

## STUDY OF GUARDIANSHIP SERVICES - BACKGROUND MEMORANDUM

Section 1 of 2011 House Bill No. 1199 (attached as an [appendix](#)) provides that the Legislative Management is to contract with a consultant to study guardianship services for vulnerable adults in the state. The study must include an analysis of the need for guardianship services in the state; the establishment of guardianships; petitioning costs and other costs associated with providing guardianship services; the entities responsible for guardianship costs; and the interaction between the courts, counties, state agencies, and guardianship organizations regarding guardianship services. The consultant is to provide periodic reports and is to present the final report and recommendations regarding the study before June 1, 2012. The Human Services Committee has been assigned this responsibility for the 2011-12 interim.

The Legislative Management also provided that the Human Services Committee is to study the efficacy of statutes governing public administrator services and methods for the timely and effective delivery of guardianship and public administrator responsibilities and services.

### BACKGROUND

When a court determines that an individual lacks the capacity to make or communicate the decisions necessary to manage his or her own personal affairs, a guardian may be appointed. Guardianship is the process by which a court, after determining that an individual is incompetent to make specific decisions, delegates the right to make those decisions to a guardian. Depending on the state statutes, a guardian may also be referred to as a conservator or curator. The process to initiate a guardianship and the practices following the appointment of a guardian differ from state to state. While all states require some sort of petition, notice, and judicial consideration before appointing a guardian, the extent of due process rights afforded the alleged incapacitated person varies.

The following is a summary of the types of guardianship:

- A general guardian is responsible for decisions in all aspects of the ward's (incompetent individual's) life.
- A limited guardian has the authority to make decisions only in specific areas of the ward's life, such as financial or residential.
- An emergency or temporary guardian may be appointed in situations where immediate action is required to prevent harm to the ward. An emergency guardianship cannot be in effect longer than 90 days and has only the authority identified by the court at the time of the appointment. The court may grant an extension beyond the 90-day limit if necessary.

- A testamentary guardian is established when a guardian spouse or guardian parent of a person determined to be incapacitated appoints, by will, a successor guardian for that person.
- A conservator may be appointed to manage the estate and finances of a ward.

The purposes of statutes relating to guardianship are to safeguard the rights and interests of minors and incompetent persons, and it is the responsibility of the courts to be vigilant in seeing that the rights of those persons are properly protected. The court with jurisdiction over a guardianship is the superior guardian, while the guardian is deemed to be an officer of the court. The conduct of the guardian is subject to regulation by a court.

### PREVIOUS LEGISLATIVE STUDIES 2003-04 Interim

During the 2003-04 interim, the Legislative Council's interim Criminal Justice Committee, pursuant to 2003 Senate Concurrent Resolution No. 4008, studied the need for guardianship services, standards and practices for guardians, and funding for programs for individuals with mental illness, vulnerable elderly adults, and individuals with traumatic brain injuries. The committee focused on two issues--the guardianship services needs in the state and procedural guardianship issues. The committee received testimony and information from a number of individuals and agencies involved in the area of guardianships and the need for guardianship services in the state. The committee also received information from the North Dakota Guardianship Task Force, a group made up of representation from the Department of Human Services, the North Dakota Long Term Care Association, the State Bar Association of North Dakota, the Protection and Advocacy Project, the State Hospital, and numerous guardianship service provider organizations. The committee recommended the following bills which were approved by the 2005 Legislative Assembly:

- Senate Bill No. 2028 provided that the Department of Human Services may contract with an entity to create and coordinate a unified system for the provision of guardianship services to vulnerable adults who are ineligible for developmental disabilities case management services. The system is to include a base unit funding level, provider standards, staff competency requirements, and guidelines and training for guardians. The bill provided a \$40,000 general fund appropriation to the department for contracting for the establishment and maintenance of a guardianship services system.
- Senate Bill No. 2029 established a procedure for the current guardian or any interested

person to file a motion with the court for the appointment of a successor guardian.

- Senate Bill No. 2030 provided for an annual report requirement for guardians and conservators. The bill also requires the State Court Administrator's office to develop and provide a form that may be used to fulfill reporting requirements.

### **CURRENT GUARDIANSHIP LAW**

The guardianship provisions of Article V of the Uniform Probate Code enacted in 1973 and the subsequent amendments in 1983 and 1989 are codified as North Dakota Century Code Chapters 30.1-26, 30.1-27, 30.1-28, and 30.1-29. Chapter 30.1-26 contains the general provisions that pertain to guardianship, including definitions and jurisdiction; Chapter 30.1-27 provides for the guardianship of minors; Chapter 30.1-28 provides for guardianships of incapacitated individuals; and Chapter 30.1-29 provides a system of protective proceedings designed to allow the management of estates by a court-appointed conservator.

Chapter 30.1-28 contains provisions regarding the procedural rights of the ward or proposed ward. Section 30.1-28-09 requires that notice be served personally on the ward or proposed ward, that person's spouse, and parents if they can be located within the state. Notice to the spouse or parent, if they cannot be located within the state, may be given by mail or publication. Section 30.1-28-03(7) provides that the proposed ward must be present at the hearing in person unless good cause is shown for the absence. The section also provides that a proposed ward has the right to be represented by counsel and to be personally interviewed by the attorney. Section 30.1-28-04 provides that at a hearing under this chapter, the court is required to hear evidence that the proposed ward is an incapacitated person. The section provides that age, eccentricity, poverty, or medical diagnosis alone is not sufficient to justify a finding of incompetency. The section also provides that the court shall:

- c. Appoint a guardian and confer specific powers of guardianship only after finding in the record based on clear and convincing evidence that:
  - (1) The proposed ward is an incapacitated person;
  - (2) There is no available alternative resource plan that is suitable to safeguard the proposed ward's health, safety, or habilitation which could be used instead of a guardianship;
  - (3) The guardianship is necessary as the best means of providing care, supervision, or habilitation of the ward; and
  - (4) The powers and duties conferred upon the guardian are appropriate as the least restrictive form of intervention

consistent with the ability of the ward for self-care.

Section 30.1-28-06 provides that the authority and responsibility of a guardian terminates upon the death of the guardian or ward. Section 30.1-28-07 provides for the conditions under which a guardian may be removed, resign, or under which the guardianship may be terminated. Section 30.1-28-12 provides that a guardian of an incapacitated individual has only the powers and duties specified by the court.

### **DEPARTMENT OF HUMAN SERVICES - GUARDIANSHIP SERVICES**

The Department of Human Services provides guardianship services under two divisions-- Developmental Disabilities and Aging Services. Under the Developmental Disabilities Division, the department has entered a contract with Catholic Charities North Dakota for full or limited guardianship services to individuals with developmental disabilities. Under the Aging Services Division, the department has established a program for providing guardianship services to individuals who have been diagnosed with a mental illness or a traumatic brain injury or elderly individuals 60 years and over. The Legislative Assembly in 2011 appropriated \$104,000 from the general fund to the department for these guardianship services for the 2011-13 biennium. The department anticipates using the funding as follows:

|                                | <b>Number of Individuals</b> | <b>Estimated Cost Per Individual</b> | <b>Total Estimated Cost</b> |
|--------------------------------|------------------------------|--------------------------------------|-----------------------------|
| Guardianship petitioning costs | 32                           | \$2,500                              | \$80,000                    |
| Guardianship fee               |                              |                                      |                             |
| First year                     | 16                           | \$500                                | 8,000                       |
| Second year                    | 32                           | \$500                                | 16,000                      |
| <b>Total</b>                   |                              |                                      | <b>\$104,000</b>            |

### **PROPOSED STUDY PLAN**

The following is a proposed study plan for the committee's consideration:

1. Prepare a request for proposal for consultant services for a study of guardianship services for vulnerable adults in the state. The proposal must include an analysis of the need for guardianship services in the state; the establishment of guardianships; petitioning costs and other costs associated with providing guardianship services; the entities responsible for guardianship costs; the interaction between the courts, counties, state agencies, and guardianship organizations regarding guardianship services; the efficacy of statutes governing public administrator services; and methods for the timely and effective delivery of guardianship and public administrator responsibilities and services.

2. Select a consultant and recommend that the chairman of the Legislative Management enter a contract for consultant services.
3. Receive information from the Department of Human Services, the judicial branch, and other appropriate entities regarding guardianship services for vulnerable adults in the state.
4. Receive periodic reports from the consultant.
5. Receive the final report and recommendations regarding the study from the consultant before June 1, 2012.
6. Receive comments by interested persons regarding the study of guardianship services for vulnerable adults in the state.
7. Develop recommendations and any bill drafts necessary to implement the recommendations.
8. Prepare a final report for submission to the Legislative Management.

ATTACH:1