardianship orders are rarely reviewed by the courts, even though the situation of the protected adult may change over the years. The Task Force reviewed the circumstances or events that should trigger a status review and concluded that, at a minimum, there should be a required court review of guardianship orders that had not otherwise been reviewed by the court for ten years. Information that would lead the courts to convene a status conference or formal hearing earlier might stem from a review of the guardian’s annual report, or from a reviewer’s on-site visit, or perhaps from information provided to a monitor by friends, relatives, neighbors or other informants.

The group endorsed the concept that it should be easier to move to a more limited guardianship, but a formal process with adequate procedural protections should be maintained when a more extensive or restrictive guardianship arrangement is proposed.

Interaction of Different Statute

The primary provisions of state law related to the determination of incapacity and the appointment, powers and duties of a guardian are contained in the Probate Code. However, there are several other state laws that cover situations in which an adult who is or becomes incapacitated may arrange for (or have appointed) a substitute decision-maker. The Task Force reviewed the provisions of these laws and the gaps or conflicts between them.

The Task Force recommends that persons known to have been designated as power of attorney or named as health care or mental health treatment agents in an advance directive should be notified in the event that any other person or agency seeks a guardianship order for the adult, and recommends that such persons be assigned a high priority for the court to consider in appointing a guardian. This honors the wishes of the adult and simplifies the substitute decision-making process. The Task Force believes that proposed guardians should be more fully informed and involved when guardianship is sought and given an opportunity to review the proposed order that will define their powers.

The Task Force believes that guardians of adults subject to proceedings under the Mental Health and Developmental Disabilities Code should be assured an opportunity to participate in hearings under the Code, but agrees that guardians do not have authority under the Code to consent to voluntary admission to a mental health treatment facility.

Task Force Recommendations

The Task Force agreed upon a variety of recommendations in two categories. Recommendations for current action are actions that the Task Force believes can be

achieved in the short run (over the next year or so). Recommendations for future action represent those actions which may require further planning and clarification, and may need a longer time frame for implementation. However, the Task Force believes that action should begin quickly on both its short-term and long-term recommendations. A more detailed explanation of the recommendations is included in the body of the report.

Recommendations for Current Action

1. Require Orientation and Training for Newly Appointed Guardians
2. Provide Annual Report Forms to All Newly Appointed Guardians
3. Appropriate Funds for a Pilot Program of Guardianship Monitoring
The Task Force supports a state appropriation of \$200,000 in the 2008 legislative session to fund a pilot program for monitoring guardians.
4. Appropriate Funds for a Guardianship Training Program
The Task Force supports the appropriation request by the Office of Guardianship in the Developmental Disabilities Planning Council, also in the amount of \$200,000, for recurring funds to develop a training program.
5. Provide Training on Alternatives to Guardianship
6. Strengthen Recognition of Advance Decisions Made by Competent Adults
7. Provide Training and Support to District Court Judges
8. Voluntary Certification Program for the Private Bar
9. Seek Funding for Skill-Development and Training
10. Amend the Probate Code
 - Require that any petition for a guardianship set forth efforts made to locate other court appointed guardians, persons with power of attorney, agents named in advance directives, or surrogates appointed by the alleged incapacitated person, and require that any such persons be notified of guardianship proceedings.
 - Include any such previously named agents or surrogate decision-makers on the priority list of persons to be considered by the court for appointment as guardian, and allow a Court to pass over someone with higher priority for appointment only for good cause shown.
 - Require the person petitioning for a guardian to serve a copy of the petition on the proposed guardian.
 - Require that a copy of the proposed guardianship order be provided to the proposed guardian, to allow an opportunity to review the proposed order.

- Require court review of guardianships at least every ten years.
- Assure that increases in the level or authority of guardians not be permitted without a full court hearing, while preserving the authority of the court to reduce guardianship through less formal processes.

11. Amend the Mental Health and Developmental Disabilities Code to require that priority be given to a previously appointed probate guardian when a treatment guardian is appointed and clarify that no one except competent adults themselves may voluntarily commit themselves to a mental health care facility.

12. Amend the Uniform Health Care Decisions Act to spell out the limited circumstances in which the guardian, or the court, could make decisions different from or in conflict with the specific previous health care instructions executed by the adult.

13. Amend the Mental Health Care Treatment Decisions Act to spell out the limited circumstances in which the guardian, or the court, could make decisions different from or in conflict with the specific previous mental health care instructions executed by the adult.

14. Extend the Current Task Force for One Additional Year

Recommendations for Future Action

- Improve and Expand Data Collection
- Revise the Annual Report Form
- Provide Additional Annual or On-going Training for Guardians
- Implement a Structured Guardianship Oversight Program Through the Courts
 - Tickler System for Annual Reports
 - Review of Annual Reports
 - On-site Visits by Court Representatives
- Designate and Fund a Responsible State Agency
- Stronger Enforcement of Authority Granted Through Advance Decision-Making
- Strengthen the independent role of the Guardian ad Litem
- Implement Criminal Background Checks for Prospective Guardians
- Consider Further Statutory Changes That Would Improve the Guardianship System

ADMINISTRATIVE IMPLICATIONS

Logistical support to the Task Force was provided by Protection and Advocacy System pursuant to a contract from the DDPC. The Task Force met monthly, and also convened four work groups, which met at least monthly to further analyze and discuss the issues identified in the memorial.

RELATIONSHIP

HM 6 relates to SB 169, Bernalillo Guardian Monitoring Study that will establish a monitoring program for guardianships and conservatorships in Bernalillo County.