

GUARDIANSHIPS AND CONSERVATORSHIPS— PROTECTION OF PERSONS UNDER DISABILITY AND THEIR PROPERTY

DOUGLAS R. STATE*

INTRODUCTION

The purpose of this article is to point out the changes the Nebraska Probate Code will make in our current law as it relates to guardianships and conservatorships and to give a brief overview of the Code in regard to these areas. Article 26 of Chapter 30 (sections 30-2601-30-2663) will generally replace the first nine Articles of Chapter 38 of the present Nebraska statutes.

Under our current law, a guardianship proceeding involves both the person *and* the property of the person. Under the Code, however, these two matters are considered separately in guardianship proceedings and protective proceedings. A protective proceeding deals with the property of an individual, and a guardianship proceeding deals with the body of the person. However a guardian may have limited powers over property.

A "guardian," under the Nebraska Probate Code section 30-2209(17) is a person who has control over the person of a minor or an incapacitated person. There is no change in the definition of a minor, found in section 30-2209(26). An "incapacitated person" is defined in section 30-2601(1) of the Code as an individual who is impaired to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person. A person may be incapacitated by reason of the items listed in the definition, but these reasons are not exclusive and there can be others which could cause a person to be incapacitated. The term incapacitated person would generally replace the terms mentally ill or incompetent person. Under section 30-2601(4) of the Code a "ward" is a person for whom a guardian has been appointed—this term is not used in protective proceedings. A "conservator" under section 30-2209(6) of the Code is a person appointed to protect the estate of a protected person. A conservator would be analogous to what we would now call a guardian of the property.

* B.A., Grinnell College; J.D., University of Iowa; Member, Knapp, State, Yeagley & Mues, Kearney, Nebraska.

Under certain circumstances a conservator can, however, have the duties of a guardian as specified in section 30-2653(a). This would occur when the protected person is a minor over whom no one has parental rights. There is no requirement under the Code that the guardian and the conservator be the same person. Nor is there any requirement that the guardianship proceeding and the conservatorship proceeding be held in the same court, *i.e.*, they can be in two different courts within the state.

A "protected person" in a conservatorship or protective proceeding is a minor or other person for whom a conservator has been appointed, or for whom a protective order has been made, as set forth in section 30-2601(3). A protective proceeding is a proceeding to determine whether a person can effectively manage his estate because he lacks the ability, is otherwise inconvenienced or because he is a minor, and to secure administration of his estate by a conservator or other appropriate relief, as set forth in section 30-2601(2).

In addition to establishing the guardianship and conservatorship proceedings of the Code, Article 26 contains provisions designed to minimize or avoid the necessity of guardianship or protective proceedings.

The facility of payment provision of section 30-2603 permits a person owing up to \$3,000 a year to a minor to pay or deliver to certain specified persons the property or the money involved and be validly discharged. While this section can only be used if there is no conservator appointed, it would be useful where there is a small amount of money payable to a minor. Rather than setting up a conservatorship, or even a guardianship, it could be paid and taken care of under the provisions of this section. Section 30-2603 does, however, only apply to a minor and does not apply to an incapacitated person.

Another Code procedure to avoid the use of a guardianship is section 30-2604, which permits the temporary delegation of powers. Under this section a parent or guardian of a minor or incapacitated person is allowed to delegate, for a period not to exceed six months, his powers regarding care, custody or property of a minor child or ward. This provision would be helpful in a situation where the parents of a minor are going to be on an extended vacation and want to delegate these powers to a close relative or some other trusted person.

GUARDIANS OF MINORS

Turning now to the guardianship of minors, the concept of parents as natural guardians as set forth in present section 38-107 is

continued under Code section 30-2608. Under Code section 30-2605 a person becomes a guardian either by accepting a testamentary appointment or by being appointed by the court. The testamentary appointment of a guardian of a minor, Code section 30-2606, can take place when both parents are deceased or when the surviving parent is incapacitated. This is a change in our current law, as presently only the last surviving parent can make the testamentary appointment. The guardian who is appointed in the will must file his acceptance of the appointment in the court in which the will is probated. Written notice of the acceptance must be given to the minor and to the person having his care or to his nearest adult relation. The Code also states that Nebraska will recognize a testamentary appointment made in this fashion in another state. Protection is given to the minor if he is fourteen years of age or older in that he can file an objection to the appointment under Code section 30-2607. If he does file an objection to the appointment the court can still appoint the testamentary nominee following a hearing on the appointment of a guardian for the minor.

Another method of securing a guardian is for the court to make the appointment. This can be done if the parental rights with regard to the minor are terminated or if the testamentary guardian does not accept appointment within thirty days after notice of the guardianship proceeding is given, as provided in Code section 30-2608. However, if the testamentary guardian does accept the appointment, then the court is without jurisdiction to appoint—the testamentary guardian has priority over a court appointed guardian. This is a change in our law. Our court has indicated that where a guardian is appointed in a will, the simple fact of appointment does not oust the court of jurisdiction to appoint someone else as the guardian.

Venue for proceedings relating to guardianship of a minor, Code section 30-2609, is where the minor resides or is present or where property is located if he is a nonresident. Under this provision it would be possible to have proper venue in more than one place within the state. In this regard the Code provides in section 30-2212 that when venue lies in more than one court, the court that first commences the action has the exclusive right to proceed.

Generally, any person can be appointed the guardian of a minor so long as the appointment is in the best interest of the minor. But again, in recognition of the fact that a minor over the age of fourteen has some rights, Code section 30-2610 does permit the minor to name his guardian. This provision is tempered by the fact that the court can, however, appoint someone else if the court

finds that the minor's choice of guardian would be contrary to the minor's best interests.

Code section 30-2611 provides who is to receive notice upon the filing of a petition for the appointment of a guardian of a minor. It is interesting to note that the procedure for court appointment requires notice to be given to a minor only if the minor is over fourteen, while the acceptance of a testamentary appointment requires notice to be given to the minor regardless of age.

At a hearing on the appointment of a guardian for a minor, the court can appoint an attorney to represent the minor and it can also appoint a temporary guardian for the minor. Under our present statutes dealing with guardians of minors there is no provision for a temporary guardian. The court may also require the guardian of a minor to file a bond pursuant to section 30-2613(4). This is an addition to the Nebraska Probate Code and is not found in the Uniform Probate Code. A bond can also be required for a guardian of an incapacitated person and a conservator, and the provisions concerning bonds in any one of these situations are set forth in sections 30-2640 and 30-2641.

When a guardian is appointed, section 30-2612 provides that he submits personally to the jurisdiction of the court in any proceeding relating to the guardianship which is instituted by an interested person. Notice of these proceedings can be given to the guardian by mail. While new to Nebraska, this is really just an extension of the long-arm principle. Similar provisions are found in the sections relating to guardianship of incapacitated persons and in the sections dealing with conservatorships.

The powers, responsibilities and duties of a guardian of a minor as specified in section 30-2613 are the same whether he has accepted a testamentary appointment or whether he is a court-appointed guardian. He has the powers and responsibilities of a parent, except that he is not legally obligated to use his own funds for the support of the ward, and is not liable to third persons for acts of the ward. While he is technically permitted to consent to the marriage and adoption of the minor, this is going to have to be read in connection with the provisions of section 43-105 of the present Nebraska statutes, which provide that the guardian can only consent to adoption with court permission. The guardian does have limited authority over the property of the minor. He is to take control of the ward's personal effects and, if necessary, apply for appointment of a conservator. In addition to receiving funds under the facility of payment provision of section 30-2603, mentioned earlier, the guardian of a minor may also receive money pay-

able for the support of the ward without limitation as to the amount. The sums so received are to be applied for the ward's needs for support, care and education. However, the use of these funds is subject to the same conditions that are contained in our present statute under section 38-111. A guardian may authorize medical or other professional care, treatment or advice and is required to report the condition of his ward or the ward's estate when ordered by the court. Section 30-2614 provides that upon termination the guardian must account, and section 30-2616 provides that upon resignation or removal there is a hearing following notice. The court may appoint an attorney to represent the minor at that time.

A new concept is introduced by section 30-2615 concerning "subsequent proceedings." The section provides that the court where the ward resides has concurrent jurisdiction with the court which made the appointment over such things as resignation, removal, accounting and other proceedings relating to the guardianship, and provides for notice to and consultation with the other court. This can take place even if the other court, where the ward is residing, is located in another state. A similar provision is provided for in the sections dealing with the guardianship of an incapacitated person.

GUARDIANS OF INCAPACITATED PERSONS

The Code also deals with the guardianship of an incapacitated person. An incapacitated person is one who lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person. A finding that an individual is incapacitated is not a finding that he is mentally ill, and the Code does not affect the other statutes concerning the commitment of a mentally ill person.

A change is introduced into our law by section 30-2617 of the Code which permits the testamentary appointment of a guardian for an incapacitated person. Such testamentary appointment can be made by a parent or by a spouse, but the spouse's appointment has priority over an appointment by a parent. In either case, seven days notice prior to filing the acceptance by the testamentary appointed guardian is required to be given to the incapacitated person *and* the person having his care or his nearest adult relative. This permits the alleged incapacitated person to object to the proceeding. An objection to the testamentary appointment terminates the proceeding.

With regard to a court appointment of a guardian of an incapacitated person venue is the same as it is with a minor, with the additional provision that if the individual has been admitted to an institution pursuant to a court order then venue is also in the court which ordered the admission. Therefore, with a resident incapacitated person there are three possible places in which venue could rest, as provided in section 30-2618.

At the present time, a petition for the appointment of a guardian can be filed by relatives or friends. Code section 30-2619(a), however, permits a voluntary application to be made for the appointment of a guardian. Code section 30-2625 provides for notice to be given upon the filing of a petition and requires that notice be given to more persons.

At a hearing for the appointment of a guardian for an incapacitated person, if the individual does not have an attorney, the court *must* appoint an attorney to represent him. Under the provisions dealing with minors the appointment of an attorney is discretionary with the court, but it is mandatory with incapacitated persons. Additionally, with an incapacitated person section 30-2619 provides that the court may have the individual examined by a physician and interviewed by a visitor. A visitor is a new concept introduced by Code section 30-2624. A visitor is a person trained in law, nursing or social work who does not have an interest in the outcome of the proceedings. The duties of the visitor are to interview the alleged incapacitated person, visit the place where he resides, visit the place where he would reside if the appointment is made and then report the findings to the court in writing.

Under the Code, section 30-2620 provides that before a guardian can be appointed for an incapacitated person, the court must find that the person is incapacitated and the appointment is necessary or desirable as a means of providing continuing care and supervision of the person of the incapacitated individual.

Code section 30-2627 sets up priorities with regard to who can be appointed guardian. We currently do not have priorities in either statutory or case law. Generally any competent person or suitable institution can be appointed guardian of an incapacitated person, except that the provision prohibiting certain persons from acting as guardian, set forth in our present section 38-519, is maintained.

Code section 30-2626 also permits the appointment of a temporary guardian, and if an emergency exists the court itself may exercise the powers of a guardian pending notice of hearing, a temporary guardian may also be appointed, if the guardian previously ap-

pointed is not performing his duties, but a temporary guardian appointed in this situation can only serve for a period of six months. Under our present law the only provisions relating to a special guardian are found in sections 38-201.01 and 38-302.01. Under these provisions the special guardian can exercise powers pending appointment, but the powers are limited to conserving assets and have nothing to do with the person of the individual.

The powers and duties of a guardian of an incapacitated person are set forth in section 30-2628. He has the same powers, rights and duties respecting his ward that a parent has respecting an unemancipated minor child except that, as with the guardian of a minor, he is not liable to third persons for acts of the ward solely by reason of the guardianship relation. The guardian can establish the ward's place of abode within or without the state, and can arrange for the ward's training and education. If there is no conservator appointed for the estate of the ward, the guardian can institute proceedings to compel a person having a duty to support the ward to pay the sums for the welfare of the ward, and may himself receive the money and property and apply them for the support, care and welfare of the ward. The guardian of an incapacitated person is required to report to the court and account for any excess funds, and can be removed by the court upon the filing of a petition and notice of hearing being given.

Code section 30-2623(b) provides that an order adjudicating incapacity can specify a minimum period not exceeding one year during which no petition for an adjudication that the ward is no longer incapacitated may be filed without special leave. Subject to such restriction the ward or any person interested in his welfare may petition for an order that the ward is no longer incapacitated and for removal or resignation of the guardian. The Code specifically provides that such application can be made by an informal letter. Any person who knowingly interferes with the transmission of the letter to the court can be held in contempt of court.

PROTECTION OF PROPERTY OF PERSONS UNDER DISABILITY AND MINORS

Turning now to conservators and protective proceedings, section 30-2630(1) provides that a conservator may be appointed or a protective order made in the following situations: where the minor owns money or property which requires management or protection which cannot otherwise be provided; or has business affairs which may be jeopardized or prevented by his minority; or where funds are needed for his support and education, and protec-

tion is necessary or desirable to obtain or provide funds. This is a broader definition than we now have. Present section 38-102 simply states that a guardian shall be appointed when it shall appear necessary or convenient. For any person other than a minor, section 30-2630(2) provides that a conservator can be appointed, or protective order made, if such person is unable to manage his property and affairs effectively for the reasons listed in the Code (which, again, are not exclusive) and the person has property which will be wasted or dissipated unless proper management is provided, or if funds are needed for the support, care and welfare of the person or those entitled to be supported by him and that protection is necessary or desirable to obtain or provide the funds.

Venue for protective proceedings is different than for guardianship proceedings. Code section 30-2632 provides that with protective proceedings venue is in the place where the protected person resides, or if the person does not reside in this state, in any place where he has property. The provision dealing with where the individual is present, which is found in the guardianship sections, is absent from the provisions relating to protective proceedings. As I previously mentioned, because of the different venue provisions under the Code, an individual could have a conservator appointed for him in one court and a guardian in another court.

After service of notice the court in which the petition is filed has exclusive jurisdiction to determine how the estate of the protected person shall be managed, expended or distributed, as set forth in section 30-2631. It also has concurrent jurisdiction to determine the validity of claims against the person or estate of the protected person. As with a guardian of an incapacitated person, section 30-2639, relating to protective proceedings, also sets forth priorities for the appointment of a conservator. Generally an individual or corporation with power to serve as trustee may be appointed as a conservator.

A petition to commence protective proceedings may be filed by the individual who would be the protected person, by any other person who is interested in the individual's estate, affairs or welfare, or by any person who would be adversely affected by lack of effective management of property or affairs—section 30-2633(a). Under our present law, our Supreme Court has held that a creditor cannot file an application for a guardianship proceeding. However, under the Code a creditor would be permitted to file a petition.

Section 30-2633(b) gives statutory direction as to what the petition must contain. Section 30-2634 sets forth who is to be given notice, and increases the number of persons who are entitled to

receive notice. Section 30-2634 also states that the court may direct notice to be given to persons other than those enumerated. Notice must also be given to persons requesting notice under section 30-2635. Section 30-2635 is important because it provides that any interested person can file a notice with the Registrar and that notice will then be sent to him of any proceedings concerning that particular protective proceeding. Any governmental agency paying or planning to pay benefits to the protected person is an interested person in protective proceedings. This section would protect the Veterans Administration, because the Code will repeal the Uniform Veterans Guardianship Act.

If a minor is the protected person, the court may appoint an attorney under section 30-2636 if the court feels that the minor is not adequately represented. The court must appoint an attorney under section 30-2636(b) for an individual who is alleged to be disabled for reasons other than minority if that individual is not already represented by counsel. This section also provides that the court may direct that the protected person be examined by a physician and be interviewed by a visitor.

Upon finding that a basis for appointment of a conservator or the making of a protective order exists, the court can make the appointment or protective order. However, a finding that such a basis exists does not affect the capacity of the protected person to make a will or for any other purpose.

Under section 30-2637 the court can exercise certain powers directly or through the conservator. After hearing and upon determining that a basis for appointment or other protective order exists with respect to a person for reasons other than minority, the court has, for the benefit of the individual and members of his household, all the powers over that individual's estate and affairs which the individual could exercise if present and not under a disability, except the power to make a will. It is interesting to read these powers as they are quite broad and include the power to make gifts, the power to enter into contracts, the power to create revocable or irrevocable trusts of property which may extend beyond the disability or beyond the individual's life, and the power to change beneficiaries of life insurance policies. However, certain of these powers can be exercised by the court only after notice and hearing.

Another important section of the provisions dealing with protective proceedings is section 30-2638 which permits the court to make an order authorizing a single transaction. First, there must be a finding that the protective order can be made and then the court can

authorize certain transactions. These may either be done by the court or the court can appoint a special conservator to assist it. Protective arrangements under this section include such things as authorizing a sale, mortgage, lease or other transfer of property, entering into a life-care contract or the establishment of a trust. This section will be quite useful when you have a client for whom a continuing arrangement is not needed and all you need is one particular transaction to be approved by the court.

Another change introduced by the Code is set forth in section 30-2649 which states that the appointment of a conservator vests in the conservator title, as trustee, to all of the property of the protected person. The letters of conservatorship are evidence of the transfer of the assets, and may be filed or recorded to give record notice of title. The purpose behind this provision is to eliminate confusion as to who can deal with the property, to give greater protection to third persons dealing with the conservator, and to invalidate transfers by the protected person.

A conservator must file an inventory, and a copy of the inventory must be furnished to the persons listed in section 30-2647. He is still responsible for accounting and can obtain binding intermediate accounting in a manner similar to the provisions set forth in sections 24-606 to 24-618 under section 30-2648.

The administrative powers of a conservator as set forth in section 30-2653 are quite lengthy. These powers may be limited by the court by noting the limitation on the letters of conservatorship as provided in section 30-2655. Generally, though, the Code gives the conservator all the powers he might conceivably need. The only power I want to specifically mention at this time, because it is a change from the Uniform Probate Code, is the fact that under the Nebraska Probate Code, before a wrongful death, tort or other claim can be settled by the conservator, he must receive court approval. Under the Uniform Probate Code the court approval would not have been required at any time.

Section 30-2654 sets forth the distributive powers and duties of a conservator. These powers and duties may also be limited by the court. This section sets forth certain matters which the conservator is to consider in distributing the assets of the protected person and among these are the recommendations of a guardian or the parent of the protected person, the size of the estate, the duration of the guardianship, other sources of funds and the accustomed standard of living of the protected person. The conservator is also directed or authorized to use the funds to support persons dependent upon the protected person and members of the

protected person's household. Under certain circumstances and upon court approval, and if the protected person is not a minor, the conservator is authorized to make gifts to charity but the amount of the gift cannot exceed, in any one year, twenty percent of the income for that year. A sort of overriding charge concerning the investment of the estate and the selecting of assets for distribution is set forth in section 30-2656. This section states that, in investing the estate and selecting the assets for distribution, the court and the conservator are to take into account any known estate plan of the protected person and specifically permits the conservator to obtain and examine the will of the protected person.

A definite procedure concerning the payment of claims by the conservator is set forth in section 30-2657. The conservator must pay from the estate all just claims upon their presentation and allowance. A presented claim is allowed if it is not disallowed by written statement mailed by the conservator to the claimant within sixty days after its presentation. Remember that a protected person still has the power to incur both tort and contract obligations.

A foreign conservator can come into the state of Nebraska and obtain property belonging to the protected person from a resident of this state upon presenting the resident with proof of his appointment and an affidavit stating that no protective proceeding is pending in this state, as set forth in section 30-2660. If the resident is not aware of any protective proceeding in this state, he may pay or deliver the property to the foreign conservator and be discharged from any further liability. This is a substantial change in our law as presently contained in section 38-801. Further, if there has been no local conservator appointed in our state and no petition is pending, a domiciliary foreign conservator can come into our state, go to the court where the property is located, file with that court an authenticated copy of his appointment from the other state and his official bond, and from that point on he has all the powers and duties of a local conservator over the property of the protected person within Nebraska.

POWERS OF ATTORNEY

Code section 30-2662 introduces the concept of the durable power of attorney. Under this section a power of attorney can be drawn containing words such as "this power of attorney shall not be affected by disability of the principal" or "this power of attorney shall become effective upon the disability of the principal." If those words or similar words are used then the authority of the attorney

in fact continues notwithstanding the later disability or incapacity of a principal. I believe a durable power of attorney will be used in many situations, particularly with older clients, and if used correctly will prove very effective in eliminating the need for a conservatorship proceeding.

Under section 30-2663 the civil law rule concerning powers of attorneys is adopted. It states that the death, disability or incompetence of the principal does not revoke or terminate the agency unless there is actual knowledge of the death, disability or incompetence. It is interesting, in examining some of the older cases in Nebraska, to see that this might not be quite as substantial a change in our law as might have been believed.

CONCLUSION

I feel that you will find, in reviewing Article 26, that it will be very beneficial. It will permit attorneys to choose the procedure they wish to follow. They will not have to use the same procedure for every client and will generally find much more statutory direction than at present. Ultimately it will save substantial time and will provide more efficient tools to aid clients.