

SUBSTITUTED JUDGMENT: CONSERVATORSHIP

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).

Conservatorship

What is a conservatorship?

A *conservator* is a person appointed by the court to manage the estate of a *protected person*. A *protected person* is a minor or other person who has a court-appointed conservator. Neb. Rev. Stat. §30-2209; §30-2601 (2006). The conservator has a duty to make sure that the decisions he or she makes are in the protected person's best interests. When this type of relationship is created between the conservator and the protected person, it is known as a "*conservatorship*."

When is a conservatorship used?

A conservatorship is used when you cannot make decisions regarding your property and assets. The court will decide if you are not able to make these decisions. A conservatorship may be created after a "*protective proceeding*" is held. At the protective proceeding, the court may appoint a conservator if it determines that you cannot manage your property and assets. Neb. Rev. Stat. §§30-2209; 30-2601 (2006).

What is a temporary conservatorship?

If there is an emergency situation and you do not have a conservator, the court may appoint a temporary conservator. In an emergency situation, you or another interested person can file a request to have a hearing as soon as possible to ask the court to decide whether you need a temporary conservator. 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 conservatorship hearing.

At a temporary appointment hearing, the person that requested the hearing must show that a temporary conservatorship is necessary for the emergency situation.

If an expedited conservatorship 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 conservator.

The temporary conservatorship will end after the ten (10) days or before if the court finds the temporary conservatorship is no longer necessary. However, if it is shown that you require a temporary conservator for a longer period of time, the court may extend the temporary conservatorship for a ninety (90) day period followed by additional ninety (90) day periods, if necessary. Neb. Rev. Stat. §30-2630.01 (2006).

How is a conservatorship created?

The way in which a person becomes a conservator is very similar to the way in which one becomes a guardian (see “Guardianship” material). Both a guardianship and a conservatorship may be combined so that a guardian can 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:** The court may appoint a conservator for you if it is shown that you:
 - have money or property that you are not able to manage,
 - have business affairs that you are unable to perform because you are a minor, or
 - need money to support your education and a conservator is necessary for you to get the money. Neb. Rev. Stat. §30-2630 (2006).

- **If you are incapacitated:** The court may also appoint a conservator for you if it is shown by clear and convincing evidence that you are not able to manage your property because of “mental illness” or “mental deficiency,” physical illness or disability, or chronic use of drugs or chronic alcoholism. The court must also find that your property will be wasted unless it is properly managed or that money is needed for your support, care, and welfare. Neb. Rev. Stat. §30-2630 (2006).
 - **Petitioning the court**
You or another person interested in your estate may file a request, or a petition, with the court to have a conservator appointed. Any person who might be hurt by poor management of your finances or property may also file a request with the court.

The petition should include:

- Why the person filing the petition is interested in your estate,
 - Your name, age, and address,
 - Your guardian’s name and address (if applicable),
 - Your nearest known relative’s name and address,
 - A general statement of your property and its value,
 - The reason why a conservator is necessary, and
 - The name and address of the proposed conservator. Neb. Rev. Stat. §30-2633 (2006).
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- **Notice of the proceeding**
Notice of a hearing for the appointment of a conservator 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. §§30-2634; 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. §30-2636 (2006).
- **Options of the court**
If the court determines that your estate needs to be protected, it has several options. The court can:
 - Act on your behalf while the conservator proceedings are going on;
 - Not appoint a conservator, but authorize a transaction relating to your finances or property if the court determines that such a transaction is in your best interests;
 - Appoint a special conservator who will assist you in creating a protective arrangement. The special conservator will end once it is arranged; or
 - Appoint a full conservator who will be responsible for managing your estate. Neb. Rev. Stat. §30-2638 (2006).

Who may be a conservator?

Usually, the court chooses a conservator who is your spouse, adult child, parent or other relative. When appointing a conservator, a court will give priority to certain persons. Priority is given to:

- A person you chose, a person acting as a power of attorney or a durable power of attorney, or a person chosen by an attorney in fact who has the power to choose for you;
- A court appointed conservator from the jurisdiction where you live;
- An individual or corporation you chose who is older than 14 and who has “sufficient mental capacity to make an intelligent choice;”
- Your spouse;
- Your adult child;
- Your parent or someone that the parent has chosen in their will to take care of you;
- 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 conservator that will serve your best interests. Neb. Rev. Stat. §30-2639 (2006). The court may require a conservator to post a bond to ensure that he or she will complete the conservator duties for you. Neb. Rev. Stat. §30-2640 (2006).

Who may not be a conservator?

Almost anyone can be a conservator, but some people cannot. People who **cannot** be your conservator:

- 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.

What are the powers and duties of a conservator?

Within ninety (90) days of being appointed, the conservator must file a complete inventory of your estate, along with an oath stating that the inventory is complete to the best of the conservator's knowledge. The conservator must also provide copies of the inventory to you and to a parent or guardian if you live with them. Neb. Rev. Stat. §30-2647 (2006).

A conservator has the same powers as you do to manage your estate. A conservator may manage your property and money as he or she believes is in your best interest, making sure not to waste or mismanage any of the property or money. A conservator can:

- Invest and reinvest your money and estate assets;
- Continue or participate in the operation of your business;
- Buy or sell property on your behalf;
- Sell or invest in stocks;
- Borrow money to be paid back by your estate assets;
- Employ persons such as attorneys or accountants on behalf of your estate; or
- Prosecute or defend legal actions to protect your estate. Neb. Rev. Stat. §30-2653 (2006).

In acting on your behalf, a conservator has the responsibility of acting as a *fiduciary*. A *fiduciary* is someone who will make decisions in the best interest of the *protected person*. Examples of a fiduciary are a conservator, guardian, or other person appointed by the court who is in charge of managing the principal's property, etc. Neb. Rev. Stat. §30-2646 (2006). The court may limit the powers of a conservator at any time. Neb. Rev. Stat. §30-2655 (2006).

How does a conservatorship end?

A conservatorship can end in one of four ways:

- When you die;
- If the court removes the conservator;
- If the conservator resigns;
- If you, your personal representative, or another interested party, requests that it ends.

If a conservator dies, resigns, or is removed, a court may appoint another conservator who will then have the same powers as the previous conservator. If a conservator resigns, is removed, or the conservatorship ends,

he or she must account for how the estate has been used. Neb. Rev. Stat. §§30-2644; 30-2659, 30-2648 (2006).

Is there any information available to help conservators know their rights and responsibilities?

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