

House Bill 1354
House Human Services Committee

Testimony Presented by Cynthia M. Feland
District Court Judge
February 2, 2021

Chair Weisz, members of the House Human Services Committee, My name is Cynthia Feland, District Court Judge in the South Central Judicial District and chair of the Guardianship Workgroup. In the fall of 2013, the Guardianship Workgroup, a multi-disciplinary group made up of stakeholders in the guardianship and conservatorship process, was created by then Chief Justice VandeWalle and assigned the task of evaluating current guardianship and conservator statutes and procedures in light of the National Probate Standards. As part of that evaluation, the Workgroup also considered the 2012 Windsor Schmidt Report from the legislative “Study of Guardianship Services for Vulnerable Adults in North Dakota”. In his report, Mr. Schmidt made a number of recommendations to improve guardianship service in North Dakota.

Over the last three legislative sessions, the Workgroup has proposed and the legislature has adopted a number of statutory amendments to improve and strengthen procedures in guardianship and conservatorship cases. The statutory amendments adopted in those legislative sessions addressed all but one of the recommendations in Windsor Schmidt’s report: the lack of a system in North Dakota to provide for public guardian services for all eligible incapacitated persons similarly, and not particular public guardian services for particular diagnoses or categories.

During his report to the member of the Human Services Committee in May of 2012, Windsor Schmidt noted that there were a total of 2,038 guardianship and conservatorship cases in North Dakota in 2010, averaging approximately 311 new appointments each year. Flash

forward ten (10) years, there are a total of 3,264 guardianship and conservatorship cases in North Dakota through the end of 2020, reflecting much higher average yearly new case filings than overserved at the time of the Windsor Schmidt Report. A review of the new guardianship and conservatorship case filings for that last four years reflects an average of 427 new cases per year (483 new cases in 2017, 492 new cases in 2018, 399 new cases in 2019, and 335 new cases in 2020.) However, these current case numbers do not reflect all of the cases where guardian services are needed. Rather, the current case numbers only reflect those cases where a proposed guardian was identified, a petition for guardianship filed, and a guardianship was ordered by the court.

Not reflected in the current number of cases are the number of individuals who are currently on waiting lists for guardianship services provided by professional guardians like Catholic Charities, Guardian Angels, and Guardian and Protective Services. According to the Windsor Schmidt report, in 2012, just one of the professional guardians, Catholic Charities, was facing a waiting list of 25. Today, Catholic Charities' waiting list surpasses 90.

In addition to those on waiting lists, there are a number of individuals admitted to the hospital following possible neglect or abuse reports to protection groups and law enforcement who are in need of a guardian. These individuals often remain hospitalized longer than necessary or are re-admitted to the hospital due to their inability to provide care for themselves, or not having another person to ensure that they receive proper care following discharge. In situations where the individual remains incapacitated and unable to continue to reside in their home, admission to a care facility becomes problematic, again lengthening their hospital stays.

Professionals in both the medical and long-term care fields noted that it is shocking to see how many individuals have nobody in their life to turn to for assistance. A survey of care facilities conducted by the Guardianship Workgroup with the assistance of the Department of Human Services reflected that there are approximately 124 individuals in care facilities that are in need of a guardian, for which no one is available to serve as guardian.

The need for guardians is further compounded by the number of existing cases where the current guardian, appointed years ago for an adult child with developmental disabilities or a traumatic brain injury, is no longer able to serve as guardian and may themselves be in need of a guardian. Implementation of the review process for existing guardianship and conservatorship cases following the 2015 legislative session, highlighted the increasing demand for guardian services.

With the need for guardian services growing and the lack of public guardian services to fill the need, stakeholders in the guardianship process have found themselves in untenable situations. Protective services have asked neighbors to step in and manage a non-relative's affairs. Sheriffs have sought out community members to take on the role of guardian, sometimes on a temporary basis while continuing to search for a more permanent solution. Most difficult are those situations where a guardian has been removed due to exploitation issues, or in some instances death, with no mechanism for identifying a replacement. In the direst situations, professional guardians have stepped up and agreed to take on the case without being provided any additional compensation.

To address the ongoing issues involving individuals who are in need of a guardian but do not have willing or responsible family members or friends available to serve as a guardian, a subcommittee of the Guardianship Standards Workgroup was formed in October of 2019. In discussing the best resolution to address the growing need for guardian services, the Subcommittee on Guardianship Services, comprised of legislators, interested community stakeholders and members of the Guardianship Workgroup, reviewed the four models for providing public guardian services identified in the Windsor Schmidt report: (1) court model, (2) independent state office, (3) division of a social service agency, and (4) county model; and reviewed guardian service programs in other state. An independent state office, modeled after the North Dakota Commission on Legal Counsel for Indigents, was determined to be the best model for the timely and effective delivery of public guardianship services in North Dakota. Travis Finck, Director of Indigent Defense Commission, served on the subcommittee and was instrumental in drafting the bill before you.

The proposed amendments contained in House Bill 1354, creates the North Dakota Commission on Guardianship to provide guardianship services for all eligible incapacitated persons in North Dakota and oversight of appointed guardians.

Section 1

Page 1, line 8-10, amends subsection 2 of N.D.C.C. §28-32-01 to add subdivision z exempting the guardianship commission from the term administrative agency. The exemption provides the commission with more flexibility to set and change standards as needed. The types of policies needed to govern guardians contracted with the commission do not fit well within the

Administrative Practices Act and are similar to those implemented by the Indigent Defense Commission and other agencies in the list of exemptions. The types of policies or standards needed to govern the guardianship commission are discussed further on in the bill under section 54-67-03, Commission Responsibilities.

Section 2

Page 2, line 10, amends subsection 1 of N.D.C.C. section 50-24.1-07 to allow the state to recover the commission's funding for guardianship services prior to the state having to share a portion with the federal government. If the Department of Human Services collects a Medicaid claim, the federal government received approximately 50% of that claim.

Section 3 - creates Chapter 54-67 establishing the Commission on Guardianship.

Page 2, line 14 through Page 3, line 9, creates **Section 54-67-01 Definitions**, providing the general definitions for the chapter. Similar to the operation of the Indigent Defense Commission, "contract guardian" is defined as the person, individual or organization, contracted with by the commission to provide guardianship services as opposed to an individual who may be employed as a guardian by the commission to provide guardianship services. The definition for "Identifiable information" specifies the personal information collected by the commission on an individual that would be confidential under section 54-67-06 below.

Page 3, line 10 through Page 4, line 20, creates **Section 54-67-02 Membership**, establishing the purpose of the commission, composition of the governing board and their respective terms.

Under subsection 1, the Guardianship Commission is responsible for developing and monitoring a process for the delivery of state-funded guardian services including the standards and policies governing eligibility for guardianship services.

Subsection 2 identifies the membership of the Guardianship Commission. After consideration of the members comprising the Indigent Defense Commission and guardianship commissions in other states; some of which were as large as 15 members, the Workgroup Subcommittee is recommending a 10 member governing board.

In addition to the recommended appointments by the governor, legislature, and Supreme Court, the remaining four board members were selected based on their expertise and the invaluable insight their respective organizations would provide to the Commission. A member of the protection and advocacy project was selected based on their involvement with both mental health and developmental disabilities as well as their initiative on the supportive decision making legislation last session. Two members from the Department of Human Services, one from the Adults and Aging Services Division, and the other from the Developmental Disabilities Division were selected due to their role concerning the Vulnerable Adult and Protective Services program's involvement with PASS funds and programming within the realm of disability services. After discussions on the inclusion of a professional and a family guardian on the Commission, the Workgroup Subcommittee ultimately determined that a member from the Guardianship Association of North Dakota should be included as they represent professional guardians, families, and others committed to representing the unmet needs of people too vulnerable to speak for themselves.

Subsection 3 provides the deadline to make initial appointments to the Commission.

Subsection 4 governs the terms of membership. The length of initial terms are modified, staggering future appointments to allow for retention of experienced commission members. It is anticipated that the administrative work and legal work would be handled similar to that for the Indigent Defense Commission with one administrative assistant to perform administrative duties and an assistant attorney general assigned to perform the legal work.

Subsection 5 provides guidance concerning the qualification of individuals considered for appointment to the commission as well as those who are excluded from appointment. Given the inherent conflict of interest, judges and employees of a judge would not be eligible to be members.

Subsection 6 covers compensation and financial reimbursement. Members will not receive compensation for serving on the commission. However, members will be entitled to receive reimbursement for reasonable and necessary travel and expenses such as food, lodging and mileage incurred in performing their commission duties. Following discussions with legislative counsel legal staff, legislative members on the commission would be reimbursed by legislative council.

Subsection 7 establishes the date and procedural mechanism for conducting the first commission meeting. After that first meeting, commission members will have 30 days to select a chair who will thereafter be selected annually.

Page 4, line 21 through Page 6, line 14, creates **Section 54-67-03. Commission Responsibilities** outlining the duties of the commission regarding delivery, management, and oversight of guardianship services.

Subdivision a requires the commission to develop standards for delivering guardianship services including the qualification of contract guardians and guardians, their caseload ratios, training, evaluations, and compensation; handling of conflicts of interest, and any other standards necessary and appropriate to ensure the delivery of adequate guardianship services.

Under subdivision b, the commission is required to develop the eligibility requirements to determine whether an individual qualifies to receive services under this chapter. For individuals determined to be eligible for services, the state will have a preferred claim against the individual's estate in the event the estate is able to provide reimbursement. The preferred claim provision is similar to the estate recovery processes used by the Department of Human Services (DHS) and was drafted with the assistance of the DHS attorney on the Workgroup Subcommittee.

Subdivision c requires the commission to develop the process to be used to contract with persons to provide guardian services. It is anticipated that a process similar to the Indigent Defense Commission would be established with a central office managing "contract guardians".

While it is not anticipated that regional offices would be established, the Workgroup Subcommittee included subdivision d to allow for future discussion if a regional office was

determined to be necessary and appropriate at some point in the future due to the unavailability of “contract guardians” to cover a specific geographic area.

The commission is also responsible for establishing a method for monitoring and tracking the caseloads of contract guardians under Subdivision e and to submit a biennial budget to Office of Management and Budget under subdivision f.

Under subdivision g, the commission would be required to take steps necessary to enable the acceptance of private, federal and public funds to support the guardian services. This provision would allow the commission to accept, hold and appropriately use bequests from individuals, families, or private organizations wishing to financially support guardian services.

Subdivisions h and I provide the commission with authority to enter into contracts necessary for providing guardianship services.

Subsection 2 requires the commission to adopt rules in a manner generally consistent with the notice and comment provisions of the Administrative Practices Act. So, while it is exempt from having to establish rules under that the Administrative Practices Act, the public notice and comment requirements will still apply.

Page 6, line 15 through Page 7, line 9, creates **54-67-04. Commission Director Responsibilities – Report to Legislative Management**, establishing the qualification and duties for the director of the commission. The proposed provision allowing for a candidate to become nationally certified within one year of appointment was included to provide the commission with the flexibility to consider candidates possessing all of the other qualities deemed appropriate for the

position. Requiring a candidate to be nationally certified at the time of application would drastically reduce the number of otherwise qualified candidates. Currently, there are only 19 certified guardians in the state.

In addition to assisting the commission with developing standards for the delivery of adequate guardianship standards, the director would be responsible for administration and implementation of guardianship services and supervising compliance with commission standards. The director would also be responsible for preparing and presenting an annual report of the commission's activities, needs and costs to both the commission and the legislative counsel.

Page 7, lines 10-15, creates **54-67-05. Guardianship Fund – Continuing appropriation,** creating a special fund to hold the funds collected under section 54-67-03 and provides for a continuing appropriation to the commission for use in administering the program.

Page 7, line 16 through Page 8, line 19 creates **54-67-06. Accessibility and Confidentiality of Records,** specifying the specific information that will be classified as confidential and the limited situations and personnel who may be granted access to the otherwise confidential records. The proposed provision was modeled after the Department of Human Services' confidentiality and access statute.

Under subsection 1, "identifiable information" of individuals applying for or receiving guardianship services is confidential. "Identifiable information" is defined in the first section of the new chapter (Page 2, line 25 through Page 3, line 9) and includes the individual's name,

address, phone number, fax number, social security number, e-mail address, program ID, and any other unique identifier. Exceptions allowing disclosure of certain information such as the individual's social security number are authorized when it is necessary for administration of the program or required or allowed under law.

Subsection 2 requires any vendor, agent or contractor to agree to keep the "identifiable information" confidential and to only use the "identifiable information" as provided in an agreement with the commission.

Under subsection 3, reports concerning an applicant, a provider of, or an individual applying for or receiving services under the program are also confidential but may be disclosed in the limited circumstances identified in subdivisions a through d.

Subsection 4 contains a penalty clause for disclosure of confidential information in violation of the section. Disclosure of confidential information provided to a government is classified as a class C felony under Section 12.1-13-01.

Fiscal Impact:

The fiscal impact for this bill only relates to the formation and operation of the commission.

This legislative body will see two other bills this session that provide funding for guardianship services: HB 1012 and HB 1015. HB1012 is the DHS budget which includes funding for the Guardianship Establishment program and guardianship services for those with developmental disabilities. HB 1015 is the Governor's budget which provides for funding of the PASS program.

The Establishment Fund is used to pay for the costs associated with filing a petition for guardianship. Anyone seeking to petition for guardianship may apply for Establishment Funds if the proposed ward is eligible for Medicaid and/or has financial resources less than 100% of the federal poverty guidelines. To meet the poverty criteria, an individual's income must be less than \$13,000 per year. Family members seeking guardianship of an individuals with developmental disabilities (DD cases) are not eligible for petitioning costs through the Establishment Fund.

A small amount of funds are available to Catholic Charities for the petitioning costs associated with establishing a guardianship in DD cases. In addition, DHS oversees funds to provide guardianships services for DD cases through a contract with Catholic Charities. All DD cases accepted by Catholic Charities under the contract must be referred through the Human Service Centers.

PASS funds provide for guardianship services of non DD cases which meet the federal poverty guidelines.

While the Workgroup Subcommittee discussed that bringing all guardianship programs under one umbrella would be logical, at this time the different funds for all of the current guardianship related programs must remain separate to ensure that they are funded regardless of the status of this bill.

Respectfully Submitted:

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Subcommittee on Guardianship Services Members: Judge **Cynthia M. Feland**, Chair; **Senator Judy Lee**, West Fargo; **Senator Timothy Mathern**, Fargo; **Representative Kathy Skroch**, Lidgerwood; **Representative Jon Nelson**, Rugby; **Jon Alm**, N.D. Department of Human Services; **Travis Finck**, Director, Indigent Defense Commission; **Shelly Peterson**, North Dakota Long Term Care Association; **Marnie Walth**, Sanford Health; **Angie Sersha**, Sanford Health; **Tim Blasl**, North Dakota Hospital Association; **Aaron Birst**, North Dakota Association of Counties; **Donna Byzewski**, Catholic Charities; **Mason Sisk**, Governor's Office; **Michelle Gayette**, N.D. Department of Human Services; **Sally Holewa**, State Court Administrator; and **Audrey Urich**, Guardian and Protective Services.