

# THE INS AND OUTS OF FIDUCIARY RELATIONSHIPS

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# FIDUCIARY RELATIONSHIPS

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- Power of Attorney for Finance
- Advance Healthcare Directive
- Trust
- Will
- Conservatorship
- Supported Decision-Making Agreement



# POWER OF ATTORNEY FOR FINANCES (DPOA)

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- Immediate vs. Springing
- Durable vs. Non-durable
- General vs. Limited
- Statutory, Printed, and Attorney-Drafted



# CAPACITY

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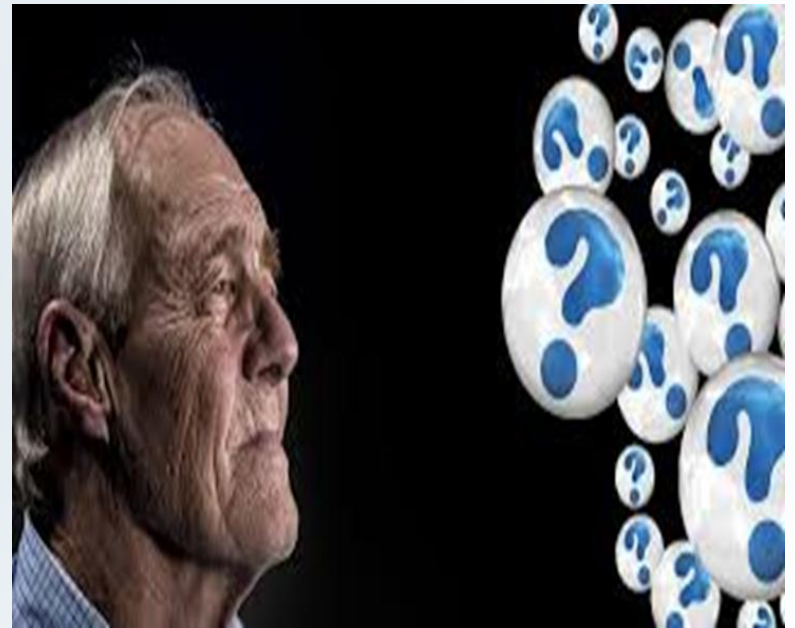
- Contractual
- Medical Decision Making
- Testamentary
- Marriage



# CAPACITY

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- Capacity of principal:
  - Rarely an “all or nothing” condition
  - May depend on location, time, or environment
  - May be transient



# POWER OF ATTORNEY FOR FINANCES

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- Agents = Attorneys in Fact
- Should you appoint Co-Agents
- Can Agents act independently, or must they act together
- Name different Agents for different tasks
- Select successor agents





# POWER OF ATTORNEY FOR FINANCES

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- Agent's powers are limited to those specified in the document
- Watch for gifting powers or Medi-Cal planning clauses



# HOW TO SIGN AS A POA

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*“Jane Doe,  
by John Doe,  
her Attorney  
in Fact”*





# POWER OF ATTORNEY FOR FINANCES - Termination

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- Revocation by Principal
- Expiration as per instrument
- Agent's death
- Agent's resignation
- Agent's incapacity to Act
- Dissolution or Annulment
- Principal's incapacity
  - Non-Durable
- Principal's Death
- Revocation by Court



# POWER OF ATTORNEY FOR FINANCES - Enforcement

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- A third party who refuses to honor a power of attorney, after being provided with an affidavit of non-revocation or non-termination, is liable for attorney's fees incurred in an action or proceeding necessary to confirm the attorney-in-fact's authority.



# ADVANCED HEALTH CARE DIRECTIVES (AHCD)

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- Select health care providers
- Select placement facilities
- Approve diagnostic tests, surgical procedures, and programs of medication
- Handle disposition of remains and authorize autopsy



# ADVANCED HEALTH CARE DIRECTIVES (AHCD)

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- Directions to provide, withhold, or withdraw artificial nutrition and hydration and all other forms of health care, including cardiopulmonary resuscitation
- Name Healthcare Agent(s)





# ADVANCED HEALTH CARE DIRECTIVES (AHCD)

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- Types of AHCD Forms
  - Statutory
    - Printed: 5 Wishes, California Medical Association
    - Attorney Drafted



# ADVANCED HEALTH CARE DIRECTIVES (AHCD)

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- Must Satisfy All of the Following:
  - Signed and Dated
  - Acknowledged before a notary public or signed by two qualified witnesses.





# ADVANCED HEALTH CARE DIRECTIVES (AHCD)

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- Must Satisfy All of the Following:
  - A witness may not be the patient's health care provider or an employee of the patient's health care provider.
  - A witness may not be the operator or an employee of a residential care facility for the elderly
  - A witness should not be a named Agent within the document



# ADVANCED HEALTH CARE DIRECTIVES (AHCD)

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- Special AHCD requirement for SNF patients
  - If the patient is in a skilled nursing facility when executing the advance directive, the document must be signed by the County Ombudsman.



# ADVANCED HEALTH CARE DIRECTIVES (AHCD)

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- NOTE: By law, a Power of Attorney for Health Care signed before January 1, 1992, expires seven years from the date of execution.



# HIPAA CONCERNS

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- Most documents executed before 1996 do not have HIPAA releases.



It's NOT a suggestion...it's the law!

# DISPOSITION OF BODY

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- Most powers end after the death of the Principal.
- Power to dispose of the principal's remains
- Power to authorize an autopsy
- Power to donate all or part of the body for transplantation, education, or research purposes.
- Burial instructions should be in this document





# ANATOMICAL GIFTS

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- An Agent may be authorized to make disposition of body parts for transplant, research, or educational purposes, OR may restrict or prohibit the power.
- Authority specifically granted takes precedence over the wishes of family members.





# ALTERNATIVES

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- Physician Orders for Life-Sustaining Treatment (POLST)
- States a patient's wishes for life-sustaining treatments
  - Prevails over an AHCD or POHC.



# TRUSTEES

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- Types of Trusts:
  - Revocable or Irrevocable
- Trustee
  - Trustor as Trustee
  - Co-trustees
  - Successor trustees



# HOW DOES A SUCCESSOR TRUSTEE BECOME THE TRUSTEE?

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- Resignation
- Trust terms
  - Doctor's Letter, Mutual Agreement, Trust Advisor Opinion
- Death of trustee
- Removal
- Court order
  - Generally, requires written acceptance



# WHAT POWERS DOES A TRUSTEE HAVE?

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- Trustee only manages assets held by the trust
- Look to the terms of the Trust “Trustee Powers”
- Third parties dealing with a trustee, if acting in good faith and without actual knowledge that the trustee is exceeding the trustee’s powers, are fully protected in dealing with or assisting the trustee and are not bound to inquire whether the trustee has the power to act.





# CONSERVATORSHIPS

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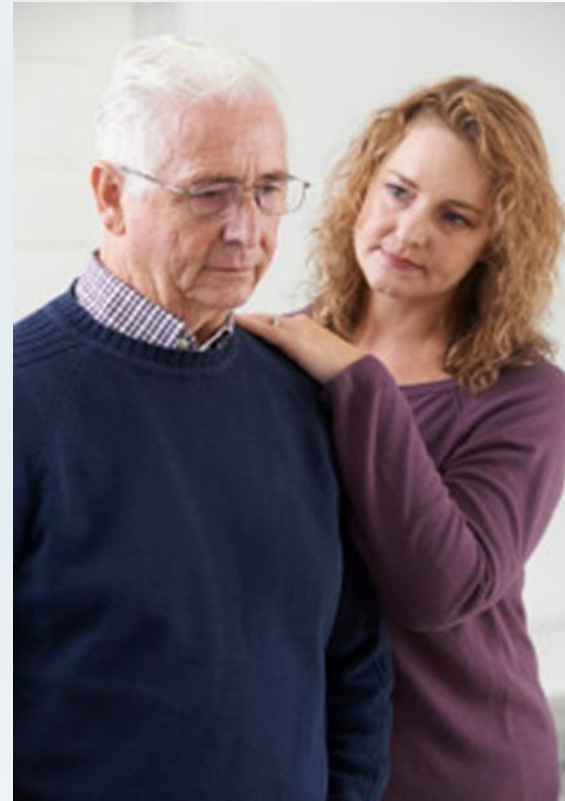
- Probate Conservatorship
- Limited Conservatorship
- LPS Conservatorship
  - Mental Health
- Person & Estate
  - Authority is proved by court-issued Letters of Conservatorship



# CONSERVATORSHIP OF THE PERSON

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- For an individual who is unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter.
- Placement
  - Responsible for providing for health, food, clothing, or shelter
- Has authority to Consent for Medical Treatment
- Agent under AHCD has priority over the conservator in decision-making power





# DEMENTIA POWERS (MAJOR NEUROCOGNITIVE DISORDER POWERS)

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- Dementia powers are necessary for placement in a secured perimeter residential care facility
- Power to authorize psychotropic medications
  - (Namenda, Aricept)



# CONSERVATORSHIP OF THE ESTATE

- For an individual who is substantially unable to manage his own financial affairs or to resist fraud or undue influence.



# SUPPORTED DECISION MAKING

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- A Supported Decision-Making Agreement appoints someone to help make decisions
- The Decider appoints a Supporter
- The Supporter does not make decisions for the Decider
- Most appropriate for Developmentally Disabled Adults



# RESOURCES

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- **Your Way: A Guide To Help You Stay in Charge of Decisions About Your Medical Care**
  - H.E.L.P.
    - <http://www.help4srs.org/publications/yourway>
    - (310) 533-1996
- **Physician Order for Life Sustaining Treatment**
  - Coalition for Compassionate Care
    - <http://www.capolst.org/>
    - (916) 489-2222

# RESOURCES FOR ADVANCE HEALTH CARE DIRECTIVE

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- **Advance Health Care Directive Kit**
  - California Medical Association
    - [www.cmanet.org](http://www.cmanet.org)
    - (800) 882-1262
- **Advance Health Care Directive Form and Instructions**
  - California Attorney General
    - <http://ag.ca.gov/consumers/pdf/AHCDS1.pdf>

# RESOURCES TO FIND AN ELDER LAW ATTORNEY

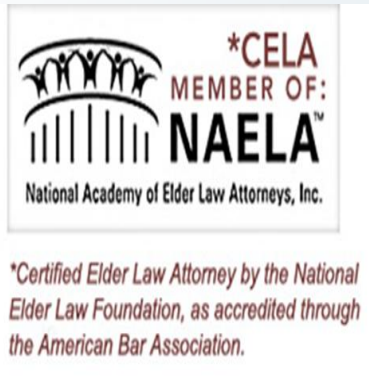
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- **California Bar Association**
  - <http://www.calbar.ca.gov>
  - (866) 442-2529
- **National Academy of Elder Law Attorneys**
  - <https://www.naela.org/>



# Thank You

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