

1999 SENATE HUMAN SERVICES

SB 2327

1999 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB2327

Senate Human Services Committee

Conference Committee

Hearing Date FEBRUARY 3, 1999

Tape Number	Side A	Side B	Meter #
1		X	5,649
2	X		
2/10/99 1		X	
Committee Clerk Signature <i>Paul Kalodziejchuk</i>			

Minutes:

The hearing was opened on SB2327.

MEL WEBSTER, attorney of law, explained the bill with written testimony. It involves payment of guardianship. SENATOR DEMERS asked what are adequate reasons for termination of authority? MR. WEBSTER answered when the agent is not acting in the best interest of the ward. Also because of distance. SENATOR LEE asked what kind of protection does the little old lady have? Courts look to independently made statements if too much interference. SENATOR THANE asked if there was overlapping to special need - adolescent or child. MR. WEBSTER said this does not apply to minors in this chapter.

BILL CHAUSSEE, Public Administrator for Burleigh and Morton counties, supports bill.

(written testimony) SENATOR DEMERS asked what is appropriate compensation? MR.

Page 2

Senate Human Services Committee

Bill/Resolution Number SB2327

Hearing Date FEBRUARY 10, 1999

CHAUSSEE stated about the ability to pay - \$50 per hour. SENATOR DEMERS asked why would you change that? MR. CHAUSSEE answered the court or other party request.

Rodger Wetzel, citizen, supports bill with written testimony.

NORM STUHMILLER, AARP, supports bill. It will insure guardianship of elderly.

AL WOLF, attorney, supports bill. Need clarification of where the responsibility is located.

Neutral Position.

DAVID BOECK, state employee and lawyer for the Protection & Advocacy Project, stated some

facts in written testimony. SENATOR LEE: Do you have any recommendations for

amendments? MR. BOECK: No, but we are willing to work with someone. SENATOR

DEMERS asked if we should amend out section 2? MR. WEBSTER answered that the courts

approve/disapprove bills. Court ordered payment; it simplifies, clarifies need. Durable Power of Attorney in Health Care and finances. Section 3 is contained in another law.

The hearing was closed on 2327.

Discussion was resumed on 2/10/99. SENATOR FISCHER moved to adopt the amendments by

Melvin Webster. SENATOR DEMERS seconded it. Discussion on amendments. Roll call vote

carried 6-0. SENATOR LEE moved to adopt Mr. Boeck's amendments. SENATOR KILZER

seconded it. Roll call vote carried 6-0. SENATOR DEMERS moved DO PASS AS

AMENDED. SENATOR LEE seconded it. Roll call vote carried 6-0-0. SENATOR DEMERS

will carry the bill.

FISCAL NOTE

(Return original and 14 copies)

Bill/Resolution No.: SB 2327 Amendment to: _____

Requested by Legislative Council Date of Request: 1/20/99

- Please estimate the fiscal impact (in dollar amounts) of the above measure for state general or special funds, counties, and cities.

Narrative:

There is no discernable fiscal impact associated with Senate Bill 2327.

- State** fiscal effect in dollar amounts:

	1997-99 Biennium		1999-2001 Biennium		2001-03 Biennium	
	General Fund	Special Funds	General Fund	Special Funds	General Fund	Special Funds
Revenues:	0	0	0	0	0	0
Expenditures:	0	0	0	0	0	0

- What, if any, is the effect of this measure on the appropriation for your agency or department:

- For rest of 1997-99 biennium: 0
- For the 1999-2001 biennium: 0
- For the 2001-2003 biennium: 0

- County, City, and School District** fiscal effect in dollar amounts:

1997-99 Biennium			1999-2001 Biennium			2001-03 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts
0	0	0	0	0	0	0	0	0

If additional space is needed,
attach a supplemental sheet.

Date Prepared: 1/21/99

Signed *Keith E. Nelson*

Typed Name Keith E. Nelson

Department Judicial Branch

Phone Number 328-4216

Date: 2/10/99
Roll Call Vote #: 1

1999 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2327

Senate HUMAN SERVICES COMMITTEE Committee

- Subcommittee on _____
or
 Conference Committee

Legislative Council Amendment Number _____

Action Taken Wehster Amendments

Motion Made By Sen Fischer Seconded By Sen DeMers

Senators	Yes	No	Senators	Yes	No
Senator Thane	✓				
Senator Kilzer	✓				
Senator Fischer	✓				
Senator Lee	✓				
Senator DeMers	✓				
Senator Mutzenberger	✓				

Total 6 (yes) 0 (no)

Absent 0

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Date: 2/10/99
Roll Call Vote #: 2

1999 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2327

Senate HUMAN SERVICES COMMITTEE Committee

Subcommittee on _____
or
 Conference Committee

Legislative Council Amendment Number _____

Action Taken Amendments Mr Boeck

Motion Made By Sen Lee Seconded By Sen Kilzer

Senators	Yes	No	Senators	Yes	No
Senator Thane	✓				
Senator Kilzer	✓				
Senator Fischer	✓				
Senator Lee	✓				
Senator DeMers	✓				
Senator Mutzenberger	✓				

Total 6 (yes) 0 (no)

Absent 0

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Date: 2/10/99
Roll Call Vote #: 3

1999 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2327

Senate HUMAN SERVICES COMMITTEE Committee

Subcommittee on _____
or
 Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass as Amended

Motion Made By Sen DeMers Seconded By Sen Lee

Senators	Yes	No	Senators	Yes	No
Senator Thane	✓				
Senator Kilzer	✓				
Senator Fischer	✓				
Senator Lee	✓				
Senator DeMers	✓				
Senator Mutzenberger	✓				

Total 6 (yes) 0 (no)

Absent 0

Floor Assignment Sen DeMers

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2327: Human Services Committee (Sen. Thane, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2327 was placed on the Sixth order on the calendar.

Page 1, line 1, replace the second "a" with "two"

Page 1, line 2, replace "subsection" with "subsections"

Page 1, line 9, replace "not otherwise compensated for services rendered, any" with "the court specifically provides in a case in which a guardian is appointed and if payment of the compensation does not unreasonably jeopardize the ward's well-being, a"

Page 1, line 10, replace "is entitled" with "may"

Page 1, line 11, remove "to" and after "the" insert "ward's"

Page 1, line 20, replace "determine" with "consider"

Page 1, line 21, remove "whether", replace "agent or" with "appointed", after "fact" insert "and agents", and replace "may exercise any" with "when assessing alternative resource plans and the need for a"

Page 1, line 22, remove "authority if a general or limited", remove "is appointed", and replace the underscored period with "; and"

Page 2, line 10, replace "A" with "Two" and replace "subsection" with "subsections"

Page 2, line 11, replace "is" with "are"

Page 2, line 12, replace "Unless a court of competent jurisdiction determines otherwise, a" with "A"

Page 2, line 15, after "30.1-28" insert "unless a court of competent jurisdiction determines, based upon clear and convincing evidence, that the attorney in fact or agent:"

- a. Refuses to observe the laws that govern the exercise of that authority; or
- b. Takes actions that are contrary to the wishes expressed by the principal when competent"

Page 2, after line 15, insert:

The authority of a validly appointed attorney in fact or agent may not be disturbed unless the court finds by clear and convincing evidence that the attorney in fact or agent:

- a. Refuses to observe the laws that govern the exercise of that authority; or
- b. Takes actions that are contrary to the wishes expressed by the principal when competent."

Renumber accordingly

1999 HOUSE HUMAN SERVICES

SB 2327

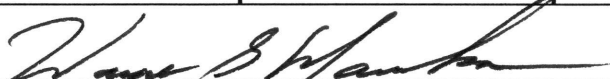
1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2327

House Human Services Committee

Conference Committee

Hearing Date March 2, 1999

Tape Number	Side A	Side B	Meter #
1	x		0.0-9.6
Committee Clerk Signature 			

Minutes:

Melvin Webster testified: (Testimony attached).

Hearing closed on SB 2327.

1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. Sb2327

House Human Services Committee

Conference Committee

Hearing Date March 16, 1999

Tape Number	Side A	Side B	Meter #
2		x	44.9-end
Committee Clerk Signature <i>Wayne B. Pender</i>			

Minutes:

COMMITTEE DISCUSSION

Rep. ROBIN WEISZ presented amendments to address some of the concerns expressed and to eliminate some of the redundancy in the language and explained the details of the amendments.

Rep. ROBIN WEISZ moved the amendments seconded by Rep. ROXANNE JENSEN. The motion PASSED on a voice vote: 12 YES, 0 NO, 3 ABSENT.

Rep. ROBIN WEISZ moved DO PASS AS AMENDED seconded by Rep. TODD PORTER.

The motion PASSED on a roll call vote: 10 YES, 2 NO, 3 ABSENT.

CARRIER: Rep. ROBIN WEISZ.

Closed COMMITTEE DISCUSSION.

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2327

Page 1, line 1, replace "section" with "sections" and remove "two new"

Page 1, line 2, remove "subsections to section"

Page 1, line 9, replace "specifically provides in a case in which a guardian is appointed and if
with approves"

Page 1, remove line 10

Page 1, line 11, remove "well-being."

Page 1, line 12, after "proceeding" insert "that person"

Page 1, line 13, after "estate" insert "if the compensation will not unreasonably jeopardize the
ward's well-being"

Page 2, line 12, replace "Two" with "A" and replace "subsections" with "subsection"

Page 2, line 13, replace "are" with "is"

Page 2, line 16, remove "unless a court of competent jurisdiction"

Page 2, remove lines 17 through 20

Page 2, line 21, remove "competent"

Page 2, remove lines 22 through 27

Renumber accordingly

March 16, 1999

VR
3/17/99

HOUSE AMENDMENTS TO ENGROSSED SENATE BILL NO. 2327 HUMSER 3/17/99

Page 1, line 1, replace "two" with "a"

Page 1, line 2, replace "subsections" with "subsection"

Page 1, line 9, replace "specifically provides in a case in which a guardian is appointed and if"
with "approves"

Page 1, remove line 10

Page 1, line 11, remove "well-being."

Page 1, line 12, after "proceeding" insert ", that person"

Page 1, line 13, after "estate" insert "if the compensation will not unreasonably jeopardize the
ward's well-being"

HOUSE AMENDMENTS TO ENGROSSED SENATE BILL NO.2327 HUMSER 3/17/99

Page 2, line 12, replace "Two" with "A" and replace "subsections" with "subsection"

Page 2, line 13, replace "are" with "is"

Page 2, line 16, remove "unless a court of competent jurisdiction"

Page 2, remove lines 17 through 20

Page 2, line 21, remove "competent"

Page 2, remove lines 22 through 27

Renumber accordingly

Amendment

Date:
Roll Call Vote #:

1999 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2327

House Human Services Committee

Subcommittee on _____
or
 Conference Committee

Legislative Council Amendment Number _____

Action Taken Pass Amendments proposed by Weisz

Motion Made By Weisz Seconded By Jensen

Representatives	Yes	No	Representatives	Yes	No
Clara Sue Price - Chairwoman			Bruce A. Eckre		
Robin Weisz - Vice Chairman			Ralph Metcalf		
William R. Devlin			Carol A. Niemeier		
Pat Galvin			Wanda Rose		
Dale L. Henegar			Sally M. Sandvig		
Roxanne Jensen					
Amy N. Kliniske					
Chet Pollert					
Todd Porter					
Blair Thoreson					

Total Yes 12 No 0 Voice Vote 3
Absent _____

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:
Protect the wellbeing of the ward + cleans up language.

Date: 3/16/99
 Roll Call Vote #: 9

1999 HOUSE STANDING COMMITTEE ROLL CALL VOTES
 BILL/RESOLUTION NO. SB 2327

House Human Services Committee

Subcommittee on _____
 or
 Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass AS Amended

Motion Made By Weisz Seconded By Porter

Representatives	Yes	No	Representatives	Yes	No
Clara Sue Price - Chairwoman	✓		Bruce A. Eckre		
Robin Weisz - Vice Chairman	✓		Ralph Metcalf	✓	
William R. Devlin		✓	Carol A. Niemeier	✓	
Pat Galvin	✓		Wanda Rose	✓	
Dale L. Henegar	✓		Sally M. Sandvig		
Roxanne Jensen	✓				
Amy N. Kliniske					
Chet Pollert	✓				
Todd Porter	✓				
Blair Thoreson		✓			

Total Yes 10 No 2
 Absent 3

Floor Assignment Rep Weisz

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2327, as engrossed: Human Services Committee (Rep. Price, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (10 YEAS, 2 NAYS, 3 ABSENT AND NOT VOTING). Engrossed SB 2327 was placed on the Sixth order on the calendar.

Page 1, line 1, replace "two" with "a"

Page 1, line 2, replace "subsections" with "subsection"

Page 1, line 9, replace "specifically provides in a case in which a guardian is appointed and if" with "approves"

Page 1, remove line 10

Page 1, line 11, remove "well-being."

Page 1, line 12, after "proceeding" insert ", that person"

Page 1, line 13, after "estate" insert "if the compensation will not unreasonably jeopardize the ward's well-being"

Page 2, line 12, replace "Two" with "A" and replace "subsections" with "subsection"

Page 2, line 13, replace "are" with "is"

Page 2, line 16, remove "unless a court of competent jurisdiction"

Page 2, remove lines 17 through 20

Page 2, line 21, remove "competent"

Page 2, remove lines 22 through 27

Renumber accordingly

1999 SENATE HUMAN SERVICES

SB 2327

CONFERENCE COMMITTEE

1999 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB2327CC

Senate Human Services Committee

Conference Committee

Hearing Date MARCH 31, 1999

Tape Number	Side A	Side B	Meter #
1	X		
Committee Clerk Signature <i>Carol Koldziejchuk</i>			

Minutes:

SENATOR THANE called the conference committee to order. Roll call: SENATOR THANE, SENATOR KILZER, SENATOR DEMERS, REPRESENTATIVE DEVLIN, REPRESENTATIVE POLLERT, REPRESENTATIVE NIEMEIER.

REPRESENTATIVE DEVLIN explained general changes. Rep. Weisz met with Legislative Council and section 3 was redundant because it was covered in other statutes. SENATOR DEMERS asked what is the definition of standard? MR. WEBSTER answered that the standard of proof in civil is more likely than not -- criminal is beyond reasonable doubt. Rep. Devlin asked Mr. Webster about the change in section 1. MR. WEBSTER explained the reason for changes in section 1. If I had my druthers, I would take the original bill rather than either version. The Senate version provides that if the court specifically provides in the case that a guardian is appointed and there are a lot of guardian ship cases that involve modification of

guardianship or termination of guardianship. There are also interim guardian proceedings in which the report of a guardian is reviewed in court and may involve expenditure of money. If a party objects you can look at items in billing. SENATOR DEMERS: We thought this was a stipend for doing this - not individual items. MR. WEBSTER: Those monthly payments received by a guardian are approved on an annual basis. Bills submitted after the hearing would be itemized. SENATOR DEMERS asked how does this section apply? MR. WEBSTER: There are only fees at appointment. Dealing with modification or termination of guardian could happen because of condition of ward has changed. In section 3 initially the bill required unless a court of competent jurisdiction determines otherwise - is not in the house version. It authorizes a guardian to make medical decisions for the incapacitated person. REPRESENTATIVE DEVLIN suggested going back to the original version. MR. WEBSTER: In the guardianship or conservator ship language the court will go with conservator ship. SENATOR DEMERS: Why is this significant? MR. WEBSTER: Conservator ship statute requires bond; mandates accounting.

Discussion continued. The committee recessed until after the session.

Committee was called to order after the session. SENATOR DEMERS reported that David Boeck said we need to make consistent with conservators statutes. Go back to the original bill. Representative Devlin and Representative Pollert are in agreement. SENATOR DEMERS moved the Senate accede to the house amendments and further amend section 3 by substituting language in original bill. REPRESENTATIVE NEIMEIER seconded it. Roll call vote carried 6-0-0. REPRESENTATIVE NEIMEIER moved a DO PASS AS AMENDED. SENATOR KILZER seconded. Roll call vote carried 6-0-0. SENATOR DEMERS will carry the bill.

Date 3/31/99

Roll call vote # 1

Please type or use black pen to complete

1997 SENATE STANDING COMMITTEE ROLL CALL VOTES

BILL/RESOLUTION NO. SB 2327

Senate Human Services Committee

Subcommittee on _____ (Identify or

Conference Committee (check where appropriate)

Legislative Council Amendment Number _____

Action Taken Amendment

Motion Made By Sen De Mers

Seconded By Rep. Niemeyer

DO NOT USE HIGHLIGHTER ON ANY FORMS

Senators	Yes	No	Representatives	Yes	No
<u>Thane</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<u>Dewlin</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
<u>Kilger</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<u>Pollert</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
<u>De Mers</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<u>Niemeyer</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>

Total 6 0
(Yes) (No)

Absent 0

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Date 3/31/99

Roll call vote # 2

Please type or use black pen to complete

1997 SENATE STANDING COMMITTEE ROLL CALL VOTES

BILL/RESOLUTION NO. SB2327

Senate Human Services Committee

Subcommittee on _____ (Identify or

Conference Committee (check where appropriate)

Legislative Council Amendment Number _____

Action Taken Do Pass as amended

Motion Made By Rep Niemeier Seconded By Sen Kilzer

Senators	Yes	No	Representatives	Yes	No
<u>Thane</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<u>DeVlin</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
<u>Kilzer</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<u>Pullett</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
<u>DeMers</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<u>Niemeier</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
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_____	<input type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>

Total 6 0
(Yes) (No)

Absent 0

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

DO NOT USE HIGHLIGHTER ON ANY FORMS

(Bill Number) SB 2327 (, as (re)engrossed):

Your Conference Committee

For the Senate:

Sen. Thane
Sen. Kilzer
Sen. DeMaso

For the House:

Rep. Denton
Rep. Pallante
Rep. Diemeier

recommends that the (SENATE/HOUSE) (ACCEDE to) (RECEDE from)
723/724 725/726 S724/H726 S723/H725
the (Senate/House) amendments on (S/J)HJ) page(s) 889 - _____

and place _____ on the Seventh order.
727

, adopt (further) amendments as follows, and place
_____ on the Seventh order:

having been unable to agree, recommends that the committee be discharged
and a new committee be appointed. 690/515

((Re)Engrossed) _____ was placed on the Seventh order of business on the
calendar.

DATE: ____/____/____

CARRIER: _____

LC NO. _____ of amendment

LC NO. _____ of engrossment

Emergency clause added or deleted _____

Statement of purpose of amendment _____

(1) LC (2) LC (3) DESK (4) COMM.

REPORT OF CONFERENCE COMMITTEE

SB 2327, as engrossed: Your conference committee (Sens. Thane, Kilzer, DeMers and Reps. Devlin, Pollert, Niemeier) recommends that the **SENATE ACCEDE** to the House amendments on SJ page 817A, adopt further amendments as follows, and place SB 2327 on the Seventh order:

That the Senate accede to the House amendments as printed on page 817 of the Senate Journal and page 877 of the House Journal and that Engrossed Senate Bill No. 2327 be further amended as follows:

Page 2, line 14, replace "A" with "Unless a court of competent jurisdiction determines otherwise, a"

Renumber accordingly

Engrossed SB 2327 was placed on the Seventh order of business on the calendar.

1999 TESTIMONY

SB 2327

STATE OF NORTH DAKOTA
FIFTY-SIXTH LEGISLATIVE ASSEMBLY
SENATE HUMAN SERVICES COMMITTEE

SB2327

Hearing scheduled for Wednesday, February 3, 1999, 10:30 a.m.

CHAIRMAN THANE AND COMMITTEE MEMBERS:

Good morning. I am David Boeck, a State employee and lawyer for the Protection & Advocacy Project, which provides advocacy services for people with disabilities including people who may be subject to the provisions of this proposed law.

The Protection & Advocacy Project is not taking a position on passage of this bill. I have signed-in as an "opponent" of the bill only because I am identifying potential problems and suggesting caution on SB2327.

Section 1 of the bill creates new rights for court-appointed visitors, lawyers, physicians, guardians, and even temporary guardians. The bill's default position or presumption is that a proposed ward has to pay all these people. Lawyers and doctors do not need these new rights.

In a typical guardianship proceeding, the proposed ward is the only person who may be required to participate involuntarily. The proposed ward may have no need for services from a visitor, lawyer, physician, guardian, or temporary guardian. That would not matter under this bill.

The bill makes no distinction based upon:

- ✗ the proposed ward's need for services
- ✗ the proposed ward's ability to pay for the services, or

* the eventual outcome of the proceeding, i.e., the proposed ward might NOT be incapacitated or may not need a guardian.

This is not fair. At the beginning of a guardianship proceeding a proposed ward is involuntarily brought into court at the prospect of losing decision-making authority. As proposed, SB2327 would make the proposed ward foot the bill.

It may be appropriate for a proposed ward's estate to pay all expenses in some instances. The district judge should consider all the facts before ordering a proposed ward to pay some or all the bills in a case. The proposed ward should not be stuck with this obligation by default or presumption. This new section is not needed.

Section 2 starts with a very good idea: a court should be required to make specific inquiry into the existence and terms of all durable powers of attorney. A court may authorize a guardianship only if a guardianship is the least restrictive form of intervention consistent with the proposed ward's ability to provide self-care. A court is required to consider alternative resource plans that are suitable to safeguard the proposed ward and which could be used instead of a guardianship. A court cannot address these questions unless it first learns what needs are provided for through a durable power of attorney.

Section 2 jeopardizes this good idea by inviting trial

judges to exercise broad discretion to override a valid durable power of attorney. A valid durable power of attorney should be honored unless very specific, narrowly defined criteria exist. For example, a statute might require a trial court to decide by clear and convincing evidence whether an identified, durable power of attorney poses significant risk of substantial harm to a proposed ward's physical, psychological, emotional, or financial well-being. In that instance, a statute could authorize a court to override that durable power of attorney only as necessary to remove the significant risk.

Section 3 duplicates much of N.D.C.C. §§ 23-12-13 (1)(a) and 23-12-13 (1)(b), which, as amended in 1995 (ch. 255), state:

Persons authorized to provide informed consent to health care for incapacitated persons - Priority.

1. Informed consent for health care for a minor patient or a patient who is determined by a physician to be an incapacitated person, as defined in subsection 2 of section 30.1-26-01, and unable to consent may be obtained from a person authorized to consent on behalf of the patient. Persons in the following classes and in the following order of priority may provide informed consent to health care on behalf of the patient:
 - a. The individual, if any, to whom the patient has given a durable power of attorney that encompasses the authority to make health care decisions, unless a court of competent jurisdiction specifically authorizes a guardian to make medical decisions for the incapacitated person;
 - b. The appointed guardian or custodian of the patient, if any;

As proposed, section 3 does not seem to add to or modify this provision.

Boeck

Fifty-sixth
Legislative Assembly
of North Dakota

PROPOSED AMENDMENTS TO SENATE BILL 2327

- Page 1, line 9, replace ~~§ If not otherwise compensated for services rendered, any~~ with ~~§ If the court specifically approves in a case in which a guardian is appointed, a~~
- Page 1, line 11, after ~~§ estate~~ insert ~~§ if payment of that compensation will not unreasonably jeopardize the ward's well-being~~
- Page 1, lines 20 to 21, replace ~~§ determine whether~~ with ~~§ consider~~
- Page 1, line 21, replace ~~§ agent or attorneys in fact appointed thereunder~~ with ~~§ appointed attorneys in fact and agents~~
- Page 1, line 21, replace ~~§ may exercise any authority if a general or limited guardian is appointed~~ with ~~§ when assessing alternative resource plans and the need for a guardian~~
- Page 1, line 22, after the underscored period insert:
~~§ The authority of a validly appointed attorney in fact or agent must not be disturbed unless the court finds by clear and convincing evidence that the attorney in fact or agent will:~~
~~§ (1) Not observe the laws that govern the exercise of that authority; or~~
~~§ (2) Take actions that are contrary to the wishes expressed by the principal when competent.~~
- Page 2, line 12, replace ~~§ Unless a court of competent jurisdiction determines otherwise, a~~ with ~~§ A~~
- Page 2, line 15, after ~~§ 30.1-28~~ insert ~~§ unless a court of competent jurisdiction determines based upon clear and convincing evidence that the attorney in fact or agent will:~~
~~§ a. Not observe the laws that govern the exercise of that authority; or~~
~~§ b. Take actions that are contrary to the wishes expressed by the principal when competent.~~

Renumber accordingly.

Senate Human Services Committee
Testimony of William Chaussee, Public Administrator
in Support of House Bill No. 2327
February 3, 1999

Chairman Thane and Members of the Committee.

My name is Bill Chaussee. I am the public administrator for Burleigh and Morton Counties and five additional surrounding counties. I appear before you in support of Senate Bill No. 2327.

As public administrator, I am often appointed a temporary guardian in situations when there is no family, exploitation exists, or there are adversarial parties involved. When the permanent guardian is appointed or if a guardian is not appointed it is not clear if payment for time and expenses of the temporary guardian will be paid by the estate. This bill would clarify this issue.

Over the past 10 years I have been appointed guardian for approximately 150 individuals. While the majority of the time existing general durable powers of attorney or durable powers of attorney for health care is not an issue, the instances when it does occur can result in confusion over who is making serious and difficult health care decisions for the individual. This Bill would clarify who is responsible for medical decision making and recognize the written wishes of the proposed ward.

I request your support for Senate Bill No. 2327.

TESTIMONY IN SUPPORT OF SB 2327
BEFORE THE SENATE HUMAN SERVICE COMMITTEE
February 3, 1999

Chairman Thane, Members of the Senate Human Service Committee:

My name is Melvin Webster. I am an attorney. A major portion of my practice involves probate and guardianships. Section 1 this bill is identical to a similar provision found in the conservatorship statute at 30.1-29-14(2), a copy of which is attached. After a petition for guardianship is filed with the district court, the district court appoints a visitor, a guardian ad litem to represent the proposed ward, and a physician. If there is an emergency, a temporary guardian is appointed and subsequently, if the court determines there is a need for a guardian, a guardian is appointed. This section merely provides that these persons can be compensated from the estate of the ward. In actuality, most courts order payment for these services. However, occasionally there is a dispute as to whether or not the Century Code permits such a payment. This provision clarifies the law and provides statutory support for what happens in 99 percent of the cases.

Section 2 of SB 2327 requires the district court to determine whether or not there are any existing durable powers of attorney for finance, business, or health care. If there are existing validly executed durable powers of attorney, the court is to determine whether the agents or attorneys in fact appointed by the powers of attorney should continue to exercise authority.

Requiring a specific finding from the court will ensure that an inquiry is made regarding powers of attorney and eliminate any confusion regarding

authority and who will exercise that authority. Since the guardianship statute mandates that the court consider whether there are any available alternative resource plans, it is only natural that the court would, and should, consider whether or not there are any existing powers of attorney since a health care power of attorney or financial power of attorney is a form of an alternative resource plan that at times can be used in lieu of a guardianship.

Section 3 of the bill provides that the authority granted to an agent pursuant to a health care power of attorney takes precedence over a guardian's authority to make medical decisions unless a court would determine otherwise. The primary reason for giving precedence to the agent appointed under a durable power of attorney for health care is that this is a decision which the ward made while competent. Unless there are good reasons for doing otherwise the principal's wishes should be respected and the health care agent should continue to make choices. However, this section permits a court to terminate the authority of a health care agent if there are adequate reasons for doing so.

I urge your support for Senate Bill 2327.

Source: S.L. 1973, ch. 257, § 1.

39 C.J.S. Guardian and Ward, §§ 30, 177.

Collateral References.

Guardian and Ward ⇐ 14, 129.

30.1-29-14. (5-414) Compensation and expense.

1. When the estate is derived, in whole or in part, from money paid or being paid by the veterans' administration to the conservator or the conservator's predecessor for the benefit of the protected person, the compensation allowed from such money to the conservator shall be limited to five percent of the amount of money received from the agency during the period covered by the account, except that the court may allow a minimum compensation of not to exceed fifty dollars per year. No commission or compensation will be allowed for receipt of moneys or other assets received from a prior fiduciary nor upon the amount received from liquidation of loans or other investments.
2. If not otherwise compensated for services rendered, any visitor, lawyer, physician, conservator, or special conservator appointed in a protective proceeding is entitled to reasonable compensation from the estate.

Source: S.L. 1973, ch. 257, § 1; 1975, ch. 290, § 14.

requirement of subsection 2. First Nat'l Bank v. VA Ctr., 458 N.W.2d 339 (N.D. 1990).

Additional Fees.

To the extent the funds have already been subjected to the full five percent statutory maximum fee, there may be no additional fees charged as a percentage of the corpus. First Nat'l Bank v. VA Ctr., 458 N.W.2d 339 (N.D. 1990).

Reasonableness.

Any conservator's fees charged against conservatee's funds, while limited by the five percent statutory maximum, are still subject to the reasonableness requirement of subsection 2. First Nat'l Bank v. VA Ctr., 458 N.W.2d 339 (N.D. 1990).

Fees Subject to Limitation.

The relevant inquiry in determining whether a particular charge violates the statute's five percent limitation from veterans' administration funds is whether the fee will be derived from funds paid by the veterans' administration. First Nat'l Bank v. VA Ctr., 458 N.W.2d 339 (N.D. 1990).

Subsection 2 will be construed as a general provision, allowing conservators in all cases reasonable compensation for services rendered to the estate. First Nat'l Bank v. VA Ctr., 458 N.W.2d 339 (N.D. 1990).

The bank is to be permitted reasonable fees to administer the estates up to a maximum of five percent of the moneys received from the veterans administration, and the bank may also be allowed a percentage of investment income as its fee for producing such income, subject to the reasonableness requirement of subsection 2. First Nat'l Bank v. VA Ctr., 458 N.W.2d 339 (N.D. 1990).

Flat Fees.

The statutory scheme does not allow flat fees which have no actual correlation to the service rendered to the particular estate. First Nat'l Bank v. VA Ctr., 458 N.W.2d 339 (N.D. 1990).

Upfront Fee of Five Percent.

It is not a statutory violation for a bank to initially charge an upfront fee of five percent of each conservatee's veterans' administration benefits as they are received each month by the bank, and the statute expressly allows fees up to a maximum of five percent of veterans administration benefits paid. First

Investment Income.

Where the fees charged against investment income do not come directly from veterans' administration funds paid to the veteran's estate, but rather from the investment income itself, they are not subject to the five percent limitation of subsection 1, though they do, of course, remain subject to the reasonableness

G.A.N.D.

The Guardianship Association of North Dakota

2557 South University Drive, Fargo, ND 58103-5736

Phone: (701) 235-4457

Senate Human Services Committee

Regarding SB 2327

Provided by: Paul T. Griffin, President
Guardianship Association of North Dakota
February 3, 1999

Chairman Thane and Members of the Human Services Committee,

My name is Paul Griffin. I supervise the Guardianship Division of Catholic Family Service, a position I have held for the past 12+ years. During that time I have had the opportunity to supervise the guardianships of over 500 individuals. Our agency has a current caseload of 336 individuals in over 60 cities and towns in every corner of our state. We have a referral list of nine (individuals that are somewhere in the appointment process) and a waiting list of three. I am also the current president of the Guardianship Association of North Dakota, an organization that represents a composite of private individuals, service providers, social service agencies and others who are involved in guardianship. Our current membership numbers 80+ and our purpose is to improve the quality and availability of guardianship services in our state.

I regret that schedule conflicts do not allow me to be personally present at your meeting today, however, I am aware that there are a number of very knowledgeable individuals who expect to be present and will provide you with relaxant, valuable information.

I want all of you to know that the Guardianship Association of North Dakota supports the intent of SB 2327 and we urge you to act upon it favorable.

Thank you for your time and attention. Should you have any questions or if I can help in any way, please do not hesitate to contact me or a member of our organization.

SENATE BILL 2327

Testimony by Rodger W. Wetzel, MPA/LSW

Chair and members of the committee, my name is Rodger Wetzel. I am appearing this morning on my own behalf to testify in favor of Senate Bill 2327.

I have been working in the area of health and human services for thirty years in North Dakota. This includes the last thirteen years at St. Alexius Medical Center, where I currently am the Director of Mental Health, Social Services, and Eldercare.

Social work staff who work in hospitals and medical centers all over North Dakota frequently are asked to provide assistance to patients, families, physicians, and other staff regarding health care decision-making. This may include the involvement of a legal guardian, if there is one, or a durable power of attorney for health care, if one has been appointed.

In addition, many hospital social work, psychology, and physician staff are often requested to serve as a visitor, psychologist, or physician in a guardianship proceeding. On several occasions these services are provided pro bono because there are no resources available to the client. However, in other situations there are resources available in the client's estate. Therefore, I am in support of the new subsection to section 30.1-28-03 of the Century Code which would allow the visitor, psychologist, or physician to receive reasonable compensation if the compensation is available from the estate.

In addition, I have been involved in over two hundred guardianship cases. It has been my experience that it is not a routine procedure that the court be proactive in inquiring as to whether there may be a durable power of attorney for health care, or general durable power of attorney, prior to making a decision in a guardianship case. If a guardian is appointed, and is given health care decision making, this can be very confusing in a health care setting if a client already has a general

durable power of attorney which allows for health care decision making, or has a durable power of attorney for health care. With medical decision-making often needed on an immediate basis, it become very cumbersome to try to determine who has the authority to make these health care decisions. It only would make sense and would not, I believe, be an undue burden on the court to ask involved parties to assist the court in determining whether there is in existence any general durable powers of attorney or durable powers of attorney for healthcare do exist. This may affect the court's decision regarding giving the guardian any health care decision making authority.

As a follow-up, I also support a durable power of attorney for health care taking precedence over the guardian in health care decision making. I believe that if any of us had selected someone else to make our health care decisions for us, and subsequently we needed a guardian, that we would hope the court would respect our health care decision making authority. This seems to be in accordance with other laws and regulations, and the federal Patient Self-Determination Act which does allow for individuals to make their own health care decisions.

In conclusion I support changes in the North Dakota century code as proposed in Senate Bill 2327. I would be happy to answer any questions. In addition I want to thank you for your interest and concern on guardianship-related issues during this session. Thank you.

TESTIMONY OF MELVIN L. WEBSTER FOR THE HUMAN SERVICES COMMITTEE
OF THE NORTH DAKOTA HOUSE OF REPRESENTATIVES IN SUPPORT
OF SENATE BILL 2327.

□

I am an attorney. I practice in Bismarck, North Dakota. My practice includes guardianships and conservatorships and other probate matters. Senate Bill 2327 was substantially amended when heard in the Senate. I still support Senate Bill 2327, but I suggest some changes to the engrossed bill. My comments are as follows:

□

Section 1. As amended, this provides for payment only in those cases in which a guardian is approved and also requires the court to make the finding that payment would not unreasonably jeopardize the ward's well being. There are a number of instances in which a guardianship case is heard other than the appointment of a guardian. It may be for the removal of an inappropriate guardian or a modification of the authority granted to a guardian or to approve or disapprove a guardian's report and/or accounting. I support the requirement for court approval which was always implicit. I suggest that it be revised to read, "If the court approves, a visitor, lawyer, physician, guardian, or temporary guardian appointed in a guardianship proceeding may receive reasonable compensation from the ward's estate."

Section 2. This section requires the court to consider the attorneys in fact and powers of attorney when assessing alternative resource plans and the need for a guardian. This merely is an explicit requirement of what is required by the guardianship statute since the definition of the term "alternative resource plans" specifically includes durable powers of attorney.

Section 3. Section 2 of the engrossed bill requires that the court consider the appointed attorneys in fact and agents under either a health care durable power of attorney or a general durable power of attorney when assessing alternative resource plans and the need for a guardian. Section 3 of the original bill was designed to address those situations in which a guardianship was established and it was later discovered that there was a valid health care durable power of attorney and to eliminate any confusion regarding the authority of the guardian and/or agent/attorney in fact. The original section gives preference to the agent under a durable power of attorney for health care unless a court determines otherwise.

The amendments contained in the engrossed bill require some very detailed findings. For instance, subsection a would require that the court find an attorney in fact/agent must have violated some law that governs the exercise of the authority before the agent could be removed, even though it was clearly in the best interest of the individual that the agent no longer exercise authority.

There are statutes in the criminal code which deal the violation of a fiduciary's authority. Section 12.1-23-07 and Section 12.1-31-07.1, Exploitation of a Vulnerable Adult.

However, as you know, the standard of proof in a criminal proceeding is very high: Proof beyond a reasonable doubt. I question whether this standard could be met in many as it also requires proof of intent. There are also instances when an individual who is suffering from dementia signs many powers of attorney, each one revoking the previous one. This is particularly true if there are quarreling family factions. One child may get a power of attorney one month, only to have it revoked by another the next month. It is extremely difficult to prove after the fact that an individual was not competent on a certain date when he or she signed a durable power of attorney.

Although durable powers of attorney for health care must be witnessed by disinterested persons, it is only necessary that the principal's signature be notarized for a general financial durable power of attorney to be effective.

There are numerous laws that govern fiduciaries, such as agents/attorneys in fact under a durable power of attorney. Section 3 of the engrossed bill needlessly complicates the guardianship proceeding. I suggest that the original language be retained and the court be required to make decisions based upon the best interests of the individual.

Proposed Amendments to Engrossed Senate Bill 2327

Section 1, page 1, lines 9-11, delete beginning with words "specifically provides in a case in which a guardian is appointed and if payment of the compensation does not unreasonably jeopardize the ward's well-being".

Page 1, line 9, after the phrase "If the court " insert the word "approves."

Section 3, page 2, lines 16-27, insert a period after chapter 30.1-28 and delete everything thereafter.

Melvin L. Webster

MELVIN L. WEBSTER

ATTORNEY

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February 8, 1999

Senator Thane, Chairman
Senate Human Services Committee

RE: Senate Bill 2327

Dear Chairman Thane and Committee Members:

I suggest that Section 1 of Senate Bill 2327 be amended as follows:

1. Line 10, the words "is entitled" be deleted and the word "may" be inserted after the word "proceeding."
2. Line 11, the word "to" be deleted and the word "ward's" be inserted before estate.

These changes would emphasize that payment from the ward's estate is permissive, not mandatory. Thank you for your time and attention to this matter.

Sincerely,



Melvin L. Webster

mre

STATE OF NORTH DAKOTA
FIFTY-SIXTH LEGISLATIVE ASSEMBLY
HOUSE HUMAN SERVICES COMMITTEE

SB2327

Hearing scheduled for Tuesday, March 2, 1999, 9:00 a.m.

CHAIRMAN PRICE AND COMMITTEE MEMBERS:

Good morning. I am David Boeck, a State employee and lawyer for the Protection & Advocacy Project, which provides advocacy services for people with disabilities including people who may be subject to the provisions of this proposed law.

I presented neutral testimony on this bill to the Senate Human Services Committee. Today I am testifying in support of the First Engrossment of the bill as passed by the Senate.

Section 1 of the bill creates new financial rights for court-appointed visitors, lawyers, physicians, guardians, and even temporary guardians, to be paid out of a ward's or proposed ward's estate. These new rights are balanced by two standards, fees can be taken involuntarily from a ward or proposed ward only when: (1) they would not deplete the estate and jeopardize the ward's well-being; and (2) when the petition proves well-founded by court appointment of a guardian, i.e., the proposed ward actually is incapacitated and needs a guardian.

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A guardianship proceeding is pursued to take away a proposed ward's right to make decisions about the ward's own life. The proposed ward may not need the guardianship-related services of a visitor, lawyer, physician, guardian, or temporary guardian. SB2327 would not force the proposed ward to foot the bill when the judge agrees the proposed ward does not need guardianship-related services.

It may be appropriate for a proposed ward's estate to pay all expenses in some instances. Under SB2327, a district judge will consider all the facts before ordering a proposed ward to pay some or all the bills in a case. The proposed ward will not get stuck automatically with all these fees.

Section 2 would require a guardianship court to specifically inquire into the existence and terms of all durable powers of attorney. Under current law, a court can authorize a guardianship only if guardianship is the least intrusive way of protecting a proposed ward. A court is required to consider alternative resource plans that are suitable to safeguard the proposed ward and which could be used instead of a guardianship. A court must discover all of the proposed ward's durable powers of attorney before it can adequately assess the proposed ward's unmet needs.

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March 2, 1999

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Section 2 protects a competent person's right to make choices that affect that person's life. A valid durable power of attorney should be honored unless very specific, narrowly defined criteria exist.

SB2327 permits a judge to override a valid durable power of attorney only if there is clear and convincing evidence that the attorney in fact or agent will not follow relevant laws or will act in a way that is contrary to the wishes expressed by the principal when competent.

Section 3 adds the provisions of section 2 to another part of the Century Code.

Please let me know if you would like me to draft a revision for any part of the engrossed bill. Thank you.