

Alternatives to Guardianship

Development Team of

Eileen M. Krumbach, Extension Educator, University of Nebraska; Richard J. Bischoff, Professor, UNL Department of Child, Youth and Family Studies; Sue Fredricks, Executive Director, Volunteers Assisting Seniors (VAS), Omaha; Thomas K. Harmon, Attorney at Law, Omaha; Bruce A. Cudly, Nebraska Region V Services; Dianne D. Delair, Staff Attorney, Nebraska Advocacy Services, Inc.; Julie J. Hippen, Program Specialist, Nebraska Department of Health and Human Services, Adult Protective Services; Marla J. Fischer-Lempke, Executive Director, The Arc of Nebraska; Mary Evans, Guardian; Sheryl L. Connolly, Trial Court Services Director, Administrative Office of the Courts

Guardianships, because they are so powerful, should be used sparingly. Other less restrictive forms of assistance may be more appropriate. This NebGuide, sixth in a series of seven, discusses legal Guardianship.

Sometimes obtaining a Guardian for a person who is having difficulty making decisions in one or more areas of his/her life is an appropriate solution. Guardianship allows a responsible person to substitute judgment for someone who cannot make or communicate decisions. Without Guardianship the person may be unprotected and lack the ability to find and use services. Even so, Guardianship should be used sparingly, precisely because Guardians have so much power.

Guardianship is one form of surrogate decision making—a term used to describe situations in which one makes decisions on behalf of someone else. It is the most restrictive choice when decision making assistance is needed. There are many more ways help can be given before proceeding to Guardianship. The following is a description of less restrictive forms of assistance listed in order of degree of restriction from the least to the most restrictive.

Non Durable Power of Attorney is a document that authorizes one to act on another's behalf. It is the delegation from the person creating the document (the principal) to the person to whom he/she is granting the power to act (the agent). A limited power of attorney gives authority to act only with regard to very specific matters. A general power of

attorney authorizes the agent to act on behalf of the principal in a wide variety of actions. A power of attorney is also terminated by the principal's death, disability, or incompetence.

Durable Power of Attorney is a power of attorney that lasts beyond the disability or incapacity of the principal. It can be revoked or modified at any time as long as the principal is competent. By assigning a power of attorney to someone else, a principal legally authorizes another person to act on his or her behalf. The agent should be selected very carefully. Characteristics a principal should look for in an agent include competence and experience in managing the type of actions assigned to him or her, reliability and trustworthiness.

Advance Directives inform others of what choices for medical treatment were made prior to the need for treatment. The most common types of advance directives are living wills, health care power of attorney, and medical directives.

- A Living Will is a written statement that describes the type of care a person wishes to receive in the event he/she is suffering from a terminal illness or is in a persistent vegetative state. You can change your mind and revoke your living will at any time, regardless of mental or physical condition.
- Health Care Power of Attorney is, quite simply, a durable power of attorney through which a principal authorizes an agent to make health care decisions on his/her behalf. If you are

competent, you can cancel the health care power of attorney at any time.

- A Medical Directive is a specific list of medical procedures on which a person may check various procedures that he/she wants, does not want, or is not sure about. A medical directive is quite specific and is often incorporated into either a living will or a health care power of attorney.

In order to exercise the most independence in selecting a surrogate decision maker, an individual should act sooner rather than later. Pre-planning is imperative. The above selection(s) must be made before it is evident that the individual is in need of assistance for making decisions. These three options give an individual the most control over who is selected to manage decisions before the crisis happens. The following options are available after it is evident that a person is in need of assistance for making decisions.

Representative Payee is a person appointed by the Social Security Administration to receive and manage benefits administered through Social Security. A representative payee is sought when a person is unable to manage the funds and do the necessary reporting required.

Protective Payee is an individual assigned by the Nebraska Department of Health and Human Services to receive public assistance payments on behalf of another person. The protective payee has a supervisory and teaching role. A payee is assigned when it has been determined that the person is unable to manage funds from the department or has previously mismanaged those funds.

Conservator is an individual or corporation appointed by the court to manage the estate, property, and/or other business affairs of an individual whom the court has determined is unable to do so for himself/herself.

Guardianship provides for the care of someone who is not able to care for himself/herself. The court may appoint a Guardian if there is clear and convincing evidence that he/she requires continuing care or supervision. Nebraska law allows for, and favors, the appointment of a limited Guardian. This is a Guardian who looks after a limited number of the person's personal needs. The court is required to look at 10 items listed in the Guardianship law and state with which of the individual items the person needs assistance. A limited Guardianship is less restrictive than a full Guardianship. A full Guardianship is established when it is determined that surrogate decision making is needed in all of the areas the court is required to review.

If you want to explore any of these options you may contact an attorney.

Resources

National Guardianship Association. (1998). *A Model Code of Ethics for Guardians*. Tucson, Ariz.

National Guardianship Association. (2003). *Standards of Practice*. Tucson, Ariz.

UNL Guardianship website at <http://www.extension.unl.edu/guardianship/> includes information, helpful links, and a calendar of educational workshops and programs.



This publication has been peer reviewed.

UNL Extension publications are available online at <http://extension.unl.edu/publications>.

Index: Family Life Relationships

2005, Revised December 2011

Extension is a Division of the Institute of Agriculture and Natural Resources at the University of Nebraska–Lincoln cooperating with the Counties and the United States Department of Agriculture.

University of Nebraska–Lincoln Extension educational programs abide with the nondiscrimination policies of the University of Nebraska–Lincoln and the United States Department of Agriculture.

© 2005-2010, 2011 The Board of Regents of the University of Nebraska on behalf of the University of Nebraska–Lincoln Extension. All rights reserved.