

LEGISLATURE OF NEBRASKA
ONE HUNDRED FOURTH LEGISLATURE
SECOND SESSION

LEGISLATIVE BILL 1008

Introduced by Coash, 27.

Read first time January 15, 2016

Committee: Judiciary

1 A BILL FOR AN ACT relating to the Nebraska Probate Code; to amend
2 sections 30-2222 and 30-2636, Reissue Revised Statutes of Nebraska,
3 section 30-2601, Revised Statutes Cumulative Supplement, 2014, and
4 sections 30-2201 and 30-2619, Revised Statutes Supplement, 2015; to
5 provide qualification requirements, powers, duties, and limitations
6 for guardians ad litem in guardianship, conservatorship, and other
7 protective proceedings; to state legislative findings; to require
8 reports; to allow payment for costs of evaluations; to define a
9 term; to harmonize provisions; and to repeal the original sections.
10 Be it enacted by the people of the State of Nebraska,

1 Section 1. Section 30-2201, Revised Statutes Supplement, 2015, is
2 amended to read:

3 30-2201 Sections 30-401 to 30-406, 30-2201 to 30-2902, 30-3901 to
4 30-3923, and 30-4001 to 30-4045, sections 2 to 11 of this act, and the
5 Public Guardianship Act shall be known and may be cited as the Nebraska
6 Probate Code.

7 Sec. 2. The Legislature finds that it is in the best interests of
8 persons under disability and the public for the authorities and
9 responsibilities of a guardian ad litem to be expanded to include an
10 objective investigation and assessment of the needs of a person who comes
11 before the court in any guardianship, conservatorship, or other
12 protective proceeding to ensure the protection of the rights of the
13 person who is the subject of the proceeding. The Legislature also finds
14 that the public is benefited from having trustworthy and competent
15 guardians and conservators appointed for incapacitated persons, wards,
16 protected persons, and minors.

17 Sec. 3. (1) A guardian ad litem appointed pursuant to section
18 30-2222, 30-2619, or 30-2636 shall:

19 (a) Be an attorney in good standing admitted to the practice of law
20 in the State of Nebraska and meet any other requirements imposed by the
21 Supreme Court; and

22 (b) Before serving as a guardian ad litem, complete the training
23 requirements for a guardian ad litem as provided under Supreme Court
24 rule.

25 (2) The Supreme Court shall promulgate rules for guardians ad litem
26 in guardianship, conservatorship, or other protective proceedings.

27 (3) A guardian ad litem appointed pursuant to section 30-2222,
28 30-2619, or 30-2636 may act as his or her own counsel and as counsel for
29 the person who is the subject of the guardianship, conservatorship, or
30 other protective proceeding unless such person obtains his or her own
31 counsel or there are special reasons why the guardian ad litem or the

1 person who is the subject of the proceeding should have separate counsel.
2 In such cases, the guardian ad litem shall have the right to counsel and
3 shall be entitled to have the court appoint counsel for him or her
4 without regard to his or her financial ability to retain counsel.

5 Sec. 4. (1) A guardian ad litem appointed pursuant to section
6 30-2222, 30-2619, or 30-2636 shall:

7 (a) Consult with the person for whom he or she has been appointed
8 within two weeks after the appointment for such person and make every
9 reasonable effort to become familiar with the condition of such person;

10 (b) Investigate, gather information regarding, and make an
11 assessment of the condition of such person and report to the court the
12 condition of such person;

13 (c) Advocate for the best interests of such person;

14 (d) Be present at all hearings before the court regarding such
15 person unless expressly excused by the court;

16 (e) Inquire of others directly involved with such person as to such
17 person's condition, including, but not limited to, any physician,
18 psychologist, care provider, clergy member, financial institution,
19 corporation, business entity, or other person with which such person has
20 done or is doing business; and

21 (f) Defend the social, economic, and safety interests of such
22 person. For purposes of this subdivision, (a) social interest means the
23 logical and practical expectations a person has who is the object of a
24 guardianship, conservatorship, or other protective proceeding based on
25 the guardian ad litem's objective and independent assessment of the
26 person's situation, including economic, social, mental, physical,
27 emotional, and other relevant factors, (b) economic interest means what a
28 reasonable person would consider to be prudent given the situation of the
29 person who is the object of the guardianship, conservatorship, or other
30 protective proceeding, and (c) safety interest means what a reasonable
31 person would consider safe given the mental, physical, and emotional

1 situation of the person who is the object of a guardianship,
2 conservatorship or other protective proceeding.

3 (2) A guardian ad litem appointed pursuant to section 30-2222,
4 30-2619, or 30-2636 may:

5 (a) Conduct discovery, present witnesses, cross-examine witnesses,
6 present other evidence, file motions, and appeal any decisions regarding
7 the person for whom he or she has been appointed;

8 (b) Enter into stipulations and agreements concerning such person in
9 the guardianship, conservatorship, or other protective proceeding deemed
10 by the guardian ad litem to be in such person's best interests;

11 (c) Request, at any time after the filing of a petition in a
12 guardianship, conservatorship, or other protective proceeding, that the
13 court order a medical, psychological, geriatric, or other evaluation of
14 the person who is the subject of the guardianship, conservatorship, or
15 other protective proceeding to determine the condition and extent of
16 impairment, if any, of the person who is the subject of the guardianship,
17 conservatorship, or other protective proceeding; and

18 (d) Have access to any report which resulted from any evaluation
19 ordered by the court and which was used for evaluating the status of the
20 person who is the subject of the guardianship, conservatorship, or other
21 protective proceeding.

22 Sec. 5. The guardian ad litem may obtain, informally or by
23 subpoena, the following information regarding the person for whom the
24 guardian ad litem has been appointed: (1) A report from any medical
25 provider, provider of psychological services, law enforcement, adult
26 protective services agency, or financial institution; and (2) any account
27 or record of any business, corporation, partnership, or other business
28 entity which such person owns or in which such person has an interest.
29 Any material obtained by a guardian ad litem pursuant to this section is
30 admissible in evidence.

31 Sec. 6. (1) The guardian ad litem shall make recommendations to the

1 court regarding a temporary or permanent guardianship, conservatorship,
2 or other protective order. The report shall be in writing and provided to
3 the court at least one week prior to the hearing date. A copy of the
4 report shall be provided to all interested persons.

5 (2) For a guardianship proceeding, the report shall address whether
6 the person for whom the guardianship is sought is an incapacitated
7 person. If the guardian ad litem determines that the person is
8 incapacitated, the guardian ad litem shall make recommendations as to
9 whether the court should order a limited or full guardianship. If the
10 guardian ad litem recommends a limited guardianship, the report shall
11 include recommendations on the authorities and responsibilities the
12 guardian and ward shall have. If a full guardianship is recommended, the
13 report shall specifically address why a full guardianship is necessary to
14 protect the best interests of the incapacitated person.

15 Sec. 7. (1) In carrying out his or her powers and duties as a
16 guardian ad litem, the guardian ad litem shall consider any information
17 that is warranted by the nature and circumstances of each guardianship,
18 conservatorship, or other protective proceeding.

19 (2) The guardian ad litem may petition the court for an order to (a)
20 inspect documents, in physical or electronic form, pertaining to the
21 person who is the subject of the guardianship, conservatorship, or other
22 protective proceeding that are in the possession of a corporation,
23 financial institution, health care provider, or business entity, or (b)
24 visit any person who may provide relevant information about the person
25 who is the subject of the guardianship, conservatorship, or other
26 protective proceeding.

27 (3) Any person, corporation, financial institution, health care
28 provider, or business entity that refuses to produce any document
29 requested by the guardian ad litem and ordered by the court shall be
30 subject to contempt of court or other discovery sanctions.

31 Sec. 8. The guardian ad litem may file a petition and any other

1 motion the guardian ad litem deems to be in the best interests of the
2 person for whom the guardian ad litem has been appointed.

3 Sec. 9. A guardian ad litem shall not have indirect or direct
4 physical control over a person for whom the guardian ad litem has been
5 appointed. A guardian ad litem shall not have indirect or direct control
6 over the property or affairs of a person for whom the guardian ad litem
7 has been appointed.

8 Sec. 10. A guardian ad litem's appointment begins at the time he or
9 she is appointed by the court and does not end until the court allows the
10 guardian ad litem to withdraw as guardian ad litem, terminates the
11 appointment of the guardian ad litem, removes or suspends the guardian ad
12 litem, or appoints the guardian ad litem to serve in another capacity.

13 Sec. 11. The court may order the cost of any evaluation as provided
14 in section 4 of this act to be paid by the county where the guardianship,
15 conservatorship, or other protective proceeding is brought, or the court
16 may, after notice and a hearing, assess the cost of any such evaluation,
17 in whole or in part, to the person who is the subject of the
18 guardianship, conservatorship, or other protective proceeding. The court
19 shall determine the ability of such person to pay and the amount of the
20 payment.

21 Sec. 12. Section 30-2222, Reissue Revised Statutes of Nebraska, is
22 amended to read:

23 30-2222 In formal proceedings involving estates of decedents,
24 minors, protected persons, or incapacitated persons, and in judicially
25 supervised settlements, the following apply:

26 (1) Interests to be affected shall be described in pleadings which
27 give reasonable information to owners by name or class, by reference to
28 the instrument creating the interests, or in other appropriate manner.

29 (2) Persons are bound by orders binding others in the following
30 cases:

31 (i) Orders binding the sole holder or all coholders of a power of

1 revocation or a presently exercisable general power of appointment,
2 including one in the form of a power of amendment, bind other persons to
3 the extent their interests (as objects, takers in default, or otherwise)
4 are subject to the power.

5 (ii) To the extent there is no conflict of interest between them or
6 among persons represented, orders binding a conservator bind the person
7 whose estate he or she controls; orders binding a guardian bind the ward
8 if no conservator of his or her estate has been appointed; orders binding
9 a trustee bind beneficiaries of the trust in proceedings to probate a
10 will establishing or adding to a trust, to review the acts or accounts of
11 a prior fiduciary and in proceedings involving creditors or other third
12 parties; and orders binding a personal representative bind persons
13 interested in the undistributed assets of a decedent's estate in actions
14 or proceedings by or against the estate. If there is no conflict of
15 interest and no conservator or guardian has been appointed, a parent may
16 represent his or her minor child.

17 (iii) An unborn or unascertained person who is not otherwise
18 represented is bound by an order to the extent his or her interest is
19 adequately represented by another party having a substantially identical
20 interest in the proceeding.

21 (3) Notice is required as follows:

22 (i) Notice as prescribed by section 30-2220 shall be given to every
23 interested person or to one who can bind an interested person as
24 described in (2)(i) or (2)(ii) above. Notice may be given both to a
25 person and to another who may bind him or her.

26 (ii) Notice is given to unborn or unascertained persons, who are not
27 represented under (2)(i) or (2)(ii) above, by giving notice to all known
28 persons whose interests in the proceedings are substantially identical to
29 those of the unborn or unascertained persons.

30 (4) At any point in a proceeding, a court may appoint a guardian ad
31 litem as provided in sections 2 to 11 of this act to represent the

1 interest of a minor, an incapacitated, unborn, or unascertained person,
2 or a person whose identity or address is unknown, if the court determines
3 that representation of the interest otherwise would be inadequate. If not
4 precluded by conflict of interests, a guardian ad litem may be appointed
5 to represent several persons or interests. The court shall set out its
6 reasons for appointing a guardian ad litem as a part of the record of the
7 proceeding.

8 Sec. 13. Section 30-2601, Revised Statutes Cumulative Supplement,
9 2014, is amended to read:

10 30-2601 Unless otherwise apparent from the context, in the Nebraska
11 Probate Code:

12 (1) Incapacitated person means any person who is impaired by reason
13 of mental illness, mental deficiency, physical illness or disability,
14 chronic use of drugs, chronic intoxication, or other cause (except
15 minority) to the extent that the person lacks sufficient understanding or
16 capacity to make or communicate responsible decisions concerning himself
17 or herself;

18 (2) A protective proceeding is a proceeding under the provisions of
19 section 30-2630 to determine that a person cannot effectively manage or
20 apply his or her estate to necessary ends, either because the person
21 lacks the ability or is otherwise inconvenienced, or because the person
22 is a minor, and to secure administration of the person's estate by a
23 conservator or other appropriate relief;

24 (3) A protected person is a minor or other person for whom a
25 conservator has been appointed or other protective order has been made;

26 (4) A ward is a person for whom a guardian has been appointed. A
27 minor ward is a minor for whom a guardian has been appointed solely
28 because of minority;

29 (5) Full guardianship means the guardian has been granted all powers
30 which may be conferred upon a guardian by law;

31 (6) Guardian means any person appointed to protect a ward and may

1 include the Public Guardian;

2 (7) Public Guardian is as defined in section 30-4103;

3 (8) Limited guardianship means any guardianship which is not a full
4 guardianship;

5 (9) Conservator means any person appointed to protect a protected
6 person and may include the Public Guardian;~~and~~

7 (10) For purposes of article 26 of the Nebraska Probate Code,
8 interested person means children, spouses, those persons who would be the
9 heirs if the ward or person alleged to be incapacitated died without
10 leaving a valid will who are adults and any trustee of any trust executed
11 by the ward or person alleged to be incapacitated. After the death of a
12 ward, interested person also includes the personal representative of a
13 deceased ward's estate, the deceased ward's heirs in an intestate estate,
14 and the deceased ward's devisees in a testate estate. The meaning of
15 interested person as it relates to particular persons may vary from time
16 to time and must be determined according to the particular purposes of,
17 and matter involved in, any proceeding. If there are no persons
18 identified as interested persons above, then interested person shall also
19 include any person or entity named as a devisee in the most recently
20 executed will of the ward or person alleged to be incapacitated; and -

21 (11) Guardian ad litem means an attorney appointed by the court in a
22 guardianship, conservatorship, or other protective proceeding pursuant to
23 sections 2 to 11 of this act to represent the interests of a person who
24 has been alleged to be incapacitated, ward, person to be protected, or
25 minor.

26 Sec. 14. Section 30-2619, Revised Statutes Supplement, 2015, is
27 amended to read:

28 30-2619 (a) The person alleged to be incapacitated or any person
29 interested in his or her welfare may petition for a finding of incapacity
30 and appointment of a guardian or a standby guardian. The petition shall
31 be verified and shall contain specific allegations with regard to each of

1 the areas as provided under section 30-2619.01 in which the petitioner
2 claims that the person alleged to be incapacitated lacks sufficient
3 understanding to make or communicate responsible decisions concerning his
4 or her own person. An interested person may file a motion to make more
5 definite and certain requesting a specific description of the functional
6 limitations and physical and mental condition of the person alleged to be
7 incapacitated with the specific reasons prompting the request for
8 guardianship.

9 (b) Upon the filing of a petition, the court shall set a date for
10 hearing on the issues of incapacity and unless the person alleged to be
11 incapacitated has retained counsel of his or her own choice or has
12 otherwise indicated a desire for an attorney of his or her own choice,
13 the court may appoint an attorney to represent him or her in the
14 proceeding. The court may appoint a guardian ad litem as provided in
15 sections 2 to 11 of this act to advocate for the best interests of the
16 person alleged to be incapacitated.

17 (c) The person alleged to be incapacitated may be examined by a
18 physician appointed by the court. The physician shall submit his or her
19 report in writing to the court and may be interviewed by a visitor, if so
20 appointed pursuant to sections 30-2619.01 and 30-2624, sent by the court.

21 (d) The person alleged to be incapacitated is entitled to be present
22 at the hearing in person and to see and hear all evidence bearing upon
23 his or her condition. He or she is entitled to be present by counsel, to
24 compel the attendance of witnesses, to present evidence, to cross-examine
25 witnesses, including the court-appointed physician and the visitor
26 appointed by the court pursuant to sections 30-2619.01 and 30-2624, and
27 to appeal any final orders or judgments. The issue may be determined at a
28 closed hearing only if the person alleged to be incapacitated or his or
29 her counsel so requests.

30 (e) At any hearing conducted under this section, the court may
31 designate one or more standby guardians of the person whose appointment

1 will become effective immediately upon the death, unwillingness or
2 inability to act, resignation, or removal by the court of the initially
3 appointed guardian and upon compliance with any rules promulgated by the
4 Supreme Court. The standby guardian shall have the same powers and duties
5 as the initially appointed guardian. The standby guardian shall receive a
6 copy of the order establishing or modifying the initial guardianship and
7 the order designating the standby guardian. Upon assuming office, the
8 standby guardian shall so notify the court in writing. Upon notification
9 and upon compliance with any rules promulgated by the Supreme Court, the
10 court shall issue new letters of guardianship that specify that the
11 standby guardianship appointment is permanent. A standby guardian shall
12 complete the training required by section 30-2601.01 at the time or times
13 required by rules promulgated by the Supreme Court or as otherwise
14 provided by order of the county court.

15 (f) The Public Guardian shall not be appointed as a standby
16 guardian.

17 Sec. 15. Section 30-2636, Reissue Revised Statutes of Nebraska, is
18 amended to read:

19 30-2636 (a) Upon receipt of a petition for appointment of a
20 conservator or other protective order because of minority, the court
21 shall set a date for hearing on the matters alleged in the petition. If,
22 at any time in the proceeding, the court determines that the interests of
23 the minor are or may be inadequately represented, the court may appoint
24 an attorney to represent the minor, giving consideration to the choice of
25 the minor if he or she is fourteen years of age or older. A lawyer
26 appointed by the court to represent a minor as provided in sections 2 to
27 11 of this act has the powers and duties of a guardian ad litem.

28 (b) Upon receipt of a petition for appointment of a conservator or
29 other protective order for reasons other than minority, the court shall
30 set a date for hearing. Unless the person to be protected has counsel of
31 his or her own choice, the court may appoint an attorney to represent him

1 or her in the proceeding. The court may appoint a guardian ad litem as
2 provided in sections 2 to 11 of this act to advocate for the best
3 interests of the person to be protected. If the alleged disability is
4 mental illness, mental deficiency, physical illness or disability,
5 chronic use of drugs, or chronic intoxication, the court may direct that
6 the person to be protected be examined by a physician designated by the
7 court, preferably a physician who is not connected with any institution
8 in which the person is a patient or is detained. The court may send a
9 visitor to interview the person to be protected. The visitor may be a
10 guardian ad litem or an officer or employee of the court.

11 (c) After hearing, upon finding that clear and convincing evidence
12 exists for the appointment of a conservator or other protective order,
13 the court shall make an appointment or other appropriate protective
14 order.

15 Sec. 16. Original sections 30-2222 and 30-2636, Reissue Revised
16 Statutes of Nebraska, section 30-2601, Revised Statutes Cumulative
17 Supplement, 2014, and sections 30-2201 and 30-2619, Revised Statutes
18 Supplement, 2015, are repealed.