

LETTER OPINION
95-L-56

March 9, 1995

Mr. John T. Goff
Cass County State's Attorney
PO Box 2806
Fargo, ND 58108

Dear Mr. Goff:

Thank you for your letter regarding the appointment of Cass County Social Services as guardian for incapacitated persons.

You first ask whether a court can order Cass County to provide guardianship services at its own expense for indigent residents, while appointing the public administrator for those individuals who have sufficient resources to pay for a guardian. You also ask if an individual or governmental agency has the right to decline an appointment as guardian. I will answer your second question first.

Although successor guardians may be appointed by will under N.D.C.C. ? 30.1-28-01, an original guardianship for an incapacitated person is created according to the procedures in N.D.C.C. ? 30.1-28-03. A district court may appoint an original guardian only after finding that the proposed ward is incapacitated, that there is no suitable alternative to the guardianship, that the guardianship is necessary to care for the ward, and that the powers and duties of the guardian are the least restrictive form of intervention necessary. N.D.C.C. ? 30.1-28-04.

After making these findings, the district court may appoint "[a]ny competent person or a designated person from a suitable institution, agency, or nonprofit group home [as] guardian of an incapacitated person." N.D.C.C. ? 30.1-28-11(1). An employee of an institution, agency, or nonprofit home that provides "care and custody of the incapacitated person" should not be appointed as guardian unless no one else can be found to serve and there is no substantial risk of a conflict of interest. Id. Subsection 3 of this statute gives priority to classes of potential guardians, including county social service agencies. Missing from this list is the public

administrator, who must act as guardian if no other qualified person is known to the court. N.D.C.C. ? 11-21-05(8).

Your letter asks whether a county social service agency can decline an appointment as guardian if it is unwilling to serve. N.D.C.C. ch. 30.1-28 does not expressly require that a person be willing to serve as guardian before being appointed by the court, but I believe this requirement is clearly implied by several provisions in that chapter.

A petition for guardianship must include the "occupation and qualifications of the proposed guardian," and the visitor appointed by the court must "interview the person seeking appointment as guardian." N.D.C.C. ? 30.1-28-03(2)(g), (6)(c) (emphasis added). "By accepting appointment, a guardian submits personally to the jurisdiction of the court" N.D.C.C. ? 30.1-28-05(1) (emphasis added). An "acceptance of appointment" is filed with the court. N.D.C.C. ? 30.1-28-13(2). Because the words "seeking" and "accepting" indicate voluntary acts by the "proposed" guardian, I believe N.D.C.C. ch. 30.1-28 contains an implied requirement that only persons who are willing to serve as guardians may be appointed under that chapter. Compare In Re Brown, 540 N.E.2d 317 (Ohio App. 1988).

The conclusion that unwilling persons may not be appointed as guardians under N.D.C.C. ch. 30.1-28 also is consistent with N.D.C.C. ? 11-21-05. Public administrators are omitted from the prioritized list of potential guardians in N.D.C.C. ? 30.1-28-11(3), but are required to act as guardians of last resort.

The public administrator shall be ex officio public . . . guardian . . . in and for his county and shall take into his charge, without application to any appropriate court or special appointment, the . . . persons and estates of all incapacitated persons, in the following cases:

. . . .

8. When the estate or person and estate of an incapacitated person shall be left in his county and there is no legal guardian . . . for such incapacitated person and no competent person who will qualify . . . to act as guardian . . .

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known to the court having jurisdiction.

N.D.C.C. ? 11-21-05 (emphasis added). Under this statute, "the public administrator becomes the ex officio guardian for an indigent and further court authority is not needed." Letter from Attorney General Nicholas Spaeth to Mr. John Gregg (February 13, 1986). The Legislature enacted N.D.C.C. ? 30.1-28-11 and amended N.D.C.C. ? 11-21-05(8) in the same bill. See 1973 N.D. Sess. Laws ch. 257, ?? 1, 7. Thus, the omission of public administrators from the list of potential guardians in N.D.C.C. ? 30.1-28-11 is not an oversight. Instead, because public administrators are required to serve as guardians of last resort, this omission is consistent with the conclusion that the persons listed in N.D.C.C. ? 30.1-28-11 are not required to accept an appointment as guardian.

For these reasons, it is my opinion that persons must be willing to serve as guardians before they can be appointed by the district court under N.D.C.C. ch. 30.1-28. In other words, the potential guardians listed in N.D.C.C. ? 30.1-28-11 are those who may accept such an appointment, but are not required to do so. Therefore, Cass County Social Services may decline an appointment as guardian under N.D.C.C. ch. 30.1-28.

Appointing a public administrator as guardian instead of a county social service agency has several advantages. First, as your letter points out, Cass County Social Services would have a potential conflict of interest if it was the guardian of an indigent person as well as the agency responsible for administering various public assistance programs. On the other hand, the public administrator for Cass County is appointed by the district court and is thereby removed from this potential conflict of interest. Second, while county social service agencies may be most aware of the programs and assistance available to indigent wards, public administrators should have obtained similar expertise through their experience as public guardians. Finally, county social service agencies with no previous experience providing guardianship services would have to assign trained staff to be on call at all times, whereas a public administrator should already be available.

You also ask whether a court can order a county to pay for guardianship services to the indigent while appointing the public administrator for those wards that have resources. As explained above, public administrators must act as guardians of last resort for their county. N.D.C.C. ? 11-21-05. This duty is not conditioned on the ability of needy county

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residents to pay for these services. However, who serves as guardian and who pays for those services are two separate questions.

Public administrators receive the same compensation for guardianship services as other guardians, "unless the court, for special reasons, allows a higher compensation." N.D.C.C. ? 11-21-08. A guardian could presumably be paid from the ward's estate if it contains sufficient resources. N.D.C.C. ? 30.1-28-12(10). However, where a ward's estate is insufficient, responsibility for the cost of guardianship services is less clear. There is no statute expressly requiring a district court to pay for these services, and neither Cass County nor the North Dakota Department of Human Services are required under N.D.C.C. ch. 50-25.2 to provide "vulnerable adult protection services," which arguably include guardianship services, beyond amounts appropriated by the Legislature. N.D.C.C. ? 50-25.2-14.

State law also requires Cass County to provide relief to needy county residents. N.D.C.C. ? 50-01-01; 1990 N.D. Op. Att'y Gen. 70. However, this obligation "only extends so far as the county has funds appropriated or available." 1990 N.D. Op. Att'y Gen. 29 at 30; see also N.D.C.C. ? 50-03-01. In addition, the Cass County Social Service Board has exclusive jurisdiction to adopt eligibility standards and funding levels for these services. N.D.C.C. ?? 50-01-01.1, 50-01-02, 50-01-09(1). Thus, while Cass County could pay for guardianship services to its indigent residents from the county human services fund, its potential responsibility for those services is limited to the amounts appropriated to the fund. N.D.C.C. ? 50-01-01.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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