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## FISCAL IMPACT REPORT

**ORIGINAL DATE** 02/03/09  
**LAST UPDATED** 03/20/09    **HB** 161/aHJC/aSJC

**SPONSOR** ONeill

**SHORT TITLE** Guardian of Protected Person Responsibility    **SB** \_\_\_\_\_

**ANALYST** Hanika-Ortiz

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY09	FY10		
	NFI		

(Parenthesis ( ) Indicate Expenditure Decreases)

Conflicts with HB 161; Companion to SB 135; and Relates to SB 178

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

- General Services Department (GSD)
- Administrative Office of the Courts (AOC)
- Aging and Long-Term Services Department (ALTSD)
- Children, Youth & Families Department (CYFD)
- Health Policy Commission (HPC)
- Department of Health (DOH)
- Developmental Disabilities Planning Council (DDPC)

### SUMMARY

#### Synopsis of SJC Amendment

The Senate Judiciary Committee Amendment replaces the word “or” with the term “and” so the amended section now reads as follows:

“if the court has determined that a conservatorship is not appropriate and if a guardian appointed by the court has been granted authority to make financial decisions on behalf of the protected person in the order of appointment and in the letters of guardianship pursuant to Subsection C of Section 45-5-308 NMSA 1978, the guardian has the following powers and duties”...

Synopsis of HJC Amendment

The House Judiciary Committee Amendment replaces the word/s “incompetent” and “insane or incompetent” with the more correct “incapacitated”.

The Amendment removes the participation of the “division” in the involuntarily commitment proceedings of an adult to a facility for evaluation or treatment. The Amendment also removes the participation of “the department” in the filing of a petition for the extended commitment of an adult.

The Amendment provides that a probate guardian need only file an application with an evaluation facility if seeking residential habilitation for his client. Upon receipt of an application, the evaluation facility evaluation may accept the client for a period of evaluation and treatment not to exceed fourteen days. If the habilitation plan recommends residential services, the evaluation facility must file with the court a petition for extended residential placement. The “department” will no longer be required to participate in these events.

A treatment guardian in accordance with the “Mental Health and Developmental Disabilities Code”, as opposed to the Uniform Health-Care Decisions Act, may act as the client’s representative pursuant to applicable federal regulations to obtain access to the client’s health information for the purpose of communicating with health-care providers in furtherance of treatment.

Synopsis of Original Bill

HB 161 implements the recommendations from the Guardianship Task Force to further clarify the role and authority of guardians of protected persons in statute.

The bill also provides clarifying language and removes gender inferences in those statutes.

**FISCAL IMPLICATIONS**

AOC reports the bill will likely have an impact on judicial resources because the courts will be required to more actively monitor guardianship cases.

**SIGNIFICANT ISSUES**

The bill makes improvements in the interaction of different statutes related to guardianship. The DDPC convened the Task Force in 2007 and completed its recommendations one year later. Invitees included the AOC, ALTSD, DOH, Office of the Attorney General, 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 and advocates.

The bill provides for the following:

Sections 1-6 amend the Uniform Health-Care Decisions Act (24-7A-6) and the Mental Health Care Treatment Decisions Act (24-7B-8) to limit the circumstances when a court can override the provisions of advance health care and mental health treatment directives while the protected person had capacity. Also includes a provision for the court’s authority to disregard such preferences when appropriate.

Sections 7-13 amend the Office of Guardianship Act to change “ward” to “protected person”.

Sections 14-19 amend the Mental Health and Developmental Disabilities Code (43-1-11 thru 19) relating to the commitment of adults and admission of an individual to a mental health-care facility, to provide a client’s guardian: 1) notice of an involuntary commitment proceedings, 2) opportunity to testify, and 3) opportunity to provide an opinion on the need for involuntary treatment.

A guardian may not consent to the admission of an individual to a mental health-care facility. A guardian may only present the individual to a mental health-care facility for an evaluation and only if a guardian’s power includes health-care treatment, or if the individual’s advance health-care directive permits treatment in a mental health care facility.

When appointing a treatment guardian, the court shall give priority to a court-appointed guardian or, if none, to an agent designated by the client when the client had capacity. The court must find by clear and convincing evidence that the client is not capable of making his/her own treatment decisions. Also requires treatment guardians to consult with other agents and guardians of the client. Allows other interested persons to petition the court for a termination of the treatment guardianship. Gives treatment guardians the authority to access the protected person’s health records and consult with health care providers.

Sections 20-42 amend the Uniform Probate Code (45-5-303 thru 313) and include:

The appointment of a guardian:

- demonstrate due diligence to locate other court appointed guardians, agents or surrogates;
- require the name and address of two persons if contact information of the proposed guardian changes;
- require information on the number of other protected persons served by the proposed guardian, their relationship, and the types of guardianship held;
- include if the proposed guardian has ever been convicted of a felony;
- require a finding that the proposed guardian has reviewed the proposed order of appointment, prior to the appointment; and
- require a copy of the order appointing the guardian to be given to the proposed guardian.

Substitution, review and termination of guardianship:

- require the guardian to submit notice to the court upon the death of the protected person;
- require protections when increasing the guardian’s authority or reducing the autonomy of the protected person - the same procedures that apply to appointment of a guardian;
- require a status hearing on requests for review of a guardianship; if the court finds the incapacitated person is capable of more autonomy, the court may enter an order removing the guardian, terminating the guardianship or reducing the powers previously granted to the guardian;
- require a status hearing not later than ten years after the initial appointment of a guardian, to review the status of the protected person's capacity and the continued need for a guardian; and

- require the court appoint a guardian ad litem to advise the court as to the status of the protected person and the guardian if the court is unable to contact either the guardian or the protected person, and neither appears for the status hearing.

Notices in guardianship proceedings:

- require notice of hearing and a copy of the petition and any interim orders be given to the proposed guardian; and any person, previously nominated or designated in a writing signed by the incapacitated person prior to his incapacity (not revoked or terminated).

Who may be appointed guardian:

- any person, previously nominated or designated in a writing signed by the incapacitated person prior to incapacity (not revoked or terminated);
- show good cause regarding appointing as the guardian a person having a lower priority; and
- require giving weight to preferences expressed in writing by the person while having capacity.

Powers and duties of a guardian:

- Grants new powers to a guardian for limited financial decision-making. The guardian has the following powers and duties:
  - institute proceedings to compel any person under a duty to support the protected person or pay sums for the welfare of the protected person, to perform that duty;
  - receive money and tangible property deliverable to the protected person and apply the money and property for support, care, and education of the protected person; but, the guardian may not use funds from the protected person's estate for room and board which the guardian has furnished, unless a charge for the service is approved by the court;
  - serve as advocate and decision-maker for the protected person in any disputes with persons or organizations regarding the protected person's finances;
  - obtain information regarding the protected person's assets and income from persons or organizations handling the protected person's finances;
  - file an initial inventory of all property belonging to the protected person within ninety days after the initial appointment; and
  - exercise care to conserve any excess for the protected person's needs and include in the guardian ninety-day and annual report a description of decisions made regarding the protected person's finances and property.

Guardian Reports:

- require the guardian to file an initial report with the appointing court within ninety days of appointment, the guardian thereafter to file an annual report;
- require the court to review the report;
- require the report to contain information on financial decisions made by the guardian, if granted that power; and
- replace the reporting form with a newly developed form.

## **PERFORMANCE IMPLICATIONS**

The bill improves the interaction of different state statutes related to guardianship. The bill may help prevent inconsistencies and conflicts of law in the future.

The AOC reports that there is no system in place in New Mexico to assure effective oversight and monitoring of court-appointed guardians.

Agencies note that the bill supports less restrictive alternatives to guardianship where warranted.

## **ADMINISTRATIVE IMPLICATIONS**

ALTSD reports some impact on petitioners for guardianship with Adult Protective Services, family guardians, and contract guardians under the Office of Guardianship with regards to additional duties.

## **CONFLICT, RELATIONSHIP**

Companion to SB 135, Guardianship and Conservatorship Needs Assessment; appropriating \$200 thousand to DFA to contract for a guardianship oversight and monitoring demonstration project in Bernalillo County.

Relates to SB 178, Interstate Mental Health Compact; improving interstate cooperation on guardianship issues.

Conflicts with HB 161 at 43-1-11, 43-1-12, and 43-1-13; the proposed amendments deal with the same sections of the law.

## **TECHNICAL ISSUES**

The bill does not define what is “clear and convincing” evidence (page 11).

## **OTHER SUBSTANTIVE ISSUES**

The bill defines a “protected person” as an adult or emancipated minor for whom a guardian has been appointed. An emancipated minor is an individual between the ages of sixteen and eighteen who has been married, who is on active duty in the armed forces or who has been declared by court order to be emancipated.

## **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

ALTSD reports continued role confusion, lack of accountability of guardians, failure to honor advance directives, and lack of a guardian’s authority to deal with minor property issues when there is no conservator.

AHO/mt:svb