

# STATE OF COLORADO

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### MEMORANDUM

March 28, 2014

**TO:** Lisa Brumfiel and Peter Coulter

**FROM:** Legislative Council Staff and Office of Legislative Legal Services

**SUBJECT:** Proposed initiative measure 2013-2014 #130, concerning probate wards

Section 1-40-105 (1), Colorado Revised Statutes, requires the directors of the Colorado Legislative Council and the Office of Legislative Legal Services to "review and comment" on initiative petitions for proposed laws and amendments to the Colorado constitution. We hereby submit our comments to you regarding the appended proposed initiative.

The purpose of this statutory requirement of the Legislative Council and the Office of Legislative Legal Services is to provide comments intended to aid proponents in determining the language of their proposal and to avail the public of knowledge of the contents of the proposal. Our first objective is to be sure we understand your intent and your objective in proposing the amendment. We hope that the statements and questions contained in this memorandum will provide a basis for discussion and understanding of the proposal.

### Purposes

The major purposes of the proposed amendment to the Colorado Revised Statutes appear to be:

1. To provide a statutory process by which a person may be declared incompetent to handle his or her own financial affairs.
2. To provide a statutory process by which a person who has been declared incompetent to handle his or her own financial affairs is provided with legal representation for any probate proceedings.
3. To establish guidelines for representation by an appointed legal representative, as well as for judicial conduct.

## Technical Comments

The following comments address technical issues raised by the form of the proposed initiative. These comments will be read aloud at the public meeting only if the proponents so request. You will have the opportunity to ask questions about these comments at the review and comment meeting. Please consider revising the proposed initiative as suggested below.

### Structural:

1. Amending clause. Each statutory section being amended, repealed, or added should be preceded by an amending clause explaining how the law is being changed. An example of an amending clause for the proposed initiative would be:

**SECTION 1.** In Colorado Revised Statutes, **add** 15-14-xxx as follows:

2. Organization of proposed initiative. It is standard drafting practice to number, before the amending clause, each section, part, etc. that is being amended or added with a section number (i.e., **SECTION 1.**, **SECTION 2.**). In the proposed initiative, the body of the initiative might be considered **SECTION 1.** (with amending clause, then content), followed by the Effective Date clause as **SECTION 2.** (See comment 6 below for more on the Effective Date clause.)
3. Section number and headnote. Each statutory section is designated with a number, followed by a descriptive headnote in bold-face type. The amending clause and headnote should not be combined in a single sentence. An example of a section number and headnote for the proposed initiative would be:

**15-14-406.7. Judicial assignment of conservators for persons deemed mentally incompetent – representation – violations – damages – audit.**

4. Statutory subdivisions. All provisions and separate paragraphs in a section should have a subdivision designation. Statutory provisions are usually divided into component parts using the following structure: Subsection, or, for example, "(1)", followed by paragraphs, or, for example, "(a)" followed by subparagraphs, or, for example, "(I)", ending with sub-subparagraphs, or, for example, "(A)". For example: 15-14-406.7 (1) (a) (I) (A) would be a progression to the last level of statutory subdivision.
5. On page 3, line 6 as a header is unnecessary and should be deleted.

Showing changes to current law:

6. It is standard drafting practice to use SMALL CAPITAL LETTERS [rather than ALL CAPS] to show the language being added to the Colorado Revised Statutes. Within the SMALL CAPITAL LETTERS, use uppercase and lowercase lettering as you would otherwise for the beginning of sentences, etc.

General word usage in Colorado Revised Statutes:

7. The word "shall" is used to indicate that a person has a duty, rather than as a future tense verb. The word "must" is used to indicate that a person or thing is subject to a condition. See section 2-4-401 (6.5) and (13.7), Colorado Revised Statutes, which define "shall" and "must" for statutory purposes. Simple present-tense verbs should be used when possible. So, for instance:
  - a. On page 1, line 11, write "A person *must* not be declared..."
  - b. On page 1, line 24, keep "The judicial branch *shall* establish..."
  - c. On page 2, line 9, write "Any presiding judge in a probate proceeding *is*..."
8. Phrase sentences in the affirmative when possible. For instance, on page 1, line 11, instead of "*No person* must be declared...", write "A person *must not* be declared..."
9. It is standard drafting practice to use singular, gender neutral pronouns in the form of "his or her". In any instance where you think it is essential to use the plural form of a pronoun, any later pronoun use in the same sentence should also be plural. So, for instance, on page 1, lines 11-16, instead of going from "a" or "said" person (singular) to "their" or "they" (plural), write "A person must not be declared incompetent to handle *his or her* own financial and medical affairs until such time as a qualified

- Colorado board certified psychiatrist has thoroughly examined *the person's* mental status and determined, in writing, under penalty of perjury, that *he or she* is mentally incompetent...". Also, on page 3, line 1, "his" should be replaced with "his or her".
10. It is standard drafting practice in the Colorado Revised Statutes to avoid the use of "said" or "such" unless absolutely necessary for clarity and replace those words with "a" or "the", as appropriate. For instance, on page 1, lines 28-29, write "*The* attorney will specifically represent *the* incompetent probate *ward* [not plural] to whom he or she has been appointed. *The* attorney [not plural]...".
  11. "United States" should not be abbreviated as "US" on page 1, line 31.
  12. It is standard drafting practice in the Colorado Revised Statutes to use "a" in place of "any", unless "any" is necessary for clarity.
  13. Numbers should be spelled out rather than stated as numerals. For instance, the numbers appearing on page 2, lines 23, 25, and 32 should be changed to "twenty", "five thousand dollars", and "two times".

Grammar, Punctuation, and Spelling:

14. The proper use of commas in the Colorado Revised Statutes is to include a comma after the second to last item in a string of terms, before the "and". For instance, on page 1, lines 36-37, write "...party, interested party, **conservator**, or guardian...".
15. There are several instances where the proposed initiative uses "wards" instead of the possessive form "ward's". See page 1, line 37; page 2, lines 1, 20, 26, 32, and 39; and page 3, line 3.
16. Page 1, line 14, "thoroughly" is misspelled.
17. Page 1, line 16, "uncapable" should be replaced with "incapable".
18. Page 1, line 30, "exclusively" is unnecessary and should be deleted.
19. Page 1, line 32, "precedence" is misspelled.
20. Page 2, line 5, "public" is misspelled.
21. Page 2, line 6, do not use "person(s)". Replace with the singular "person".
22. Page 2, line 24, do not use "his/her". Replace with "his or her".

23. Page 2, line 28, "one-half" should include a hyphen.

24. Page 2, line 33, missing period at end of the sentence.

## **Substantive Comments and Questions**

The substance of the proposed initiative raises the following comments and questions:

1. Article V, section 1 (5.5) of the Colorado constitution requires all proposed initiatives to have a single subject. What is the single subject of the proposed initiative?
2. Defined terms. The proposed initiative uses several terms interchangeably (such as "conservator"/"qualified legal representation"; "ward"/"probate ward"/"incompetent probate ward"). Some of the terms used in the proposed initiative are already defined in article 14 of title 15, Colorado Revised Statutes, or there is another term with a similar meaning, thus creating potential confusion and conflict.
  - a. "**Conservator**" is defined in section 15-14-102 (2), Colorado Revised Statutes, as "a person at least twenty-one years of age, resident, or non-resident, who is appointed by a court to manage the estate of a protected person. The term includes a limited conservator." The proposed initiative also requires court appointment, but adds the requirement that the conservator be selected from a pool of "qualified attorneys". Would the proponents consider adding a specific definition of "conservator" to the initiative that is stated to only apply to that section? In the alternative, would the proponents consider using a term other than "conservator" for the court-appointed attorneys in the proposed initiative?
  - b. "**Legal representative**" is defined in section 15-14-102 (6), Colorado Revised Statutes, as including "a representative payee, a guardian or conservator acting for a respondent in this state or elsewhere, a trustee or custodian of a trust or custodianship of which the respondent is a beneficiary, or an agent designated under a power of attorney, whether for health care or property, in which the respondent is identified as the principal." The proposed initiative uses the term "legal representation", which might cause confusion with the defined term "legal representative", which is significantly different from what the proponents appear to be intending. As mentioned in (a) above, would the proponents consider adding a

specific term other than "conservator" or "legal representative" or "legal representation" to refer to the court-appointed attorneys in the proposed initiative?

- c. **"Ward"** is defined in section 15-14-102 (15), Colorado Revised Statutes, as "an individual for whom a guardian has been appointed." Again, this raises the possibility of conflicting meanings for the same term, because a "ward" in the proposed initiative appears to refer only to a person who has been determined to be incompetent to handle his or her financial affairs. Would the proponents consider either defining the term specifically for their new language or, in the alternative, using a different term entirely?
  - d. **"Protected person"** is defined in section 15-14-102 (11), Colorado Revised Statutes, as "a minor or other individual for whom a conservator has been appointed or other protective order has been made." Although the proposed initiative does not use the term "protected person", it appears that the individuals in question would be "protected persons" once a conservator (if that term continues to be used) is appointed. Would the proponents consider using the term "protected person" in the proposed initiative?
3. The proposed initiative does not mention an age limit to which it applies. Do the proponents intend for it to apply to minors as well as adults?
  4. The proposed initiative requires a "Colorado board certified psychiatrist" to examine and determine that the person in question is "mentally incompetent...". This raises the following questions:
    - a. The terms "competent" and "incompetent" have very explicit meanings when used in the criminal context of "competent/incompetent to proceed" with court proceedings. See section 16-8.5-102, Colorado Revised Statutes. Do the proponents intend for a similar usage to be applied by the examining psychiatrist in determining whether a person is "mentally incompetent"? If so, would the proponents consider using the similar language with the criminal context removed? If not, would the proponents consider adding more explicit guidelines to assist the examining psychiatrist in determining whether or not an individual is "incompetent"?
    - b. Psychiatrists in Colorado are not "certified" but rather "licensed" by the Colorado medical board pursuant to article 36 of title 12, Colorado Revised Statutes. Would the proponents consider changing the language in the first paragraph on page 1 to "a psychiatrist

licensed by the state of Colorado pursuant to article 36 of title 12, C.R.S.,...."?

- c. Psychiatrists are typically not the only professionals qualified to perform examinations of the type suggested in the proposed initiative. Psychologists who are licensed pursuant to article 43 of title 12, Colorado Revised Statutes, are also usually included in the list of people qualified to perform competency evaluations. Would the proponents consider adding licensed psychologists to the persons who may perform a competency evaluation under the proposed initiative?
  - d. It is unclear from the language on page 1, lines 11-19, who is responsible for requesting an evaluation, appointing a psychiatrist, and paying for the evaluation (both in situations where the individual is deemed incompetent and those where he or she is deemed competent). Would the proponents consider adding language to the initiative to clarify those questions?
5. The paragraph on page 1, lines 24-33, addresses the selection of attorneys to represent the "ward" in future proceedings. The language raises the following questions:
- a. What do the proponents mean by a "qualified attorney" on lines 24-25? Is this simply a licensed attorney? Does the attorney need to specialize in estate law or other type of law? Does the attorney need to have practiced for a minimum number of years? Are all attorneys in the judicial district who meet the requirements (whatever those might be) for a "qualified attorney" required to take part in this process and take a turn at representing a "ward" under this section?
  - b. The language instructs the judicial branch to put the names "in a basket" and then randomly pick names from that. Putting names "in a basket" is not how things are typically handled at this level. Would the proponents consider simply writing "The judicial branch shall establish a list of names of qualified attorneys [as specified in paragraph ( )] in each judicial district to be selected at random at such time as representation is required pursuant to this section."?
  - c. The paragraph includes language related to payment of attorney fees, but no mention is made of how, if at all, expenses related to representation will be paid.

- d. On line 32 of that paragraph, the proposed initiative states that "payment shall take precedence [sic] in being paid...". Do the proponents intend for the attorney fees to be paid over all other expenses or just certain ones?
6. Page 1, lines 35-37, concern conflicts of interest in representation by a court-appointed attorney. Conflicts of interest for attorneys such as those listed in the proposed initiative are governed by the Colorado Rules of Professional Conduct, specifically Rule 1.7. As such, the language on page 1, lines 35-37, is unnecessary and may be deleted.
7. Similarly, page 2, lines 1-7, concern vigorous and competent representation by the court-appointed attorney. This is also governed by the Colorado Rules of Professional Conduct, specifically the Preamble and Rule 1.1. As such, the language on page 2, lines 1-7, is unnecessary and may be deleted.
8. Page 2, lines 9-13 and 15-21, concern judicial liability and discipline, respectively. These paragraphs raise the following questions:
  - a. In general terms, a judge has wide judicial immunity if he or she is acting within his or her jurisdiction and the act he or she performed was a judicial act. There is extensive case law on this subject. Would the proponents consider removing lines 9-13 on page 2?
  - b. Judicial conduct is governed by the Colorado Commission on Judicial Discipline, created in article VI, section 23 (3) of the Colorado constitution. Section 23 (3) (d) specifically covers removal from the bench or other discipline.
  - c. Attorney conduct is governed by the Office of Attorney Regulation Counsel established by the Colorado Supreme Court, a nine-member Attorney Regulation Committee, and an Office of the Presiding Disciplinary Judge. Alleged attorney misconduct must be evaluated by one or more of these entities before any disbarment or a permanent revocation of his or her license to practice law.
  - d. Given the comments in (b) and (c) above, would the proponents consider removing lines 9-21 on page 2?
9. Page 2, lines 23-29, relate to damages that can be assessed if a "ward's" rights have been violated in a probate proceeding. The language raises the following questions:

- a. An award of twenty times damages is excessively high compared to other statutory provisions. It is also unclear what the base amount would be and how that would be established.
  - b. Lines 25-26 state that "in no instance shall said amount come from the wards [sic] assets." In what situation do the proponents envision that a damages award ever be assessed *for* the plaintiff *from* his or her own assets?
  - c. Lines 26-29 state that the representing attorney is entitled to "one-half of all damages assessed by this section" in addition to the hourly salary. It is unclear if the "one half" means an amount equal to one-half of the total damages awarded to the plaintiff, but in addition to the plaintiff's award, or if it is considered as one-half of the total award to the plaintiff (and taken from that total amount).
  - d. It is unclear which rights exactly need to be violated to trigger the terms of this paragraph.
10. Page 2, lines 31-33, require the "conservator" (attorney?) to obtain a surety bond in the amount of twice the value of the ward's assets prior to any representation. This presents an impossible situation for the "conservator" if the proceeding includes a determination of the value of the total assets. Would the proponents consider settling on a value or other way of dictating the amount of the surety bond?
11. Page 2, lines 35-41, and page 4, lines 1-4, concern the performance of an independent audit prior to the closing of the "conservatorship". This language raises the following questions:
- a. It is unclear what the proponents mean by the closing of a conservatorship. Is that when a specific proceeding has finished or when the judge removes the attorney from his or her representation? Or something else?
  - b. What qualifications does the person or persons have to have to perform the audit? Who appoints that person?
  - c. What are considered "detailed backup documents"? What constitutes "incomplete" records?
  - d. If the audit determines some sort of misconduct, the terms of the proposed initiative state that "the conservator and his bondsperson shall immediately pay for said audit." Do the conservator and

bondsperson pay in equal amounts or some other percentage? What is "immediately" – one week, 30 days, 60 days?

12. Numerous statutory sections exist in part 4 of article 14 of title 15, Colorado Revised Statutes, that govern certain aspects of "protection of property of protected persons". *See*, for example, sections 15-14-401, 15-14-402, 15-14-406, 15-14-406.5, 15-14-413, and 15-14-431, C.R.S. Many of these sections would conflict with the new language proposed by the proponents. Would the proponents consider reviewing part 4 of article 14 of title 15, C.R.S., to determine whether or not their intended language is already in place or, if not, could simply be added to existing statutory sections?