

## LAW IN BRIEF

### WHAT IS A CONSERVATORSHIP?

#### INTRODUCTION TO SUBSTITUTED JUDGMENT

Substituted judgment is a legal tool that grants a person the power to make property or care decisions on behalf of another person who is unable to fully understand the decision or unable to communicate the decision.

#### Types of Substituted Judgment

There are several types of substituted judgment available. It is best to choose an option that allows the person in need to remain involved in the decision-making process and allows the person in need to retain the highest possible level of independence. The different types of substituted judgment include:

- Health Care Power of Attorney
- Representative Payee
- Power of Attorney
- Conservatorship
- Guardianship.

**Note:** Each form of substituted judgment is listed in order from most independence to least independence for the person in need. See last page of this brief for more information on each type.

This law in brief will discuss the type of substituted judgment known as **conservatorship**. This brief will only discuss conservatorship for adults.

#### WHAT IS A CONSERVATORSHIP?

A conservatorship is a form of substituted judgment. It is created when the court appoints a person, called a conservator, to help manage the property and assets of another individual known as a protected person.<sup>1</sup> A conservator generally has the power to make financial decisions on behalf of the protected person, including the power to enter into contracts, pay bills, and invest assets. A conservator is only

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<sup>1</sup> Neb. Rev. Stat. § 30 – 2601 (2016).

appointed if a judge determines that the person in question is incapacitated. A person may be determined to be incapacitated if he/she is found to be impaired and unable to make decisions or communicate those decisions.<sup>2</sup>

### HOW IS A CONSERVATORSHIP FORMED?

Conservatorships are created by a court. In order for a court to appoint a conservator, the following procedure must be followed:

1. The person in need or a person interested in the welfare of the person in need must ask the court to find that the person in need is incapacitated.<sup>3</sup> The individual must also request the court to appoint a conservator. These requests are made through a petition to the court.<sup>4</sup>
2. The petition must include:<sup>5</sup>
  - The interest of the petitioner (why does the petitioner have an interest in the individual in need's welfare).
  - The name, age, residence and address of the person the petitioner is requesting the court to put under a conservatorship (the alleged person in need).
  - The name and address of the alleged person in need's guardian (if he/she currently has one).
3. After the petition has been filed, the court may send a visitor to interview the alleged incapacitated person to verify the allegations of incapacity.<sup>7</sup> The visitor will then file a report within 60 days of the original petition for conservatorship.<sup>8</sup> There will then be an opportunity to respond. This
  - The name and address of the person in need's nearest relative if the information is known to the petitioner.
  - A general statement of the value of the alleged person in need's property/assets (this includes any compensations, insurance, pension, or allowance to which the person in need is entitled).
  - Reasons why the petitioner is seeking a conservatorship including specific allegations of particular needs.
  - Name and address of a person the petitioner wants to be appointed conservator (if one is available). Generally, if the proposed conservator is a competent person or institution, he/she may be appointed with a few exceptions.<sup>6</sup>
  - The name and address of the person who is sought to be appointed as conservator.
  - The reasons why the individual shall be appointed as conservator.

<sup>2</sup> *Id.*

<sup>3</sup> Neb. Rev. Stat. § 30 – 2619 (2016).

<sup>4</sup> *Id.*

<sup>5</sup> Neb. Rev. Stat. § 30 – 2633 (1997).

<sup>6</sup> Neb. Rev. Stat. § 30 – 2627 (2014).

<sup>7</sup> Neb. Rev. Stat. 30-2619.01 (1982).

<sup>8</sup> Neb. Rev. Stat. 30-2619.03 (1982)

response must be filed within ten days of the visitor's report.<sup>9</sup>

4. The Court Clerk will schedule a hearing.
5. The person alleged to be incapacitated, his/her spouse, adult children, parents, any current guardian or conservator of the person in need, and any person who has custody of the person in need must be notified **personally 14 days before the hearing.**<sup>10</sup>
6. If none of the previously mentioned individuals exist, then the closest adult relative of the person in need must be notified personally 14 days before the hearing, if such a relative can be found.<sup>11</sup>

Notification must include:<sup>12</sup>

- The date, time, and place of the hearing.
- A statement that he/she has the right to request an attorney to represent him/her at the hearing.
- A statement that he/she has the right to present evidence on his/her own behalf.
- A statement that he/she has the right to be given the contact information of the temporary conservator, if one has been appointed.
- A statement that he/she has the right to compel witnesses to testify on his/her behalf.

- A statement that he/she has the right to cross-examine any witnesses brought by the person requesting the conservatorship.
- And a statement that he/she has the right to appeal the court's decision on the conservatorship.

**NOTE:** If the petitioner does not properly notify the alleged person in need, the alleged person in need may request the court dismiss the case.

7. In between the filing of a petition and the setting of a hearing, a guardian ad litem (GAL) may be appointed for the person in need. A guardian ad litem is a person assigned to ensure the best interests of the alleged person in need are pursued.<sup>13</sup>
8. A hearing will be held to determine whether the alleged person in need needs a conservator appointed. If it is clear that the alleged person in need is unable to manage his/her financial affairs, then the court will appoint a conservator.<sup>14</sup> If the matter is contested, a trial will be held. After the trial, if the court finds that a conservator is in the best interest of the petitioned person, then the court will issue an Order of Appointment and a conservator will be appointed.<sup>15</sup>

<sup>9</sup> Neb. Rev. Stat. 30-2619.04 (1982).

<sup>10</sup> Neb. Rev. Stat. 30-2634 (1997).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Neb. Rev. Stat. 30-4203 (2016).

<sup>14</sup> Neb. Rev. Stat. 30-2630 (1993).

<sup>15</sup> <https://supremecourt.nebraska.gov/guardianship-conservatorship-faq/5-process-becoming-guardian-or-conservator>

**Temporary Conservatorship** will be an expedited version of this timeline. The person requesting a conservator must prove to the court that the protected person has an emergency. A hearing will be held within ten days of the request for a conservator. A judge may appoint a temporary conservatorship lasting 90 days, unless the court extends it further. <sup>16</sup>

## ENDING A CONSERVATORSHIP

A conservatorship ends when:

- The conservator dies or becomes incapacitated. <sup>17</sup>
- The protected person dies. <sup>18</sup>
- The court removes the conservator after a finding that it is in the best interest of the person in need. <sup>19</sup>
- The conservator resigns. <sup>20</sup>
- The protected person is found by the court to no longer be incapacitated and granted his/her full decision-making rights back. <sup>21</sup>

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<sup>16</sup> Neb. Rev. Stat. 30-2630.01 (2014).

<sup>17</sup> Neb. Rev. Stat. 30-2622 (1975).

<sup>18</sup> *Id.*

<sup>19</sup> Neb. Rev. Stat. 30-2623 (1997).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

This Law in Brief discusses conservatorships. **Conservatorships are a very restrictive form of substituted judgment.** Below is a guide to other decision-making alternatives that work to protect a person, while also providing him/her the most independent living lifestyle available. Other forms of protection should be considered before guardianship.

<b>Types of Substituted Judgment (Alternatives to Full Guardianship)</b>	
<i>These Alternatives are listed in order from least restrictive to most restrictive form of substituted judgment.</i>	
<b>Health Care Power of Attorney</b>	This is a person selected by the individual in need to make decisions on his/her behalf regarding health care. <sup>22</sup>
<b>Representative Payee</b>	This is a person selected by the Social Security Administration to manage the Social Security benefits for an individual who is found to be in need of assistance. <sup>23</sup>
<b>Power of Attorney</b>	A power of attorney may be selected by the person in need through a written document. This document provides that the selected person with power of attorney may make decisions on behalf of the protected person regarding property (including money). <sup>24</sup>
<b>Conservatorship</b>	This is a court-appointed person who is granted the power to help an incapacitated person make decisions about his/her property and assets. A conservatorship may be limited to certain decisions, for a temporary time. <sup>25</sup>
<b>Guardianship</b>	This is a person who is granted the power to make decisions for a minor or incompetent person. A guardian may make decisions about the person's living arrangements, medical care, education, legal decisions and obligations, and money and property. <sup>26</sup>

<sup>22</sup> Neb. Rev. Stat. 30-3403 (1992).

<sup>23</sup> <https://www.ssa.gov/payee/>

<sup>24</sup> Neb. Rev. Stat. 30-4041 (2012).

<sup>25</sup> <https://supremecourt.nebraska.gov/programs-services/guardianship-conservatorship>

<sup>26</sup> *Id.*