

2019 SENATE JUDICIARY

SB 2072

2019 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Fort Lincoln Room, State Capitol

SB 2072
1/8/2019
#30519 (30:51)

☐ Subcommittee
☐ Conference Committee

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| Committee Clerk: Meghan Pegel |
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Explanation or reason for introduction of bill/resolution:

A BILL for an Act to amend and reenact sections 30.1-27-01, 30.1-27-02, 30.1-27-05, 30.1-27-06, 30.1-27-07, 30.1-27-08, 30.1-27-09, and 30.1-27-11 of the North Dakota Century Code, relating to guardianship of minors; and to repeal sections 30.1-27-03, 30.1-27-04, 30.1-27-10, and 30.1-27-12 of the North Dakota Century Code, relating to guardianships of minors.

Minutes:

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| 1 Attachment |
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Chair Larson opened the hearing on SB 2072.

Cynthia Feland, District Court Judge in the South Central Judicial District, testifies in favor of bill (see attachment #1)

(12:05) Senator Myrdal: In Section 2 at what point would that information surface that the appointee in a will would not be appropriate? Who would that information potentially come from and where would it come?

Judge Feland: There are certain steps that the person who was sought to be appointed would have to bring forward themselves. They're signing an affidavit indicating they've never been investigated or convicted of any of these offenses as well as providing the background check when they're saying they're ready, willing and able to take over these duties. Typically, in your normal case, that would end it, but if there's a situation where things have changed- and unfortunately we find people don't always update their wills as often as they should- and a family member who has had no issues with drugs or other abuse issues that have never come out, may come out later. The parent had every intention of changing things and never got it done. The Workgroup is really concerned that in those situations, we cannot just have a carte blanche sign off on this. There had to be a mechanism where the court could look at those situations. If there are things come into play that make it very clear that this is something that could be harmful for the child, we wanted to make sure there was a mechanism within the law for the court to address those issues. That notice is going to go to all the individuals who would typically receive notice in those cases. It would bring it to a head in a way that the court could deal with it in a constructive fashion and ensure that it wasn't just people making statements. That intent was to make sure that the child was going to be put someplace that was safe. There aren't many of these cases. Of all the cases that were

filed this last year in the probate code, 14 of them would have stayed in the probate code under this provision. All of the rest of them are cases that should have been initiated.

(15:18) Vice Chairman Dwyer: How would a person know how to provide a criminal history record check report?

Judge Feland: There is a big movement to assist the average, public citizen in being able to use the court system themselves. On the Supreme Court web page, there is a self-help tab. We like to make it uniform and easy for anybody to be able to use. There are forms and explanation sheets for doing a guardianship of an incapacitated adult. It walks you through how to fill out the forms, what needs to be filed, the services issues and the background check. That was something that was added last legislative session.

The Supreme Court adopted a rule where we set up requirements for people who were going to be guardians to ensure that they understood the authority and responsibilities placed on them for a very vulnerable population. They have to do the very same type of background check, and the process is explained. Part of the rule that the Supreme Court adopted went back through and addressed all of the cases that were currently existing prior to the legislative change for incapacitated adults. The rule is bringing all of those in conformance within a 5-year time frame. We're trying to streamline the process and making it easier for everybody to utilize. The hope is that when this bill passes and by the time it goes into effect in August, there will be forms online on the self-help page that will walk everybody through how to do it.

(18:25) Judge Feland continues her testimony (see attachment #1 page 5)

(28:30) Christina Sambor, Youthworks Representative, testifying in favor of the bill

Sambor: Through my background as an attorney and through all of the work we do with kids in vulnerable situations, I know these clarifications are something that Youthworks feels very strongly about and thinks it will be really helpful in making sure that the judicial procedures are clear for vulnerable youth in North Dakota.

Senator Luick: Moved a Do Pass.

Senator Myrdal: Seconded.

Senator Myrdal: They've done a tremendous job. I trust that this is as solid as it could be for our very vulnerable citizens.

A Roll Call Vote Was Taken: 6 Yeas, 0 Nays, 0 Absent. Motion carries.

Vice Chairman Dwyer will carry the bill.

**2019 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2072**

Senate Judiciary 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 Senator Luick Seconded By Senator Myrdal

| Senators | Yes | No | Senators | Yes | No |
|------------------|-----|----|---------------|-----|----|
| Chair Larson | X | | Senator Bakke | X | |
| Vice Chair Dwyer | X | | | | |
| Senator Luick | X | | | | |
| Senator Myrdal | X | | | | |
| Senator Osland | X | | | | |
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Total (Yes) 6 No 0

Absent 0

Floor Assignment Vice Chairman Dwyer

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

REPORT OF STANDING COMMITTEE

SB 2072: Judiciary Committee (Sen. D. Larson, Chairman) recommends **DO PASS**
(6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2072 was placed on the
Eleventh order on the calendar.

2019 HOUSE JUDICIARY

SB 2072

2019 HOUSE STANDING COMMITTEE MINUTES

Judiciary Committee
Prairie Room, State Capitol

SB 2072
3/12/2019
33580

☐ Subcommittee
☐ Conference Committee

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| Committee Clerk: DeLores D. Shimek |
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Explanation or reason for introduction of bill/resolution:

Relating to guardianship of minors.

Minutes:

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| 1 |
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Chairman Koppelman: Opened the hearing on SB 2072.

Cindy Feland, District Court Judge, South Central Judicial District: (Attachment #1)
Read testimony. Went through each section of the bill. (:33-8:20)

Rep. McWilliams: Do we have a definition section in this chapter for relative?

Cindy Feland: Under section 27-20.02; so it references the provisions of the Uniform Juvenile Court Act. That is intended to make sure we have consistency between the two. So regardless of whether the provisions are being brought in under the probate code or under the juvenile court act to appoint a guardian in either place the same people are going to receive notification and it is the same relatives potentially that will be involved. We wanted to make sure there was that consistency. (9:40-11:00) Continued on Section 3.

Chairman K. Koppelman: What is the Guardianship work group?

Cindy Feland: I have the list on the last page of my testimony. These are the steady members that have been there and these people work really hard.

Chairman K. Koppelman: Would you explain to the committee what is a guardian ad litem versus a guardian.

Cindy Feland: It is an individual appointed by the courts to represent the best interest of the minor. They will also express to us what the minor wants, but they will not adequate the minors position if they do not believe it is in the best interest of the minor. They are an investigator; and they would get the information and then have to write a report. Sometimes they get sent out to get additional background information before making a determination. The guardian is basically taking over for the parent for whatever period of time it is. This would be a permanent situation until the child reaches the age of 18.

Rep. Paur: What is a testamentary guardian? Should the explanation be broadened?

Cindy Feland: No. To anybody that works in the probate code; some of these terms are terms and testamentary means you have a will. If something is in testate it means you didn't have a will so the only ones that are going to be handled are testamentary appoints where the parent has specifically listed in a will this is the person that they want to be the guardian. Continued with Section 4 through the end of the bill. (19:13-22:18).

Rep. McWilliams: Page 3, line 11 when it says the guardian ad litem fees must be paid from the estate of the deceased parent, if available. If they are not available is that just covered by the county?

Chairman K. Koppelman: I see a couple significant public policy changes. Under current law it says the court shall appoint a person nominated by the minor, if the minor is 15 years of age or older unless the court finds the appointment contrary to the best interests of the minor. What is wrong with that?

Cindy Feland: We will still have it, but it will not be here. It is simplifying the procedure. Here we are talking about a minor being able to say who they want, which is going to happen if we need to put it in juvenile court or if the minor contests who the parents have listed in this preceding, that then goes to juvenile court and all of that is hashed out there. These are supposed to strictly deal with probate cases where the parent has provided for a testamentary appointment; the proposed guardian that is being requested by the parent be the testamentary guardian agrees that they are going to do it and the court finds that it is in the best interest. A hearing isn't even required if everyone agrees. This is really a transfer and addressed in juvenile court.

Chairman K. Koppelman: Is there anything in statute saying that these kinds of provisions are going to be followed in juvenile court under those circumstances?

Cindy Feland: When you see the next bill and we go through all those details you will see how we have all those safe guards that are spelled out. It is hard to take these separately because they are really comingled. It is so helpful that you have them stacked next to each other. You can see how this is very confusing. Probate court was never intended to do juvenile guardianships. It was intended to deal with wills or assets.

Chairman K. Koppelman: On line 10, Page 3 it says the court shall appoint an attorney promptly to act as a guardian ad litem. Not all guardian ad litem has had to be attorneys. Would you address that?

Cindy Feland: It is a trend regarding guardianship cases. We are trying to maintain consistency. We have a guardian ad litem who is an attorney who represents the best interests of an incapacitated adult when we deal with that. so we are maintaining the consistency by having an attorney who is there to represent the best interest of the child in the probate court as well. If this goes to juvenile court, and is contested, and will get transferred over to juvenile court, there is a provision that is actually going to say if that attorney guardian ad litem wants to stay on we will keep him. Part of the composition of who

we had in this work group included a guardian ad litem in juvenile court who is not an attorney and after discussions it was felt this was the best way to accomplish this. Current there isn't a guardian ad litem appointed and currently there isn't anyone there at the court with an independent or objective view of what is in the best interest of the child. The court relies on those people who come in.

Chairman K. Koppelman: What portion of the sky would fall if the legislature were to amend this to delete the portion that says it has to be an attorney. You still have courts making these appointments and I suspect they are going to lean toward an attorney being this individual in most cases, but it would allow the leeway of the court to say here is a responsible competent party who wants to act in this capacity who may not be a practicing attorney. Is that OK?

Cindy Feland: Through the discussions guardian ad litem; it was intended to maintain that consistency with how we do all guardianship cases without changing how we did procedures in juvenile court. We were trying to maintain that consistency throughout the proceedings. Family law attorneys are very use to dealing with lay guardian's ad litem. People who work in the probate court have no idea what a lay guardian ad litem is as opposed to an attorney guardian ad litem.

Rep. Rick Becker: The language that is being struck on the bill on page 3, line 6, the court shall appoint a person nominated by the minor if they are fourteen or older unless it is contrary to the best interest. In the next bill it says the court may give substantial weight to the preference of the minor. Do you think those are two differing degrees of consideration?

Cindy Feland: No I don't. I actually think it makes it clearer for the court. Remember the Uniform Code wasn't something that was drafted to conform with any of our provisions. It was uniform to be applied to all the state that were willing to adopt it. Sometimes that can work well with certain types of statutes, but when you are dealing with family law issues, ND structure isn't necessarily like any other state.

Chairman K. Koppelman: When you talk about those best interest standards it is what is the best interest in the courts opinion or judgement.

Cindy Feland: It is always objectivity that is involved. You are required to make specific findings. When a court hasn't made specific findings or the court determines the court abused is discursion because of that then there is a mechanism to accomplish that.

Chairman K. Koppelman: I think when we box things in so tightly like guardian ad litem being an attorney we decrease the courts ability to exercise judgement if there are people that are competent and experienced and it may not be a lawyer.

Cindy Feland: We want to be careful how we word the terminology because they are very different things.

Chairman K. Koppelman: If on line 10, page 3 if it said if the court shall appoint a guardian ad litem with no specific qualifiers there. That probably wouldn't change practice for most courts anyway.

Cindy Feland: We will get arguments at court. If the committee were to give a directive to use both; we could work with legislative counsel to work on a proposed amendment to the provision that would clarify.

Chairman K. Koppelman: If you would do that I would certainly appreciate that.

Rep. McWilliams: On page 2, line 15-19 it says explaining the guardianship process; Is an attorney ad litem the best person to do this? Doesn't this language preclude the use of a counselor.

Cindy Feland: The intent behind the language was to maintain consistency with regard of how we do those adult cases. We want to make sure the minor understands the minor's rights. An attorney is able to provide legal information to the minor although that attorney cannot represent the minor. Section 5: Started (43:00-44:30).

Chairman K. Koppelman: Bottom of page 5, line 27 did you intent to say any person?

Cindy Feland: No we intended to say any person interested in the welfare of the minor. Any person is consistent with language we have had on being able to contest proceedings whether it be in juvenile court or an adult proceeding. Defined under the code we make sure it includes all of those individuals who can lodge a complaint. Sometimes you may have somebody who is very closely associated with the family that knows a lot of information and they would have the ability then, if they have an interest, in the welfare of the minor to be able to bring that information to the courts attention.

Chairman K. Koppelman: Person could be other than an individual.

Cindy Feland: Social Services potentially could. If there was someone acting in a capacity like a school counselor. If there was some other treatment provider bring it on behalf of an agency where they were aware of a report that was pending. It would also give juvenile court the ability if they have other information they could file that as well. Continuing on to Section 6. (46:23)

Rep. McWilliams: Why would we want to take away the notice?

Cindy Feland: Because you are not going to do things within juvenile court once that appointment takes place. That notice would take place in juvenile court. Other proceedings that would come up don't have anything to do with probate; they have to do with the guardianship itself, which really isn't properly handled within the probate procedures. Continued on Section 7: (47:40) Section 8 continued (49:00-50:00)

Rep. McWilliams: How often does this occur?

Cindy Feland: Very rarely. More frequent is where there isn't a will. Then you end up with those protested proceedings in the probate court where it was really never really intended.

Chairman K. Koppelman: How much of the juvenile courts time is spent on these kinds of issues versus delinquency or what would be criminal cases if in adult court?

Cindy Feland: You are not asking the right person. The vast part of our juvenile cases are handled by referees. If they demand a district judge, they hear the case; occasionally there is conflict issues where the district judge is involved. I will tell you when we did have a discussion that this cleaned up a lot of problems and lot of the things. I can't give you exact numbers.

Chairman K. Koppelman: By moving this to the juvenile court system and their discretion, you really moving it from district judges to referees.

Cindy Feland: I get assigned a lot of these cases and they want a district judge to hear the case. Discussed caseloads and the number of judges so there is no universal way that is done statewide. There is nothing worse for grandparents than sending them packing when they have spent all this money to file all of this paperwork in adult court only to be told you can't do this. You have to do this in juvenile court. They are pushed out and have to start all over again. We are trying to make this very clean and streamlined so you know exactly where to go.

Rep. McWilliams: Back to page 2, line 3; that section is pretty broad. How does that change from the definition we are using now?

Cindy Feland: This is broad, but you want to be careful about making things too restrictive. When something is not specifically defined in the code or there isn't a reference as to what definition you look at; courts are forced to struggle with it all the time. Everybody has their own definition they want the court to use. So we took a definition and we made for sure that we incorporated that here so was very clear. We wanted to make for sure that a notice was given to those individuals so that information would be brought forward.

Opposition: None

Neutral: None

Hearing closed.

2019 HOUSE STANDING COMMITTEE MINUTES

Judiciary Committee
Prairie Room, State Capitol

SB 2072
3/27/2019
34250

☐ Subcommittee
☐ Conference Committee

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|------------------------------------|
| Committee Clerk: DeLores D. Shimek |
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Explanation or reason for introduction of bill/resolution:

Relating to guardianship of minors.

Minutes:

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| 1 |
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Chairman Koppelman: Opened the meeting on SB 2072. Passed out proposed amendment (Attachment #1) This just tracks what we did on SB 2073.

**Motion Made to move the amendment removes the attorney references by Rep. Satrom
Seconded by Rep. McWilliams**

Voice vote carried.

Do Pass as Amended Motion Made by Vice Chairman Karls; Seconded by Rep. Satrom

Discussion:

Roll Call Vote: 12 Yes 0 No 2 Absent Carrier: Rep. McWilliams

Closed.

PROPOSED AMENDMENTS TO SENATE BILL NO. 2072

Page 3, line 10, replace "an attorney promptly to act as" with "a"

Page 3, line 10, after the first "litem" insert "promptly"

Page 3, line 21, remove "attorney serving as"

Renumber accordingly

Date: 3-27-19
Roll Call Vote #: 1

2019 HOUSE STANDING COMMITTEE
ROLL CALL VOTES 2072

House Judiciary Committee

☐ Subcommittee

Amendment LC# or Description: remove reference to attorney

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 SATROM Seconded By McWilliams

| Representatives | Yes | No | Representatives | Yes | No |
|---------------------|-----|----|------------------------|-----|----|
| Chairman Koppelman | | | Rep. Buffalo | | |
| Vice Chairman Karls | | | Rep. Karla Rose Hanson | | |
| Rep. Becker | | | | | |
| Rep. Terry Jones | | | | | |
| Rep. Magrum | | | | | |
| Rep. McWilliams | | | | | |
| Rep. B. Paulson | | | | | |
| Rep. Paur | | | | | |
| Rep. Roers Jones | | | | | |
| Rep. Satrom | | | | | |
| Rep. Simons | | | | | |
| Rep. Vetter | | | | | |
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Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

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

*Vain
Vote
Carried*

Date: 3-27-19
Roll Call Vote #: 2

2019 HOUSE STANDING COMMITTEE
ROLL CALL VOTES 2072

House Judiciary Committee

☐ Subcommittee

Amendment LC# or Description: 19.8009.01002.02000

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 Karls Seconded By Satrom

| Representatives | Yes | No | Representatives | Yes | No |
|---------------------|-------------------------------------|----|------------------------|-------------------------------------|----|
| Chairman Koppelman | <input checked="" type="checkbox"/> | | Rep. Buffalo | <input checked="" type="checkbox"/> | |
| Vice Chairman Karls | <input checked="" type="checkbox"/> | | Rep. Karla Rose Hanson | <input checked="" type="checkbox"/> | |
| Rep. Becker | <input checked="" type="checkbox"/> | | | | |
| Rep. Terry Jones | <input checked="" type="checkbox"/> | | | | |
| Rep. Magrum | <input checked="" type="checkbox"/> | | | | |
| Rep. McWilliams | <input checked="" type="checkbox"/> | | | | |
| Rep. B. Paulson | <input checked="" type="checkbox"/> | | | | |
| Rep. Paur | <input checked="" type="checkbox"/> | | | | |
| Rep. Roers Jones | <input checked="" type="checkbox"/> | | | | |
| Rep. Satrom | <input checked="" type="checkbox"/> | | | | |
| Rep. Simons | <input checked="" type="checkbox"/> | | | | |
| Rep. Vetter | <input checked="" type="checkbox"/> | | | | |
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Total (Yes) 12 No 0

Absent 2

Floor Assignment Rep. McWilliams

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

REPORT OF STANDING COMMITTEE

SB 2072: Judiciary Committee (Rep. K. Koppelman, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (12 YEAS, 0 NAYS, 2 ABSENT AND NOT VOTING). SB 2072 was placed on the Sixth order on the calendar.

Page 3, line 10, replace "an attorney promptly to act as" with "a"

Page 3, line 10, after the first "litem" insert "promptly"

Page 3, line 21, remove "attorney serving as"

Renumber accordingly

2019 TESTIMONY

SB 2072

**Senate Bill 2072
Judiciary Committee**

**Testimony Presented by Cynthia M. Feland
District Court Judge
January 8, 2019**

Chair Larson, members of the Senate Judiciary 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. For the last two legislative sessions, the Guardianship Workgroup has identified and recommended a number of statutory amendments to improve and strengthen procedures in cases involving guardianship for incapacitated adults and conservatorship cases. The proposed amendments contained in Senate Bill 2072 are intended to clarify the procedures for guardianship of minors in probate cases. These statutory amendments were reviewed by the Judicial Conference in November.

Under the current statutory structure, there has been a lot of confusion and lack of understanding regarding the process to establish a guardianship of a minor as guardianship of minors may be sought under two different statutory schemes: the probate code or the Juvenile Court Act. Under the provisions of the probate code in Chapter 30.1-27, a guardian may be appointed if there are no living parents, the parents' rights have been terminated by the court or the parents' rights have been suspended by the circumstances. The "suspended by the circumstances" option has caused the most confusion.

In 2013, the North Dakota Supreme Court reversed an order appointing guardianship under the “suspended by circumstances” option of Section 30.1-27-04, as a court is not permitted to appoint a guardian when the minor has a living parent who is entitled to custody. *See, In re the Guardianship of J.S.L.F., 2013 ND 31, 826 N.W.2d 916.* In 1973, when the current statutory provisions were considered for adoption, testimony reflected that the provisions in the Uniform Probate Code were never intended to change the law regarding custody of children. Rather, if parental fitness to provide a minimal standard of adequate care of a child are at issue, the guardianship proceedings should take place in Juvenile Court where safeguards exist to protect interests of the child and the parents’ fundamental rights to parent their children.

In reviewing current case law and the provisions of Chapters 30.1-27 of the Uniform Probate Code and 27-20 of the Uniform Juvenile Court Act, the Guardianship Workgroup determined that the best way to alleviate this confusion is to make clear that all guardianships of minors must take place in juvenile court unless the guardianship of the minor is an uncontested, approved testamentary appointment and there are no surviving parents. All other guardianship of minor cases would be addressed in juvenile court under the provisions of a new chapter to the Uniform Juvenile Court Act under a companion bill, Senate Bill No. 2073.

Section 1 – Status of guardian of minor – General

Page 1, lines 7-13, amends N.D.C.C. § 30.1-27-01 to clarify that chapter 30.1-27 governs only those guardianship of minor cases involving a testamentary appointment which is approved by the court.

Currently, there are two options to seek guardianship of a minor: the Uniform Probate Code and the Uniform Juvenile Court Act. Although the North Dakota Supreme Court has

clearly indicated that when the fitness of a parent is at issue, the provisions of the Uniform Probate Code were not designed to circumvent the protections afforded parents and children under the Uniform Juvenile Court Act, these cases continue to be brought under the probate code. The Workgroup discussed at length the current confusion surrounding when to file guardianship of minor cases in probate court versus juvenile court. The amendments aim to alleviate any confusion and provide clear direction to practitioners and the public.

Section 2 – Testamentary appointment of guardian of a minor

Page 1, lines 17-22, amends N.D.C.C. § 30.1-27-02 to replace “parent is adjudged incapacitated” with “parent’s rights have been terminated by prior court order.”

Similar to the amendment of § 30.1-27-01, the amendment on page 1, lines 17-22, clarifies that a guardianship under chapter 30.1-27 is limited to those situations where there is no surviving parent.

Page 2, lines 3-4, amends N.D.C.C. § 30.1-27-02 to replace the term “relation” with “relative under section 27-20-02.”

The replacement of the term “relation” with “relative under section 27-20-02”, at page 2, lines 3-4, is intended to clarify the individuals to be given notice. The use of the term “relative under section 27-20-02” provides consistency in the notice required under all guardianship cases regardless of the court wherein the case is filed.

Page 2, lines 3-4, amends N.D.C.C. § 30.1-27-02 to add a new provision requiring background information on the proposed testamentary guardian.

After lengthy discussion, the Workgroup concluded that given the period of time that may have passed from the drafting of a Will, the additional requirement provides a mechanism to ensure that the guardian appointed in the Will is still appropriate. The criminal records check must include all household members of the testamentary guardian. The Workgroup also felt it was important to mirror the requirements for guardianship of incapacitated adults by requiring the proposed testamentary guardian to file an affidavit stating whether the proposed guardian has been investigated for offenses related to theft, fraud, or the abuse, neglect, or exploitation of an adult or child since these offenses are so central to the duties of a guardian and an investigation would not be documented on a background check. The Workgroup considered including a reference to Section 50-11.3-01 but the Department of Human Services (DHS) felt such an addition would create too much of a burden on DHS staff.

Section 3 – Jurisdiction and venue

Page 2, lines 15-31, amends the caption and provisions of N.D.C.C. § 30.1-27-05 to clarify jurisdiction and venue for testamentary and non-testamentary guardianships.

These amendments distinguish the two different options for minor guardianship cases; identifying the jurisdiction for uncontested testamentary guardianship of minors in the district court and jurisdiction of all other guardianship of minor cases in juvenile court. Subsection 1 provides that the probate court will retain jurisdiction over those cases where the testamentary guardian accepts appointment and is approved by the court. Subsection 2 identifies the types of guardianship of minor cases to be addressed in juvenile court. It should be noted that the Workgroup discussed at length procedures for contesting testamentary appointments and determined that transferring those cases to juvenile court avoids duplication of procedures,

maintains consistency in the handling of contested guardianship of minor proceedings and ensures that all of the appropriate safeguards available in juvenile court were available for consideration by the court

Sections 4 – Court appointment of guardian ad litem – approval of acceptance of testamentary appointment.

Page 3, lines 5-30, Page 4, lines 1-31, and Page 5, lines 1-2, amends the caption and provisions of N.D.C.C. § 30.1-27-06 to remove the minor's preference and adds the requirement for appointment of a guardian ad litem.

Subsection 1, Page 3, lines 9-11, requires the appointment of an attorney guardian ad litem, consistent with the procedures for appointment of a guardian in incapacitated adult cases, and directs payment of fees for the guardian ad litem.

Subsection 2, Page 3, lines 12-30 through Page 4, lines 1-5, establishes the duties of a guardian ad litem in a testamentary appointment case, similar to those in cases involving incapacitated adults. Appointment of the guardian ad litem is intended to provide further safeguards that the person appointed in the Will is the appropriate person to be appointed the guardian using a best interests of the child analysis.

Subsection 3, Page 4, lines 10-13, identifies the individuals to be served with a copy of the guardian ad litem's report and the time frame for service of the report.

Subsection 4, Page 4, lines 10-13, authorizes the court to approve the appointment of the testamentary guardian without a hearing in uncontested cases.

Subsection 5, Page 4, lines 14-15, established that the duties of the guardian ad litem conclude upon approval of the testamentary guardian or transfer to juvenile court.

Subsection 6, Page 4, lines 16-24, provides for issuance of the letters of guardianship and the contents of the letters. Currently there are no specific requirements for letters of guardianship. Requiring the letters of guardianship and specifying the contents of the letters is consistent with guardianship of incapacitated adult cases and provides the guardians with a concise document to use in exercising authority under the guardianship. Schools and medical facilities often require a copy of the court order granting decision making authority for the minor, and the letters eliminate the necessity of filing court orders which may contain additional probate information not applicable to the guardianship. The letters would also reflect any limitations on the guardian's decision-making authority and provide for an expiration date. The expiration date ensures that the guardianship terminates when the child reaches the age of majority.

Subsections 7 and 8, Page 4, lines 25-31 through Page 5, lines 1-2, provide an extra layer of confidentiality for the guardian ad litem's report and medical information given the confidential and sensitive information these documents often contain.

Sections 5 – Objection to the appointment of a testamentary guardian of minor – Procedure.

Page 5, lines 3-30 and Page 6, lines 1-5, amends the caption and provisions of N.D.C.C. § 30.1-27-07 to replace the current procedures for objecting to appointment of the testamentary guardian of a minor.

Under the proposed revisions, it identifies persons who may object to the appointment of the guardian following the filing of the guardian ad litem's report. As the focus is the best interests of the child, any objection must explain how the appointment of the guardian ~~ad litem~~ is contrary to the best interests of the child.

Subsection 1 includes a provision requiring a child, age fourteen years or older, to receive a copy of the guardian ad litem report under § 30.1-27-06 and allowing the minor an opportunity to object to the appointment of the proposed testamentary guardian.

Subsection 2 makes clear that an objection to the appointment of the testamentary guardian must contain specific facts and cannot simply state in vague terms that the appointment would be contrary to the best interests.

Subsection 3 authorizes the transfer of the case to juvenile court for further disposition if a valid objection is filed or if the court determines on its own motion that the transfer is in the best interest of the child. As previously mentioned, adjudication of contested appointments in juvenile court avoids duplication of procedures, maintains consistency in the handling of contested guardianship of minor proceedings, and ensures that all of the appropriate safeguards available in juvenile court were available for consideration by the court

Section 6 - Acceptance of appointment

Page 6, lines 6-15, amends the caption and provisions of N.D.C.C. § 30.1-27-08 to remove the notice procedures following acceptance as no further proceedings will occur under the Uniform Probate Code. Once the guardian has accepted appointment and that court has approved the appointment, any subsequent proceedings would be handled in juvenile court. If a guardian does

not accept the appointment, the case is transferred to juvenile court to be handled under the same procedures as cases without a Will.

Section 7 – Powers and duties of guardian of minor

Page 6, lines 16-31 through Page 7, lines 1-29, amends N.D.C.C. § 30.1-27-09 to replace the delineated powers and duties of the guardian with those delineated under Chapter 27-20.1., thereby maintaining consistency with all guardianship of minor cases.

Section 8 – Proceedings subsequent to approval or findings – Transfer to juvenile court.

Page 7, lines 30-31 through Page 30, lines 1-17, amends the caption and provisions of N.D.C.C. § 30.1-27-11 to replace the provisions addressing venue for proceeding subsequent to the appointment of a guardian with provisions directing that all subsequent proceedings will be handled in juvenile court. Here again, the transfer to juvenile court ensures consistency in the handling of guardianship proceedings and ensures that all of the appropriate safeguards available in juvenile court were available for consideration by the court

Section 9 – Repeal

Page 8, lines 18-19, repeals N.D.C.C. § 30.1-27-03, 30.1-27-04, 30.1-27-10, and 30.1-27-12.

The repealed provisions are addressed under the revisions to other sections in this chapter and the Uniform Juvenile Court Act.

Respectfully Submitted:

Cynthia M. Feland
District Judge

Guardianship Workgroup Members: Judge **Cynthia M. Feland**, Chair; **Stephen Astrup**, Vogel Law Firm; **Rich LeMay**, North Dakota Legal Services; **Rachel Thomason**, Bismarck, **Allyson Hicks**, North Dakota Attorney General's office; **Pamela Nesvig**, Judicial Referee; **Lauren Bosch**, Guardian Ad Litem; **Aaron Birst**, North Dakota Association of Counties; **Donna Byzewski**, Catholic Charities; **Michelle Gayette**, N.D. Department of Human Services; **David Boeck**, Protection and Advocacy; **Sally Holewa**, State Court Administrator; **Donna Wunderlich**, Trial Court Administrator, Unit 3; **Karen Kringlie**, Juvenile Court Director, Unit 2; **Catherine Palsgraff**, Citizen Access Coordinator; **Cathy Ferderer**, Family Law Mediation Program Administrator; **Storm Olson**, North Dakota Department of Human Services; **Rose Nichols**, Guardian Monitoring Program; and **Norma O'Halloran**, Grand Forks County Clerk of Court's Office.

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**Senate Bill 2072
House Judiciary Committee**

**Testimony Presented by Cynthia M. Feland
District Court Judge
March 12, 2019**

Chair Koppelman, members of the House Judiciary 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. For the last two legislative sessions, the Guardianship Workgroup has identified and recommended a number of statutory amendments to improve and strengthen procedures in cases involving guardianship for incapacitated adults and conservatorship cases. The proposed amendments contained in Senate Bill 2072 are intended to clarify the procedures for guardianship of minors in probate cases. These statutory amendments were reviewed by the Judicial Conference in November.

Under the current statutory structure, there has been a lot of confusion and lack of understanding regarding the process to establish a guardianship of a minor as guardianship of minors may be sought under two different statutory schemes: the probate code or the Juvenile Court Act. Under the provisions of the probate code in Chapter 30.1-27, a guardian may be appointed if there are no living parents, the parents' rights have been terminated by the court or the parents' rights have been suspended by the circumstances. The "suspended by the circumstances" option has caused the most confusion.

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In 2013, the North Dakota Supreme Court reversed an order appointing guardianship under the “suspended by circumstances” option of Section 30.1-27-04, as a court is not permitted to appoint a guardian when the minor has a living parent who is entitled to custody. *See, In re the Guardianship of J.S.L.F., 2013 ND 31, 826 N.W.2d 916.* In 1973, when the current statutory provisions were considered for adoption, testimony reflected that the provisions in the Uniform Probate Code were never intended to change the law regarding custody of children. Rather, if parental fitness to provide a minimal standard of adequate care of a child are at issue, the guardianship proceedings should take place in Juvenile Court where safeguards exist to protect interests of the child and the parents’ fundamental rights to parent their children.

In reviewing current case law and the provisions of Chapters 30.1-27 of the Uniform Probate Code and 27-20 of the Uniform Juvenile Court Act, the Guardianship Workgroup determined that the best way to alleviate this confusion is to make clear that all guardianships of minors must take place in juvenile court unless the guardianship of the minor is an uncontested, approved testamentary appointment and there are no surviving parents. All other guardianship of minor cases would be addressed in juvenile court under the provisions of a new chapter to the Uniform Juvenile Court Act under a companion bill, Senate Bill No. 2073.

Section 1 – Status of guardian of minor – General

Page 1, lines 7-13, amends N.D.C.C. § 30.1-27-01 to clarify that chapter 30.1-27 governs only those guardianship of minor cases involving a testamentary appointment which is approved by the court.

Currently, there are two options to seek guardianship of a minor: the Uniform Probate Code and the Uniform Juvenile Court Act. Although the North Dakota Supreme Court has

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clearly indicated that when the fitness of a parent is at issue, the provisions of the Uniform Probate Code were not designed to circumvent the protections afforded parents and children under the Uniform Juvenile Court Act, these cases continue to be brought under the probate code. The Workgroup discussed at length the current confusion surrounding when to file guardianship of minor cases in probate court versus juvenile court. The amendments aim to alleviate any confusion and provide clear direction to practitioners and the public.

Section 2 – Testamentary appointment of guardian of a minor

Page 1, lines 17-22, amends N.D.C.C. § 30.1-27-02 to replace “parent is adjudged incapacitated” with “parent’s rights have been terminated by prior court order.”

Similar to the amendment of § 30.1-27-01, the amendment on page 1, lines 17-22, clarifies that a guardianship under chapter 30.1-27 is limited to those situations where there is no surviving parent.

Page 2, lines 3-4, amends N.D.C.C. § 30.1-27-02 to replace the term “relation” with “relative under section 27-20-02.”

The replacement of the term “relation” with “relative under section 27-20-02”, at page 2, lines 3-4, is intended to clarify the individuals to be given notice. The use of the term “relative under section 27-20-02” provides consistency in the notice required under all guardianship cases regardless of the court wherein the case is filed.

Page 2, lines 3-4, amends N.D.C.C. § 30.1-27-02 to add a new provision requiring background information on the proposed testamentary guardian.

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After lengthy discussion, the Workgroup concluded that given the period of time that may have passed from the drafting of a Will, the additional requirement provides a mechanism to ensure that the guardian appointed in the Will is still appropriate. The criminal records check must include all household members of the testamentary guardian. The Workgroup also felt it was important to mirror the requirements for guardianship of incapacitated adults by requiring the proposed testamentary guardian to file an affidavit stating whether the proposed guardian has been investigated for offenses related to theft, fraud, or the abuse, neglect, or exploitation of an adult or child since these offenses are so central to the duties of a guardian and an investigation would not be documented on a background check. The Workgroup considered including a reference to Section 50-11.3-01 but the Department of Human Services (DHS) felt such an addition would create too much of a burden on DHS staff.

Section 3 – Jurisdiction and venue

Page 2, lines 15-31, amends the caption and provisions of N.D.C.C. § 30.1-27-05 to clarify jurisdiction and venue for testamentary and non-testamentary guardianships.

These amendments distinguish the two different options for minor guardianship cases; identifying the jurisdiction for uncontested testamentary guardianship of minors in the district court and jurisdiction of all other guardianship of minor cases in juvenile court. Subsection 1 provides that the probate court will retain jurisdiction over those cases where the testamentary guardian accepts appointment and is approved by the court. Subsection 2 identifies the types of guardianship of minor cases to be addressed in juvenile court. It should be noted that the Workgroup discussed at length procedures for contesting testamentary appointments and determined that transferring those cases to juvenile court avoids duplication of procedures,

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maintains consistency in the handling of contested guardianship of minor proceedings and ensures that all of the appropriate safeguards available in juvenile court were available for consideration by the court

Sections 4 – Court appointment of guardian ad litem – approval of acceptance of testamentary appointment.

Page 3, lines 5-30, Page 4, lines 1-31, and Page 5, lines 1-2, amends the caption and provisions of N.D.C.C. § 30.1-27-06 to remove the minor's preference and adds the requirement for appointment of a guardian ad litem.

Subsection 1, Page 3, lines 9-11, requires the appointment of an attorney guardian ad litem, consistent with the procedures for appointment of a guardian in incapacitated adult cases, and directs payment of fees for the guardian ad litem.

Subsection 2, Page 3, lines 12-30 through Page 4, lines 1-5, establishes the duties of a guardian ad litem in a testamentary appointment case, similar to those in cases involving incapacitated adults. Appointment of the guardian ad litem is intended to provide further safeguards that the person appointed in the Will is the appropriate person to be appointed the guardian using a best interests of the child analysis.

Subsection 3, Page 4, lines 10-13, identifies the individuals to be served with a copy of the guardian ad litem's report and the time frame for service of the report.

Subsection 4, Page 4, lines 10-13, authorizes the court to approve the appointment of the testamentary guardian without a hearing in uncontested cases.

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Subsection 5, Page 4, lines 14-15, established that the duties of the guardian ad litem conclude upon approval of the testamentary guardian or transfer to juvenile court.

Subsection 6, Page 4, lines 16-24, provides for issuance of the letters of guardianship and the contents of the letters. Currently there are no specific requirements for letters of guardianship. Requiring the letters of guardianship and specifying the contents of the letters is consistent with guardianship of incapacitated adult cases and provides the guardians with a concise document to use in exercising authority under the guardianship. Schools and medical facilities often require a copy of the court order granting decision making authority for the minor, and the letters eliminate the necessity of filing court orders which may contain additional probate information not applicable to the guardianship. The letters would also reflect any limitations on the guardian's decision-making authority and provide for an expiration date. The expiration date ensures that the guardianship terminates when the child reaches the age of majority.

Subsections 7 and 8, Page 4, lines 25-31 through Page 5, lines 1-2, provide an extra layer of confidentiality for the guardian ad litem's report and medical information given the confidential and sensitive information these documents often contain.

Sections 5 – Objection to the appointment of a testamentary guardian of minor – Procedure.

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Subsection 1 includes a provision requiring a child, age fourteen years or older, to receive a copy of the guardian ad litem report under § 30.1-27-06 and allowing the minor an opportunity to object to the appointment of the proposed testamentary guardian.

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Respectfully Submitted:

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District Judge

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Guardianship Workgroup Members: Judge **Cynthia M. Feland**, Chair; **Stephen Astrup**, Vogel Law Firm; **Rich LeMay**, North Dakota Legal Services; **Rachel Thomason**, Bismarck, **Allyson Hicks**, North Dakota Attorney General's office; **Pamela Nesvig**, Judicial Referee; **Lauren Bosch**, Guardian Ad Litem; **Aaron Birst**, North Dakota Association of Counties; **Donna Byzewski**, Catholic Charities; **Michelle Gayette**, N.D. Department of Human Services; **David Boeck**, Protection and Advocacy; **Sally Holewa**, State Court Administrator; **Donna Wunderlich**, Trial Court Administrator, Unit 3; **Karen Kringlie**, Juvenile Court Director, Unit 2; **Catherine Palsgraff**, Citizen Access Coordinator; **Cathy Ferderer**, Family Law Mediation Program Administrator; **Storm Olson**, North Dakota Department of Human Services; **Rose Nichols**, Guardian Monitoring Program; and **Norma O'Halloran**, Grand Forks County Clerk of Court's Office.

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Prepared by the Legislative Council staff for
Representative K. Koppelman
March 26, 2019

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PROPOSED AMENDMENTS TO SENATE BILL NO. 2072

Page 3, line 10, replace "an attorney promptly to act as" with "a"

Page 3, line 10, after the first "litem" insert "promptly"

Page 3, line 21, remove "attorney serving as"

Renumber accordingly