

# Disability Rights Nebraska

Protection and Advocacy for People with Disabilities

This is basic information and does not constitute legal advice.

## Substituted Judgment – Guardianship

### What is substituted judgment?

Substituted judgment can be used if you need help making decisions about your care or property. There are several types of substituted judgment you can choose. The best type of substituted judgment is one that allows you to be as independent as possible.

### What are the types of substituted judgment?

There are many types of substituted judgment you can choose. The different types include: health care power of attorney, representative payee, power of attorney, durable power of attorney, conservatorship, and guardianship. The types are listed in order from allowing you the most independence (health care power of attorney) to the least independence (guardianship).

## Guardianship

### What is a guardianship?

A “**guardian**” is a person who is appointed by the court or through a will. A guardian has the power to make decisions for an incompetent person or minor child. The incompetent person or minor child is known as a “*ward*.” The guardian has a duty to make sure that the decisions he or she makes are in the ward’s best interests. When this type of relationship is created between the guardian and the ward, it is known as a “**guardianship**.” Neb. Rev. Stat. §§30-2209; 30-2601 (2006).

### Are all guardianships the same?

No. Guardianships are created for different reasons. Guardianships can be created to care for a minor child or an incapacitated person who has a mental or physical illness or a disability. There are two types of guardianships:

- **Full guardianship**

A full guardianship means that the guardian has the sole ability to make decisions for you about:

- Where you will live;

- Any training or education you might receive,
  - Your medical care,
  - Your personal property,
  - Any consents or releases for you,
  - Any contracts for you,
  - Legal proceedings against people who are legally responsible to support you, and
  - Handling your money and property for your support.
- **Limited guardianship**  
A limited guardianship allows for you to make some decisions. In other words, you are able to make certain decisions, but the guardian is there to help you if you are not able to make some decisions.

The type of guardianship that is chosen depends on your needs. Generally, courts are encouraged to favor the least restrictive guardianship. Neb. Rev. Stat. §§30-2601; 30-2601.02 (2006).

### **What is a temporary guardianship?**

A temporary guardianship may be placed on you in one of two ways:

- **If you are a minor:** A temporary guardian has the same responsibilities as a permanent guardian, but a temporary guardianship will only last for up to six (6) months. The appointment of a temporary guardianship for a minor ward is sometimes used in emergency situations as well. Neb. Rev. Stat. §30-2611 (2006).
- **If you are incapacitated:** The court may appoint a temporary guardian in an emergency situation or order the appointment of a temporary guardian to handle the emergency.

In an emergency situation, you or another interested person can file a request with the court to have a hearing as soon as possible to decide whether you need a temporary guardianship. This is also called an “expedited hearing.” You must request an expedited hearing at least ten (10) business days before the date of the permanent guardianship hearing.

At a temporary guardianship hearing, the petitioner must show that temporary guardianship is necessary for the emergency situation. Neb. Rev. Stat. §30-2626 (2006).

If an expedited guardianship hearing is requested, you or another interested person must be notified at least twenty-four (24) hours before the expedited hearing. At the expedited hearing, the court will list certain duties and powers of the temporary guardianship.

The temporary guardianship will end after ten (10) days or before if the court finds the temporary guardianship is no longer necessary. However, if it is shown that you require a temporary guardianship for a longer period of time, the court may extend the temporary guardianship for a ninety (90) day period followed by additional ninety (90) day periods, if necessary. Neb. Rev. Stat. §30-2626 (2006).

## How is a guardianship created?

The way in which a person becomes a guardian is very similar to the way in which one becomes a conservator (see “Conservatorship” material). Both a guardianship and a conservatorship may be combined so that a guardian may also be a conservator. However, a guardianship is “of the person” and a conservatorship is “of the property and assets.”

- **If you are a minor:** If both of your parents have died, a guardian may have been appointed through your parents’ will. If a guardian is appointed through a will, he or she has to accept the appointment in order to actually become the minor’s guardian. If the court decides that a guardian is necessary and it would be in your best interests, the court may appoint a guardian. Neb. Rev. Stat. §§30-2606; 30-2610 (2006).
- **If you are incapacitated:** Your parent or spouse may appoint a guardian for you by will. If this happens, you can file a request with the court that asks them to decide whether you are incapacitated. Usually, the person that requested the guardianship will file a paper that contains their concerns and why you may need a guardian. In this paper, they will probably say that you lack the ability to communicate and/or understand your needs.
  - **Petitioning the court**  
You or another person interested in your estate may file a request, or a petition, with the court to have a guardian appointed. Any person who might be hurt by poor management of your finances or property may also file a request with the court. Neb. Rev. Stat. §30-2619 (2006).

The petition should include:

- Specific reasons why you do not have “sufficient understanding to make or communicate responsible decisions” for yourself,
- If someone other than you filed the request for appointment of a guardian, you can file a request with the court asking that the request be more specific in stating that you are incapacitated and that you require a guardian. Neb. Rev. Stat. §30-2619 (2006).
- **Notice of the proceedings**  
Notice of a guardianship hearing must be given to you if you are fourteen (14) years old or older, to any living parent, and the person who had custody of you sixty (60) days before the request for guardianship.

Notice of a hearing for the appointment of a guardian must be given to you, your spouse, parents, and adult children. You must be notified fourteen (14) days before the hearing is scheduled. The notice must include:

- The date and time of the hearing, and
- A list of your rights, such as your right to:
  - Request an attorney;
  - Present evidence on your own behalf;
  - Make a witness attend;
  - Cross examine witnesses;
  - Appeal. Neb. Rev. Stat. §§30-2611; 30-2220 (2006).

- **Procedure of the hearing**

Once the court receives your petition for the appointment of a conservator, it will set a date for the hearing. If you are a minor, the court may appoint an attorney to represent you. This attorney also has the powers and duties of a guardian ad litem, which includes acting in your best interests. A guardian ad litem may also be appointed if you are not a minor. The court may require that you have an examination by a physician chosen by the court. Neb. Rev. Stat. §30-2611 (2006).

A hearing will be held in the county where you live. You can attend the hearing, be represented by counsel, and present evidence and witnesses. If the court determines a guardian will be in your best interests, one will be appointed for you. In some situations, a court may appoint a temporary guardianship that can last up to six (6) months. Neb. Rev. Stat. §30-2611 (2006). If a guardian is appointed and you disagree with the decision, you can appeal the decision. Neb. Rev. Stat. §§30-2617; 30-2619 (2006).

### **Who may be a guardian?**

- **If you are a minor:** Your parents are considered to be the guardians. However, if both parents die; a guardian may be appointed by the court or through a will. If your parents are not competent or are not qualified to be guardians, the court may need to appoint someone else. If you are fourteen (14) years old or older, you can choose a person to be your guardian. The court may consider the person you chose unless that person is not within your best interest to be your guardian. Neb. Rev. Stat. §§30-2608; 30-2610 (2006).
- **If you are incapacitated:** Any competent person or appropriate institution may be appointed as a guardian. A court will usually consider your wishes within the priority of persons the court typically regards as potential guardians.

When appointing a guardian, a court will give priority to certain persons. Priority is given to:

- A person you named in a power of attorney,
- A person you chose acting under a power of attorney or a durable power of attorney,
- A person chosen by an attorney in fact who has the power to choose for you,
- Your spouse,
- Your adult child,
- Your parent,
- Your relative that you have resided with for at least the previous six (6) months, and
- A person chosen by the individual caring for or paying benefits to you.

With this information in mind, the court will appoint a guardian whom it believes will serve your best interests. Neb. Rev. Stat. §30-2627 (2006). The court may require that the guardian post a bond to make sure that he or she will complete the guardianship duties. Neb. Rev. Stat. §30-2227 (2006).

## Who may not be a guardian?

- **If you are a minor:** Almost any competent person can be your guardian. Neb. Rev. Stat. §30-2627 (2006).
- **If you are incapacitated:** There are several people that **cannot** be a guardian. People who **cannot** be your guardian:
  - Your residential care facility, nursing home, assisted-living facility or institution involved in the care, treatment, or housing of any person physically or mentally handicapped, infirm, or aged;
  - An employee of your residential care facility, nursing home, assisted-living facility or institution involved in the care, treatment, or housing of any person physically or mentally handicapped, infirm, or aged;
  - A spouse of an employee of your residential care facility, nursing home, assisted-living facility or institution involved in the care, treatment, or housing of any person physically or mentally handicapped, infirm, or aged. Neb. Rev. Stat. §30-2627 (2006).

## What are the powers and duties of a guardian?

Generally, if you are incapacitated, the guardianship will be limited unless the court finds that a full guardianship is necessary. If the court decides that a limited guardianship is appropriate, it will list the decisions that the guardian can make for you in these areas:

- **Your place of residence**

When deciding where you should live, the guardian must make reasonable efforts to make sure that you are placed in the least restrictive environment. For example, a guardian may decide that the most appropriate place for you to live is in a group home instead of an institution. The group home would be less restrictive to you.

- **Your medical care arrangements**

If you need to have physical or other medical care, the guardian may set up the appointment for you, if necessary.

- **Protecting your personal property**

If someone is violating your property rights, the guardian may step in to help you protect your property. For example, if you have a car and your brother is trying to take the car away, the guardian would need to step in to help you protect your car.

- **Consents, approvals, or releases on your behalf**

A guardian may give consent on your behalf. An example of this is if you need surgery and your consent is required. The guardian may sign the consent form on your behalf so that the necessary surgery may occur.

- **Ensuring that you have appropriate training, education, or habilitating services**

A guardian may set up any training, education, or habilitation services that are necessary for you. For example, if you wish to take a class to learn how to manage your money, the guardian may help you register for the class.

- **Initiating legal proceedings against persons legally responsible for supporting you**  
If you do not have a conservator, the guardian may start legal proceedings against a person who is legally responsible to support you, if that person is not supporting you. For example, if you have a trust and the trustee has not been giving you money from the trust, the guardian may start legal proceedings to make the trustee give you money from the trust.
- **Contractual agreements**  
If you do not have a conservator, guardians may make contracts for you. For example, if you want to have a cellular phone, you may need to sign a contract. The guardian may sign the contract for you so that you may have a cellular phone.
- **Properly receive money and property for you and properly applying funds to your expenses**  
It is the guardian's responsibility to properly use your money to pay for your expenses. For example, you receive money from a trust to pay for expenses and the guardian is in charge of making sure the expenses are paid, it is the guardian's responsibility to ensure that money paid out of the trust is properly used for your expenses. Neb. Rev. Stat. §§30-2613; 30-2620 (2006).

A full guardianship includes all of the above areas.

### How does a guardianship end?

- **If you are a minor:** The guardianship may end when:
  - You die;
  - You are adopted;
  - You get married;
  - You reach the age of majority (nineteen (19) years of age in Nebraska). Neb. Rev. Stat. §43-2101 (2006); or
- The guardian dies, resigns, or is removed by the court.

If a guardian wants to resign, he or she must file their resignation with the court and it must be approved by the court. The court must also approve a removal in much the same way. For a guardian to be removed, you (if fourteen years or older) or another interested person must file a request with the court. The court will determine whether the removal of the guardian will be in your best interests. Neb. Rev. Stat. §§30-2614; 30-2616 (2006).

- **If you are incapacitated:** The guardianship may end when:
  - The guardian dies, becomes incapacitated, resigns, or is removed;
  - You die or you are no longer incapacitated as determined by a court hearing.

You or another interested person can file a request with the court asking it to decide whether you are no longer incapacitated. For a guardian to be removed, the ward or another interested person must file a request with the court asking it to decide whether removing the guardian will be in your best interests. If a guardian wants to resign, he or she must file their

resignation with the court and it must be approved by the court. Neb. Rev. Stat. §§30-2614; 30-2616 (2006).

Before the court will approve the resignation, removal of a guardian, or declare the ward as no longer being incapacitated, the court may have a court-appointed visitor (a person trained in law, nursing social work, mental health, mental retardation, gerontology, or developmental disabilities) go to your and the guardian's homes to see the conditions of the homes. The court-appointed visitor will report those conditions in writing to the court. Neb. Rev. Stat. §§30-2622; 30-2623; 30-2624 (2006).

### **Is there any information available to help guardians know their rights and responsibilities?**

Yes. The court requires that guardians successfully complete an approved guardian training program. The training includes information about the rights of protected persons, duties and responsibilities of guardians, reporting requirements, and other resources to help the person in their role as a guardian. Neb. Rev. Stat. §30-2601.01 (2006).