Senate Bill 2291
Senate Judiciary Committee
Testimony Presented by Sara Behrens
January 29, 2025

Good afternoon Chair Larson, members of the committee. My name is Sara Behrens and I am a staff attorney with the State Court Administrator's Office. I also serve as staff to the Guardianship Standards Workgroup. I am here today in support of Senate Bill 2291. This bill was drafted as a collaborative effort by the members of the Guardianship Standards Workgroup. The proposed amendments contained in Senate Bill 2291 are intended to clarify procedures in guardianships and conservatorships.

Sections 1 and 2

These sections were requested by the Department of Health and Human Services. Jonathan Alm will testify to the reasons for the changes in these two sections of the bill.

Section 3:

Section 3 adds a good cause exception to the expiration of the letters of guardianship in a juvenile matter where a review hearing cannot be held prior to the expiration of those letters. This provides flexibility to ensure that there isn't a

lapse in authority while waiting for a hearing to be held. The extension is limited to 90 days. New letters are required reflecting the extended expiration date.

Section 4:

Currently, there are definitions in both chapters 30.1-01 and 30.1-26. This bill brings the definitions from section 30.1-26 into chapter 30.1-01 so that the definitions are more easily located. The definitions of "alternative resource plan," "incapacitated person," "least restrictive form of intervention," "protected person," "protective proceeding," "refusal," and "ward" are simply moved from chapter 30.1-01 to 30.1-26.

Page 7, lines 16-30 and page 8, lines 1-8, clarifies the definition of "interested person." Currently, the definition is geared towards probate and not guardianships and conservatorships. There has been confusion regarding who would be an interested person in a guardianship proceeding. The amendment separates the definition into paragraph a which applies for all purposes other than guardianships and conservatorships, and paragraph b which applies for purposes of guardianships and conservatorships. Those considered interested persons would be:

- the petitioner for appointment of the guardian, which may be someone other than the guardian,
- the spouse, parent, adult children, or siblings of the ward, protected person, or an adult relative if one of those individuals is not found,

- an adult individual who has lived with a ward or protected person for more than 6 months,
- an attorney for the ward or protected person,
- a representative payee for the ward or protected person, and
- any other person designated by the court.

Page 8, lines 29-31, deletes the definition of "limited guardian." This term is not used anywhere else in the code other than the definition of "ward." A guardian's authority can be limited and those limitations would be derived from the letters themselves. We are aware of concerns raised by Mr. Olson from Protection and Advocacy, one of the Workgroup members. The Workgroup had voted to remove the definition; however, we won't object to the definition being left in.

Page 9, line 18, eliminates the definition for "person with limited capacity." This section currently refers to section 30.1-26-01; however, this definition has not existed in 30.1-26-01 since 1989. This cleans up this section by removing reference to a nonexistent definition.

Section 5:

Section 5 amends section 30.1-28-03.1 to specify that a report prepared and submitted by a guardian ad litem, a visitor, or an expert examiner, as well as the annual, final and financial reports prepared and submitted by the guardian are

confidential and not open to public inspection. All of these documents routinely contain confidential medical and financial information. Currently, only the expert examiner and visitor reports are confidential.

Section 6:

Section 6 amends subsection 3 of section 30.1-28-03.2 to refer to a new section created by the bill, found on page 18, Section 12.

Section 7:

Section 7 adds the good cause extension to section 30.1-28-04 for those instances when a hearing cannot be held prior to the expiration of the initial order. Like the prior good cause section, new letters of guardianship are required to reflect that extended date.

Page 14, lines 20-21, adds the visitor and expert examiner to those who are discharged of their duties following the hearing. At that point, these individuals' duties are completed at the point the hearing is completed.

Section 8:

Section 8 is simply removing the notice piece because it is provided elsewhere.

Section 9:

This section amends 30.1-28-07 to remove the provisions regarding removal or resignation of a guardian and, instead, the section will govern change in or

termination of guardianship. These are the situations where a ward may no longer be incapacitated or no longer be incapacitated to the extent they were when the guardian was initially appointed. An informal request can be made and the clerk will send a copy to the parties and those identified in the new notice provision.

Section 10:

This section creates a new section to chapter 30.1-28 to govern instances of removal, resignation or death of a guardian and appointment of a successor guardian. The new section was created to provide a clearer procedure in these instances as it created confusion being combined with the prior section.

Page 16, lines 22-27, provides the court, the ward, or any interested person can seek removal of the guardian if it's in the best interests of the ward.

Page 16, line 28, allows for the guardian to resign and the court to accept that resignation.

Page 16, lines 29-31, and page 17, lines 1-4, provides for the submission of a final report and accounting when a guardian dies, is removed, or resigns.

Page 17, lines 5-7, requires a hearing no later than 60 days following the filing of the petition or request. The hearing can be held later if good cause exists for the delay. The court must then make written findings and conclusions of law.

Page 17, lines 8-16, provides the procedure for appointment of a successor guardian. The court can appoint a successor guardian or can make other orders if

appointing a successor guardian is not appropriate. A hearing is held if requested. Otherwise, the court may sign the order appointing the successor guardian. Procedure for appointment of a successor guardian is currently found in section 30.1-28-15 which is repealed by this bill. Moving the procedure to this new section provides more clarity in what situations a successor is appropriate and how to appoint that successor. The new section makes clear that the court does not need to wait for someone to petition for removal of a guardian and appointment of a successor if the situation requires it.

Section 11:

Page 17, lines 19-21, amends subsection 1 of section 30.1-28-09 to remove references to proceedings following the appointment of a guardian. This is now covered in the next section.

Section 12:

The new section governs notices in guardianship proceedings following appointment of the guardian. Current law contains various notice provisions scattered throughout chapter 30.1-28 and those provisions are not always consistent. Section 30.1-28-09 provides the notice provision applicable prior to appointment. This new section will provide uniformity and clarity to notices following that appointment.

Following the appointment, those who require notice may be different from those requiring notice of the proceedings to appoint a guardian. Subsequent to the appointment, notice must be given to the parties, the conservator, if any, the ward, and any interested persons designated in the court's order. Throughout the bill, the various notice requirements have been replaced by a reference to this new section.

Section 13:

Section 13 clarifies that the hearing on a petition for an emergency guardian must be held within 10 days of the filing of the petition.

Section 14:

Section 14 addresses liability of the guardian. Guardians on the Workgroup expressed concerns about being held liable for acts of the ward in a broad range of situations. The fear is that the risk of liability may deter individual from being willing to serve as a guardian. The additions specify that a guardian is liable for breaches of the guardian's fiduciary duty and acts of the ward in cases where the guardian was grossly negligent. The addition also makes clear that a guardian is not required to expend the guardian's own funds simply because they are the guardian.

We are aware that there may be an amendment proposed to expand the immunity from liability for guardians. Prior to 1989, there was a provision that stated "A guardian of an incapacitated person has the same powers, rights, and

duties respecting his ward that a parent has respecting his unemancipated minor child except that a guardian is not liable to third persons solely by reason of the parental relationship." This was removed in 1989 and, unfortunately, the legislative history does not provide insight as to the reason for the removal.

The issue of liability was brought to the Workgroup and discussed at multiple meetings. The original proposal was to state that "a guardian is not liable to a third person for the acts of the ward solely by reason of the guardianship relationship." Concerns were raised that the suggested language would provide almost blanket immunity for a guardian. The next iteration presented stated "A guardian is not liable for the acts of the ward unless the guardian is personally negligent." Concerns were raised that the protection was not substantial enough without a definition of negligence included. The Workgroup then decided on the language that is found in the bill stating that a guardian is only liable if the guardian was grossly negligent which means "in the want of slight care and diligence." The term has been further defined in case law to mean a lack of care that is essentially willful in nature or no care at all. This provision provides protection to the guardian from liability for acts of ward unless the guardian acted without any care at all and the ward then committed a wrongful act.

Blanket immunity would be inappropriate. There may be instances where the guardian is aware of the likelihood of the ward committing an act against a third

party and immunity from liability would be unjust. Whatever wording the Committee chooses, we would like it to be clear that, while few and far between, there are those instances where a guardian could and should be liable just like any other professional.

Section 15:

Section 15 simply fixes an error in section 30.1-28-12.1 where the term "interested party" was used where it should be "interested person."

Section 16:

Section 16 amends section 30.1-28-12.2 to refer to the new notice provision found in section 12 of this bill.

Section 17:

We now move from guardianships to conservatorships. Similar to the guardianship changes, this section amends 30.1-29-05 to remove the provision on page 25, lines 1-5 regarding notice following the appointment of a conservator and moves it to its own section.

Section 18:

Section 18 creates a new section to chapter 30.1-29 regarding notice following appointment of a conservator. Like in the guardianship realm, those requiring notice may be different following the appointment and currently the

provisions are not uniform in the chapter. Amendments are made throughout the bill to refer to the new notice section.

Section 19:

Section 19 amends subsection 6 of section 30.1-29-07 to allow those who prepared and submitted reports, such as the expert examiner, to be subpoenaed to testify and be cross-examined. The subpoena can be issued by the court, the guardian ad litem, the petitioner or the person to be protected.

Page 25, lines 18-19 makes clear that both the guardian ad litem and expert examiner are discharged following the hearing as their role has been completed at that point.

Section 20:

Section 20 creates a new section to chapter 30.1-29 governing confidentiality of the reports submitted in a conservatorship proceeding. The reports prepared and submitted by the guardian ad litem and expert examiner, as well as the annual and final reports and financial accounting submitted by the conservator are all confidential as they routinely contain confidential medical and financial information. This confidentiality exists for guardianship proceedings and should exist for conservatorship proceedings as well.

Sections 21 through 24:

These four sections amend sections 30.1-29-08, 30.1-29-13, 30.1-29-18, and 30.1-29-19, to remove the notice provisions as they are now governed by section 18 of this bill.

Section 25:

Section 25 amends subsection 1 of section 30.1-29-01 to make it clear that the court must hold a hearing within 10 days of filing a petition for the appointment of an emergency conservator.

Sections 26-27:

These two sections amend sections 30.1-29-22 and 30.1-29-25 to remove the notice provisions as they are now governed by section 18 of this bill.

Section 28:

Repeals section 30.1-26-01, 30.1-28-08, and 30.1-28-15. Section 30.1-26-01 includes the definitions which were moved into section 30.1-01-06 in section 4 of the bill. Section 30.1-28-08 contains a definition of visitor which is already defined in section 30.1-01-06. Section 30.1-28-15 pertains to appointment of successor guardians. Successor guardians are now covered in the new section to chapter 30.1-28 which is created by section 10 of the bill.