

# Disability Rights Nebraska

Protection and Advocacy for People with Disabilities

## What Is a Guardianship for A Potentially Incapacitated Person?

### Substituted Judgment

Substituted judgment is a legal tool that can be used when a person needs assistance making decisions about his/her care or property due to his/her inability to fully understand a decision that needs to be made or inability to communicate a decision. Substituted judgment gives power to another person to make decisions on behalf of the person who is in need but incapacitated.

### Types of Substituted Judgment

There are several types of substituted judgment available. When selecting a type of substituted judgment, one should note that the best form of substituted judgment is the option which allows the person in need to remain as involved and independent as possible in the decision-making process for his/her care. The different types of substituted judgment include:

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

**Note:** Each form of substituted power of attorney type is listed previously 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 **Guardianships**. This brief will only discuss Guardianships for adults. See our other Law in Brief for information on Guardianships of minors.

## What is a Guardianship?

A Guardianship is the relationship between a person that a court has found to be incompetent to make his/her own decisions and the person it appoints to do the decision making. The courts use the word “Ward” to describe the person in need of a decision maker and the word “Guardian” to describe a person appointed to make decisions on behalf of a person in need.

Not all Guardianships are the same. The court may decide to create a temporary, limited, or full Guardianship for a person in need of decision making.

- **Temporary Guardianships** are created in emergency situations so that the Guardian will assist the person in need through the emergency.
- **Limited Guardianships** are created when the court finds that the person in need is able to make some decisions, but assigns the Guardian to help with other decisions. For example, the court may find the person in need can make his/her education decisions, but cannot make decisions on his/her living arrangement.
- **Full Guardianships** are created when the court finds the person in need is unable to make any decisions about his/her living arrangements, medical care, education, legal decisions and obligations, money or property.

*Courts are encouraged to favor the least restrictive Guardianship for the needs of a person.<sup>1</sup>*

## Who may serve as a Guardian?

Any competent person or appropriate institution may serve and be appointed as a Guardian. However, when appointing a Guardian, a court will give priority to certain people. Priority is given to:

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<sup>1</sup> Neb. Rev. Stat. §§ 30-2601 (2014), 30-2601.02 (2006).

- An agent named in the person in need's Power of Attorney.
- A person selected by an agent named in the person in need's Power of Attorney.
- The spouse of the person in need.
- The adult child of the person in need.
- The parent of the person in need.
- A relative that has resided with the person in need for at least the previous six months.
- A person chosen by a person who is caring for or paying benefits to the person in need.
- The Public Guardian.<sup>2</sup>

*(For more information on the Public Guardian, see our other Law in Brief on this topic).*

A person appointed as a Guardian must complete a training course. The training includes information about the rights of Wards, the duties and responsibilities of Guardians, reporting requirements, and resources to help the Guardian fulfill their duties.

While many people can be appointed as Guardians, there are also people who cannot be appointed as Guardians. Those people are:

- The residential care facility, nursing home, assisted living facility or institution involved in the care, treatment, or housing of the person in need for his/her physical, mental, or aged care.
- An employee of the person in need's residential care facility, nursing home, assisted living facility or institution.
- The spouse of an employee of the person in need's residential care facility, nursing home, or assisted living facility or institution.<sup>3</sup>

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<sup>2</sup> Neb. Rev. Stat. § 30-2627 (2014).

<sup>3</sup> Neb. Rev. Stat. § 30-2627 (2014).

## Powers and duties of a Guardian

Because all Guardianships are different, the court must designate what decisions a Guardian has the authority to make for a person in need. Below is a list of different areas of authority a court could grant a Guardian authority to make decisions for a person in need. A full Guardianship would grant a Guardian the authority to make decisions in all the areas listed below.

- **Place of residence:** When deciding where the Ward should live, the Guardian must make reasonable efforts to make sure that the Ward is placed in the least restrictive environment.
- **Medical care arrangements:** If the Ward needs to have physical or other medical care, the Guardian may set up the appointment for them.
- **Protecting personal property:** If someone is violating the Ward's property rights, the Guardian may step in to help them protect their property.
- **Consents, approvals, or releases on the Ward's behalf:** A Guardian may give consent on the Ward's behalf.
- **Ensuring appropriate training, education, or habilitating services:** A Guardian may set up any training, education, or habilitation services that are necessary.
- **Initiating legal proceedings against people legally responsible for supporting the Ward:** If the Ward does not have a Conservator, the Guardian may start legal proceedings against a person who is legally responsible to support the Ward.
- **Contractual agreements:** If the Ward does not have a Conservator, Guardians may make contracts for the Ward.
- **Properly receive money and property for the Ward and properly applying funds to the Ward's expenses:** It is the Guardian's responsibility to properly use the Ward's money to pay for their expenses.<sup>4</sup>

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<sup>4</sup> Neb. Rev. Stat. §§ 30-2613, 2620 (2011).

## How are Guardianships formed?

As stated previously in this brief, Guardianships are created by a court. In order for a court to appoint a Guardian for a person in need, the following procedure must be followed:

1. The person in need or another person interested in the welfare of a person must request the court to appoint a Guardian through a petition. The petition should clearly indicate what areas of assistance the person being petitioned for needs. See *the previous section of this Law in Brief to identify areas of possible need.*
2. The court clerk will schedule a hearing.
3. The petitioner must notify the alleged person in need, his/her spouse, adult children, parents, and any other known important relatives personally 14 days before a hearing.<sup>5</sup>

Notification must include:

- Date and time of the hearing.
  - That he/she has the right to request an attorney to represent him/her at the hearing.
  - That he/she has the right to compel witnesses to testify on his/her behalf.
  - That he/she has the right to cross-examine any witnesses brought by the person requesting the Guardianship.
  - And that he/she has the right to appeal the court's decision on the Guardianship.
4. Once the petition is filed and a hearing is set a few things may happen in between:
    - A Guardian ad litem may be appointed for the alleged incapacitated person. A Guardian ad litem is an individual assigned to ensure the best interest of the alleged incapacitated person in need.<sup>6</sup> He/she may perform the duties normally

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<sup>5</sup> Neb. Rev. Stat. § 30-2625 (1997).

<sup>6</sup> Neb. Ct. R. § 6-1469.

performed by a lawyer to ensure that the person is represented.<sup>7</sup> In cases where the person has counsel, the GAL serves as an advocate for the person's best interests.<sup>8</sup>

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

5. A hearing will be held to determine whether the person being petitioned for a Guardian is in need of one. During the hearing, the alleged person in need may bring witnesses, documents, recordings, etc. to prove that he/she does/does not need a Guardian. In addition, he/she may cross-examine all witnesses brought from the other parties.

If the court finds a Guardian is in the best interest of the petitioned person, one will be appointed.

**Temporary Guardianship** will be an expedited version of this timeline. The person requesting a Guardian for himself/herself or another will have to explain to the court that the Guardianship is needed for an emergency situation. The person alleged to be in need of a Guardian will be notified within 24 hours of the hearing. The hearing will be held and if the judge appoints a temporary Guardian, his/her service will end in 10 days, unless the judge extends it by a 90-day period.

## Ending a Guardianship

A Guardianship ends when:

- The Guardian dies or becomes incapacitated.
- The protected person dies.
- The Guardian resigns. When a Guardian wants to resign, he or she must file their resignation with the court and it must be approved by the court before he/she can stop making decisions on behalf of a person in need.

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

- The court removes the Guardian.
- The protected person is found by the court to no longer be incapacitated and granted his/her full decision-making rights back.

## Removing a Guardian

A court can remove a Guardian when it finds that the protected person does not need assistance anymore or terminates the Guardian for failure to uphold his/her duties owed to the protected person.

Before the court will approve the resignation, removal of a Guardian, or declare a person under Guardianship as no longer being needed, the court may send a visitor to report on the person's current status and living conditions and the Guardian's ability to provide for the person.<sup>9</sup>

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<sup>9</sup> Neb. Rev. Stat. §§ 30-2622 (2006); 2623 (2006); 2624 (2013).

This Law in Brief discusses Guardianships. **Guardianships are the most 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>	A person selected by the individual in need to make decisions on his or her behalf regarding health care. The individual selects an “Attorney in Fact”, granting him or her authority to make medical decisions for the individual, when he or she becomes unable to make those decisions on his or her own.
<b>Representative Payee</b>	A person selected by the Social Security Administration to make decisions for a person receiving Social Security payments. The Payee is limited to only making decisions about those Social Security benefits.
<b>Power of Attorney</b>	A document that you draft selecting a person to make decisions on your behalf regarding your income, property and assets.
<b>Conservatorship</b>	A Conservator is a court-appointed person granted the power to help an incapacitated person make decisions about his or her property and assets. A Conservator may be the Public Guardian. A Conservatorship may be limited to certain decisions, for a temporary time, or it may be a full Conservatorship that must be contested to be removed.
<b>Guardianship</b>	A Guardian is a person 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, money and property. A Guardian may be appointed by a court or designated through a Power of Attorney or Will. The Public Guardian may be designated as a Guardian for an incompetent person. A Guardianship may be limited to certain decisions, for a temporary time, or it may be a full Guardianship that must be contested to be removed.