

NEVADA POWERS OF ATTORNEY: FUNDAMENTALS AND MISCONCEPTIONS

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Powers of attorney offer an effective opportunity for all Nevada citizens to designate an individual to assist them with their financial and medical needs in the event they are unable to manage these affairs themselves. However, there are some common misconceptions among the general public, and even some attorneys, about powers of attorney and how they function.

Power of Attorney Fundamentals

Powers of attorney are governed by Chapter 162A of the Nevada Revised Statutes. There are two types in Nevada: one for financial matters and another for healthcare decisions. A financial power of attorney (FPOA) can be signed either by the principal or a third party at the principal's direction. The FPOA is presumed to be valid if the signature is notarized. A healthcare power of attorney (HCPOA) must be signed by the principal only. The signature must either be notarized or witnessed by "two adult witnesses who know the principal personally," and at least one witness cannot be related to the principal.

If the principal is a patient in a hospital or resides in a group home, assisted living center or nursing home, an FPOA or HCPOA will not be valid unless a certification of competency is signed by a physician, psychologist or psychiatrist and is attached with it. Certain parties are prohibited from serving as agents under a power of attorney, including an owner or employee of a hospital, assisted living facility or skilled nursing facility, unless the owner or employee is a spouse, legal guardian or next of kin to the principal.

Once an FPOA or HCPOA has been signed, they are effective immediately, unless the document says otherwise. A power of attorney terminates upon the death of the principal, when the principal revokes it, or upon a stated date or event given in the document.

What language should an FPOA or HCPOA contain?

The Nevada Legislature has provided a statutory form in Chapter 162A for both types of powers of attorney. Any FPOA or HCPOA executed under Nevada law must be substantially like the statutory form to be valid.

Powers of Attorney, Guardianship and Certifications

By executing an FPOA and HCPOA, a principal can avoid a future guardianship. If the principal needs assistance with financial or healthcare matters, the agent will be able to step in and care for the principal.

Nevada law goes to great lengths to encourage third parties to honor and accept an FPOA or HCPOA when it is presented to them. When a power of attorney is rejected, it leaves the agent with no other option but to seek a guardianship, which statutorily terminates the principal's powers of attorney and can be very costly. Third parties are protected from liability resulting from reliance upon an FPOA or HCPOA when the reliance is done in good faith and without any actual knowledge that the document is void, invalid or has been previously terminated.

Some third parties, including financial institutions, may hesitate to honor an FPOA when it is initially presented to them out of fear of fraud. Instead, a third party can seek for a certification of the FPOA from the agent, an attorney or both to obtain additional reassurances that the FPOA is a valid document under Nevada law. The certification process generally takes no more than five to 10 business days, depending on the circumstances. Failure to accept a certified FPOA subjects the third party to attorney's fees and costs for any court action that has to confirm or validate the FPOA.

A Healthcare Power of Attorney Is Not Enough

A HCPOA, by itself, is not enough to protect a client and address all of the client's possible future healthcare needs. Nev. Rev. Stat. § 162A.860's statutory form HCPOA contains a "Statement of Desires" section that offers each principal five statements. Any statement that the client agrees with must be initialed. Two of the statements allow for the agent to withhold "life-sustaining or prolonging treatments" under particular conditions, and a third statement allows the agent to order the continued use of artificial nutrition and hydration for the principal even after all other types of treatment have been withheld.

Although the five options at Nev. Rev. Stat. § 162A.860 cover most of the possible end-of-life healthcare scenarios a principal may experience, none of them explicitly prohibit the use of artificial nutrition and hydration. Instead, the Uniform Act on Rights of the Terminally Ill, found at Nev. Rev. Stat. §§ 449.535 to 449.690, provides a different form, commonly known as a physician's directive or living will, to prevent artificial nutrition and hydration from being used in the first place. The physician's directive has one statement the client chooses to initial or leave blank, which states:

Withholding or withdrawal of artificial nutrition and hydration may result in death by starvation or dehydration. Initial this box if you want to receive or continue receiving artificial nutrition and hydration by way of the gastrointestinal tract after all other treatment is withheld pursuant to this declaration.

Therefore, a client's healthcare planning is not complete until both a HCPOA and a physician's directive have been executed.

My Doctor Will Know How to Find My Healthcare Power of Attorney

While it is commendable for an individual to make the efforts to sign a HCPOA, it will do little good if a hospital, physician or other healthcare provider is not aware of the document before the individual receives medical treatment.

To combat this problem, the Nevada Secretary of State's office began offering the Living Will Lockbox (www.livingwilllockbox.com) in 2007. After an HCPOA or other medically-related document, such as a living will, are uploaded to the Nevada Secretary of State through the website portal, healthcare providers can access them for the patient's care.

In lieu of using the Living Will Lockbox, individuals must either provide copies to their doctors or other medical professionals ahead of time, or carry a copy with them at all times to help ensure that their medical wishes are carried out. While most individuals know who their treating physician will be, none of us know at which hospital we may end up for treatment in the event of an emergency, making this alternate option less effective.

Powers of attorney are an established and effective means of protecting against possible future incapacity and inability to care for a principal's financial or healthcare affairs. When third parties honor powers of attorney because they understand the statutory protections afforded to them, the chances that the principal will need a guardianship are significantly reduced. When a living will is used with an HCPOA, the principal's wishes regarding feeding tube use can be fully carried out. When the principal uploads signed healthcare documents to the Living Will Lockbox, medical providers of the principal will be able to make informed decisions regarding treatment and care. **NL**



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