

The Appointment Proceeding for Guardian and Conservator

The scope of this presentation is to detail the requirements when filing a petition for appointment of Guardian and/or a petition for appointment of Conservator for a person who is an adult. This presentation **DOES NOT** encompass the situations when one needs to file a petition for appointment of Guardian and/or a petition for appointment of Conservator for an individual who is a minor.

I.

Questions.

Prior to filing the petition for the appointment of a Guardian and/or a Conservator it makes sense to resolve certain issues.

A. Guardianship Issues.

With respect to filing a Petition for Appointment of Guardian for an adult incapacitated person the following questions should be considered and answered:

1. Is the individual suffering from any type of listed incapacity?
2. Does the cause of incapacity interfere with the individual's ability to make or communicate responsible decisions concerning his or her medical treatment, his or her place of abode, quality of life, giving consents or such other issues relating to his or her person?
3. Do we have clear and convincing evidence to show that the incapacity prevents the person from making responsible decisions concerning his or her person?
4. What are the abilities of the individual? Can the individual make some decisions regarding the areas outlined and should the guardianship be limited?
5. Should the individual be examined by a Physician?
6. Is there a need to have a Visitor appointed to conduct an evaluation of the allegations of incapacity and to obtain evidence relating to ability to make, communicate, or carry out responsible decisions concerning his or her person with regard to selecting his or her place of abode; arranging for his or her medical care; giving necessary consents, approvals, or releases; or any of the other listed areas of inquiry?
7. Is there a power of attorney in existence that has been executed by the alleged incapacitated person?
8. Was the incapacitated person competent at the time of execution of the

power of attorney?

9. Is the attorney in fact competent to handle the affairs of the individual, and if not, should a guardian be appointed to revoke or amend the power of attorney? Should the power to amend or revoke the power of attorney by the guardian be limited?

10. Has a parent or a spouse appointed a guardian for the individual in their will?

11. Is there an informal structure in place that meets the needs of the individual?

12. Where is the venue for the proceeding?

13. Is there an emergency that needs to be addressed prior to the hearing on the appointment of Guardian?

B. Conservatorship Issues.

With respect to filing a Petition for Appointment of a Conservator for an adult protected person the following questions should be considered and answered:

1. Does the individual have property or property affairs?

2. Is the individual unable to effectively manage his or her property and property affairs for the reasons listed?

3. Will the individual's property be wasted or dissipated unless proper management is provided?

4. Does the individual or those entitled to be supported by such individual need funds for his or her support, care, and welfare and is protection necessary or desirable to obtain or provide such funds?

5. Do we have clear and convincing evidence to show that there is a basis for the appointment of a conservator or other protective order?

6. What are the abilities of the individual? Can the individual make some decisions regarding the areas outlined and should the powers of the conservator be limited?

7. Should the individual be examined by a Physician?

8. Is there a need to have a Visitor appointed to conduct an interview?

9. Is there a power of attorney in existence that has been executed by the alleged protected person?

10. Was the alleged protected person competent at the time of execution of the power of attorney?

11. Is the attorney in fact competent to handle the affairs of the individual, and if not, should a conservator be appointed to revoke or amend the power of attorney? Should the power to amend or revoke the power of attorney by the conservator be limited?

12. Has a parent or a spouse appointed a conservator for the individual in their will?

13. Is this a one time occurrence or is there a need for on going management?

14. Is there an informal structure in place that meets the needs of the individual?

15. Where is venue for the proceeding?

16. Is there an emergency that needs to be addressed prior to the hearing on the appointment of Conservator?

II.

Guardians

When do we need to actually request the appointment of a Guardian for an adult and what is the process to obtain the appointment?

A. Incapacity.

Is the individual incapacitated and does that incapacity prevent the individual from making responsible decisions?

In appointing a guardian the Court must determine (Sec. 30-2620):

1. By clear and convincing evidence that the individual is incapacitated by reason of (Sec 30-2601 (1) Definition of incapacity) :

mental illness
mental deficiency
physical illness or disability

chronic use of drugs
chronic intoxication
or other cause;

2. The reason for incapacity causes the person to lack sufficient understanding or capacity to make or communicate responsible decisions concerning his or her person;

3. The appointment is necessary or desirable as **the least restrictive alternative available** for providing continuing care or supervision;

AND

4. The guardianship shall be limited unless the Court determines by clear and convincing evidence that a full guardianship is necessary.

B. Least Restrictive Alternatives.

Are there any least restrictive alternatives to the appointment of a Guardian?

Sec. 30-2601.02 sets forth that there is a need for providing mechanisms for intervening in the lives of certain persons who are impaired by reason of disability and that it is the intent of the Legislature to authorize the use of guardianships and conservatorships for such intervention. However, it is also the intent of the Legislature to encourage the least restrictive alternative possible on the impaired person's exercise of personal and civil rights consistent with the impaired person's need for services by encouraging judges to utilize limited guardianships if appropriate.

Sec. 30-2620. requires the Court to determine that the appointment of a guardian is necessary or desirable as the least restrictive alternative available for providing continuing care or supervision of the person and that if the court finds that a guardianship should be created, the guardianship shall be a limited guardianship unless the court finds by clear and convincing evidence that full guardianship is necessary.

C. Durable Powers of Attorney for Health Care.

What happens if there is already a durable power of attorney for health care in effect?

Sec. 30-2667 sets forth that if, following execution of a durable power of attorney, a court of the principal's domicile appoints a conservator, guardian of the estate, or other fiduciary charged with the management of all of the principal's property or all of his or her property except specified exclusions, the attorney in fact shall be accountable to the fiduciary as well as to the principal. The fiduciary shall have the same power to revoke or amend the power of attorney that the principal would have

had if he or she were not disabled or incapacitated.

Sec. 30-2671 gives the county court and the district court of the principal's domicile concurrent jurisdiction to determine the validity and enforceability of a durable power of attorney.

These sections appear to apply only to powers of attorney that affect management of assets rather than decisions affecting the person. Although, in the list of priorities, the acting attorney-in-fact is the top priority for appointment as guardian, the Court acting in the best interest of the incapacitated person can deviate from that priority by passing over a person having priority and can appoint a person having lower priority or no priority.

D. Testamentary Appointments of Guardians.

What happens if either a deceased spouse or a deceased parent has appointed a guardian for the individual in their Will?

Sec. 30-2617 provides for the Testamentary appointment of guardian for incapacitated person by a spouse or parent.

1. The spouse of a married incapacitated person may by will appoint a guardian of the incapacitated person. This appointment becomes effective seven days after the named guardian does the following:

a. Gives written notice of his or her intention to accept the duties of guardian to the incapacitated person;

b. Gives written notice of his or her intention to accept the duties of guardian to the person having his or her care or to his or her nearest adult relative, and

c. Files acceptance of appointment in the court in which the will is informally or formally probated if, prior thereto, both parents are dead or the surviving parent is adjudged incapacitated.

AN EFFECTIVE APPOINTMENT BY A SPOUSE HAS PRIORITY OVER AN APPOINTMENT BY A PARENT unless it is terminated by the denial of probate in formal proceedings.

2. The parent of an incapacitated person may by will appoint a guardian of the incapacitated person. This appointment becomes effective seven days after the named guardian does the following:

a. Gives written notice of his or her intention to accept the duties of guardian to the incapacitated person;

b. Gives written notice of his or her intention to accept the duties of guardian to the person having his or her care or to his or her nearest adult relative, and

c. Files acceptance of appointment in the court in which the will is informally or formally probated if, prior thereto, both parents are dead or the surviving parent is adjudged incapacitated. If both parents are dead, an effective appointment by the parent who died later has priority unless it is terminated by the denial of probate in formal proceedings.

3. This state shall recognize a testamentary appointment effected by filing acceptance under a will probated at the testator's domicile in another state.

THIS TYPE OF APPOINTMENT IS TERMINATED upon the filing with the court in which the will was probated the written objection to the appointment by the person for whom a testamentary appointment of guardian has been made. However, an objection does not prevent appointment by the court of the testamentary nominee or any other suitable person in a proper proceeding that determines the incapacity of the individual.

If the individual does not object to the testamentary appointment, then this process is simpler, faster and avoids the necessity of proving the incapacity of the individual and that the incapacity causes the individual to lack sufficient understanding or capacity to make or communicate responsible decisions concerning his or her person.

E. Venue.

In what County Court should the Petition be Filed?

Sec. 30-2618 provides that the venue for guardianship proceedings for an incapacitated person is:

1. In the place where the incapacitated person resides or is present,

2. Where property is located if he or she is a nonresident,

or

3. If the incapacitated person is admitted to an institution pursuant to order of a court of competent jurisdiction, venue is also in the county in which that court sits.

F. Petitioners.

Who gets to Petition the Court for the appointment of the Guardian?

Sec. 30-2619 allows the petition for a finding of incapacity and appointment of a

guardian to be filed by:

1. The person alleged to be incapacitated

or

2. Any person interested in his or her welfare.

Sec. 30-2209 (21) defines interested person as including:

1. Heirs, devisees, children, spouses, creditors, beneficiaries and any others having a property right in or claim against a the estate of the ward which may be affected by the proceeding.

2. Persons having priority for appointment as Guardian.

3. Persons who are fiduciaries representing interested persons.

G. The nominated Guardian.

Who can you nominate in the Petition to be Guardian?

Sec. 30-2627 provides that any competent person or a suitable institution may be appointed guardian of a person alleged to be incapacitated.

HOWEVER, there are some exceptions.

This section sets forth that it shall be unlawful for the following to be appointed guardian:

1. Any agency providing residential care in an institution or community-based program;

2. Any owner, part owner, manager, administrator, employee, or spouse of an owner, part owner, manager, administrator, or employee of any nursing home, room and board home, assisted-living facility, or institution engaged in the care, treatment, or housing of any person physically or mentally handicapped, infirm, or aged to be appointed guardian of any such person residing, being under care, receiving treatment, or being housed in any such home, facility, or institution within the State of Nebraska; or

3. Any county attorney or deputy county attorney appointed as guardian for a person alleged to be incapacitated to circumvent his or her duties or the rights of the ward pursuant to the Nebraska Mental Health commitment Act by consenting to inpatient or outpatient psychiatric treatment over the objection of the ward.

Nothing shall prevent the guardian officer for one of the Nebraska veterans homes as provided in Section 80-327 from being appointed guardian officer for one of the Nebraska veterans homes as provided in Section 80-327 from being appointed guardian or conservator for the person alleged to be incapacitated.

H. Priorities for Appointment.

Who has Priority for Appointment as Guardian?

Persons have priority for appointment as guardian in the following order:

1. The first priority goes to any person nominated most recently by one of the following methods:

a. A person nominated by the incapacitated person in a power of attorney or a durable power of attorney;

b. A person acting under a power of attorney or durable power of attorney; or

c. A person nominated by an attorney in fact who is given power to nominate in a power of attorney or a durable power of attorney executed by the incapacitated person;

2. The spouse of the incapacitated person;

3. An adult child of the incapacitated person;

4. A parent of the incapacitated person, including a person nominated by will or other writing signed by a deceased parent;

5. Any relative of the incapacitated person with whom he or she has resided for more than six months prior to the filing of the petition;

6. A person nominated by the person who is caring for him or her or paying benefits to him or her.

One should note that although there is a priority list set out in the Statute, this Section further provides that the court shall take into consideration the expressed wishes of the allegedly incapacitated person and the Court, acting in the best interest of the incapacitated person, may pass over a person having priority and appoint a person having lower priority or no priority.

With respect to persons having equal priority, the court shall select the person it deems best qualified to serve.

I. Allegations in the Petition.

What is required to be in the Petition.

1. The Petition (Sec. 30-2619) shall contain specific allegations in which the petitioner claims that the person alleged to be incapacitated lacks sufficient understanding to make or communicate responsible decisions concerning his or her own person with regard to each of the following areas:

- a. Selecting his or her place of abode within or without this state;
- b. Arranging for his or medical care;
- c. Protecting his or her personal effects;
- d. Giving necessary consents, approvals, or releases;
- e. Arranging for training, education, or other habilitating services appropriate to him or her;
- f. Applying for private or governmental benefits to which he or she may be entitled.
- g. Instituting proceedings to compel any person liable for the support of the proposed ward to support him or her if no conservator has been appointed for the proposed ward;
- h. Entering into contractual agreements if no conservator has been appointed for the proposed ward;
- i. Receiving money and tangible property deliverable to him or her and applying such money and property to his or her expenses for room and board, medical care, personal effects, training, education, and habilitative services; and
- j. Any other area of inquiry which the court may direct.

2. If the petition does not contain these allegations, then this same section allows an interested party to file a motion to make the Petition more definite and certain by requesting that the Petitioner set forth a specific description of the functional limitations and physical and mental condition of the person alleged to be incapacitated together with the specific reasons prompting the request for guardianship.

3. Sec. 30-2619 states that the petition shall be verified by the Petitioner.

J. Other Information in the Petition.

What else should be in the Petition?

The petition should also include the following:

1. Name, residence, mailing address and date of birth of the alleged ward.
2. Name and mailing address of the spouse, parents and adult children of the alleged ward.
3. Name, mailing address, date of appointment, and location of Court appointing who is currently serving as guardian or conservator.
4. Name and mailing address of any person who has the care and custody of the alleged ward.
5. Name and mailing address of any other interested party.
6. Name and mailing address of the proposed Guardian.
7. The status of priority of the proposed Guardian or the reason why priority should be ignored.

K. Contents of the Notice.

What needs to be in the Notice of the Filing of the Petition and the Hearing on the Appointment?

Sec. 30-2625 requires that the Notice contain the following information:

1. The filing of the petition.
2. The time and place of the hearing on the petition.
3. The notice required to be served upon the person alleged to be incapacitated shall list the following rights:
 - a. The right to request the appointment of an attorney;
 - b. The right to present evidence in his or her own behalf;
 - c. The right to request that the power of the guardian, if appointed, be limited by the court;
 - d. The right to be notified regarding how to contact the temporary guardian if a temporary guardian is appointed;

- e. The right to compel attendance of witnesses;
- f. The right to cross-examine witnesses, including the court-appointed physician;
- g. The right to appeal any final order, and
- h. The right to request a hearing closed to the public.

4. If a temporary guardian has been appointed, the notice shall include a notice of such appointment and of the right to request an expedited hearing pursuant to Section 30-2626.

L. Recipients of the Notice.

Who gets the Notice of the filing and date of the hearing?

Sec. 30-2625 requires that in a proceeding for the appointment of a guardian for a person alleged to be incapacitated notice of hearing shall be given to each of the following:

- 1. The ward or the person alleged to be incapacitated.
- 2. The alleged incapacitated persons spouse, parents, and adult children.
- 3. Any person who is serving as guardian or conservator of the ward or who has care and custody of a person alleged to be incapacitated; and alleged to be incapacitated, if any can be found.
- 4. If no spouse, parents, or adult children can be found, then at least one of the closest adult relatives of the ward or person alleged to be incapacitated, if any can be found.

M. Method of Giving Notice.

How and when is Notice to be Given?

- 1. Notice which is appropriate to the circumstances of the ward or person alleged to be incapacitated **SHALL BE SERVED PERSONALLY AT LEAST FOURTEEN DAYS PRIOR** to the hearing **ON THE WARD OR PERSON ALLEGED TO BE INCAPACITATED**.

Sec. 30-2625 allows the Court to require the petitioner to serve notice in alternative formats or with appropriate auxiliary aids and services if necessary to ensure equally effective communication with the ward or person alleged to be incapacitated, including, but not limited to, the use of braille, sign language, large print, reading aloud,

or other reasonable accommodation for the known disabilities of the individual based on the allegations specified in the petition.

THE ALLEGED INCAPACITATED PERSON CAN WAIVE NOTICE, however, such waiver shall not be effective unless he or she attends the hearing and the court determines that the waiver is appropriate.

2. Notice which is appropriate to the circumstances of the ward or person alleged to be incapacitated shall be served personally at least fourteen days prior to the hearing on his or her spouse and parents if they can be found within the state.

N. Bonds for the Guardian.

Does the Guardian Need a Bond?

The court may require a guardian to furnish a bond in an amount and conditioned in accordance with the provisions of Sections 30-2640 and 30-2641.

III.

Temporary Guardians

A. Requests for Appointment of Temporary Guardians.

Can I get a Temporary Guardian Appointed?

Section 30-2626 gives the Court the power to appoint a temporary guardian under the following circumstances:

1. If an individual has no guardian and an emergency exists, the court may, pending notice and hearing, exercise the power of a guardian to address the emergency

Or

2. If an individual has no guardian and an emergency exists, the court may enter an ex parte order appointing a temporary guardian to address the emergency.

B. Hearing on Appointment of Temporary Guardian.

Can there be a Hearing on the issue of the Appointment of the Temporary Guardian?

1. If the petitioner requests the entry of an order of temporary guardianship

without requesting an ex parte order, the court may hold an expedited hearing.

2. If the court denies the request for the ex parte order, the court may, in its discretion, enter an order for an expedited hearing.

3. The Court can appoint a temporary guardian ex parte. When the court appoints a temporary guardian ex parte; then the person alleged to be incapacitated or any interested party, may request an expedited hearing.

When is the Hearing Held?

If the request for the expedited hearing is filed more than ten business days prior to the date set for the hearing on the petition for appointment of the guardian, then the expedited hearing shall be held within ten business days after the request is received.

B. Notice of Expedited Hearing.

What needs to be in the Notice of the Expedited Hearing and How is it Served.

The Notice of the Expedited Hearing shall contain the following:

1. The time and place of hearing.
2. The notice shall specify that a temporary guardian has been appointed.
3. The notice shall be served as provided in Section 30-2625.
4. The notice shall be given at least twenty-four hours prior to the expedited hearing.

C. Burden of Proof.

Who has the Burden of Proof at the Expedited Hearing?

At the hearing on the temporary appointment, the petitioner shall have the burden of showing by a preponderance of the evidence that temporary guardianship continues to be necessary to address the emergency situation. Unless the person alleged to be incapacitated has counsel of his or her own choice, the court may appoint an attorney to represent the person alleged to be incapacitated at the hearing as provided in Section 30-2619.

D. Authority of Court

What can the Court Do at the Expedited Hearing?

The court may render a judgment authorizing the temporary guardianship to continue beyond the original ten-day period. If extended the Order shall prescribe the specific powers and duties of the temporary guardian in the letters of temporary guardianship and shall be effective for a single ninety-day period.

Thereafter and for good cause shown, the court may extend the temporary guardianship for successive ninety-day periods.

E. Authority of Temporary Guardian.

What are the Powers of the Temporary Guardian?

The order and letters of temporary guardianship shall specify the powers and duties of the temporary guardian **LIMITING** the powers and duties to those necessary to address the emergency.

In other respects the provisions of the Nebraska Probate Code concerning guardians apply to temporary guardians.

F. Termination of Temporary Guardianship.

When does the Temporary Guardianship Terminate?

The temporary guardianship shall terminate at the end of the ninety-day period in which the temporary guardianship is valid or at any time prior thereto if the court deems the circumstances leading to the order for temporary guardianship no longer exist or if an order has been entered as a result of a hearing pursuant to Section 30-2619 which has been held during the ninety-day period.

IV.

Conservators

When do we need to actually request the appointment of a Conservator for an adult and what is the process to obtain the appointment?

A. Need for Protection.

Does the individual have assets that needed protected?

In appointing a Conservator the Court must determine (Sec 30-2630):

1. By clear and convincing evidence that the individual is unable to manage his or her property and property affairs effectively for reasons such as:

mental illness
mental deficiency,
physical illness or disability,
chronic use of drugs,
chronic intoxication,
confinement,
lack of discretion in managing benefits received from public funds,
detention by a foreign power, or
disappearance;

and

2. The person has property which will be wasted or dissipated unless proper management is provided,

or

That funds are needed for the support, care, and welfare of the person or those entitled to be supported by him or her and that protection is necessary or desirable to obtain or provide funds.

B. Least Restrictive Alternatives.

Are there any least restrictive alternatives to the appointment of a Conservator?

Sec. 30-2601.02 sets forth that there is a need for providing mechanisms for intervening in the lives of certain persons who are impaired by reason of disability and that it is the intent of the Legislature to authorize the use of guardianships and conservatorships for such intervention. However, it is also the intent of the Legislature to encourage the least restrictive alternative possible on the impaired person's exercise of personal and civil rights consistent with the impaired person's need for services by encouraging judges to utilize limited guardianships if appropriate.

Sec. 30-2655 allows the Court, at the time of appointment or later, to limit the powers of a conservator otherwise conferred by Sections 30-2653 and 30-2654, or previously conferred by the court, and may at any time relieve him or her of any limitation. If the court limits any power conferred on the conservator by Section 30-2653 or 30-2654, the limitation shall be endorsed upon his letters of appointment.

C. Durable Powers of Attorney for Management of Assets.

What happens if there is already a power of attorney for management of assets in effect?

Sec. 30-2667 sets forth that if, following execution of a durable power of

attorney, a court of the principal's domicile appoints a conservator, guardian of the estate, or other fiduciary charged with the management of all of the principal's property or all of his or her property except specified exclusions, the attorney in fact shall be accountable to the fiduciary as well as to the principal. **THE FIDUCIARY SHALL HAVE THE SAME POWER TO REVOKE OR AMEND THE POWER OF ATTORNEY THAT THE PRINCIPAL WOULD HAVE HAD IF HE OR SHE WERE NOT DISABLED OR INCAPACITATED.**

Sec. 30-2671 gives the county court and the district court of the principal's domicile concurrent jurisdiction to determine the validity and enforceability of a durable power of attorney

D. Testamentary Appointments of Conservators.

No statutory authority for a deceased spouse or deceased parent to appoint a Conservator for an individual in their Will.

E. Venue

In which County Court should the Petition be filed?

Sec. 30-2632 provides that venue for conservatorship proceedings for a protected person is:

1. In the place in this state where the person to be protected resides whether or not a guardian has been appointed in another place; or
2. If the person to be protected does not reside in this state, in any place where he or she has property.

Once a petition for appointment of a conservator is filed in the proper County Court and after the service of notice, Sec. 30-2631 sets forth that until termination of the proceeding, the court in which the petition is filed has:

1. Exclusive jurisdiction to determine the need for a conservator or other protective order until the proceedings are terminated;
2. Exclusive jurisdiction to determine how the estate of the protected person which is subject to the laws of this state shall be managed, expended or distributed to or for the use of the protected person or any of his or her dependents;
3. Concurrent jurisdiction to determine the validity of claims against the person or estate of the protected person and his or her title to any property or claim.

F. Petitioners

Who gets to Petition the Court for the appointment of the Conservator?

Sec. 30-2633 allows the petition for appointment of a conservator or protective order to be filed by:

1. The person to be protected,
2. Any person who is interested in his or her estate, property affairs, or welfare including his or her parent, guardian, or custodian, or
3. Any person who would be adversely affected by lack of effective management of his or her property and property affairs.

Again, Sec. 30-2209 (21) defines interested person as including:

1. Heirs, devisees, children, spouses, creditors, beneficiaries and any others having a property right in or claim against a the estate of the ward which may be affected by the proceeding.
2. Persons having priority for appointment as Guardian.
3. Persons who are fiduciaries representing interested persons.

G. The nominated Conservator.

Who can you nominate in the Petition to be Conservator?

Sec. 30-2639 provides that the Court may appoint an individual, or a corporation with general power to serve as trustee, as conservator of the estate of a protected person. This specifically allows the spouse, adult child, parent, or other relative of the person in need of protection to be appointed conservator.

HOWEVER, there are some exceptions:

This section sets forth that it shall be unlawful for the following to be appointed conservator:

1. Any agency providing residential care in an institution or community-based program; or
2. Any owner, part owner, manager, administrator, employee, or spouse of an owner, part owner, manager, administrator, or employee of any nursing home, room and board home, assisted-living facility, or institution engaged in the care, treatment, or

housing of any person physically or mentally handicapped, infirm, or aged to be appointed conservator of any such person residing, being under care, receiving treatment, or being housed in any such home, facility or institution within the State of Nebraska.

H. Priorities for Appointment?

Who has Priority for Appointment as Conservator?

Qualified individuals who exhibit the ability to exercise the powers to be assigned by the court have priority for appointment as conservator in the following order:

1. A person nominated most recently by one of the following methods:
 - a. A person nominated by the protected person in a power of attorney or durable power of attorney;
 - b. A person acting under a power of attorney or durable power of attorney;
 - c. A person nominated by an attorney in fact who is given power to nominate in a power of attorney or a durable power of attorney executed by the protected person;
2. A conservator, guardian of property, or other like fiduciary appointed or recognized by the appropriate court of any other jurisdiction in which the protected person resides;
3. An individual or corporation nominated by the protected person if he or she is fourteen or more years of age and has, in the opinion of the court, sufficient mental capacity to make an intelligent choice;
4. The spouse of the protected person;
5. An adult child of the protected person;
6. A parent to the protected person or a person nominated by the will of a deceased parent;
7. Any relative of the protected person with whom he or she has resided for more than six months prior to the filing of the petition;
8. A person nominated by the person who is caring for him or her or paying benefits to him or her.

One should note that although there is a priority list set out in the Statute, this Section further provides that when appointing a conservator, **THE COURT SHALL TAKE INTO CONSIDERATION** the expressed wishes of the person to be protected

and the Court, acting in the best interest of the protected person, may pass over a person having priority and appoint a person having lower priority or no priority.

It should also be noted that a person having priority listed in subdivision 2, 4, 5, 6 or 7 above may nominate in writing a person to serve in his or her stead.

With respect to persons having equal priority, the court shall select the person it deems best qualified of those willing to serve.

I. Allegations in the Petition.

What is required to be in the Petition?

1. The Petition for Appointment (Sec. 30-2633) shall set forth, to the extent known, the following:

- a. The interest of the petitioner;
- b. The name, age, residence, and address of the person to be protected;
- c. The name and address of his or her guardian, if any;
- d. The name and address of his or her nearest relative known to the petitioner;
- e. A general statement of his or her property with an estimate of the value thereof, including any compensation, insurance, pension, or allowance to which he or she is entitled;
- f. Specific allegations regarding the necessity of the appointment of a conservator;
- g. The name and address of the person whose appointment is sought as Conservator; and
- h. The basis of priority for appointment.

2. If the petition does not contain these allegations, then this same section allows an interested person to file a motion to make more definite and certain by requesting that the Petitioner set forth a specific description of the functional limitations and physical and mental condition of the person sought to be protected with the specific reasons prompting the request for conservatorship.

The Petition is not required to be verified like the petition for the appointment of a Guardian.

J. Other information in the Petition.

What else should be in the Petition?

The petition should also include the following:

1. Name, mailing address, date of appointment, and location of Court appointing any person who is currently serving as guardian or conservator.
2. Name and mailing address of any person who has the care and custody of the alleged protected person.
3. Name and mailing address of any other interested party.
4. The status of priority of the proposed Conservator or the reason why priority should be ignored.

K. Contents of Notice.

What needs to be in the Notice of the Filing of the Petition and the Hearing on the Appointment?

Sec 30-2634 requires that the Notice contain the following:

1. The filing of the petition,
2. The time and place of the hearing on the petition, and
3. The notice required to be served upon the person to be protected shall list the following:
 - a. The right to request the appointment of an attorney;
 - b. The right to present evidence in his or her own behalf;
 - c. The right to be notified regarding how to contact the temporary conservator if a temporary conservator is appointed;
 - d. The right to compel attendance of witnesses;
 - e. The right to cross-examine witnesses, including the court-appointed physician;
 - f. The right to appeal any final order; and
 - g. The right to request a hearing closed to the public.
4. If a temporary conservator has been appointed, the notice shall include a

notice of such appointment and the right to request an expedited hearing pursuant to Section 30-2630.01.

L. Recipients of the Notice.

Who gets the Notice of the filing and the date of the hearing?

1. Sec 30-2634 requires that in a proceeding for the appointment of a conservator notice of hearing shall be given to each of the following:

- a. The person to be protected;
- b. The alleged protected person spouse and adult children;
- c. Any person who is serving as guardian or conservator or who has care and custody of the person to be protected; and
- d. If no spouse or adult child is notified, at least one of the closest adult relatives of the person to be protected, if any can be found.

2. Notice must be given to any person who has filed a request for notice under Section 30-2635 and to interested persons and other person as the court may direct.

M. Method of Giving Notice.

How and when is Notice to be Given?

1. Notice which is appropriate to the circumstances of the person to be protected **SHALL BE SERVED PERSONALLY AT LEAST FOURTEEN DAYS PRIOR** to the hearing on

- a. The person to be protected,
- b. His or her spouse if they can be found within the state; and
- c. His or her parents if they can be found within the state.

2. Notice to any person who has filed a request for notice under Section 30-2635; to any interested persons and any other person as the court may direct shall be given in accordance with Section 30-2220.

3. Sec 30-2634 allows the court to require the petitioner to serve notice in alternative formats or with appropriate auxiliary aids and services if necessary to ensure equally effective communication with the protected person or person in need of protection, including, but not limited to, the use of braille, sign language, large print, reading aloud, or other reasonable accommodation for the known disabilities of the

individual based on the allegations specified in the petition.

THE ALLEGED PROTECTED PERSON CAN WAIVE NOTICE, however, such waiver by the person to be protected shall not be effective unless he or she attends the hearing and the court determines that the waiver is appropriate.

N. Bonds for the Conservator.

When does a Conservator Need a Bond?

Sec. 30-2640 provides that the court may require a conservator to furnish a bond conditioned upon faithful discharge of all duties of the trust according to law, with sureties as it shall specify and may eliminate the requirement or decrease or increase the required amount of any such bond previously furnished.

The amount of the bond may be fixed at the discretion of the court, but if not otherwise fixed by the court, the amount of the bond shall be in the amount of the aggregate capital value of the personal property of the estate in his or her control plus one year's estimated income from all sources minus the value of the securities deposited under arrangements requiring an order of the court for their removal.

The court, in lieu of sureties on a bond, may accept other security for the performance of the bond, including a pledge of securities or a mortgage of land. The court may consider the desires of the protected person as expressed in any written power of attorney in determining whether a bond shall be required and the amount thereof.

O. Terms and requirements of bonds.

Sec. 30-2641 provides that the following requirements and provisions apply to any bond required under Section 30-2640:

1. Unless otherwise provided by the terms of the approved bond, sureties are jointly and severally liable with the conservator and with each other;
2. By executing an approved bond of a conservator, the surety consents to the jurisdiction of the court which issued letters to the primary obligor in any proceeding pertaining to the fiduciary duties of the conservator and naming the surety as a party defendant. Notice of any proceeding shall be delivered to the surety or mailed to him by registered or certified mail at his address as listed with the court where the bond is filed and to his address as then known to the petitioner;
3. On petition of a successor conservator or any interested person, a proceeding may be initiated against a surety for breach of the obligation of the bond of the conservator;

4. The bond of the conservator is not void after the first recovery but may be proceeded against from time to time until the whole penalty is exhausted.

No proceeding may be commenced against the surety on any matter as to which an action or proceeding against the primary obligor is barred by adjudication or limitation.

V.

Temporary Conservators

A. Requests for Appointment of Temporary Conservators.

Can I get a Temporary Conservator Appointed?

Sec. 30-2630.01 gives the Court the power to appoint a temporary conservator under the following circumstances:

1. If an individual has no conservator and an emergency exists, the court may, pending notice and hearing, exercise the power of a conservator or
2. If an individual has no conservator and an emergency exists enter an emergency protective order appointing a temporary conservator to address the emergency.

B. Hearing on Appointment of Temporary Conservator.

Can there be a hearing on the issue of the Appointment of the Temporary Conservator?

1. If the petitioner requests the entry of an order of temporary conservatorship without requesting an ex parte order, the court may hold an expedited hearing.
2. If the court denies the request for the ex parte order, the court may, in its discretion, enter an order for an expedited hearing.
3. The Court can appoint a temporary Conservator ex parte. When the court appoints temporary conservator ex parte, then the person alleged to be in need protection or any interested party, may request an expedited hearing.

When is the hearing held?

If the request for an expedited hearing is filed more than ten business days prior to the date set for the hearing on the petition for appointment of the conservator, then the hearing shall be held within ten business days after the request is received.

C. Notice of Expedited Hearing.

What needs to be in the Notice of the Expedited Hearing and How is the Notice Given?

The Notice of the Expedited Hearing shall contain the following:

1. Time and place of hearing.
2. The notice shall specify that a temporary conservator has been appointed.
3. The notice shall be served as provided in Section 30-2624.
4. The notice shall be given at least twenty-four hours prior to the expedited hearing.

D. Burden of Proof.

Who has the Burden of Proof at the Expedited Hearing?

At the hearing on the temporary appointment, the petitioner shall have the burden of showing by a preponderance of the evidence that temporary conservatorship continues to be necessary to address the emergency situation. Unless the person alleged to be in need of protection has counsel of his or her own choice, the court may appoint an attorney to represent the person at the hearing as provided in Section 30-2636.

E. Authority of Court.

What can the Court do at the Expedited Hearing?

The court may render a judgment authorizing the temporary conservatorship to continue beyond the original ten-day period. The judgment shall prescribe the specific powers and duties of the temporary conservator in the letters of temporary conservatorship and shall be effective for a ninety-day period.

Thereafter and for good cause shown, the Court may extend the temporary conservatorship for successive ninety-day periods.

F. Authority of Temporary Conservator.

What are the powers of the Temporary Conservator?

The order and letters of temporary conservatorship shall specify the powers and duties of the temporary conservator.

In other respects the provisions of the Nebraska Probate Code concerning conservators apply to temporary conservators.

G. Termination of Temporary Conservatorship.

When does the Temporary Conservatorship Terminate?

The temporary conservatorship shall terminate at the end of the ninety-day period in which the temporary conservatorship is valid or at any time prior thereto if the court deems the circumstances leading to the order for temporary conservatorship no longer exist or if an order has been entered as a result of a hearing pursuant to Section 30-2636 which has been held during the ninety-day period.

VI.

Protective Arrangement and Single Transactions

Sometimes there is not a need for ongoing management of a person's property of property affairs.

Sec. 30-2638 authorizes the Court to approve protective arrangements or single transactions without the requirement of the appointment of a permanent Conservator.

A. Basis for Authorization.

In authorizing a protective arrangement or single transaction the Court, as it would when determining that a basis exists under Sec 30-2630 for the appointment of a Conservator, must determine:

1. By clear and convincing evidence that the individual is unable to manage his or her property and property affairs effectively for reasons such as:

mental illness
mental deficiency,
physical illness or disability,
chronic use of drugs,
chronic intoxication,
confinement,
lack of discretion in managing benefits received from public funds,
detention by a foreign power, or
disappearance;

and

2. The person has property which will be wasted or dissipated unless proper

management is provided,

or

That funds are needed for the support, care, and welfare of the person or those entitled to be supported by him or her and that protection is necessary or desirable to obtain or provide funds.

B. Authorized Situations.

What are the types of things the Court can authorize without appointing a Conservator?

The court, without appointing a conservator, may authorize, direct or ratify:

1. Any transaction necessary or desirable to achieve any security, service, or care arrangement meeting the foreseeable needs of the protected person.

These arrangements include, but are not limited to, payment, delivery, deposit or retention of funds or property, sale, mortgage, lease or other transfer of property, entry into an annuity contract, a contract for life care, a deposit contract, a contract for training and education, or addition to or establishment of a suitable trust.

2. Any contract, trust or other transaction relating to the protected person's financial affairs or involving his or her estate if the court determines that the transaction is in the best interests of the protected person.

C. Considerations before authorization of single transaction.

Before approving a protective arrangement or single transaction, the court shall consider the interests of creditors and dependents of the protected person and, in view of his or her disability, whether the protected person needs the continuing protection of a conservator.

D. Special Conservators.

The court may appoint a special conservator to assist in the accomplishment of any protective arrangement or single transaction authorized.

The special conservator shall have the authority conferred by the order.

The special conservator shall serve until discharged by order after report to the court of all matters done pursuant to the order of appointment.

VII.

Miscellaneous

A. Requests for Notice of Hearings.

Who can request and receive notice?

1. Sec. 30-2635 provides that in Protective proceedings any interested person who desires to be notified before any order is made may file with the registrar a request for a notice subsequent to payment of any fee required by statute or court rule.

The clerk shall mail a copy of the demand to the conservator if one has been appointed. A request **IS NOT EFFECTIVE UNLESS** it contains:

- a. A statement showing the interest of the person making it and
- b. His or her address, or the address of his or her attorney.

The request is effective only as to matters occurring after the filing. Any governmental agency paying or planning to pay benefits to the person to be protected is an interested person in protective proceedings.

B. Appointment of Attorney, Guardian ad litem, Physician and Visitor.

Guardianships

1. Sec. 30-2619 provides that upon the filing of a petition for the appointment of a Guardian, if the person alleged to be incapacitated has not retained counsel of his or her own choice or has not otherwise indicated a desire for an attorney of his or her own choice, the court may appoint in attorney to represent him or her in the proceeding.

The court may appoint a guardian ad litem to advocate for the best interests of the person alleged to be incapacitated.

The person alleged to be incapacitated may be examined by a physician appointed by the court. The physician shall submit his or her report in writing to the court.

The Court may appoint a visitor to conduct an interview pursuant to Sections 30-2619.01 and 30-2624.

Conservatorships

1. Sec. 30-2636 provides that upon receipt of a petition for appointment of a conservator or other protective order, if the person to be protected does not have counsel of his or her own choice, the court may appoint an attorney to represent him or

her in the proceeding.

The court may appoint a guardian ad litem to advocate for the best interests of the person to be protected.

If the alleged disability is mental illness, mental deficiency, physical illness or disability, chronic use of drugs, or chronic intoxication, the court may direct that the person to be protected be examined by a physician designated by the court, preferably a physician who is not connected with any institution in which the person is patient or is detained.

The court may send a visitor to interview the person to be protected. The visitor may be a guardian ad litem or an officer or employee of the court.

C. Power to make Will.

Does the appointment of a Conservator prevent the protected person from making a will?

An order by the Court determining by clear and convincing evidence that a basis for appointment of a conservator or other protective order exists has no effect on the capacity of the protected person to make a will.

This same section provides that even though the Court has all the powers over the estate and affairs of the protected person which he or she could exercise except the Court has no power to make a will for such protected person.

D. Waiver of bond of Conservator by Power of Attorney.

A principal in a power of attorney or a durable power of attorney may waive the requirement that the conservator, guardian of the estate, or guardian of the person be required to post a bond.

E. Consolidated Proceedings for Guardianship and Conservatorship.

Sec. 30-2602 provides that the court has jurisdiction over protective proceedings and guardianship proceedings and that when both guardianship and protective proceedings as to the same person are commenced or pending in the same court, the proceeding may be consolidated.