

# It's Time for The NRS 162a Power Play: Changes and Challenges to Powers of Attorney

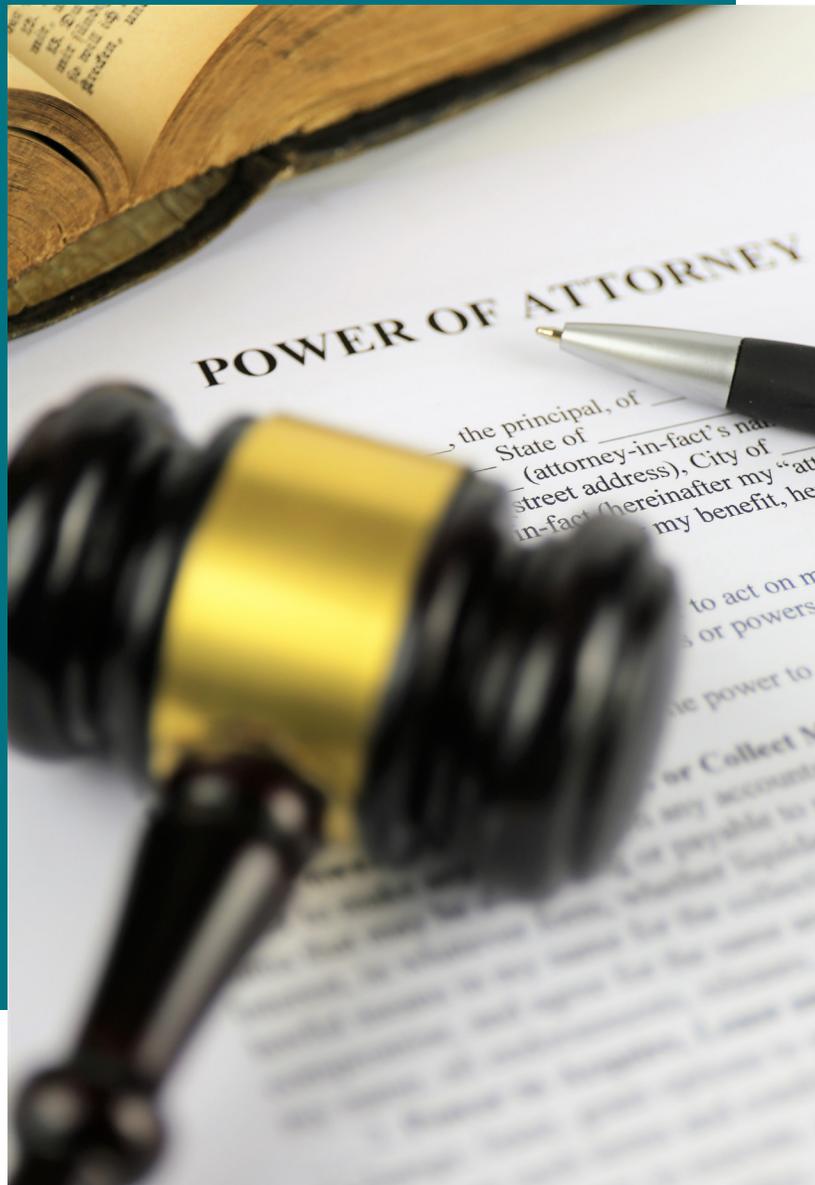
BY ALAN D. FREER, ESQ., AND JEFFREY P. LUSZECK, ESQ.

Nevada's 2019 legislative session saw substantial changes to NRS 162A through five separate bills. Said amendments illustrate the Legislature's belief that alternatives to guardianship are becoming more important. This article identifies the more substantive amendments and the changes to the statutory power of attorney forms resulting from said amendments. Finally, this article addresses challenging and enforcing powers of attorney.

## 1. Changes to Substantive Law

- SB 134 permits an advanced practice registered nurse to make diagnoses and determinations in the same manner, and with the same effect, as a physician. Specifically, Section 29 amends NRS 162A.260 by providing that an advanced practice registered nurse may make a determination of incapacity pursuant to a power of attorney.
- SB 121, Sections 2 and 3, specify that a principal who has executed a power of attorney for financial matters continues to have the authority to act on his/her own behalf unless the document removes such authority, and any decision or instruction communicated by the principal supersedes any decision or instruction communicated by an agent.
- AB 299, Section 2.5, revises "incapacity" as defined in NRS 162A.070 by providing that incapacity may be determined by a provision contained within the power of attorney or by a court of competent jurisdiction. Unless the power of attorney provides a method to determine incapacity, the agent must obtain a court determination of incapacity before the agent is authorized to act. As one of the primary purposes for a springing power of attorney is to avoid the time and cost of court proceedings, it is important for a power of attorney to expressly provide for a method determining the principal's incapacity.
- AB 299, Sections 3 and 4, amend NRS 162A.220 and 162A.800, respectively, to clarify that a nondurable power of attorney will

CONTINUED ON PAGE 26



# Changes and Challenges to Powers of Attorney



PHOTO CREDIT: SHUTTERSTOCK

terminate upon the appointment of a guardian, and durable power of attorney will be suspended unless and until the court orders the termination of the guardianship.

## 2. Changes to Statutory Forms

The legislative session saw the introduction of a new statutory form for a health care power of attorney for a principal diagnosed with dementia. That new form is located in SB 121 at Section 1.5.

In addition, to effectuate the substantive changes referenced above, the statutory forms for financial powers of attorney, *see* NRS 162A.620, and health care powers of attorney, *see* NRS 162A.860, have been amended as follows:

- SB 540, Section 32, amends NRS 162A.620 to provide checkmark provisions authorizing the agent to consent to placement in an assisted living facility, skilled nursing facility or secured residential long-term care facility.

- SB 223, Sections 4 and 5 (along with SB 121, Sections 3, 6 and 6.5), amend NRS 162A.620, 162A.860 and 162A.865, respectively, to remove the notarial affirmations that the principal appeared to be of sound mind and under no duress, fraud or undue influence.
- SB 134, Sections 33 and 34, amend NRS 162A.860 and 162A.865 to include “advanced practice registered nurse” where references to physician or doctor occur.
- SB 121, Section 3, includes a new paragraph to NRS 162A.620, which specifies that, unless otherwise provided, the principal’s authority to act continues after execution of the power of attorney, and that the principal’s instruction or decision supersedes any inconsistencies from an agent.
- SB 540, Section 3.5, adds language in the “warning” section of NRS 162.860 informing the principal that he/she has “the right to decide where to live” as the principal ages and becomes

incapacitated, and the “the right to determine whether to authorize the [agent] to make decisions” concerning where the principal lives. Section 3.5 warns the principal “[i]f you do not provide such authorization to the [agent], that person may not be able to assist you to move to a more supportive living arrangement without obtaining approval through a judicial process.” Finally, Section 3.5 provides a new “statement of desires” that gives the principal the option of choosing: (a) to live at home so long as it is safe and medical needs are met; or (b) to live at home “for as long as possible without regard for my medical needs, personal safety or ability to engage in activities of ... daily living.”

- AB 299, Section 5, provides additional “warning” language in the “copies” section of NRS 162A.860 that the principal may request the Nevada Secretary of State to electronically store the power of attorney in the Nevada Lockbox for access by authorized health-care providers. Finally, Section 5 includes a new “statement of desires” that allows the principal’s attending physician to administer “any medication to alleviate suffering without regard that the medication is likely to cause addiction or reduce the extension of ... life” if the principal has an incurable or terminal condition with no reasonable hope of recovery or survival.

## 3. Challenging or Enforcing Powers of Attorney

With the legislative emphasis on powers of attorney, it is increasingly important to understand where and how to challenge or enforce a power of attorney.

### a. Challenging and/or Seeking to Enforce Powers of Attorney

Powers of attorney can be challenged and/or enforced under NRS Chapter 30 or NRS 162A.330 (at least with respect to a financial power of attorney).

#### *Declaratory Relief Act*

NRS 34.040 and NRS 34.060 allow the principal, the principal's legal representative or any interested person to seek to have "determined any question of construction or validity arising under the instrument and obtain a declaration of rights, status or other legal relations thereunder." (NRS 34.040). Any action for relief under these statutes must be made in a proceeding commenced pursuant to Titles 12 or 13 of NRS.

#### *NRS 162A.330*

NRS 162A.330 allows certain individuals to petition the court to "construe a [financial] power of attorney," which would include an action to confirm and/or contest the validity of the financial power of attorney. NRS 162A does not contain a mechanism to construe a health care power of attorney.

In both the Second and Eighth Judicial Districts, any matter arising under NRS 162A is to be tried by the Probate Court and is automatically referred to the Probate Commissioner. *See* EDCR 4.03(a) and WDCR 57.3(1).

### b. The Appointment of a Guardian Terminates and/or Suspends Powers of Attorney.

One of the primary reasons behind powers of attorney is to avoid guardianship. Notwithstanding, there are certain circumstances when guardianship

is initiated despite the fact that powers of attorney exist.

#### *Guardianship Over the Estate*

If a court appoints a guardian of the principal's estate, a nondurable financial power of attorney is terminated, while a durable power of attorney is suspended unless the guardianship court allows the agent to retain specific powers conferred by the power of attorney. *See* AB 299, Section 1. In such a case, the agent shall file an accounting with the guardianship court and the guardian on a quarterly basis or other period the court determines.

*Id.* Upon termination of the guardianship, the durable power of attorney is effective. *Id.*

Once appointed, the guardian is charged with securing originals or copies of any power of attorney executed by the principal so as to ensure the agent does not act on behalf of the principal. NRS 159.089(4)(b).

#### *Guardianship Over the Person*

If a court appoints a guardian of the principal's person, a nondurable health care power of attorney is terminated, while a durable health care power of attorney is suspended unless the court orders the termination of the guardianship. *See* AB 299, Section 4. If the health care power of attorney is suspended, the guardian shall follow "any provisions contained in the nondurable power of attorney for health care delineating the principal's wishes for medical and end-of-life care." *Id.*

### c. Challenging an Agent's Actions

#### *Financial Power of Attorney*

It is often difficult to tell whether financial abuse is occurring because powers of attorney provide for a reasonable level of privacy. For example, an agent is not required to "disclose receipts, disbursements or transactions conducted on behalf of the principal unless required under the power of attorney, ordered by a court, or requested by the principal, a guardian or other fiduciary acting for the principal..." *See* NRS 162A.310(8). If abuse of a financial power of attorney is suspected, however, certain individuals, including, the principal, principal's spouse, parent, descendant or beneficiary of the principal, may petition a court to "construe a power of attorney or review the agent's conduct, and grant appropriate relief." *See* NRS 162A.330.

#### *Healthcare Power of Attorney*

Although NRS 162A does not contain a mechanism to review a healthcare agent's conduct, relief can be sought under NRS 30.

Due to the breadth of changes to NRS 162A, it is incumbent on attorneys to familiarize themselves with the amendments, particularly the changes to the statutory form powers of attorney.

Section 3.5 provides a new "statement of desires" that gives the principal the option of choosing: (a) to live at home so long as it is safe and medical needs are met; or (b) to live at home "for as long as possible without regard for my medical needs, personal safety or ability to engage in activities of ... daily living."

#### **ALAN D. FREER** is

a partner at Solomon, Dwiggin & Freer Ltd., where he focuses his practice primarily on trust and estate litigation. Freer presently serves as co-chair of the Legislative Committee for the Probate and Trust Section of the State Bar of Nevada.



#### **JEFFREY P. LUSZECK**

is a partner at Solomon, Dwiggin & Freer Ltd. His practice areas are primarily trust and estate litigation and small business litigation.

