

**FIFTY-THIRD LEGISLATURE
SECOND SESSION, 2018**

February 14, 2018

Mr. Speaker:

Your **JUDICIARY COMMITTEE**, to whom has been referred

**SENATE JUDICIARY COMMITTEE SUBSTITUTE
FOR SENATE BILL 19**

has had it under consideration and reports same with recommendation that it **DO PASS**, amended as follows:

1. On page 1, line 11, after the semicolon, strike the remainder of the line, strike line 12 in its entirety, strike line 13 through the semicolon and insert in lieu thereof "AMENDING ARTICLE 5 OF THE UNIFORM PROBATE CODE ADDRESSING SEPARATE ACCOUNTS AND RECORDS, LIABILITY OF A GUARDIAN OR CONSERVATOR, VOTING RIGHTS OF A PROTECTED PERSON, NOTICE, CONFIDENTIALITY, VISITATION, ALTERNATE PROTECTIVE ARRANGEMENTS, WAIVERS OF LIABILITY AND BONDING;".

2. On page 1, line 13, strike ", REPEALING".

3. On pages 1 through 5, strike Section 1 in its entirety.

4. On page 6, line 13, through page 7, line 9, strike Subsections C through E in their entirety and insert in lieu thereof the following new subsection:

"C. The guardian or conservator shall maintain those books and records that are in the possession, custody or control of the guardian or conservator and that concern the funds, investments or other property held by the guardian or conservator as a fiduciary for an individual for seven years, or for such other period as may be provided by the court.".

5. On page 10, lines 13 through 17, strike Subparagraph (a) in its entirety and insert in lieu thereof the following new subparagraph:

"(a) spouse, or, if the alleged incapacitated person has none, an adult with whom the alleged incapacitated person is in a long-term relationship of indefinite duration in which the individual has demonstrated an actual commitment to the alleged incapacitated person similar to the commitment of a spouse and in which the individual and the alleged incapacitated person consider themselves to be responsible for each other's well-being;".

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6. On page 14, lines 3 through 5, remove the brackets and line-through.

7. On page 18, line 11, after "interest", insert ", as determined by the court,".

8. On page 18, strike lines 16 through 19 in their entirety and insert in lieu thereof the following new subsection:

"N. The issue of whether a guardian shall be appointed for the alleged incapacitated person shall be determined by the court at an open hearing unless, for good cause, the court determines otherwise."

9. On page 21, line 19, strike "adult".

10. On page 22, line 16, strike "an" and insert in lieu thereof "any".

11. On page 23, lines 4, 8, 9, 14, 18, 21 and 23, strike each occurrence of "incapacitated" and insert in lieu thereof "protected".

12. On page 23, line 17, strike "an incapacitated" and insert in lieu thereof "a protected".

13. On page 24, lines 4, 5, 6, 9, 10, 12, 15, 17, 20 and 23, strike each occurrence of "incapacitated" and insert in lieu thereof "protected".

14. On page 25, lines 1, 2 and 4, strike each occurrence of "incapacitated" and insert in lieu thereof "protected".

15. On page 26, lines 16, 17, 22, 24 and 25, strike each occurrence of "incapacitated" and insert in lieu thereof "protected".

16. On page 26, line 20, strike "an incapacitated" and insert in lieu thereof "a protected".

17. On page 27, line 1, strike "incapacitated" and insert in lieu thereof "protected".

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18. On page 28, between lines 14 and 15, insert:

"SECTION 7. Section 45-5-314 NMSA 1978 (being Laws 1989, Chapter 252, Section 14, as amended) is amended to read:

"45-5-314. ANNUAL REPORT--AUDITS.--

A. The guardian of an incapacitated person shall file an initial report with the appointing court within ninety days of the guardian's appointment. Thereafter, the guardian shall file an annual report within thirty days of the anniversary date of the guardian's appointment. A copy of the report shall also be submitted to the district judge who appointed the guardian or the judge's successor, to the incapacitated person and to the incapacitated person's conservator, if any. The court shall review this report. The report shall include information concerning the progress and condition of the incapacitated person, including [~~but not limited to~~] the incapacitated person's health, medical and dental care, residence, education, employment and habitation; a report on the manner in which the guardian carried out the guardian's powers and fulfilled the guardian's duties; and the guardian's opinion regarding the continued need for guardianship. If the guardian has been provided power pursuant to Paragraph (4) of Subsection B of Section 45-5-312 NMSA 1978, the report shall contain information on financial decisions made by the guardian. The report [~~shall~~] may be substantially in the following form:

"STATE OF NEW MEXICO
COUNTY OF _____
JUDICIAL DISTRICT COURT
IN THE MATTER OF THE GUARDIANSHIP OF

CAUSE NO. _____
an incapacitated adult

GUARDIAN'S 90-DAY _____ ANNUAL _____ FINAL _____ (check one)
REPORT ON THE CONDITION AND WELL-BEING OF AN ADULT PROTECTED PERSON
Date of Appointment: _____

Pursuant to Section 45-5-314 NMSA 1978, the undersigned duly appointed, qualified and acting guardian of the above-mentioned protected person reports to the court as follows

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(attach additional sheets, if necessary):

1. **PROTECTED PERSON:** Name _____
Residential Address _____
Facility Name _____
City, State, Zip Code _____
Telephone _____ Date of Birth _____
Name of person primarily responsible at protected person's
place of residence: _____.

2. **GUARDIAN:** Name _____
Business Name (if any) _____
Address _____
City, State, Zip Code _____
Telephone _____ Alternate Telephone # _____
Relation to Protected Person _____

3. **FINAL REPORTS ONLY** (otherwise, go to #4)

I am filing a Final Report because of: My resignation
 Death of the Protected Person Court Order
 Other (please explain): _____

A. If because of **resignation**, Name of successor, if
appointed: _____
Address _____
City, State, Zip Code _____

B. If because of **Protected Person's death**: (attach
copy of death certificate, if available)
Date and place of death: _____
Name of personal representative if appointed: _____
Address _____
City, State, Zip Code _____

4. During the past year or 90 days (if initial report), I
have visited the Protected Person _____ times. The date of
my last personal visit was _____.

5. (A) Describe the residence of the Protected Person:
 Hospital/medical facility Protected Person's
home
 Guardian's home Relative's home (explain

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_____ Nursing home _____ Boarding/Foster/Group Home
_____ Other: _____
_____ below)

(B) During the past year or 90 days (if first report),
has the Protected Person changed his/her residence? _____
Do you anticipate a change of residence for the protected
person in the next year? _____

6. The name and address of any hospital or other institution
(if any) where the Protected Person is now admitted:

_____.

7. The Protected Person is under a physician's regular care.
_____ Yes _____ No

Identify the health care providers.

Physician: _____

Dentist (if any): _____

Mental Health Professional (i.e., psychiatrist, counselor): _____

Other: _____

8. (A) During the past year or 90 days (if initial report),
the Protected Person's physical health:

Remained the same _____

Primary diagnosis: _____

_____ improved _____ deteriorated

(explain) _____

(B) During the past year or 90 days (if initial report),
the Protected Person's mental health: Remained the same _____

Major diagnosis, if any: _____

Improved _____ deteriorated (explain) _____

If physical or mental health has deteriorated, please explain:

9. Describe any significant hospitalizations or mental or
medical events during the past year or 90 days (if initial report):

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10. List the Protected Person's activities and changes, if any, over the past year or 90 days (if initial report):

Recreational Activities: _____
Educational Activities: _____
Social Activities: _____
List Active Friends and/or Relatives: _____
Occupational activities: _____
Other: _____

11. Describe briefly any contracts entered into and major decisions made on behalf of the Protected Person during the past year or 90 days (if initial report): _____

12. The Protected Person has made the following statements regarding his/her living arrangements and the guardianship over him/her: _____

13. I believe the Protected Person has unmet needs.
_____ Yes (explain) _____ No

If yes, indicate efforts made to meet these needs: _____

14. The Protected Person continues to require the assistance of a guardian: _____ Yes _____ No
Explain why or why not: _____

15. The authority given to me by the Court should:
_____ remain the same _____ be decreased _____ be increased
Why: _____

16. Additional information concerning the Protected Person or myself (the guardian) that I wish to share with the Court: _____

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17. If the court has granted you the authority to make financial decisions on behalf of the Protected Person, then please describe the decisions you have made for the protected person:

Signature of Guardian: _____ Date: _____
Printed Name: _____."

~~[A.]~~ B. Any guardian may rely on a qualified health care professional's current written report to provide descriptions of the physical and mental conditions required in items 7, 8, 9, 14 and 15 of the annual report as specified in Subsection A of this section.

~~[B.]~~ C. The guardian may be fined five dollars (\$5.00) per day for an overdue annual report. The fine shall be used to fund the costs of visitors, counsel and functional assessments utilized in conservatorship and guardianship proceedings pursuant to the Uniform Probate Code.

~~[C.]~~ D. The court shall not waive the requirement of an annual report under any circumstance but may grant an extension of time not to exceed sixty days. The court may require the filing of more than one report annually.

E. A guardian of a protected person shall fully comply with the requirements of any audit of an account, inventory, report or property of a protected person."

19. On page 31, lines 9 through 13, strike Subparagraph (a) in its entirety and insert in lieu thereof the following new subparagraph:

"(a) spouse, or, if the alleged incapacitated person has none, an adult with whom the alleged incapacitated person is in a long-term relationship of indefinite duration in which the individual has demonstrated an actual commitment to the alleged incapacitated person similar to the commitment of a spouse and in which the individual and the alleged incapacitated person consider themselves to be responsible for each other's well-being;"

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20. On page 38, between lines 16 and 17, insert the following new section:

"SECTION 10. Section 45-5-405.1 NMSA 1978 (being Laws 1993, Chapter 301, Section 26) is amended to read:

"45-5-405.1. PROTECTIVE ARRANGEMENTS AND SINGLE TRANSACTIONS AUTHORIZED.--

A. ~~If after notice in accordance with Section 45-5-405 NMSA 1978 to all interested persons, as defined in Section 45-1-201 NMSA 1978, and after hearing, it is established that a basis exists as described in Section 45-5-401 NMSA 1978 for affecting the estate and financial affairs of a person, the court, without appointing a conservator, may [authorize, direct or ratify any transaction necessary or desirable to achieve any security, service or care arrangement meeting the foreseeable needs of the person. The court shall appoint a guardian ad litem to represent the interests of the person at the hearing. Protective arrangements and single transactions include:~~

~~(1) payment, delivery, deposit or retention of funds or property;~~

~~(2) sale, mortgage, lease or other transfer of property;~~

~~(3) entry into an annuity contract, a contract for life care, a deposit contract and a contract for training and education; and~~

~~(4) addition to or establishment of a trust.~~

B. ~~When it has been established in a proceeding authorized by this section that a basis exists as described in Section 45-5-401 NMSA 1978 for affecting the estate and financial affairs of a person, the court, without appointing a conservator, may authorize, direct or ratify any contract, trust or other single transaction relating to the protected person's estate and financial affairs if the court finds that the transaction is in the best interests of the protected person.~~

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~~C. Before approving a transaction under this section, the court shall consider the interests of creditors and dependents of the protected person and, in view of the disability, whether the protected person needs the continuing protection of a conservator. The court may appoint one or more persons to assist in the accomplishment of any protective arrangement or other transaction authorized under this section. That person shall have the authority conferred by order of the court, shall serve until discharged by order of the court and shall report to the court of all matters done pursuant to the court's order] issue an order pursuant to Subsection B of this section for a protective arrangement instead of conservatorship for the person. Unless the person already has an attorney of the person's own choice, the court shall appoint an attorney to represent the person at the hearing. The court-appointed attorney shall have the duties of a guardian ad litem, as set forth in Section 45-5-404.1 NMSA 1978.~~

B. The court, instead of appointing a conservator, may:

(1) authorize a person or direct a person to execute a transaction necessary to protect the financial interest or property of the protected person, including:

(a) an action to establish eligibility for benefits;

(b) payment, delivery, deposit or retention of funds or property;

(c) sale, mortgage, lease or other transfer of property, including water rights and oil, gas and other mineral interests;

(d) purchase of an annuity;

(e) entry into a contractual relationship, including a contract to provide for personal care, supportive services, education, training or employment;

(f) addition to or establishment of a trust;

(g) ratification or invalidation of a

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contract, trust or other transaction, including a transaction related to the property or business affairs of the protected person; or

(h) settlement of a claim; or

(2) restrict access to the protected person's property by a specified person whose access to the property places the protected person at serious risk of financial harm.

C. After the notice and hearing pursuant to Subsection A of this section, the court may issue an order to restrict access to the protected person or the protected person's property by a specified person that the court finds by clear and convincing evidence:

(1) through fraud, coercion, duress or the use of deception and control caused or attempted to cause an action that would have resulted in financial harm to the protected person or the protected person's property; and

(2) poses a serious risk of substantial financial harm to the protected person or the protected person's property.

D. Before issuing an order pursuant to Subsection B or C of this section, the court shall consider the factors described in Section 45-5-417 NMSA 1978 that a conservator shall consider when making a decision on behalf of an individual subject to conservatorship.

E. Before issuing an order pursuant to Subsection B or C of this section for a protected person who is a minor, the court also shall consider the best interest of the minor, the preference of the parents of the minor and the preference of the minor, if the minor is twelve years of age or older.

F. Before issuing an order pursuant to Subsection B or C of this section for a protected person who is an adult, the court shall also consider the adult's prior or current directions, preferences, opinions, values and actions, to the extent actually known or reasonably ascertainable."".

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21. On page 39, lines 10 through 12, remove the brackets and line-through.

22. On page 45, line 18, after "interest", insert ", as determined by the court,".

23. On page 45, strike lines 23 through 25 in their entirety and insert in lieu thereof the following new subsection:

"Q. The issue of whether a conservator shall be appointed for the alleged incapacitated person shall be determined by the court at an open hearing unless, for good cause, the court determines otherwise."

24. On pages 46 through 49, strike Section 11 in its entirety and insert in lieu thereof:

"SECTION 12. Section 45-5-409 NMSA 1978 (being Laws 1989, Chapter 252, Section 22, as amended) is amended to read:

"45-5-409. ANNUAL REPORT AND ACCOUNT--AUDITS.--

A. Every conservator shall file an annual report and account with the appointing court within thirty days of the anniversary date of the conservator's appointment, upon the conservator's resignation or removal or upon termination of the conservatorship. A copy of the annual report and account shall also be mailed to the district judge who appointed the conservator or [his] the conservator's successor, to the incapacitated person and to [his] the incapacitated person's guardian, if any. The report shall include information concerning the progress and condition of the person under conservatorship, a report on the manner in which the conservator carried out [his] the conservator's powers and fulfilled [his] the conservator's duties and the conservator's opinion regarding the continued need for conservatorship. The report may be substantially in the following form:

"IN THE DISTRICT COURT
COUNTY, STATE OF NEW MEXICO

_____) No. _____
In the matter of the)
Conservatorship of)
_____)

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(Enter Name of Person Under Conservatorship)

CONSERVATOR'S REPORT AND ACCOUNT

Pursuant to Section [~~45-5-407~~] 45-5-409 NMSA 1978, the undersigned duly appointed, qualified and acting conservator of the above-mentioned protected person reports to the court as follows:

1. My name is: _____
2. My address and telephone number are: _____
3. The name, if applicable, and address of the place where the person under conservatorship now resides are:

4. The name of the person primarily responsible for the care of the person under conservatorship at such person's place of residence is: _____
5. The name and address of any hospital or other institution where the person under conservatorship is now admitted on a temporary basis are: _____
6. A brief description of the physical condition of the person under conservatorship is: _____
7. A brief description of the mental condition of the person under conservatorship is: _____
8. A description of contracts entered into on behalf of the person under conservatorship during the past year: _____
9. Describe all financial decisions made during the past year, including all receipts and disbursements, any sale, lease or mortgage of estate assets and any investment made on behalf of the person under conservatorship (NOTE: If the person under conservatorship is sharing expenses with others in a household and paying into joint household expenses, please identify the percentage of the expenses paid for by the person under conservatorship and how you determined that this percentage is appropriate.):

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10. The reasons, if any, why the conservatorship should continue are: _____

Signature of Conservator: _____
Date: _____".

B. Any conservator may rely on a qualified health care professional's current written report to provide descriptions of the physical and mental conditions required in items 6, 7 and 10 of the annual report and account as specified in Subsection A of this section.

C. The court shall not waive the requirement of an annual report and account under any circumstance, but may grant an extension of time. The court may require the filing of more than one report and account annually.

D. The conservator may be fined five dollars (\$5.00) per day for an overdue annual report and account. The fine shall be used to fund the costs of visitors, counsel and functional assessments utilized in conservatorship and guardianship proceedings pursuant to the Uniform Probate Code.

E. In connection with [~~any~~] an account, the court may require a conservator to submit to a physical check of the property in [~~his~~] the conservator's control, to be made in any manner the court may order.

F. In any case in which property consists in whole or in part of benefits paid by the United States department of veterans [~~administration~~] affairs to the conservator or [~~his~~] the conservator's predecessor for the benefit of the protected person, the [~~veterans administration~~] department office that has jurisdiction over the area is entitled to a copy of any report and account filed under Chapter 45, Article 5 NMSA 1978.

G. A conservator shall fully comply with the requirements of any audit of an account, inventory, report or property of a protected person."

SECTION 13. A new section of Part 4 of Article 5 of the Uniform Probate Code, Section 45-5-409.1 NMSA 1978, is enacted to

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read:

"45-5-409.1. [NEW MATERIAL] WAIVER OF LIABILITY.--

A. No person shall request, procure or receive a release or waiver of liability, however denominated, of a conservator, an agent, an affiliate or a designee of a conservator or any other third party acting on behalf of a conservator.

B. A release or waiver of liability that is requested, procured or received contrary to the provisions of Subsection A of this section is void."".

25. On pages 52 through 260, strike Sections 13 through 16 and 101 through 607 in their entirety and insert in lieu thereof the following new sections:

"SECTION 15. TEMPORARY PROVISION--REPORTING REQUIREMENTS.--On or before November 1, 2018, and again on or before November 1, 2019, the administrative office of the courts shall report to the legislative finance committee on the following topics:

A. the status of the Uniform Guardianship, Conservatorship and Other Protective Arrangements Act as approved by the national conference of commissioners on uniform state laws, including publication of official commentary and introduction and enactment by state legislatures;

B. the feasibility of the implementation in New Mexico of the Uniform Guardianship, Conservatorship and Other Protective Arrangements Act; and

C. an estimate of the financial cost to the judiciary to implement the Uniform Guardianship, Conservatorship and Other Protective Arrangements Act.

SECTION 16. APPLICABILITY.--The provisions of this act apply to:

A. a proceeding for appointment of a guardian or conservator or for a protective arrangement instead of guardianship or conservatorship commenced on or after July 1, 2018; and

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B. a guardianship, conservatorship or protective arrangement instead of guardianship or conservatorship in existence on June 30, 2018 unless the court finds application of a particular provision of this act would substantially interfere with the effective conduct of the proceeding or prejudice the rights of a party, in which case the particular provision of this act does not apply and the superseded law applies.

SECTION 17. EFFECTIVE DATE.--The effective date of the provisions of this act is July 1, 2018."

26. Renumber sections to correspond with these amendments.,

and thence referred to the **APPROPRIATIONS & FINANCE COMMITTEE**.

Respectfully submitted,

Gail Chasey, Chair

Adopted _____
(Chief Clerk)

Not Adopted _____
(Chief Clerk)

Date _____

The roll call vote was 13 For 0 Against

Yes: 13
No: 0
Excused: None
Absent: None

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