

HOUSE HUMAN SERVICES COMMITTEE

Testimony in support of HB 1354

67th Legislative Session

Representative Kathy Skroch, District 26

Thank you, Chairman Weisz, and members of the Human Services Committee for allowing me to appear before you today to introduce HB 1354.

For the record, I am Representative Kathy Skroch, representing District 26 which is made up of portions of Dickey, Ransom, Richland and all of Sargent counties of ND.

I appear before you today to introduce HB 1354 which will create a Commission on Guardianship. The proposed bill is offered in response to exhaustive studies on guardianship. This includes the Winsor C. Schmidt national study on guardianship, "**Wards of the State: A National Study of Public Guardianship**". The study was conducted to assess the state of guardianship as it relates to current law, its provisions and meeting the demand for guardianships. The study has been used as a model for adopting state statutes for guardianship programs across the nation. Concerns about a coming crisis drew national attention of the U.S. Congress in the early 1980 and change began. Despite efforts to address the critical shortage of guardianship services in ND and across the nation the problem has persisted for well over 25 years.

A similar study relating only to North Dakota was requested by the ND Department of Human Services in cooperation with the ND Legislative Council. This study, "**Guardianship for Vulnerable Adults in North Dakota: Recommendations Regarding Unmet Needs, Statutory Efficacy and Cost Effectiveness**". It was also conducted by Winsor C. Schmidt. Recommended changes proposed took into consideration compliance with the **Olmstead Commission** requirements. At the time of this 2010 study there were 2,038 guardianship and conservatorship cases in ND. There were 323 new filings in 2010. In 2007 the ND Legislature approved funding for 35 additional openings for corporate guardianship services for people with developmental disabilities. Catholic Charities of ND contracted with the state to provide guardianship services, the Guardianship Program of Catholic Charities, which in 2011 had nearly reached its capacity of 414 wards. CCND continues to have a waiting list.

The study also pointed out best practice standards for the guardian/ward ratio set as a 1/20 ratio. So critical is the need for services, that providers often face heavy caseloads and emergency guardianship request situations. Providers at times are operating at 1/30 to 1/35 ration.

The shortage has been further impacted by increased demand to provide for individuals suffering with drug addiction and mental illness; an aging population of the "baby boomer" generation and loss of spousal care givers; and lack of family support available.

A Guardianship Task Force in conjunction with legislators and stakeholders has worked collaboratively to reach the point where legislation could be proposed to address the shortage of guardians. The need for a commission on guardianship was clearly identified. A subgroup was then established for the specific purpose of carefully drafting legislation. The proposed legislation, HB 1354, is the end result of years of work to address procedural issues, incapacity assessments and the accountability of guardians.

Now to the bill itself: Section 28-32-01

Page 1. Section 1, line 10-adds subdivision z., which establishes "The commission on guardianship."

Section 2. AMMENDMENT to 50-24.1-07, allows for the collection of debts owed to a provider upon the death of a resident as claims against the estate.

Page 2. Section 3, Creates a new chapter 54-67 which establishes:

54-67-01. Definitions- all the definitions used in this chapter.

Page 3. -02, line 10, spells out the purpose and structure and **membership** of the commission.

Page 4. -03., line 21 details the responsibilities of the commission.

Subdivision a. relates to establishing standards;

On page 5, line 8, subdivision b. addresses rule writing related to a wards ability to pay for services provided

(c. through i. are all related to procedures) c. process of contract guardians; **d.** authorizes the commission to establish guardian offices as considered necessary; **e.** establishes a method for tracking and monitoring caseloads related to contract guardians and guardians; **f. duty to submit a budget request to the office of management and budget.**

Page 6, -04. Starting on line 15, authority of the Commission to appointment a director, establishes responsibilities and duties and provides for a report to Legislative Management.

Page 7, -05, line 10, establishes the Guardianship fund and continuing appropriation authority

Page 7, -06, lines 16 through 19 continuing to Page 8, lines 1 through 16, all relate to the keeping and handling of and accessibility to records and data; and the protection of confidentiality

Page 8, lines 17 through 19, provides for a penalty if an individual is in violation of this section subject to the penalty provided in section 12.1-13-01 for the wrongful disclosure of confidential information.

In closing, I have been a co-guardian since 2003. There was a point in time where a doctor suggested that my husband Michael and I give up being guardians for our son. The doctor claimed that then we could just be his friend, that it would be less controversial when dealing with his severe relapses of his mental illness. We prayed about this, a lot, then began a search to see if we could find a provider of guardianship services.

1. There weren't any available.
2. One service which provided two guardians was too far away. The cost of travel for them to meet with our son ate up all their profit.
3. They were already maxed out on clients.
4. They didn't take people with mental illness, especially severe cases.

So, we are still guardians, have a great relationship with our son and are glad we didn't turn the responsibility for his care over to a different provider.

This concludes my testimony in support of HB 1354 which creates a Commission on Guardianship. I encourage a DO PASS recommendation from the committee.

I will stand for question.

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I. INTRODUCTION

Eighty-nine year old woman. Lives alone in the middle of nowhere. Home is a disaster. No running water, sewage system, toilet, etc. Rotten food, cat feces, garbage, and clutter everywhere. Since appointed guardians, we have weekly taken out groceries to her and as needed (150 miles round trip), called daily for reminders to take medications, taken her to several medical appointments (180 miles round trip), built new steps out of lumber we have, met with water, sewer, and fuel companies and set up services. She greets anyone that comes up to the front yard with a shotgun. She gets \$557 per month social security. There is no money for us to obtain our monthly fee.¹

The above case of guardianship in North Dakota, described by DKK Guardian and Conservatorship Services Inc., Jamestown, North Dakota, raises a number of the state’s current guardianship challenges: an increasing population of older, vulnerable individuals without willing and responsible family members or friends, great geographic distances, health care access and cost, risk of abuse or neglect, risk of violence, and organization, funding, and cost-effectiveness of guardian services. This Article presents the results of a study of guardianship services for vulnerable adults in North Dakota commissioned by the North Dakota Legislative Council. The study reviews the North Dakota statutes governing guardianship and public administrator services, evaluates the effectiveness of the statutes compared to other states, and compares North Dakota to national models. This study includes interviews of one to three hours with at least thirty-two guardianship stakeholders in North Dakota.²

1. Letter from Kristie Kinzell, DKK Guardian and Conservatorship Services, Inc., Jamestown, North Dakota, to Winsor Schmidt (Mar. 27, 2012) (on file with the author).

2. See Winsor Schmidt, Final Report: A Study of Guardianship Services for Vulnerable Adults in North Dakota, p.1, n.1 (May 30, 2012) (names and affiliations of guardianship

DAKOTA

This first section identifies the extent of the need for guardianship services in North Dakota. Section A will address the number of guardians appointed by the courts, and the quantity of unmet need for guardian services. Section B will discuss the unmet need for guardian services measured by qualitative standards, i.e., the ratio of guardianship staff to clients, the guardian ward visitation standard, and standards regarding guardian licensing, certification, or registration.

A. NUMBER OF GUARDIANS APPOINTED BY THE COURTS AND THE UNMET NEED FOR GUARDIAN SERVICES

There were 2038 guardianship and conservatorship cases in North Dakota in 2010.⁶ There were 323 new filings in 2010 and an average of 311 new appointments per year from 2008-2010.⁷ In 2007, the North Dakota Legislature approved funding for thirty-five additional openings for corporate guardianship services for people with developmental disabilities that reduced a long waiting list of unmet need.⁸ The Guardianship Program of Catholic Charities was projected to reach capacity of 414 wards by October 2011.⁹ Catholic Charities is reportedly facing a new waiting list of at least twenty-five people with developmental disabilities needing guardianship services.¹⁰

Another source for identifying the unmet need for guardian services in North Dakota is a Guardianship Needs Assessment Survey conducted from January to February 2012 through the North Dakota Long Term Care Association of the fifty-eight Assisted Living Facilities, sixty-four Basic Care Facilities, and eighty-two Nursing Facilities. The response rate ranged from 69% to 79%.¹¹ The results for the number of adults in each facility type who do not already have a guardian and who need a court-appointed guardian (unmet need for a guardian) are: 7 adults for assisted living facili-

6. *Human Services Interim Committee Meeting*, 62nd North Dakota Legislative Assembly (Oct. 26, 2011) Interim Session (testimony of Sally Holewa, State Court Administrator).

7. *Id.*

8. *Consideration of SB 2012 before the S. Comm. on Appropriations*, 62nd North Dakota Legislative Assembly (Jan. 19, 2011) (testimony of Larry Bernhardt, Executive Director, Catholic Charities North Dakota).

9. *Id.*

10. Interview with David Boeck, Director of Legal Services, North Dakota Protection and Advocacy Project (Jan. 13, 2012); Interview with Donna Byzewski, Director of Guardianship Services, Catholic Charities (Jan. 14, 2012).

11. E-mail from Shelly Peterson, President, North Dakota Long Term Care Association, to Winsor Schmidt (Feb. 6, 2012) (on file with author).

at the
time of
the 2010
study

ties, 46 adults for basic care facilities, and 296 adults for nursing facilities.¹² The results for the number of adults in each facility type who need a court-appointed guardian and do not have willing or responsible family members or friends to serve as a guardian or resources to employ a guardian are: seven adults assisted living facilities, forty-four adults for basic care facilities, and sixty-four adults for nursing facilities.¹³

The Guardianship Needs Assessment Survey was also used for the Developmental Center and for the State Hospital. The results for the number of adults in each facility who do not already have a guardian and who need a court-appointed guardian (unmet need for a guardian) are: zero for the developmental center and twelve adults for the state hospital.¹⁴ The results for the number of adults in each facility who need a court-appointed guardian and do not have willing or responsible family members or friends to serve as a guardian or resources to employ a guardian are: zero¹⁵ for the developmental center and nine adults for the state hospital.¹⁶

A person who is incapacitated enough to need a guardian, but who does not have willing and responsible family members or friends to serve as guardian, or resources to employ a professional guardian, is almost unimaginably helpless. With a guardian, surrogate decisions occur and a person remains autonomous. However, when a person is incapacitated and without a guardian, responsible decisions do not occur and a person loses autonomy.

There is some published research on the extent of the need for public guardianship. A 1983 survey in Florida found 11,147 identifiable persons reportedly in need of a public guardian.¹⁷ Florida's population in 1983 was 10,704,805.¹⁸ North Dakota's population in 2010 was 672,591.¹⁹ A

12. North Dakota Long Term Care Association, *Guardianship Needs Assessment Survey Results 2* (2012).

13. *Id.*

14. E-mail from Alex Schweitzer, Superintendent, North Dakota State Hospital, North Dakota Development Center (Feb. 17, 2012) (on file with author).

15. Catholic Charities provides guardianship services for individuals who need a court-appointed guardian in the developmental center. Schweitzer, *supra* note 14.

16. *Id.*

17. See generally Winsor Schmidt & Roger Peters, *Legal Incompetents' Need for Guardians in Florida*, 15 BULL. AM. ACAD. PSYCHIATRY & L. 69 (1987). The survey included Florida's seventy-four public receiving facilities, community mental health centers, and clinics, thirty private receiving facilities, eleven Aging and Adult district services, Developmental Services institutional and residential placements, and six state hospitals. The survey did not include private clients residing in nursing homes and in adult congregate living facilities, and the survey did not include transients. Several informants suggested 10% of nursing home residents in south Florida were incapacitated but without a guardian.

18. CENSUSSCOPE (FLORIDA), http://www.censuscope.org/us/s12/chart_popl.html (last visited Sept. 11, 2013).

certification of guardians as well as continuing education within the appointment process to ensure that all (i.e., professional and family) guardians meet core competencies.”⁴⁶ As recommended by the Wingspan national guardianship conference, North Dakota should “adopt minimum standards of practice for guardians, using the National Guardianship Association Standards of Practice as a model.”⁴⁷ In consideration of national standards, the successful experiences of fifteen other states, North Dakota stakeholder concerns about oversight and monitoring of guardians and guardian annual reports, and lack of criminal background checks and credit checks, North Dakota should license, certify, or register professional guardians, including education, continuing education, and adoption of minimum standards of practice.

“Wingspan”
national guardianship conference
Recommendation
for court procedure
state statutes.

III. THE ESTABLISHMENT OF GUARDIANSHIPS

This section reviews the establishment of guardianships and the services available for assistance with the establishment of guardianships. Later, I will provide some recommendations for changes. Compared with the significant unmet need for guardianships, and the complexity of establishing guardianships, assistance with establishment of guardianships is limited. The Aging Services Division reported funding for assistance (petitioning and other related costs) with the establishment of thirty-two guardianships in the current biennium.⁴⁸

North Dakota Century Code chapter 30.1-28 specifies the judicial process for the establishment of guardianships. Any interested person may petition for the appointment of a guardian for an allegedly incapacitated person.⁴⁹ No filing fee may be required for a petition by a member of the individual treatment plan team or by any state employee.⁵⁰ The court shall set a hearing date, appoint an attorney to act as guardian ad litem, appoint a physician or clinical psychologist to examine the proposed ward, and appoint a visitor to interview the proposed guardian and proposed ward.⁵¹

46. *Wingspan Implementation*, *supra* note 41, at 7. The 2013 North Dakota Legislature passed House Bill 1041 appropriating \$70,000 to the supreme court for developing and delivering guardianship training for the July 1, 2013 to June 30, 2015 biennium. See ABA Commission on Law and Aging, *State Adult Guardianship Legislation: Directions of Reform-2013*, p. 11, available at http://www.americanbar.org/content/dam/aba/administrative/law_aging/2013_final_guardianship_legislative_update_12-18-13.authcheckdam.pdf.

47. *Wingspan*, *supra* note 40, at 604.

48. See Engan Testimony, *supra* note 28.

49. N.D. CENT. CODE § 30.1-28-03(1) (2010).

50. *Id.*

51. *Id.* § 30.1-28-03(3).

for 46% of federal Medicaid costs, and for long health care duration.⁷⁴ The elderly population is 9% of the Medicaid population nationally, but accounts for 27% of program costs.⁷⁵ One percent of the population accounted for 20.2% of total health care expenditures in 2008 and 20% of the population in the top 1% retained this ranking in 2009; the top 1% accounted for 21.8% of the total expenditures in 2009 with an annual mean expenditure of \$90,061.⁷⁶ The median intensive care unit (“ICU”) length of stay for patients without capacity and without a surrogate is twice as long as other ICU patients.⁷⁷

Without sufficient appropriate guardianship services, significant health care costs are incurred through inappropriate institutionalization, insufficient deinstitutionalization, excessive emergency care, and lack of timely health care. Guardianship studies from Florida, New York, and Virginia report annual savings by guardianship programs ranging from \$3.9 million to \$13 million.⁷⁸ Half of the legally incapacitated public mental hospital patients without guardians in a Florida study could have been immediately discharged if a public guardian was available.⁷⁹ The Greater New York Hospital Association lost \$13 million in nine months awaiting appointment of guardians for 400 un-discharged patients.⁸⁰ Virginia saved \$5.6 million in health care costs in one year with appropriate public guardian services for eighty-five patients.⁸¹ Florida saved \$3.9 million in

74. See, e.g., Marguerite Burns, Nilay Shah & Maureen Smith, *Why Some Disabled Adults In Medicaid Face Large Out-Of-Pocket Expenses*, 29 HEALTH AFF. 1517 (2010).

75. See, e.g., BARRY FURROW ET AL., HEALTH LAW: CASES, MATERIALS AND PROBLEMS 570 (6th ed. 2008).

76. Steven Cohen & William Yu, *The Concentration and Persistence in the Level of Health Expenditures Over Time: Estimates for the U.S. Population 2008-2009*, AGENCY FOR HEALTHCARE RESEARCH AND QUALITY, Statistical Brief 354 (Jan. 2012).

77. See generally Douglas White, J. Randall Curtis, Bernard Lo, & John Luce, *Decisions to Limit Life-Sustaining Treatment for Critically Ill Patients Who Lack Both Decision-Making Capacity and Surrogate Decision-Makers*, 34 CRITICAL CARE MED. 2053 (2006). See also Anirban Basu, Romina Kee, David Buchanan & Laura Sadowski, *Comparative Cost Analysis of Housing and Case Management Program for Chronically Ill Homeless Adults Compared to Usual Care*, 47 (1pt2) Health Services Research 523 (2012) (housing and case management program for chronically ill homeless adults generated annual cost savings of \$6,307 per person); Laura Sadowski, Romina Kee, Tyler VanderWeele & David Buchanan, *Effect of a Housing and Case Management Program on Emergency Department Visits and Hospitalizations Among Chronically Ill Homeless Adults: A Randomized Trial*, 301 (17) JAMA 1771 (2009) (housing and case management reduces hospital days and emergency department visits for chronically ill homeless adults).

78. Schmidt, *supra* note 26, at 36 n.26 (New York); Schmidt & Peters, *supra* note 17 (Florida); Teaster et al., *supra* note 71 (Florida); TEASTER & ROBERTO, *supra* note 33 (Virginia).

79. See generally Schmidt & Peters, *supra* note 17.

80. Schmidt, *supra* note 26, at 36 n.26.

81. TEASTER & ROBERTO, *supra* note 33.

health care costs in one year with appropriate public guardian services.⁸² Washington State concluded that the decrease in average costs of residential settings exceeded the cost of providing a guardian within thirty months in 2008-2011. Clients with a public guardian had a decrease of an average of twenty-nine hours in personal care needed each month, compared with an increase in care hours for similar clients; 21% of clients with a public guardian had a reported improvement in self-sufficiency in the previous three months.⁸³ The Vera Institute of Justice Guardianship Project in New York City obtained a reported net Medicaid cost-savings of \$2,500,026 for 111 guardianship clients in 2010.⁸⁴

North Dakota has experienced some deinstitutionalization through guardianship. Catholic Charities North Dakota reports residential placement moved from a more restrictive and expensive setting to a less restrictive setting for twenty-two guardianship clients in 2011. Seven clients moved from the North Dakota State Hospital, two clients moved from the Developmental Center, two clients moved from a nursing home to an Individualized Supported Living Arrangement (“ISLA”), and one client moved from a hospital to a nursing home.

V. THE ENTITIES RESPONSIBLE FOR GUARDIANSHIP AND PUBLIC ADMINISTRATOR COSTS

Section 1 of 2011 House Bill No. 1199 specified that the study of guardianship services for vulnerable adults must include “the entities responsible for guardianship costs.”⁸⁵ States generally provide for state funding or county funding of public guardianship costs, but North Dakota takes an unusual hybrid approach.⁸⁶ Entities responsible for guardianship and public administrator costs in North Dakota have included general fund appropriations to the Department of Human Services (Developmental Disabilities Division, and Aging Services Division) to contract with an entity to create and coordinate a unified system for the provision of guardianship services (a) to vulnerable adults who are ineligible for developmental disabilities case management services, and (b) to individuals

82. Teaster et al., *supra* note 71.

83. Burley, *supra* note 72, at 16, 19, 20.

84. Guardianship Project, *supra* note 73 (nursing home avoidance among Medicaid clients, hospital avoidance among Medicaid clients, mental health facility cost avoidance among Medicaid clients, delayed spend-down/Medicaid avoidance, and Medicaid liens paid).

85. North Dakota Legislative Council, Study of Guardianship Services—Background Memorandum (2011).

86. *See, e.g.*, TEASTER ET AL., *supra* note 33.