

GUARDIANSHIP SERVICES, STANDARDS, AND PRACTICES STUDY - BACKGROUND MEMORANDUM

Senate Concurrent Resolution No. 4008 (attached as an appendix) directs the Legislative Council to study the need for guardianship services, standards and practices for guardians, and funding for programs for individuals with mental illness, vulnerable elderly adults, and individuals with traumatic brain injuries. Testimony on Senate Concurrent Resolution No. 4008 indicated that a need exists to improve services to persons in need of guardianship.

BACKGROUND

When a court determines that an individual lacks the capacity to make or communicate the decisions necessary to manage his or her own personal affairs, a guardian may be appointed. Guardianship is the process by which a court, after determining that an individual is incompetent to make specific decisions, delegates the right to make those decisions to a guardian. Depending on the state statutes, a guardian may also be referred to as a conservator, committee, or curator. The procedures to initiate a guardianship and the practices following the appointment of a guardian also differ from state to state. While all states require some sort of petition, notice, and judicial consideration before appointing a guardian, the extent of due process rights afforded the alleged incapacitated person varies from state to state.

As a general rule, there are two types of guardianships--a guardianship affecting personal interests, known as guardianship of the person; and a guardianship of the estate. The spheres of authority of a guardian of the person and of a guardian of the estate are distinct and mutually exclusive. Some jurisdictions recognize a third type of guardianship, known as a limited guardianship. In a limited guardianship, the guardian is entrusted with only those duties and powers that the ward is incapable of exercising.

The purpose of statutes relating to guardianship is to safeguard the rights and interests of minors and incompetent persons, and it is the responsibility of the courts to be vigilant in seeing that the rights of those persons are properly protected. The court with jurisdiction over a guardianship is the superior guardian, while the guardian is deemed to be an officer of the court. The conduct of the guardian is subject to regulation by a court.

NORTH DAKOTA LAW

The Development of North Dakota's Guardianship Law

Pre-1973 Guardianship Law

Under North Dakota's pre-1973 guardianship law, the county court was authorized to appoint a guardian for a person or for the estate of any incompetent state resident. The guardianship proceeding was initiated by the filing of a petition with the county court. The alleged

incompetent person was served a citation, giving notice of the filing and the date of the hearing on the petition. After an informal hearing at which the attendance of the alleged incompetent person was not required, the court was authorized to appoint a guardian if it determined that an appointment was either necessary or convenient. The pre-1973 statutes did not require a medical evaluation or other evidence that the person was actually incompetent. The court was also authorized to appoint a guardian ad litem. As distinguished from current law, the pre-1973 law established no standard of proof for determining whether a person was incompetent.

The pre-1973 guardianship laws also permitted the appointment of a guardian for the estate of nonresidents. The statute provided that a person interested in the estate of the alleged incompetent could file a petition in the county court in the county in which the property was located. After issuing a citation to all interested parties and conducting a hearing, the court was authorized to appoint a guardian of the estate based solely on the petition.

1973 Adoption of Uniform Probate Code Article V

In 1973 the North Dakota Legislative Assembly adopted the Uniform Probate Code (UPC). Article V of the UPC divided guardianship law into two parts. The first part, guardianship, provided for the protection of the person; and the second part, conservatorship, provided for the protection of the estate. The UPC differed from pre-1973 law in that the UPC separated the guardianship of the person and conservatorship of estates and property, improved due process provisions, and improved powers of the supervising courts. Article V also provided for a durable power of attorney that did not terminate on the disability or incompetence of the principal. In addition, Article V contained separate provisions for guardianships of minors and persons who were mentally incompetent. Article V also required the appointment of a physician to examine the proposed ward and a visitor to interview both the proposed ward and the person seeking appointment as the guardian. The UPC defined visitor as a person who is trained in law, nursing, or social work and is an officer, employee, or special appointee of the court with no personal interest in the proceedings. The notice provisions defects of the pre-1973 statutes were partially remedied by the UPC. Under the UPC, a waiver of notice by the proposed ward was not effective unless the ward attends the hearing or the ward's waiver of notice was confirmed in an interview with the court-appointed visitor.

The adoption of the UPC resulted in other changes in the state's guardianship law. In proceedings for the removal of a court-appointed guardian, the UPC changed the focus from the behavior of the guardian to the best interest of the ward. Another change was in

venue for proceedings subsequent to appointment. The pre-1973 statute limited the jurisdiction to the county court that appointed the guardian. The UPC gave the court in the county in which the ward resided concurrent jurisdiction with the appointing court in any subsequent proceedings relating to the guardianship.

1983 Amendments to Guardianship Statutes

The 1983 Legislative Assembly passed House Bill No. 1057. The bill primarily dealt with three issues--the statutory guardianship of the superintendent of the Grafton State School; the services for developmentally disabled persons; and limited guardianships. The bill deleted provisions making the superintendent of Grafton State School the automatic guardian of the residents at Grafton. The bill also amended the statutory requirements for individualized habilitation plans by requiring that the plan state whether the developmentally disabled person needs a guardian and determine the degree of protection the person needs.

Regarding limited guardianship, 1983 House Bill No. 1057 expanded the definitions of "conservator" and "guardian" to include limited conservators and limited guardians. The bill directed the court to exercise its authority consistent with the "maximum self-reliance and independence of the incapacitated person and make appointive and other orders only to the extent necessitated by the incapacitated person's actual mental and adaptive limitations or other conditions warranting the procedure." North Dakota Century Code (NDCC) Section 30.1-28-04(1). The provision required the court to make item-specific determinations and that the powers of the guardian be tailored to the actual limitations of the ward. The bill permitted the court to limit the powers of the guardianship at the time of appointment or at a later date. The bill also specifically required the court to determine whether the proposed ward is mentally incompetent and thus not qualified to vote. The bill recognized the degrees of incapacity or incompetence and required the court to match the guardian's responsibilities with the ward's actual mental and adaptive limitations.

1989 Amendments to Guardianship Statutes

The 1989 Legislative Assembly enacted House Bill No. 1480, which made additional amendments to the guardianship provisions of the Uniform Probate Code. The bill provided for a definition of "alternative resource plan" and "least restrictive form of intervention." The bill also amended NDCC Section 30.1-28-02 to provide that the proposed ward may demand change of venue to either the county of residence or the county where the proposed ward is present. The bill expanded the duties of the attorney to include a personal interview of the proposed ward, explaining the guardianship proceeding to the proposed ward, and representing the proposed ward as guardian ad litem. The bill also expanded the duties of the physician and the visitor and provided for guardian reporting requirements.

Current Guardianship Law

The guardianship provisions of Article V of the Uniform Probate Code enacted in 1973 and the subsequent amendments in 1983 and 1989 are codified as NDCC Chapters 30.1-26, 30.1-27, 30.1-28, and 30.1-29.

Chapter 30.1-26 contains the general provisions that pertain to guardianship, including definitions and jurisdiction; Chapter 30.1-27 provides for the guardianship of minors; Chapter 30.1-28 provides for guardianships of incapacitated persons; and Chapter 30.1-29 provides a system of protective proceedings designed to allow the management of estates by a court-appointed conservator.

North Dakota Century Code Chapter 30.1-28 contains provisions regarding the procedural rights of the ward or proposed ward. Section 30.1-28-09 requires that notice be served personally on the ward or proposed ward, that person's spouse, and parents if they can be located within the state. Notice to the spouse or parent, if they cannot be found within the state, may be given by mail or publication. Section 30.1-28-03(7) provides that the proposed ward must be present at the hearing in person unless good cause is shown for the absence. The section also provides that a proposed ward has the right to be represented by counsel and to be personally interviewed by the attorney. Section 30.1-28-04 provides that at a hearing under this chapter, the court is required to hear evidence that the proposed ward is an incapacitated person. The section provides that age, eccentricity, poverty, or medical diagnosis alone is not sufficient to justify a finding of incompetency. The section also provides the standard of proof under which a finding of incapacity may be made. Section 30.1-28-04(2)(c) provides that the court shall:

- c. Appoint a guardian and confer specific powers of guardianship only after finding in the record based on **clear and convincing evidence** that:
 - (1) The proposed ward is an incapacitated person;
 - (2) There is no available alternative resource plan that is suitable to safeguard the proposed ward's health, safety, or habilitation which could be used instead of a guardianship;
 - (3) The guardianship is necessary as the best means of providing care, supervision, or habilitation of the ward; and
 - (4) The powers and duties conferred upon the guardian are appropriate as the least restrictive form of intervention consistent with the ability of the ward for self-care. (emphasis supplied)

North Dakota Century Code Section 30.1-28-06 provides that the authority and responsibility of a guardian terminates upon the death of the guardian or ward. Section 30.1-28-07 provides for the conditions under which a guardian may be removed, resign, or

under which the guardianship may be terminated. Section 30.1-28-12 provides that a guardian of an incapacitated person has only the powers and duties specified by the court.

PREVIOUS STUDIES

1981-82 Interim

During the 1981-82 interim the Legislative Council's interim Judiciary Committee, pursuant to House Concurrent Resolution No. 3058, studied guardianship and conservatorship laws and commitment proceedings affecting developmentally disabled persons. The committee focused on the issues relating to the automatic guardianship authority of the superintendent of the Grafton State School and the type of guardianships needed to address the residents' needs. The committee recommended a bill that removed provisions regarding the automatic guardianship of the Grafton State School residents; established a limited type of guardianship and conservatorship; provided that the individual habilitation plan team must determine whether an individual needs a guardian when developing the plan; required the state's attorney in the county in which the guardianship proceeding takes place to represent the petitioner in the hearing; established an order of priority for payment of the costs of the guardianship hearings; and provided for the conditions under which a person may act as a guardian of an incapacitated person. The bill was enacted by the 1983 Legislative Assembly.

1997-98 Interim

During the 1997-98 interim the Legislative Council's interim Judiciary Committee, as part of the committee's responsibility to review uniform laws, recommended to the Legislative Council by the Commission on Uniform State Laws under NDCC Section 54-35-03, reviewed the Uniform Guardianship and Protective Proceedings Act (1997). The committee received testimony in opposition to revised Article V of the Uniform Probate Code that indicated that the present law regarding guardianships is more specific and clear than the revised Act and that there are no major defects in the current structure. The testimony further indicated that the areas of concern with the revised Act included the removal of the requirement to appoint a guardian ad litem in each case, the establishment of a guardianship without a hearing, the reduction of the time limit for an emergency temporary guardianship to 60 days, the lack of specificity in defining the areas of a limited guardianship, and the removal of the guardian's authority to place a ward in a mental health care facility under "voluntary" admission status for up to 45 days. The committee received no testimony in support of the revised Article V. The committee made no recommendation regarding the Uniform Guardianship and Protective Proceedings Act (1997).

RECENT LEGISLATION

The 1999 Legislative Assembly considered two bills relating to guardianship services. The first, House Bill No. 1301, related to provider standards, staff

competency, accreditation standards, and the use of an emergency funding procedure to cover the costs of establishing needed guardianships. The bill included a general fund appropriation of \$878,000. The bill failed to pass the House of Representatives. The second, House Bill No. 1302, provided for an appropriation of \$50,000 for the provision of volunteer guardianship services. The bill failed to pass the House. The 1999 Legislative Assembly passed House Concurrent Resolution No. 3016, which directed a study of the qualifications, standards, and monitoring requirements for guardianship services for incapacitated persons. The resolution was not given priority for study during the 1999-2000 interim.

The 2001 Legislative Assembly considered two bills relating to guardianship services. The first, Senate Bill No. 2329, provided for an appropriation of \$440,000 for the development of a guardianship service system for vulnerable adults who are not developmentally disabled and an appropriation of \$50,000 for the provision of volunteer guardianship services. The bill failed to pass the Senate. The second bill, House Bill No. 1388, provided for standards of practice for guardians. The bill failed to pass the House.

The 2003 Legislative Assembly did not consider any bills relating to guardianship services; however, the Legislative Assembly passed Senate Concurrent Resolution No. 4008, which directed this guardianship study.

SUGGESTED STUDY APPROACH

The committee, in its study of the need for guardianship services, standards and practices for guardians, and funding for programs for individuals with mental illness, vulnerable elderly adults, and individuals with traumatic brain injuries, may wish to approach this study as follows:

- Receive information and testimony from the Department of Human Services, guardianship services agencies and associations, the Protection and Advocacy Project, adult protection professionals, outreach workers, family members, and other interested persons regarding needed guardianship services, funding, and standards of practice and whether the need for these services is being met.
- Receive information and testimony from representatives of the judiciary regarding the guardianship process.
- Receive information and recommendations from the North Dakota Guardianship Task Force and other agencies and associations regarding all aspects of the guardianship process, including the petitioning process, attorneys, guardian ad litem, court visitor, costs of hearings, available guardians, training of guardians, guardianship standards and qualifications, guardianship reports, and guardianship reimbursement.
- Develop recommendations and prepare legislation necessary to implement the recommendations.

ATTACH:1