

**NEW MEXICO ADULT GUARDIANSHIP STUDY COMMISSION
FINAL 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: December 28, 2017

Re: Final report

The New Mexico Adult Guardianship Study Commission (the Commission) is proud to submit its final report for consideration by the Supreme Court. This report provides an overview of the Commission’s efforts since it was established in April of 2017 and sets forth the Commission’s recommendations for improving the guardianship system in New Mexico. While all of the recommendations are critically important, the Commission considers four of its recommendations to be of the highest priority for improving the guardianship system. The Commission urges the Court, the Legislature, and the Governor to work together to fund and implement these highest priority recommendations at the earliest opportunity.

OVERVIEW

The Supreme Court established the Commission on April 6, 2017, and charged it 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 Commission submitted its initial status report on October 1, 2017. This final report includes recommendations from the initial status report, together with additional recommendations developed since the Commission submitted its initial report to the Court.

The all-volunteer Commission has worked diligently to meet its responsibilities under the Court’s order. The Commission held ten full-day meetings in less than eight months. The meetings were open to the public and were held in geographically diverse areas of the state, including eight 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. And for much of the Commission’s duration, the website has allowed 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 and submitted written comments through the Commission’s website. The Commission also gave those who were unable or unwilling to speak at public meetings the opportunity to speak with the Commission Chair in private. Family members of protected persons, in particular, took these opportunities 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. The Commission reviewed the proposed Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (the UGCOPAA). Approved by the National Conference of Commissioners on Uniform State Laws on July 19th, 2017, the UGCOPAA is the product of a two-year effort to address common problems—indeed, many of the same problems that have been brought to the Commission's attention during the past eight months—in guardianship and conservatorship proceedings across the country. The UGCOPAA is intended to replace Article 5 of the Uniform Probate Code, which New Mexico adopted in 1975.

The Commission was extremely fortunate to have the chair of the UGCOPAA's drafting committee, Professor David English, attend the Commission's meeting on Friday, November 17th. Professor English gave an overview of the UGCOPAA and answered questions about the drafting process and about the UGCOPAA itself. His insight was invaluable and significantly improved the Commission's understanding of the UGCOPAA. The Commission supports the spirit of the UGCOPAA and believes that it would significantly improve the guardianship system in New Mexico. Therefore, as described in greater detail below, a majority of the Commission supports the immediate enactment of the UGCOPAA with a handful of amendments to make the legislation consistent with New Mexico law. But passing the law is only the first step. The UGCOPAA is not perfect, and the Commission anticipates that the law's implementation will reveal

weaknesses that may not be immediately apparent. The Commission therefore recommends treating the UGCOPAA as a “living document” and strongly encourages ongoing efforts to amend the law as necessary, once it has been enacted.

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.

As previously mentioned, the Commission submitted its initial status report to the Court on October 1, 2017. The report included seventeen initial recommendations and seven issues that the Commission had identified as warranting further study. (A summary of the Commission’s initial recommendations and issues for further study is attached to this report as Appendix A.) After considering the initial report, the Court approved the Commission’s request to publish the Commission’s initial recommendations for public comment and approved three of the Commission’s initial recommendations for immediate action:

- *Establish an Adult Guardianship and Conservatorship Rules Committee. (Initial recommendation O)*
- *Establish an Adult Guardianship and Conservatorship Forms Committee. (Initial recommendation P)*
- *Authorize the Commission Chair to seek a formal ethics advisory opinion regarding potential ethical issues that have come to the attention of the Commission. (Initial recommendation Q)*

For the first two recommendations above, the Court has announced and solicited applications for the formation of the Ad hoc Committee on Rules and Forms for Guardianship and Conservatorship Proceedings. For the third recommendation above, the Commission Chair submitted a written request to the Ethics Advisory Committee by letter dated October 18th, 2017, and has received confirmation that several formal ethics advisory opinions are forthcoming on the issues raised in her request.

The Commission has continued to work diligently since submitting its initial status report in October. Several commissioners attended legislative committee

hearings at which issues about the guardianship system were discussed. The Commission Chair and Senator Ortiz y Pino testified before the Legislative Health and Human Services Committee and answered numerous questions about the Commission's recommendations and about its views of the UGCOPAA. Significantly, the Commission has learned that Senator James White of Albuquerque intends to introduce the UGCOPAA during the upcoming 2018 legislative session and that Governor Martinez has been asked to include the UGCOPAA on the call so that the act may be considered in the thirty-day session.

The Commission also held three meetings after submitting its initial status report. While the Commission's primary focus at its last three meetings was the UGCOPAA, the Commission also discussed the written comments received in response to its initial recommendations. The comments were thoughtful and constructive, and the commissioners were grateful for the additional input. The Commission also received public comment at its final meetings, considered a number of other issues, and continued to refine its initial recommendations, particularly with respect to how they would be affected by passage of the UGCOPAA. The Commission's final recommendations are set forth below.

The Commission strongly believes that all of the recommendations in this report are necessary to improve the guardianship system, especially for those whom it affects the most: protected persons and their families. The recommendations 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 and other forms of misconduct. Other shortcomings in the current system would be addressed and significantly improved by the UGCOPAA if it were enacted, including increasing notice and access to hearings and records in guardianship and conservatorship proceedings and limiting the use of temporary, emergency appointments of guardians and conservators.

The Commission is proud of the progress that it has made in such a short time and is honored for the opportunity to address this important issue. One of the biggest lessons learned from this process is that all branches of government share responsibility for the problems with the current guardianship system, and as a result, no single branch of government can reform the system on its own. The Commission is therefore hopeful that the Court, the Legislature, and the Governor will work together to improve the system by fully funding and implementing the recommendations set forth in this report.

RECOMMENDATIONS

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

Highest Priority Recommendations

The Commission proposes the following highest priority recommendations as steps that should be taken at the earliest opportunity to improve the guardianship system. While each of these recommendations is critically important, they are offered here in order of priority. The Commission acknowledges that these recommendations would require swift legislative action if they are to be implemented in the upcoming 2018 legislative session. The Commission welcomes and encourages action by anyone interested in pursuing these recommendations, whether acting on behalf of the legislative, executive, or judicial branches of government.

1. *Appropriate sufficient funds to implement a computerized system to automate the filing and monitoring of conservator reports.*

Under current statute, a conservator must submit to the court an annual report that includes information about (1) the protected person's progress and condition, (2) the manner in which the conservator has carried out his or her powers and fulfilled his or her duties, and (3) the conservator's opinion about whether the conservatorship should continue. *See* NMSA 1978, § 45-5-409. Section 423(b) of the UGCOPAA similarly requires the filing of an annual report and imposes additional requirements on the information and disclosures that must be included in the report. The Commission heard from multiple sources that conservator reports often are not submitted and that the courts lack a simple, reliable method for monitoring compliance with the reporting requirement. The Commission also learned that when reports are submitted under current law, they often do not provide adequate information to enable the court to monitor or identify problems with a particular conservatorship. Financial records, in particular, frequently are omitted or are so disorganized as to prevent meaningful review. And in complex financial cases, the court may not have the expertise necessary to evaluate the report.

The Commission has learned that the Minnesota Judicial Branch has developed software that has significantly improved the Minnesota courts' ability to

monitor and review financial and accounting information submitted in annual conservator reports. The software has allowed the Minnesota courts to develop a uniform annual report that conservators complete and submit electronically through the courts' electronic filing system. The software imports the data into the courts' case management system and analyzes the information for certain "red flags" that indicate financial mismanagement or exploitation. The software also triggers an electronic notification in the electronic court file that is visible to judges and court staff. For further information about how the Minnesota Judicial Branch has used the software to monitor conservatorships, visit [http://www.eldersandcourts.org/~media/Microsites/Files/cec/MMC%20 History.ashx](http://www.eldersandcourts.org/~media/Microsites/Files/cec/MMC%20History.ashx).

The Commission strongly recommends appropriating sufficient funds to the Administrative Office of the Courts (AOC) to develop a similar automated process for monitoring information submitted in annual reports. Courts play an essential role in monitoring conservatorships, but they currently lack the tools to effectively and efficiently carry out their responsibilities. Developing and implementing a system like the one used in Minnesota would improve the quality of information submitted to the New Mexico courts and would assist with monitoring compliance with reporting requirements and identifying financial mismanagement or exploitation. In the Commission's view, a similar system in New Mexico would be well-worth the one-time cost of development and implementation.

The Commission has learned that the AOC has explored whether Minnesota's software could be adapted to work with the Odyssey Case Management System ("Odyssey") used in New Mexico. Assuming Minnesota's software could be adapted for use with Odyssey, the AOC estimated that establishing a similar automated system for submitting and monitoring reports would require a one-time expenditure of \$400,000 to \$600,000. In the process of drafting this report, however, the Commission has learned that other states have tried to adapt Minnesota's software and have not been successful. The Commission therefore recommends appropriating sufficient funds to the AOC to develop and implement a computerized system to automate the filing and monitoring of conservator reports, whether the system is developed by adapting Minnesota's software or by pursuing other options.

In the course of studying the guardianship system, the Commission has identified a potential source of funding for this recommendation. The Commission has learned that over the past five years the Office of Guardianship has accumulated approximately \$3,000,000 in a non-reverting fund. These monies are best-suited for funding non-recurring expenses. The Commission recommends

sweeping up and appropriating a portion of the money to fund the one-time cost of implementing this recommendation.

2. *Appropriate funds for the Administrative Office of the Courts to hire three fulltime auditors, at a total annual cost of \$76,455 per auditor, to assist the courts with monitoring conservatorships.*

As a follow-up to Recommendation 1, the Commission strongly recommends appropriating funds for the AOC to hire three fulltime auditors to assist the courts with reviewing the information electronically submitted by conservators. While the software described in Recommendation 1 would greatly improve the courts' ability to monitor conservatorships, hiring auditors to review the information submitted by conservators would maximize the software's efficacy. The Minnesota Judicial Branch, for example, has a staff of nine auditors who carry out two functions. First, they follow up with the parties when a case is flagged by the automated system and submit a report to the court outlining their findings. And second, they perform a full audit of each conservatorship once every four years. The Commission recommends hiring three auditors to perform the first function and to conduct random audits of conservatorships as time permits.

3. *Appropriate funds for the Administrative Office of the Courts to hire two special masters, at a total annual cost of \$123,726 per special master, to hear grievances in guardianship and conservatorship proceedings.*

The Commission recommends appropriating funds for the AOC to hire two special masters to hear grievances in guardianship and conservatorship cases. Under current law, there is no formal process for objecting to the conduct of a guardian or conservator. *But see* NMSA 1978, § 45-5-307(C) (“The incapacitated person or any person interested in the incapacitated person’s welfare may petition for an order that the incapacitated person is no longer incapacitated and for removal or resignation of the guardian.”); § 45-5-415(C) (same for conservators). Section 127 of the UGCOPAA, however, sets forth a formal grievance process that includes review and a hearing by the court when appropriate. It is critically important to establish a grievance process in New Mexico and to ensure that grievances can be heard promptly since they may involve the health and safety of the person under guardianship or conservatorship. The courts currently are overburdened, and it is common for judges’ schedules to be booked for four months in advance. Special masters tasked with hearing grievances would allow for quicker access to the courts. The Commission therefore recommends hiring two special masters to hear grievances and make recommendations to the judge who

presides over the case. The special masters should be employed by the AOC, rather than by individual districts, and should hear grievances throughout the state on an ad hoc basis. If the UGCOPAA is not enacted, the Commission recommends creating a grievance process by court rule.

4. *Enact the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act and appropriate sufficient funding to fully implement its provisions.*

The Commission recommends enacting the UGCOPAA. In making this recommendation, the Commission wishes to emphasize several points. First, the final version of the UGCOPAA was not available to the Commission until November, and the Commission therefore did not have sufficient time to consider every provision in detail. Second, the UGCOPAA is not a miracle cure for solving the myriad issues with the current system. True reform will require a sustained effort by all three branches of government to appropriate necessary funding and resources for implementation and adequate oversight, to enact any follow-up legislation that may be necessary, and to ensure adequate training on the sweeping changes made under the new law. And third, if the UGCOPAA is passed without adequate funding for auditors and special masters to provide necessary oversight of its implementation, the Commission is concerned that the law will simply be a band-aid that will not address the problems with the current system. All of that said, however, the Commission strongly believes that passing the UGCOPAA would lay the groundwork for addressing and improving upon nearly all of the problems that have been brought to the Commission's attention.

Like all uniform laws, the UGCOPAA identifies material throughout its provisions that should be adapted to conform to the laws, procedures, and resources of the enacting state. Since the UGCOPAA may be considered in the 2018 legislative session, the Commission offers the following recommendations for the Legislature's consideration:

- a. **Mandatory appointment of respondent's attorney.** Sections 305 and 406 are substantially identical and set forth two alternatives for when the court must appoint an attorney for the respondent. To ensure that every respondent's rights are represented, the Commission recommends Alternative B, under which the court shall appoint a respondent's attorney unless the respondent already is represented by counsel. *Accord* NMSA 1978, § 45-5-303(C) ("Unless an alleged incapacitated person already has an attorney of the alleged

incapacitated person’s own choice, the court shall appoint an attorney to represent the alleged incapacitated person.”); § 45-5-407(B) (same).

- b. **Domestic partner.** The term “domestic partner” appears in brackets eighteen times in the UGCOPAA as an alternative when the term spouse is used. For example, Section 302(b)(2)(A) provides that a petition for the appointment of a guardian for an adult shall include “the name and address of the respondent’s . . . spouse [or domestic partner], or if the respondent has none, an adult with whom the respondent has shared household responsibilities for more than six months in the 12-month period immediately before the filing of the petition.” The Commission recommends including the phrase “domestic partner” whenever it appears in the UGCOPAA. The Commission further recommends defining the term “domestic partner” in Section 102, using the definition set forth in the Uniform Health-care Decisions Act. *See* NMSA 1978, § 24-7A-5(B)(2) (“an individual in a long-term relationship of indefinite duration with the [respondent] in which the individual has demonstrated an actual commitment to the [respondent] similar to the commitment of a spouse and in which the individual and the [respondent] consider themselves to be responsible for each other’s well-being”).
- c. **Reference to Uniform Probate Code.** The end of Section 414(a)(9) includes a bracketed instruction to insert the enacting state’s law governing the execution of wills. The Commission recommends replacing the instruction with the phrase, “in compliance with the Uniform Probate Code.”
- d. **Time limit for hearing on ex parte emergency appointment.** Sections 312(e)(2) and 413(e) provide that a hearing must be held within “[five] days” of the ex parte appointment of an emergency guardian or conservator. The Commission recommends replacing the bracketed language with “fourteen days” to allow time for meaningful review by the court and the parties of the allegations set forth in the emergency petition. Several commissioners also wish to emphasize that ex parte emergency appointments should be the exception and not the rule and therefore should be made with caution.
- e. **Duration of emergency appointment.** Sections 312(b) and 413(b) provide that an emergency guardian’s or conservator’s authority “may

not exceed [60] days” and that such authority “may be extended once for not more than [60] days.” The Commission recommends maintaining the time limits currently in effect, which limit the duration of the initial appointment to 60 days and permit a single extension for up to 30 days. *See* NMSA 1978, §§ 45-5-310(B), 45-5-408(B).

The Commission also recommends the following substantive revisions to the UGCOPAA, either when the legislation is originally introduced, as amendments during the legislative session, or as part of follow-up legislation at some point in the future.

- f. **Who may petition.** The Commission recommends striking the language from Sections 302(a) and 402(a)(1) that permits “the individual for whom the order is sought” to petition for the appointment of a guardian or conservator. In the Commission’s view, a respondent who is capable of petitioning for the appointment of a guardian or conservator should be able to execute a less restrictive alternative to guardianship or conservatorship such as a power of attorney. Further, New Mexico has long forbidden the respondent from consenting to a guardianship or conservatorship. *See* NMSA 1978, §§ 45-5-315, 45-5-426. The Commission therefore recommends striking the language quoted above from these two provisions.
- g. **Discretionary hearing on approval of plan and report.** Sections 316(d) and 419(d) require the court to review the guardian’s or conservator’s plan and either to approve the plan or to require a new plan. Sections 317(h) and 423(h) permit the guardian or conservator to petition the court to review and approve a report filed under those sections. The Commission recommends clarifying that, upon the filing of a plan or a report, the court has the discretion to hold a hearing to review, and consider any objections to, the plan or report before approval. The clarification would highlight to the court and the parties that a hearing on a plan or a report may be appropriate when, for example, the plan or report is questioned or challenged. Hearings should be discretionary, however, to avoid overburdening the courts by requiring a hearing in every instance.
- h. **Amend the definition of “Conservator” to include a guardian authorized to make financial decisions.** Under current law, a court

may grant a guardian the authority to make financial decisions on behalf of the protected person. *See* NMSA 1978, § 45-5-312(B)(4) (setting forth the general powers and duties of a guardian). The UGCOPAA is silent about whether such authority may be given to a guardian. Neither law clearly requires a guardian with authority to make financial decisions to file an annual accounting detailing those financial decisions. The Commission believes that anyone who handles money on behalf of a person under guardianship should be required to account for it and should be subject to the same requirements as a conservator, including the duty to obtain bonding or an alternative asset protection arrangement and to file annual reports. The Commission therefore recommends amending the definition of “Conservator” in Section 102(5) of the UGCOPAA to include “a guardian authorized to make financial decisions for the person subject to guardianship.” The Commission further recommends amending Section 313, which sets forth the duties of a guardian, to clarify that a guardian authorized to make financial decisions is subject to the requirements that apply to conservators.

High Priority Recommendations

In addition to the highest priority recommendations identified above, the Commission proposes the following high priority recommendations for improving the guardianship system. These recommendations are intended to address critical shortcomings of the current system and should be implemented as soon as practicable. While not in any particular order of priority, these recommendations are grouped based on the Commission’s view of how they should be implemented, whether through administrative action, court rule, or the legislative/executive process. Recommendations that would be substantially affected by enactment of the UGCOPAA are preceded by an asterisk (*).

Administrative reforms

- A. *Require regular training for all current and future judges about the law that applies in guardianship and conservatorship proceedings and specialized training on how to effectively respond to the high emotion that often accompanies these cases.*

The Commission recommends requiring training for all judges at the 2018 or 2019 Judicial Conclave, whichever follows consideration by the Legislature of the UGCOPAA. 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.

B. 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.

C. 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.

D. 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.

Court rules or forms

E. *Require a professional guardian or conservator appointed by a court to be certified 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.

F. **In an order appointing a conservator, require bonding or an alternative asset-protection arrangement to protect the interests of the person subject to conservatorship.*

In addition to stringent oversight requirements, the Commission recommends requiring conservators to furnish a bond or secure another asset-protection arrangement as a further protection for individuals subject to conservatorship. (*Section 416 of the UGCOPAA imposes 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.

G. *In an order appointing a conservator, require the following reporting and financial accountability measures:*

- i. *require conservators, upon appointment, to sign releases permitting the courts to obtain financial documents of protected persons;*
- ii. **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;*
- iii. *require conservators to maintain a separate trust account for each protected person to avoid commingling of funds; and*
- iv. *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. (*Section 423(b)(5) of the UGCOPAA requires a conservator's annual report to include "the most recent reasonably available financial statements" for bank and investment accounts, mortgages, and other debts of the person subject to conservatorship.)

H. *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.

I. *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.

J. 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.

K. Create a Court-approved waiver-of-liability form that clearly and fully explains that individuals do not have to sign a waiver before monies are released at the end of a conservatorship.

This recommendation is made in response to repeated concerns from families who informed the Commission that they believed they were required to sign a waiver that released a conservator or other fiduciary from liability before the family members could take control of their deceased family member's estate at the end of a conservatorship. The form should explain that signing a waiver is a voluntary alternative to returning to court for a formal discharge order.

L. Develop a rules-based process for selecting independent court appointees in guardianship and conservatorship proceedings.

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 such as a guardian *ad litem* or visitor. The Commission strongly believes that this practice should be avoided due to the potential for a conflict of interest. The Commission therefore recommends the development of a rules-based process for selecting independent court appointees in guardianship and conservatorship proceedings.

Legislation

M. 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.

CONCLUSION

The Commission believes that the recommendations set forth in this report will significantly improve the current guardianship system. However, it is important to view the report as, not the end, but the beginning of an ongoing effort to protect some of the most vulnerable members of our community and their families. On behalf of the entire Commission, thank you for the opportunity to work on this important issue. Please do not hesitate to contact the Commission Chair for further assistance in considering the Commission's recommendations.

NEW MEXICO ADULT GUARDIANSHIP STUDY COMMISSION INITIAL STATUS REPORT

SUMMARY OF RECOMMENDATIONS AND ISSUES FOR FURTHER STUDY

Note: This summary is intended for reference purposes only. For a full explanation of the Commission's recommendations and issues for further study, please see the Initial Status Report, dated October 1, 2017.

Recommendations:

- 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.
- 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.
- 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.
- 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.
- 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.
- F. Require regular training for all current and future judges about the law that applies in guardianship and conservatorship proceedings.
 - G. Create a flowchart and glossary of terms for the guardianship/conservatorship process.
 - H. Create educational and training resources for non-lawyers involved in a guardianship or conservatorship proceeding.
 - I. Require mediation or facilitated family meetings in all contested guardianship and conservatorship 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.
 - K. Create and mandate the use of a coversheet in adult guardianship and conservatorship proceedings.
 - 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.
 - 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.
 - 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.
 - O. Establish an Adult Guardianship and Conservatorship Rules Committee.
 - P. Establish an Adult Guardianship and Conservatorship Forms Committee that includes members who are not lawyers.

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.

Issues for further study:

1. Whether to support the enactment of the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act.
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.
3. Whether to recommend changes to the procedures for seeking or appointing a temporary guardian or conservator in an emergency, *ex parte* proceeding.
4. Whether to recommend changes to the statutes that govern the order of priority for the appointment of a guardian or conservator.
5. Whether to recommend the creation of a “limited 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.
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.
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.