

How Do I File a Claim in Nebraska Small Claims Court?

Substituted judgement

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 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 minors. See our other Law in Brief for information on Guardianships of adults.

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 others. 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.

How is a guardianship for a minor formed?

A Guardianship may be created for a minor when the minor's parents have died or are unable to provide care for the minor either because they have been suspended by a court, live overseas, or have abandoned the child with no prearrangements.¹ A Guardian can be designated in a Will of a parent, but it will not become effective until the designated Guardian accepts appointment. The court will appoint a Guardian if the judge finds it is in the best interest of the child.²

Almost anyone may serve as a Guardian; however, the court will look into the best interest of the child and will consider the selection of a child over 14 years of age, if his/her selection of a Guardian is in his/her best interest. Additionally, Guardians must complete a training program before their authority is effective. The training includes information about the rights of Wards, the duties and responsibilities of Guardians, reporting requirements, least restrictive options for housing, medical care, and psychiatric care, and resources to help the Guardian fulfill their duties.³

Forming a guardianship for a minor

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

1. The child in need or another person interested in the welfare of the child must request the court to appoint a Guardian through a petition.
2. The court clerk will schedule a hearing.
3. The following persons must be notified of the Guardianship hearing:

¹<http://extensionpublications.unl.edu/assets/html/g1597/build/g1597.htm>

² Neb. Rev. Stat. §§ 30-2606, 30-2610 (2006).

³ Neb. Rev. Stat. § 30-2601.01 (2014).

- Any living parent.
- The child named in the petition, if over the age 14.
- Any person who had custody of the minor for 60 days before the request for Guardianship. ⁴

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 will be appointed for the child. A Guardian ad litem is a person assigned to ensure the best interest of the child.⁵ He/she may perform the duties normally performed by a lawyer to ensure that the child is fully represented.⁶

5. A hearing will be held to determine whether the child should be appointed a Guardian. Likely the judge will find it in the best interest of the child to have a Guardian, as the state does not recognize a child's

⁴ Neb. Rev. Stat. §§ 30-2611; 30-2220 (2006).

⁵ Neb. Ct. R. § 6-1469.

⁶ *Id.*

decisions before the age of 19. An exception to this would be if the child was emancipated previously.

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 six months, unless the judge extends it.

Guardian's powers and duties

- A Guardian has the powers and responsibilities of a parent, but a Guardian is not required to provide from their own funds for the Ward.
- A Guardian must take reasonable care of the Ward's personal effects.
- A Guardian may receive money or property for the support of the Ward.
- Any sums received by the Guardian shall be applied to the Ward's support, care, and education.
- A Guardian may initiate legal proceedings against persons with a duty to pay sums for the welfare of the Ward.
- A Guardian may aid in the Ward's education and social activities.
- A Guardian may authorize medical treatment for the Ward.
- A Guardian must report on the condition of the Ward as ordered by a court.

A temporary Guardian has the same responsibilities as a permanent Guardian, but a temporary Guardian will only last for up to 6 months. The appointment of a temporary Guardian can be used in emergency situations.⁷

⁷ Neb. Rev. Stat. § 30-2611 (2006).