

**Senate Bill 2057
House Judiciary Committee**

**Testimony Presented by
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District Court Judge
Chair, Guardianship Workgroup
January 12, 2021**

Chair Lee, members of the Senate Human Services Committee, I am Cynthia Feland, District Court Judge in the South Central Judicial District and Chair of the Guardianship Workgroup. 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 then 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 three 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, minors and in conservatorship cases.

The proposed amendments contained in Senate Bill 2057 are intended to establish procedural safeguards for transactions involving the sale of a ward's property by the guardian.

In comparing the provisions for the sale of a ward's property under Chapters 30.1-28 and 30.1-29, the Guardianship Workgroup noted that procedural safeguards only exist for the sale of a ward's property under conservatorships. Under the current provisions of Chapter 30.1-28, a guardian is not required to seek Court approval or even provide notice prior to the sale of a ward's property under the current provisions of chapter 30.1-28. Further, chapter 30.1-28 provides no clear guidance on the use of a guardian's financial authority to sell the ward's property. Although the requirement for Court approval prior to the sale of any of the ward's

property could be included in the initial order appointing a guardian, the extent of the ward's property or the necessity for the sale of any of the ward's property may not be known at the time of appointment. The proposed amendments are intended to prevent the sale of the ward's property if the sale is unnecessary and to ensure that the proceeds from the sale of any property are appropriate.

Section 1 – General powers and duties of guardian.

Page 1, lines 21-23 through Page 2, lines 1-13, amends subsection 7 of N.D.C.C. § 30.1-28-12 to add subparagraphs c through e clarifying that guardians with financial authority must seek Court authorization before selling or otherwise encumbering a ward's property.

Subparagraph c incorporates the requirement to seek court approval prior to any sale, mortgage or transfer ownership of all real property and personal property valued over two thousand five hundred dollars owned by the ward as an additional duty imposed on guardians with financial authority.

Subparagraph d adds, as an additional duty imposed on guardians with financial authority, the requirement to seek Court approval prior to entering into any leases of the ward's property. Although leases are temporary rather than permanent transfers of ownership, the Workgroup determined that given the potential for malfeasance Court oversight would guard against any potential abuse of authority by a guardian.

Subparagraph e adds the requirement that a guardian is only permitted to purchase, lease, obtain ownership or become the beneficiary of any of the ward's property if approved by the Court. Requiring Court approval would prevent

malfeasance while providing the guardian with the same opportunities as others interested in a ward's property. The proposed amendment is consistent with the provisions related to purchases made by a personal representative from an estate in probate.

Section 2 – Authorization of a single transaction to sell, encumber, or transfer ownership of real or personal property of the ward.

Page 2, lines 14-15, amends chapter 30.1-28 to create a new section establishing the procedures to be followed for the sale of the ward's property by the guardian.

Subsection 1, Page 2, lines 18-23, identifies transactions requiring a guardian to seek Court authorization before selling, mortgaging, leasing, or otherwise encumbering or transferring a ward's real or personal property.

Following lengthy discussion, the Workgroup concluded that real property owned by the ward should always require Court approval before a sale. In contrast, only personal property with a value over \$2,500 would require Court approval. In recommending the \$2,500 threshold for personal property, the Workgroup balanced the additional costs, such as storage fees, that would likely be incurred for personal property of minimal value, the additional burdens placed on the guardian for seeking Court approval of a sale, and the need to ensure the appropriateness of the sale. The Workgroup also noted that proposed threshold amount for personal property is consistent with the sale of a tenant's abandoned property by a landlord without Court intervention.

Subsection 2, Page 2, lines 24-30 through Page 3, lines 1-8, identifies the required contents of a motion seeking to sell a ward's property.

Under the proposed amendments, the guardian's request must include the type and description of the property, type of transaction, details of and reason for the requested transaction, method used to determine the current fair market value of the property, an explanation identifying why the proposed transaction is in the best interests of the ward, and a notice giving interested persons ten (10) days to object and demand a hearing. The Workgroup considered longer objection periods but chose ten days after considering potential financial and market pressures.

Absent good cause, transactions involving the sale of real property will require an appraisal. The "good cause" exception was included to address situations where an appraisal may not be feasible and other sources are available which provide the Court with sufficient evidence as to the appropriateness of the proposed value placed on the ward's real property. Some of the other sources considered by the Workgroup included USDA's publication of County Rents and Land Values, annual survey of County Rents and Prices conducted by the North Dakota Department of Trust Lands, and records evidencing recent sales of similar real property in the same area.

For the sale of personal property, the guardian must provide a description of how fair market value for the property was determined.

All the information required by the proposed amendments is intended to ensure that the Court has sufficient information to determine whether to authorize the transaction.

Subsection 3, Page 3, lines 9-10, requires the guardian to serve the ward, the ward's spouse, and all interested parties with the motion. The Workgroup included notice to the ward's spouse separately to maintain consistency with other notice provisions in the chapter and to address any interest a spouse may have in the property at issue.

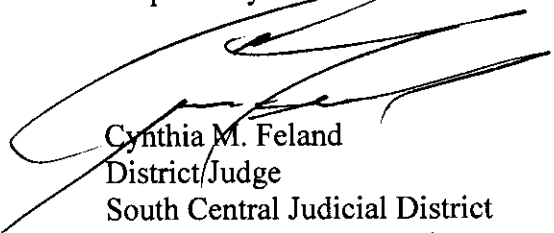
Subsection 4, Page 3, lines 11-14, provides for an expedited process where the ward's spouse and other interested parties consent to proposed sale of the ward's property. Any consent to the sale of property must be filed with the guardian's motion. Unless required by the Court, a hearing is not required if the motion for sale of property is unopposed by all of the interested parties.

Subsection 5, Page 3, lines 15-16, requires the Court to make specific findings regarding whether the proposed sale of property is in the best interests of the ward.

Section 3 – Protective arrangements and single transactions authorized

Page 3, lines 17-19, amends N.D.C.C. § 30.1-29-09 to add a new subsection clarifying that the provisions for authorizing single transactions in section 2 above do not apply to guardian or conservators. The amendment avoids any confusion regarding the procedure to be used by a guardian seeking to sell the ward's property.

Respectfully Submitted:



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Guardianship Workgroup Members: Judge **Cynthia M. Feland**, Chair; Judge **Pamela Nesvig**, South Central Judicial District; Judge **Stacey Louser**, North Central Judicial District; **Jon Alm**, N.D. Department of Human Services; **Mikayla Jablonski Jahner**, North Dakota Legal Services; **Rachel Thomason**, attorney, Bismarck; **Tracey Laaveg**, attorney, Park River; **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; **Chris Carlson**, attorney, Bismarck; **Brittany Fode**, N.D. Department of Human Services; **Sally Holewa**, State Court Administrator; **Donna Wunderlich**, Trial Court Administrator, Unit 3; **Karen Kringlie**, Juvenile Court Director, Unit 2; **Catherine Palsgraff**, Citizen Access Coordinator; **Cathy Ferderer**, Family Law Mediation Program Administrator; **Rose Nichols**, Guardian Monitoring Program; **Norma O'Halloran**, Grand Forks County Clerk of Court's Office; **Rebecca Nelson**, Ramsey County Clerk of Court; **Audrey Urich**, Guardian and Protective Services; and **Margo Haut**, Guardian Angels Inc.