

## LAW IN BRIEF

### WHAT IS A HEALTH CARE POWER OF ATTORNEY AND SHOULD I GET ONE?

#### SUBSTITUTED JUDGMENT

Substituted judgment is a legal tool that can be used when a person needs assistance making decisions about his/her care or property due to his/her inability to fully understand a decision that needs to be made or inability to communicate a decision. Substituted judgment gives power to another person to make decisions on behalf of the person who is in need but incapacitated.

#### Types of Substituted Judgment

There are several types of substituted judgment available. When selecting a type of substituted judgment, one should note that the best form of substituted judgment is the option which allows the person in need to remain as involved and

independent as possible in the decision-making process for his/her care. The different types of substituted judgment include:

- Health Care Power of Attorney
- Representative Payee
- Power of Attorney
- Conservatorship
- Guardianship

**Note:** Each type is listed previously in order from most independence to least independence for the person in need. See last page of this brief for more information on each type.

This Law in Brief will discuss the type of substituted judgment known as the **Health Care Power of Attorney**.

## HEALTH CARE POWER OF ATTORNEY

A Health Care Power of Attorney (“HPOA”) is a legal document that grants a an Attorney-in-Fact the power to make health care decisions for a Principal when he/she is determined, by a physician, to be unable to make health care decisions on his/her own. A *Principal* is the person in need of health care decision-making assistance. The *Attorney-in-Fact* is the person the Principal selects and grants authority to make his/her decisions.

An HPOA can be made at any point in the Principal’s life, but the Attorney-in-Fact’s authority is not granted immediately. An Attorney-in-Fact’s authority goes into effect when the Principal’s treating physician determines the Principal is incapacitated and unable to make health care decisions.<sup>1</sup>

If the Principal disagrees with the doctor’s determination, he/she may challenge the decision by filing a petition in the county court where he/she lives.<sup>2</sup> The court will then appoint a Guardian ad Litem and hold a hearing within 7 days of receiving the petition.<sup>3</sup> It will then

determine whether the Principal is able to make his/her decisions on his/her own.<sup>4</sup>

An Attorney-in-Fact’s authority ends under an HPOA when:

- The Principal dies.
- The Principal becomes competent and revokes the Attorney-in-Fact’s power. It can be cancelled either verbally or in writing; it is best to revoke an Attorney-in-Fact’s power in writing. The Principal should also tell his/her doctor so that it gets noted in the medical records.
- The Attorney-in-Fact withdraws. If the Principal is unable to understand the withdrawal, the Attorney-in-Fact may withdraw by informing the doctor, who will write it in the Principal’s medical record.<sup>5</sup>
- When the Principal creates a new HPOA the creation of another HPOA revokes the previous one. However, if the Attorney-in-Fact of the original HPOA makes a decision, not knowing that his/her power was revoked, the decision will be respected.

<sup>1</sup> Neb. Rev. Stat. § 30-3402 (2006).

<sup>2</sup> Neb. Rev. Stat. § 30-3415 (2006).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Neb. Rev. Stat. §§ 30-3410, 30-3420, 30-3407 (2006).

## Powers and Duties of an Attorney-in-Fact

An Attorney-in-Fact is only authorized to make decisions listed in the Principal's HPOA. The Attorney-in-Fact can only make those decisions when the Principal's doctor has determined that the Principal is not capable of making them on his/her own. The Attorney-in-Fact will have the power to receive information about the Principal's medical records and medical care.<sup>6</sup>

An Attorney-in-Fact may not:

- Agree to anything the Principal could not consent to under the law.
- Make decisions for the Principal that might harm their unborn child.
- Make decisions not to give the Principal things that will help them live or take away things that are keeping the Principal alive.<sup>7</sup>

## Is an HPOA the same as a Living Will?

No. A Living Will is a separate document that states the kinds of medical treatment that a person wants or does not want when they are unable to make their

own health care decisions. It is essentially guidance for physicians or an Attorney-in-Fact. Like an HPOA, it can be created at any time, so long as the patient is competent when creating it. Unlike an HPOA, a living will does not become effective merely when the Principal is deemed incompetent. A living will is effective when:

1. The doctor has been given a copy of it to add to the patient's medical record.
2. The patient has been determined to be terminal or in a persistent vegetative state.
3. The individual has been determined to be unable to make decisions about life-sustaining treatment.
4. The physician has notified the patient's immediate family or guardian of the decision to carry out the living will.<sup>8</sup>

**Additional information can be found at:**  
<http://supremecourt.nebraska.gov/self-help/financial-medical/power-attorney>

<sup>6</sup> Neb. Rev. Stat. § 30-3417 (2006).

<sup>7</sup> Neb. Rev. Stat. § 30-3417 (2006).

<sup>8</sup> Neb Rev. Stat. § 20-405 (2006).

As stated previously in this information, there are many different types of substituted judgment for an individual in need. Below is a guide to other decision-making alternatives. The best form of substituted judgment is one that works to protect a person in need but also gives him/her the most independence in his/her life decisions.

| <b>Types of Substituted Judgment<br/>(Alternatives to Full Guardianship)</b>   |   |
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| <i>These Alternatives are listed in order from least restrictive to most restrictive form of substituted judgment.</i> |   |
| <b>Health Care Power of Attorney</b>   | A person selected by the individual in need to make decisions on his or her behalf regarding health care. The individual selects an “Attorney-in-Fact”, granting him or her authority to make medical decisions for the individual, when he or she becomes unable to make those decisions on his or her own.  |
| <b>Representative Payee</b>  | A person selected by the Social Security Administration to make decisions for a person receiving Social Security payments. The Payee is limited to only making decisions about those Social Security benefits.  |
| <b>Power of Attorney</b>   | A document that you draft selecting a person to make decisions on your behalf regarding your income, property and assets.   |
| <b>Conservatorship</b>   | A Conservator is a court-appointed person granted the power to help an incapacitated person make decisions about his or her property and assets. A Conservator may be the Public Guardian. A Conservatorship may be limited to certain decisions, for a temporary time, or it may be a full Conservatorship that must be contested to be removed.   |
| <b>Guardianship</b>  | A Guardian is a person granted the power to make decisions for a minor or incompetent person. A Guardian may make decisions about the person’s living arrangements, medical care, education, legal decisions and obligations, money and property. A Guardian may be appointed by a court or designated through a power of attorney or will. The Public Guardian may be designated as a Guardian for an incompetent person. A Guardianship may be limited to certain decisions, for a temporary time, or it may be a full Guardianship that must be contested to be removed. |