

Guardian Guidance Document

This document includes additional information about guardians and legally authorized representatives according to Nebraska State law.

Guardianship of Minors

In Nebraska, a guardian of a minor has the duty and authority to act in the best interests of the minor, subject to residual parental rights and responsibilities, to make important decisions in matters having a permanent effect on the life and development of the minor and to be concerned with his or her general welfare. Under Nebraska law, a person becomes a guardian of a minor by acceptance of a testamentary appointment (in other words, via a will) or upon appointment by the court (Neb. Rev. Stat. §30-2605). The guardianship continues until terminated by “the death, resignation or removal of the guardian or upon the minor’s death, adoption, marriage or attainment of majority...” (Neb. Rev. Stat. §30-2614).

Under Nebraska law, guardians of minors have the following powers and duties (see Neb. Rev. Stat. §30-2613):

(1) A guardian of a minor has the powers and responsibilities of a parent who has not been deprived of custody of his minor and unemancipated child, except that a guardian is not legally obligated to provide from his own funds for the ward and is not liable to third persons by reason of the parental relationship for acts of the ward. In particular, and without qualifying the foregoing, a guardian has the following powers and duties:

...

(c) The guardian is empowered to facilitate the ward's education, social, or other activities and to authorize medical or other professional care, treatment, or advice. A guardian is not liable by reason of this consent for injury to the ward resulting from the negligence or acts of third persons unless it would have been illegal for a parent to have consented. A guardian may consent to the marriage or adoption of his ward.

Guardianship of Incapacitated Persons

As with minors, guardians for incapacitated persons can be established by testamentary appointment (see Neb. Rev. Stat. §30-2617) or upon appointment by the court (see Neb. Rev. Stat. §30-2619). The guardianship continues until terminated by “the death of the guardian or ward, the determination of incapacity of the guardian, or upon removal or resignation” of the guardian (see Neb. Rev. Stat. §30-2622). However, if the incapacity of a person is in question, a court may appoint a “Visitor” with specific training in the area, to conduct an evaluation of the allegations of incapacity to assist the court in its determination of whether the appointment of a guardian is in the best interests of that person (see Neb. Rev. Stat. §30-2619.01).

If a court determines that the appointment of a guardian is in the best interests of the individual in question, that guardian may be vested with some or all of the duties as determined by the court in accordance with Neb. Rev. Stat. §30-2620, of which the relevant duties are the following:

The court may appoint a guardian if it is satisfied by clear and convincing evidence that the person for whom a guardian is sought is incapacitated and that the appointment is necessary or desirable as the least restrictive alternative available for providing continuing care or supervision of the person of the person alleged to be incapacitated. 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 a full guardianship is necessary. If a limited guardianship is created, the court shall, at the time of appointment or later, specify the authorities and responsibilities which the guardian and ward, acting together or singly, shall have with regard to:

...

(2) Arranging for medical care for the ward;

...

4) Giving necessary consent, approval, or releases on behalf of the ward;

...

(5) Arranging for training, education, or other habilitating services appropriate for the ward;

...

(8) Entering into contractual arrangements on behalf of the ward, if no conservator has been appointed

In addition, guardians of incapacitated persons have general powers and duties for their ward as set forth in Neb. Rev. Stat. §30-2628, which states, in relevant part:

(a) Except as limited by an order entered pursuant to section 30-2620, a guardian of an incapacitated person has the same powers, rights, and duties respecting his or her ward that a parent has respecting his or her unemancipated minor child, except that a guardian is not liable to third persons for acts of the ward solely by reason of the parental relationship. In particular, and without qualifying the foregoing, a guardian has the following powers and duties, except as may be specified by order of the court:

(1) To the extent that it is consistent with the terms of any order by a court of competent jurisdiction relating to detention or commitment of the ward, he or she is entitled to custody of the person of his or her ward and may establish the ward's place of abode within or without this state. When establishing the ward's place of abode, a guardian shall make every reasonable effort to ensure that the placement is the least restrictive alternative. A guardian shall authorize a placement to a more restrictive environment only after careful evaluation of the need for such placement. The guardian may obtain a professional evaluation or assessment that such placement is in the best interest of the ward.

(2) If entitled to custody of his or her ward, he or she shall make provision for the care, comfort, and maintenance of his or her ward and, whenever appropriate, arrange for his or her training and education. Without regard to custodial rights of the ward's person, he or she shall take reasonable care of his or her ward's clothing, furniture, vehicles, and other personal effects and commence protective proceedings if other property of his or her ward is in need of protection.

(3) A guardian may give any consents or approvals that may be necessary to enable the ward to receive medical, psychiatric, psychological, or other professional care, counsel, treatment, or service. When making such medical or psychiatric decisions, the guardian shall consider and carry out the intent of the ward expressed prior to incompetency to the extent allowable by law. Notwithstanding this provision or any other provision of the Nebraska Probate Code, the ward may authorize the release of financial, medical, and other confidential records pursuant to sections 20-161 to 20-166.

...

For research conducted in jurisdictions other than Nebraska, the research must comply with the laws regarding guardianship in all relevant jurisdictions. The Office of General Counsel will provide assistance with regard to the laws in other jurisdictions.

As with minors, guardians for incapacitated persons can be established by testamentary appointment (see Neb. Rev. Stat. §30-2617) or upon appointment by the court (see Neb. Rev. Stat. §30-2619). The guardianship continues until terminated by “the death of the guardian or ward, the determination of incapacity of the guardian, or upon removal or resignation” of the guardian (see Neb. Rev. Stat. §30-2622). However, if the incapacity of a person is in question, a court may appoint a “Visitor” with specific training in the area, to conduct an evaluation of the allegations of incapacity to assist the court in its determination of whether the appointment of a guardian is in the best interests of that person (see Neb. Rev. Stat. §30-2619.01).

If a court determines that the appointment of a guardian is in the best interests of the individual in question, that guardian may be vested with some or all of the duties as determined by the court in accordance with Neb. Rev. Stat. §30-2620, of which the relevant duties are the following:

The court may appoint a guardian if it is satisfied by clear and convincing evidence that the person for whom a guardian is sought is incapacitated and that the appointment is necessary or desirable as the least restrictive alternative available for providing continuing care or supervision of the person of the person alleged to be incapacitated. 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 a full guardianship is necessary. If a limited guardianship is created, the court shall, at the time of appointment or later, specify the authorities and responsibilities which the guardian and ward, acting together or singly, shall have with regard to:

...

2) Arranging for medical care for the ward;

...

4) Giving necessary consent, approval, or releases on behalf of the ward;

...

(5) Arranging for training, education, or other habilitating services appropriate for the ward;

...

(8) Entering into contractual arrangements on behalf of the ward, if no conservator has been appointed

In addition, guardians of incapacitated persons have general powers and duties for their ward as set forth in Neb. Rev. Stat. §30-2628, which states, in relevant part:

(a) Except as limited by an order entered pursuant to section 30-2620, a guardian of an incapacitated person has the same powers, rights, and duties respecting his or her ward that a

parent has respecting his or her unemancipated minor child, except that a guardian is not liable to third persons for acts of the ward solely by reason of the parental relationship. In particular, and without qualifying the foregoing, a guardian has the following powers and duties, except as may be specified by order of the court:

1) To the extent that it is consistent with the terms of any order by a court of competent jurisdiction relating to detention or commitment of the ward, he or she is entitled to custody of the person of his or her ward and may establish the ward's place of abode within or without this state. When establishing the ward's place of abode, a guardian shall make every reasonable effort to ensure that the placement is the least restrictive alternative. A guardian shall authorize a placement to a more restrictive environment only after careful evaluation of the need for such placement. The guardian may obtain a professional evaluation or assessment that such placement is in the best interest of the ward.

(2) If entitled to custody of his or her ward, he or she shall make provision for the care, comfort, and maintenance of his or her ward and, whenever appropriate, arrange for his or her training and education. Without regard to custodial rights of the ward's person, he or she shall take reasonable care of his or her ward's clothing, furniture, vehicles, and other personal effects and commence protective proceedings if other property of his or her ward is in need of protection.

(3) A guardian may give any consents or approvals that may be necessary to enable the ward to receive medical, psychiatric, psychological, or other professional care, counsel, treatment, or service. When making such medical or psychiatric decisions, the guardian shall consider and carry out the intent of the ward expressed prior to incompetency to the extent allowable by law. Notwithstanding this provision or any other provision of the Nebraska Probate Code, the ward may authorize the release of financial, medical, and other confidential records pursuant to sections 20-161 to 20-166.

As with minors, guardians for incapacitated persons can be established by testamentary appointment (see Neb. Rev. Stat. §30-2617) or upon appointment by the court (see Neb. Rev. Stat. §30-2619). The guardianship continues until terminated by “the death of the guardian or ward, the determination of incapacity of the guardian, or upon removal or resignation” of the guardian (see Neb. Rev. Stat. §30-2622). However, if the incapacity of a person is in question, a court may appoint a “Visitor” with specific training in the area, to conduct an evaluation of the allegations of incapacity to assist the court in its determination of whether the appointment of a guardian is in the best interests of that person (see Neb. Rev. Stat. §30-2619.01).

If a court determines that the appointment of a guardian is in the best interests of the individual in question, that guardian may be vested with some or all of the duties as determined by the court in accordance with Neb. Rev. Stat. §30-2620, of which the relevant duties are the following:

The court may appoint a guardian if it is satisfied by clear and convincing evidence that the person for whom a guardian is sought is incapacitated and that the appointment is necessary or desirable as the least restrictive alternative available for providing continuing care or supervision of the person of the person alleged to be incapacitated. 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 a full guardianship is necessary. If a limited guardianship is created, the court shall, at the time of appointment or later, specify the

authorities and responsibilities which the guardian and ward, acting together or singly, shall have with regard to:

...

(2) Arranging for medical care for the ward;

...

4) Giving necessary consent, approval, or releases on behalf of the ward;

...

(5) Arranging for training, education, or other habilitating services appropriate for the ward;

...

(8) Entering into contractual arrangements on behalf of the ward, if no conservator has been appointed

In addition, guardians of incapacitated persons have general powers and duties for their ward as set forth in Neb. Rev. Stat. §30-2628, which states, in relevant part:

(a) Except as limited by an order entered pursuant to section 30-2620, a guardian of an incapacitated person has the same powers, rights, and duties respecting his or her ward that a parent has respecting his or her unemancipated minor child, except that a guardian is not liable to third persons for acts of the ward solely by reason of the parental relationship. In particular, and without qualifying the foregoing, a guardian has the following powers and duties, except as may be specified by order of the court:

(1) To the extent that it is consistent with the terms of any order by a court of competent jurisdiction relating to detention or commitment of the ward, he or she is entitled to custody of the person of his or her ward and may establish the ward's place of abode within or without this state. When establishing the ward's place of abode, a guardian shall make every reasonable effort to ensure that the placement is the least restrictive alternative. A guardian shall authorize a placement to a more restrictive environment only after careful evaluation of the need for such placement. The guardian may obtain a professional evaluation or assessment that such placement is in the best interest of the ward.

(2) If entitled to custody of his or her ward, he or she shall make provision for the care, comfort, and maintenance of his or her ward and, whenever appropriate, arrange for his or her training and education. Without regard to custodial rights of the ward's person, he or she shall take reasonable care of his or her ward's clothing, furniture, vehicles, and other personal effects and commence protective proceedings if other property of his or her ward is in need of protection.

(3) A guardian may give any consents or approvals that may be necessary to enable the ward to receive medical, psychiatric, psychological, or other professional care, counsel, treatment, or service. When making such medical or psychiatric decisions, the guardian shall consider and carry out the intent of the ward expressed prior to incompetency to the extent allowable by law. Notwithstanding this provision or any other provision of the Nebraska Probate Code, the ward may authorize the release of financial, medical, and other confidential records pursuant to sections 20-161 to 20-166.

Power of Attorney

In general, a power of attorney is a legal authorization allowing a person to act on behalf of another in a legal, business or personal matter. With regard to matters involving consent for participation in research, a power of attorney may be exercised by an individual or body authorized under applicable

law to provide permission on behalf of a prospective subject to the subject's participation in the procedure(s) involved in the research. A person can be delegated the power of attorney to make decisions, including informed consent, on behalf of a minor or incapacitated adult so long as the delegation is made by an authorized person – either the individual themselves before incapacity occurred or a parent or guardian of a minor. There are three relevant types of powers of attorney under Nebraska law; (1) durable power of attorney (2) temporary power of attorney by parents and guardians, and (3) healthcare power of attorney.

Durable Power of Attorney (*Neb. Rev. Stat. §30-2665*)

As used in the Uniform Durable Power of Attorney Act, unless the context otherwise requires, durable power of attorney shall mean a power of attorney by which a principal designates another his or her attorney in fact in writing and the writing contains the words, "This power of attorney shall not be affected by subsequent disability or incapacity of the principal," or "This power of attorney shall become effective upon the disability or incapacity of the principal or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's subsequent disability or incapacity.

The authority of a person having a power of attorney to act on behalf of another is set forth in Neb. Rev. Stat. §30-2665, which states:

All acts done by an attorney in fact pursuant to a durable power of attorney during any period of disability or incapacity of the principal have the same effect and inure to the benefit of and bind the principal and his or her successors in interest as if the principal were competent and not disabled.

Durable Power of Attorney is also dealt with in Nebraska Short Form Act, Neb. Rev. Stat §49-1501 et. seq. which provides a uniform set of rules governing the form of power of attorney documents for both specific and general purposes. Whether the durable power of attorney in a given case will convey the authority to consent to participation on behalf of the principal in research depends on the specific language used in the durable power of attorney document.

Temporary Power of Attorney by Parent or Guardian

A parent or guardian of a minor or incapacitated person may also execute a power of attorney on behalf of their child or ward under Neb. Rev. Stat. §30-2604, which states:

A parent or a guardian of a minor or incapacitated person, by a properly executed power of attorney, may delegate to another person, for a period not to exceed six months, any of his powers regarding care, custody, or property of the minor child or ward, except his power to consent to marriage or adoption of a minor ward.

It should be noted that it would be highly unusual for someone with a limited power of attorney such as this to consent for a minor or incapacitated person for IRB purposes

Healthcare Power of Attorney

With specific regard to health care issues, especially clinical trials or research involving the provision of medical treatments, power of attorney for an incapacitated person is addressed in Neb. Rev. Stat. §30-3402 et. seq. These statutory sections contain the following definitions with relation to healthcare power of attorney:

....

(2) Attending physician shall mean the physician, selected by or assigned to a principal, who has primary responsibility for the care and treatment of such principal;

(3) Attorney in fact shall mean an adult properly designated and authorized under sections 30-3401 to 30-3432 to make health care decisions for a principal pursuant to a power of attorney for health care and shall include a successor attorney in fact;

(4) Health care shall mean any treatment, procedure, or intervention to diagnose, cure, care for, or treat the effects of disease, injury, and degenerative conditions;

(5) Health care decision shall include consent, refusal of consent, or withdrawal of consent to health care. Health care decision shall not include (a) the withdrawal or withholding of routine care necessary to maintain patient comfort, (b) the withdrawal or withholding of the usual and typical provision of nutrition and hydration, or (c) the withdrawal or withholding of life-sustaining procedures or of artificially administered nutrition or hydration, except as provided by sections 30-3401 to 30-3432;

...

(7) Incapable shall mean the inability to understand and appreciate the nature and consequences of health care decisions, including the benefits of, risks of, and alternatives to any proposed health care or the inability to communicate in any manner an informed health care decision;

...

(10) Power of attorney for health care shall mean a power of attorney executed in accordance with sections 30-3401 to 30-3432 which authorizes a designated attorney in fact to make health care decisions for the principal when the principal is incapable;

(11) Principal shall mean an adult who, when competent, confers upon another adult a power of attorney for health care;

The legal standard for determining whether or not a person is incapacitated for purposes of a healthcare power of attorney is found in Neb. Rev. Stat. §30-3412, which states:

Incapacity of principal; determination.

(1) A determination that a principal is incapable of making health care decisions shall be made in writing by the attending physician and any physician consulted with respect to the determination that the principal is incapable of making health care decisions, and they shall document the cause and nature of the principal's incapacity. The determination shall be included in the principal's medical record with the attending physician and, when applicable, with the consulting physician and the health care facility in or of which the principal is a patient or resides.

(2) A physician who has been designated a principal's attorney in fact shall not make the determination that the principal is incapable of making health care decisions.