

Durable Powers of Attorney

In New Mexico, every capacitated adult—one who can make rational decisions—may direct his own medical treatment. He may consent to treatment, or refuse it even if the treatment would save his life. Similarly, a capacitated adult can control his or her own financial matters.

Capacitated adults can assign these decisions to others. This assignment by a capacitated adult can remain effective even if the adult later becomes incapacitated. This is traditionally done in a durable power of attorney. The term “durable” means that even if the maker of the document becomes incapacitated, the power survives. A power of attorney stops being effective when the person who made it dies. A power of attorney does not avoid the need for a will.

Several terms describe the assignment of health care decisions to another. Although often called a durable power of attorney for health care, such assignment is sometimes called an advance health care directive, and in some states, a “Living Will.”

Living Wills

The term “Living Will” is problematic in New Mexico. New Mexico *had* a law, called the Right to Die Act, which authorized a “Right to Die Statement.” The most common form of Right to Die Statement, drafted at UNM’s Institute of Public Law, was also entitled a “Living Will.” The Right to Die Statement applied only when a person was in an irreversible coma or had a terminal illness, and it directed only that maintenance

medical treatment be discontinued. If you imagine the universe of health care decisions as a pie, the Right to Die Statement (or New Mexico Living Will) only applied to the tiniest sliver of the entire pie of possible medical decisions. For example, if you were not terminally ill or in an irreversible coma, the living will did not cover decisions about flu shots, antibiotics, and elective or necessary surgery.

The New Mexico Right to Die Act was cutting edge law when enacted in the 1970's; however, by 1997 it became clear that all of the powers granted in the Right to Die Act could be included a broader and more effective document, such as a durable power of attorney or advance health care directive. A person who had a Living Will in 2001 still has an effective document, but the executed document only applies to a few possible health care decisions. For that reason, it is usually far preferable to delegate broader powers with a durable power of attorney or advance health care directive.

Advance Health Care Directives

In 1997, New Mexico’s legislature adopted the “Uniform Health Care Decisions Act.” The Uniform Health Care Decisions Act makes clear an individual’s right to delegate health care decision-making. The Act provides a form for this delegation, called an Advance Health Care Directive. The Act additionally allows an individual to orally appoint a decision-maker by telling his physician, who will then record the appointment in the medical record. Finally, the Act allows an automatic delegation of

medical decision-making to a set list of people, including the person’s (in the following order): (1) spouse, (2) significant other, (3) adult child, (4) parent, (5) adult sibling, (6) grandparent, or (7) an adult who has exhibited special care and concern for the person and who is familiar with the person’s health care values.

The automatic delegation of health care decisions under the new Act makes it even more important to select your decision-maker if you would not want someone on the list of priorities to make decisions for you. For example, a single senior whose only daughter has completely opposite health care values would want to be sure that the person she prefers (perhaps a sister, neighbor or good friend) makes decisions for her, not the daughter whom the law might select if the senior had not made her choice clear. The senior should make the selection in a written durable power of attorney or advance health care directive.

Although New Mexico law supplies at least two forms for assigning health care decision-making, it is not necessary to use any set form. A durable power of attorney can be written to include your specific wishes about health care. It is essential in choosing a person to make decisions for you that you choose someone who both understands your health care values and has the ability to follow through on your behalf. A loving spouse may seem like the best choice, but would he be able to withdraw medical treatment and let you die? It is always best to discuss this issue with the person you will choose to make decisions for

you to be sure that he understands and will comply with your wishes.

Financial Decision Making

The law for assigning *financial* decision-making to another is a bit less confusing. The same principles apply—any individual with mental capacity may assign his financial decision-making to another. This assignment can last even if the individual becomes incapacitated if the power is “durable”. The most common term for the document used to transfer this power is a durable power of attorney. The durable power of attorney may be a separate legal document (sometimes entitled durable power of attorney for financial decision-making) or it may be combined in one form with a durable power of attorney for health care decision-making.

A person who executes a durable power of attorney for financial decision-making must choose whether the document becomes effective immediately, or only on the person’s incapacity (the most common form says incapacity may be certified by the written, notarized statement of two qualified health care professionals). The choice is important, because if you make the power effective immediately, the person you choose may sell your house or clear out your bank account *while you are still capacitated*. It is important that you trust the person completely. The advantage of making the power effective immediately is that the person you select will not need to obtain a notarized statement of two qualified health care professionals before acting on your behalf. The durable power of attorney for

financial decisions, like the durable power of attorney for health care decisions, does not have to follow a form, but can be written specifically to give just one or a few of your powers to another.

Who Can Help?

The Senior Citizens’ Law Office provides monthly seminars about durable powers of attorney at senior centers around the city. To learn of the next seminar, call 265-2300. If you visit an attorney to prepare a will, the attorney will likely also offer you a durable power of attorney as part of the estate planning package.

Summary

In summary, capacitated adults in New Mexico may assign their health care and financial decision-making to another. The most common way for making these assignments is to execute durable powers of attorney and advance directives for health care. Living Wills, while still valid in New Mexico, are too limited to be the favored form of assigning health care decision-making.

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DELEGATING HEALTH CARE AND FINANCIAL DECISIONS



- **Durable Powers of Attorney for financial decision**
- **Advance health care directives**