



# ABQ Elder Law, PC

Elder Law  
Probate  
Estate Planning  
Wills & Trusts  
Guardianships & Conservatorships  
Medicaid & VA Pension Planning  
Elder Mediation/Facilitated Family Meetings

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## Legal Basics

### I. What Are Powers of Attorney?

- A. Document that allows you to act on someone's behalf
- B. POA's are governed by two different statutes, one for financial and one for healthcare
- C. People of all ages need them, but especially the elderly or someone with long term illness
- D. Terms/definitions:
  1. Principal: person who is signing
  2. Agent: the person who is acting on behalf of Principal
    - a) Also called "attorney-in-fact"
  3. Durable: clause in POA that means the document is effective no matter how old it is or whether or not the Principal has capacity
- E. Principal must have the legal capacity to sign one
- F. Springing (effective upon incapacity) v. effective immediately
- G. Internet or boxed forms, computer programs NOT a good idea
  1. often not specific to NM law
  2. not address all issues
  3. Principal may not clear as to what a particular power means or the consequences of that power without professional advice
- H. Filing of divorce revokes spouse as agent
- I. Protects against guardianship and conservatorship so long as Principal cooperative
  1. Guardian makes medical and placement decisions
  2. Conservator = guardian of the money and property
  3. Expensive and time consuming district court cases

4. Even with a well-executed estate plan, the Principal's condition or circumstances may require a guardianship and conservatorship

## **II. Power of Attorney for Healthcare**

### A. HIPAA considerations

1. Federal law that protects information in medical records
2. Without consent from patient, doctors prohibited from sharing medical information
3. Make effective immediately so Agent can talk to doctor even if you are not incapacitated. Realistically, Agent cannot make a decision on your behalf if you disagree and are capable of communicating it

### B. Include end of life decisions (esp. CPR) and feeding tube v. no feeding tube

### C. Medical decisions made in accordance with Principal's wishes, NOT Agent's wishes

1. Agent and Principal should talk about what Principal wants
2. If Agent does not have enough information to decide then Agent must make decision based on what Agent feels is in Principal's *best interest*

D. New Mexico law focuses on **who** makes the decisions, not trying to anticipate every possible situation in the document. Agent has discretion to make any decision the Principal could make if he were able, subject to special provisions in the document

### E. in absence of official HCPOA, Uniform Healthcare Decisions Act controls:

1. "Surrogate" (substitute) decision making classes. Priority is spouse, life partner, adult child (as a class), parent, adult siblings (class), grandparent.
2. Classes can have a tie → no decision is made

### F. Guardianship filed if not able to resolve problem under UHCDA

## **III. Power of Attorney for Financial Decisions**

### A. New law as of 2007: Uniform Power of Attorney Act

### B. Default is effective immediately

1. Can specify only upon incapacity
2. Consider effective immediately so Agent can act in an emergency

### C. Statutory form (form provided by law) is dangerous

1. Agent can be given a lot of power, including changing how your assets are transferred at your death

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2. Must absolutely trust Agent
3. Consult an attorney about the powers to ensure plans you have made are not

disturbed. Every situation is different.

D. NO governing act in absence of written power of attorney as with Uniform Healthcare Decisions Act

1. Thus, filing for a conservator is the only option
2. Expensive and time consuming

**IV. Wills**

A. The *Personal Representative* is the equivalent of an Agent under a power of attorney

B. A Personal Representative has no authority to act unless actually appointed by the probate or district court judge in a probate case

C. The Will itself does not transfer title to land or other property. This must be done in a probate proceeding.

D. The *Testator* must have capacity to sign the Will

E. The Will does not govern what happens to anything while the Testator is alive; it “comes to life” after the Testator dies.

F. If not executed correctly, the Will is not valid.

G. A copy of a Will can be probated but it is more expensive

H. With some exceptions, Wills should be probated within three years

I. If there is no Will, intestacy law governs the distribution of property

**V. Trusts**

A. Most common Revocable Living Trust

B. The *Grantor* must understand what he is signing

C. Rules in the Trust say what happens to the Grantor’s assets while he is alive as well as after he is dead

D. *Trustee* is the person who controls the assets. While the Grantor is alive, the Grantor is often the Trustee.

E. *Beneficiaries* are the people who benefit from the Trust; typically the Grantor and his spouse while he is alive

F. More complicated than a Will so more expensive but likely cheaper than probate

G. Trust is like a pot in a kitchen: the Trustee can add things to the pot as the cook in the kitchen, take things out of the pot, and use items in the pot for the Beneficiaries

H. Not appropriate for everyone

I. Avoid probate if the Grantor and Trustee have put all of Grantor's assets into the Trust

J. Effect on Medicaid qualification must be considered

K. There are other kinds of Trusts such as irrevocable trusts, special needs trusts, testamentary trusts, etc.

## **VI. Guardianship and Conservatorship**

A. Guardian of the person; conservator of the Estate

B. "Protected person" is one who demonstrates over time either partial or complete functional impairment 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 he is unable to manage his personal affairs, estate or financial affairs. NMSA 1978 § 45-5-101(F)

C. The process

1. Jurisdiction is district court; venue is the county of residence of the alleged incapacitated person

2. Petitioner files the petition asking for a guardian, conservator or both to be appointed

3. Court appoints:

a) Qualified healthcare professional ("QHCP")

b) Visitor

c) Guardian ad litem

4. All three must file written reports

5. Hearing on the permanent appointment

6. Emergency guardianships can be granted *ex parte*

7. Report to Court

## **VII. Long Term Care Insurance**

A. Pays for long term care; not health insurance

B. Frequently offered by larger employers

C. Older policies may not cover assisted living or at-home care

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D. Hybrid polices have life insurance and long term care insurance components are now available

E. Allows person to have more choices and not be dependent on Medicaid

F. Person must pay for own care through elimination period

**VIII. Medicare**

A. Medical insurance for 65 and older or younger people on SSDI

B. Parts A, B, C & D (C is Medicare Advantage Plan)

C. Co-pays and deductibles apply

D. Does not pay for custodial or long term care

E. Entitlement program

**IX. Medicaid**

A. Pays for long term care and medical care

B. Waiver programs available to keep people out of nursing homes

C. Must use Medicaid providers so fewer choices for facilities

D. Needs based program

E. No cap on benefits as with Aid & Attendance

F. Caregiver contracts can be used as a spend down tool for Medicaid or VA

qualification but must be done correctly!!

**X. VA Benefits**

A. Healthcare through the VA, including telemedicine

B. Compensation for a service connected disability

C. Pension: needs based program

D. Both compensation and pension are not taxable income but sometimes considered income for Medicaid purposes

E. Aid & Attendance is a form of pension that reimburses veterans for care up to a certain amount

1. Must have served 90 days during period of war (actual combat service not required) and meet other service requirements

2. Cap on what the VA will pay