

THE INS AND OUTS OF FIDUCIARY RELATIONSHIPS

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Capacity

Capacity of principal:

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

Capacity

- Contractual
- Medical Decision Making
- Testamentary
- Marriage

I. ADVANCED HEALTH CARE DIRECTIVES (AHCD)

- Directions to provide, withhold, or withdraw artificial nutrition and hydration and all other forms of health care, including cardiopulmonary resuscitation.

ADVANCED HEALTH CARE DIRECTIVES (AHCD)

- Selection and discharge of health care providers and institutions
- Approval or disapproval of diagnostic tests, surgical procedures and programs of medication

AHCD

Types of AHCD Forms

- Statutory
- Printed – 5 Wishes, California Medical Association
- Attorney drafted

AHCD must satisfy all of the following:

- Dated as of execution
- Signed by either the principal or in the principal's name by another adult in the principal's presence and at her direction.
- Acknowledged before a notary public or signed by two qualified witnesses.

AHCD 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 community care facility
- A witness may not be the operator or an employee of a residential care facility for the elderly

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 ombudsman.

AHCD

- NOTE: PAHC signed before January 1, 1992 expired seven years from the date of execution. PAHC or AHCDs signed after that date are indefinite in duration unless otherwise specified.

HIPAA concerns

- Most documents executed after 1996 have HIPAA releases.

Disposition of body

- Unless the principal limits the agent's powers some powers continue 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

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

Alternatives

- Do Not Resuscitate Order
- Instruction to forgo resuscitative measures.
- A bracelet, watch or medallion may be worn.
- Physician Orders for Life sustaining Treatment (POLST)
- Converts a patient's wishes concerning life-sustaining treatments into medical orders that are immediately actionable. Prevails over an AHCD or POHC.

II. POWER OF ATTORNEY FOR FINANCES (DPOA)

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

POWER OF ATTORNEY FOR FINANCES

- Agent or Attorney in Fact
- Multiple agents
- Act independently or joint action required
- Different agents for different tasks
- Successor agents

How to sign as POA

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

POWER OF ATTORNEY FOR FINANCES

- Powers granted by law
- Other powers granted by the Principal

POWER OF ATTORNEY FOR FINANCES - termination

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

POWER OF ATTORNEY FOR FINANCES -enforcement

- 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.

III. TRUSTEES

- Types of Trusts: Revocable or Irrevocable

- Trustee

 - Trustor as trustee

 - Co-trustees

 - Successor trustees

How does a successor trustee become the trustee ?

- 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?

- 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, is fully protected in dealing with or assisting the trustee and is not bound to inquire whether the trustee has power to act.

IV. CONSERVATORSHIPS

- Probate conservatorship
- Limited conservatorship
- LPS conservatorship (mental health)
 - Person & Estate
- Authority is proved by court issued Letters of Conservatorship

Conservatorship of the Person

- 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 conservator in decision making power

Dementia Powers

(Major Neurocognitive Disorder Powers)

- 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.

Resources

- 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

- Advance Health Care Directive Kit
 - California Medical Association
 - 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

- California Bar Association
- National Academy of Elder Law Attorneys

Thank You

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**Certified Elder Law Attorney by the National Elder Law Foundation, as accredited through the American Bar Association.*

