

Senate Bill 2225
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 2225 establish a procedure for judicial authorization prior to involuntary treatment of a ward with prescribed medication. As many member of this committee may recall, in 2017, legislation was passed allowing guardians with full medical authority to consent to involuntary treatment with prescribed medication without a court order. During the 2017 legislative session, the Workgroup appeared at the legislative committee hearings and expressed three main areas of concern with the proposed legislation: (1) overbroad authority granted to guardians; (2) lack of specific findings and judicial oversight prior to authorization; and (3) potential for abuse.

Although the legal effect of a guardianship removes a ward's freedom of choice and places that responsibility with the guardian, North Dakota law still requires judicial oversight of certain decisions made by the guardian on the ward's behalf. Under section 30.1-28-12, a guardian may not consent to psychosurgery, abortion, sterilization, or experimental treatment without court approval. Specific findings by a Court are also required under section 30.1-28-04(3) before a ward may be deprived of the right to vote, to marry or divorce, to have a driver's license or to possess a firearm. The current broad grant of authority to the guardian to consent to involuntary treatment of a ward with prescribed medication without court approval does not align with these laws.

The Workgroup also noted that even under the civil commitment statute, a party seeking to involuntarily treat a patient with prescribed medication in a non-emergency situation must obtain a court order, even though the individual has been deemed incapable of making responsible decisions about his or her care under section 25-03.1-18.1. In determining whether to authorize involuntary treatment with prescribed medication in mental health and competency restoration cases, a court is required to consider a number of factors and to make specific findings which include a determination that the benefits of the treatment outweigh the known risks. While the current provisions of subsection 6 of section 30.1-28-12 require a recommendation from the ward's treating physician, PA, psychiatrist or advanced practice registered nurse prior to consenting to involuntary treatment, the current procedure does not involve the same level of scrutiny that is afforded to other mental health patients. Further, wards have no ability to contest the authorization until after the medication has been involuntarily administered. As a result, guardians have, in some instances, authorized involuntary treatment

without being given complete information or where there is no medical necessity and the medication merely makes the ward more manageable.

In an effort to address concerns with the current law and those raised by the supporters of the 2017 statutory revisions, the Workgroup sought input from Dr. Gabriela Balf, Dr. Rosalie Etherington, the North Dakota Long-Term Care Association, as well as staff and administration from care centers around the state. After lengthy discussions, a compromise was reached to propose amendments to the current law which would only require prior approval for involuntary treatment with mood stabilizers and antipsychotic medications as they are the ones most frequently sought to be used involuntarily and have the most significant risks and side effects.

Although all prescribed medications require consistent use, a lapse in treatment with mood stabilizers and antipsychotic medications may compromise the effectiveness of the medication for certain mental health conditions like schizophrenia even if only discontinued for a short period of time. In some case, the lapse has rendered the medication ineffective. Given the often limited availability of alternative mood stabilizers and antipsychotic medications, effective treatment may no longer be available. The proposed legislation provides safeguards to the ward consistent with those in the mental health statutes while ensuring consistent use of the medication once approved.

Section 1:

Page 1, lines 12 through 13, amends section 25-03.1-18.2 to correct the list of medical practitioners to include all those with authority to prescribe mood stabilizers and antipsychotic medications.

Page 1, line 14 through 23, amends section 25-03.1-18.2 to remove subsection 1 and 2 which are superseded by amendments in chapter 30.1-28 in section 7 of this bill.

Section 2

Page 2, lines 29 through 30, amends section 30.1-26-01 to add a new subsection defining “refusal”. In proposing the definition, the Workgroup discussed situations where a ward’s verbal and physical responses may be contradictory; saying no but holding out a hand to take the medication. The definition clarifies that only a “clear and unequivocal” response is to be treated as a “refusal”.

Section 3

Page 4, lines 2 through 3, amends subsection n of subsection 2 of section 30.1-28-03 to correct the language describing the proposed ward’s limitations that may be addressed in the expert examiners statement.

Page 4, line 9, amends subsection 2 of section 30.1-28-03 to add the right to use or possess firearms to the list of rights which may be restricted if a guardianship is ordered. The addition is consistent with federal law which already requires the court to make specific findings.

Page 4, lines 10 through 13, amends subsection 2 of section 30.1-28-03 to add a new subsection clarifying that a request for authority to authorize involuntary treatment of a ward with prescribed medication may be made in the original petition for guardianship.

Section 4

Page 6, lines 12 through 15, amends section 30.1-28-04 to remove subsection 7 which is superseded by section 7 of this bill.

Section 5

Page 7, lines 19 through 29, amends section 30.1-28-12 to remove subsection 6 which is superseded by section 7 of this bill.

Section 6

Page 10, line 10, amends section 30.1-28-14 to correct citation references due to renumbering.

Section 7

Page 10, line 13 through Page 11, line 21, creates a new chapter to 30.1-28 requiring guardians to seek court authority to authorize the involuntary treatment of a ward with prescribed medication.

Subsection 1 permits a guardian to request authorization to consent to involuntary treatment of the ward with prescribed mood stabilizers or antipsychotic medications. The request may be made in the initial petition seeking guardianship or in a separate proceeding after the guardianship has been established.

Subsection 2 requires a report from the treating medical professional having the ability to prescribe mood stabilizers and antipsychotic medications and identifies the information that must be included in the report.

Subsection 3 provides a list of the factors, consistent with those in section 25-03.1-18.1, mental health commitment proceeding, to be considered by the court in determining whether to grant authorization for the involuntary treatment of a ward with prescribed medication.

Subsection 4 establishes that the burden of proof for involuntary treatment with prescribed medication is clear and convincing evidence, again consistent with the requirements under mental health statutes in chapter 25-03.1. Authority under the treatment order is for a period of 90 days unless otherwise specified by the Court. The ability to extend authority beyond 90 days is intended to prevent lapses in treatment with prescribed medication for those wards.

Section 8

Page 11, line 24 through Page 12, line 15, creates a new chapter to 30.1-28 to establish the hearing procedure for seeking authority to authorize involuntary treatment with prescribed medication.

Subsection 1 requires that a hearing be held within 3 business days from filing the petition. This can be extended if good cause is shown.

Subsection 2 requires the hearing to be held in the jurisdiction where the ward resides or is located.

Subsection 3 requires that the guardian and the ward be given the opportunity to testify. Testimony may also be received from any other interested person.

Subsection 4 closes the hearing except for those determined by the court to have a legitimate interest in the proceeding and requires the hearing to be held informally.

Subsection 5 authorizes discovery and subpoena power, requires receipt of relevant and material evidence, establishes a presumption in favor of the ward, and places the burden of proof on the petitioner.

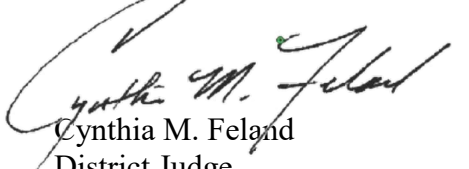
Section 9

Page 12, lines 18 through 26, creates a new chapter to 30.1-28 authorizing a court to issue an order granting a guardian continuing authority to authorize involuntary treatment with prescribed medication up to the length of the guardianship where evidence is presented that the ward will require treatment longer than 90 days and has a history of declining treatment which resulted in harm to the ward or others.

Section 10

Page 12, line 29 through Page 13, line 2, creates a new chapter to 30.1-28 to clarify that amendment to chapter 30.1-28 does not affect a physicians' ability to authorize the involuntary treatment with prescribed medications under chapter 25-03.1.

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**, 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**

Testimony Presented by Cynthia M. Feland
District Court Judge
March 15, 2023
Page **8** of **8**

Vavrovskv, Director of Social Services, Life Skills and Transition Center; and **Margo Haut**,
Guardian Angels Inc.