

WHAT IS A POWER OF ATTORNEY? HOW DO I MAKE ONE?

Substituted Judgment

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 the **Power of Attorney**.

Power of Attorney

A Power of Attorney ("POA") is a writing or record where a Principal grants an Agent the power to make decisions about his/her finances and

property. **It is essentially a safety net.** The Principal may never need another person to make decisions about his/her finances or property, but if he/she does, then creating a Power of Attorney will ensure that his/her choice of a person to manage his/her affairs is respected. Thus, it is important for a Principal to create a POA sooner than later.

Principal: The person in need of an Agent to make decisions about his/her property.

Agent: The person who is granted the power to make decisions on the Principal's behalf.

A POA grants power to an Agent immediately, unless it states otherwise. This means that if the Principal does not want his/her Agent to have power over his/her property and finances immediately, then he/she must explain in the POA when power is granted. A Principal can designate a certain date for the POA to begin or make it effective when he/she is deemed incapacitated by a physician.

A POA ends (1) when the Principal cancels the Agent's authority, or (2) when the Principal dies.

Duties of an Agent

An Agent owes a duty to a Principal to make decisions based on the Principal's reasonable expectations. An Agent must:

- Act in good faith and with the best interest of the Principal in mind.
- Follow the wishes of the Principal to the best of his or her ability.
- Keep a record of all receipts, disbursements, and transactions made on the Principal's behalf.
- Protect and preserve the assets and estate of the Principal to the best of his or her ability.
- Cooperate with any other person granted substituted judgment powers on behalf of the Principal, such as a Guardian, Conservator, or Health Care Power of Attorney.¹

If an Agent violates his or her duty, you may revoke his or her

¹ Neb. Rev. Stat. § 30-4014.

authority. If the violation results in a loss for you, the Agent may owe you for:

- Any amount required to restore the value of your property to what it would have been if the violation had not occurred.
- Any costs or expenses, including attorney fees, to determine whether a violation occurred and how to remedy it.²

How to Create a Power of Attorney

1. Designate an Agent: Almost anyone can act as an Agent. However, it is important to pick someone that you trust will include you in any decisions he/she makes for you. It is also important to speak to this person and let them know that you plan to make them your Agent.

2. Designate a Successor Agent (optional): You may designate a Successor Agent. The successor would become your Agent if your first Agent is unable or unwilling to act for you. This is not required but may be a good idea if you think there is any reason your first choice may not be able to make decisions for you.

3. Grant Authority: You decide what authority of your finances and property your Agent will have. You can give them access to all of your finances and property, or you can limit them to certain decisions like:

- Real Property (Buildings or land you own)
- Tangible Personal Property: (Cars, TV, furniture, etc.)
- Stocks and bonds
- Commodities and Options in your name
- Banks or financial institutions
- Decisions to maintain your entity or business
- Decisions about estate, trusts, or other beneficial interests
- Decisions to assert and maintain claims and litigation in a court or administrative agency
- Decisions to maintain standard of living for you and your family
- Benefits you receive from the government or civil or military service
- Retirement Plans
- Taxes

4. Grant Specific Authority (Optional): You may grant your Agent the ability to do specific tasks, like make donations in your name. This is also not

² Neb. Rev. Stat. § 30-4017.

required but may fit your situation. For example, if you donate money to an organization every year, you may want to continue that when your Agent is making decisions for you.

5. Add any Additional Limits to Authority: Anything else you want your Agent to have the authority over or include anything you want your agent not have authority over. If you want the Power of Attorney to begin only if you become incapacitated or at a certain time, put that here.

6. Give any Special Instructions to Your Agent (Optional): You may include any other instructions you wish your Agent to have to help them make good decisions on your behalf.

7. Nominate a Conservator or Guardian (Optional): You may designate who you want the court to appoint as your Conservator and/or Guardian if you become incapacitated.

8. Signature and Acknowledgement: You and your Agent must sign the agreement in the presence of a notary. You and your Agent should not sign your document until you are both in front of the notary!

9. Keep your Power of Attorney Safe! You do not need to file your Power of Attorney with a court, but you want to make sure that it is in a safe place where it cannot get damaged and can be found when needed.

10. Inform Others of Your Power of Attorney: Let a few others know about your agreement and its location. In the event you need your Agent, they will know how to locate it and make sure your choices are honored.

As stated previously in this information, there are many different types of substituted judgment for an individual in need. Below is a guide to other decision-making alternatives. The best form of substituted judgment is one that works to protect a person in need but also gives him/her the most independence in his/her life decisions.

Types of Substituted Judgment (Alternatives to Full Guardianship) <i>These Alternatives are listed in order from least restrictive to most restrictive form of substituted judgment.</i>	
Health Care Power of Attorney	A person selected by the individual in need to make decisions on his or her behalf regarding health care. The individual selects an "Attorney-in-Fact", granting him or her authority to make medical decisions for the individual, when he or she becomes unable to make those decisions on his or her own.
Representative Payee	A person selected by the Social Security Administration to make decisions for a person receiving Social Security payments. The Payee is limited to only making decisions about those Social Security benefits.
Power of Attorney	A document that you draft selecting a person to make decisions on your behalf regarding your income, property and assets.
Conservatorship	A Conservator is a court-appointed person granted the power to help an incapacitated person make decisions about his or her property and assets. A Conservator may be the Public Guardian. A Conservatorship may be limited to certain decisions, for a temporary time, or it may be a full Conservatorship that must be contested to be removed.
Guardianship	A Guardian is a person granted the power to make decisions for a minor or incompetent person. A Guardian may make decisions about the person's living arrangements, medical care, education, legal decisions and obligations, money and property. A Guardian may be appointed by a court or designated through a Power of Attorney or will. The Public Guardian may be designated as a Guardian for an incompetent person. A Guardianship may be limited to certain decisions, for a temporary time, or it may be a full Guardianship that must be contested to be removed.