

LEGISLATIVE BILL 428

Approved by the Governor April 1, 1982

Introduced by V. Johnson, 8

AN ACT to amend sections 30-2619, 30-2620, 30-2624, 30-2625, 30-2627, 30-2628, 30-2630, and 30-2633, Reissue Revised Statutes of Nebraska, 1943, relating to the Nebraska Probate Code; to change procedures for court appointment of a guardian of an incapacitated person; to provide procedures for use of visitors; to provide duties; to limit protective orders as prescribed; and to repeal the original sections.

Be it enacted by the people of the State of Nebraska,

Section 1. That section 30-2619, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

30-2619. (a) The allegedly incapacitated person or any person interested in his or her welfare may petition for a finding of incapacity and appointment of a guardian. The petition shall be verified and shall contain allegations with regard to any of the areas as provided under section 2 of this act in which the petitioner claims that the allegedly incapacitated person lacks sufficient understanding to make or communicate responsible decisions concerning his or her own person.

(b) Upon the filing of a petition, the court shall set a date for hearing on the issues of incapacity and unless the allegedly incapacitated person has counsel of his or her own choice or has indicated a desire for an attorney of his or her own choice, it may appoint an appropriate official or attorney to represent him or her in the proceeding, who shall have the powers and duties of a guardian ad litem.

(c) The person alleged to be incapacitated may be examined by a physician appointed by the court who shall submit his or her report in writing to the court and may be interviewed by a visitor, if so appointed pursuant to section 2 of this act and section 30-2624, sent by the court. ~~The visitor also shall interview the person seeking appointment as guardian, and visit the present place of abode of the person alleged to be incapacitated and the place it is proposed that he will be detained or reside if the requested appointment is made and submit his report in writing to the court.~~

(d) The person alleged to be incapacitated is entitled to be present at the hearing in person, and is entitled to see or and hear all evidence bearing upon his or her condition. He or she is entitled to be present by counsel, to present evidence, and to cross-examine witnesses, including the court-appointed physician and the visitor appointed by the court pursuant to section 2 of this act and section 30-2624. The issue may be determined at a closed hearing only if the person alleged to be incapacitated or his or her counsel so requests.

Sec. 2. Following the filing of a petition, the court may appoint a visitor and direct such visitor to conduct an evaluation of the allegations of incapacity as provided under this section. To conduct the evaluation of the allegations of incapacity, the visitor shall interview the allegedly incapacitated person, the person seeking appointment as guardian, the agencies providing services to the allegedly incapacitated person, and other persons and agencies that may provide relevant information. The visitor shall also visit the present place of abode of the person alleged to be incapacitated and, if any change of residence is anticipated, the place it is proposed that he or she will be detained or reside if the requested appointment is made, and submit his or her report in writing to the court.

As part of the evaluation of allegations of incapacity, a visitor, if appointed, shall obtain evidence relating to the allegedly incapacitated person's ability to make, communicate, or carry out responsible decisions concerning his or her person with regard to:

- (1) Selecting his or her place of abode within or without this state;
- (2) Arranging for his or her medical care;
- (3) Protecting his or her personal effects;
- (4) Giving necessary consents, approvals, or releases;
- (5) Arranging for training, education, or other habilitating services appropriate to him or her;
- (6) Applying for private or governmental benefits to which he or she may be entitled;
- (7) 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;

(8) Entering into contractual agreements if no conservator has been appointed for the proposed ward;

(9) 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

(10) Any other area of inquiry which the court may direct.

Sec. 3. The guardianship evaluation by the visitor shall be conducted with minimum interference with the allegedly incapacitated person's activities. Any interviews and examinations shall take place in the usual residence unless the visitor deems it necessary to conduct the interview or examination elsewhere. In cases of such necessity, the interview or examination shall take place during normal business hours.

Sec. 4. The visitor shall file an evaluation report based upon the evaluation of the allegations of incapacity with the court within sixty days of the filing of the guardianship petition. Copies of the evaluation report shall be made available to the guardian ad litem, the proposed ward, and the petitioner. The evaluation report shall contain:

(1) A record of the visitor's interviews;

(2) Evidence obtained in each of the categories listed in section 2 of this act;

(3) Recommendations as to the need of the proposed ward for a guardian in each of the areas listed in section 2 of this act;

(4) The visitor's opinion as to the appropriateness of the person seeking appointment as guardian;

(5) Recommendations as to other appropriate candidates; and

(6) The visitor's opinion as to the needed duration of the guardianship.

Sec. 5. The petitioner and the proposed ward shall have ten judicial days to file responses to the visitor's evaluation report.

Sec. 6. That section 30-2620, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

30-2620. The court may appoint a guardian as requested 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 a means of providing continuing care and or supervision of the person of the incapacitated person. The court may, 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:

(1) Selecting the ward's place of abode within or without this state;

(2) Arranging for medical care for the ward;

(3) Protecting the personal effects of 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;

(6) Applying for private or governmental benefits to which the ward may be entitled;

(7) Instituting proceedings to compel any person under a duty to support the ward or to pay sums for the welfare of the ward to perform such duty, if no conservator has been appointed;

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

(9) Receiving money and tangible property deliverable to the ward and applying such money and property to the ward's expenses for room and board, medical care, personal effects, training, education, and habilitating services, if no conservator has been appointed, or requesting the conservator to expend the ward's estate by payment to third persons to meet such expenses.

If the court does specify such authorities and responsibilities, the specifications shall be endorsed upon the letters of appointment of the guardian, and shall be treated as specific limitations upon the general

powers, rights, and duties accorded by law to the guardian. Alternatively, the court may dismiss the proceeding or enter any other appropriate order.

Sec. 7. The reasonable fees and costs of a guardian ad litem, physician, and visitor appointed by the court shall be allowed, disallowed, or adjusted by the court and may be paid from the estate of the ward if the ward possesses an estate, or, if not, shall be paid by the county in which the proceedings are brought or by the petitioner as costs of the action.

Sec. 8. That section 30-2624, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

30-2624. A visitor ~~is,---with---respect---to guardianship---proceedings,--a--person--who--is~~ shall be trained in law, nursing, or social work, mental health, mental retardation, gerontology, or developmental disabilities and ~~is~~ shall be an officer, employee, or special appointee of the court with no personal interest in the proceedings.

Any qualified person may be appointed visitor of a proposed ward, except that it shall be unlawful for any owner, part owner, manager, administrator, or employee, or any spouse of an owner, part owner, manager, administrator, or employee of a nursing home, room and board home, convalescent home, group care home, or institution providing residential care to any person physically or mentally handicapped, infirm, or aged to be appointed visitor of any such person residing, being under care, receiving treatment, or being housed in any such home or institution within the State of Nebraska.

The court shall select the visitor who has the expertise to most appropriately evaluate the needs of the person who is allegedly incapacitated.

The court shall maintain a current list of persons trained in or having demonstrated expertise in the areas of mental health, mental retardation, drug abuse, alcoholism, gerontology, nursing, and social work, for the purpose of appointing a suitable visitor.

Sec. 9. That section 30-2625, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

30-2625. (a) In a proceeding for the appointment or removal of a guardian of an incapacitated person other than the appointment of a temporary guardian or temporary

suspension of a guardian, notice of hearing shall be given to each of the following:

(1) the ward or the person alleged to be incapacitated and his or her spouse, parents, and adult children;

(2) any person who is serving as his or her guardian or conservator or who has his or her care and custody; and

(3) in case no other person is notified under (1), at least one of his or her closest adult relatives, if any can be found.

(b) Notice shall be served personally on the alleged incapacitated person, and his or her spouse and parents if they can be found within the state. Notice to the spouse and parents, if they cannot be found within the state, and to all other persons except the alleged incapacitated person shall be given as provided in section 30-2220. Waiver of notice by the person alleged to be incapacitated is not effective unless he or she attends the hearing or his or her waiver of notice is confirmed in an interview with the visitor or such notice is waived by a guardian ad litem. Representation of the alleged incapacitated person by a guardian ad litem is not necessary.

(c) In addition to notifying him or her of the filing of the petition and the time and place of the hearing on the petition, the notice required to be served upon the allegedly incapacitated person shall list the following rights of the person:

(1) The right to have an attorney appointed;

(2) The right to present evidence in his or her own behalf; and

(3) The right to request that the power of the guardian, if appointed, be limited by the court.

The court may require that the notice contain such other matters as the court may deem appropriate.

Sec. 10. That section 30-2627, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

30-2627. (a) Any competent person or a suitable institution may be appointed guardian of an incapacitated person, except that it shall be unlawful for any agency

providing residential care in an institution or community based program, or any owner, part owner, manager, administrator, or anyone employed by employee, or any spouse of an owner, part owner, manager, administrator, or employee of any nursing home, room and board home, convalescent home, or institution engaged in the care, treatment, or housing of any person physically or mentally handicapped, infirm, or aged to be appointed guardian or conservator of any such person residing, being under care, receiving treatment, or being housed in any such home or institution within the State of Nebraska. Nothing in this subsection shall prevent the allegedly incapacitated person's spouse, adult child, parent, or relative from being appointed guardian.

(b) Persons who are not disqualified and who exhibit the ability to exercise the powers to be assigned by the court have priority for appointment as guardian in the following order:

- (1) the spouse of the incapacitated person;
- (2) an adult child of the incapacitated person;
- (3) a parent of the incapacitated person, including a person nominated by will or other writing signed by a deceased parent;
- (4) 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;
- (5) a person nominated by the person who is caring for him or her or paying benefits to him or her.

(c) The court may require a guardian to furnish a bond in an amount and conditioned in accordance with the provisions of section 30-2640.

Sec. 11. That section 30-2628, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

30-2628. (a) 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 modified 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.

(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 or other professional care, counsel, treatment, or service.

(4) If no conservator for the estate of the ward has been appointed, he or she may:

(i) institute proceedings to compel any person under a duty to support the ward or to pay sums for the welfare of the ward to perform his or her duty;

(ii) receive money and tangible property deliverable to the ward and apply the money and property for support, care, and education of the ward; but he or she may not use funds from his or her ward's estate for room and board which he or she, his or her spouse, parent, or child have furnished the ward unless a charge for the service is approved by order of the court made upon notice to at least one of the next of kin of the ward, if notice is possible. He or she must exercise care to conserve any excess for the ward's needs.

(5) A guardian is required to report the condition of his or her ward and of the estate which has been subject to his or her possession or control, at least every two years and as required by the court or court rule. The court shall receive from any interested person, for a period of thirty days after the filing of the guardian's report, any comments with regard to the need for continued guardianship or amendment of the guardianship order. If the court has reason to believe that additional rights should be returned to the ward or assigned to the guardian, the court shall set at date for a hearing and may provide all protections as set forth for the original finding of incapacity and appointment of

a guardian.

(6) If a conservator has been appointed, all of the ward's estate received by the guardian in excess of those funds expended to meet current expenses for support, care, and education of the ward must be paid to the conservator for management as provided in this code, and the guardian must account to the conservator for funds expended.

(b) Any guardian of one for whom a conservator also has been appointed shall control the custody and care of the ward, and is entitled to receive reasonable sums for his or her services and for room and board furnished to the ward as agreed upon between him or her and the conservator, provided the amounts agreed upon are reasonable under the circumstances. The guardian may request the conservator to expend the ward's estate by payment to third persons or institutions for the ward's care and maintenance.

Sec. 12. That section 30-2630, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

30-2630. Upon petition and after notice and hearing in accordance with the provisions of this part, the court may appoint a conservator or make other protective order for cause as follows:

(1) Appointment of a conservator or other protective order may be made in relation to the estate and property affairs of a minor if the court determines that a minor owns money or property that requires management or protection which cannot otherwise be provided, has or may have business affairs which may be jeopardized or prevented by his or her minority, or that funds are needed for his or her support and education and that protection is necessary or desirable to obtain or provide funds.

(2) Appointment of a conservator or other protective order may be made in relation to the estate and property affairs of a person if the court determines that (i) the person is unable to manage his or her property and property affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, confinement, or lack of discretion in managing benefits received from public funds, detention by a foreign power, or disappearance; and (ii) 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.

Sec. 13. That section 30-2633, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

30-2633. (a) The person to be protected, any person who is interested in his or her estate, property affairs, or welfare including his or her parent, guardian, or custodian, or any person who would be adversely affected by lack of effective management of his or her property and property affairs may petition for the appointment of a conservator or for other appropriate protective order.

(b) The petition shall set forth, to the extent known, the interest of the petitioner; the name, age, residence, and address of the person to be protected; the name and address of his or her guardian, if any; the name and address of his or her nearest relative known to the petitioner; 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; and the reason why appointment of a conservator or other protective order is necessary. If the appointment of a conservator is requested, the petition also shall set forth the name and address of the person whose appointment is sought and the basis of his or her priority for appointment.

Sec. 14. That original sections 30-2619, 30-2620, 30-2624, 30-2625, 30-2627, 30-2628, 30-2630, and 30-2633, Reissue Revised Statutes of Nebraska, 1943, are repealed.