

Senate Bill 2029
House Human Services Committee
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INTRODUCTION: Chairman Ruby and members of the House Human Services Committee, my name is Garrick Voigt, a staff attorney with the Office of the State Court Administrator and staff for the Task Force on Guardianship Monitoring. I am here today in support of SB 2029. This testimony will provide background on events leading up to SB 2029, explain the substance of the bill, summarize the current adult guardianship structure and programs in North Dakota, and explain discussions that occurred during Senate hearings.

PART 1: BACKGROUND

General: It is important to have general knowledge of two significant events that gave widespread attention to guardianship in North Dakota to understand SB 2029. Likewise, being aware of recent guardianship reform attempts is critical to understand the bill.

Winsor Schmidt Report: The first significant event that gave widespread attention to guardianship in North Dakota occurred in 2012 when Dr. Winsor Schmidt, a nationally recognized expert on elder law and guardianship, conducted a comprehensive analysis of guardianship and conservatorship systems in North Dakota. This report is commonly referred to as the Winsor Schmidt Report. The 63rd Legislative Assembly requested the study to evaluate the effectiveness, oversight, and accountability of guardianship services within North Dakota. The Winsor Schmidt Report contained many findings and recommendations, including:

Key Findings from the Winsor Schmidt Report:

1. **Lack of Oversight.** The report identified that North Dakota's guardianship system had insufficient monitoring and oversight of both professional and family guardians, increasing the risk of abuse, neglect, and financial exploitation of vulnerable individuals.
2. **Insufficient Resources.** The system was under-resourced, making it difficult for courts and state agencies to adequately monitor and support guardianship cases.
3. **Training and Education Gaps.** Guardians, particularly family members who took on guardianship roles, often did not receive adequate training or resources to understand their duties and responsibilities.
4. **Inadequate Data Collection.** The report highlighted that North Dakota lacked a centralized system for collecting data on guardianship cases, which hindered the ability to track outcomes, patterns of misconduct, or emerging trends.

Recommendations from the Winsor Schmidt Report:

1. Creation of a state office for guardianship monitoring to provide oversight, education, and accountability.
2. Adopt minimum ethical standards for guardians.
3. Development of training programs for both professional and family guardians.
4. Establishment of clear protocols for handling complaints and misconduct.
5. Implementation of better data collection to monitor guardianship trends and outcomes across the state.

The findings and recommendations of the Winsor Schmidt report have since influenced past and present legislative and policy discussions around guardianship reform in North Dakota. Many of the recommendations found in the Winsor Schmidt report have been implemented in North Dakota; however, many key issues, mainly the aforementioned issues, have yet to be resolved.

Mismanagement of Professional Guardianship Entity: The second significant event that gave widespread attention to guardianship in North Dakota occurred in 2015, when two owners of North Dakota's then-largest guardianship entity were convicted on federal charges for stealing Supplemental Nutrition Assistance Program (SNAP) benefits from their clients. The conviction was reported to the National Center of Guardian Accreditation (NCGA), a Pennsylvania-based nonprofit that certifies guardians in our state, but it took no action on the report. Despite the criminal conviction, the professional guardianship entity continued to receive public funds from the Public Administrator Support Services (PASS) program for 157 clients.

That same guardianship entity was sued civilly in 2018 for significant mismanagement of a client's trust, which included farmland, and fraudulent conduct. In 2021, the court found the officers of the professional guardianship entity engaged in fraudulent activities, including unauthorized withdrawals, self-dealing, violating federal probation terms, breaching their fiduciary duties, and engaging in deceptive practices. They were ordered to pay damages, reimburse unauthorized fees, and cover potential tax liabilities. The professional guardians were ordered to pay over \$800,000. The misconduct of the professional guardianship entity was not limited to that one ward. After the 2021 judgment was entered, the NCGA finally took action; however, it took over 11 months to decertify the guardianship entity. During those 11 months, the guardianship entity was providing guardianship services for 218 individuals and were conservators for two individuals.

Misconduct is not limited to that one guardianship entity. Some other examples of guardian misconduct include guardians failing to apply for government benefits when the ward is entitled to them, allowing a guardian's family or friends to live in a ward's home or use the ward's property after the ward has been moved to assisted

living, purchasing insurance and/or other products from the guardian's friends or family, requiring wards to relocate to the guardian's city of residence to reduce the guardian's travel time, charging excessive fees, etc. The Court System and the Task Force recognize that the misconduct of a few guardians does not diminish the integrity of the majority of guardians, who are compassionate and diligent. However, these examples of misconduct emphasize that enhanced monitoring is necessary to protect some of North Dakota's most vulnerable citizens.

Legislative History: After the misconduct of the professional guardianship entity was discovered, the Guardianship Work Group (Work Group) under the Supreme Court began discussing ways to protect wards. The Work Group proposed House Bill 1354 during the 67th Legislative Assembly (2021), which would have established an independent commission to develop and monitor a process for the delivery of state-funded guardianship services. House Bill 1354 was defeated in the House of Representatives because there were concerns with the independent nature of the proposed commission. Instead, there was a desire to assign the task to either the Executive or Judicial Branch. During the 68th Legislative Assembly (2023), SB 2345 passed both chambers of the General Assembly and was signed by the governor.

Senate Bill 2345 enacted Chapter 27-27 of the North Dakota Century Code, creating the Task Force on Guardianship Monitoring (Task Force). The Task Force is comprised of 14 current voting members and five former members, totaling 19 individuals with diverse expertise. The 19 individuals who served on the Task Force can be found on Appendix A, on page 18 of this testimony. In addition to these members, the president of the Guardianship Association of North Dakota attended and actively participated in a majority of Task Force meetings. The Task Force's mission is to address matters of guardianship accountability and further protections of individuals under guardianship and to recommend the regulations necessary to enhance the guardianship monitoring program to investigate suspected guardian mismanagement or illegal behavior.

In addition to these duties, the Task Force assisted the Interim Government Finance Committee of the 68th General Assembly, which was tasked with studying the North Dakota guardianship system, to ascertain whether it was feasible to consolidate all guardianship programs under one agency, and to determine an appropriate level of funding for each program. The Task Force finished drafting a proposed bill in May, 2024 and presented its findings and recommendations to the Government Finance Committee during its June and September meetings. The Government Finance Committee voted unanimously (with two members absent) to sponsored the bill that ultimately became SB 2029.

PART 2: SB 2029 OVERVIEW

Summary: Senate Bill 2029 is an enabling statute, allowing the Supreme Court to create a new guardianship structure in North Dakota. The Task Force identified multiple issues with the current guardianship system in North Dakota, and each problem has a specific solution. Appendix B, on pages 19-20 of this testimony, is a visual aid that identifies some of the most important issues identified by the Task Force, a solution for each problem, and an explanation providing context to the problem and/or the solution, which has been incorporated into SB 2029.

The Task Force proposed a four-phased approach to implement this new guardianship structure. Phase One was drafting SB 2029. Phase Two is drafting and presenting proposed court rules to the Supreme Court. Phase Three involves drafting policies for the new guardianship structure, and Phase Four involves the drafting of internal operating procedures, standard forms, and guides. Appendix C, on page 21 of this testimony, is an aid to visualize each phase.

Senate Bill 2029 creates four independent entities under the Supreme Court to satisfy specific functions. The four entities created or authorized by SB 2029 are the:

1. Office of Guardianship and Conservatorship (OGC), which will contract for public guardianship services, process professional guardian and conservator licenses, and provide educational resources and information to assistance family guardians.
2. Office of Guardianship and Conservatorship Counsel (Investigation Counsel), which will investigate allegations of guardian misconduct.
3. Guardianship and Conservatorship Review Board (Review Board), which will conduct administrative hearings to resolve concerns about guardian misconduct.
4. Guardianship and Conservatorship Operations Committee (Operations Committee), which will adopt policies for these four entities and establish the budget for them.

Appendix D on page 22 of this testimony is a visual aid that goes over the tentative composition, roles, and responsibilities of these four entities. Four new fulltime equivalent (FTE) positions will be required in the Judicial Branch to staff these four entities. The Review Board and Operations Committee will not consist of FTEs, as those positions are unpaid. The reason the Task Force recommended the creation of four separate entities is to limit the power of these entities and to limit potential conflicts of interest.

Purpose: Senate Bill 2029 has three primary objectives:

1. Protect wards by providing oversight of guardians, which is achieved by expanding the current Monitoring Program and implementing a complaint review process.
2. Account for taxpayer funds, which is achieved by transferring all public adult guardianship program to the Judicial Branch, thereby subjecting the funds to review by the State Auditor.
3. Consolidate public adult guardianship programs under one funding umbrella, which is achieved by transferring it to the only entity willing to take on the responsibly, the Judicial Branch.

In addition to achieving these primary goals, SB 2029 also allows the OGC to support family guardians by providing more information about options and resource than is currently allowed.

PART 3: BILL SUBSTANTIVE EXPLANATION

Section 1: Section 1, the primary section of the bill, creates and enacts Chapter 27-27.1, a new chapter establishing the OGC and outlines its duties and powers.

Section 27-27.1-01: This section provides the general definitions for the chapter. To understand the definition of “agency permit” in subsection 1, it is important to note that SB 2029 will create a licensing structure for professional guardians and conservators. Conservators and guardians will either be “licensed” or “unlicensed.” Different duties and powers apply to licensed and unlicensed conservators and guardians.

Agency permits were proposed as a mechanism to alleviate a concern professional guardianship entities had concerning licensing all of its employees. Employees of a licensed guardianship entity could apply for an agency permit as opposed to a license. Agency permits allow the employee to provide guardianship and conservatorship services or be appointed as guardian or conservator in a case. The permit is “temporary” because it is attached to the employment with the licensed guardianship entity, meaning if the permit holder quits working for the professional guardianship entity, then the permit would be void.

The bill also defines public conservator and public guardian. The intent and purpose of public conservators and public guardians is to distinguish those cases where the OGC has “contracted” with another to provide guardianship or conservatorship services for individuals who are eligible for public services but have no one who is able or willing to provide those guardianship or conservatorship services. Public services are state or federally-funded programs administered by the OGC and available to eligible individuals.

Section 27-27.1-02: Subsection 1 creates the OGC under the Supreme Court. Subsection 2 provides the duties of the OGC, including developing policies and procedures governing public guardianship and conservatorship services and ethical standards for licensed and unlicensed guardians and conservators. The OGC must also maintain accurate records of all financial transactions and provide a biennial report to legislative management. Subsection 3 provides discretionary powers, including recommending rules and policies regarding guardians and conservators, establishing training and mentoring programs, and monitoring guardianship and conservatorship services, exercising a preferred claim against the estate of an individual receiving public service under certain circumstances, and receiving private, federal, and other public funds. Subsection 4 prohibits the OGC from authorizing payment to a public guardian or public conservator who exceeds a specific case threshold, which would be set by the Operations Committee. Subsection 5 prohibits the OGC and any employee or officers from acting as a “public” guardian or conservator or otherwise representing a person in their official capacity.

Section 27-27.1-03: This section creates a new fund to hold all money transferred by the legislative assembly and collected by the OGC as a continuing appropriation for use in administering guardianship and conservatorship services and programs.

Section 27-27.1-04: This section identifies information and reports that are classified as confidential and the policies and procedures for disclosure of the information and records. The proposed legislation is modeled after the confidentiality and access statute used by the Department of Health and Human Services (HHS) excluding subsection 3, which was added so Investigation Counsel may share information with the Office of the Attorney General (AG) or Bureau of Criminal Investigation (BCI) if Investigation Counsel suspects a guardian or conservator committed a crime.

Section 27-27.1-05: This section prohibits a person from acting as guardian or conservator for three or more adult individuals at the same time without a license, prohibits public services from being extended to minors unless the minor is seeking guardianship as an incapacitated adult, and requires a person to be a licensed guardian or conservator to advertise guardianship or conservatorship services to the public. Subsection 4 lists exceptions to these prohibitions. Subsection 5 provides that violating the section is a class B misdemeanor after August 1, 2026.

Section 27-27.1-06: Provides civil immunity to anyone who provides good faith information or testimony regarding a guardian or conservator’s misconduct or lack of professionalism.

Section 27-27.1-07: This section grants the Supreme Court original jurisdiction to revoke and suspend guardian and conservator licenses. It also requires the Supreme Court to establish an appeal process for OGC and Review Board actions. Subsection 3 requires courts to waive court costs and filing fees if a person is receiving public services. Subsection 4 requires all guardians and conservators to adhere to ethical standards adopted by the OGC or Supreme Court.

Section 27-27.1-08: This section authorizes the Supreme Court to create the Review Board and Investigation Counsel and requires the Supreme Court to establish an Operations Committee. The composition of the Review Board and Operations Committee would be promulgated by the Supreme Court rulemaking process.

Section 27-27.1-09: This section authorizes the Supreme Court to grant immunity to members of the Review Board, develop confidentially and disclosure standards for disciplinary hearings, grant subpoena and other investigative powers, and adopt rules related to guardian and conservator investigations and hearings.

Section 27-27.1-10: Subsection 1 provides that the AG will defend the OGC and its officers if a case is filed against it/them. Subsection 2 clarifies that the AG and BCI handle criminal investigations.

Section 27-27.1-11: This section requires state and local governments and their officers and employees to cooperate with investigations by providing requested information and documentation unless disclosure is prohibited by federal law or regulation, and mandates sheriffs and police officers to serve process and execute all lawful orders of the OGC, the Review Board, or the Investigation Counsel.

Section 27-27.1-12: This section requires a person to attend a disciplinary proceeding as a witness if subpoenaed and provides a subpoena enforcement mechanism.

Section 27-27.1-13: This section grants the state a preferred claim against the estate of an individual receiving public guardian or conservatorship services in the event the individual's estate is able to provide reimbursement. The language of this section is similar to the estate recovery processes used by HHS and was developed with the assistance of HHS's counsel.

Sections 2 & 3: Section 2 creates a new subsection to section 30.1-28-07 and Section 3 creates a new subsection to section 30.1-29-15. These new subsections authorize the creation of a disqualification roster to be maintained by the State Court Administrator to identify nonprofessional (family) guardians or conservators that are removed for cause. The disqualification roster is the alternative to licensure for nonprofessional guardians to prevent an individual from being appointed as a guardian or conservator in another case. This section only applies to nonprofessionals because professionals will go through a license revocation process.

Section 4: This section amends the Medicaid statute in section 50-24.1-07 to allow the OGC to claim funds paid out for public guardianship services above HHS's Medicaid claim. The "preferred claim" status allows the state to recover OGC funding before sharing any balance with the federal government. On Medicaid claims, the federal government receives approximately 50% of the amount collected by HHS.

Section 5: This section repeals Chapter 27-27, which created the Task Force. The Task Force will accomplish its mission before this bill goes into effect on July 1, 2025.

Section 6: The appropriation clause of SB 2029 consolidates the existing guardianship programs under one agency. To understand Section 6, it will be helpful to understand the current programs and the history of their funding. Because there is a bit of material to digest, Appendix E, on page 23 of this testimony provides a summary of the current adult guardianship programs discussed in Part 4 of this testimony. The historical funding of adult guardianship programs is covered in Part 5 of this testimony. Appendix F on page 24 of this testimony is a visual aid that shows the 23-25 biennium appropriations for these programs and compares it to the appropriation clause of SB 2029.

Administration of all of the existing adult guardianship programs would become the responsibility of the OGC. The four line items in Section 6 of the bill categorize the existing expenditures into establishment costs for developmentally disabled (DD) and non-DD cases, and guardianship and conservatorship services for DD and non-DD cases. The OGC would continue to cover costs and fees covered under the current programs. The first line item, "Establishment costs – indigents," on p. 10, line 12, incorporates the HHS Aging Services Division Guardianship Establishment Fund. The second line item on line 13, "Establishment costs - developmentally disabled," incorporates the DD establishment funds administered by the DD Services Division. The third line item on line 14, "Public guardian and conservator fees – indigents" incorporates the OMB PASS program. The fourth line item on line 15, "Guardianship contracts - developmentally disabled" incorporates the portion of the DD Corporate Guardianship Contract with Catholic Charities that covers fees for providing guardianship services.

PART 4: CURRENT ADULT GUARDIANSHIP PROGRAMS EXPLANATION

Current DHS Programs: The majority of adult guardianship programs are administered under HHS through the Aging Services Division, DD Services Division, North Dakota State Hospital (NDSH), and Life Skills Transition Center (LSTC).

Establishment Fund. The HHS Aging Services Division administers the Guardianship Establishment Fund, which Covers petitioning costs to establish guardianships for adults eligible to receive case management services. Petitioning costs include service fees for the petitioning attorney, guardian ad litem (GAL), and court visitor. To qualify for services, the proposed ward must be at least 18 years of age, not eligible for DD case management services, and at or below 100% federal poverty level or Medicaid eligible. The program is capped at \$3,000 per case.

DD Establishment Fund. The DD Services Division administers the DD Guardianship Establishment Program and the Corporate Guardianship Contract. Under the DD Establishment Program, funds are available to cover the petitioning costs to establish guardianship for those willing to serve as guardians of DD adults. To qualify for services, the proposed ward must be 18 years of age or older, eligible for DD case management services, and be at or below the 100% federal poverty level or Medicaid-eligible. Like the Establishment Fund administered by Aging Services, the petitioning costs are capped at \$3,000 per case.

Corporate Guardianship Contract. Under the Corporate Guardianship Contract, the DD Services Division contracts with Catholic Charities to provide guardianship services for 529 DD adults receiving DD case management services. The Corporate Contract includes two line items: one covering the petitioning costs to establish the guardianship and one covering guardianship fees.

State Hospital. As part of its operating costs, NDSH establishes guardianships for individuals with a mental illness who are receiving treatment at its facility. Generally, guardianships initiated by NDSH begin with the establishment of an emergency guardianship while the petition for long-term guardianship is pending. After guardianship is established, NDSH also expends funds for the appointment of successor guardians, for medication orders, and for court orders to continue treatment at their facility. Expenditures by the NDSH for guardianship services are part of its operating expenses, so this spending is not generally captured when calculating guardianship services for the purpose of appropriations.

Life Skills Transition Center. Guardianships are also established by LSTC for minors with an intellectual or developmental disability who are becoming incapacitated adults for whom LSTC is continuing to provide services. Guardianship petition costs as well as costs for the appointment of successor guardians, and medication or continued treatment orders, similar to the NDSH, are

part of the professional services or operating expenses line items of the LSTC's budget. Here again, LSTC's guardianship costs have not been included in guardianship bills and summaries.

Current OMB Program: The Office of Management and Budget (OMB) administers the PASS program through the North Dakota Association of Counties (NDACo). PASS funds are grants provided to pay a flat rate to cover the cost of guardianship services for vulnerable adults. To qualify for PASS funding, the vulnerable adult must be at least 18 years old and at or below 100% of the federal poverty level or Medicaid eligible. Adults eligible for DD programs are not eligible for PASS funding and are funded through either the DD Establishment Fund or DD Corporate Contract. The petitioning costs to establish a guardianship are not covered under the PASS program. By the end of the 2023-25 biennium, approximately 600 individuals are projected to be enrolled in the PASS program.

Current Judicial Branch Program: The Judicial Branch administers and operates the Guardianship Monitoring Program to conduct well-being and financial reviews referred to the program by district courts. In addition to referrals from district courts, the program manager also conducts random financial reviews and provides educational guardianship training. The monitoring program funds court visitor appointments for well-being reviews. Reimbursement for each visitor appointment is capped at \$300 (6-hours at \$50.00/hr.). For more complex cases, the court-appointed visitor may request approval for additional time.

PART 5: HISTORICAL FUNDING FOR ADULT GUARDIANSHIP

Establishment Fund: For the 2023-25 biennium, the Guardianship Establishment Fund was increased to \$423,000, which included an increase in the per case cap from \$2,500 to \$3,000. Even with the increased appropriation, the Aging Service's Establishment Fund was exhausted sometime in late March or early April of 2024. A major contributing factor to the rapid depletion of the Aging Service's Establishment Fund was due to deficit spending during the prior biennium. During the 2021-23 biennium, the Aging Service's Establishment Fund ran at a deficit that was balanced at the beginning of the current biennium.

In May 2024, HHS used its authority to conduct inter-department transfers and allocated \$300,000 to replenish the Aging Service's Establishment Fund, which is on track to receive 292 referrals this biennium. Other factors contributing to the rapid depletion of the Aging Service's Establishment Fund are rising costs for services and increased demand. Under the current \$3,000 per case cap, unpaid services totaled \$139,909 (as of January 8, 2024). If trends continue, unpaid services could exceed \$177,600 by the end of the biennium. The funding request for the 2025-27 biennium listed in the bill would increase the per-case cap to \$5,000 to ensure providers are paid for and willing to perform the necessary services to

establish guardianships. The original funding request in SB 2029 was \$1,500,000, and the Senate Appropriations Committee did not change that figure.

DD Establishment Fund: For the current biennium, the DD Services Division was appropriated \$500,192 (\$300,000 for the DD Establishment Fund and \$200,195 under the Corporate Guardianship Contract with Catholic Charities). As of January 7, 2025, the DD Services Division approved 112 of the 124 requests for Establishment Funds. If trends continue, the projected demand for referrals by the end of the current biennium would be approximately 166. The average cost to establish a guardianship for a DD individual is approximately \$3,000 per case. However, many of these referrals require the establishment of an emergency guardianship which increases the cost to approximately \$4,000 per case. The DD Services Division has already obligated all of its funding for Establishment Fund referrals this biennium. Additional funding for 40 more slots was added in September of 2024. As of early January 2025, 80% of those funds have been exhausted. Meaning the 23-25 appropriation amount was insufficient to meet demand. The original appropriation request for the 2025-27 biennium was \$1,296,400. The Senate Appropriations committee reduced the amount of this line item by \$200,000, totaling \$1,096,400.

PASS Program: During the 2023 legislative session, the PASS daily rate was increased from \$10/day to \$14/day. Additional appropriations during the 2023 special legislative session increased PASS funding to \$7.1 million, and it offered guardianship provides a daily rate of \$17. At the end of the 2023-25 biennium, it is estimated that approximately 600 individuals will be enrolled in the PASS program. Enrollment is projected to continue to increase by five individuals a month. That's why the original funding request for the "Public guardian and conservator fees – indigents" line item was \$8.6 million (offering a \$18/day rate and meeting the increased demand for services). The Senate Appropriations Committee reduced the \$8.6 million to \$7.1 million.

Corporate Guardianship Contract: The DD Services Division has appropriated \$4,288,349 for its corporate guardianship contract for this biennium. The current contract provides funding for guardianship services for 529 DD adults. Catholic Charities provides guardianship services for between 60 to 80 new DD adults in each biennium. Although 40 of the DD adults receiving services from Catholic Charities died during the 21-23 biennium, the standard demand for services requires an increase in the number of individuals to be served. The DD waitlist has approximately 147 individuals waiting to receive guardianship services. The original line item requested for this program was \$6,835,136 which would provide funding to cover guardianship services for 760 DD adults (incorporating the existing waiting list and the projected demand). The daily rate for DD guardianship fees is generally less than non-DD guardianship fees. The rate used for this line item is \$12.14 for the first year and \$12.50 for the second year. The Senate Appropriations Committee reduced the line item to \$5.5 million.

PART 6: DISCUSSION TOPICS DURING SENATE HEARINGS

Introduction: This segment of testimony will cover topics that were raised during Senate hearings. There was substantial discussion about how transferring these programs to the Judicial Branch could impact guardians and the people they serve.

Structure & Conflicts of Interest: The branch of government that should house these entities and potential conflicts of interest was the most discussed topic during Senate hearings. The Winsor Schmidt Report explains a few public guardianship models on pages 17-19. Those models are a(n): (1) court model, (2) independent state office model, (3) social service agency model, and (4) county model. An independent state office model was attempted and rejected by the House previously. The resources are no longer available to use a county model. The Governor's Office was asked whether it would house the OGC, and it declined, opining that the Judicial Branch seemed a more appropriate fit. That leaves a court model or social service agency model. HHS requested that it not house the OGC because it would create a conflict of interest since HHS provides direct services to individuals. The concern HHS has regarding a potential conflict of interest is supported by the Winsor Schmidt Report (p. 18 (stating “[t]he placement of the public guardianship function in an agency providing direct services to [incapacitated persons] presents a clear conflict of interest”)).

The Governor's Office and HHS would prefer not to oversee the OGC. The Court System wasn't exactly thrilled to take on the responsibility of overseeing the OGC, but it is willing to do so. The reluctance of state agencies to oversee the OGC led the Task Force to draft a court model. While a court model primarily utilizes court rule, SB 2029 is the statutory authority the Court System requests to properly establish a new guardianship system for North Dakota that achieves all the goals identified by the Task Force.

Sample language for a court model is on pages 66-73 of the Winsor Schmidt Report. That proposed language is far more centralized and directly under the Office of the State Court Administrator than the structure proposed in SB 2029, yet Winsor Schmidt raises no conflict of interest concerns with his proposed structure. The term “conflict of interest” appears 20 times in the Winsor Schmidt Report and is used when discussing:

1. The placement of a public guardian services under a social service agency (pp. 18-19, 44).
2. Conflicts of interest involving a guardianship agency (pp. 40-41).
3. Proposed bill and rule language (pp. 59-60).

The term “conflict of interest” also appears once as it relates to placing an office of public guardianship under a court system (p. 18, fn. 52. (explaining that judges felt there could be a potential conflict of interest if a judge oversaw a guardianship case and had the responsibility of administering a public guardian's activities)). Since

North Dakota district court judges oversee guardianship proceedings, it is important for district court judges to have no involvement in administering the public guardian program or be involved in Review Board proceedings, which is the structure proposed under SB 2029. Moreover, eight jurisdictions have their office of public guardian under their respective judicial branch (CO, DE, HI, IN, KS, MA, NE, and WA), while seven jurisdictions have an entity within its judicial branch to process complaints against guardian (AZ, CO, MN, NE, NV, TX, and WA).

The Task Force determined that the creation of the Operations Committee was necessary to create an arms-length relationship between the OGC and the Supreme Court. The Operations Committee would decide who is entitled for OGC public services, hire the OGC director, and create the budget for the OGC and Investigation Counsel, not the Supreme Court. The OGC would contract with public guardians and administer the public, adult guardianship programs. The OGC director would hire and oversee OGC staff. Investigation Counsel would conduct administrative investigations while the Review Board would hold administrative hearings, when necessary. This decentralized and independent structure was chosen to limit conflicts of interest and is modeled after the Judicial Conduct Commission. While district court judges would continue to hear guardianship petitions, district court judges would have no influence on the OGC, Investigation Counsel, or Review Board actions. Likewise, these entities would be unable to mandate district court action for a guardianship or conservatorship proceeding. For these reasons, the Court System is confident that SB 2029 does not create a conflict of interest by placing the OGC, Review Board, Investigation Counsel, and Operations Committee under the Judicial Branch.

Judicial Oversight: Some opposing the bill claim that oversight of guardian conduct is not a judicial function. All 50 states have a statute mandating the judicial branch to oversee guardian conduct. That's the whole reason judges may remove a guardian from a case. Traditionally, the way a judge provides oversight is based on reports from the guardian and holding hearings, when necessary. This traditional approach can be very time consuming for the overseeing court. Additionally, the traditional method gets complicated when a guardian has wards scattered throughout judicial districts and other jurisdictions. Due to the flaws with the traditional oversight approach, 21 states, including North Dakota, have implemented what I call an enhanced, proactive guardianship monitoring program.

These monitoring programs generally assist district court judges in overseeing a guardianship by allowing select individuals with expertise relevant to guardianship to review guardian reports and alert the judge, when necessary. Twenty of the 21 monitoring programs, including North Dakota's, is administered by that state's respective judicial branch. Former Chief Justice VandeWalle created the Guardianship Monitoring Program in 2018 through North Dakota Supreme Court Administrative Order 24, and judicial oversight over guardian conduct has been a judicial function ever since.

Legislative Oversight: Some legislators have concerns that transferring these programs to the Judicial Branch will remove legislative oversight over public guardianship programs. First, it should be noted the OGC will be required to provide a report each biennium to Legislative Management regarding the operation of these programs. That mandate is on p. 3, lines 5-8 of SB 2029. Furthermore, the Legislature has many courses of actions to check the OGC, such as: moving the OGC to a state agency, ceasing to fund certain programs or personnel, moving the entity or program to the counties, amending the North Dakota Century Code to mandate certain action from the Judicial Branch, etc. Additionally, it should be noted that the Legislature has zero oversight over the PASS program other than appropriating its funding, so the increased transparency by transferring the program to the Court System will actually increase legislative oversight over the PASS program.

Operations Committee Composition: Some guardians contest being excluded from the Operations Committee. The Task Force determined that having a professional guardian on the Operations Committee would be a direct conflict of interest because the Operations Committee would set the pay for public guardians, set the OGC budget, and adopt ethical standards applicable to guardians. Public guardians do not currently set their pay under state-funded programs and the Task Force determined that should not change. The Operations Committee would consult with professional guardians to determine appropriate pay rates (which is what the NDACo currently does with the PASS program).

State Licensure: The purpose of licensure was also a highly discussed topic. The risk associated with relying on an out-of-state body to certify and decertify guardians became apparent when the NCGA failed to revoke a professional guardian's certification following a federal conviction and took 11 months to decertify a professional guardianship following a civil judgment entered against it. Relying on an out-of-state- entity which has no responsibility for the actions of guardians and whose primary purpose is training and testing is an ineffective method of oversight and provides a false sense that there is some kind of investigative or enforcement mechanism in place. Establishing state licensure removes that reliance. State licensure for guardians and conservators would not be unique to North Dakota. Six states have some type state registration, certification, or licensure for professional guardians (AK, AZ, CA, FL, TX, and WA).

The Task Force determined that licensure would create a mechanism for preventing a professional guardian from continuing to provide services following a finding of severe mismanagement or illegal behavior since professional guardians are typically appointed as guardians for wards across the state. Currently, if a professional guardian commits misconduct and is removed in a particular case, there is no clear mechanism to address the other cases in which the professional guardian has been appointed. If professional guardians or conservators are subject to license revocation, then the professional guardian or conservator could be

removed in mass, thereby protecting vulnerable people from predatory behavior and increasing court efficiency, which saves taxpayer dollars.

Proactive & Reactive Nature: Some commented that the bill is too reactive because it focuses solely on disciplining guardians after misconduct had occurred instead of focusing on education as a preventative measure. That's simply untrue. The plan is to expand the existing monitoring program into a monitoring and education program and add one FTE to the program. The OGC will function as an educational resource to prevent misconduct while the Investigation Counsel satisfies the reactive function. This proactive and reactive dichotomy work in tandem to maximize the efficiency of the guardianship structure in North Dakota.

Legal Fees: There was also concerns about guardians being required to retain a lawyer to respond to administrative investigations. A guardian will not be required to retain a lawyer to participate in administrative investigations or hearings. The North Dakota Rules of Civil Procedure and North Dakota Rules of Evidence will generally not apply to these administrative proceedings, and these proceedings are not intended to be adversarial in nature, instead being rehabilitative. These administrative proceedings are not court proceedings and are more akin to a relaxed version of an administrative hearing held by a state agency. Furthermore, the Review Board will be unable to impose punitive sanctions on a guardian.

The plan is to allow corporate guardians to select an agent to represent its business interest. That agent need not be an attorney, and that non-attorney agent would likely be sufficient to represent the corporate guardian's interest in a vast majority of circumstances. Conversely, a guardian would likely retain counsel when license revocation or suspension is sought; however, the Task Force anticipates the number of those proceedings to be extremely low. Lastly, the Investigation Counsel and OGC will not file against a guardian in court; therefore, it seems unlikely that this bill will increase a guardian provider's legal fees or require family guardians to retain attorneys.

Cumbersome Licensing Standards: Some guardians expressed concern that the OGC would impose cumbersome licensing standards. The Supreme Court already promulgates minimum qualifications for guardians through Rule 59 of the North Dakota Supreme Court Administrative Rules. Initially, the criteria outlined in Admin. R. 59 would be the criteria for a professional guardian to obtain a license. Senate Bill 2029 does authorize the OGC to implement a licensing fee, which could be considered extra criteria, but it has yet to be decided whether an application fee will be imposed. If one is implemented, it would be based on incidental costs directly attributable to the licensing process.

Payment: Professional guardians were also worried about timely payments immediately after the transition. The Court plans to maintain the payment procedures of current programs to ensure a smooth transition and to ensure that no delay in payment occurs.

Family Guardians: There have been concerns that passing SB 2029 would make it more difficult for individuals to be appointed and act as a guardian for family members. The appointment qualifications for family guardians would not be changed. Another concern that arose was that passing SB 2029 would make individuals less likely to serve as guardian for family members. Family guardians are already subject to civil and criminal liability for their conduct as a family guardian. It doesn't seem like a logical conclusion for family guardians to be more hesitant to serve as a guardian simply because they may be subject to an administrative hearing. Furthermore, establishing the OGC would make it easier for family guardians to fulfill their duties because a family guardian could call the OGC to ask for assistance or information.

Program Eligibility: Some fear that individuals currently receiving public services would become ineligible for a service if program eligibility changed. The plan is to keep the eligibility criteria for these programs the same for that reason. The goal is for no one to fall off the current public programs after the transition.

Moving Social Services: There were some concerns about moving social services out of HHS, but those comments must be grounded on confusion. Senate Bill 2029 does not remove direct services provided by HHS. Those services will remain and not be affected. Individuals who receive services from HHS would continue to get services, including case managers and benefits. The functionality of the LSTC and NDSH will not be adversely impacted by this legislation.

Operating Costs: Senate Bill 2029 does not include the costs to staff the proposed OGC and Investigation Counsel, which would include increasing the Judicial Branch budget by \$936,405.

Savings: As mentioned in this testimony, some individuals have discharge delays because they do not have a guardian. One function of the OGC would be finding public guardians for individuals when no family or friends are available to serve as guardians; thereby, preventing hospital discharge delays. The general counsel and vice-president of the North Dakota Hospital Association gave testimony in support of SB 2029 on January 13, explaining that in 2023, the six acute care prospective payment system hospitals in North Dakota (making up approximately 80% of the hospital care in the state) experienced at least 1,373 avoidable patient days because the patient lacked a guardian. This represents approximately \$1,945,725 of cost to the North Dakota healthcare delivery system that could have been avoided.

PASS Funding: There were some concerns with transferring the PASS program from the NDACo to the Judicial Branch. First, it is extremely important to understand that it is the NDACo's position that the PASS program should not be administered by the NDACo, which was asked to temporarily administer the program for two years. Unfortunately, those two years have gone by, and the NDACo is still stuck administering the program. Furthermore, because the NDACo is a non-profit organization, the PASS program is not subject to audit by the North Dakota Auditor. Transferring the PASS program to the Judicial Branch would subject those taxpayer dollars to the State Auditor.

CONCLUSION: Enacting SB 2029 would resolve issues that have been persisting in North Dakota for over a decade by adding protections for some of North Dakota's most vulnerable citizens. This will be achieved by increasing guardian accountability while also assisting guardians, especially family guardians, by providing resources and information so guardians can fulfill their duties. Enacting this legislation would establish accountability for millions of taxpayer dollars and simplify the appropriation process for adult guardianship programs throughout the State. For these reasons, it is urged that you recommend a do pass for SB 2029. I stand for questions.

Appendix A: Task Force on Guardianship Monitoring Composition

Name	Organization	Title
Cynthia Feland, Chair	South Central Judicial District	Presiding Judge
Jon Alm	Department of Health and Human Services	Chief Legal Officer
Cheryl Bergian	Cheryl Bergian Law Office	Owner; Attorney
Scott Bernstein	Guardian & Protective Services	Executive Director
Reid Brady	East Central Judicial District	Judge
Donna Byzewski	Catholic Charities North Dakota	Director of the Guardianship Division/Intellectual Disabilities
James Carkuff	Bureau of Criminal Investigation	Agent, Medicaid Fraud Control Unit
Megan Carmichael	Office of the Attorney General (former)	Assistant Attorney General (former)
Paul Emerson	Cass County State's Attorney's Office	Assistant State's Attorney
Jeremy Ensrud	Office of the Attorney General	Assistant Attorney General
Michelle Gayette	Assistant Director (former)	Adult & Aging Services (former)
Sally Holewa	North Dakota Court System	State Court Administrator
Thomas Jackson	Jackson, Welder & Arthurs, Inc	Partner; Attorney
Tracy Laaveg	LS Law Group, PC	Partner; Attorney
Ariah Magness	Sanford South Clinic	Care Manager; Licensed Baccalaureate Social Worker
Rose Nichols	North Dakota Court System	Guardianship Monitoring Program, Program Manager
Micah Olson	Protection & Advocacy Project	Attorney
Dean Rummel	Legislative Assembly	Senator (37th Legislative District)
Charles Stroup (deceased)	Retired	Nonprofessional guardian/conservator; banking consultant

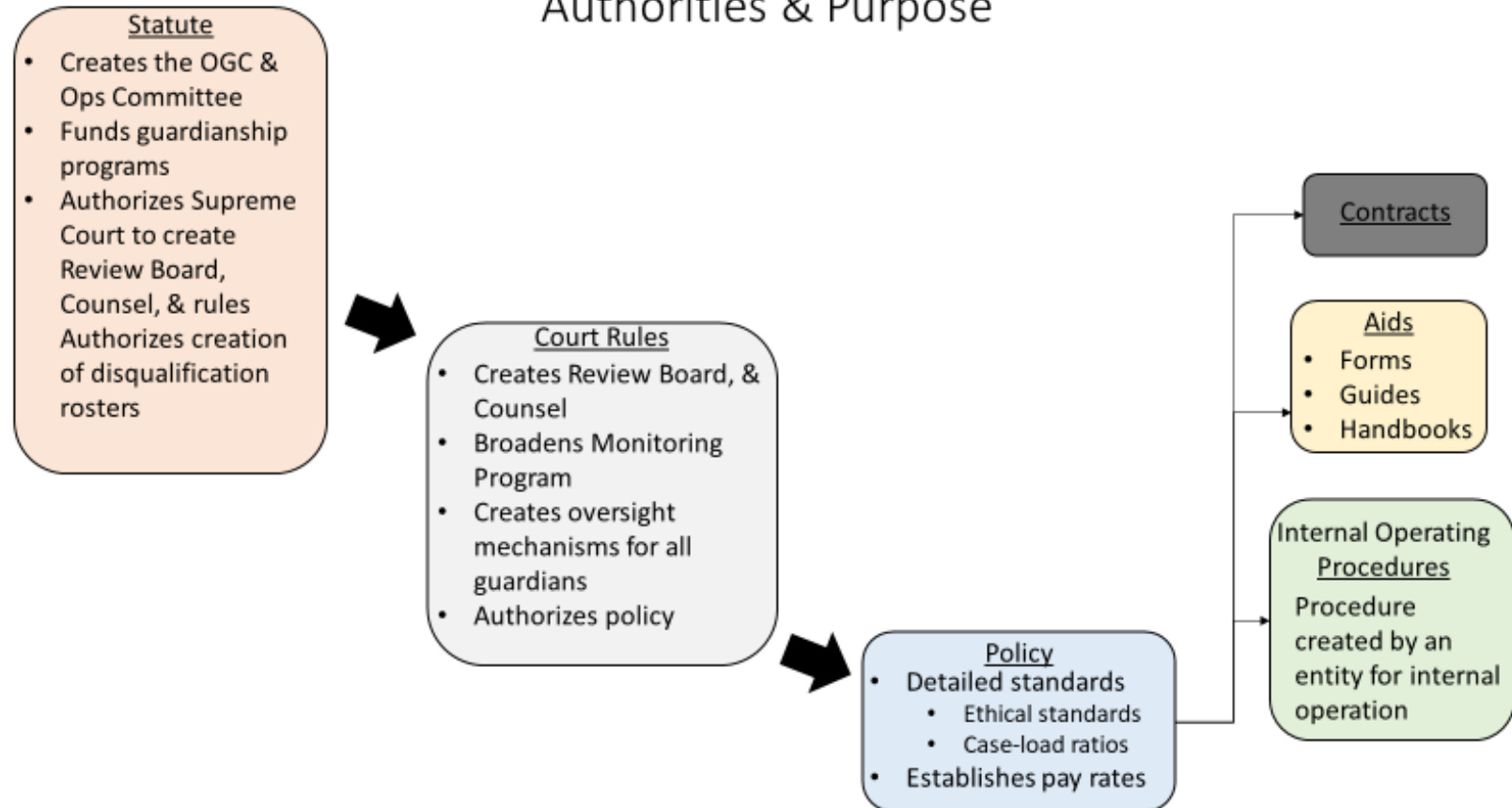
Appendix B: Problems, Solutions & Explanations

1	Problem: State-wide removal of professional guardians following serious misconduct.
	Solution: Implement licensing requirements for guardians and conservators and establish a review board.
	Explanation: A professional guardianship entity exploited its wards' estates, necessitating individual petitions and separate proceedings for removal in each case. Licensing professional guardians and conservators would create an efficient, streamlined process for mass removal, saving time and resources for both the wards and the court system.
2	Problem: Preventing reappointment of family guardians with a history of misconduct.
	Solution: Establish disqualification rosters.
	Explanation: Currently, there is no mechanism to prevent family guardians removed for misconduct from being reappointed in future proceedings. The disqualification rosters in Sections 2 and 3 of the bill empower district courts to place individuals on a roster if they were removed for cause. The courts will develop rules governing the roster procedures. This measure is specific to family guardians, as licensed guardians will continue to be subject to the license revocation process.
3	Problem: Investigating alleged misconduct.
	Solution: Establish an investigative counsel.
	Explanation: Law enforcement agencies and various investigative bodies within the Department of Health and Human Services often decline to investigate allegations of guardian misconduct, even in cases of abuse, exploitation, or neglect of vulnerable adults. An investigative counsel would ensure that valid complaints are thoroughly examined. Investigations would be confidential and aimed at gathering facts for potential disciplinary actions.
4	Problem: Addressing both intentional and unintentional misconduct by guardians.
	Solution: Establish an investigative counsel, a review board, and expand the current monitoring program.
	Explanation: Despite investigations, victims of guardian misconduct often lack civil or criminal recourse. The creation of a Review Board would provide a structured forum to address complaints. The investigative counsel would negotiate corrective actions with the guardian. If no resolution is reached, an administrative-style hearing would be held, with limited adversarial proceedings and would not apply the Rule of Evidence. Sanctions may include license revocation, probation, restitution, administrative fees, or letters of reprimand. Probation conditions might include additional education or mentorship. The expanded monitoring program would oversee guardians on probation. The Review Board would focus solely on administrative sanctions and would not have authority to initiate civil or criminal lawsuits.
5	Problem: Providing educational resources and assistance to family guardians.
	Solution: Expand the Monitoring Program and introduce Advisory Opinions.
	Explanation: Family guardians often lack the necessary knowledge and resources, leading to unintentional misconduct. Expanding the monitoring program into an educational and monitoring program would allow monitors to provide direct assistance and resources. Additionally, guardians could request ethical advisory opinions from the investigative counsel for guidance.

6	Problem: Streamlining funding for guardianship programs across multiple entities.
	Solution: Centralize all public guardianship services under the Office of Guardianship and Conservatorship.
	Explanation: Guardianship programs are currently managed by multiple entities, making financial tracking challenging. Consolidating funding under a single office would improve efficiency and oversight of state-funded guardianship programs.
7	Problem: Difficulty in locating successor guardians.
	Solution: Establish the Office of Guardianship and Conservatorship.
	Explanation: The inability to find successor guardians leads to delays in court proceedings and prolonged hospital stays for individuals requiring guardianship, incurring significant costs to the State. The new office would be tasked with locating potential family or professional guardians, thereby expediting the discharge process and reducing financial burdens on the State.
8	Problem: Long waiting lists for guardians.
	Solution: Properly fund the Office of Guardianship and Conservatorship.
	Explanation: The current corporate guardian contract with Catholic Charities lacks sufficient funding to address its waiting list of 142 individuals. Increased funding for developmental disability (DD) guardianship services could significantly reduce the backlog.
9	Problem: Ensuring ethical standards for guardians.
	Solution: Establish enforceable ethical standards for guardians and conservators.
	Explanation: Currently, the National Guardianship Association sets standards, with noncompliance addressed by the Center for Guardianship Certification. Establishing state-specific ethical standards would provide clear, centralized expectations for both family and professional guardians. The Review Board would oversee compliance and enforcement.
10	Problem: Auditing the PASS Program funds.
	Solution: Transfer the PASS program under the Office of Guardianship and Conservatorship.
	Explanation: The PASS program, currently administered by the Association of Counties, is not subject to state auditing. Moving it under the Judicial Branch would ensure proper financial oversight and accountability.

Appendix C: Approach for Implementing Guardianship Structure

Authorities & Purpose



Appendix D: Tentative Roles & Responsibilities

Guardianship Structure

Judicial Branch

Legend

- * New FTE
- ** Existing FTE

Hires

Hires

Hires

Ops. Committee

- SBAND Appointee (Lawyer)
- SBAND Appointee (Retired Judge/Referee or Surrogate Judge)
- DHS Appointee
- Public Member (Supreme Court Appointee)
- State Court Admin.

OGC

*Director

- *Admin. Assistant
- *Accountant
- *Program Manager
- **Monitor

Counsel

**Investigation Counsel

Review Board

- SBAND Appointee (Lawyer)
- SBAND Appointee (Retired Judge/Referee or Surrogate Judge)
- GAND Appointee
- Hospital Appointee
- Long-term Care Appointee
- Public Member (Supreme Court Appointee)
- Public Member (Supreme Court Appointee)

Ops. Committee

- Approve budgets for OGC, Counsel, and Review Board
- Enact policies

Think Legislative Equivalent

OGC

- Administer funds for public services (PASS, DD, establishment funds)
- Draft budget & policies
- Administer Monitoring & Education Programs
- Process licenses

Think Executive Equivalent

Counsel

- Validate legitimacy of concerns
- Investigate legitimate concerns
- Initiate formal proceedings
- Present findings to Review Board

Think Independent AG Equivalent

Review Board

- Conduct oversight review hearings
- Issue findings and order

Think Judicial Equivalent

Appendix E: Summary of Current Adult Guardianship Programs

Dept.	Division	Program	Description
HHS	Aging Services	Establishment Fund	Covers petitioning costs to establish guardianships for adults eligible to receive case management services. Petitioning costs include service fees for petitioning attorney, guardian ad litem (GAL), and court visitor. To qualify for services, the proposed ward must be at least 18 years of age, NOT eligible for DD case management services and at or below 100% federal poverty level or Medicaid eligible.
HHS	DD	DD Establishment Fund	Covers petitioning costs for persons willing to serve as guardian for a DD adult. To qualify for services, the proposed ward must be at least 18 years of age, eligible for DD case management services and at or below 100% federal poverty level or Medicaid eligible. Current funding covers 100 cases at \$3,000 per case.
HHS	DD	Corporate Guardianship Contract	HHS DD Services Division contract with Catholic Charities to cover petitioning costs and guardianship services for 529 DD individuals. To qualify for services, the proposed ward must be at least 18 years of age, eligible for DD case management services and at or below 100% federal poverty level or Medicaid eligible. The total contract price includes two line items: one covers petitioning costs and the other covers guardianship services fees. Petitioning costs include service fees for petitioning attorney, guardian ad litem (GAL), and court visitor. Guardianship fees for each case are \$10.82/day for the first year of the biennium and \$11.36/day for the second.
HHS	NDSH	Professional Services / Operating Costs	NDSH establishes guardianships for individuals with a mental illness while receiving treatment. Generally, includes petitioning costs for establishment of emergency guardianships prior to regular guardianship. Funds also expended for orders appointing successor guardians, and for medication, and continued treatment at an institution order. Expended funds are part of the agency's operating costs
HHS	LSTC	Professional Services / Operating Costs	LSTC establishes guardianships when a minor is becoming a DD adult needing guardianship services while LSTC is providing services. Petitioning costs for the services of the petitioning attorney, GAL and court visitor. Funds also expended for orders appointing successor guardians, and for medication, and continued treatment at an institution order. Expended funds are part of the agency's operating costs
OMB	Delegated to NDACo	PASS	Provides guardianship grants to private agencies and individuals who serve as public guardians for vulnerable adults. Pays for guardian fees (\$17 per day), directly to the guardian. Does not cover petitioning costs. To qualify for services, individuals must be at least 18 years of age, NOT eligible for DD case management services and at or below 100% federal poverty level or Medicaid eligible. Projected to have approximately 600 individuals who qualify for services at the end of the 23-25 biennium.
Judicial Branch	Guardianship Monitoring Program		Currently operates the Guardianship Monitoring Program, which takes referrals from district courts to conduct wellbeing and financial reviews for existing guardianship cases. Referrals to the program are made by district courts. Program manager also conducts random financial reviews and provides educational guardianship training. Court visitors are contracted to conduct wellbeing checks.

Appendix F: Guardianship Program Funding Comparison

Office	Program	New Line Item in Bill	23-25 Funding	25-27 Funding	Increase
Department of Health & Human Services (HHS) Aging Services Division	Guardianship Establishment Fund*	Establishment costs - indigents	423,000	1,550,000	827,000
			300,000		
HHS Developmental Disabilities (DD) Services Division	DD Guardianship Establishment Fund**	Establishment costs - developmentally disabled	300,000	780,000	360,000
			120,000		
HHS North Dakota State Hospital (NDSH)	NDSH professional services/operating costs	Establishment costs - developmentally disabled	193,596	288,000	94,404
HHS Life Skills and Transition Center (LSTC)	LSTC professional services/operating costs	Establishment costs - developmentally disabled	23,388	28,400	5,012
Office of Management and Budget (OMB)	Public Administrator Support Services (PASS)	Public guardian and conservator fees - indigents	7,100,000	7,100,000	0
HHS DD Services Division	Corporate Guardianship Contract - Catholic Charities - Guardian Fees	Guardianship contracts - developmentally disabled	4,288,349	5,500,000	1,211,651
TOTAL IN SB 2029			\$12,748,333	\$15,246,400	\$2,498,067
* Inter-department transfer after original funds were exhausted					
** 40 slots added in September 2024					