

**NEW MEXICO ADULT GUARDIANSHIP STUDY COMMISSION
INITIAL STATUS REPORT**

To: New Mexico Supreme Court
Hon. Judith K. Nakamura, Chief Justice

From: New Mexico Adult Guardianship Study Commission
Hon. Wendy York (Ret.), Chair
Patricia Galindo, Vice-chair
Neil R. Bell, Commission staff

Date: October 1, 2017

Re: Initial status report

The New Mexico Adult Guardianship Study Commission (the Commission) is proud to submit its initial status report for consideration by the Supreme Court. This report includes an overview of the Commission's activities since it was established on April 6, 2017, a preliminary list of recommendations for improving the guardianship system in New Mexico, and a list of issues that the Commission intends to study further, with the Court's permission.

OVERVIEW

The Supreme Court established the Commission on April 6, 2017, and charged the Commission with the following objectives:

[T]o study the operation and structure of the adult guardianship system in New Mexico, to report its findings to [the] Court and other participants in guardianship administration, and to make any recommendations it deems appropriate for improving the operation or structure of the New Mexico guardianship system.

To that end, the Court ordered the Commission to "conduct public information-gathering hearings," to "review facts and law relating to operation of the current system," to "consider proposed improvements to the current system," and to "submit its findings and recommendations to [the] Court without undue delay, including any recommendations the Commission may have for changes in court rules, statutes, administrative practices, additional resources, or any other proposals that may reasonably improve the guardianship system in New Mexico." The Court further ordered the Commission to submit an initial status report no later than October 1, 2017, and "such other interim and final reports as the Commission deems appropriate."

The all-volunteer Commission has worked diligently to meet its responsibilities under the Court's order. The Commission held seven full-day meetings in less than six months. The meetings were open to the public and were held in geographically diverse areas of the state, including five meetings in Albuquerque, one in Las Cruces, and one in Santa Fe. Commissioners also collaborated on their own time to develop recommendations for the full Commission to

consider at its public meetings. Additionally, the Commission has responded to numerous inquiries from the press and has maintained a publicly accessible website that it has used to foster transparency about the Commission's work. The website includes information about meetings, including agendas, materials, and minutes, full audio recordings of meetings, and numerous resources about the guardianship systems in New Mexico and in other states. The website also permits members of the public to submit written comments about the guardianship system, which are posted to the website for viewing by the Commission and the public.

In studying the guardianship system, the Commission considered information from a variety of sources. First, the Commission heard from many members of the public about their experiences with, concerns about, and recommendations for improving the guardianship system. These individuals and groups addressed the commission during public comment sessions at its meetings, submitted written comments through the Commission's website, and in some instances met privately with the chair. Family members of protected persons, in particular, took the opportunity to share highly personal, heartfelt, and often painful stories of their experiences with the guardianship system, hoping their stories would lead to meaningful reform. Public input was invaluable in educating the Commission about the strengths and weaknesses of the current system, particularly in meeting the needs of protected persons and their families.

The Commission also requested and heard presentations from an array of individuals and groups associated with the guardianship system. The presentations ranged from an overview of the guardianship process and the current statutes, to a summary of alternatives to guardianship, to an explanation of the role of each participant in the process. The latter category included presentations by court-appointed guardians and conservators (both professional and family member), a petitioning attorney, a guardian *ad litem*, a qualified health care provider, a court-appointed visitor, and representatives from the Office of Guardianship. A member of the Adult Protective Persons Task Force presented a summary of that group's efforts to identify ways in which the guardianship system could be reformed. And Senior Justice Maes and representatives from the Judicial Information Division of the Administrative Office of the Courts presented an overview of the courts' case management system. They offered insight into how the system might be used, for example, to collect data and to monitor deadlines in guardianship proceedings.

A variety of written materials also informed the Commission's work. Most notably, the Commission reviewed the proposed Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (the Uniform Act). Approved by the National Conference of Commissioners on Uniform State Laws on July 19th, 2017, the Uniform Act is the product of a years-long effort to address common problems—indeed many of the same problems that have been brought to the Commission's attention during the past six months—in guardianship and conservatorship proceedings across the country. The Uniform Act is intended to replace Article 5 of the Uniform Probate Code. New Mexico adopted Article 5 in 1975 and has not meaningfully revised it in the past 40-plus years.

Based on an informal, preliminary vote, the Commission is generally supportive of the Uniform Act and of the significant changes that it would make to the guardianship system if it were enacted in New Mexico. Further study of the Uniform Act is necessary, however, before the Commission can make a formal recommendation about whether to support its introduction

and passage in the upcoming legislative session. To that end, the chair of the Uniform Act's drafting committee, Professor David English, has generously agreed to speak with the Commission in person on Friday, November 17th, and to answer questions about the drafting process and about the Uniform Act itself. The Commission plans to make a final recommendation about the Act after meeting with Professor English.

Another issue that has significantly influenced the Commission's work is the pair of federal indictments that were issued this summer against two corporate officers of Ayudando Guardians. These indictments revealed structural weaknesses in the oversight of guardians and conservators in New Mexico. The Commission used these public allegations as a case study to help identify improvements that should be made to prevent similar misconduct in the future.

And as a final matter, the Commission strongly believes that the recommendations in this report, if implemented, would improve the guardianship system for those whom it affects the most: protected persons and their families. The recommendations address issues that range from requiring stricter accountability and oversight of guardians and conservators, to establishing clear grievance processes for family members and other interested parties, to creating easily accessible educational and training resources, to protecting the assets of protected persons from fraud or other forms of misconduct. Other issues still require study, including the proper balance between transparency, confidentiality, and sequestration in guardianship proceedings and the appropriate role of temporary, emergency appointments in the guardianship process. Overall, however, the Commission is proud of the progress that it has made in such a short time. The Commission is honored to have been given the opportunity to address this important issue and is hopeful that the Court will support the Commission's recommendations, including its desire to continue working to find ways to improve the guardianship system.

RECOMMENDATIONS

The Commission offers the following recommendations for the Court's consideration.

- A. *Require certification by statute or court rule of professional guardians and conservators by a national organization, such as the Center for Guardianship Certification. This recommendation is not intended to preclude New Mexico from developing its own certification requirements.*

Currently, certification is required only for guardians and conservators who provide contract services through the Office of Guardianship. The Commission recommends requiring certification for all professional guardians and conservators. Requiring certification would (1) set the standard of care commensurate with the National Guardianship Association standards and ethical rules and would mandate training; (2) create oversight, accountability, and grievance procedures through the national organization; (3) place the responsibility on the guardian and conservator to obtain and maintain certification at no cost to the state or protected person; (4) create a formalized vetting process to evaluate the competency of the guardian or conservator; (5) provide a background check at no cost to the state or protected person's estate; and (6) help rebuild public confidence in protective proceedings.

The Commission recommends limiting the certification requirement to a *professional* guardian or conservator, which would be defined as a person (including a corporation) appointed to serve as a guardian or conservator for more than two non-family members. The Commission made this distinction in response to several members of the public who suggested that guardians appointed to care for family members typically lack the time and resources to obtain certification.

- B. Require bonding or an alternative asset-protection arrangement by statute or court rule for conservators to protect the interests of the individual subject to the conservatorship.*

In addition to stringent oversight requirements, the Commission recommends requiring conservators to furnish a bond or to secure another asset-protection arrangement as a further protection for individuals subject to conservatorship. The Uniform Act includes a substantially similar bonding requirement. The Commission is aware that the Second Judicial District now requires bonding of estates valued at more than \$30,000.

- C. Propose legislation to establish and fund an adult protected person oversight board to regulate certified, bonded, professional guardians and conservators and to communicate concerns about professional guardians and conservators to the courts.*

The Commission recommends establishing a guardian and conservator oversight board with the authority to establish state-certification requirements and to require bonding of professional guardians and conservators. The oversight board also should communicate with the courts about misconduct by guardians or conservators.

Minority views: Two commissioners would prefer an oversight board with greater authority over guardians and conservators, including the authority to hear grievances, to require audits, and to monitor compliance with laws, rules, and estate plans. A third commissioner dissented from this recommendation, citing the view that greater transparency in guardianship proceedings would empower family members and the public to hold guardians and conservators accountable without the need for an oversight board.

- D. Seek legislative funding for appropriate personnel, including but not limited to monitors and auditors, to investigate information contained in annual reports and audits of guardians and conservators, and to report to the court.*

The Commission recommends seeking funding for personnel within the judiciary who would be responsible for monitoring and auditing information submitted by guardians and conservators. These reviews should be performed in a targeted manner, when appropriate, and on a random basis to instill an expectation of accountability for individuals who provide guardianship or conservatorship services.

Minority view: One commissioner dissented from this recommendation, preferring to assign investigative responsibilities to an office or agency outside of the judiciary.

- E. Establish stringent reporting and financial accountability measures for conservators, including the following:*
- 1. require conservators, upon appointment, to sign releases permitting the courts to obtain financial documents of protected persons;*
 - 2. require annual reports to include bank and financial statements and any other documentation requested by the court auditor, with appropriate protections to prevent disclosure of confidential information;*
 - 3. require conservators to maintain a separate trust account for each protected person to avoid commingling of funds; and*
 - 4. require conservators to maintain financial records for seven years.*

These recommendations are the result of the chair's meeting with a forensic accountant to discuss sufficient oversight requirements of conservators to reduce the potential for fraud. They also incorporate the revised fiduciary accounting requirements imposed by the Department of Veterans' Affairs in its report dated March 1, 2011.

- F. Require regular training for all current and future judges about the law that applies in guardianship and conservatorship proceedings.*

The Commission recommends requiring training of all judges at the 2018 or 2019 Judicial Conclave, whichever follows consideration by the legislature of the Uniform Act. The Commission also recommends requiring regular guardianship and conservatorship training for all new judges and creating an online video or web resource that could be accessed by judges whenever they have questions about guardianship or conservatorship proceedings. The Commission recommends requiring regular training because of the unique nature of these cases, which includes the courts' independent oversight responsibility, regardless of whether a specific motion is filed.

- G. Create a flowchart and glossary of terms for the guardianship/conservatorship process.*

The Commission recommends the creation of a flowchart of, and glossary of terms used in, the guardianship and conservatorship processes to assist judges, attorneys, family members, and members of the public. The glossary of terms should be written in plain English, and the flowchart and glossary should be readily available online. The Commission believes that a flowchart and glossary of terms would be an invaluable resource to judges, attorneys, and family members and that it would have an immediate, discernible impact on guardianship proceedings.

- H. Create educational and training resources for non-lawyers involved in a guardianship or conservatorship proceeding.*

Based on numerous comments from members of the public about the complexity of the guardianship and conservatorship processes, the Commission recommends developing educational and training resources to make the processes more understandable.

- I. Require mediation or facilitated family meetings in all contested guardianship and conservatorship proceedings.*

The Commission heard from multiple sources that getting family members together early in contested guardianship and conservatorship proceedings could help to avoid many common problems in these types of cases. The Commission therefore recommends requiring mediation of or facilitated family meetings for all contested proceedings.

- J. Require by court rule that a judge make specific findings of fact when appointing a guardian or conservator if the judge deviates from the protected person's advance directive, trust, will, or estate plan or the order of priority listed in the statute.*

This recommendation is intended to address the numerous comments that the commission has received about estate plans being disregarded or not followed in the course of a guardianship or conservatorship proceeding. The recommendation would require the court to document in a court order any deviation from an estate plan to ensure that the change has not been overlooked and that it was a considered, deliberate decision made by the court, based upon evidence.

- K. Create and mandate the use of a coversheet in adult guardianship and conservatorship proceedings.*

The Commission recommends the creation of a coversheet that must be filed with all adult guardianship and conservatorship petitions as a way to identify individuals who are entitled to notice of the proceeding and to sort cases based on the potential issues that may arise. For example, it would be useful for a court to know early in a proceeding whether a petition for the appointment of a guardian or conservator is contested or uncontested, or whether it is for a minor who is moving to adulthood. The coversheet also should be filed with a motion to appoint a successor guardian or conservator and with every annual report submitted by a guardian or conservator to alert the court to changes in the circumstances of case participants, such as a change of address or the death of a guardian.

- L. Authorize and seek funding for the Administrative Office of the Courts to hire special masters or commissioners to hear grievances against guardians and conservators.*

The Commission recommends authorizing and seeking funding for the hiring of special masters or commissioners who would advise the assigned judge of the master's or commissioner's recommended action in a grievance. The goal of this recommendation is to provide quick and easy access for any interested party who has a grievance against a guardian or a conservator. The special masters or commissioners should be hired by the Administrative Office of the Courts and authorized to hear grievances on a statewide basis, rather than employed by individual districts.

- M. Seek legislative funding for technology and necessary staffing to modernize accounting and tracking of conservatorships and to build safeguards to protect vulnerable adults from financial exploitation.*

The Commission recommends seeking funding for technology and necessary staffing to implement improvements to the courts' case management system that would alert judges when

annual reports are due, indicate “red flags” that may reveal financial exploitation or other problematic issues, and automate auditing functions. The Minnesota courts have developed a system, including software and staffing, that would serve as a model for this recommendation.

N. Establish a recurring, diverse commission, which would be appointed every four years to hold public hearings about the guardianship and conservatorship statutes, rules, and procedures in New Mexico and to make recommendations for continued improvement of the guardianship system.

The Commission recommends establishing a recurring commission that would focus on inquiries or requests about the system as a whole, including rules or statutes, and not on problems in individual cases.

Minority view: One commissioner dissented from this recommendation, citing the view that a permanent commission is unnecessary and would defer work that already has been assigned to the Commission.

O. Establish an Adult Guardianship and Conservatorship Rules Committee.

The Commission recommends establishing a Supreme Court rules committee to review and develop rules necessary to ensure that all processes and procedures are followed in guardianship cases.

P. Establish an Adult Guardianship and Conservatorship Forms Committee that includes members who are not lawyers.

The Commission recommends establishing a Supreme Court forms committee to develop a set of Court-approved forms for use in adult guardianship proceedings.

Q. Authorize the Commission Chair to seek a formal ethics advisory opinion regarding potential ethical issues that have come to the attention of the Commission.

Several attorney-related ethical concerns have been raised during the course of the Commission’s work. These ethical concerns include, for example, whether the Rules of Professional Conduct allow an attorney to recommend the appointment of a particular guardian whom the attorney has represented in another proceeding. The Commission recommends authorizing the chair to request one or more formal ethics advisory opinions to address how the rules apply in each scenario. A copy of the proposed letter is attached as Exhibit A.

ISSUES FOR FURTHER STUDY

1. Whether to support the enactment of the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act.

As explained previously, the Commission plans to submit a formal recommendation about whether to support passage of the Uniform Act after meeting with Professor David English

on November 17, 2017. Passage of the Uniform Act would represent a significant shift in the laws governing guardianship and conservatorship proceedings and would be the single largest reform of the guardianship system in decades.

- 2. Whether to recommend changes to the statutes and court rules that govern sequestration of court hearings and confidentiality of court records in guardianship and conservatorship proceedings.*

The Commission has heard numerous appeals from the public about this issue. On the one hand, many have advocated for greater access to information for family members. On the other hand, many have argued to continue to protect the privacy of individuals subject to guardianship or conservatorship. The Commission has not had time yet to fully consider this complicated issue. The Commission notes, however, that the Uniform Act addresses these competing concerns in its provisions regarding who may attend hearings and the confidentiality of court records. The Commission would like to speak with Professor English about the approach taken in the Uniform Act before making a recommendation on this issue.

- 3. Whether to recommend changes to the procedures for seeking or appointing a temporary guardian or conservator in an emergency, ex parte proceeding.*

The overuse of temporary appointments, which are often made on an ex-parte, emergency basis, is a troubling issue that has been repeatedly brought to the Commission's attention. Numerous family members have shared stories of feeling blindsided, overwhelmed, and powerless when learning that a guardian or conservator has been appointed for their loved one without their knowledge. The Commission supports limiting the use of temporary appointments and providing judges with training and education to ensure that temporary appointments are the exception, rather than the rule. The Commission also would like to speak with Professor English about the Uniform Act, which proposes stricter requirements for temporary appointments.

- 4. Whether to recommend changes to the statutes that govern the order of priority for the appointment of a guardian or conservator.*

The Commission has heard from several members of the public who believe that the statutory order of priority for the appointment of a guardian or conservator is unfair or is not followed in all cases. The Commission also is considering whether a protected person should be permitted to disqualify in an estate plan or other legal document a particular individual from being appointed as guardian or conservator. The Commission has not had time to fully consider this issue and would like to speak with Professor English about how it is addressed in the Uniform Act before taking action.

- 5. Whether to recommend the creation of a "limited financial conservator" whose authority is limited to accessing financial information to enable informed decision-making about the alleged incapacitated person's placement pending the appointment of a guardian or conservator.*

The Commission would like to consider whether to recommend the creation of a “limited financial conservator” while a guardianship or conservatorship proceeding is pending. This recommendation would address a concern raised by the New Mexico Hospital Association about frequent delays in obtaining a guardianship or conservatorship for in-patients in a hospital’s psychiatric unit. The limited financial conservator would be permitted to access and share the protected person’s financial information with service providers to enable them to arrange for placement in another setting pending a hearing on the petition. The Commission has not had time to consider this proposal.

6. *Whether to recommend appointing guardians ad litem and court-appointed visitors on a rotating basis, rather than on the recommendation of a petitioning attorney.*

The Commission heard from several commenters that the current system allows the petitioning attorney to “stack the deck” in the petitioner’s favor by recommending the appointment of certain individuals as guardian *ad litem* and visitor. The Commission would like to explore the idea of creating a rotating list of GALs and visitors to remove this perceived unfairness from the system.

7. *Whether to recommend auditing and reporting requirements for conservators like those applicable to charitable organizations under the Charitable Solicitations Act, NMSA 1978, §§ 57-22-1 to -11.*

The Commission would like to explore whether conservators should be subject to auditing and reporting requirements like those applicable to charitable organizations under the Charitable Solicitations Act. The Commission generally supports a requirement for conservators to obtain and submit annual audits to the Attorney General’s Office and for those audits to be posted on the Attorney General’s publicly accessible website. However, further study is necessary to determine whether these requirements should apply, for example, to all professional conservators or only to conservators who oversee assets valued at more than a certain amount, e.g., \$500,000.

NEXT STEPS

With the Court’s permission, the Commission would like to continue working on the items identified above and to submit a final report by January 1, 2018. The meeting with Professor English on November 17th, in particular, is a critical step in determining whether to recommend supporting the adoption of the Uniform Act. As explained throughout this report, the Commission views the Uniform Act as a potentially transformative piece of legislation and would like to have a full understanding before making a recommendation about whether to support its adoption.

If the Court permits the Commission to continue its work, the Commission also would request permission to invite public comment on the recommendations included in this report. Specifically, the Commission would request a two-week comment period through the Commission’s website, beginning as soon as possible. The Commission has tried to involve the public as much as possible in its work and would like to provide an opportunity for the public to

respond to the Commission's recommendations and to suggest revisions or additional recommendations that could be included in the final report.

On behalf of the entire Commission, thank you for the opportunity to work on this important issue. Please do not hesitate to contact the chair if you have questions or require further assistance in considering the Commission's recommendations.



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September 27, 2017

William Slease
Disciplinary Board
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Dear Mr. Slease:

As you know, I was appointed by the New Mexico Supreme Court to chair the Adult Guardianship Study Commission. The commission has been meeting since April of this year. Several potential ethical issues have come to our attention and we believe that a Formal Advisory ethics opinion addressing these issues would be beneficial. The issues are as follows:

1. A guardianship or conservatorship for an alleged incapacitated person begins with the filing of petition by an interested person. The interested person may or may not be a family member. The proceeding can be contested by the alleged incapacitated person, family members or other individuals. These individuals may or may not be represented by an attorney.

It is not uncommon for disputes to arise over whether a guardian or conservator should be appointed and who that guardian and conservator should be. We would like to obtain a Formal Advisory Ethics opinion on the following scenario: May an attorney recommend the appointment of a guardian or conservator if he or she has had an attorney-client relationship with that particular guardian or conservator? If the attorney may make the recommendation, must he or she disclose the fact of representation to (a) his or her client; (b) the other individuals who are involved in the case; and/or (c) the court. If that guardian or conservator is proposed by another individual, must the attorney disclose his or her current or past attorney-client relationship?

2. If an attorney has an ownership interest in a guardianship or conservatorship organization, may the attorney recommend that organization to serve as guardian or conservator? If the attorney may make the recommendation, must he or she disclose the fact of representation to (a) his or her client; (b) the other individuals who are involved in the case; and/or (c) the court. If that guardian or conservator is proposed by another individual, must the attorney disclose his or her current or past ownership interest?

Exhibit A

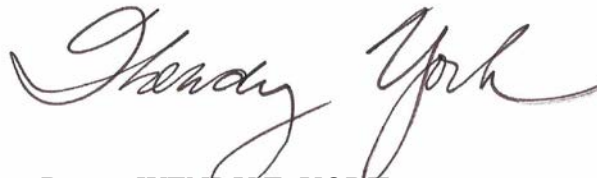
3. If an attorney has served on the board of a guardianship or conservatorship organization, may the attorney recommend that organization serve as guardian or conservator? If the attorney may make the recommendation, must he or she disclose the fact of board membership to (a) his or her client; (b) the other individuals who are involved in the case; and/or (c) the court. If that guardian or conservator is proposed by another individual, must the attorney disclose his or her current or past board membership?

4. In order to appoint a guardian or conservator, the court must appoint a guardian ad litem and a visitor to independently assess whether a guardianship or conservatorship is necessary and whether a full or limited appointment should be made. The number of individuals who serve in these capacities is limited and it is not uncommon for them to have worked as guardian ad litem or visitor for the petitioning attorney in the past (and vice versa). In these situations, where the petitioning attorney, guardian ad litem and visitor have worked on other cases, must the attorneys disclose that fact to the individuals who are involved in the case; and/or (c) the court. Must the guardian ad litem make the same disclosures? Is disclosure required if someone else recommends the GAL or Visitor? If there is a duty to disclose, what is the extent of that disclosure?

If you have any questions, please contact me. We would appreciate any guidance you can give to the lawyers who practice in this area.

Very truly yours,

SHEEHAN & SHEEHAN, P.A.

A handwritten signature in cursive script that reads "Wendy York". The signature is written in black ink and is positioned above the typed name.

By: WENDY E. YORK

WEY:aep