

Disability Rights Nebraska

Protection and Advocacy for People with Disabilities

This is basic information and does not constitute legal advice.

Substituted Judgment Health Care Power of Attorney

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).

Health Care Power of Attorney

What is a health care power of attorney?

A health care power of attorney is a piece of paper that creates a relationship between a “**principal**” and an “**attorney in fact**.” The principal is the person who needs help in making decisions about health care. The principal chooses an attorney in fact to make health care decisions for the principal. The attorney in fact makes sure that the principal’s health care needs are met. For example, Jane (the principal) may appoint Joe (the attorney in fact) to make decisions about her health care if she cannot make her own health care decisions. Neb. Rev. Stat. §30-3402 (2006).

When is a health care power of attorney used?

A health care power of attorney is used when you cannot make health care decisions for yourself. Your doctor will decide when you are not able to make health care decisions. If your doctor decides that you cannot make health care decisions, your doctor must note this in your medical records. Neb. Rev. Stat. §30-3412 (1995).

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If you think you can make decisions about your health care and your doctor says you cannot, you can file a petition in county court. The petition must be filed in the county where you live and should ask the court to decide whether you are able to make your own health care decisions.

The court will choose a person called a “*guardian ad litem*.” The guardian ad litem will help the court in its decision. The court will have a hearing within seven (7) days after it receives the petition. Within seven (7) days of the hearing, the court will determine if you can make health care decisions for yourself. If the court decides that you can make decisions, then you can continue to make decisions about your health care. The attorney in fact will not make health care decisions for you. Neb. Rev. Stat. §30-3415 (2006).

Who may be an attorney in fact?

Almost anyone can be an attorney in fact, but some people cannot. People who **cannot** be your attorney in fact are:

- Your doctor;
- An employee of your doctor who is not related to you by blood, marriage, or adoption;
- A person who owns, operates, or is an employee of the health care provider where you live or are a patient and who is not related to you by blood, marriage, or adoption;
- A person who is already an attorney in fact for ten (10) or more people and is not related to you by blood, marriage, or adoption. Neb. Rev. Stat. §30-3406 (2006).

How is a health care power of attorney created?

To create a health care power of attorney, you must choose a person to be your attorney in fact. You must state the person’s name in writing and:

- Write your name, the name of the attorney in fact, and another person you would like to be your attorney in fact if the first person cannot do it;
- Write what kinds of health care decisions the attorney in fact can make for you if you cannot make your own decisions;
- Write down the date; and

- Make sure the health care power of attorney is signed by two adult witnesses. The witnesses must see you sign the health care power of attorney or you must sign and date it in front of a notary public. Neb. Rev. Stat. §30-3404 (2006).

What are the powers and duties of an attorney in fact?

The attorney in fact can only make decisions that are listed in your health care power of attorney. The attorney in fact can only make those decisions if your doctor says you cannot. The attorney in fact will be able to receive information about your medical care and your medical records. Neb. Rev. Stat. §30-3417 (2006).

The attorney in fact may make decisions about your health, but the attorney in fact **may not**:

- Agree to anything you could not consent to under the law;
- Make decisions for you that might harm your unborn child, if you are pregnant;

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- Make decisions to not give you things that will help you live or take away things that are keeping you alive. Neb. Rev. Stat. §30-3417 (2006).

How does a health care power of attorney end?

A health care power of attorney can end in one of three ways:

- When you die;
- If you cancel it when you are competent. You can cancel your health care power of attorney either verbally or in writing. It is often best to cancel it in writing to make sure your wishes to cancel are known. Also, it will be cancelled when you tell your doctor. The doctor will note this in your medical records; or
- If the attorney in fact withdraws. If the attorney in fact does not want to make health care decisions for you, he or she can tell you at any time if you are able to understand this. If you are not able to understand this, the attorney in fact must tell your health care provider who will note it in your medical records. Neb. Rev. Stat. §§30-3410; 30-3420; 30-3407 (1995).

If the attorney in fact makes decisions for you without knowing that you have died, the decision will still be effective. Neb. Rev. Stat. §30-3420 (2006).

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