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MONDAY
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NEW MEXICO'S LEADING NEWS SOURCE
ALBUQUERQUE JOURNAL

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'Premature' to link fires across Duke City

Winds hamper federal inquiry into blaze that destroyed Nob Hill condos

BY OLIVER LYTTLEBROOK
ALBUQUERQUE, N.M. (AP) — A team of federal arson investigators worked Sunday at a Nob Hill luxury condo complex destroyed by a blaze last week that caused reported millions in damage, officials announced Sunday.

The investigation was hampered by gusty winds that prevented the Bureau of Alcohol, Tobacco, Firearms and Explosives team, including 20 agents, from erecting a crane to help clear debris from the intersection at Carlisle and Central, an ATF spokesman said.

Tom Mangum, an ATF special agent and spokesman, said the cause of the fire remained undetermined Sunday.

And he called it "premature" to discuss any possible connection between the Carlisle blazes, which started Wednesday, and six other fire and vandalism incidents in the area since.

A series of fires were lit at the anti-abortion ministry Project Defending Life at San Mateo and Marquette on Wednesday morning.

"Suspicious devices" were left at three Starbucks coffee shops in the Nob Hill area Friday.

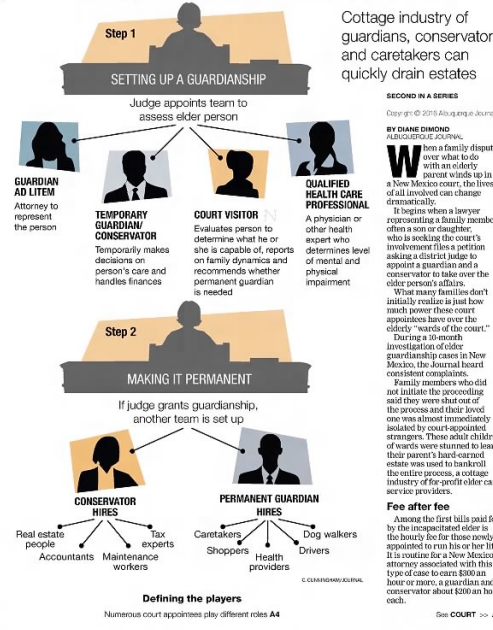
And two major fires were started early Saturday morning: one at Barnes & Noble at Coronado Center between 1 and 2 a.m. and one at the Old Navy on Culebra and San Mateo. Firefighters were able to extinguish the fires, but both buildings received smoke and water damage that likely will prevent them from reopening for some time.

The FBI is investigating with help from local agencies.

Police Chief Gordon Eden and Mayor Richard Berry announced Saturday that a suspect has been taken into custody and handed over to the FBI, but as of Saturday the suspect had not been charged in connection with any of the incidents. And

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JOURNAL INVESTIGATIVE REPORT - PART 2
WHO GUARDS THE GUARDIANS?



'He wouldn't end his life,' sister of Las Cruces 'suicide' victim says



UPFRONT
It seemed nothing could stop Steve Smelser, nothing he couldn't figure out, fix or do.

He had been stabbed, struck by a car, had his neck fractured during a particularly brutal karate class, had his head run over in a fight with thugs, flown off the edge of a cliff on a motorcycle. When no one was willing to help, he flew after 9/11 to help older sister Sherisse Hughes move back to New Mexico from Connecticut after a nasty divorce.

Smelser did, arriving back without sheep and in just enough time to take a test at school.

It seemed he was invincible. He was good with his hands. A jack-of-all-trades, they called him, a master at construction, carpentry, masonry, renovating, mowing, drilling, driving 30 wheels, landscaping and running a dog kennel and grooming business. He excelled in Boy Scouts, soccer, martial arts, boating,

fishing and hunting.

He was good with his heart, the kind of man who called friends and family just to see how they were doing, the kind of man who unashamedly told his macho buddies he loved them.

But Smelser, 46, wasn't invincible after all. On April 15, he was found dead in his home in Las Cruces, homicide blasted through his



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INSIDE CLASSIFIEDS >> D2 | COMICS >> C3 | EDITORIALS >> A6 | EDUCATION >> C1 | OBITUARIES >> D8 | PUZZLES >> C2, D2 | TV >> C4 | WEATHER >> C4
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Court appointees have incredible power over elderly 'wards'

From PAGE A1

According to lawyers familiar with the system, the older — frequently pre-diagnosed with some sort of diminished mental capacity — also must pay for his or her own neuropsychological exam by what's called a qualified health care professional. That routinely costs close to \$1,000.

The costs for a court visitor, the court appointee who helps investigate the family dynamic, can run about \$2,000 a month. Payments to one court visitor reviewed by the Journal topped more than \$14,400. Initial costs for all these professionals add up quickly, and the appointees become inextricably entangled in the elder's care.

Once those fee-profit professionals are in place, they communicate with the judge about their findings and take permission to take certain major actions, such as liquidating the senior's stocks or moving the ward to a different living arrangement.

In some cases, the elder's house is sold and the person is moved to a care facility, chosen by the court appointees. If they are allowed to stay in their home, they then must pay the cadre of support personnel the guardian and conservator are allowed to hire in-home caretakers, personal shoppers, dog walkers, housekeepers, pool maintenance companies and messenger or delivery services.

In one case reviewed by the Journal, a daughter of a now-deceased elderly man who became a ward of the court says her father was charged for both a dog walker and the fire. The dog walker and the fire were paid up the day's work. She says he also paid for pool maintenance for a backyard pool no one used and messenger services to pick up his prescriptions at a nearby pharmacy that offered free delivery.

Several family members say supervision of the extra personnel is lacking.

"My mother was routinely fed a diet of McDonald's and Taco Bell," one woman said. "About her now-deceased mother, when she had her hands full, she goes to groceries to make sure it's anyone's guess." She also complained that the boxes of caregivers in and out of her mother's home "were full empty on the job, items disappeared from the house and some were Mrs. Morris' dishes. There was one complaint to her as the guardian and the conservator wouldn't talk to me."

The conservator handling the estate of a 79-year-old woman who lived in a ranch in Albuquerque's bosque used her money to install satellite TV after caretakers complained the elderly woman's television didn't get enough channels.

Conservator records reflect the monthly charge of nearly \$60, Nancy Orta is the CEO of Decades LLC, an elder care agency that accepts court appointments to act as case guardians and/or conservators and handled that case. She told the Journal that Decades hires various outside caretaker agencies and admitted that "from time to time, we may encounter a problem with an employee from an agency. But when those problems occur, we try diligently to rectify the issues."

It is not unusual for in-home care to drain an estate of more than \$120,000 a year. One attorney claimed the cost of care for his client's wealthy parent who had been declared incapacitated topped \$60,000 in one calendar year.

"The home care costs were absolutely unconscionable, insane," according to this Albuquerque lawyer, who is familiar with the process. "The annual cost was in the



COURTESY OF FAMILY

The daughter of an elderly dementia patient said her mother was moved without her consent from a home where she had a specially decorated single room, left, to this crowded room in a home in the Rio Rancho area, above, which she had to share with a terminally ill patient.

hundreds of thousands of dollars for this woman to stay in her home," he said. An example he offered were the super-market bills — \$400 worth of groceries a week ... for a 96-pound lady," he said. "That's \$1,400 a month."

Secrecy is king

Public court documents outline a pending civil suit stemming from an elder care case managed by Decades. Both the company and Orta, its CEO, are named in the suit. The case stems from the firm's services to a now-deceased wealthy woman whose estate was worth millions.

The plaintiff alleges "that over a nine-year period Defendants mismanaged and abused Decades' position as the appointed guardian of and conservator for the decedent." On a state website, the docket entry for this case lists the complaint as being for "Breach of Fiduciary Duty, Negligence, Unfair Practices and Accounting."

But the rest of this case is sealed — initially at the request of the petitioner, who later asked to open it up. District Judge Alan Madrid declined to do so. It is not clear why, because the sealing order itself, along with any reasons for the decision, is also sealed. Madrid did not respond to the Journal's request for comment.

In its response to the attempt to unseal court records, Decades calls the idea "patently flawed" and insists, "The plain language of the statutes and rules states that all records in the G (guardian and conservator) proceeding shall be confidential and does so unambiguously."

If Decades prevails in keeping all the guardian conservator documents secret, it is unclear how the civil suit can proceed in a public courtroom.

Asked to comment on the suit, Decades CEO Orta, responding to written questions from the Journal, wrote, "It would be inappropriate to comment on the pending litigation but we will say that we believe strongly that the allegations made in that claim have no merit."

Orta further referenced the civil suit and said, "Decades provides its clients with top quality care and under Decades management she lived to be well over 100 years of age in the comfort of her own home."

In a 2011 lawsuit, Decades was alleged to have engaged in breach of fiduciary responsibility for violating court-imposed specific duties for the estate of Jeffrey Harman, a deceased person. Decades was the case manager and co-conservator of that estate.

"The wishes of Helen Harman were to preserve her assets so that she could remain living at home yet Decades LLC, by failing to take steps to preserve

her assets, violated their wishes," according to the suit. Decades also allegedly failed to file the required state reports and "did not timely file any of the court ordered tax returns for Helen Harman." Decades denied the allegations, and court records show the matter subsequently was dismissed.

Honor system

In some instances described in the Journal, the adult children who did not initiate the court proceeding were later haunted by guardians from visiting or phoning their elderly parent because, they were told, they might "use" their mom or dad.

As one who has been through the process put it, "Usually, the first one to the courtroom has all the rights. The rest of the kids get screwed."

When the elder's assessable money "bottoms out" on the conservator can, with court approval and without consulting the ward or the family, dip into trust accounts or put the client in a home for sale, including all the contents. If the children want a key to the house, they are told they must buy it from their parent, at the price of the item set by the conservator.

"The daughter of an elderly dementia patient in Albuquerque told the Journal that her mother was perfectly comfortable and well cared for in her original nursing home when nationally, and without explanation, the court-appointed guardian moved her to what the daughter felt was a substandard home in the Rio Rancho area out of one morning. One photo alone."

The woman longed for her specially decorated single room where she had been living with her daughter said. At the new facility, she was housed with a terminally ill roommate in a double room crammed with tubes, medical equipment, and medical waste. She soon developed bed sores and had chronic trouble with her feet.

The worried daughter alerted an ombudsman with the New Mexico Aging and Long Term Services Department, who finally intervened and forced improvements.

"If an adult child challenges his or her parent's conservator, the guardian or conservator has the right to hire their own attorney to defend themselves. That additional lawyer is also paid for out of the ward's estate."

In other words, any challenge by an heir dogpiles their inheritance so they have every incentive not to go back to court to ask the judge to change the arrangement.

Defending the system

Attorney Gregory Mackenzie, a veteran trial and estate litigation specialist, insists the system is not difficult for family

members to navigate and is not adversarial.

"There's been a lot of criticism about this system so being this star chamber kind of system that is designed to keep confidential information from family members so that the professionals can prey upon the elders," he said. "In my experience, that's not the way the system is used."

The judges who appoint guardians and conservators ultimately are responsible for approving all actions, and appointees, that are an unhappy relative of a now-deceased father put it. "The judges don't take the time to analyze anything ... they just rubber stamp whatever the guardian says or spends, no questions asked. It's like court-appointed robbery."

Attorney Ruth Peregzen says all the lawyers at her law firm are concerned about how "unconsciously conscious" these proceedings can become, but she vigorously defends the judges who handle these delicate cases.

"I think our judges are extremely compassionate and concerned about the costs," she said during an interview at her Albuquerque office. "Often the expensive proceedings are those proceedings that are expensive because there ... is huge conflict among the children of the protected person."

Orta of Decades LLC also defended judges for company concerns, saying they "display remarkable levels of care, compassion and patience in these cases."

During the Journal's investigation, there were many complaints regarding how court-appointed conservators and trustees handled the ward's estates. While there is a requirement for each appointee to file an annual report with the judge assigned to the case, family members provided copies of those documents that appear to be inaccurate.

According to one veteran CPA's sworn affidavit to the court in a recent case, "The documents submitted ... if they are to be a financial accounting are inaccurate and substantially deficient ... nothing more than the printout of a check register."

Pending Civil Court Judge Shannon Bacon in Albuquerque said she sees all appointees' report forms and admits they are "not terribly detailed."

She told the Journal that because "New Mexico doesn't have three cents to rub together," there is no in-depth review or audit performed. Asked if it is an honor system between judge and appointee, she said, "It is."

Family members said they were frustrated they were not given a chance to directly address the judge because, they claimed, the judges only want to hear from the lawyers. In some cases, close family members say neither they nor their parent knew there was going to be a guardianship hearing. That is counter to New Mexico statute (NMSA 1978, 65-6-60), which specifically says both the person to be protected and any adult children be given written notice 14 days in advance.

Sen. Neal, chief judge of the 2nd Judicial District in Albuquerque, responding to written questions from the Journal, insisted, "The judges follow the law regarding who is provided notice of hearings."

COURTROOM Part 3: Life Under Court Control

PHOTO BY PHIL WOODRUFF FOR RICHARD PREGAZEN. PHOTO BY GREGORY MACKENZIE. COURTESY OF GREGORY MACKENZIE

DEFINING THE PLAYERS

It is important to understand the various players in a case involving an incapacitated person. Among the positions a New Mexico District Court judge appoints:

GUARDIAN AD LITEM
The court appoints an attorney to represent the person alleged to be incapacitated. They are present at court proceedings to assist on behalf of the potential ward and inform the court as to what they believe is in the potential ward's best interests.

COURT VISITOR
This person is usually a social worker or for-profit care manager who evaluates the potential ward, determines if they are capable of doing and what daily activities they need help with. They present their findings about family dynamics to the court and make a recommendation on whether a permanent guardian should be appointed.

QUALIFIED HEALTH CARE PROFESSIONAL
A physician, nurse practitioner, psychologist or neuropsychologist is assigned to determine the level of mental and physical impairment and make a report to the court. In New Mexico, such a report is routinely ordered even if the elder has already been determined to have dementia.

PERMANENT GUARDIAN
This person is appointed after an initial 60- to 90-day assessment to make decisions about a ward's medical care, where they will live, what kind of care they will receive and who will provide that care. After being in-home caregivers, the guardian often relies on especially familiar relationships with the ward. A guardian can be a for-profit corporation or an individual, such as a family member.

CONSERVATOR
This appointee can be a bank, corporation or an individual. The conservator handles all of the ward's finances. They pay the ward's bills, maintain the ward's home and investments and make decisions about what the ward's future care needs might be, ensuring there are enough assets in place to pay for that care. The conservator, working with the guardian, can also hire companies to provide services for the ward.

CAREGIVER
This position is determined by the guardian, who hires the necessary number of staff to provide the ward with in-home care. Caregivers are assigned to wide-ranging tasks, from providing simple companionship and light meal preparation to constant bedside monitoring with medical equipment. They are usually provided by a company, which bonds the employees and conducts background checks.

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DIANE DIMOND is an Albuquerque native and recipient of the American Bar Association's Silver Gavel Award. She has covered some of the nation's biggest stories — including the murder of JonBenet Ramsey, the Michael Jackson case and the Bush-Gore election recount in Florida — in a career that has included Court TV, MSNBC and the "Today" show. She is the author of three books on the criminal justice system. Dimond's column on crime and justice appears in the Journal every Saturday.

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ATTORNEY GREGORY MACKENZIE

PHOTO BY PHIL WOODRUFF FOR RICHARD PREGAZEN. PHOTO BY GREGORY MACKENZIE. COURTESY OF GREGORY MACKENZIE