IN THE SUPREME COURT
OF THE STATE OF NEBRASKA

CASE No. S-24-251

In the Matter of the Guardianship of

Tomas Tomas Jose, a minor child

On Appeal from the County Court of Hall County, Nebraska
The Honorable County Court Judge Arthur S. Wetzel

BRIEF OF AMICUS CURIAE CENTER FOR IMMIGRANT AND REFUGEE ADVANCEMENT

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STATEMENT OF JURISDICTION

Amicus accepts and adopts Appellant's Statement of Jurisdiction.

STATEMENT OF THE CASE

Amicus accepts and adopts Appellant's Statement of the Case.

PROPOSITIONS OF LAW

I.

The "least restrictive alternative" standard applies solely to guardianship petitions for individuals incapacitated by reasons other than minority. *NEB. REV. STAT.* § 30-2620.

III.

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 alleged to be incapacitated. *NEB. REV. STAT.* § 30-2620

IV.

An incapacitated person is "any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause **(except minority)** to the extent that the person lacks sufficient understanding or capacity to make or communicate responsible decisions concerning himself or herself."

NEB. REV. STAT. § (1) (emphasis added).

IV.

NEB. REV. STAT. § 43-1238(b) should be interpreted to allow a court with initial jurisdiction of a proceeding under § 43-1238(a), to retain jurisdiction to make findings of fact pursuant to § 43-1238(b) after the child turns 19 if requested. *See O.Y.P.C. v. J.C.P.,* 126 A.3d 349, 352 (N.J. Super. Ct. App. Div. 2015)

STATEMENT OF FACTS

Amicus accepts and adopts Appellant's Statement of Facts.

STATEMENT OF INTEREST OF AMICI CURIAE

Undersigned counsel motioned for leave to file an amicus curiae brief on behalf of Center for Immigrant and Refugee Advancement (CIRA) on October 7, 2024. Said motion was granted. The statements of interest provided in Amici's motion are hereby incorporated by reference.

SUMMARY OF ARGUMENTS

The trial court erred by finding that the "least restrictive alternative" standard applies to this case. The plain language of Nebraska's guardianship statutes, reinforced by legislative intent, unequivocally establishes that the "least restrictive alternative" standard applies solely to guardianships for individuals incapacitated by reasons other than minority. In contrast, the "best interest" standard governs guardianships involving minors. Nebraska case law consistently upholds this distinction, applying the "least restrictive alternative" standard exclusively in cases of non-minority incapacity,

while reserving the "best interest" standard for all guardianship matters concerning minor children.

NEB. REV. STAT. § 43-1238(b) should be interpreted to allow courts with initial jurisdiction under Section 43-1238(a) to retain jurisdiction to make findings pursuant to Section 1238(b) after the child turns 19 if requested and supported by sufficient evidence. The legislative history clearly demonstrates that § 43-1238(b) was enacted, in part, to facilitate applications for special immigrant juvenile status (SIJS) by eligible noncitizen minors under 8 C.F.R. § 204.11. To find that the court cannot make findings after a child turns 19 would go against legislative intent.

While no binding case law exists, upon reversal, the trial court should retain jurisdiction to address Appellant's requests although Tomas is now 19 because "a decision of an appellate court modifying or reversing a trial court decision is given retroactive effect to the day of the original judgment …" *See e.g., In re Luis J.*, 300 Neb. 659 (2018) (on remand); *Gotten v. Gotten*, 748 S.W.2d 430 (Tenn. Ct. App. 1987).

ARGUMENT

I. "THE LEAST RESTRICTIVE ALTERNATIVE" STANDARD IS NOT APPLICABLE TO PETITIONS FOR THE APPOINTMENT OF GUARDIANSHIP OF A MINOR.

a. The plain language of the statute and its legislative history make clear that the "least restrictive alternative" standard applies exclusively to guardianship petitions for individuals incapacitated by factors other than minority age.

Nebraska guardianship statutes are part of the Nebraska Probate Code (NPC). *NEB. REV. STAT.* § 30-2201. The NPC states that,

> 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 alleged to be incapacitated.

NEB. REV. STAT. § 30-2620 (emphasis added). The appointment of a guardian under Section 2620 requires two findings: (1) the person for whom a guardian is sought is **incapacitated**; **and** (2) the appointment is **necessary or desirable as the least restrictive alternative** available for providing continuing care or supervision of such person. *In re Guardianship & Conservatorship of Hartwig*, 656 N.W.2d 268 (2003) (emphasis added). The NPC defines an incapacitated person as,

> Any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause **(except minority)** to the extent that the person lacks sufficient understanding or capacity to make or communicate responsible decisions concerning himself or herself.

NEB. REV. STAT. § 30-2601(1) (emphasis added). This definition was incorporated from the Uniform Probate Code (UPC) § 5-307. *See* L.B. 354, 83rd Leg., p. 91 (1974). Comment to Section 5-301 in the UPC, states that, "While an incapacitated person will typically be an adult, appointment can be made for a minor under this part if the reason for the appointment is an incapacity **other than the minor's age**." (emphasis added). UNIF. PROB. CODE § 5-304 (UNIF. LAW COMM'N amended 2019). Thus, both the plain language of the NPC and its legislative history strongly support the conclusion that the "least restrictive alternative" standard applies only to guardianships involving incapacity other than minority.

A review of the legislative history for LB 782 (1993), which amended *NEB. REV. STAT.* § 30-2620 to establish the "least restrictive alternative" standard, reveals that the legislature's intent in adopting this standard was to safeguard the rights of seniors in response to

concerns raised by the Department on Aging. They did not intend for this standard to apply to guardianships of minors who are not incapacitated. On January 21, 1993, Senator Wesely introduced LB 782 for debate. *See* NEB. UNICAMERAL FLOOR DEB., L.B. 782, Judiciary Committee, 93rd Leg. 4596-97 (1993). In his opening statement, he shared:

> About three years ago the Department of Aging and others came to me and said, look, we have an increasing utilization of guardianship and conservatorships and are we, in fact, needing to have all of these? Are they, in fact, being handled properly? Are the people that are going under these having their rights protected?

See NEB. UNICAMERAL FLOOR DEB., L.B. 782, Judiciary Committee, 93rd Leg. 4596-97 (1993).

The Legislative Journals indicate that as foundation for L.B. 782, the 92nd Nebraska Legislature passed Legislative Resolution 141 (LR 141). *See* L.R. 141, 92nd LEG., FIRST SESS., NEB. LEG. J. pgs. 2281, 2598 (1991). This resolution called for an interim study of Nebraska's guardianship laws, focusing in relevant part on: standards of proof for incapacity, and court review of least restrictive alternatives. *Id.*

The prayer section of LR 141 lists eight reasons for conducting the interim study. To wit:

> WHEREAS, Nebraska is seventh in the nation in the ratio of persons sixty-five years of age or older to the entire state population; and
>
> WHEREAS, the group of Nebraskans seventy-five years of age or older is rapidly increasing; and
>
> WHEREAS, those seventy-five years of age or older are likely to be frail and vulnerable and without family caregivers; and
>
> WHEREAS, the Legislature states in the Nebraska Community Aging Services Act that older individuals of Nebraska are entitled to the same opportunities as others in personal choice and management of their own lives; and
>
> WHEREAS, many older Nebraskans have court-appointed

guardians; and
WHEREAS, the standard for appointment of a guardian is clear and convincing evidence that the appointment is necessary or desirable as a means of providing continued care or supervision; and
WHEREAS, advanced age can be the sole determination of incapacity; and
WHEREAS, wards of guardians have little protection under the law, have no court-appointed advocates, have hearings before judges only, and must bear the cost of their appeals and all courts and attorney fees.

Id. at 2281. Notably, six out of the eight reasons listed mention seniors as the vulnerable population. None of the eight reasons refers to minors as a population of concern. This interim study resulted in the creation of the "least restrictive alternative" standard. Given that both the Legislative Journals and the Floor Debate focus exclusively on elderly incapacitated individuals, it is clear that the Legislature intended the standard to apply only to individuals incapacitated by cognitive decline in old age or other disabilities—not to minor children. The trial court's application of the wrong standard in this case is therefore a blatant error of law that must be reversed.

b. A review of Nebraska case law clearly establishes that the "least restrictive alternative" standard applies solely to petitions for incapacitated individuals, not minor children.

In guardianship cases involving minors, the governing standard is the "best interest" of the child, while guardianships for individuals incapacitated by factors other than minority are subject to the "least restrictive means" standard. Nebraska law defines a minor ward as, "[…] a minor for whom a guardian has been appointed **solely** because of minority." R.R.S. Neb. § 30-2601(5) (emphasis added). *NEB. REV. STAT.* § 30-2610 further states that, "the Court may appoint as a

guardian any person whose appointment would be **in the best interest of the minor**." *NEB. REV. STAT.* § 30-2610 (emphasis added).

The Nebraska Court of Appeals, *In re Lavone M.,* stated, "the best interests of the children must always be considered in determining matters of child custody." 9 Neb. App. 245 (2000). The Nebraska Supreme Court held that when a parent's constitutionally protected relationship with a child is not at issue, both public policy and Nebraska Law require that any guardianship be determined using the best interest of the child. *In re Estate of Jeffrey B.,* 688 N.W.2d at 144 (2004). For example, in *In re McDowell*, the Court of Appeals upheld the appointment of guardians for two minor children whose parents died tragically, finding that the care, structure, and support provided by the guardians clearly aligned with the children's best interests. 17 Neb. App. 340 (2009). The same court in *In re Mercedes L.,* found that appointment of a foster parent as the guardian of a minor over the objections of the biological mother was in the best interest of the child where the record showed that the mother did not demonstrate sufficient progress toward the goal of reunification. *See* 26 Neb. App. 737 (2019). In each of these cases, the courts used the "best interest" standard to determine the need for a guardian. Notably, none addressed whether a guardianship was the "least restrictive alternative" after deeming the guardianship and proposed guardian appropriate. This omission, coupled with the arguments advanced above, strongly indicates that the least restrictive alternative standard applies solely to guardianships involving incapacity not due to minority.

Similarly, Nebraska precedent clearly establishes that the "least restrictive means" standard applies exclusively to guardianships for individuals incapacitated by factors other than minority age. In *In re Nabity*, the Nebraska Supreme Court upheld the appointment of a guardian as the least restrictive alternative where the ward's dementia and Alzheimer's prevented her from recognizing her cognitive limitations. 289 Neb. 164 (2014). Likewise, in *In re Beverly A.,* the Nebraska Court of Appeals affirmed the necessity of a guardian

because the ward was unwilling or unable to make responsible decisions about her health, consistently refused medication, and repeatedly relied on emergency services. 2019 Neb. App. LEXIS 357 (2019). Amici were unable to identify any case in which a Nebraska appellate court applied the "least restrictive alternative" standard in a guardianship based solely on the ward's minority.

In the present case, Appellant sought to be appointed as guardian of a minor child residing in Hall County without parental supervision. Appellant's goal is to step into the role of the minor's parents to ensure his well-being, as outlined in *NEB. REV. STAT.* § 30-2613(1). The trial court's application of the "least restrictive" instead of the "best interest" standard disregards the statutory text, legislative intent, and an extensive body of case law differentiating guardianships for minors from those for incapacitated individuals. The trial court's decision must therefore be reversed.

II. *NEB. REV. STAT.* § 43-1238(b) SHOULD BE INTERPRETED TO ALLOW A COURT WITH INITIAL JURISDICTION OF A PROCEEDING UNDER § 43-1238(a), TO RETAIN JURISDICTION TO MAKE FINDINGS PURSUANT TO § 43-1238(b) AFTER THE CHILD TURNS 19 IF REQUESTED.

a. The plain language of *NEB. REV. STAT.* § 43-1238(b) creates an obligation for courts to make requested findings or determine that the evidence is insufficient, and where a court refuses to do either, denying the requested findings based on mootness contradicts the plain meaning and legislative intent of the statute.

If the Court were to dismiss this case as moot and deny Tomas the opportunity to have special findings entered, it would be acting against the plain meaning of *NEB. REV. STAT.* § 43-1238(b). *NEB. REV. STAT.* § 43-1238(b) states in relevant part, "[i]f there is sufficient evidence to support such factual findings, the court **shall** issue an

order containing such findings when requested by one of the parties or upon the court's own motion." (emphasis added). An exercise of statutory interpretation must always start by giving statutory language its plain and ordinary meaning. *State v. Lovvorn*, 393 Neb. 844, 932 N.W.2d 64 (2019). The term "shall" when used in a statute is ordinarily considered mandatory. *Smith v. Smith*, 248 Neb. 360, 535 N.W.2d 694 (1995). The Nebraska Supreme Court has interpreted "shall" to mean that "the court must either make the SIJS determinations upon request or find that the evidence is not sufficient to support such findings." *De Mateo v. Mateo-Cristobal*, 938 N.W.2d 372, 377 (2020).

Appellant filed a petition to establish a guardianship and requested findings as outlined in Section 43-1238(b). The lower court didn't question the sufficiency of the evidence or need for guardianship; rather, it applied the wrong standard, wrongly concluding that a guardianship wasn't the least restrictive option and disregarding the requested findings.

While there is no binding precedent on this issue, upon reversal, the trial court should retain jurisdiction to enter an order addressing Appellant's requests although Tomas is now 19 because,

> […] a decision of an appellate court modifying or reversing a trial court decision is given retroactive effect to the day of the original judgment […] The appellate court acts only upon the record in the case in the trial court and when the appellate court enters an order modifying the trial court order it is doing what should have been done in the first instance.

See e.g., In re Luis J., 300 Neb. 659 (2018) (on remand); *Gotten v. Gotten*, 748 S.W.2d 430 (Tenn. Ct. App. 1987); *Phillips v. Phillips*, 233 S.W.2d 775 (Mo. Ct. App. 1950); *Massey v. Massey*, 213 So.2d 260 (Fla. Dist. Ct. App. 1968). Annot., 86 A.L.R.2d 696 (1962). These decisions, though not binding, are persuasive. Tomas was 18 when the trial court misapplied the legal standard, denying him the opportunity to have a guardian appointed and the necessary findings to pursue SIJS.

Thus, this Court should reverse and remand for an order applying the correct standard.

The legislative history of *NEB. REV. STAT.* § 43-1238(b) shows that in 2018, our legislature amended the state's version of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) to clarify that judges have authority to make SIJ findings in any proceeding in which the custody of a child is at issue. The intent of the amendment was to,

> Reinforce existing state law that grants state court judges the jurisdiction and authority to make factual findings regarding abused, abandoned, and/or neglected children in the context of findings related to the best interest of the child," which the bill accomplished by "requir[ing] judges to make these findings where there is sufficient evidence presented."

See Introducer's Statement of Intent, L.B. 826, Judiciary Committee, 105th Leg., 2d, Sess. (Feb. 2, 2018). Where, as in this case, the record contains sufficient evidence, refusing to make findings contradicts legislative intent. This Court should reverse and remand with instructions to make findings based on the record.

b. Other states have extended courts' jurisdiction to make specific findings after the minor has attained the age of majority, up to age 21. This court should follow their lead to uphold both the intent and plain meaning of *NEB. REV. STAT.* § 43-1238(b).

The Immigration and Nationality Act (INA), defines a child as "an unmarried person under 21 years of age." *See* INA § 101(b)(1); 8 C.F.R. § 204.11(b)(1)-(2). California, Colorado, Connecticut, Florida, Indiana, Illinois, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, Ohio, Texas, Vermont, Virginia, and Washington have therefore extended courts' jurisdiction to make findings beyond the state age of majority, or have defined *juvenile* to allow dependency determinations even beyond the age of

majority to avoid defeating the purpose of Congress' hybrid federal-state scheme. *See e.g.*, *Matter of Perez Quintanilla*, A98-383-010 (AAO June 7, 2007) (applicant met the eligibility criteria for SIJS where the court extended its jurisdiction beyond the juvenile's 18th birthday pursuant to Fla. Stat. § 39.013(2)). In Massachusetts, Probate and Family Courts can exercise jurisdiction over immigrant children up to age 21 to facilitate the making of SIJS findings. *See Recinos v. Escobar*, 473 Mass.734, 739 (2016); *see also, O.Y.P.C. v. J.C.P.,* 126 A.3d 349, 352 (N.J. Super. Ct. App. Div. 2015) ("It would defeat the purpose of the hybrid federal-state scheme Congress created if state family courts decline to hear cases solely because a juvenile is over the age of 18, so long as the juvenile is still under the age of [21].").

This Court should likewise expand jurisdiction for state courts to make SIJS predicate findings on behalf of noncitizens until age 21, to align Nebraska law with the federal definition of "child." This step would further the intent of our legislature to provide eligible youth with access to findings that are necessary to support SIJS eligibility.

Finally, if this Court were to find the issues presented moot because Tomas has turned 19, Amicus prays that the case be heard under the public interest exception to the mootness doctrine as briefed by Appellant. *See NP Dodge Mgmt Co. v. Holcomb*, 314 Neb. 748, 993 N.W.2d 105 (2023).

CONCLUSION

For these reasons, Amicus Curiae respectfully supports Appellant's request to reverse and remand to the County Court to make the requested findings based on the record.

Dated this 28th day of October 2024.

RESPECTFULLY SUBMITTED:

/s/Roxana Cortes-Mills .
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WORD COUNT CERTIFICATE

I, Roxana Cortes-Mills, hereby certify that this Amicus Brief contains a total of 3765 words, certificate included.

Certificate of Service

I hereby certify that on Monday, October 28, 2024 I provided a true and correct copy of this *Amicus Brf - Ctr Immigrant & Refugee Adv* to the following:

Tomas Tomas Jose (Self Represented Litigant) service method: **No Service**

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