

**Sixty-eighth Legislative Assembly of North Dakota
In Regular Session Commencing Tuesday, January 3, 2023**

SENATE BILL NO. 2224
(Senators Dwyer, Lee, Sickler)
(Representatives Klemin, Nelson, Schneider)

AN ACT to create and enact a new section to chapter 30.1-28 and a new subsection to section 30.1-28-10.1 of the North Dakota Century Code, relating to guardianship proceedings for minors becoming incapacitated adults and emergency guardianship; to amend and reenact section 27-20.1-02, subsection 1 of section 27-20.1-09, subsection 2 of section 27-20.1-17, subsection 60 of section 30.1-01-06, subsection 1 of section 30.1-26-01, subsection 2 of section 30.1-27-05, sections 30.1-28-03, 30.1-28-04, and 30.1-28-07, subsection 2 of section 30.1-28-09, and subsection 7 of section 30.1-28-12 of the North Dakota Century Code, relating to guardianship of minors, sale of property by a guardian, termination of a guardianship, waiver of notice, and guardians ad litem.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 27-20.1-02 of the North Dakota Century Code is amended and reenacted as follows:

27-20.1-02. Jurisdiction.

The juvenile court has exclusive original jurisdiction of proceedings to grant, modify, or terminate guardianship for a child, except the testamentary appointment of a guardian for a minor governed by chapter 30.1-27 and the appointment of a guardian for a minor becoming an incapacitated adult under section 7 of this Act.

SECTION 2. AMENDMENT. Subsection 1 of section 27-20.1-09 of the North Dakota Century Code is amended and reenacted as follows:

1. If, at any time in the proceeding, the court determines the child is of sufficient age and competency to assist counsel and the interests of the child are or may be inadequately represented, the court may appoint an attorney to represent the child. The court shall make appropriate findings to support the appointment of counsel.

SECTION 3. AMENDMENT. Subsection 2 of section 27-20.1-17 of the North Dakota Century Code is amended and reenacted as follows:

2. A guardian's authority and responsibility terminates upon the death, resignation, or removal of the guardian, or upon the child's death, adoption, marriage, or attainment of majority, but termination does not affect the guardian's liability for prior acts or the guardian's obligation to account for funds and assets of the child. ~~For cases arising under section 27-20.3-16, the age of majority is age twenty-one.~~

SECTION 4. AMENDMENT. Subsection 60 of section 30.1-01-06 of the North Dakota Century Code is amended and reenacted as follows:

60. "Visitor" means an individual, in guardianship proceedings, who is trained in nursing or, social work, medical care, mental health care, or rehabilitation and is an ~~officer~~, employee, or special appointee of the court with no personal interest in the proceedings.

SECTION 5. AMENDMENT. Subsection 1 of section 30.1-26-01 of the North Dakota Century Code is amended and reenacted as follows:

1. "Alternative resource plan" means a plan that provides an alternative to guardianship, using available support services and arrangements which are acceptable to the alleged incapacitated person. The plan may include the use of providers of service such as visiting nurses, homemakers, home health aides, personal care attendants, and adult day care and multipurpose senior citizen centers; home and community-based care, human service zones, and developmental disability services; powers of attorney, durable powers of attorney, health care directives, and supported decisionmaking; representative and protective payees; and licensed congregate care facilities.

SECTION 6. AMENDMENT. Subsection 2 of section 30.1-27-05 of the North Dakota Century Code is amended and reenacted as follows:

2. The juvenile court under chapter 27-20.1 has exclusive original jurisdiction over proceedings to consider objections to the testamentary appointment under section 30.1-27-07 and over the court appointment of a guardian of a minor except the appointment of a guardian for a minor becoming an incapacitated adult under section 7 of this Act. Any person interested in the welfare of a minor may petition the juvenile court for the appointment of a guardian under section 27-20.1-05 in the following situations:
 - a. If there is a living parent of the minor, known or unknown;
 - b. If the testamentary guardian fails to accept appointment as guardian within sixty days after the death of the minor's last living parent;
 - c. If both parents are dead or the surviving parent's rights have been terminated by prior court order, but there has been no appointment of a guardian for the minor by will; or
 - d. If a guardianship of a minor is sought for any other reason.

SECTION 7. A new section to chapter 30.1-28 of the North Dakota Century Code is created and enacted as follows:

Guardianship proceedings for minor becoming an incapacitated adult.

1. As used in this section:
 - a. "Legal decisionmaking" means the legal right and responsibility to make all legal decisions for a child including those regarding education, health care, and personal care decisions.
 - b. "Child" means an individual who is under the age of eighteen and is not married.
 - c. "Child becoming an incapacitated adult" means a child who has reached age seventeen years and six months and is proposed to become an incapacitated adult at age eighteen.
2. A petition to establish a guardianship for a child becoming an incapacitated adult may be filed by any person interested in the welfare of the child and having knowledge of the facts alleged or information and belief the facts are true.
3. The procedure in this chapter for appointment of a guardian of an incapacitated adult must be the procedure used for appointment of a guardian for a child becoming an incapacitated adult except the court shall appoint as the guardian any person that had legal decisionmaking responsibility for the child when the child turned seventeen years and six months of age. If the court finds the appointment of the person with legal decisionmaking authority would be contrary to the best interests of the incapacitated adult, the priorities listed in section 30.1-28-11 may be followed.
4. A guardianship order under this section may take effect immediately on the day the child turns eighteen years of age.

SECTION 8. AMENDMENT. Section 30.1-28-03 of the North Dakota Century Code is amended and reenacted as follows:

30.1-28-03. (5-303) Procedure for court appointment of a guardian of an incapacitated person.

1. Any person interested in the welfare of an allegedly incapacitated person may petition for the appointment of a guardian. No filing fee under this or any other section may be required when a petition for guardianship of an incapacitated person is filed by a member of the individual treatment plan team for the alleged incapacitated person or by any state employee in the performance of official duties.
2. The petition for appointment of a guardian must state:
 - a. The name, address, and corporate or agency status of the petitioner, and its connection with or relationship to the proposed ward;
 - b. The name, age, and address of the proposed ward;
 - c. The name and address of any person or institution having care or custody over the proposed ward;
 - d. The names and addresses of the spouse, parents, and adult children or, if none, any adult siblings and any adult with whom the proposed ward resides in a private residence, or, if none, the nearest adult relative;
 - e. A brief description of and the approximate value of the real and personal property and income of the proposed ward, so far as they are known to the petitioner;
 - f. The extent of guardianship authority sought, including full authority, limited authority, or no authority in each area of residential, educational, medical, legal, vocational, and financial decisionmaking 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;
 - g. The occupation and qualifications of the proposed guardian;
 - h. The name and address of the attorney, if known, who most recently represented the proposed ward;
 - i. A statement alleging specific facts establishing the necessity for the appointment of a guardian;
 - j. The name and address of any current conservator appointed for the proposed ward;
 - k. The name and address of any person designated as an attorney in fact or agent in a power of attorney or as an agent in a health care directive;
 - l. The name and address of any representative payee for the proposed ward;
 - m. That less intrusive alternatives to guardianship have been considered;
 - n. In the form of an attached recent statement, the physical, mental, and emotional limitations of the proposed ward from an expert examiner, if available; and
 - o. Whether the petition seeks to restrict any of the following rights:
 - (1) To vote;
 - (2) To seek to change marital status; or

- (3) To obtain or retain a motor vehicle operator's license.
3. Upon the filing of a petition, the court promptly shall set a date for hearing on the issues of incapacity, appoint an attorney to act as guardian ad litem, appoint an expert examiner to examine the proposed ward, and appoint a visitor to interview the proposed guardian and the proposed ward. The proposed guardian shall attend the hearing on the petition unless excused by the court for good cause.
 4. The duties of the guardian ad litem include:
 - a. Personally interviewing the proposed ward;
 - b. Explaining the guardianship proceeding to the proposed ward in the language, mode of communication, and terms that the proposed ward is most likely to understand, including the nature and possible consequences of the proceeding, the right to which the proposed ward is entitled, and the legal options that are available, including the right to retain an attorney to represent the proposed ward;
 - c. Advocating for the best interests of the proposed ward. The appointed attorney serving as legal guardian ad litem may not represent the proposed ward or ward in a legal capacity;
 - d. Submitting a written report to the court containing the guardian ad litem's response to the petition and an assessment of the proposed ward's ability to attend the hearing either in person or by remote means; and
 - e. Reviewing the visitor's written report submitted in accordance with subdivision h and i of subsection 6 and discussing the report with the proposed ward.
 5. The expert examiner shall examine the proposed ward and submit a written report to the court. The written report must contain:
 - a. A description of the nature and degree of any current incapacity or disability, including the medical or psychological history, if reasonably available;
 - b. A medical prognosis or psychological evaluation specifying the estimated severity and duration of any current incapacity or disability;
 - c. A statement as to how or in what manner any underlying condition of physical or mental health affects the proposed ward's ability to provide for personal needs; and
 - d. A statement as to whether any current medication or physical or mental condition affects the demeanor of the proposed ward or the ability of the proposed ward to attend and participate fully in any court proceeding or in any other procedure required by the court or by court rule.
 6. The visitor shall have the following duties:
 - a. To meet, interview, and consult with the proposed ward regarding the guardianship proceeding, including explaining the purpose for the interview in a manner the proposed ward can reasonably be expected to understand.
 - b. To ascertain the proposed ward's views concerning the proposed guardian, the powers and duties of the proposed guardian, the proposed guardianship, and the scope and duration thereof.
 - c. To interview the person seeking appointment as guardian.
 - d. To interview other persons interested in the welfare of the proposed ward.

- e. To visit the proposed ward's present place of residence.
 - f. To discuss an alternative resource plan with the proposed ward, if appropriate.
 - g. To obtain other relevant information as directed by the court.
 - h. To submit a written report to the court.
 - i. The visitor's written report must contain:
 - (1) A description of the nature and degree of any current impairment of the proposed ward's understanding or capacity to make or communicate decisions;
 - (2) A statement of the qualifications and appropriateness of the proposed guardian and a recommendation regarding whether the proposed guardian should be appointed;
 - (3) If the visitor recommends the proposed guardian should not be appointed, a recommendation regarding an alternative individual or entity that should be appointed as guardian;
 - (4) Recommendations, if any, on the powers to be granted to the proposed guardian, including an evaluation of the proposed ward's capacity to perform the functions enumerated under subsections 3 and 4 of section 30.1-28-04; and
 - (5) An assessment of the capacity of the proposed ward to perform the activities of daily living; and
 - (6) An assessment of the proposed ward's ability to attend the hearing either in person or by remote means.
7. In determining whether appointment of a guardian is appropriate, the court shall consider the reports ordered by the court under this section from a guardian ad litem, visitor, and an expert examiner. The court, guardian ad litem, petitioner, or proposed ward may subpoena the individual who prepared and submitted the report to appear, testify, and be cross-examined.
8. The proposed ward must be present at the hearing in person or by remote means, unless good cause is shown for the absence. Good cause does not consist only of the physical difficulty of the proposed ward to attend the hearing. The proposed ward has the right to present evidence, and to cross-examine witnesses, including the court-appointed expert examiner and the visitor. ~~The issue may be determined at a closed hearing if the proposed ward or the proposed ward's counsel so requests.~~
9. Every hearing under this chapter must be closed to the public unless the proposed ward, the ward, the attorney, or guardian ad litem of the proposed ward or ward requests it remain open. An individual or entity may request permission to observe or participate in the hearing and the request must be granted if the court determines the applicant's participation would be in the best interest of the proposed ward or ward.
10. The court shall take all necessary steps to make the courts and court proceedings accessible and understandable to impaired persons. Accordingly, the court may convene temporarily, or for the entire proceeding, at any other location if it is in the best interest of the proposed ward.
- ~~10.~~11. If the court ~~approves~~appoints a visitor, lawyer, or expert examiner, ~~guardian, or emergency guardian appointed~~ in a guardianship proceeding, that person may receive reasonable compensation from the ward's estate if the compensation will not unreasonably jeopardize the ward's well-being.
12. If the court approves a guardian or emergency guardian in a guardianship proceeding, that person may receive reasonable compensation and reimbursement from the ward's estate if

the compensation and reimbursement will not unreasonably jeopardize the ward's well-being and estate. The court shall consider the following factors when determining what constitutes reasonable compensation and reimbursement:

- a. The size and nature of the ward's estate;
 - b. The benefit to the ward, or the ward's estate, of the guardian's services;
 - c. The necessity for the services performed;
 - d. The ward's anticipated future needs and income;
 - e. The time spent by the guardian in the performance of the services;
 - f. Whether the services were routine or required more than ordinary skill or judgment;
 - g. Any unusual skill, expertise, or experience brought to the performance of the services;
 - h. The guardian's estimate of the value of the services performed;
 - i. The fee customarily charged in the community for similar services;
 - j. The nature and length of the relationship with the ward;
 - k. The experience, reputation, diligence, and ability of the person performing the service;
 - l. Any conflict of interest the guardian may have; and
 - m. Whether the appointment as guardian precluded the guardian from other employment.
13. The court may determine the weight to be given to each factor under subsection 12, and to any other factor the court considers relevant. A separate finding is not required for each factor, but the court's findings must contain sufficient specificity to show the factual basis for the court's determination.
14. The court must approve compensation and reimbursement before payment to the guardian is made.

SECTION 9. AMENDMENT. Section 30.1-28-04 of the North Dakota Century Code is amended and reenacted as follows:

30.1-28-04. (5-304) Findings - Order of appointment.

1. The court shall exercise the authority conferred in this chapter 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.
2. At a hearing held under this chapter, the court shall:
 - a. Hear evidence that the proposed ward is an incapacitated person. Age, eccentricity, poverty, or medical diagnosis alone is not sufficient to justify a finding of incapacity;
 - b. Hear evidence and determine whether there are any existing general durable powers of attorney and durable powers of attorney for health care. If there are validly executed durable powers of attorney, the court shall consider the appointed attorneys in fact and agents appointed thereunder when assessing alternative resource plans and the need for a guardian; and

- 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.
3. Except upon specific findings of the court, a ward may not be deprived of any of the following legal rights: to vote, to seek to change marital status, or to obtain or retain a motor vehicle operator's license.
4. The court may find that the ward retains other specific rights.
5. The order appointing a guardian confers upon the guardian only those powers and duties specified in the order. In addition to any other powers conferred upon the guardian, the court's order must state whether the guardian has no authority, general authority, or limited authority to make decisions on behalf of the ward in each of the areas of residential, educational, medical, legal, vocational, and financial decisionmaking. A grant of limited authority must specify the limitations upon the authority of the guardian or the authority retained by the ward. The court's order must require the guardian to provide within ninety days from the date of the order a beginning inventory of all assets owned by the ward or in which the ward has an interest. The guardian shall provide a copy of the beginning inventory to the ward and any interested persons designated by the court in its order. Unless terminated earlier by the court, an order appointing or reappointing a guardian under this section is effective for up to five years. At least ninety days before the expiration of the initial order of appointment or any following order of reappointment, the court shall request and consider information submitted by the guardian, ward, ward's attorney, if any, and any interested persons regarding whether the need for a guardian continues to exist. If it is recommended that the guardianship continue, the court may appoint a guardian ad litem or visitor, or both, in accordance with section 30.1-28-03. The court shall hold a hearing on whether the guardianship should continue. Following the hearing and consideration of submitted information, the court may reappoint the guardian for up to another five years, allow the existing order to expire, or appoint a new guardian in accordance with this section. The supreme court, by rule or order, shall provide for the regular review of guardianship in existence on August 1, 2015.
6. Unless a court of competent jurisdiction determines otherwise, a durable power of attorney for health care executed pursuant to chapter 23-06.5 takes precedence over any authority to make medical decisions granted to a guardian pursuant to chapter 30.1-28.
7. A grant of general authority to make medical decisions includes the authority to consent to involuntary treatment with prescribed medications. Except upon specific findings of the court, a grant of limited authority does not include authority to consent to involuntary treatment with prescribed medications.
8. The court may require a guardian to furnish a bond in the amount and with sureties as the court specifies.
9. After the hearing, the guardian ad litem must be discharged of the person's duties as guardian ad litem.

SECTION 10. AMENDMENT. Section 30.1-28-07 of the North Dakota Century Code is amended and reenacted as follows:

30.1-28-07. (5-307) Removal or resignation of guardian - ~~Termination~~Change in or termination of guardianship.

1. On petition of the ward or any person interested in the ward's welfare, the court may remove a guardian and appoint a successor if in the best interests of the ward. On petition of the guardian, the court may accept the guardian's resignation and make any other order which may be appropriate.
2. The ward or any person interested in the ward's welfare may petition for an order that the ward is no longer incapacitated or no longer incapacitated to the same extent as the ward was when the original guardianship order was made or last reviewed by the court, or that the duties and authority of the guardian require modification, and for removal or resignation of the guardian, termination of the guardianship, or change in the duties and authority of the guardian. A request for this order may be made by informal letter to the court or judge. Any person who knowingly interferes with transmission of this kind of request to the court or judge may be adjudged guilty of contempt of court.
3. Before removing a guardian, changing the guardian's duties and authority, accepting the resignation of a guardian, or on finding that the ward is no longer incapacitated, or no longer incapacitated to the same extent and ordering the guardianship terminated or modified, the court, following the same procedures to safeguard the rights of the ward as apply to a petition for appointment of a guardian, may send a visitor to the residence of the present guardian and to the place where the ward resides or is detained, to observe conditions and report in writing to the court.
4. A hearing must be held no later than sixty days following the filing of the petition or informal request, unless good cause is shown. Following the hearing, the court shall make written findings of fact. Before terminating or modifying the guardianship, the court shall find by a preponderance of the evidence that the ward is no longer incapacitated, no longer incapacitated to the same extent as the ward was when the original guardianship order was made or last reviewed by the court, or that it is in the best interests of the ward that the duties and authority of the guardian be modified. New letters of guardianship must be issued to the guardian in the same manner as provided in section 30.1-28-05.
5. In deciding whether to terminate or modify a guardianship, the court may require a report by and consider the recommendations of an expert examiner.
6. If the guardian dies, or if on the basis of a petition filed under this section or a report or other information, there is probable cause to believe a guardian is not performing the guardian's duties effectively and there is an imminent danger the ward's physical, mental, or emotional health or safety will be seriously impaired, the court shall take whatever action is necessary to protect the ward, including dismissal of the guardian and appointment of an emergency guardian as provided in section 30.1-28-10.1.
7. On termination of the guardianship, a guardian shall file a final report and accounting and provide a copy of the report and accounting to those given notice under section 30.1-28-09. The report and accounting must be filed with the clerk of district court. The filing of the report and accounting does not constitute the court's approval of the report and accounting. The court may approve a report and settle and allow an accounting only upon notice to the ward and other interested persons who have made an appearance or requested notice of the proceedings.

SECTION 11. AMENDMENT. Subsection 2 of section 30.1-28-09 of the North Dakota Century Code is amended and reenacted as follows:

2. The petitioning party, unless otherwise directed by the court, shall cause notice to be served personally on the ward or proposed ward, and the ward's or proposed ward's spouse and parents if they can be found within the state. Notice to the spouse and parents, if they cannot be found within the state, and to all other persons except the ward or proposed ward must be given as provided in section 30.1-03-01. ~~Waiver of notice by the ward or proposed ward is not effective unless the ward or proposed ward attends the hearing or the ward's or proposed ward's waiver of notice is confirmed in an interview with the visitor.~~

SECTION 12. A new subsection to section 30.1-28-10.1 of the North Dakota Century Code is created and enacted as follows:

The petitioner may request the court extend the emergency order for up to an additional ninety days upon good cause shown. The request must be filed with the court at least fourteen days before the expiration of the emergency order and served on the alleged incapacitated individual, the individual's spouse, if any, and any other persons as the court directs. The court shall hold a hearing on the appropriateness of the extension within ten days of the request. No additional extensions of the emergency guardianship may be granted.

SECTION 13. AMENDMENT. Subsection 7 of section 30.1-28-12 of the North Dakota Century Code is amended and reenacted as follows:

7. If no conservator for the estate of the ward has been appointed and if the guardian has been granted authority to make financial decisions on behalf of the ward, the guardian ~~may~~shall:
 - a. Institute proceedings to compel any person under a duty to support the ward or to pay sums for the welfare of the ward to perform that duty.
 - b. Receive money and tangible property deliverable to the ward and apply the money and property for support, care, and education of the ward; but, the guardian may not use funds from the ward's estate for room and board which the guardian or the guardian's spouse, parent, or child have furnished the ward unless a charge for the service is approved by order of the court made upon notice to at least one of the next of kin of the ward, if notice is possible. The guardian shall exercise care to conserve any excess for the ward's needs.
 - c. Move the court under section 30.1-28-03.2 for authority to sell, mortgage, or otherwise encumber or transfer ownership or beneficiary of:
 - (1) The real property of the ward; or
 - (2) The personal property of the ward valued over two thousand five hundred dollars upon such terms as the court may order, for the purpose of paying the ward's debts; providing for the care, maintenance, rehabilitation, training, or education of the ward or the ward's dependents; or for any other purpose which is in the best interests of the ward. The sale, mortgage, or other encumbrance or transfer of ownership of personal property of the ward valued at two thousand five hundred dollars or less does not require a court order.
 - d. Move the court under section 30.1-28-03.2 for authority to lease the real or personal property of the ward.
 - e. A guardian may not purchase, lease, or obtain ownership or become the beneficiary of property of the ward unless the price and manner of the sale are approved by the court.

President of the Senate

Speaker of the House

Secretary of the Senate

Chief Clerk of the House

This certifies that the within bill originated in the Senate of the Sixty-eighth Legislative Assembly of North Dakota and is known on the records of that body as Senate Bill No. 2224.

Senate Vote: Yeas 47 Nays 0 Absent 0

House Vote: Yeas 92 Nays 1 Absent 1

Secretary of the Senate

Received by the Governor at _____ M. on _____, 2023.

Approved at _____ M. on _____, 2023.

Governor

Filed in this office this _____ day of _____, 2023,

at _____ o'clock _____ M.

Secretary of State