ESTATE PLANNING SEMINAR

Planning for Incapacity

Durable Powers of Attorney • Advance Health Care Directives

Protecting your family before you need to

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WHY THIS MATTERS

What Happens Without One?

A husband has a stroke and cannot speak or sign his name. His wife goes to the bank to pay the mortgage from his account.

The bank says no. There is no power of attorney on file. The usual path forward is then a conservatorship — and a judge, not the family, decides who manages his affairs.

Months

of court proceedings before anyone is authorized to act OR petition for temporary conservatorship

Recurring cost

of attorney, investigator and court fees — paid from his own assets

A judge decides

who is appointed — not necessarily who the family would choose

THE DEFAULT IF YOU DO NOTHING

Conservatorship: Person and Estate

Of the Person

For an adult unable to provide properly for personal needs — physical health, food, clothing or shelter (Prob. Code § 1801(a)).

- Where the conservatee lives, and with whom
- Medical care, subject to separate court powers
- Day-to-day care and supervision
- Determined by judge on a case by case basis

Of the Estate

For an adult substantially unable to manage financial resources or resist fraud or undue influence (§ 1801(b)).

- Bank accounts, income, bills, real property
- Bond, inventory and periodic accountings (§§ 2320, 2610, 2620)
- Court approval required for major transactions

Court-supervised and due-process heavy by design: clear and convincing evidence (§ 1801(e)), a court investigator (§ 1826), the right to counsel (§§ 1470–1471), and the right to attend and contest. Capacity is presumed (§ 810).

THE DEFAULT IF YOU DO NOTHING

Who Serves — and What It Costs

A family member

Most common. The court is not required to appoint the person the family expects, and contested appointments are where families come apart.

Someone you nominated

A nomination in your own POA or directive carries real weight (§§ 1810, 4126, 4672) — the court gives it preference absent good cause.

A licensed professional fiduciary

Licensed and regulated by the Professional Fiduciaries Bureau (Bus. & Prof. Code § 6500 et seq.); charges a fee; files accountings.

The Public Guardian

The county office of last resort where no one else is able, willing or suitable (Prob. Code § 2920 et seq.).

The cost is not a one-time filing fee. A conservatorship of the estate generally runs for the rest of the conservatee's life: bond premiums, biennial accountings, attorney and conservator compensation on court approval (§§ 2640–2642), and a fresh petition for anything out of the ordinary — all paid from the conservatee's own money.

THE CORE IDEA

Your Estate Plan: Planning for Incapacity

Power of Attorney

Governs who manages your affairs while you are alive.

- Effective when signed, unless drafted to spring
- Authority ends at your death (Prob. Code § 4152(a)(4))
- Reaches what a trust cannot — IRAs, 401(k)s, tax returns, benefits

Will / Trust

Direct where your property goes — and a funded trust also works during life.

- A will takes effect only at death
- A funded revocable trust also covers incapacity — but only assets actually retitled into it
- Executor / successor trustee acts on your behalf

A third document — the Advance Health Care Directive — covers medical decisions. We come to it in the second half.

KEY TERMS

The Two Roles in a Power of Attorney

The Principal

The person who signs the document and grants the authority. That is you.

- Must have capacity to contract at the moment of signing (§ 4120)
- Sets the scope — the agent gets only what the document gives
- Can revoke at any time while capacity lasts

The Agent

The person authorized to act on the Principal's behalf. California calls this person the “attorney-in-fact” (§ 4014) — not a lawyer, just a legal title.

- Must have capacity to contract (§ 4200)
- Entitled to reasonable compensation unless the document says otherwise (§ 4204)
- Has no duty to act at all until he agrees in writing (§ 4230(a))

Durable vs. Non-Durable – Will your PoA survive?

Non-Durable

California's default if the document is silent.

- Authority ends the moment the Principal becomes incapacitated (§ 4155)
- Defeats the entire purpose of incapacity planning
- This is what you get if the document says nothing about durability

Durable — Only If It Says So

Authority continues through incapacity (§ 4125).

- Requires express language — “shall not be affected by subsequent incapacity of the principal,” or similar words (§ 4124)
- May also nominate your conservator (§§ 4126, 1810)
- This is why an old document must be read, not assumed to still work

California Power of Attorney Law, Prob. Code §§ 4000–4545. California has NOT adopted the Uniform Power of Attorney Act (2006) — most online material describes the opposite rule.

Springing vs. Immediate

Springing

Effective only when a trigger is declared.

- The person you name declares, under penalty of perjury, that the trigger has occurred (§ 4129)
- Feels safer — but the trigger creates delay exactly when speed matters
- Without a HIPAA authorization in the document, a physician may not even speak to your agent

Immediate

Effective the moment it is signed.

- No declaration, no certification, no delay
- The agent can act the day something happens
- Requires real trust in the named agent from day one

A springing POA may itself be non-durable (§ 4030) .

SCOPE

General vs. Limited Authority

General Power of Attorney

Broad authority across financial, property and business matters.

- A general grant gives the agent what you could do yourself (§ 4261)
- Typically the vehicle for full incapacity planning
- Still requires certain powers to be spelled out expressly (§ 4264)

Limited / Special Power of Attorney

Authority restricted to a specific transaction or purpose.

- Example: selling one parcel of real estate while you are traveling
- Useful alongside a general POA, not instead of it
- Not incapacity planning on its own

A POA may also grant "personal care" authority — where you live, meals, household help (§ 4123(c)). That sounds like it covers medical placement. It does not. *See slide 19.*

WHAT IT MAKES POSSIBLE

A POA Is More Than Bill-Paying

A well-drafted durable PoA is a planning instrument, not just a convenience. These are things your agent can do only if the document was written to allow them.

Fund the trust you already signed

Retitle the account or parcel that never made it into the trust — avoiding a probate your plan was built to prevent. Requires express authority (§ 4264(a)–(b)).

Continue a gifting program

Keep an annual-exclusion gifting plan running through incapacity. Gifts are never implied — they must be expressly granted (§ 4264(c)).

Open the safe deposit box

Access is not in the standard statutory form and is routinely refused without it. A custom clause naming the institution solves it.

Handle assets outside of Trusts

IRAs, 401(k)s, tax filings and elections, Social Security, Medi-Cal applications, insurance, DMV.

The through-line: what your agent can do is set by what the document says — not by how much your family trusts him.

THE DETAIL THAT TRIPS PEOPLE UP

Some Powers Must be Specifically Mentioned

Under Prob. Code § 4264, seven powers are never implied by general language. They must be expressly granted in the document — or the agent simply cannot exercise them, no matter how broad the rest of the form reads.

- Creating, modifying or revoking a trust
  § 4264(a)
- Funding a trust the principal did not create
  § 4264(b)
- Making or revoking a gift
  § 4264(c)
- Disclaiming or releasing an interest
  § 4264(d)
- Creating or changing survivorship interests
  § 4264(e)
- Changing beneficiary designations
  § 4264(f)
- Making a loan to the agent
  § 4264(g)

And one thing no POA can ever authorize: making, amending or revoking your will (§ 4265).

A generic downloaded POA almost never grants these — which is why an agent under a bare-bones form often cannot do the planning that matters most, at the moment it matters most.

TYPES OF POWERS

Where the Form Comes From

Internet / pre-printed

Often silent on durability (§ 4124) and almost always missing the § 4264 powers. Printed forms sold for use without a lawyer must carry statutory warnings (§ 4128).

California's statutory form

Section 4401. Legally sufficient, and the one form a bank can be compelled to honor (§ 4406). Must be notarized (§ 4402(c)). Exempt from the § 4128 warnings (§ 4128(c)).

The bank's own form

Usually reaches only that institution's accounts. Convenient for one bank, useless for the house, the IRS, or the brokerage down the street.

Attorney-drafted

Durability and the § 4264 grants written to your actual plan, plus successor agents, HIPAA authority and a conservator nomination.

The statutory form cuts both ways. Left unmodified it confers very broad authority — real property (§ 4451(b)), insurance and annuities (§ 4457(b)), estate and trust transactions (§ 4458) — much of which principals do not intend. “Official” does not mean “tailored.”

Getting It Signed Correctly

1

Signed by the Principal

Or in the Principal's name by another adult, in the Principal's presence and at the Principal's direction. Capacity to contract, judged at the moment of signing (§§ 810–812, 4120, 4121(b)).

2

Dated

The date of execution is a statutory element. An undated POA is legally insufficient (§ 4121(a)) — and this is a defect you actually see in practice.

3

Notarized OR witnessed

California requires one or the other, not both. Two witnesses if not notarized, and the attorney-in-fact may not act as a witness (§§ 4121(c), 4122).

4

Notarized for real property

Recorders require an acknowledged instrument (Gov. Code § 27287), and the § 4401 statutory form must be acknowledged in any event (§ 4402(c)).

The health care directive is signed under a different statute, with stricter witness rules. We come to that on slide 23.

The important decision: Who is the agent?

Family or a trusted friend

Most common and usually right. Test it on three questions: is he honest under pressure, is he organized enough to keep records, and will he actually answer the phone?

A professional fiduciary

Licensed under Bus. & Prof. Code § 6500 et seq. and regulated by the Professional Fiduciaries Bureau — exam, education and periodic accountings. Charges a fee. The right answer for some families.

Co-agents — with care

Co-agents must act unanimously unless the document says otherwise (§ 4202(b)). “Both my children” is a deadlock clause unless you draft around it.

Successors, always

Name an alternate so the plan does not fail if your first choice dies, moves or declines (§ 4203). And ask first — no one is obligated to serve (§ 4230(a)).

Proximity, availability and willingness beat birth order every time. The best agent is the one who will do the work, not the one whose feelings would be hurt.

The Agent's Legal Duties

Naming an agent is not handing over a blank check. The Power of Attorney Law imposes real fiduciary duties (Prob. Code §§ 4230–4238) — and real liability for breaching them.

Loyalty

Act solely in the Principal's interest and avoid conflicts of interest (§ 4232).

Stay in scope

Exercise only the authority granted, with the care of a prudent person dealing with the property of another (§ 4231).

Keep it separate

Do not commingle. The Principal's property stays the Principal's, in the Principal's name (§ 4233).

Keep records

Records of every transaction — a duty that cannot be drafted away (§ 4236).

The remedies are real — surcharge, double damages for a bad-faith taking (§ 4231.5), attorney fees (§ 4545), financial elder abuse (Welf. & Inst. Code § 15610.30), criminal exposure (Pen. Code § 368). But they arrive after the money is gone: there is no bond and no court supervision.

THE PRACTICAL REALITY

Banks Don't Always Cooperate

California has no general statute compelling acceptance. Section 4406 compels it — and awards fees — only for the § 4401 statutory form. In practice, this is the weakest link in the framework.

The agent's affidavit

An affidavit under § 4305 shifts fees to a third person who still refuses without a good-faith belief the agent is not qualified (§ 4306).

A petition to compel

Section 4541(f) allows a petition to compel a third person to honor the agent's authority — available for any POA, not just the statutory form.

What cuts against you

Sections 4302, 4308 and 4310 give institutions real cover, and branch knowledge is not imputed across the bank.

Set expectations honestly: § 4406(d) makes refusal unreasonable if the only objection is that the POA is not the bank's own form — but nothing guarantees frictionless acceptance.

STAYING IN CONTROL

Revocable — But Put It in Writing

A Power of Attorney may be revoked at any time while the Principal has capacity — but the revocation must be in writing (Prob. Code § 4151(a)(2)). Tearing up a copy accomplishes nothing.

Signing one today does not mean losing control today. But revocation binds an agent or a bank only once they have notice — so notify the agent and every institution in writing (§§ 4151(b), 4152(b), 4303–4305).

Two exceptions worth knowing: a power coupled with an interest sits outside this law entirely (§ 4050(b)(1)), and a conservator may revoke only with prior court authorization (§ 4206(b)).

Two Documents, Two Statutes

Financial POA

Governs money, property and financial affairs.

- Power of Attorney Law (§§ 4000–4545)
- Effective when signed unless drafted to spring
- No authority over health care — even if it grants "personal care" powers

Advance Health Care Directive

Governs medical treatment decisions.

- Health Care Decisions Law (§§ 4600–4806)
- Springing by default — effective on a determination of incapacity (§ 4682)
- Stricter witness rules (§§ 4673–4675)

Hutcheson v. Eskaton FountainWood Lodge (2017) 17 Cal.App.5th 937: an agent holding only a financial POA could not admit her principal to a residential care facility — the admission agreement, and its arbitration clause, were void.

Your Voice When You Cannot Speak

One document does two separate jobs. You can do either, or both — and California publishes an optional statutory form for it (§ 4701).

Part One: Name an Agent

A power of attorney for health care designates an agent to make health care decisions for you (§ 4629).

- Any adult with capacity may execute one (§ 4680 et seq.)
- The agent decides as you could decide yourself, subject to your limits (§ 4683(a))
- Authority begins on a determination that you lack capacity, unless you say otherwise (§ 4682)

Part Two: Give Instructions

An individual health care instruction records your own wishes directly (§§ 4623, 4670).

- Be as specific as you like about treatments you do or do not want
- Or leave decisions to your agent's judgment on the medical facts
- Instructions govern even where no agent is available

Drafting also covers: nomination of a conservator (§§ 4672, 1810), organ donation, and burial or cremation.

AUTHORITY OF AGENT

What Your Health Care Agent Can Do

Medical decisions

Consent to, refuse or withdraw any care, treatment, service or procedure — to the same extent you could yourself (§ 4683(a)).

Personal care

Where you live, meals, household employees, transportation, mail, recreation — if the document grants it (§ 4671(b)).

End of life

Life-sustaining treatment, artificial nutrition and hydration, and comfort care, guided by your written instructions.

After death

Anatomical gifts (Health & Saf. Code § 7150 et seq.), autopsy (§ 7113) and disposition of your remains — burial or cremation (§ 7100). See Prob. Code § 4683(b).

This list closely parallels the powers of a conservator of the person — which is precisely the point. You are choosing, in advance and for free, the authority a judge would otherwise assign.

What No Agent May Ever Do

No matter how the document is drafted, the Health Care Decisions Law does not permit an agent or surrogate to consent to any of these on behalf of an incapacitated adult (Prob. Code §§ 4652, 4653):

1. Commitment to or placement in a mental health treatment facility
2. Convulsive treatment (Welf. & Inst. Code § 5325)
3. Psychosurgery (Welf. & Inst. Code § 5325)
4. Sterilization or abortion
5. Mercy killing, assisted suicide or euthanasia

Withholding or withdrawing life-sustaining treatment is not on this list — that is a fundamental right (§ 4650(a)), and it is what the directive is for.

Signing the Directive Is Different

A written advance health care directive is valid if it is signed, dated, and either acknowledged before a notary or signed by two adult witnesses (§§ 4673, 4674). The witness rules are stricter than for a financial POA.

Signed and dated

Signed by you, or in your name by another person in your presence and at your direction, and bearing an execution date (§ 4673(a)).

Who cannot witness

Not your agent, not your health care provider or its employees, not the operator or employee of a community care or residential facility (§ 4674).

One disinterested witness

At least one witness must not be related to you by blood, marriage or adoption, and must not be entitled to any part of your estate (§ 4674(e)).

Skilled nursing patients

If you are a patient in a skilled nursing facility, a patient advocate or ombudsman must also sign (§ 4675).

Compare the financial POA: notary OR two witnesses, with no disinterested-witness requirement (§§ 4121(c), 4122). Executing both documents at one sitting, with a notary, avoids the whole problem.

THE PIECE EVERYONE FORGETS

HIPAA: The Authorization That Makes It Work

HIPAA protects your medical information — from everyone, including the people you chose. Without a compliant authorization, a physician may decline to tell your agent anything at all.

It gates the springing POA

If your POA springs on a determination of incapacity, someone must first get the medical facts. No authorization, no determination, no authority.

It gates ordinary decisions

A health care agent who cannot get records or speak to the treating physician is deciding blind — and hospitals do turn agents away.

It has to satisfy both laws

Federal HIPAA (45 C.F.R. § 164.508) and California's Confidentiality of Medical Information Act (Civ. Code § 56.10 et seq.).

Build the authorization into the directive and the financial POA, and name the agents — including successors — as authorized recipients in both.

The Directive and the POLST Are Not the Same

Advance Health Care Directive

Your document, signed by you, in advance.

- Names an agent and records your wishes
- Applies whenever you lack capacity, in any setting
- Adults have a fundamental right to direct that life-sustaining treatment be withheld or withdrawn (§ 4650(a))

POLST / DNR

A physician's order, signed by you and your doctor, about care right now.

- A request regarding resuscitative measures — expressly NOT an advance directive (§ 4780(a)(1))
- Must be explained by a health care provider, including how it differs from a directive (§ 4780(c))
- May also be shown by an EMSA “DNR” medallion (§ 4780(e))

A POLST is revocable at any time by a person with capacity (§ 4780(d)), may be modified after medical evaluation (§ 4781.2(c)–(d)), and never obligates a provider to give medically ineffective care (§ 4781.2(b)).

Changing or Ending a Directive

Changing your agent

The designation of an agent may be revoked only by a signed writing, or by personally informing your supervising health care provider (§ 4695(a)).

Changing everything else

Any other part of the directive may be revoked at any time, in any manner that communicates your intent to revoke (§ 4695(b)).

Signing a new one

A later directive revokes an earlier one to the extent of any conflict (§ 4696) — so collect and destroy the old copies.

Divorce

Dissolution or annulment of a marriage or domestic partnership automatically revokes your former spouse or partner as agent (§ 4697(a); Fam. Code §§ 297.5(b), 299(d)).

The document only works if it can be found. Give copies to your agent, your successor agent, and your physician — and tell them where the original is. A directive in a safe deposit box at 2 a.m. is a directive that does not exist.

CAUTIONARY PATTERNS

Five Ways These Documents Fail

The Silent Document

A POA with no durability language. It lapsed the moment the Principal lost capacity (§ 4155) — and the bank correctly refuses it.

The Self-Dealing Agent

A general POA with no § 4264 limits considered. The agent gifts himself funds — surcharge, double damages, elder abuse liability.

The Out-of-State Document

Valid in California (§ 4053) — but it may lack the § 4264 express grants a California institution expects to see.

The Admission-Packet Directive

Signed at intake and witnessed by facility staff who are disqualified under § 4674. Nobody checks until it matters.

No Document at All

The family discovers there is nothing on file — and heads to conservatorship court.

Four of these five are drafting failures, not bad luck — and every one of them is visible on the face of the document before anything goes wrong.

DOING IT RIGHT

What a Complete Incapacity Plan Includes

Both documents, not one

A financial POA and an Advance Health Care Directive. Neither reaches the other's territory — that is the Hutcheson lesson.

Hot powers expressly granted

The § 4264 powers, tailored to actual goals — trust funding, gifting, Medi-Cal planning, business succession.

Successor agents named

So the plan does not fail if the first agent cannot serve (§ 4203). Co-agents must act unanimously unless you say otherwise (§ 4202(b)).

HIPAA authority built in

Naming every agent and successor as an authorized recipient, under both federal and California law.

Coordinated and nominating

Works with the will and trust — and can nominate your conservator (§§ 4126, 4672, 1810).

Reviewed periodically

Divorce revokes a spouse as agent (§§ 4154, 4697). So do deaths, moves and new assets — review, do not assume.

BEFORE WE OPEN IT UP

Questions We Hear Most

“Can I just use the form my bank gave me?”

Sometimes — but a bank's form usually reaches only that bank's accounts and omits the § 4264 powers your agent may need for everything else.

“Can't I just use an online template?”

The risk is not validity in the abstract. It is whether the durability language (§ 4124) and the specific powers you will need were included at all.

“I signed one at the hospital — am I covered?”

Often not. Intake directives are commonly witnessed by staff who are disqualified under § 4674, and they say nothing about your finances.

“What if I never sign one?”

Usually a court-supervised conservatorship: expensive, public, permanent, and a judge — not you — picks who serves.

Questions? Both of us are here afterward — and there is no charge for asking.

YOUR NEXT STEP

Have an Existing Document? Bring It In.

A California power of attorney does not expire with age (Prob. Code § 4127) — but it can still be missing durability language, the § 4264 powers your family would need, or a HIPAA authorization. A health care directive signed at a hospital admission desk may have been witnessed by people the statute disqualifies. Bring both in and we will review them with you.

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