

**FISCAL NOTE**  
**Requested by Legislative Council**  
**02/05/2015**

Amendment to: SB 2168

- 1 A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2013-2015 Biennium		2015-2017 Biennium		2017-2019 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

- 1 B. **County, city, school district and township fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

	2013-2015 Biennium	2015-2017 Biennium	2017-2019 Biennium
Counties			
Cities			
School Districts			
Townships			

- 2 A. **Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

This bill relates to the process for appointing guardians and to the duties of guardians.

- B. **Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

Based on the committee discussions of how this bill will be implemented the Department of Human Services expects a nominal increase in costs for future bienniums related to this bill.

In addition the court system would include costs for the additional hearings. However this cost is not anticipated to be significant.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

- A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*
- B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*
- C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation or a part of the appropriation is included in the executive budget or relates to a continuing appropriation.*

**Name:** Paul R Kramer

**Agency:** Human Services

**Telephone:** 328-4608

**Date Prepared:** 02/05/2015

**FISCAL NOTE**  
**Requested by Legislative Council**  
**01/14/2015**

Bill/Resolution No.: SB 2168

- 1 A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2013-2015 Biennium		2015-2017 Biennium		2017-2019 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

- 1 B. **County, city, school district and township fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

	2013-2015 Biennium	2015-2017 Biennium	2017-2019 Biennium
Counties			
Cities			
School Districts			
Townships			

- 2 A. **Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

This bill relates to the process for appointing and duties of guardians.

- B. **Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

Section 3 provides that guardianships be reappointed by court order every five years.

The Department of Human Services expects increased costs relating to the re-establishment of guardianships requirement. However, assuming this re-establishment provision will begin five years from the effective date of the bill the increased costs are expected to begin after the 2017-19 biennium.

The court system would also incur costs for the additional hearings. However this cost is not anticipated to be significant and would not occur until 2019.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

- A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

- B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

- C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation or a part of the appropriation is included in the executive budget or relates to a continuing appropriation.*

**Name:** Don Wolf

**Agency:** ND Court System

**Telephone:** 328-3509

**Date Prepared:** 01/16/2015

**2015 SENATE HUMAN SERVICES**

**SB 2168**

# 2015 SENATE STANDING COMMITTEE MINUTES

## Human Services Committee Red River Room, State Capitol

SB 2168  
1/19/2015  
J# 22104

- ☐ Subcommittee  
☐ Conference Committee

Donald Mueller



### Explanation or reason for introduction of bill/resolution:

A bill relating to confidentiality of reports and personal information in guardianship proceedings; sections relating to petitions, guardians ad litem, reports, contents of court orders, service of orders and notice requirements in guardianship proceedings, emergency guardians, guardian duties and annual reports, and the appointment of a conservator.

### Minutes:

Attach #1: Testimony by Cynthia Feland

### Fiscal Note

**Chairman Judy Lee** was asked to sponsor SB 2168 by the court system.

**Cynthia Feland**, District Court Judge in the South Central Judicial District, provided testimony IN FAVOR of SB 2168. (attach #1). Break in oral testimony for questions thus far (14:07)

**Chairman Judy Lee** wanted to clarify that there was not a limit on the number of 5 year terms, but rather that there would be a review about whether or not that was an appropriate guardian to continue.

**Ms. Feland** responded that we looked at what would be an appropriate timeframe for the guardianship to come before the court again. Five years was a good gauge because the court would also have an opportunity to review the monitoring going on. We don't want them in an infinite situation, but want to do a more meaningful assessment then what is currently provided to the court. At this point they don't come in on any basis. We also do outreach, where we may go to a nursing home or hospitals or wherever the ward is, to ensure that when we are giving the authority to someone, they are managing it in an appropriate fashion. It gives the court the ability to assess whether or not the current guardian is doing what the guardian is to be doing.

**Senator Howard Anderson, Jr.** (16:10) stated two things he saw; the ability to subpoena the people who have written reports, and also have court review cases every 5 years. Having we given consideration whether the courts have time for this.

**Ms. Feland** indicated that the court has the responsibility to oversee these things and needs to make time. If we have time to give the authority, then we need to take the time to review that authority. The court needs to take some responsibility for placing that ward in care of another person or entity, so it is important to have that review process. It won't take a long time. The courts are specifically requesting this. It was not a provision that came from the work group, but through the judicial conference, that we need some monitoring process.

**Senator Dever** pointed out the fiscal note speaks to this section and there are no numbers in the fiscal note because it is 5 years out. There must be some cost associated to that.

**Chairman Judy Lee** noted the fiscal note, although there is no fiscal impact at this time.

**Senator Dever** indicated that in 5 years, everyone who is under guardianship will be called into the court at that point.

**Ms. Feland** indicated they would do an implementation process. Right now, the clerk sends out notification, so courts would send out graduated process. Over 4,000 active cases in North Dakota, to do all those every 5 years in 1 year time frame would be significant problem.

**Senator Dever** stated the fiscal note is to the Department of Human Services.

**Chairman Judy Lee** indicated the guardianship of it. Also refers to the courts.

Return to oral/written testimony by **Judge Feland**. (19:58-23:43) Break in oral testimony for questions.

**Senator Howard Anderson, Jr.** asked what is a guardian ad litem.

**Ms. Feland** stated that a guardian ad litem is an attorney, not to represent what the ward expressly says they want, but in reviewing the situation, to provide a recommendation to the court as to what is in the wards best interest. In this case, they are categorized as alleged incapacitated persons because no determination has been made at the filing of the emergency petition as to whether or not they are incapacitated, as that is the decision for the court to make. It's the difference of do you represent what the individual want as opposed to what is in the individual's best interest. The problem we have now is when looking at emergency cases, we have an attorney. When looking at a petition for a long-term appointment of a guardian, the court is required to appoint a guardian ad litem. We end up having someone who is forced to be in the role of an attorney as opposed to a guardian ad litem where the court can't appoint the guardian ad litem because of the potential conflict between the two interests. It does create some problems. We lose that continuity because the judge who is assigned to do that emergency proceeding may not be the same judge who actually handles the guardianship proceedings. That's in part due to the short time factors that we are dealing with these appointments.

**Senator Howard Anderson, Jr.** asked if a guardian ad litem doesn't have to be an attorney.

**Ms. Feland** indicated that in these cases, they do. In other cases, they do not.

**Senator Howard Anderson, Jr.** indicated that some place the term attorney was changed to guardian ad litem.

**Ms. Feland** responded that's because we want to make it clear that they are not there to represent the expressed interest of the proposed ward or alleged incapacitated person. They are there to represent what is in their best interest, even if it is contradictory to what they are saying.

**Senator Howard Anderson, Jr.** asked in reference to the ad litem, is there a temporary or transitional? Is it until the courts appoint a permanent one?

**Ms. Feland** indicated right now we have two separate proceedings. You have an emergency guardianship, which usually leads to long term permanent guardianship. Sometimes the emergency goes away within 60 days so they don't need a permanent one. Sometimes the person is going to have surgery or they are going to be incapacitated for a short period of time and they are requesting that a guardianship be imposed. But then things go fine with the surgery and they let the emergency order expire. In other instances, you have someone who has some type of medical emergency, they've been found in their home, very physically and mentally vulnerable, they get placed in a hospital, and they are not able to make decisions themselves, so an emergency guardianship is sought, and there is a hearing process that has to take place if that emergency order is entered without hearing. But then later on after 90 days and was able to collect the information, the court can assess if that emergency situation equates to a permanent guardianship. We are trying to create a system with continuity. We looked at emergency provision, it was because of the process that was recommended in a huge report and committee only took portions of the recommendation, there wasn't time to look at the best way to do that. The hearing process takes care of the concerns with making that initial appointment guardian ad litem as opposed to attorney, and we make sure they understand they still have a right to an attorney, so for those people where there are concerns for other motives for why an emergency is sought, they still have the ability to make sure their interests are brought forward before the court, and it isn't just the guardian ad litem.

**Chairman Judy Lee** asked why would somebody not name someone power of attorney for that particular function.

**Ms. Feland** indicated that as a judge, you cannot provide legal representation. Some people are concerned that it could be a long standing situation because the surgeries that we are talking about where there is a very good likelihood that the person will not be able to meet there needs afterwards. One could argue that the power of attorney would work in those instances.

**Chairman Judy Lee** indicated they would be out of the will.

**Ms. Feland** answered it does happen. Emergencies have not been given, and then when they come in on the full petition hearing, it is more a fight about how Mom and Dad are



spending their inheritance. Those cases don't usually go very far, because if the person is capable of making decisions on their own. The Court looks at people not being able to take care of their own needs.

Return to oral/written testimony by **Judge Feland** (31:28-34:12). Break in oral testimony for questions.

**Senator Warner** asked who compensates the guardian ad litem?

**Ms. Feland** indicated it depends, the petitioner usually will indicate where they are making that request from. Ultimately the decision is left with the Court. Sometimes it is from the proposed wards or the alleged incapacitated persons assets, and other instances it is the petitioners themselves that bears that cost. In instances where the court has determined that the guardianship is not appropriate, then it is the petitioner's responsibility.

Return to oral written testimony by Judge Feland (35:25-40:50). End of oral testimony.

**Senator Warner** referred to her written testimony. Early in the document it mentions a visitor. How does the role of a visitor differ from that of the guardian ad litem?

**Ms. Feland** answered that the visitor is typically a person who has social work background. From their duties, they have specific delineated duties and responsibilities that they go through in making a determination as to whether guardianship is appropriate. The guardian ad litem looks at the legal side if it is in the best interest of this individual for a guardian to be appointed.

**Chairman Judy Lee** made comment that she was happy the advanced age wording was deleted.

End of Judge Feland testimony.

**Aaron Birst** with the Association of Counties testified IN FAVOR of SB 2168. Mr. Birst indicated that he sat on the committee along with Terry Traynor. This is one component and also multiple other areas that they are trying to modernize the statute.

**Josh Askvig**, AARP, testified IN FAVOR of SB 2168. They believe it provides additional protections for those the proposed wards.

**Judy Vetter**, President of the State Guardianship of North Dakota, spoke IN FAVOR of SB 2168. Our goal is to strengthen those laws.

**Mr. David Boeck**, Protection & Advocacy Project, wants to provide comments through the bill (45:40). Mr. Boeck had written testimony, but instead of submitting this testimony he provided information regarding the following areas in the bill:

- Page 2, lines 8-9, regarding the change in wording. (begin 46:45).
- Page 3, lines 8-13, he disagreed with the changes. (begin 48:00, end 49:39). Mr. Boeck disagrees with the idea disagreed that person who suddenly is dealing with emergency guardianship to have a lawyer represent that person.

**Chairman Judy Lee** asked do you see something that prevents them from doing that in statute.

**Mr. Boeck** responded that he doesn't see that, but the language "may not represent" may give the impression that once you are guardian ad-litem, you can't represent the individual.

**Chairman Judy Lee** think make sure someone's representation of the wards expressed interest as compared to what might be in their best interest, that there is a difference there. My impression of the language is that it is intended to recognize that someone should be available to represent the potential wards expressed interests, but it can't be done by someone who is supposed to represent what is truly in their bst interest because they may not be the same thing.

**Mr. Boeck** confirmed and agreed with that point.

**Mr. Boeck** then continued going through the bill detailing concerns or support by each line. This includes:

- (51:25) Page 4, lines 21-25, regarding subpoenas for guardian ad litem
- (52:06) Page 4, line 25, regarding cross examination, where physicians should be cross examined
- (52:54) Page 5, line 11-19, regarding confidentiality of reports is a welcome addition to the law. Mr. Boeck discusses the administrative rule 41.
- (55:00) Page 5, lines 28 to end of page, suggested 60 days rather than 90 days.

**Chairman Judy Lee** asked it depends on the asset the individuals have, and how to determine value, not always easy to find the assets. In order for this to be done, is this critical for you?

**Mr. Boeck** indicated that he could accept the 90 days but could certainly report within 60 days.

**Mr. Boeck** then continued going through the bill detailing concerns or support by each line. This includes:

- (56:52) Page 6, down to line 12. He provided his support for guardianships being 5 years, but would like effective for up-to-5 years.
- (57:25) Line 10, the same as stated above (5 year issue).
- (57:44) Page 6, Line 25, regarding services provided are identified.
- (59:35) Page 7, line 7, regarding the petitioner.
- (1:00:00), Page 7, Line 16, regarding the emergency guardianship, disagrees going from 60 days to 90 days; and also who represents the person.

(1:02:50)

**Chairman Judy Lee** indicated that the ward still has the right to hire an attorney that who would represent the ward. But are you talking about a situation in which an individual wouldn't have the capability or resources to do this?

**Mr. Boeck** responded yes.

**Mr. Boeck** then continued going through the bill detailing concerns or support by each line. This includes:

- (1:03:13) Page 8, Line 9, regarding 10 days instead of 5 for hearings.
- (1:04:24) Lines 25-27, regarding explaining what happened to the ward is very positive.

**Mr. Boeck** then addressed earlier questions about emergency guardianship and what they are for. He doesn't agree that they are appropriate when someone is going in for surgery. A person write a durable power of attorney that could be valid for a fixed period of time, or durable if it goes on. In his view, this is not an appropriate case for emergency. He has seen case where someone is incapacitated, unable to make decisions, and has no one able to come forward and make a decision; that's an emergency.

**Mr. Boeck** then continued going through the bill detailing concerns or support by each line. This includes:

- (1:06:05) page 9, Lines 3-9, regarding annual reports, are positive improvements
- (1:06:33) page 10, line 5, regarding advanced age, is a positive improvement.

End of Mr. Boeck testimony

#### OPPOSITION TO SB 2168

No opposed testimony

#### NEUTRAL TO SB 2168

No neutral testimony

Chairman Judy Lee asked that they review some of the concerns and find some area of shared consent.

#### Closed Public Hearing

# 2015 SENATE STANDING COMMITTEE MINUTES

**Human Services Committee**  
Red River Room, State Capitol

SB 2168  
1/21/2015  
22328

☐ Subcommittee  
☐ Conference Committee

Donald Mueller



## Explanation or reason for introduction of bill/resolution:

A bill relating to confidentiality of reports and personal information in guardianship proceedings; sections relating to petitions, guardians ad litem, reports, contents of court orders, service of orders and notice requirements in guardianship proceedings, emergency guardians, guardian duties and annual reports, and the appointment of a conservator.

## Minutes:

Attach #1: email from Judge Cynthia Feland  
Attach #2: Proposed amendments

These minutes are from committee work on January 21, 2015.

**Chairman Judy Lee** provided copies of an email from **Judge Cynthia Feland** (attach #1), which also includes the attached proposed amendments (attach #2).

The committee reviewed and amendments. Discussion starts (8:27)

**Chairman Judy Lee** if we approve them, our intern Femi could integrate into the bill.

**Senator Dever** asked if Mr. Boeck and the group are in agreement, or is there only partial agreement with the agreements.

**Chairman Judy Lee** said Mr. Boeck was going to work with the group.

**Senator Dever** was wondering if Mr. Boeck has reviewed the amendments and if he is okay with the proposed amendments.

**Chairman Judy Lee** indicated there wasn't full consensus.

**V. Chairman Oley Larsen** for clarification, from the testimony that Judge Cynthia Feland first put in, those are the first set of amendments, so the new ones are to complement those. So for example, on page 2, line 8, this first set of amendment suggestions is highlighted, and then on this amendment, the words change. So it appears these would meld Cynthia Feland's information from testimony with these together.

**Chairman Judy Lee** read email from Mr. Boeck, that he had some exceptions and would notify her. However, Chairman Judy Lee hasn't heard from him, so she sent email to him for clarification.

We will wait for Mr. Boeck. It would be hard not to support the workgroup, but the committee will not dismiss any importance.

End committee work on SB 2168 for today.

# 2015 SENATE STANDING COMMITTEE MINUTES

**Human Services Committee**  
Red River Room, State Capitol

SB 2168


1/27/2015

22678

☐ Subcommittee

☐ Conference Committee

Committee Clerk Signature



## Explanation or reason for introduction of bill/resolution:

A bill relating to confidentiality of reports and personal information in guardianship proceedings; sections relating to petitions, guardians ad litem, reports, contents of court orders, service of orders and notice requirements in guardianship proceedings, emergency guardians, guardian duties and annual reports, and the appointment of a conservator.

## Minutes:

Attach #1: Proposed Amendments by Judge Feland  
Attach #2: Proposed Amendments by David Boeck  
Attach #3: Amendments rejected by Proponents

These are minutes from Senate Human Services Committee on January 27, 2015, 3:30pm.

**Judge Cynthia Feland** stated they went through and discussed the amendments from her and also Mr. David Boeck, where there was consensus and where there were disagreements. (attach #1). amendments where we thought there was consensus, but not yet. If we go through what we agreed to. (attach #1).

**Judge Feland** walked through the amendments, line for line, and spoke of the areas of agreement (1:10-8:00)

**Mr. Boeck** provided his corrected set. (attach #2). Judge Feland went through these proposed changes. (8:00-10:13)

**Chairman Judy Lee** asked if Mr. Boeck had great angst?

**Mr. Boeck** indicated "emergency" word can be removed.

**Cynthia Feland** then went through Mr. Boeck's proposed amendments that they do not agree with. (attach #3) (10:32-16:30).

**Senator Howard Anderson, Jr.** could you ask the amendments that you agree on, and send them to Femi electronically and to Mr. Boeck, and then Mr. Boeck and Mr. Gangi can object.

**Chairman Judy Lee** stated it's okay if we take a moment if we have any other information that we want. There is a different of opinion regarding the ad litem and attorney.

**Mr. David Boeck** provided his side of the concerns, reviewing the line items in Attachment #3. (18:07-20:50)

**Chairman Judy Lee** indicated what the ward might want and what was in the best interest for the ward. She understands the potential conflict. She understands both sides of this disagreement.

**Mr. Boeck** the guardian ad litem could do that, it wouldn't necessarily happen.

**Chairman Judy Lee** indicated nothing necessarily happens.

**Mr. Boeck** stated the problem is that the guardian ad litem judges the proposed ward. Decides here's how your living, stating not making good decisions.

**Chairman Judy Lee** indicated that guardian ad litem doesn't have to tell someone what to do. We do have the right to make bad choices sometimes too. How much regulation do we get into here, and what is for the best interest.

**Mr. Boeck** the guardians' ad litem have no training to be a guardian ad litem. They don't know the alternatives to guardianship. They don't have special skills to communicate with someone who has an intellectual disability or speech impediment. We put that person in place to decide what's best.

**Chairman Judy Lee** asked how do we fix that.

**Mr. Boeck** indicated that the courts indicated they will do training. In the meantime, we don't have them trained. If you have to choose between attorney to represent the individual just for emergency guardianship or choose a guardian ad-litem who is not trained, given our acceptance of the adversary of justice, the proposed ward should have someone to advocate.

**Chairman Judy Lee** asked you think that will be accomplished by saying that the guardian ad litem can resign and be the representative of the ward.

**Mr. Boeck** answered it may be, in some instances.

**Chairman Judy Lee** stated she's not seeing a total connection. Chairman Judy Lee is not seeing that the threat to the well-being of the ward or the wards life and resources being managed appropriately is threatened by having a different professional step in. Chairman Judy Lee provided example of family situation, discussing relationship with one person and there is a change. Caring people appointed by the court as well as the ward itself have to develop the relationship.

**Mr. Boeck** presumes they need a guardian.

**Senator Howard Anderson, Jr.** asked that we move onto the other items.

**Chairman Judy Lee** stated page 5, that agreement has been met. Page 7 change from 60 days instead of 90 days. Mr. Boeck yields on the 90 days. The rest of page 7 is revisit of guardian ad litem. Guardian and guardian ad litem issue is what remains.

**Senator Howard Anderson, Jr.** asked about the petitioner shall cause notice to be served, and Mr. Boeck and Judge Feland indicated that those have been fixed and addressed.

**Chairman Judy Lee** requested that the amendments be pulled together, we understand the issue that Mr. Boeck presented, and then move on.

**Judge Feland** clarified one more area of concern. He wants to appoint both the guardian ad litem and attorney.

**Mr. David Boeck** if we have to appoint lawyer for ad litem, then appoint two and let one be the advocate to the person. If just an advocate for independent choices, then you only need one, which is what the current law is.

**Chairman Judy Lee** asked about Mr. Boeck's amendment reference.  
Page 7, line 27, line 28, and page 8.

**Mr. Boeck** stated he has covered this and has no further comment.

**Judge Feland** wants a unified system, for an emergency, you have a court appointed attorney, but for a petition hearing on a guardianship, you have a guardian ad litem. We are trying to build a seamless guardian ad litem process throughout. The court needs a report from a guardian ad litem, so that is why we are requesting that it maintain that guardian ad litem position throughout so we have that unified process. Judge Feland also discussed the emergency for attorney and guardian ad litem issues.

**Mr. Boeck** responded, a perspective from the court system that will make things run efficiently and smoothly. Sometimes respecting individual rights is not smooth system. Sometimes we have to pay attention to what is occurring with individuals.



# 2015 SENATE STANDING COMMITTEE MINUTES

Human Services Committee  
Red River Room, State Capitol

SB 2168  
2/2/2015  
22993

- ☐ Subcommittee  
☐ Conference Committee

Committee Clerk Signature

*Donald Mueller*

## Explanation or reason for introduction of bill/resolution:

A bill relating to confidentiality of reports and personal information in guardianship proceedings; sections relating to petitions, guardians ad litem, reports, contents of court orders, service of orders and notice requirements in guardianship proceedings, emergency guardians, guardian duties and annual reports, and the appointment of a conservator.

## Minutes:

Attach #1: Revised proposed amendments from Judge Feland

These are minutes from the Senate Human Services Committee on February 2, 2015.

Judge Cynthia Feland's revised proposed amendment was distributed to the Senate Human Services Committee. (attach #1).

**Senator Howard Anderson, Jr.** made a motion to ADOPT AMENDMENT, as provided most recently from Judge Feland. The motion was seconded by **V. Chairman Oley Larsen**.

## Discussion

**Senator Dever** asked what if it accommodates both Judge Feland and Mr. David Boeck's concerns.

**Chairman Judy Lee** indicated everything that they are in agreement too. The disagreement is in regards to two attorneys, as stated by David Boeck.

**V. Chairman Oley Larsen** indicated 60 to 90 days that Mr. Boeck concurred.

Roll Call Vote #1 to AMEND SB 2168  
6 Yes, 0 No, 0 Absent. Motion passed.

**Senator Dever** made a motion to DO PASS AS AMENDED for SB 2168. The motion was seconded by **V. Chairman Oley Larsen**. No discussion.

Senate Human Services Committee

SB 2168

02/02/2015

Page 2

Roll Call Vote #2 to DO PASS AS AMENDED SB 2168.

6 Yes, 0 No, 0 Absent. Motion passed.

**Senator Howard Anderson, Jr.** will carry SB 2168 to the floor.

February 2, 2015

TW  
2/2/15

PROPOSED AMENDMENTS TO SENATE BILL NO. 2168

Page 2, line 8, remove the overstrike over "~~The extent of~~"

Page 2, line 8, remove "Whether"

Page 2, line 8, remove "is"

Page 2, line 8, remove the overstrike over "~~including~~"

Page 2, line 9, remove the overstrike over "~~full authority, limited authority, or no authority~~"

Page 2, line 11, after "decisionmaking" insert "unless the petitioner is undecided on the extent of authority in any area, in which case the petition must state the specific areas in which the authority is sought"

Page 2, line 19, replace "under" with "as an attorney in fact or agent in"

Page 2, line 19, after "or" insert "as an agent in a"

Page 4, line 21, replace "if" with "whether"

Page 4, line 22, replace "report" with "reports"

Page 4, line 23, after the first underscored comma insert "guardian ad litem,"

Page 4, line 25, remove "on the matters stated in the report"

Page 5, line 14, remove "and"

Page 5, line 15, after "cause" insert ", and others authorized by court rule"

Page 5, line 18, replace "or" with an underscored comma

Page 5, line 19, replace "and the" with ", and others authorized by court rule. The"

Page 6, line 3, after the first "for" insert "up to"

Page 6, line 10, after "for" insert "up to"

Page 6, line 12, after the underscored period insert "The supreme court, by rule or order, shall provide for the regular review of guardianship in existence on the effective date of this Act."

Page 6, line 25, replace "petitioner" with "petitioning party, unless otherwise directed by the court,"

Page 7, line 7, replace "petitioner" with "petitioning party, unless otherwise directed by the court,"

Renumber accordingly

Date: 02/02 2015  
Roll Call Vote #: 1

**2015 SENATE STANDING COMMITTEE**  
**ROLL CALL VOTES**  
BILL/RESOLUTION NO. SB2168

Senate Human Services Committee

☐ Subcommittee

Amendment LC# or Description: latest version 15. 8110.02001 Title .03000

Recommendation: ☒ Adopt Amendment  
☐ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation  
☐ As Amended ☐ Rerefer to Appropriations  
☐ Place on Consent Calendar  
Other Actions: ☐ Reconsider ☐ \_\_\_\_\_

Motion Made By Anderson Seconded By Larson

Senators	Yes	No	Senators	Yes	No
Senator Judy Lee (Chairman)	✓		Senator Tyler Axness	✓	
Senator Oley Larson (V-Chair)	✓		Senator John M. Warner	✓	
Senator Howard C. Anderson, Jr.	✓				
Senator Dick Dever	✓				

Total (Yes) 6 No 0

Absent 0

Floor Assignment \_\_\_\_\_

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

Date: 02/02 2015  
Roll Call Vote #: 2

**2015 SENATE STANDING COMMITTEE**  
**ROLL CALL VOTES**  
BILL/RESOLUTION NO. SB 2168

Senate Human Services Committee

☐ Subcommittee

Amendment LC# or Description: 15.8110.02001 Title .03000

Recommendation: ☐ Adopt Amendment  
☒ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation  
☒ As Amended ☐ Rerefer to Appropriations  
☐ Place on Consent Calendar  
Other Actions: ☐ Reconsider ☐ \_\_\_\_\_

Motion Made By Dever Seconded By Larsen

Senators	Yes	No	Senators	Yes	No
Senator Judy Lee (Chairman)	✓		Senator Tyler Axness	✓	
Senator Oley Larson (V-Chair)	✓		Senator John M. Warner	✓	
Senator Howard C. Anderson, Jr.	✓				
Senator Dick Dever	✓				

Total (Yes) 6 No 0

Absent 0

Floor Assignment Anderson

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

**REPORT OF STANDING COMMITTEE**

**SB 2168: Human Services Committee (Sen. J. Lee, Chairman)** recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2168 was placed on the Sixth order on the calendar.

Page 2, line 8, remove the overstrike over "~~The extent of~~"

Page 2, line 8, remove "Whether"

Page 2, line 8, remove "is"

Page 2, line 8, remove the overstrike over "~~, including~~"

Page 2, line 9, remove the overstrike over "~~full authority, limited authority, or no authority~~"

Page 2, line 11, after "decisionmaking" insert "unless the petitioner is undecided on the extent of authority in any area, in which case the petition must state the specific areas in which the authority is sought"

Page 2, line 19, replace "under" with "as an attorney in fact or agent in"

Page 2, line 19, after "or" insert "as an agent in a"

Page 4, line 21, replace "if" with "whether"

Page 4, line 22, replace "report" with "reports"

Page 4, line 23, after the first underscored comma insert "guardian ad litem,"

Page 4, line 25, remove "on the matters stated in the report"

Page 5, line 14, remove "and"

Page 5, line 15, after "cause" insert ", and others authorized by court rule"

Page 5, line 18, replace "or" with an underscored comma

Page 5, line 19, replace "and the" with ", and others authorized by court rule. The"

Page 6, line 3, after the first "for" insert "up to"

Page 6, line 10, after "for" insert "up to"

Page 6, line 12, after the underscored period insert "The supreme court, by rule or order, shall provide for the regular review of guardianship in existence on the effective date of this Act."

Page 6, line 25, replace "petitioner" with "petitioning party, unless otherwise directed by the court."

Page 7, line 7, replace "petitioner" with "petitioning party, unless otherwise directed by the court."

Renumber accordingly

**2015 HOUSE HUMAN SERVICES**

**SB 2168**



# 2015 HOUSE STANDING COMMITTEE MINUTES

**Human Services Committee**  
Fort Union Room, State Capitol

SB 2168  
3/11/2015  
Job #24702

☐ Subcommittee  
☐ Conference Committee

Committee Clerk Signature

*Beckie Stuge*

## Explanation or reason for introduction of bill/resolution:

Relating to petitions, guardians ad litem, reports, contents of court orders, service of orders and notice requirements in guardianship proceedings.

## Minutes:

Testimony #1, #2

Chairman Weisz opened the hearing on SB 2168.

**Sen. Judy Lee:** Introduced and testified in support of the bill.

**Cynthia Feland:** South Central District Judge testified in support of the bill. (See Testimony #1)

30:53

**Chairman Weisz:** Are you saying if authority can't be determined then they get authority in a specific area?

**Judge Feland:** Right now they list areas, such as legal, financial, medical, and with this bill they would have to list degrees in these areas also (do they want full, limited or no authority in these areas). At the time the petition is filed they don't have enough information.

**Chairman Weisz:** What is the difference between limited and full authority.

**Judge Feland:** Each case would be different. If it's a limited authority situation, the court will delineate within that order how the authority is limited.

**Rep. Rich Becker:** On page 3, line 15, can you define "ad litem"? Also, is that person also a lawyer?

**Judge Feland:** In guardianship cases, a guardian ad litem is always a lawyer. In other area of the law it is not necessarily lawyer. It will depend on the provision.

**Rep. Rich Becker:** Is "ad litem" a new concept? Is it only in North Dakota?



34:34

**Judge Feland:** It is not new to North Dakota, nor is it exclusive to North Dakota. A guardianship case in North Dakota there will always be an ad litem appointed. This provision would make it clear that the individual still has the right to have their own counsel.

**Rep. Hofstad:** Is the visitor always a health care professional?

**Judge Feland:** It is defined by statute, there is a list of different types of professionals that can act in that capacity, usually someone with a social work or nurse background. Currently there isn't a provision that says a family member can act as the visitor.

**Rep. Hofstad:** It is defined in statute?

**Judge Feland:** It is.

**Rep. Fehr:** Subsection "n" on page 2, does this authorize a release of information? Or does a release have to be signed?

**Judge Feland:** If the petitioner has the ability to have access to any of this information that it be included in the petition.

39:50

**Judy Vetter, President for the Guardianship Association of North Dakota.**  
Testified in support of the bill.

I am also the administrator for Guardian Protective Services, a private non-profit corporation that provides guardianship services for vulnerable adults in North Dakota. I am part of the work group that is working on all the changes. A lot of thought and discussion was put in to each area. It's a good step forward in strengthening our guardianship laws in North Dakota.

**Tony Wilder, Executive Director of the State Bar Association:**  
Testified in support of the bill.

My association supports passage of SB 2168.

42:05

**David Boeck, Lawyer for the Protection and Advocacy Project**  
Testified in support of the bill. (See Testimony #2)

52:53

**Rep. Mooney:** Where the attorney serves as the legal guardian ad litem, are there no concerns for conflict of interest?

**Attorney Boeck:** That's a possibility, but some sparsely populated areas need to drive a distance for an attorney. Judges may appoint a guardian ad litem, and the if appointed lawyer has a conflict of interest under the rules of professional conduct that govern lawyers, that attorney would be required to tell the court that they have a conflict of interest.

**Rep. Mooney:** Isn't there a possibility of unscrupulous behaviors that aren't self-reporting, and adding the possibility of some extreme abuse?

**Attorney Boeck:** That is a risk.

**Rep. Mooney:** We are talking about particularly vulnerable people who would have a guardian ad litem.

**Attorney Boeck:** Yes, they would be particularly vulnerable. I haven't seen a petition for guardianship filed where the proposed ward wasn't compromised in some way. A lawyer who would be defending the proposed ward would be arguing that the guardian doesn't need full decision making authority in the area of finances. The ward could still make decisions based on an allowance extended from the guardian to the ward, restricting the guardians' control.

## **NO OPPOSITION**

57.33

**Chairman Weisz:** Judge Feland, can you give us more clarification on when a guardian ad litem is required?

**Judge Feland:** On an emergency case an attorney is always appointed. Then if a permanent/long term guardianship is sought, then three automatic appointments by the court must take place: a physician, a guardian ad litem and a court visitor. In the rural areas in every single emergency case, two attorneys will always be tied up in this case, because the attorney appointed cannot also be the guardian ad litem. If we make the visitor an ad litem, the court is still insuring that this individual's best interest is being represented, and now the attorney can continue being the guardian ad litem. We are trying to create consistency in a more cohesive type of procedure to be followed.

**Rep. Porter:** On page 3, line 8: are you reading that as a singular right? I'm reading it as all of the rights.

**Judge Feland:** When we made the proposal, a guardian ad litem was to be the sole person the court would appoint. We wanted to make sure the individual still had the right to retain their attorney. We felt it was important to specifically delineate that within the requirements. In the existing language it explains that the guardian ad litem is already required to explain: the nature and possible consequences of the proceedings, the right to which the proposed ward is entitled, legal options available. We felt it was very important that there was a specific explanation that they also had the right to an attorney.

**Chairman Weisz:** I think the point is in the current language, it says 'the right to which the proposed ward is entitled'.

**Judge Feland:** That would encompass all of those rights including the right that we specifically delineated here.

**Chairman Weisz:** We understand the new language. But, would it encompass all rights, not one single right?

**Judge Feland:** Yes, it would encompass all those rights: you have the right to contest the hearing, you have the right to call witnesses, you have the right to subpoena witnesses to testify... all those rights.

**Rep. Porter:** On page 6, line 5, talking about the copy provided by the guardian with the beginning inventory the ward and any interested persons designated by the court. In Mr. Boeck's testimony he felt it was necessary that court also be a recipient of that. But in reading this, they can designate themselves as a recipient if they see it necessary.

**Judge Feland:** The court needs to get that beginning inventory. The annual report would be of any use if you didn't have a beginning inventory to know where you started. It wasn't specifically required, we felt it was very important.

**Rep. Oversen:** On page 3 again, I going to agree that the singular 'right' should read 'rights'. if it is encompassing other rights, then it should be plural.

**Judge Feland:** You can change that. That's the current legislative status of the law. I think the way it's written that it does encompass that.

**Rep. Mooney:** Did you have a chance to look at the amendments that were proposed?

**Judge Feland:** Yes, just now as Mr. Boeck was going through them.

**Rep Mooney:** On page 8, line 7, have you had a chance to look at that?

**Judge Feland:** This is talking about dual representation. We first became aware of this when Mr. Boeck brought it up. We feel this is a duplication that should not be ordered in every one of these cases. It is an available option but it puts an extra layer of expense where it isn't warranted in many situations.

Chairman Weisz closed the hearing on SB 2168.

## 2015 HOUSE STANDING COMMITTEE MINUTES

**Human Services Committee**  
Fort Union Room, State Capitol

SB 2168  
3/17/2015  
Job #25021

☐ Subcommittee  
☐ Conference Committee

Committee Clerk Signature



### Minutes:

Chairman Weisz took up SB 2168. There were a few questions raised on this so I don't know if you need additional time. Main point of this bill was to separate the petitioner and have the guardian item to also be the person's attorney. Page 3, line 8 if that should say, "the right" versus "the rights". People seem understand this as rights I guess.

Rep. Porter: I was comfortable with Judge Feland's explanations of the bill and what it was doing and how the courts were doing it. Even with the verbiage on page 3, line 8 that the explanation was suffice to me.

Chairman Weisz: Ok committee what are your wishes?

Rep. Porter: I move a Do Pass on SB 2168.

Rep. Fehr: Second.

ROLL CALL VOTE: 13 y 0 n 0 absent

MOTION CARRIED

Bill Carrier: Rep. Oversen

Date: 3-17-15  
Roll Call Vote #:

2015 HOUSE STANDING COMMITTEE  
ROLL CALL VOTES  
BILL/RESOLUTION NO. 2168

House Human Services Committee

☐ Subcommittee

Amendment LC# or Description: \_\_\_\_\_

Recommendation: ☐ Adopt Amendment  
☒ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation  
☐ As Amended ☐ Rerefer to Appropriations  
☐ Place on Consent Calendar  
Other Actions: ☐ Reconsider ☐ \_\_\_\_\_

Motion Made By Rep. Porter Seconded By Rep. Fehr

Representatives	Yes	No	Representatives	Yes	No
Chairman Weisz	✓		Rep. Mooney	✓	
Vice-Chair Hofstad	✓		Rep. Muscha	✓	
Rep. Bert Anderson	✓		Rep. Oversen	✓	
Rep. Dick Anderson	✓				
Rep. Rich S. Becker	✓				
Rep. Damschen	✓				
Rep. Fehr	✓				
Rep. Kiefert	✓				
Rep. Porter	✓				
Rep. Seibel	✓				

Total (Yes) 13 No 0

Absent 0

Floor Assignment Rep. Oversen

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

**REPORT OF STANDING COMMITTEE**

**SB 2168, as engrossed: Human Services Committee (Rep. Weisz, Chairman)**  
recommends **DO PASS** (13 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING).  
Engrossed SB 2168 was placed on the Fourteenth order on the calendar.

**2015 TESTIMONY**

**SB 2168**

Attach#1  
SB2168 01/19/15  
J# 22104

**Senate Bill 2168**  
**Senate Human Services Committee**

**Testimony Presented by Cynthia M. Feland**  
**District Court Judge**  
**January 19, 2015**

Chair Lee, members of the Senate Human Services Committee, I am Cynthia Feland, District Court Judge in the South Central Judicial District. In the fall of 2013, the Guardianship Workgroup, a multi-disciplinary group made up of stakeholders in the guardianship and conservatorship process, was created by Chief Justice VandeWalle and assigned the task of evaluating current guardianship and conservator statutes and procedures in light of the National Probate Standards. In reviewing our current statutes governing the guardianship and conservatorship processes, the Guardianship Workgroup identified and recommended a number of statutory amendments to improve and strengthen procedures in guardianship and conservatorship cases. These statutory amendments were reviewed by the Judicial Conference in November. All of the proposed amendments are contained in Senate Bill 2168.

**Section 1 - Petitions, Guardians Ad Litem, and Reports**

- Page 2, line 8-9, amends N.D.C.C. §30.1-28-03(2)(f), governing the provision in the petition related to degrees of authority, to provide that the petitioner must indicate the area(s) in which guardianship authority is sought, not the degree of authority sought.

The current statute requires the petitioner to indicate whether full, limited, or no authority is sought in each of the listed areas. At the time of petitioning, the petitioner frequently does not have sufficient information to request a particular degree of authority. The recommended degree of authority (full, limited, no authority) in each of the designated areas will still be included in the report of the court-appointed visitor [N.D.C.C. §30.1-28-03(6)(h)] and if appointment of a



guardian is appropriate, the court's order appointing a guardian would still set out the degree of authority conferred on the guardian [N.D.C.C. §30.1-28-04(2)(c)].

- Page 2, lines 17-22, amends N.D.C.C. §30.1-28-03(2) to add subdivisions (j), (K) and (l) requiring that any person with authority to act on behalf of the proposed ward be included in the petition. Subdivision (m) is added to ensure that lesser intrusive alternatives to a guardianship have been considered. Finally, subdivision (N) is added to require that any recent statements from physicians, mental health service providers, or other healthcare providers be submitted with the petition.
- Page 2, lines <sup>29-30</sup>~~23-25~~, amends N.D.C.C. §30.1-28-03(3) to add the requirement that hearings be scheduled "promptly" and that the proposed guardian attend the hearing unless excused by the court. Current statutory provisions do not explicitly require.
- Page 2, line 31 through 3, lines 1-15, amends N.D.C.C. §30.1-28-03(4) to address issues related to an attorney serving as a guardian ad litem and to add a new subdivision requiring the guardian ad litem to file a written report responding to the petition.

N.D.C.C. §30.1-28-03(3) requires that the court appoint an attorney to act as guardian ad litem for the proposed ward. The role of an attorney differs from that of a guardian ad litem. There is often confusion and potential ethical issues associated with the role of an attorney versus the role of a guardian ad litem. The traditional role of a guardian ad litem is to advocate for the best interests of the ward, rather than to represent the expressed interests of the proposed ward. Complications arise when the proposed ward seeks to retain the guardian ad litem as their individual counsel or retains a different attorney to represent the ward and the guardian ad litem

is allowed to withdraw. In either situation, the court does not have the input of the guardian ad litem as no response from the guardian ad litem is filed with the Court.

To dispel any confusion, the proposed amendments to subsection (4) would focus on the attorney's role and duties as *guardian ad litem* only. Included in the guardian ad litem's duties would be the duty to advise the proposed ward of the right to retain an attorney for purposes of legal representation. Under the proposed amendments, subsection (4)(c) would be amended to replace "representing" with "advocating for the best interests" of the proposed ward.

Additionally, it would explicitly provide that the attorney serving as guardian ad litem may not be retained to represent the proposed ward. This change is intended to help ensure that the role of the guardian ad litem is clear and conflicts of interest are avoided. The Guardianship

Workgroup considered the impact such a requirement would have in more rural communities and determined the proposal would not unduly burden a ward's ability to retain counsel.

Subsection (4)(d) adds the requirement that the guardian ad litem submit a report containing the guardian ad litem's response to the petition. Currently, there is no requirement for a written response to be filed with the clerk, although the filing of a response by the guardian ad litem is the common practice. The requirement for the filing of a written report would avoid delays by alerting the court and parties to contested issues.

- Page 4, lines 21-25, amends N.D.C.C. §30.1-28-03 to add subsection (7), which advises the parties that the physician's report and visitor's report will be considered by the court and that the court or any of the parties may issue subpoena(s) if cross-examination of either report is sought. As a matter of current practice, the physician rarely attends, and attendance by the visitor is sporadic which can result in hearings being continued due to confusion over which party bears

subpoenaing responsibilities. The amendment eliminates any confusion as to the party responsible for subpoenaing the physician or visitor and ensures that subpoenas are timely issued where cross-examination of the physician and/or visitor at a hearing is desired.

- Page 5, line 5, amend N.D.C.C. §30.1-28-03(10) to correct the prior revision of temporary guardian to emergency guardian.

### **Section 2 - Confidentiality**

Creates a new section to N.D.C.C. §30.1-28 to provide confidentiality for the physician and visitor reports; medical, psychological, and treatment information protected by federal law; and any financial account numbers related to the ward. The proposal is patterned, in part, after Section 307 of the Uniform Guardianship and Protective Proceedings Act. While confidentiality of discrete documents in guardianship proceedings is set out in other areas, it would be beneficial to have a general confidentiality provision in the guardianship chapter.

### **Section 3 – Order Appointing Guardian**

Amends N.D.C.C. §30.1-28-04(5) to require the guardian to file of a beginning inventory within 90 days of appointment as guardian and to provide a copy of the inventory to those interested parties specified by the court. The amendment would also create an expiration date for the guardian's authority unless a request to continue the guardianship is made.

Currently, no beginning inventory is required. The beginning inventory would provide a starting point for comparing expenditures during the guardianship.

Concerns have long been raised about the perpetual nature of guardian appointments. The proposed expiration date would give the court an opportunity to assess the necessity of the guardianship

continuing and to determine whether the current guardian should continue to act in that capacity or whether a new guardian should be appointed. Prior to the hearing to determine if the guardianship should continue, the court would have the authority to re-appoint a court visitor and/or guardian ad litem if deemed necessary.

#### **Sections 4 - Notice**

Amends N.D.C.C. §30.1-28-05(2) to include a requirement that the order appointing the guardian ad litem be served on the same parties as those entitled to notice of the petition, motion to terminate or motion to remove the guardian. This would include the ward or proposed ward and their spouse, parents or adult children; any person, corporation or institution serving as the ward's guardian, attorney in fact, representative payee for public benefits, or conservator.

#### **Sections 5 - Notice of Guardianship Proceedings**

Amends N.D.C.C. §30.1-28-09(1) and (2) to clarify that the petitioner is responsible for providing notice of a hearing for appointment, removal, alteration or termination of a guardianship.

#### **Section 6 - Emergency Guardian Notice of Guardianship Proceedings**

- Page 7, lines 17-24, contains no substantive change. Merely modifies for ease in understanding.
- Page 7, lines 24-25, amends N.D.C.C. §30.1-28-10.1(1) to extend the period of the appointment of an emergency guardian to ninety days and to appoint a guardian ad litem, not an attorney, for the alleged incapacitated person. N.D.C.C. §30.1-28-10.1 currently provides that the appointment of an emergency guardian may not exceed sixty days. Current experience reflects that the sixty-day time period is insufficient time for various activities related to the guardianship

to be accomplished. The amendment would extend the appointment to a maximum of ninety days, the time period included in the earlier temporary guardianship statute.

- Page 7, lines 26-28 and Page 8, line 2, amends N.D.C.C. §30.1-28-10.1 to provide for the appointment of a guardian ad litem rather than an attorney for the alleged incapacitated person in emergency guardianships. Under the present system, there is uncertainty regarding the status and role of the attorney upon expiration of the emergency guardianship. Appointment of the guardian ad litem at the time of an emergency petition allows for continuity as the same individual is then able to continue to advocate for the best interests of the alleged incapacitated individual throughout both the emergency guardianship and guardianship proceedings. Here again, the alleged incapacitated person would still have the ability to retain individual counsel.
- Page 7, lines 30-31 and Page 8, lines 6-7, amend N.D.C.C. §30.1-28-10.1(1) and (2) to provide that notices in emergency guardianship proceedings would be given to the spouse, if any, of the alleged incapacitated individual. Presently there is no requirement that the spouse be notified.
- Page 8, line 9, amends N.D.C.C. §30.1-28-10.1(2) to change the period for holding a hearing on an emergency petition from five days to ten days. Scheduling and conducting a hearing on an emergency petition within five days has proven problematic. Especially in the rural areas, five days is insufficient to appoint an attorney as guardian ad litem and for the guardian ad litem to meet with the alleged incapacitated person prior to the emergency hearing.
- Page 8, lines 10-15, amend N.D.C.C. §30.1-28-10.1 to create a new subsection (3) that would explicitly impose a duty on the emergency guardian to safeguard any assets held by the alleged incapacitated individual and authorize only those expenditures necessary for the support and care

of the individual. The amendment also requires that this duty be specifically delineated in the court's order appointing the emergency guardian.

**Section 7 – General Powers and Duties of Guardian**

- Page 8, lines 25-27, amends N.D.C.C. §30.1-28-12(5) to add a new subdivision to require the guardian to meet with an un-represented ward following the hearing and explain the contents of the court's order, including the extent of the guardian's authority.
- Page 9, lines 3-9, amends N.D.C.C. §30.1-28-12(8) to require more detailed information about the guardian's exercise of powers and duties within the last year and to clarify the status of the guardian's annual report. The current statute does not provide guardians with sufficient direction concerning the contents of the annual report. While a number of guardians provide the type of detail proposed by the amendments, others submit bare bones reports that provide insufficient information concerning the guardian's exercise of powers and duties. The amendments would strengthen the protections of the annual report by providing detail to enhance the court's and interested parties' ability to recognize areas of concern over the ward care or expenditures of the wards assets.
- Page 9, lines 13-16, amends N.D.C.C. §30.1-28-12(8) to clarify the status concerning the filing of the annual report to reflect that acceptance of the annual report for filing is a clerical function and does not constitute an adjudication or determination of the merits of the report.
- Page 9, lines 25-26, amends N.D.C.C. §30.1-28-12(9) to require that the annual report be distributed to any interested persons designated in the court's order. In many cases, the ward does not have any capacity to comprehend the appropriateness of the guardian's exercise of duties and

Testimony Presented by Cynthia M. Feland  
District Court Judge  
January 19, 2015  
Page 8 of 8

powers. The amendment would allow interested parties to request copies of the annual report at the time of the original appointment enhancing the detection of any malfeasance by the guardian.

**Section 8 – Conservator Appointment**

Page 10, line 5, amends N.D.C.C. §30.1-29-01(2)(a) to remove any reference to advanced age. Similar references were removed some time ago from guardianship statutes and should likewise be removed from N.D.C.C. §30.1-29-01(2)(a).

Respectfully Submitted:

Cynthia M. Feland  
District Judge

Guardianship Workgroup Members: Judge **Cynthia M. Feland**, Chair; **Mel Webster**, Bismarck; **Roger Wetzel**, Bismarck; **Leo Ryan**, Jamestown; **Jim Fitzsimmons**, North Dakota Legal Services; **Aaron Birst**, North Dakota Association of Counties; **Donna Byzewski**, Catholic Charities; **Michelle Gayette**, N.D. Department of Human Services; **Judy Vetter**, Guardian and Protective Services; **Sally Holewa**, State Court Administrator; **Donna Wunderlich**, Trial Court Administrator, Unit 3.

Attach #1  
01/21/15  
SB2168

**From:** Feland, Cynthia M.

**Sent:** Tuesday, January 20, 2015 12:01 PM

**To:** Lee, Judy E.

**Cc:** Ganje, Jim M.; Boeck, David; 'Aaron Birst'; 'Donna Byzewski'; Wunderlich, Donna L.; 'Jim Fitzsimmons'; 'Judy Vetter'; 'Leo Ryan'; 'Mel Webster'; Gayette, Michelle D.; Holewa, Sally; Traynor, Terry O.

**Subject:** Amendments to SB 2168

Senator Lee,

Following yesterday's hearing, members of the Guardianship Workgroup met with Mr. Boeck. Several of Mr. Boeck's suggestions would further enhance SB2168 and are included in the attached proposed amendments. The amendments do not contain any modifications to the role of attorney as guardian ad litem versus court appointed attorney for the alleged incapacitated person (emergency proceedings) or proposed ward (guardianship proceedings). The current language in the bill was the product of very length detailed discussions of the Workgroup in this area. After listening to Mr. Boeck's concerns, Workgroup members maintain that no modifications should be made to the current language in the this area.

Please do not hesitate to contact me if you wish to discuss further.

*Cynthia M. Feland*

Cynthia M. Feland  
District Judge  
514 East Thayer Avenue  
Bismarck, ND 58501  
(701) 222-6682



PROPOSED AMENDMENTS TO SENATE BILL NO. 2168

Attach 2  
01/21/15  
SB2168

Page 2, line 8, after "authority" insert "or a specific degree of authority"

Page 4, line 23, after the first underscored comma insert "guardian ad litem."

Page 4, line 25, remove "on the matters stated in the report"

Page 5, line 12, replace "A" with "Unless otherwise provided by court rule, a"

Page 5, line 17, after "and" insert ", unless otherwise provided by court rule."

Page 6, line 3, after "for" insert "up to"

Page 6, line 10, after "for" insert "up to"

Page 6, line 12, after the underscored period insert "The supreme court, by rule or order, shall provide for the regular review of guardianships in existence on the effective date of this Act."

Page 6, line 25, replace "petitioner" with "petitioning party, unless otherwise directed by the court."

Page 7, line 7, replace "petitioner" with "petitioning party, unless otherwise directed by the court."

Renumber accordingly

Page 2, lines 8-11

Current law:

§ 30.1-28-03

....

2. The petition for appointment of a guardian must state:

....

- f. The extent of the guardianship sought, including whether the nominated guardian seeks to have full authority, limited authority, or no authority in each area of residential, educational, medical, legal, vocational, and financial decisionmaking;

Proposed in **SB 2168**:

- f. ~~The extent of the~~Whether guardianship authority is sought, including whether the nominated guardian seeks to have full authority, limited authority, or no authority in each area of residential, educational, medical, legal, vocational, and financial decisionmaking;

Alternative **now** (1-27-2015) **proposed**:

- f. The extent of the guardianship sought, including ~~whether the nominated guardian seeks to have~~ full authority, limited authority, or no authority in each area of residential, educational, medical, legal, vocational, and financial decisionmaking; if the petitioner is undecided on the degree of decisionmaking in any area, the petition should specify those areas;

SB2168  
Attach #1  
01/27/15  
J# 22628

from David Boeck

Amendments intended to improve grammar and sentence structure

Proposed Amendments to Senate Bill 2168

Page 2, line 19, replace "under" with "as attorney-in-fact or agent in"

Page 2, line 19, after "or" insert "as agent in a"

#2  
01/27/15  
SB 2168  
JA 22678

SB 2168 provides new language that refers to persons "designated" in a power of attorney or health care directive. It does not identify to what the person is designated. My "correction" adds that the person in a power of attorney is designated "attorney-in-fact" or "agent" and in a health care directive as an "agent." These terms are used in the State's Uniform Durable Power of Attorney Act, chapter 30.1-30, and the State's law on Health Care Directives, chapter 23-06.5. Examples of those terms in the Century Code include N.D.C.C. section 30.1-30-06 and N.D.C.C. section 23-06.5-02 (definition).

Page 4, line 21, replace "if" with "whether"  
grammar

Page 4, line 22, replace "report" with "reports"  
Agreement in number

Page 7, line 24, replace "the" with "an emergency"  
To distinguish between the emergency guardian and a guardian appointed after a full hearing

Renumber accordingly



Amendments rejected by the Proponents of SB 2168

Attach #3  
SB 2168  
01/27/15  
J# 22678

Proposed Amendments to Senate Bill 2168

Page 3, line 13, after "capacity" insert "unless the guardian ad litem resigns as guardian ad litem"

This addresses an issue discussed at the January 19 hearing. The proponents intend that after an attorney is appointed guardian ad litem, that attorney cannot withdraw (to represent the proposed ward) and remains guardian ad litem for the entire proceeding and any subsequent proceedings. I propose that the state that an attorney is allowed to resign as guardian ad litem to serve as the proposed ward's attorney.

Senator Lee asked why this provision should include the attorney's option to withdraw to represent the proposed ward. This is why. The proponents intend that the guardian ad litem would not be allowed to withdraw to represent the proposed ward. I believe the proponents have presented this interpretation to the judicial conference and established a consensus, so it is very likely a judge would interpret the statute as the proponents intend.

Page 5, line 14, remove "and"

Page 5, line 15, after "cause", insert ", and government officials and their agents exercising their official duties and functions"

The proponents and I agreed to the substance of this change. After seeing the written version, I realize the language used employs mistaken sentence structure that could lead to an unintended interpretation. There are multiple clauses in this sentence so placement of the inserted clause affects what is modified.

The text of the Supreme Court Administrative Rule 41, section 5 (c) (1), which the group intends to keep in force is: "This rule does not preclude access to court records by the following persons in the following situations ... federal, state, and local officials, or their agents, examining a court record in the exercise of their official duties and powers".

In this alternative, I used the language used from the court rule. There are other ways to achieve the intended result. For example,

## Amendments rejected by the Proponents of SB 2168

instead of the rule's language, the drafters could use the language from the court rule, "federal, state, and local officials, or their agents, examining a court record in the exercise of their official duties and powers".

Page 5, line 18, insert a comma immediately after "proceeding" and remove "or"

Page 5, line 19, insert a comma immediately after "counsel" and after "counsel" insert "government officials and their agents exercising their official duties and functions", and replace "and the" with "The"

This is the same concern addressed in the previous suggestion for page 5, lines 14 and 15.

Page 7, line 25, replace "ninety" with "sixty"

Page 7, line 26, remove the overstrike over "an attorney to"

Page 7, line 27, remove the overstrike over "represent" and remove "a guardian ad litem to advocate for the best interests of"

Page 7, line 28, after the first "proceeding" insert "and a guardian ad litem to advocate for the ward's best interests in the proceeding"

\*Page 8, line 2, remove the overstrike and immediately after "attorney" insert "and"

These changes to pages 7 and 8 support the current law that directs a court to appoint an attorney for the proposed ward in an emergency guardianship proceeding. This also retains the proponents' position that the court should appoint a guardian ad litem for the emergency proceeding. So a court would be appointing both an attorney to represent the proposed ward and a guardian ad litem to advocate for the "best interests" of the proposed ward.

As I explained at the Committee hearing, guardians ad litem in guardianship proceedings are not specially trained in how to communicate effectively with a proposed ward who has an intellectual disability, diminished capacity, or other disabilities in communications or cognitive processing. Guardians ad litem do not have to be trained in realistic alternatives to guardianships.

## Amendments rejected by the Proponents of SB 2168

I am assured the court will establish qualifications for guardians ad litem in guardianship proceedings and will impose mandatory training. This would be a very significant improvement in the system. But until that happens, we have to rely upon the law as it exists ... without specific standards for guardianship proceedings.



J# 22993

Attach #1

~~01/20/2015~~

SB2168

02/02/2015

email attachment  
from Judge  
Feland.

PROPOSED AMENDMENTS TO SENATE BILL NO. 2168

Page 2, line 8, remove the overstrike over "~~The extent of~~"

Page 2, line 8, remove "Whether"

Page 2, line 8, remove "is"

Page 2, line 8, remove the overstrike over "~~including~~"

Page 2, line 9, remove the overstrike over "~~full authority, limited authority, or no authority~~"

Page 2, line 11, after "decisionmaking" insert "unless the petitioner is undecided on the extent of authority in any area, in which case the petition must state the specific areas in which authority is sought"

Page 2, line 19, replace "under" with "as an attorney in fact or agent in"

Page 2, line 19, after "or" insert "as an agent in a"

Page 4, line 21, replace "if" with "whether"

Page 4, line 22, replace "report" with "reports"

Page 4, line 23, after the first underscored comma insert "guardian ad litem,"

Page 4, line 25, remove "on the matters stated in the report"

Page 5, line 14, remove "and"

Page 5, line 15, after "cause" insert ", and others authorized by court rule"

Page 5, line 18, replace "or" with an underscored comma

Page 5, line 19, replace "and the" with ", and others authorized by court rule. The"

Page 6, line 3, after "for" insert "up to"

Page 6, line 10, after "for" insert "up to"

Page 6, line 12, after the underscored period insert "The supreme court, by rule or order, shall provide for the regular review of guardianships in existence on the effective date of this Act."

Page 6, line 25, replace "petitioner" with "petitioning party, unless otherwise directed by the court,"

Page 7, line 7, replace "petitioner" with "petitioning party, unless otherwise directed by the court,"

Renumber accordingly



**Senate Bill 2168  
House Human Services Committee**

**Testimony Presented by Cynthia M. Feland  
District Court Judge  
March 11, 2015**

Chairman Weisz, members of the House Human Services Committee, I am Cynthia Feland, District Court Judge in the South Central Judicial District. In the fall of 2013, the Guardianship Workgroup, a multi-disciplinary group made up of stakeholders in the guardianship and conservatorship process, was created by Chief Justice VandeWalle and assigned the task of evaluating current guardianship and conservator statutes and procedures in light of the National Probate Standards. In reviewing our current statutes governing the guardianship and conservatorship processes, the Guardianship Workgroup identified and recommended a number of statutory amendments to improve and strengthen procedures in guardianship and conservatorship cases. These statutory amendments were reviewed by the Judicial Conference in November. All of the proposed amendments are contained in Senate Bill 2168. During the Senate hearing in January, several suggestions were made by David Boeck of Protection and Advocacy. Following discussions between the Workgroup and Mr. Boeck, most of the suggestions were incorporated in to the legislation as it appears before you in Engrossed Senate Bill No. 2168.

**Section 1 - Petitions, Guardians Ad Litem, and Reports**

- Page 2, line 8-13, amends N.D.C.C. §30.1-28-03(2)(f), governing the provision in the petition related to degrees of authority, to provide that the petitioner must indicate the area(s) in which guardianship authority is sought, not the degree of authority sought.

The current statute requires the petitioner to indicate whether full, limited, or no authority is sought in each of the listed areas. At the time of petitioning, the petitioner frequently does not have sufficient information to request a particular degree of authority. The proposed amendment allows the petitioner to indicate the areas of authority sought without requiring the degree of authority to be listed when the petition is unsure on the appropriate degree of authority.

The recommended degree of authority (full, limited, no authority) in each of the designated areas will still be included in the report of the court-appointed visitor [N.D.C.C. §30.1-28-03(6)(h)] and if appointment of a guardian is appropriate, the court's order appointing a guardian would still set out the degree of authority conferred on the guardian [N.D.C.C. §30.1-28-04(2)(c)].

- Page 2, lines 19-27, amends N.D.C.C. §30.1-28-03(2) to add subdivisions (j), (K) and (l) requiring that any person with authority to act on behalf of the proposed ward be included in the petition. Subdivision (m) is added to ensure that lesser intrusive alternatives to a guardianship have been considered. Finally, subdivision (N) is added to require that any recent statements from physicians, mental health service providers, or other healthcare providers be submitted with the petition.
- Page 2, line 28 to Page 3, lines 1-2, amends N.D.C.C. §30.1-28-03(3) to add the requirement that hearings be scheduled "promptly" and that the proposed guardian attend the hearing unless excused by the court. Current statutory provisions do not explicitly require.
- Page 3, line 9-18, amends N.D.C.C. §30.1-28-03(4) to address issues related to an attorney serving as a guardian ad litem and to add a new subdivision requiring the guardian ad litem to file a written report responding to the petition.

N.D.C.C. §30.1-28-03(3) requires that the court appoint an attorney to act as guardian ad litem for the proposed ward. The role of an attorney differs from that of a guardian ad litem. There is often confusion and potential ethical issues associated with the role of an attorney versus the role of a guardian ad litem. The traditional role of a guardian ad litem is to advocate for the best interests of the ward, rather than to represent the expressed interests of the proposed ward. Complications arise when the proposed ward seeks to retain the guardian ad litem as their individual counsel or retains a different attorney to represent the ward and the guardian ad litem is allowed to withdraw. In either situation, the court does not have the input of the guardian ad litem as no response from the guardian ad litem is filed with the Court.

To dispel any confusion, the proposed amendments to subsection (4) would focus on the attorney's role and duties as *guardian ad litem* only. Included in the guardian ad litem's duties would be the duty to advise the proposed ward of the right to retain an attorney for purposes of legal representation. Under the proposed amendments, subsection (4)(c) would be amended to replace "representing" with "advocating for the best interests" of the proposed ward. Additionally, it would explicitly provide that the attorney serving as guardian ad litem may not be retained to represent the proposed ward. This change is intended to help ensure that the role of the guardian ad litem is clear and conflicts of interest are avoided. The Guardianship Workgroup considered the impact such a requirement would have in more rural communities and determined the proposal would not unduly burden a ward's ability to retain counsel.

Mr. Boeck raised concerns during the hearing in the Senate Human Services Committee that both an attorney and guardian ad litem should be appointed. Although the Workgroup had previously discussed at length the issue of appointed attorney v. guardian ad litem v. both, we did discuss the issue again at our meeting last week. Following additional discussion, the Workgroup

maintains that the guardian ad litem appointment is the best course. While appointing both would be ideal, it was determined to be an unnecessary cost that in most cases would be borne by the proposed ward whose resources are already limited in most cases. Further, the provision still allows for the proposed ward or alleged incapacitated person to retain counsel.

Subsection (4)(d) adds the requirement that the guardian ad litem submit a report containing the guardian ad litem's response to the petition. Currently, there is no requirement for a written response to be filed with the clerk, although the filing of a response by the guardian ad litem is the common practice. The requirement for the filing of a written report would avoid delays by alerting the court and parties to contested issues.

- Page 4, lines 24-28, amends N.D.C.C. §30.1-28-03 to add subsection (7), which advises the parties that the physician's report and visitor's report will be considered by the court and that the court or any of the parties may issue subpoena(s) if cross-examination of either report is sought. As a matter of current practice, the physician rarely attends, and attendance by the visitor is sporadic which can result in hearings being continued due to confusion over which party bears subpoenaing responsibilities. The amendment eliminates any confusion as to the party responsible for subpoenaing the physician or visitor and ensures that subpoenas are timely issued where cross-examination of the physician and/or visitor at a hearing is desired.
- Page 5, line 8, amend N.D.C.C. §30.1-28-03(10) to correct the prior revision of temporary guardian to emergency guardian.

**Section 2 - Confidentiality**

Creates a new section to N.D.C.C. §30.1-28 to provide confidentiality for the physician and visitor reports; medical, psychological, and treatment information protected by federal law; and any financial account numbers related to the ward. The proposal is patterned, in part, after Section 307 of the Uniform Guardianship and Protective Proceedings Act. While confidentiality of discrete documents in guardianship proceedings is set out in other areas, it would be beneficial to have a general confidentiality provision in the guardianship chapter.

**Section 3 – Order Appointing Guardian**

Amends N.D.C.C. §30.1-28-04(5) to require the guardian to file of a beginning inventory within 90 days of appointment as guardian and to provide a copy of the inventory to those interested parties specified by the court. The amendment would also create an expiration date for the guardian's authority unless a request to continue the guardianship is made.

Currently, no beginning inventory is required. The beginning inventory would provide a starting point for comparing expenditures during the guardianship.

Concerns have long been raised about the perpetual nature of guardian appointments. The proposed expiration date would give the court an opportunity to assess the necessity of the guardianship continuing and to determine whether the current guardian should continue to act in that capacity or whether a new guardian should be appointed. Prior to the hearing to determine if the guardianship should continue, the court would have the authority to re-appoint a court visitor and/or guardian ad litem if deemed necessary.

**Sections 4 - Notice**

Amends N.D.C.C. §30.1-28-05(2) to include a requirement that the order appointing the guardian ad litem be served on the same parties as those entitled to notice of the petition, motion to terminate or motion to remove the guardian. This would include the ward or proposed ward and their spouse, parents or adult children; any person, corporation or institution serving as the ward's guardian, attorney in fact, representative payee for public benefits, or conservator.

**Sections 5 - Notice of Guardianship Proceedings**

Amends N.D.C.C. §30.1-28-09(1) and (2) to clarify that the petitioner is responsible for providing notice of a hearing for appointment, removal, alteration or termination of a guardianship.

**Section 6 - Emergency Guardian Notice of Guardianship Proceedings**

- Page 7, lines 23-30, contains no substantive change. Merely modifies for ease in understanding.
- Page 7, lines 30-31, amends N.D.C.C. §30.1-28-10.1(1) to extend the period of the appointment of an emergency guardian to ninety days and to appoint a guardian ad litem, not an attorney, for the alleged incapacitated person. N.D.C.C. §30.1-28-10.1 currently provides that the appointment of an emergency guardian may not exceed sixty days. Current experience reflects that the sixty-day time period is insufficient time for various activities related to the guardianship to be accomplished. The amendment would extend the appointment to a maximum of ninety days, the time period included in the earlier temporary guardianship statute.
- Page 8, lines 1-3, and line 8, amends N.D.C.C. §30.1-28-10.1 to provide for the appointment of a guardian ad litem rather than an attorney for the alleged incapacitated person in emergency guardianships. Under the present system, there is uncertainty regarding the status and role of the



attorney upon expiration of the emergency guardianship. Appointment of the guardian ad litem at the time of an emergency petition allows for continuity as the same individual is then able to continue to advocate for the best interests of the alleged incapacitated individual throughout both the emergency guardianship and guardianship proceedings. Here again, the alleged incapacitated person would still have the ability to retain individual counsel.

- Page 8, lines 5-6 and lines 12-13, amend N.D.C.C. §30.1-28-10.1(1) and (2) to provide that notices in emergency guardianship proceedings would be given to the spouse, if any, of the alleged incapacitated individual. Presently there is no requirement that the spouse be notified.
- Page 8, line 15, amends N.D.C.C. §30.1-28-10.1(2) to change the period for holding a hearing on an emergency petition from five days to ten days. Scheduling and conducting a hearing on an emergency petition within five days has proven problematic. Especially in the rural areas, five days is insufficient to appoint an attorney as guardian ad litem and for the guardian ad litem to meet with the alleged incapacitated person prior to the emergency hearing.
- Page 8, lines 16-21, amend N.D.C.C. §30.1-28-10.1 to create a new subsection (3) that would explicitly impose a duty on the emergency guardian to safeguard any assets held by the alleged incapacitated individual and authorize only those expenditures necessary for the support and care of the individual. The amendment also requires that this duty be specifically delineated in the court's order appointing the emergency guardian.

**Section 7 – General Powers and Duties of Guardian**

- Page 9, lines 1-3, amends N.D.C.C. §30.1-28-12(5) to add a new subdivision to require the guardian to meet with an un-represented ward following the hearing and explain the contents of the court's order, including the extent of the guardian's authority.
- Page 9, lines 9-17, amends N.D.C.C. §30.1-28-12(8) to require more detailed information about the guardian's exercise of powers and duties within the last year and to clarify the status of the guardian's annual report. The current statute does not provide guardians with sufficient direction concerning the contents of the annual report. While a number of guardians provide the type of detail proposed by the amendments, others submit bare bones reports that provide insufficient information concerning the guardian's exercise of powers and duties. The amendments would strengthen the protections of the annual report by providing detail to enhance the court's and interested parties' ability to recognize areas of concern over the ward care or expenditures of the wards assets.
- Page 9, lines 19-20, amends N.D.C.C. §30.1-28-12(8) to clarify the status concerning the filing of the annual report to reflect that acceptance of the annual report for filing is a clerical function and does not constitute an adjudication or determination of the merits of the report.
- Page 9, line 31 and Page 10, line 1, amends N.D.C.C. §30.1-28-12(9) to require that the annual report be distributed to any interested persons designated in the court's order. In many cases, the ward does not have any capacity to comprehend the appropriateness of the guardian's exercise of duties and powers. The amendment would allow interested parties to request copies of the annual report at the time of the original appointment enhancing the detection of any malfeasance by the guardian.



**Section 8 – Conservator Appointment**

Page 10, line 10, amends N.D.C.C. §30.1-29-01(2)(a) to remove any reference to advanced age.

Similar references were removed some time ago from guardianship statutes and should likewise be removed from N.D.C.C. §30.1-29-01(2)(a).

Respectfully Submitted:

Cynthia M. Feland  
District Judge

Guardianship Workgroup Members: Judge **Cynthia M. Feland**, Chair; **Mel Webster**, Bismarck; **Roger Wetzel**, Bismarck; **Leo Ryan**, Jamestown; **Jim Fitzsimmons**, North Dakota Legal Services; **Aaron Birst**, North Dakota Association of Counties; **Donna Byzewski**, Catholic Charities; **Michelle Gayette**, N.D. Department of Human Services; **Judy Vetter**, Guardian and Protective Services; **Sally Holewa**, State Court Administrator; **Donna Wunderlich**, Trial Court Administrator, Unit 3, **David Boeck**, Protection and Advocacy.

House Human Services Committee  
Sixty-Fourth Legislative Assembly of North Dakota  
Senate Bill No. 2168  
March 11, 2015

Chairman Weisz and Members of the House Human Services Committee: I am David Boeck, a State employee and lawyer for the Protection & Advocacy Project. The Protection & Advocacy Project is an independent state agency that acts to protect people with disabilities from abuse, neglect, and exploitation, and advocates for the disability-related rights of people with disabilities.

This bill offers some significant improvements to the guardianship law. Still, this committee should make some amendments to improve the enrolled bill. I have prepared proposed amendments and I will discuss those with you.

Page 3, line 8, this provision currently and as proposed would charge the guardian ad litem with the responsibility of explaining the single right of the proposed ward to the proposed ward. The statute does not identify the single "right." I propose an amendment to change the singular right to rights. Someone should explain the proposed ward's rights to the proposed ward, for whom this proceeding is completely new.

It should be unnecessary to identify each right. Undoubtedly, a form will be created for the guardian ad litem's report to the court. This form could easily list rights, e.g., the right to hire and be represented by an attorney, the right to confront witnesses against the proposed ward,

the right to cross-examine witnesses including the appointed physician or clinical psychologist and the appointed visitor who have submitted reports to the court, the right to testify, the right to present evidence, the right to subpoena witnesses and documents.

The proposed ward is unlikely to know these rights unless someone explains them. If the proposed ward has an attorney, the proposed ward's attorney could explain them. If the proposed ward does not have an attorney, the guardian ad litem is in the best position to explain them in advance of the hearing.

Page 3, lines 11 to 16, propose a change that goes backward from the current law. Presently, a guardian ad litem is able to resign as guardian ad litem and represent the proposed ward. The enrolled bill would unnecessarily limit the proposed ward's right to hire an attorney by disqualifying the guardian ad litem.

This would be especially oppressive for a proposed ward who lives in a small town or in rural North Dakota. Some small towns might have only one licensed attorney in private practice or none. It might be well over 20 miles to the closest available attorney.

If a guardian ad litem agrees to represent a proposed ward, the court might appoint another guardian ad litem or might decide a guardian ad litem would be unnecessary because the proposed ward had representation.

Page 6, lines 1-5 requires a newly appointed guardian to “provide” a beginning inventory and requires the newly appointed guardian to provide copies to the ward and others. It does not require the guardian to provide a copy to the court. This is easily remedied by requiring the guardian to “file” the beginning inventory.

In 2013, the Legislature amended the law and, among other things, required the court to appoint an attorney to represent the proposed ward whenever the court had appointed an emergency guardian without advance notice to the proposed ward. This is a very valuable protection for a ward in the circumstances. There are not sufficient reasons to abandon this safeguard.

An emergency guardianship could immediately deprive the proposed ward of total control over all personal decisions. An ex parte emergency guardianship deprives the proposed ward of all opportunity to make a case to the judge in the first instance. Before the proposed ward could ever present a case to the judge, the judge would already have acted on the ex parte petition. The judge would already have been persuaded the need was so extreme as to require emergency action. The proposed guardian would need an appointed attorney unless the proposed ward could readily retain legal representation.

Thank you. Please let me know if you have any questions.

Proposed Amendments to Senate Bill 2168

Page 3, line 8, replace "right" with "rights"

Page 3, line 12, remove the overstrike over the first "the"

Page 3, line 12, remove ". The"

Page 3, line 12, overstrike "appointed attorney"

Page 3, line 15, remove "serving as legal guardian ad litem may not represent"

Page 3, line 16, remove "the proposed ward or ward in a legal capacity"

Page 6, line 2, replace "provide" with "file"

Page 8, line 7, after the period, insert:

"If the court appoints an emergency guardian without prior notice to the alleged incapacitated person, the court shall appoint an attorney to represent the individual in the proceeding. A guardian ad litem shall resign as guardian ad litem if the guardian ad litem and the alleged incapacitated individual agree that the guardian ad litem shall directly represent the incapacitated individual. Upon resignation of a guardian ad litem, the court may appoint a different attorney to serve as guardian ad litem.

3."

Page 8, line 16, overstrike "3." and insert immediately thereafter "4."

Page 8, line 22, replace "4." with "5."

Page 8, line 24, remove "5." and insert immediately thereafter "6."

Renumber accordingly