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Sixty-fourth
Legislative Assembly
of North Dakota

**FIRST ENGROSSMENT**

**ENGROSSED SENATE BILL NO. 2168**

Introduced by

Senators J. Lee, Armstrong, Nelson

Representatives Delmore, Klemin, Weisz

A BILL for an Act to create and enact a new section to chapter 30.1-28 of the North Dakota Century Code, relating to confidentiality of reports and personal information in guardianship proceedings; and to amend and reenact section 30.1-28-03, subsection 5 of section 30.1-28-04, subsection 2 of section 30.1-28-05, subsections 1 and 2 of section 30.1-28-09, section 30.1-28-10.1, subsections 5, 8, and 9 of section 30.1-28-12, and subsection 2 of section 30.1-29-01 of the North Dakota Century Code, relating to petitions, guardians ad litem, reports, contents of court orders, service of orders and notice requirements in guardianship proceedings, emergency guardians, guardian duties and annual reports, and the appointment of a conservator.

**BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

**SECTION 1. 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 ~~the~~ guardianship authority sought, including ~~whether the nominated guardian seeks to have~~ 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; ~~and~~

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; and

n. In the form of an attached recent statement, the physical, mental, and emotional limitations of the proposed ward, from a physician, mental health services provider, or other healthcare provider, if available.

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 a physician or clinical psychologist 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 ~~attorney~~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; ~~and~~
   c. ~~Representing~~Advocating for the best interests of the proposed ward ~~as guardian ad litem. If the~~. The appointed attorney ~~or other attorney is retained by the proposed ward to act as an advocate, the attorney shall promptly notify the court, and the court may determine whether the attorney should be discharged from the duties of guardian ad litem~~serving as legal guardian ad litem may not represent the proposed ward or ward in a legal capacity; and
   d. Submitting a written report to the court containing the guardian ad litem's response to the petition.
5. The physician or clinical psychologist 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 affects the demeanor of the proposed ward or the ability of the proposed ward to 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 visit the proposed ward's present place of residence.

e. To discuss an alternative resource plan with the proposed ward, if appropriate.

f. To obtain other relevant information as directed by the court.

g. To submit a written report to the court.

h. 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;

(3) 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

(4) An assessment of the capacity of the proposed ward to perform the activities of daily living.

7. <u>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 either a physician or a clinical psychologist. 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.</u>

<u>8.</u> The proposed ward must be present at the hearing in person, 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 physician and the visitor. The issue may be determined at a closed hearing if the proposed ward or the proposed ward's counsel so requests.

~~8.~~9. 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.

~~9.~~10. If the court approves a visitor, lawyer, physician, guardian, or ~~temporary~~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.

**SECTION 2.** A new section to chapter 30.1-28 of the North Dakota Century Code is created and enacted as follows:

**Confidentiality - Reports - Personal information.**

1. A written report prepared and submitted under subsection 5 or 6 of section 30.1-28-03 is closed to the public and is not open to inspection except by the court, parties to the proceeding or their counsel, other persons for those purposes as the court may order for good cause, and others authorized by court rule.

2. Medical, psychological, or other treatment information protected by federal law or regulation and any financial account numbers related to a ward or proposed ward are confidential and may not be disclosed except to parties to the proceeding, their counsel, and others authorized by court rule. The court may permit access by other persons for good cause.

**SECTION 3. AMENDMENT.** Subsection 5 of section 30.1-28-04 of the North Dakota Century Code is amended and reenacted as follows:

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 the effective date of this Act.

**SECTION 4. AMENDMENT.** Subsection 2 of section 30.1-28-05 of the North Dakota Century Code is amended and reenacted as follows:

2. A copy of the order appointing the guardian must be served ~~upon the ward and the ward's attorney~~ by the petitioner to those given notice under section 30.1-28-09. The order must contain the name and address of the guardian as well as notice of the ward's right to appeal the guardianship appointment and of the ward's right to seek alteration or termination of the guardianship at any time.

**SECTION 5. AMENDMENT.** Subsections 1 and 2 of section 30.1-28-09 of the North Dakota Century Code are amended and reenacted as follows:

1. In a proceeding for the appointment or removal of a guardian or for an alteration or termination of a guardianship other than for the appointment of an emergency guardian or for the temporary suspension of a guardian, notice of hearing shall be given by the petitioning party, unless otherwise directed by the court, to each of the following:

a. The ward or the proposed ward and the ward's or proposed ward's spouse, parents, and adult children;

b. Any person, corporation, or institution who is serving as the ward's guardian, attorney in fact, representative payee for public benefits, or conservator, or who has the ward's care and custody;

c. If no other person is notified under subdivision a, then the adult siblings and any adult with whom the proposed ward resides in a private residence, or if none can be found, any known adult relative; and

d. The attorney for the proposed ward, the visitor, and the physician or clinical psychologist, together with a copy of the respective order of appointment for each.

2. ~~Notice must~~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 6. AMENDMENT.** Section 30.1-28-10.1 of the North Dakota Century Code is amended and reenacted as follows:

**30.1-28-10.1. Emergency guardian.**

1. ~~If~~On petition by a person interested in the alleged incapacitated individual's welfare, the court may appoint an emergency guardian if the court finds that compliance with the procedures of this chapter likely will result in substantial harm to the alleged incapacitated individual's health, safety, or welfare, and that no other person appears to have authority and willingness to act in the circumstances~~, the court, on petition by a person interested in the alleged incapacitated individual's welfare, may appoint an emergency guardian whose authority may not exceed sixty days and who may exercise only the powers specified in the order~~. The court may appoint the guardian for a specified period of time, not to exceed ninety days. Immediately upon receipt of the

petition for an emergency guardianship, the court shall appoint ~~an attorney to represent~~a guardian ad litem to advocate for the best interests of the alleged incapacitated individual in the proceeding and any subsequent proceeding. Except as otherwise provided in subsection 2, reasonable notice of the time and place of a hearing on the petition must be given to the alleged incapacitated individual, the individual's spouse, if any, and any other person as the court directs.

2. An emergency guardian may be appointed without notice to the alleged incapacitated individual and the alleged incapacitated individual's ~~attorney~~guardian ad litem only if the court finds from affidavit or other sworn testimony that the alleged incapacitated individual will be substantially harmed before a hearing on the appointment can be held. If the court appoints an emergency guardian without notice to the alleged incapacitated individual, the alleged incapacitated individual and the individual's spouse, if any, must be given notice of the appointment within forty-eight hours after the appointment. The court shall hold a hearing on the appropriateness of the appointment within ~~five~~ten days after the appointment.

3. If a conservator has not been appointed for the alleged incapacitated individual and the emergency guardian has authority for financial decisionmaking, the court's order of appointment must state that the guardian shall safeguard any assets held by the alleged incapacitated individual and, during the period of appointment and subject to any further order of the court, may expend the individual's assets only for the necessary support and care of the individual.

4. Appointment of an emergency guardian, with or without notice, is not a determination of the alleged incapacitated individual's incapacity.

~~4.~~5. The court may remove an emergency guardian at any time. An emergency guardian shall make any report the court requires. In all other respects, the provisions of this chapter concerning guardians apply to an emergency guardian.

**SECTION 7. AMENDMENT.** Subsections 5, 8, and 9 of section 30.1-28-12 of the North Dakota Century Code are amended and reenacted as follows:

5. When exercising the authority granted by the court, the guardian shall safeguard the civil rights and personal autonomy of the ward to the fullest extent possible by:

a. Meeting with the ward following the hearing, unless the ward is represented by an attorney, and explaining to the fullest extent possible the contents of the court's order and the extent of the guardian's authority;

b. Involving the ward as fully as is practicable in making decisions with respect to the ward's living arrangements, health care, and other aspects of the ward's care; and

~~b.~~c. Ensuring the ward's maximum personal freedom by using the least restrictive forms of intervention and only as necessary for the safety of the ward or others.

8. A guardian shall file an annual report with the court ~~informing the court of~~regarding the exercise of powers and duties in areas of authority specified in the court's order of appointment. The report must describe the status or condition of the ward, including any change of residence and reasons for the change, any medical treatment received by or withheld from the ward, any expenditure and income affecting the ward, any sale or transfer of property affecting the ward, and any exercise of legal authority by the guardian affecting the ward. The report must include changes that have occurred since the previous reporting period and an accounting of the ward's estate. The guardian also shall report ~~whether the ward has resided in an institution,~~ whether the ward continues to require guardianship~~,~~ and whether any powers of the guardian should be increased or limited. The ~~filing of a~~ report ~~and its acceptance by the court or~~must be filed with the clerk of district court. The filing of the report does not constitute an adjudication or a determination of the merits of the report nor does the filing of the report constitute the court's approval of the report. The court may approve a report and allow and settle an accounting only upon notice to the ward's guardian ad litem and other interested persons who have made an appearance or requested notice of proceedings. The office of the state court administrator shall provide printed forms that may be used to fulfill reporting requirements. Any report must be similar in substance to the state court administrator's form. The forms must be available in the office of clerk of district court or obtainable through the supreme court's internet website.

9. Copies of the guardian's annual report to the court and of any other reports required by the court must be mailed to the ward and any interested persons designated by the

court in its order. The ward's copy must be accompanied by a statement, printed with not less than double-spaced twelve-point type, of the ward's right to seek alteration, limitation, or termination of the guardianship at any time.

**SECTION 8. AMENDMENT.** Subsection 2 of section 30.1-29-01 of the North Dakota Century Code is amended and reenacted as follows:

2. Appointment of a conservator or other protective order may be made in relation to the estate and affairs of a person if the court determines that:
   a. The person is unable to manage the person's property and affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, ~~advanced age,~~ chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance.
   b. The person has property which will be wasted or dissipated unless proper management is provided, or that funds are needed for the support, care, and welfare of the person or those entitled to be supported by the person and that protection is necessary or desirable to obtain or provide funds.