

Senate Bill 2222
Senate Judiciary Committee

Testimony Presented by Cynthia M. Feland
District Court Judge
Chair, Guardianship Workgroup
March 15, 2023

Chair Klemin, members of the House Judiciary Committee, my name is Cynthia Feland, District Court Judge in the South Central Judicial District and Chair of the Guardianship Workgroup. The Guardianship Workgroup is a multi-disciplinary group of professionals with extensive and varied experience in the area of guardianships and conservatorships created in 2013 to evaluate and improve procedures in cases involving guardianships for incapacitated adults, minors and in conservatorship cases. For the last four legislative sessions, the Guardianship Workgroup has identified and recommended a number of statutory amendments to improve and strengthen procedures in cases involving guardianship for incapacitated adults and conservatorship cases.

The proposed amendments contained in Senate Bill 2222 are intended to clarify the procedures in conservatorship cases, to require court approval of any sale of real property, to provide factors for determining reasonable compensation and to add a new section authorizing the appointment of an emergency conservator.

Section 1:

Page 1, lines 11 through 13, amends section 30.1-03-02 to clarify that notice of a hearing may not be waived by a ward, proposed ward or protected person. The proposed amendment is consistent with amendments being proposed to section 30.1-28-09(2) in Senate Bill 2224. The current language is part of the original Uniform Law and the comments contain no explanation for inclusion of the waiver provision. Although the currently language does not

specifically identify the ward, proposed ward or protected person as a “person” able to waive notice, the proposed language eliminates any ambiguity.

Section 2

Page 1, lines 16 through 23, amends section 30.1-29-05 with stylistic changes to clarify that someone other than the petitioner may serve notice of the proceeding.

Page 2, lines 1 through 5, amends section 30.1-29-05 to remove the waiver of notice by the proposed protected person consistent with the proposed amendment in Section 1 of the bill and amendments being proposed to Section 30.1-28-09(2) in Senate Bill 2224.

Section 3

Page 3, lines 2 through 3, amends section 30.1-29-07(1)(f) to modify the guardian ad litem’s duties in minority conservatorship cases to include an assessment of the protected person ability to attend the hearing in person or by reliable electronic means.

Page 3, lines 27 through 28, amends section 30.1-29-07(2)(f) to modify the guardian ad litem’s duties in all other conservatorship cases to include an assessment of the protected person ability to attend the hearing in person or by reliable electronic means.

Page 4, lines 14 through 16, amends section 30.1-29-07(3)(a)(4) to modify the expert examiner’s duties to include an assessment of the protected person ability to attend the hearing in person or by reliable electronic means.

Page 4, lines 23 through 24, amends section 30.1-29-07(4) to add the option for the protected person to appear by remote means. In making this recommendation the discussed both

the personal and financial benefits to the protected person of not being required to travel to a courthouse or having the court proceeding held at the location where they are located.

Page 4, lines 18 through 20, and line 30 through Page 5, line 1, moves the language concerning the Court's consideration of the guardian ad litem's and expert examiner's reports from subsection (3)(b) of section 30.1-29-07 to subsection (5) of section 30.1-29-07.

Page 5, lines 9 through 10, amends section 30.1-29-07(6) to clarify that the guardian ad litem is discharged from their duties following the hearing.

Page 5, line 11 through Page 6, line 2, amends section 30.1-29-07 to add subsection 7 providing a list factors for courts to consider in determining reasonable compensation for conservatorship services.

Although conservators are allowed to receive compensation for their services, there is currently no statutory provision, rule or case law providing guidance in determining reasonable or appropriate compensation. The lack of guidance is especially problematic in cases where challenges have been made to the compensation sought by conservators. The list of factors provided was comprised by the Workgroup after reviewing other state statutes and case law. Use of factors is consistent with the requirements for judicial determinations in other areas of the law and provided the court with a basis for determining the reasonableness of requested fees.

Page 6, lines 3 through 6, amends section 30.1-29-07 to add subsection 8 to clarify that specific findings are not required for each factor and that not all factors will be present in each case. Determination as to the weight to be given each factor would remain within the court's discretion.

Page 6, lines 7 through 8, amends section 30.1-29-07 to add subsection 9 to clarify that the conservator must receive approval from the court prior to receiving any compensation for services.

Section 4

Page 6, line 17, amends subsection 2 of section 30.1-29-08 to include a reference to the proposed amendments to section 30.1-29-22 in section 8 of this bill adding additional requirements for sale of the protected persons real property.

Page 6, line 25, amends subsection b of subsection 2 of section 30.1-29-08 to clarify that the provision applies to minors regardless of the existence of a disability.

Section 5

Page 8, line 17, amends subsection 1 of section 30.1-29-09 to include a reference to the proposed amendments to section 30.1-29-22 in Section 8 of this bill adding additional requirements for sale of the protected persons real property.

Section 6

Page 8, lines 26 through 28, amends subsection 1 of section 30.1-29-18 to expand the list of persons entitled to a copy of the beginning inventory to ensure that all of the proper persons receive copies.

Section 7

Page 9, lines 10 through 13, and 17 through 23, amends subsection 2 of section 30.1-29-19 to clarify that a final report must be filed in all conservatorship cases and to include a reference to the proposed amendments to section 30.1-29-18 in section 6 of this bill expanding the list of persons entitled to a copy of the report.

Page 10, lines 3 through 4, amends subsection 3 of section 30.1-29-19 to include a reference to the proposed amendments to section 30.1-29-18 in section 6 of this bill expanding the list of persons entitled to a copy of the annual report.

Section 8

Page 10, line 10 through Page 11, line 11, amends section 30.1-29-22 to add a new subsection establishing requirements and procedures for the sale of the protected person's property which mirror those in the guardianship statutes. Although conservators are responsible for the fiscal health of the protected person's estate and typically have more skill when it comes to handling finances than guardians, the Workgroup concluded that any sale of real property owned by the protected person should always be pre-approved by the Court.

Under the proposed amendments, the conservator's request must include the type and description of the property, details of and reason for the requested transaction, method used to determine the current fair market value of the property, an explanation identifying why the proposed transaction is in the best interests of the person to be protected, and a notice giving interested persons ten (10) days to object and demand a hearing. The ten (10) day period was chosen after considering potential financial and market pressures and is consistent with the sale of real property by a guardian.

Absent good cause, transactions involving the sale of real property will require an appraisal. The "good cause" exception was included to address situations where an appraisal may not be feasible and other sources are available which provide the Court with sufficient evidence as to the appropriateness of the proposed value placed on the protected person's real property. Some of the other sources considered by the Workgroup included USDA's publication of County Rents and Land Values, annual

survey of County Rents and Prices conducted by the North Dakota Department of Trust Lands, and records evidencing recent sales of similar real property in the same area.

Under subsection b of subsection 2, the conservator is required to serve the protected person, the protected person's spouse, and all interested parties with the motion. The Workgroup included notice to the protected person's spouse separately to maintain consistency with other notice provisions in the chapter and to address any interest a spouse may have in the property at issue.

Subsubsection c of subsection 2 provides for an expedited process where the protected person's spouse and other interested parties consent to proposed sale of the protected person's real property. Any consent to the sale of the real property must be filed with the conservator's motion. Unless required by the Court, a hearing is not required if the motion for sale of property is unopposed by all of the interested parties.

Subsubsection d of subsection 2 requires the Court to make specific findings regarding whether the proposed sale of property is in the best interests of the protected person.

Section 9

Page 11, lines 16-20, amends subsection 1 of section 30.1-29-24 to remove language that is superseded by chapter 30.1-27 and 27-20.1.

Page 11, line 24, amends subsection 3 of section 30.1-29-24 to add a reference to the proposed additional requirements for sale of the protected person's real property under the proposed amendments to 30.1-29-22 in Section 8 of the bill.

Page 12, lines 20-21, amends subsection i of section 30.1-29-24(3) to except the sale of real estate from actions which may be taken by a conservator without a court order.

Section 10

Page 15, lines 19-20, amends subsection 3 of section 30.1-29-25 to clarify that a final report must be filed when minor's conservatorship is terminated.

Page 15, lines 21-25, amends subsection 4 of section 30.1-29-25 to clarify that the court, not the conservator will determine whether a conservatorship is no longer needed, and that a final report must be filed if the conservatorship is terminated.

Section 11

Page 16, line 18 through Page 17, line 13 amends chapter 30.1-29 to create a new section providing a procedure for the appointment of an emergency conservator to protect the assets in the estate of a proposed protected person that may be diminished if immediate action is not taken. Prior to the conservatorship hearing, there is no provision to immediately protect a proposed protected person's assets. After lengthy discussions about the limitations of an emergency guardianship, the potential for abuse of authority under an existing power of attorney, exertion of undue influence on a proposed protected person and the potential need for protection of an estate where guardianship is not appropriate, the Workgroup is recommending establishing a procedure for the appointment of an emergency conservator.

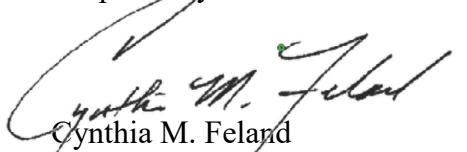
Subsection 1 authorizes an emergency conservatorship where substantial harm to the estate of a proposed protected person may occur prior to a hearing seeking establishment of a conservatorship hearing. Mirroring the provisions for an emergency guardianship, the appointment is for a period not to exceed 90 days, requires the appointment of a guardian ad litem, and notice to the person to be protected, that person's spouse, if any, and anyone else directed by the court.

Subsection 2 provides for an ex parte appointment of an emergency conservator if the court finds that substantial harm will occur before a hearing can be held. Again, mirroring the ex parte emergency appointment of a guardian, notice must then be given to the protected person, that person's spouse, if any, and anyone else the directed by court within 48 hours of the ex parte appointment and a hearing must be held within 10 days.

Subsection 3 clarifies that the appointment of the emergency conservatorship is not a finding that the person needs protection.

Subsection 4 allows the court to remove the emergency conservator at any time and require them to submit reports. The proposed language also clarifies that all other provisions of the chapter apply.

Respectfully Submitted:



Cynthia M. Feland
District Judge
South Central Judicial District
Chair, Guardianship Workgroup

Guardianship Workgroup Members: Judge **Cynthia M. Feland**, Chair; Judge **Pamela Nesvig**, South Central Judicial District; Judge **Stacey Louser**, North Central Judicial District; Judge **Cherie Clark**, Southeast Judicial District; **Jon Alm**, N.D. Department of Health and Human Services; Dr. Gabriela Balf, psychiatrist; **Cheryl Bergan**, attorney, Fargo; **Jennifer Lee**, Executive Director, North Dakota Legal Services; **Thomas Jackson**, attorney, Bismarck, **Tracey Laaveg**, attorney, Park River; **Jesse Maier**, attorney, Fargo; **Mikayla Reis**, attorney, Bismarck; **Heather Krumm**, attorney, Mandan; **Lonnie Wagner**, ND Department of Veterans Affairs; **Aaron Birst**, North Dakota Association of Counties; **Donna Byzewski**, Catholic Charities; **Michelle Gayette**, N.D. Department of Health and Human Services; **Rachael Sinness**, Protection and Advocacy; **Chris Carlson**, attorney, Bismarck; **Brittany Fode**, N.D. Department of Health and Human Services; **Sally Holewa**, State Court Administrator; **Donna Wunderlich**,

Testimony Presented by Cynthia M. Feland
District Court Judge
March 15, 2023
Page 9 of 9

Trial Court Administrator, Unit 3; **Karen Kringlie**, Juvenile Court Director, Unit 2; **Catherine Palsgraff**, Citizen Access Coordinator; **Cathy Ferderer**, Family Law Mediation Program Administrator; **Rose Nichols**, Guardian Monitoring Program; **Norma O'Halloran**, Grand Forks County Clerk of Court's Office; **Rebecca Nelson**, Ramsey County Clerk of Court; **Scott Bernstein**, Executive Director, Guardian and Protective Services; **Diane Osland**, Lutheran Social Services of MN; **Roxane Romanick**, CEO, Designer Genes of North Dakota, Inc.; **Keith Vavrovskv**, Director of Social Services, Life Skills and Transition Center; and **Margo Haut**, Guardian Angels Inc.