

## Frequently Asked Questions (FAQs):

Please also see the FAQ's from the:

New Mexico Guardianship Association (NMGA) website at: <http://www.nmgaresourcecenter.org>, or at <http://www.guardianshipnm.org/index.htm>.  
Ph: 505-881-3338

National Guardianship Association website at: <http://www.guardianship.org/>  
Ph: 814-238-3126 or 877-326-5992; E-mail: [info@guardianship.org](mailto:info@guardianship.org)

The following is from the Lawyer Referral for the Elderly (LREP)  
Ph: 797-6005 or 1-800-876-6657

All these legal processes are complicated and can lead to overstepping and family fights, and you are strongly encouraged to get expert help.

### **Advocacy, the Law and Surrogate Decision Makers**

General Principles:

- A person is capable and can give power as they choose.
- If a person gives a power, they can take it back (revoke it) if they are still capable.
- There are legal documents and processes a person can use while capable to determine what should happen when he or she becomes incapable.
- If a person becomes incapable (incapacitated) in a particular aspect of life, there are legal processes to determine how decisions are made.
- Capacity is evaluated by health care professionals. It generally means the ability to understand what's happening and manage one's living needs and financial affairs.
- The law guides who to ask for health care and financial decisions, and the ultimate authority is the court.
- The least restrictive way of limiting a person's power is the best and most favored by the law.

Powers a person can give in writing while capable:

- Power of Attorney (POA) for financial matters
- Advance Health Care Directive (AHCD) for health care matters
- Do Not Resuscitate (DNR) Order for Emergency Medical Services

Power a person can give orally while capable:

- Designate a surrogate health care decision maker

Power the law governs without a court order:

- Designation of a surrogate health care decision maker according to listed priorities

Powers a court can give for an incapacitated person:

- Guardian over the person
- Conservator over the person's finances (estate)

### **Power of Attorney (POA)**

POA is a legal document in which a person (principal) gives a person they trust (agent) authority to act on their behalf in financial matters. The best POA is durable, which means it's still good once person is incapacitated. We recommend POA be springing, which means it's only good once person is incapacitated. An agent's power is limited by the terms of the POA and the law. A POA can be broad or specific. It only governs the financial matters that the principal says the agent can handle. A POA needs to be notarized, and it's best if it is prepared by an attorney working for the principal.

### **Advance Health Care Directive (AHCD)**

AHCD is a legal document in which a person designates an agent for health care decisions (medical POA). It's generally only effective when person is incapacitated. This document also allows a person to give individual instructions about end-of-life care and organ donation (or allow agent to decide).

### **Do Not Resuscitate (DNR) Order**

This is an order issued by a physician and signed by a person saying that resuscitative measures should not be performed by Emergency Medical Services if person dies. It can also be signed by an authorized health care decision maker (agent who has medical POA or legal guardian).

### **Uniform Health Care Decisions Act**

This law governs how to designate someone (surrogate decision maker) to make health care decisions for a person who is incapable of making them. A person who is capable can designate a surrogate in writing or orally. If a surrogate hasn't been designated, the law provides for people (in descending order of priority) to be named. If all people in a certain category (like all adult children) don't agree on a decision, health care provider can go by majority rule. If all are equally divided, the court must get involved.

### **Guardian and Conservator under the Uniform Probate Code**

If person is incapacitated and hasn't given power in writing to an agent, the court can appoint a guardian over the person and a conservator over financial matters. A guardian can then make placement and health care decisions and a conservator can make financial decisions. A court can also appoint a temporary guardian or conservator if needed to prevent immediate and irrevocable serious harm. A court can also limit the powers of the guardian and conservator depending on the person's capacity and needs. Two other people involved in the court process are a visitor and guardian ad litem. A visitor is usually a social worker who gives the court an objective report on the person's situation. A guardian ad litem (GAL) is an attorney appointed to represent the incapacitated person. The GAL reports to the court what the best interests of the person are.