

Steve Sisolak
Governor



Richard Whitley
Director

State of Nevada
Department of Health and
Human Services

Disability Rights, Guardianship, Adult Mistreatment

Aging and Disability Services Division

Jennifer Richards, Esq.



7/28/2021

Helping people. It's who we are and what we do.



NRS 427A Attorney

- *Governor Appointee*
- *NRS 427A.123 Attorney for the Rights of Older Persons, Persons With a Physical Disability, an Intellectual Disability or a Related Condition (“Rights Attorney”)*
 - Provide Education, Advocacy, Technical Assistance
 - Act as Legal Assistance Developer pursuant to the Older Americans Act (OAA)
 - Statewide Guardianship Commission

•*Disclaimer: This presentation is not a substitute for legal advice and does not create an attorney-client relationship.*





Consider

- “A few conclusions become clear when we understand this: that our most cruel failure in how we treat the sick and the aged is the failure to recognize that they have priorities **beyond merely being safe and living longer**; that the chance to shape one’s story is essential to sustaining meaning in life; that we have the opportunity to refashion our institutions, our culture, and our conversations in ways that transform the possibilities for the last chapters of everyone’s lives.”
— Atul Gawande, quote from *Being Mortal: Medicine and What Matters in the End*





UN Convention on the Rights of Persons with Disabilities

- There are eight guiding principles that underlie the Convention and each one of its specific articles:
 1. Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons
 2. Non-discrimination
 3. Full and effective participation and inclusion in society
 4. Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity
 5. Equality of opportunity
 6. Accessibility
 7. Equality between men and women
 8. Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities





ADA Title II

- “No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of service, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”
- *Olmstead v. L.C., 119 S. Ct. 2176 (1999)*





Advance Care Planning in Nevada

“

I have seen the damage we in medicine do when we fail to acknowledge that such power is finite and always will be. We've been wrong about what our job is in medicine. We think our job is to ensure health and survival. But really it is larger than that. It is to enable well-being.

— *Atul Gawande, quote from Being Mortal: Medicine and What Matters in the End*

”



Competency versus Capacity



CAPACITY = MEDICAL



COMPETENCE = LEGAL.



MEDICAL DECISION-MAKING CAPACITY IS SPECIFIC TO THE PROPOSED MEDICAL INTERVENTION, AND IT CAN CHANGE OVER TIME. **INCOMPETENCE** IS A LEGAL TERM THAT REFERS TO AN ENDURING GENERAL INABILITY TO MAKE VALID DECISIONS. THIS IS ESTABLISHED BY A JUDGE, AND IT IS RESERVED FOR INDIVIDUALS WHO ARE PRESUMED TO BE PERMANENTLY AND MARKEDLY IMPAIRED



WHICH DO WE USE IN NEVADA?



Definitions

- **Health Care Power of Attorney/Advanced Directive:** A document that takes effect upon one's incompetency and designates a surrogate decision-maker for healthcare matters. • The Uniform Health-Care Decisions Act (1993) states that the power of attorney for healthcare must be in writing and signed by the principal. Unless otherwise stated, the authority is effective only upon a determination that the principal lacks capacity, and it ceases to be effective once the principal regains his capacity. The agent must make decisions in accordance with the principal's relevant instructions, if there are any, or in the principal's best interests. — Also termed *power of attorney for healthcare*; *healthcare proxy*. **2.** A legal document explaining one's wishes about medical treatment if one becomes incompetent or unable to communicate. — Often shortened to *directive*.
- **Living Will:** An instrument, signed with the formalities statutorily required for a will, by which a person directs that his or her life not be artificially prolonged by extraordinary measures when there is no reasonable expectation of recovery from extreme physical or mental disability. • Most states have living-will legislation.
- **Do Not Resuscitate Order (DNR):** A document, executed by a competent person, directing that if the person's heartbeat and breathing both cease while in a hospital, nursing home, or similar facility, no attempts to restore heartbeat or breathing should be made. — Abbr. DNR order. — Also termed *advance directive*.





End of Life Decisions

- **Physician's Order for Life Sustaining Treatment (POLST):** A Physician Order for Life-Sustaining Treatment is a medical order that results from conversations between a patient who has a serious illness or frailty and the patient's physician concerning the patient's end of life care.
- A POLST form consists of medical orders indicating a patient's wishes regarding life-saving medical interventions. POLST forms vary from state to state; however, they commonly allow patients to indicate whether they want to receive treatments such as the following that are listed by the Patients Rights Council:
 - • Cardiopulmonary resuscitation (CPR) • Antibiotics • Artificially administered nutrition and fluids • Blood transfusions • Dialysis • Future hospitalization • Comfort measures only (which orders that even non-invasive curative medical treatment should not be provided)
- Nevada specific “Declaration to Withhold or Withdraw Life Sustaining Treatment”
 - NRS 449A.436 and surrogate decision making for end of life decisions by family members (NRS 449A.454)





Advance Care Planning Tools in Nevada

- Supported Decision Making
- Healthcare Power of Attorney
- Special Form Power of Attorney for Dementia





Supported Decision Making (SDM)

Balancing Empowerment and the Progressive Nature of Dementia

- Persons who are actively involved in choices retain ability longer
- Those closest will be able to understand the person longer than others

A Supported Decision-Making Agreement must be in writing, signed by the Decider and one or more Supporters

It must have two witnesses who are not supporters or the decider at the meeting when the agreement is signed and dated

NRS 162c
Nevada's SDM
Law

The agreement has to say what the Supporter can and can't do for the Decider





Recent POA Updates

- *Clarifying the process for determining incapacity*
 - Terms of POA document OR **NRS 162A.810 - Time at which power of attorney is effective.**
 - *New Law added 2019 Session*
- *Placement preferences in the form document*
 - Principal can indicate placement preferences to direct agent in the event placement outside the home is needed (skilled nursing facility, group home)
 - *New Law added 2019*





Recent POA Updates cont'd

EXPRESSION OF INTENT CONCERNING LIVING ARRANGEMENTS

[.....] It is my intention to live in my home as long as it is safe and my medical needs can be met. My agent may arrange for a natural person, employee of an agency or provider of community-based services to come into my home to provide care for me. When it is no longer safe for me to live in my home, I authorize my agent to place me in a facility or home that can provide any medical assistance and support in my activities of daily living that I require. Before being placed in such a facility or home, I wish for my agent to discuss and share information concerning the placement with me.

[.....] It is my intention to live in my home for as long as possible without regard for my medical needs, personal safety or ability to engage in activities of daily living. My agent may arrange for a natural person, an employee of an agency or a provider of community-based services to come into my home and provide care for me. I understand that, before I may be placed in a facility or home other than the home in which I currently reside, a guardian must be appointed for me.

[.....] I desire for my agent to take the following actions relating to my care:



Special Form Power of Attorney for Dementia

- Added in 2019
- NRS 162A.870
- Straightforward language





Guardianship





What is Guardianship?

- 2,000+ years old
- 449 BC – Roman Law and the Twelve Tables reference guardianship by providing that a family or paternal relative should protect a person and his goods if that person was unable to take care of himself.
 - Traditionally only applied to children but expanded to include incapacitated and disabled adults
 - U.S. System modeled after English
 - *Parens Patrie*





Civil Liberties

- Adult guardianship has been recognized as the “most punitive civil penalty that can be levied against an American citizen.”
 - Susan G. Haines, Esq., John J. Campbell, Esq., *Defects, Due Process, and Protective Proceedings: Are Our Probate Codes Unconstitutional?*, 14 Quinnipiac Prob. L.J. 57, 59
- Civil Liberties implicated in Guardianship
 - The right to choose where to live and with whom to associate
 - The right to make medical decisions regarding one’s body
 - The right to marry and associate freely
 - The right to travel or pursue in privacy the activities of daily living
 - The right to be free from unwanted constraints or incarceration
 - The right to vote





Nevada Requirements

- Capacity
 - NRS 159.019 **“Incapacitated” defined.** A person is “incapacitated” if he or she, for reasons other than being a minor, is unable to receive and evaluate information or make or communicate decisions to such an extent that the person lacks the ability to meet essential requirements for physical health, safety or self-care without appropriate assistance
- Guardianship is necessary
 - No other least restrictive alternatives
 - Supported Decision-making, representative payee, powers of attorney (special dementia POA), advanced psychiatric directive, circle of support
 - “Comfort Orders”





Challenges and Opportunities to Improve Access to Justice



Nevada's Legal Service Providers and Access to Justice

- 5 legal services providers statewide;
 - Washoe Legal Services (WLS)
 - Volunteer Attorneys for Rural Nevadans (VARN)
 - Southern Nevada Senior Law Program (SNSLP)
 - Legal Aid Center of Southern Nevada (LACSN)
 - Nevada Legal Services (NLS)
- ADSD provides grant funding under the Older American's Act (60+) and select specialty funding awards





Current Challenges

- Limited Funding
- Workforce Challenges
- Barriers for those in Long Term Care Settings
 - *Certificate of Competency*
- Lack of Education for legal professionals





Civil Legal Needs and Economic Impact Study

- Supreme Court of Nevada Access to Justice Commission 2017
- **The “Justice Barrier” is high.** Nevada’s poorest and most vulnerable residents have 147,000 legal problems per year. Legal aid is currently able to fully address only 24 percent of the total need; **76 percent of need goes unmet, and low-income Nevadans fighting to protect their families, homes, and jobs must face the consequences in court without legal help**
- Return on Investment – Estimated \$128million dollar impact on the state, that is a \$7 return for every \$1 of funding
- Providing Advance Care Directives (\$18M) savings in 2016 statewide





Opportunities

- Explore additional grant funding
- Partner with paralegal programs, UNLV Boyd School of Law, improve *Pro Bono* efforts
- Medicaid now covers cognitive assessments, could improve access to complete Certificates of Competency for those in long term care settings.
- Partner with the State Bar of Nevada and others to develop continuing legal education courses that provide training from a multi-disciplinary team of professionals
- Medical Legal Partnerships





Questions?





Contact Information

Jennifer Richards, Esq.

Chief Rights Attorney and State Legal Assistance Developer

jrichards@adsd.nv.gov

775-685-6584

www.adsd.nv.gov



Acronyms

- ADA – Americans with Disabilities Act
- OAA – Older American's Act
- POA – Power of Attorney