

## **Human Services Committee**

**Testimony of Sally Holewa  
July 31, 2012**

Good morning Chairman Wieland and members of the Human Services Committee. For the record, my name is Sally Holewa. I am the State Court Administrator for the North Dakota Court system.

The committee has asked the court to prepare a cost estimate for a court model for delivering public guardianship services. We have prepared 3 different cost estimates based upon different assumptions.

### **Cost Estimates for Court Model**

The first estimate, Version A, is based on the assumption that some guardianship costs would remain with the Developmental Services Division. Under this model, we estimate the state would be responsible for the costs of an additional 305 public guardianship cases. Under this model, we assumed that the court would be responsible for establishing a guardianship program that would then contract with private individuals or guardianship organizations to act as guardians. Additionally, the court would be responsible for training and monitoring the guardians. The monitoring would include a review of every annual account and a 1:1 visit with each person under public guardianship. The estimated cost for this model is \$4,577,549.

The second estimate, Version B, is based on the same assumptions as Version A, except that all guardianship costs, including those currently paid by the

Developmental Services Division, would be transferred to the court. We estimate that this would bring the number of public guardianship cases the court would be responsible for to 751. The estimated cost for this model is \$8,254,851.

The third model, Version C, is an alternative to Versions A and B and would resolve the court's conflict of interest concerns. Under this model, the county and the Division of Developmental Disabilities would each continue to fund public guardianships in the same manner they are now. The state could choose to reimburse the counties for the daily costs of the guardians. The court would assume responsibility for setting standards for guardians, providing training to guardians, and monitoring the guardians. This model assumes that regardless of whether a guardianship is private or public, court staff would review all annual accounts and make 1:1 visits with each ward at least once every two years. The cost for this model is \$2,163,322.

As you are aware, we do have a concern about a potential conflict of interest if all guardianship services are placed under the court. A judge has to be able to objectively evaluate accusations against a guardian and weigh their performance. It becomes more difficult to do this when the guardian has been selected and trained by the court system. In particular, the public perception of a separation between the court and the guardian would be difficult to enforce. We also have an ongoing concern about the potential for physical and financial exploitation of wards that is not limited to just those under public guardianship. While our preference would be for an independent Office of Adult Guardianship Services, we are comfortable with the alternative we propose. Ultimately, we would like to see the state take a more proactive stance in monitoring guardianships, so if in the end, the legislature were to decide that a court model such as Version A or B is best for

the state, we would take on that responsibility and do what we could to minimize the conflict of interest.

### **Comments on Other Recommendations**

If there is time, I would like to add just a few comments on some of the other recommendations in the final report.

In addition to the financing and delivering of public guardianship services, the report covers two other aspects of guardianships. The first is strengthening procedural safeguards that would go into effect prior to a guardianship being granted. The second is setting up mechanisms to prevent abuse and exploitation once a guardianship has been established.

### **Procedural Safeguards**

The report recommends requiring several things that are intended to safeguard the rights of the proposed ward. Among those items are requirements:

- That a petition for guardianship contain detailed information about the need for guardianship and information about the qualifications of the proposed guardian;
- That the ward be given notice of the hearing;
- That the proposed ward be present at the hearing unless certain conditions are met;

- That the proposed ward be provided with a written notice of their rights prior to the hearing, which includes information on the nature, purpose and consequences of a guardianship.

Each of these requirements could be incorporated into the current guardianship process with minor adjustments to current practice.

In addition to these general safeguards, the report recommends additional safeguards for emergency guardianships. These include a requirement that:

- Notice be given to the proposed ward of the petition and hearing prior to the emergency hearing, unless certain conditions are met;
- The right to request a hearing on an emergency order, and if an emergency order is issued, that the ward be given notice of their right to request a hearing on the order; and
- Reducing the length of time an emergency appointment can be in effect from 90 days to 60 days.

These protections could also be incorporated into the emergency guardianship process with minor adjustments to current practice.

The report has other due process recommendations, two of which have the potential to add significant costs to the state. Those recommendations are: (1) proposed ward's right to counsel at state expense if the ward is indigent; (2)

proposed ward's right to an independent medical and/or psychological evaluation at state expense; and (3) the right to a jury trial on the petition.

The right to legal counsel is a tricky area to get a handle on in these types of cases just because the very thing that is being alleged, that the proposed ward is too incapacitated to make decisions for themselves, necessarily leaves you grappling with the question of whether they can make a "knowing and intelligent" waiver of counsel. Some states get around this by automatically appointing an attorney for every proposed ward and then requiring reimbursement from the assets of the ward, or alternatively, allowing those proposed wards to choose to retain a private attorney. It is an admirable goal, but before North Dakota went down the route of requiring counsel either for all proposed wards or only for those who are indigent, there should be some additional study of the costs and feasibility.

I have some hesitations about the recommendation to institute a right to an independent medical or psychological evaluation at state expense. It is not the concept itself because as things currently exist, a proposed ward is able to introduce a medical or psychological exam as a rebuttal to the petition. What concerns me more is the other language he is proposing which would appear to give the proposed ward the right to refuse to cooperate with a court ordered exam. This recommendation, if adopted, has the potential to be quite costly and there should be some additional study of the costs and the availability of qualified professionals to perform the exams in a timely fashion.

The report recommends adopting a right to a jury trial in guardianship cases. There would be a minimal cost to institute this recommendation since there are not very many contested guardianship cases. However, I hesitate to support this right

because North Dakota currently does not allow jury trials for mental health commitments and commitments of sexually dangerous individuals. Since there can be some overlap between mental health issues and guardianship issues, by allowing trials in one area and not another we may be setting ourselves up for an equal protection challenge in the future. My suggestion is that the legislature consider getting additional input from the state bar association, mental health organizations and other interested persons before implementing this change.

Finally, the report recommends changing the standard of proof for guardianships from “clear and convincing evidence” to “clear, *unequivocal* and convincing evidence.” This is not a standard currently recognized under North Dakota law. Footnote #93 of the report states that the rationale behind the change is to indicate that guardianships require a higher standard of proof than other civil cases. This higher standard of proof already exists in North Dakota because other civil cases require only a showing of the “preponderance of evidence.” Because we already have set the bar higher for guardianship cases there does not appear to be any compelling reason to change the current standard.

### **Prevention of Exploitation and Abuse**

To prevent exploitation and abuse of wards, the report recommends mandatory background checks, including a criminal history and credit check, for all potential guardians. I support these recommendations, but recognize that there would be an impact on the BCI to accommodate the additional record checks.

The report recommends that professional guardians and organizations operating as professional guardianship services be bonded and carry professional liability insurance. I also support these recommendations, but would point out that the

legislature would also need to define what constitutes a professional guardian or guardianship service.

The report recommends that the court institute a program to monitor annual reports, contact wards, and make other investigations. The court currently relies on concerned relatives or other interested parties to alert the court to potential abuse by objecting to an annual account or bringing a motion to remove a guardian. The court currently does not have adequate staff with the appropriate technical skills to monitor accounts or to make home visits to wards. With additional staff, the court could implement such a program. We anticipate that in order to review all guardianships, both private and public, every two years, it will require 10 additional staff. Those costs are included in the Version C cost estimate that I discussed earlier.