

Senate Bill 2224
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 2224 are intended to clarify the procedures in guardianship cases, to provide factors for determining reasonable compensation for a guardian's services, to authorize an extension of emergency guardianships and to add a new section authorizing the appointment of a guardian for a minor about to become an adult.

Section 1:

Page 1, lines 16-17, amends section 27-20.1-02 to except the appointment of a guardian for a minor becoming an incapacitated adult from the juvenile court's jurisdiction.

Section 2

Page 1, lines 20-23, amends subsection 1 of section 27-20.1-09 to limit appointment of counsel for a child to those children who are of a sufficient age and competency

to assist counsel with their case. The proposal legislation addresses concerns raised by the Indigent Defense Commission concerning the appointment of attorneys for children based on the recommendation of the non-attorney guardian ad litem without any consideration of the child's age and ability to "assist" in their own case. The Workgroup was advised that children as young as 9 months have been appointed attorneys. Given that the role of the guardian ad litem is to represent the "best interest" of the child, appointment of an attorney to represent the client's interest is untenable for a child who is unable to communicate with counsel. The proposed amendment also requires findings by a court supporting the appropriateness of any appointment.

Section 3

Page 2, lines 6-7, amends subsection 2 of section 27-20.1-17 to remove the age reference concerning minors needing foster care. The provision was included in 2019 when chapter 27-20.1 was enacted. Based on other legislative revision to the juvenile code in 2021, the provision is not needed and has created confusion.

Section 4

Page 2, lines 10 through 12, amends subsection 60 of section 30.1-01-06 to expand the definition "visitor" to include other individuals in health related fields. The Workgroup discussed at length the increasing difficulty in locating qualified individuals to serve as visitors. Expanding the definition of "visitor" would remove obstacles in locating additional professionals to provide the required report to the court on the proposed ward's incapacity or disability, and ability to provide for their personal needs.

Section 5

Page 2, lines 20 and 22 through 23, amends subsection 1 of section 30.1-26-01 to revise the list of alternative resource plans to add power of attorney, health care directives and

supported decision making, and remove multipurpose senior citizen centers which no longer exist. The definition has not been revised since its adoption in 1989.

Section 6

Page 2, lines 29 through 31, amends subsection 2 of section 30.1-27-05 to except the appointment of a guardian for a minor becoming an incapacitated adult from the juvenile court's jurisdiction.

Section 7

Page 3, line 10 through 12 through Page 4, line 2, creates a new section to Ch. 30.1-28 to provide a procedure for establishing a guardianship for a child in need of a guardianship upon reaching the age of majority. Under the proposed provisions, a petition for adult guardianship may be filed when the child has reached 17 years and 6 months of age. Hearing on the petition may be held prior to the child reaching age 18. If an adult guardianship is deemed appropriate, the letters of guardianship would become effective on the date the child turns age 18. Varying methods are currently being used by district courts across the state. The proposed amendment eliminates jurisdictional issues and provides for a standardized procedure to address the gap that frequently occurs in cases where a minor will immediately need a guardian upon turning age 18.

Section 8

Page 6, lines 2 through 3, amends subsection 4 of section 30.1-28-03 to expand the contents of the guardian ad litem's report to include an assessment of the ward's ability to attend a hearing in person or by remote means.

Page 6, lines 15 and 17, amends subsection 5 of section 30.1-28-03 to expand the contents of the expert examiner's report to include an assessment of the ward's ability to attend a hearing in person or by remote means.

Page 7, lines 17 through 18, amends subsection 6 of section 30.1-28-03 to expand the contents of the visitor's report to include an assessment of the ward's ability to attend a hearing in person or by remote means.

Page 7, line 24, amends subsection 8 of section 30.1-28-03 to permit the proposed ward to appear at the hearing remote means.

Page 7, line 30 through Page 8, line 3, amends section 30.1-28-03 to add a new subsection closing all guardianship hearing to the public unless otherwise requested by the ward, ward's attorney or guardian ad litem given the sensitive medical, mental health and financial information that may be discussed. Individuals and entities may also request to be present and that request will be granted if determined by the Court to be in the ward's best interest.

Page 8, lines 8 through 9, amends subsection 11 of section 30.1-28-03 to remove guardians and emergency guardians from the subsection as compensation for all guardians will be covered under new subsections.

Page 8, line 12 through Page 9, line 2, amends section 30.1-28-03 to add subsection 12 providing a list factors for courts to consider in determining reasonable compensation for guardianship services.

Although guardians are allowed to receive reasonable compensation for their services, there is currently no statutory provision, rule or case law providing guidance in determining what constitutes reasonable or appropriate compensation. The lack of

guidance is especially problematic in cases where challenges have been made to the compensation sought by guardians. 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 9, lines 3 through 6, amends section 30.1-28-03 to add subsection 13 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 9, lines 7 through 8, amends section 30.1-28-03 to add subsection 14 to clarify that the guardian must receive approval from the court prior to receiving any compensation for services.

Section 9

Page 11, lines 13 through 14, amends subsection 9 of section 30.1-28-04 to clarify that the guardian ad litem is discharged from their duties following the hearing.

Section 10

Page 11, lines 24 through 28, amends subsection 2 of section 30.1-28-07 to clarify that a guardianship may be modified or terminated prior to a review hearing when: (1) the ward is no longer incapacitated to the same extent, (2) modifications to the duties and authority of the guardian are needed, (3) change in person appointed is needed, or (4) a guardianship is no longer appropriate. Currently, there is no clear procedure for requesting the proposed modifications to an existing guardianship other than removal or resignation of a guardian. The Workgroup sought

to provide a clear procedure for addressing other situations that may arise following the original appointment which require action prior to a review hearing.

Page 12, lines 1 through 6, amends subsection 3 of section 30.1-28-07 to authorize the appointment of a visitor by the court prior to taking action in any of the requests made under subsection 2.

Page 12, lines 8 through 16, amends section 30.1-28-07 to add subsection 4 to require a hearing on the proposed modification or termination within 60 days of filing the petition unless good cause is shown. Written findings are required following the hearing. The burden of proof for finding that the ward is no longer incapacitated, no longer incapacitated to the same extent, or it would be in the ward's best interest to modify the duties and authority of the guardian is reduced to preponderance of the evidence. While the determination of incapacity appropriately requires a higher standard, the Workgroup determined that preponderance of evidence was more appropriate for making changes within the guardianship. New letters of guardianship are also required.

Page 12, lines 17 through 18, amends section 30.1-28-07 to add subsection 5 to permit the court to require a report from an expert examiner prior to determining whether termination or modification of the guardianship is appropriate.

Page 12, lines 19 through 24, amends section 30.1-28-07 to add subsection 6 to clarify that an emergency guardian may be appointed after establishment of a guardianship when necessary to provide immediate protection of the ward if the guardian dies or is not properly performing their duties. Currently, the statutory provisions governing emergency guardians in section 30.1-28-10.1 do not specifically authorize the appointment of an emergency guardian after establishment of a guardianship. Although rare, situations have arisen where district courts

have appointed emergency guardians to ensure that the ward's needs are met until a "successor" guardian is located.

Page 12, lines 25 through 31, amends section 30.1-28-07 to add subsection 7 to require that a guardian file a final report and accounting when the guardianship is terminated. The current statutory provisions only require the filing of an annual reporting.

Section 11

Page 13, line 7 through 10, amends subsection 2 of section 30.1-28-09 to remove the waiver of notice by the ward consistent with amendments being proposed to sections 30.1-03-02 and 30.1-29-05 in Senate Bill 2222. After extensive discussion, the Workgroup determined that as a matter of practice a ward or proposed ward should always be given notice of any hearing. While some wards may have cognitive difficult which make it impossible for them to understand or participate, the proposed amendment prevents potential abuse of a waiver.

Section 12

Page 13, line 13 through 19, amends section 30.1-28-09 to create a new subsection authorizing one extension of an emergency guardianship order for a period of up to an 90 days if good cause is shown. A hearing is required and no further extensions are permitted.

The current statute is silent on whether an emergency guardianship may be extended beyond the 90 day period resulting in inconsistencies among the district courts in responding to requests for extensions, the length of those extensions, and successive requests for extensions. The length of an emergency appointment was extended from 60 days to the current 90 day period during the 2015 legislative session. In recommending the extension to 90 days in 2015, the Workgroup noted that the 90 day period was consistent with the time period included in the earlier temporary guardianship statute and covered the intervening time between the filing of a

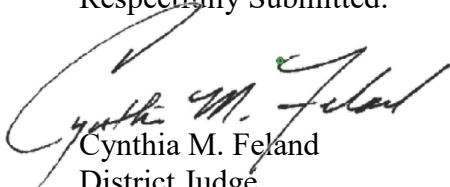
petition for guardianship and the guardianship hearing. Although most guardianship hearing occur within that 90 day time frame, the Workgroup noted that on occasion there are cases which may take additional time. The proposed amendment would authorize one extension for up to an additional 90 days only if good cause is shown. The maximum period of 6 months is consistent with the earlier temporary guardianship statute and ensures that the subject of the emergency guardianship is not subjected to lengthy restrictions of their decision making authority prior to a determination of their incapacity.

Section 13

Page 13, line 24, amends subsection 7 of section 30.1-28-12 to require guardians to seek court approval prior to the sale of real property and certain personal property.

Last session, Chapter 30.1-28 was amended to add subsection 7 which provided a procedure for the sale of the ward's property by the guardian if no conservator of the ward's estate had been appointed. After adoption of subsection 7, the Workgroup realized the word "may" and not "shall" was used making the additional duty of the guardian permissive. The proposed correction would clarify that the additional duties under subsection 7 are required.

Respectfully Submitted:



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Guardianship Workgroup Members: Judge **Cynthia M. Feland**, Chair; Judge **Pamela Nesvig**, South Central Judicial District; Judge **Stacey Louser**, North Central Judicial District; Judge

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