

# MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

2029

2005 SENATE JUDICIARY

SB 2029

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2029

Senate Judiciary Committee

Conference Committee

Hearing Date January 10, 2005

Tape Number	Side A	Side B	Meter #
1		X	1321 - 2890
1		X	3745 - 4129
Committee Clerk Signature <i>Mona L. Salberg</i>			

Minutes: Relating to the appointment of a successor guardian.

**Senator John (Jack) T. Traynor**, Chairman called the Judiciary committee to order. All Senators were present. The hearing opened with the following testimony:

**Testimony In Support of the Bill:**

**Rep. Delomore** - District 43 introduced the bill (meter 3841). This bill came out of the interim committee that I chaired, criminal justice along with **Sen. Trenbeath** and **Senator Triplett**.

Thank you goes to ND Guardianship task force who work hard in helping our committee come up with three quality bill drafts. Discussed the three bills (SBA 2028, SBA 2029, and SBA 2030) and how they work together.

**Vonett Rictor**, Leg Council (meter 1321) Discussed an overview of the bill.

**Sen. Nelson** questioned why we could not use the existing legislation for a successor guardianship. General discussion on definition of "successor guardianship" and discussion how this new legislation says that "Guardianship" is already established and we do not have to

establish this point again but rather the identification of a new "Guardian". Discussion of clerical description. **Sen. Traynor** discussed his own experience in his practice of the common practice of a will.

**Mr. Mel Webster**, Bismarck -Guardian Attorney (meter 1793) Testified in favor. Further clarified the bill and how it changes the current system.

**Sen. Trenbeath** discussed an amendment to delete a the end of 3 & 4 and creating a section 5. Discussion of presenting a notice by regular mail vs. service. Discussed expenses, public notices etc.. Discussion of an estate case.

**Mr. Bruce Murry**, ND Protection and Advocacy Group (meter 2656) attachment #1. Presented an amendment Att. #2.

**Testimony in Opposition of the Bill:**

None

**Senator John (Jack) T. Traynor**, Chairman closed the Hearing

**Senator John (Jack) T. Traynor**, Chairman reopened the Hearing. (tape 1, side 2, meter 3745)

Discussed preparing an amendment. Jeff to prepare enclosed amendments; submitted by Mr. Murry and adding a subsection.

**Senator John (Jack) T. Traynor**, Chairman closed the Hearing

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2029

Senate Judiciary Committee

Conference Committee

Hearing Date January 11, 2005

Tape Number	Side A	Side B	Meter #
1	x		920 - 1400
Committee Clerk Signature <i>Mira L Solberg</i>			

Minutes: Relating to the appointment of a successor guardian.

**Senator John (Jack) T. Traynor**, Chairman called the Judiciary committee to order. All

Senators were present. The committee opened with the following discussion:

Discussion (meter 920) Move to make amendments by **Sen. Nelson** and seconded by **Sen.**

**Trenbeath** all in favor.

**Sen. Nelson** move to Do Pass as twice amend seconded by **Sen. Trenbeath** all in favor, none oppose. Motion passes.

Carrier: **Sen. Nelson**





Date: 01/10/05  
Roll Call Vote #: 3

**2005 SENATE STANDING COMMITTEE ROLL CALL VOTES**  
**BILL/RESOLUTION NO. SB ~~2125~~ 2029**

Senate Judiciary Committee

Check here for Conference Committee

Legislative Council Amendment Number 50135.0201 0300

Action Taken Move to Do Pass as Amended twice

Motion Made By Sen. Nelson Seconded By Sen. Trenbeath

Senators	Yes	No	Senators	Yes	No
Sen. Traynor	X		Sen. Nelson	X	
Senator Syverson	X		Senator Triplett	X	
Senator Hacker	X				
Sen. Trenbeath	X				

Total (Yes) 6 No 0

Absent 0

Floor Assignment Sen. Nelson

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE**

**SB 2029: Judiciary Committee (Sen. Traynor, Chairman) recommends AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2029 was placed on the Sixth order on the calendar.

Page 1, line 15, remove "If a hearing is not requested, the court may appoint a"

Page 1, remove line 16

Page 1, line 19, after the period insert "The public administrator or corporate guardian shall then provide written notice of the motion to the state office of the protection and advocacy project, along with the contact information for each ward and proposed guardian.

5."

Renumber accordingly

2005 HOUSE JUDICIARY

SB 2029

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2029

House Judiciary Committee

Conference Committee

Hearing Date 2/14/05

Tape Number	Side A	Side B	Meter #
1	xx		0-10.3
1	xx		43-45
Committee Clerk Signature <i>Al Penrose</i>			

Minutes: 12 members present, 2 members absent (Rep. Bernstein & Rep. Charging).

**Chairman DeKrey:** We will open the hearing on SB 2029.

**Representative Lois Delmore:** I was the chair of the Interim Criminal Justice committee. The first two bills (SB 2029 and SB 2030) came out of that committee. They center on guardianship appointment, successor guardian as well as filing of reports by guardians and conservators.

Vonette Richter will explain the two bills in greater detail. There is still one more bill, in the Senate Appropriations Committee.

**Chairman DeKrey:** Thank you. Further testimony in support.

**Vonette Richter, LC:** I staffed the Interim Criminal Justice Committee. The Committee was charged with studying guardianship services issues, and there is another bill dealing with guardianship services. These two bills, SB 2029 and SB 2030 were two bills that kind of resulted from that study, that even though they weren't within the main scope, they are essentially procedural issues dealing with the guardianship process. The first bill, SB 2029, sets

out a process in code for the appointment of a successor guardian. The committee heard testimony that there are frequently times in the guardianship process where there is a need to appoint a successor guardian, either because of retirement or death of a guardian, or some other reason why that person can't continue to serve as guardian. The bill you have is about the procedure, as far as the notice requirement, in subsection 4, there is a little change from standard notice procedure, provides that if a current or former guardian serves as a public administrator or corporate guardian with more than 10 wards, the notice of motion and motion may be served by first class mail. In the Senate Judiciary Committee, the next sentence was added to that bill, starting on line 18 provides that the public administrator or corporate guardian shall then provide written notice of the motion to the state office of the Protection and Advocacy Project, along with contact information for each ward and proposed guardian.

**Chairman DeKrey:** Why did the Senate pick the P&A.

**Vonette Richter, LC:** I'm not sure.

**Chairman DeKrey:** Thank you. Further testimony in support of SB 2029.

**Melvin Webster, Attorney:** A good portion of my practice involves the area of guardianship. I appear urging you to support SB 2029. This bill really doesn't make any substantive changes in the current law. It just clarifies what is permissible under Rules of Court. The one substantive change referred to is in the notice section, which provides that for a public administrator or a corporate guardian, notice can be given by first class mail. To balance that change, there was an amendment added to the bill that Protection and Advocacy must also be notified. Truthfully, I think the notification of Protection and Advocacy probably provides more protection for the ward, than merely sending out the notice to various family members. I know that they take this

very seriously. One of the difficulties in appointment of a successor guardian, frequently is serving the necessary individuals to whom notice is required under the code. To provide personal service sometimes you can send out a certified letter, and very frequently when you send out certified mail, restricted delivery, return receipt requested, one of the things that happens is the post office doesn't pay any attention to the fact that you've requested a restricted delivery and certified mail, and then you have to go through it two or three times. In addition, if you have someone who doesn't want to be served, which happens frequently, they just ignore the certified mail, and it's not picked up. Then it is necessary to have the sheriff or private process server serve. That can be an expensive process. It's not too expensive if you are dealing with one individual, but if you are a corporate guardian or public administrator and have 50, or in the case of Catholic Charities, I believe they have approx. 300 individuals, take the \$45-50 necessary to serve it privately, and now you are talking about a lot of money. That can get to be very expensive. This procedure, other than the notice change in paragraph 4, really does not change what is permitted under the Rules of Court in serving a motion.

**Chairman DeKrey:** Thank you. Further testimony in support.

**Bruce Murray, Protection & Advocacy Project:** Support (see written testimony).

**Chairman DeKrey:** Thank you. Further testimony in support, testimony in opposition. We will close the hearing.

(Reopened later in the same session).

**Chairman DeKrey:** What are the committee's wishes in regard to SB 2029.

**Representative Kretschmar:** I move a Do Pass.

**Representative Koppelman:** Second.

Page 4  
House Judiciary Committee  
Bill/Resolution Number SB 2029  
Hearing Date 2/14/05

**12 YES 0 NO 2 ABSENT**

**DO PASS**

**CARRIER: Rep. Delmore**

Date: 2/14/05  
 Roll Call Vote #: 1

2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
 BILL/RESOLUTION NO. 2029

HOUSE JUDICIARY COMMITTEE

Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken Do Pass

Motion Made By Rep. Kretschmar Seconded By Rep. Koppelman

Representatives	Yes	No	Representatives	Yes	No
Chairman DeKrey	✓		Representative Delmore	✓	
Representative Maragos	✓		Representative Meyer	✓	
Representative Bernstein	A		Representative Onstad	✓	
Representative Boehning	✓		Representative Zaiser	✓	
Representative Charging	A				
Representative Galvin	✓				
Representative Kingsbury	✓				
Representative Klemin	✓				
Representative Koppelman	✓				
Representative Kretschmar	✓				

Total (Yes) 12 No 0

Absent 2

Floor Assignment Rep. Delmore

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE (410)**  
February 14, 2005 11:30 a.m.

**Module No: HR-29-2749**  
**Carrier: Delmore**  
**Insert LC: . Title: .**

**REPORT OF STANDING COMMITTEE**

**SB 2029, as engrossed: Judiciary Committee (Rep. DeKrey, Chairman) recommends DO PASS (12 YEAS, 0 NAYS, 2 ABSENT AND NOT VOTING). Engrossed SB 2029 was placed on the Fourteenth order on the calendar.**

2005 TESTIMONY

SB 2029

Att #1

TESTIMONY - PROTECTION AND ADVOCACY PROJECT

SB 2029 - SENATE JUDICIARY COMMITTEE

HONORABLE JOHN TRAYNOR, CHAIRMAN

January 10, 2004, 10:45 a.m.

5

Chairman Traynor, and members of the Senate Judiciary Committee, I am Bruce Murry, an employee of the North Dakota Protection and Advocacy Project (P&A).

Protection and Advocacy has consulted extensively with Mr. Melvin Webster, primary spokesperson for this bill. We agreed corporate guardians with ten or more wards should give notice of successor guardianship proceedings to P&A. P&A would then facilitate the ward's understanding of the notice and informed decision-making about whether to request a hearing. The proposed amendment is attached.

Thank you for your consideration, and I suggest the committee amend the bill, and give the bill a "do pass" recommendation.

#2

PROPOSED AMENDMENTS TO SENATE BILL 2029:

Page 1, line 19, after "first-class mail." insert "The public administrator or corporate guardian shall then provide written notice of the motion to the state office of the protection and advocacy project, along with the contact information for each ward and proposed guardian."

Excerpts from 2005 Interim Criminal Justice Report for Senate Bill Nos. 2028, 2029, and 2030.

## **GUARDIANSHIP SERVICES STUDY**

The committee received testimony and information from a number of individuals and agencies involved in the area of guardianships and the need for guardianship services in the state. The committee also received extensive information from the North Dakota Guardianship Task Force, a group made up of representation from the Department of Human Services, the North Dakota Long Term Care Association, the State Bar Association of North Dakota, the Protection and Advocacy Project, the State Hospital, and numerous guardianship service provider organizations. The task force provided to the committee information regarding community education, petitioning and hearing, resources, guardians, court visitors, indigent individuals in need of guardians, and legislation. The committee's considerations focused on two issues--the guardianship services needs in the state and procedural guardianship issues.

### **Guardianship Services Needs in the State**

The committee received extensive information and testimony from the North Dakota Guardianship Task Force regarding the guardianship services needs in the state. According to the testimony, the Legislative Assembly has enacted a number of significant changes to the state's guardianship laws over the past 16 years, including separating guardianship law from conservatorship law, allowing for limited guardianships, changing the burden of proof from a preponderance of the evidence to clear and convincing evidence, changing the law relating to capacity versus incompetence, and requiring that alternative resource plans be considered. It was noted that the Legislative Assembly rejected the new changes to the Uniform Probate Code that dealt with guardianship in part because it was believed current North Dakota law was better than the proposed revisions to the Uniform Probate Code.

Guardianship, which is a court-appointed relationship between a competent adult and an individual who is not able to handle the individual's affairs, is not an automatic process. The testimony stressed that each individual's situation must be considered carefully and completely. A guardian is required to act in and represent the best interests of the ward, protect the ward and the ward's rights, and ensure that services are provided in the most normal and least restrictive means possible. According to the testimony, much of a guardian's time is spent talking with physicians, case managers, social workers, pastors, family members, or police officers on behalf of wards. It was noted that guardianship should be pursued only when alternative resources such as homemaker services, a representative payee for Social Security benefits, social services support, residential placements, and in-home services have been tried but are unsuccessful or not appropriate given the circumstances. According to the testimony, a guardian often must make very difficult decisions on behalf of a ward. It was noted that most wards do not have assets. Some wards have Social Security benefits or veterans' benefits that can be used but most are indigent.

The committee also received testimony that there are no statutory standards regarding the qualifications of guardians other than a guardian must be 18 years of age and competent. It was noted that Catholic Charities North Dakota, which is the only organization in the state providing corporate guardianship services, does have policies regarding the qualifications of guardians it hires. It was stressed that there is a need to develop statewide standards for guardians.

The committee received the results of a survey conducted by the North Dakota Guardianship Task Force. The purpose of the survey, which was conducted in early January 2004, was to help determine the need, standards and practices, and funding issues regarding guardianship services in the state. The task force received 141 responses to the survey and categories of respondents included family members, the legal profession, and social services. With respect to the issue of need, 57 percent of the respondents indicated guardianship needs for the populations served are not adequate and 50 percent of the respondents indicated it is difficult to find individuals who are willing to serve as guardians. The results indicated that family members are typically the first choice for guardians, but when a family member is not available, a public administrator assigned by a judge becomes the guardian. It was noted that a number of courts do not have a public administrator. The survey results also indicated that approximately 22 percent of the respondents indicated family members are generally not willing or able to serve as guardians. It was noted that as anticipated, over half of the survey respondents indicated they are seeing changes in the population needing guardianship services. Those changes are most identifiable in the elderly population, followed by individuals with mental illness, physical disabilities, and head and brain injuries. With regard to standards and practices for guardianship, approximately 25 percent of the respondents indicated they do not have an adequate knowledge of guardianship and the guardianship process and when asked if they have experienced any barriers or problems accessing or working with the legal system for guardianship, 35 percent indicated "yes" with the majority citing lack of funds and length of time for the process as barriers. Eighty-three percent of the respondents indicated that there should be minimum standards for individuals serving as guardians. The survey results also indicated the need for guardians to be serving in the best interests of the wards, citing accountability, knowledge of expectations, and to ensure and protect consumer rights and assets as important. Regarding the funding of guardianship services in the state, the survey results indicated that the ward or the ward's family pays for the legal costs of establishing the guardianship; however, when resources are not available, the guardianship establishment costs are being paid by pro bono services, state agencies, counties, the State Hospital, legal aid, nursing homes, charitable organizations, and the petitioner. It was noted that many respondents indicated that if resources are not available, the court is not petitioned and a guardian is not appointed.

To address the issues raised in the testimony regarding the need for guardianship services in the state, the committee considered a bill draft that required the Department of Human Services to contract with an entity to create and coordinate a unified system for the provision of guardianship services to vulnerable adults who are ineligible for developmental disabilities case management services. The system would be required to include a base unit funding level, provider standards, staff competency requirements, an emergency funding procedure to cover the costs of establishing needed guardianships, and guardians and training for guardians. The bill draft also provided for an appropriation of \$772,550. Testimony in explanation of the bill draft indicated

that the appropriation amount included \$247,000 for administrative costs, \$40,000 for training and standards, \$135,000 for court costs, and \$350,000 for guardianship services.

According to the testimony in support of the bill draft, \$772,550 is the minimum amount needed to provide training to guardians and guardianship services to 210 needy persons. The testimony indicated that the bill draft would provide guardianship services for those persons who are vulnerable but who are not developmentally disabled. The testimony further indicated that the rules that would be developed would include financial eligibility criteria. The appropriation would pay for guardianship services for an individual at a rate of \$5 per day. The services a guardian provides for \$5 per day include making legal decisions, securing housing, making health care decisions, and completing applications for services. The estimate that 210 individuals are in need of guardianship services is based upon the guardianship task force survey. Although Catholic Charities North Dakota is the only organization in the state providing corporate guardianship services, the bill draft would allow for organizations other than Catholic Charities North Dakota to contract with the Department of Human Services for the guardianship services.

### **Procedural Guardianship Issues**

During the course of the committee's study of guardianship services needs issues, several issues were raised regarding the guardianship process, including the procedure for the appointment of a successor guardian and the filing of annual reports by guardians and conservators.

Regarding the appointment of a successor guardian, the committee received testimony that state law does not provide for a procedure for the appointment of a successor guardian. There are frequently instances in which the appointment of a successor guardian is necessary, such as the death or resignation of a guardian. It was noted that the procedure for the appointment of a successor guardian is not the same as the procedure for the creation of the guardianship. When naming a successor guardian, there is not a need to repeat the entire guardianship proceeding because the determination that a guardian is necessary has already been made and therefore that part of the process does not need to be repeated for the appointment of a successor. The testimony indicated that a parent or guardian may name a successor guardian in a will or a coguardian may have been appointed at the time the guardianship was initially created. Testimony received from an attorney who practices in the area of guardianship law indicated that the procedures used by attorneys for the appointment of a successor guardian meet the requirements of guardianship statutes; however, it would be helpful if the statutes specifically provided for the appointment of successor guardians.

The committee considered a bill draft that established a procedure for the current guardian or any interested person to file a motion with the court for the appointment of a successor guardian. The bill draft provided that the notice of motion must include a statement that provides an opportunity for hearing, if requested. If a hearing is not requested, the court may appoint a successor guardian. It was noted that the procedure in the bill draft follows the procedure set forth in the North Dakota Rules of Court Rule 3.2. This rule provides for a motion accompanied by a brief and an affidavit signed by the existing guardian or someone with knowledge of the reasons a successor guardian is needed. The bill draft also contained a provision that provided if the guardian is a public administrator or a corporate guardian that serves more than 10 wards, the guardian is permitted to provide notice by publishing the motion and the notice of motion in a

newspaper of general circulation within the judicial district in which the court is located. Because of concerns that publication of a motion regarding the appointment of a successor guardian is a shortcut and a departure from statutory notice requirements, the bill draft was amended to provide that the motion and the notice of motion for a public administrator or a corporate guardian with more than 10 wards may be served by first-class mail.

Testimony in support of the bill draft indicated that the bill draft would be helpful in providing a statutory procedure for the appointment of successor guardians. The testimony indicated that the procedure in the bill draft is the procedure being used by attorneys in the state for the appointment of successor guardians. It was noted that although the procedure in subsection 4 of the bill draft is a departure from current statute, it is economical and at the same time protects the rights of individual wards. It was also noted that less than 10 percent of all successor guardianship appointments are contested. Other testimony indicated that because it is now possible to serve notice by fax and e-mail, allowing service by first-class mail is a satisfactory option.

Testimony in opposition to the bill draft expressed concern about the method of service provided for in subsection 4 of the bill draft. According to the testimony, the method of service--first-class mail--affects the due process of a ward if the ward's guardian has 10 or more wards. It was argued that this change would treat a ward with a corporate guardian differently than a ward with a private-party guardian. It was also argued that because wards of corporate guardians are often members of groups with specific disabilities, to treat such individuals differently than those with private guardians could create a perception of discrimination.

The committee also received testimony regarding the reporting requirements of guardians and conservators. According to the testimony, in about 99 percent of guardianship and conservatorship cases, the court requires an annual report; however, the requirement is not statutory. In addition, the testimony indicated that each judge has different practices for the filing and approval of reports causing a lack of predictability in the current system.

The committee considered a bill draft that provided for an annual report requirement for guardians and conservators. The bill draft also required the State Court Administrator's office to develop and provide a form that may be used to fulfill reporting requirements.

Testimony in support of the bill draft indicated that the bill draft would make it clear that the filing of an annual report is not the same as court approval of the report. It was noted that the bill draft makes it clear that court approval requires notice.

Testimony from the State Court Administrator's office indicated that the Council of Presiding Judges has not been satisfied with the handling of annual reports. It was noted that this bill draft is an attempt to clarify the procedure and provide direction to judges. According to the testimony, the judiciary is in agreement with moving forward with this idea. It was also noted that a standardized form would give information to the judges in a uniform format and make it easier to spot irregularities.

One committee member expressed concern that there has not been any harm identified which creates a need for this legislation. It was noted that requiring annual reports would take judicial discretion out of the process.

### **Recommendations**

The committee recommends Senate Bill No. 2028 to require the Department of Human Services to contract with an entity to create and coordinate a unified system for the provision of guardianship services to vulnerable adults who are ineligible for developmental disabilities case management services. The system is required to include a base unit funding level, provider standards, staff competency requirements, the use of an emergency funding procedure to cover the costs of establishing needed guardianships, and guardians and training for guardians. The bill also provides for an appropriation of \$772,550.

The committee recommends Senate Bill No. 2029 to establish a procedure for the current guardian or any interested person to file a motion with the court for the appointment of a successor guardian.

The committee recommends Senate Bill No. 2030 to provide for an annual report requirement for guardians and conservators. The bill draft also requires the State Court Administrator's office to develop and provide a form that may be used to fulfill reporting requirements.

TESTIMONY – PROTECTION AND ADVOCACY PROJECT

SB 2029 – HOUSE JUDICIARY COMMITTEE

HONORABLE DUANE DEKREY, CHAIRMAN

February 14, 2005 9:00 a.m.

Chairman DeKrey, and members of the House Judiciary Committee, I am Bruce Murry, a staff attorney for the North Dakota Protection and Advocacy Project (P&A).

Protection and Advocacy has consulted extensively with Mr. Melvin Webster, primary spokesperson for this bill. We agreed corporate guardians with ten or more wards should give notice of successor guardianship proceedings to P&A. P&A would then facilitate the ward's understanding of the notice and informed decision-making about whether to request a hearing.

Thank you for your consideration and I would be happy to answer any questions.