

It's Your Estate Presentation Outline – Week Two

Planning for the Grey Area of Incapacity: Using Advance Health Care Directives and Powers of Attorney

What is “Incapacity”? – Rarely a black or white decision.

Defined in California Probate Code Sections 810-813

- Presumption of Capacity §810
- The mere diagnosis of a mental or physical disorder SHALL NOT be sufficient in and of itself to support a determination that a person is of unsound mind or lacks the capacity to do a certain act. §811 (d)
- Capacity to Make Decisions §812
- Capacity to Give/Withhold Informed Consent to Medical Treatment §813

How Do You Plan for Incapacity? Communication is Key!

- 1) Health Care Power of Attorney
- 2) Advance Health Care Directive
- 3) HIPAA Authorization
- 4) Your Way
- 5) DNR & POLST
- 6) Durable Power of Attorney (Finances)
- 7) Conservatorship

Health Care Power of Attorney

Designates the person who has the authority to handle your medical affairs and convey your wishes to doctors upon your incapacity.

- The person granting the authority (you) is called the “Principal.”
- The person receiving the authority is called the “Agent.”

Qualities to look for when choosing an Agent.

- Willingness to follow your wishes,
- Proximity/Availability/Ability to serve,
- Trustworthy,
- Experience, and
- Religious beliefs.

Advance Health Care Directive

Document used to convey to your Health Care Agent your desires concerning life sustaining treatment and anatomical gifts.

Statutory form is found at CA Probate Code §4701.

HIPAA Authorization

Provides the Agents named in your Health Care Power of Attorney and General Durable Power of Attorney (discussed later) with access to your medical information.

Hospitals generally will not release your medical information to anyone, including a spouse or close family member, unless they are provided with a HIPAA Authorization.

Non-Legal Tools to Communicate Your Wishes

<https://itsyourmoneyandestate.org/educate/its-your-estate-fall/>

Your Way (Audience = Loved Ones)

Your Way is a guide to help you stay in charge of decisions about your medical care. It will help you think about what's important to you; what kind of medical care you want or don't want; and what quality of life means to you. It will help you communicate with your family and friends, so that if they ever have to make medical care decisions for you, your voice will be heard. Your Way is not a substitute for the official legal document in which you name the people who will make decisions for you, but it is a companion document for sorting out, recording, and communicating your feelings and views.

Prehospital DNR (Audience = First Responders/EMS Personnel)

Designed for use in a **prehospital setting** (patient's home, long-term care facility, during transport to or from a health care facility, and in other locations outside acute care hospitals).

Instructs EMS personnel what your decisions are concerning resuscitative measures in the event of cardiac arrest. Resuscitative measures to be withheld include chest compressions, assisted ventilation, endotracheal intubation, defibrillation, and cardiotoxic drugs.



POLST (Audience = First Responders/EMS Personnel)

Physician Orders for Life-Sustaining Treatment (POLST) is a form that gives seriously-ill patients more control over their end-of-life care, including medical treatment, extraordinary measures (such as a ventilator or feeding tube) and CPR.

Printed on bright pink paper, and signed by both a patient and physician, nurse practitioner or physician assistant, POLST can prevent unwanted or ineffective treatments, reduce patient and family suffering, and ensure that a patient's wishes are honored.

Types of Powers of Attorney (POA)

1. Healthcare vs. Financial
2. General vs. Limited
3. Durable vs. Non-Durable
4. Immediate vs. Springing
5. Statutory vs. Attorney Drafted vs. Financial Institution Forms

General Durable Power of Attorney

Designates the person who has the authority communicate on your behalf pertaining to financial matters.

- The person granting the authority (you) is called the “Principal.”
- The person receiving the authority is called the “Agent” or “Attorney-in-Fact.”

When Estate Plans Go Wrong: Naming the wrong person as Agent!

Being an Agent/Successor Trustee is a job. Who has the skills needed to do the job?

The legal authority to act on another’s behalf is a significant responsibility that can be abused and mismanaged with potential disastrous consequences for the Principal’s estate, or physical and mental well-being.

- The Agent owes a *Fiduciary Duty* to the Principal.
- The Agent is legally and ethically bound to act only in the best interests of the Principal.
- The Fiduciary Duty owed by an Agent to the Principal is one of the highest standards of care that exists under the law.



- Your Agent must be unquestionably trustworthy.

10 Traits to consider when “hiring” an Agent/Successor Trustee

- 1) Integrity/Humility
- 2) Reliability
- 3) Unbiased
- 4) Resolute
- 5) Organized
- 6) Financial competence
- 7) Willingness
- 8) Time
- 9) Proximity
- 10) Age

People commonly choose the following people as their Agent:

- Family member or friend,
- Professional advisor (CPA),
- Fiduciary,
- Co-Agents, and
- Alternate Agents

Discuss Pros and Cons

Discuss Prohibited Agents

Time Permitting

Conservatorship – The No-Plan Plan

“If you fail to plan, you are planning to fail!” Benjamin Franklin

Conservatorship

A court procedure giving another person the authority to act on behalf of an incapacitated adult when there is no advance legal planning.

- The person who can’t manage their financial or health care affairs is called the “*Conservatee*.”
- The person who is tasked with the duty of making the financial and health care decisions for the Conservatee is called the “*Conservator*.”



Conservatorship of the Estate - A conservator of the estate is appointed by a court for an adult person who is unable to manage their financial affairs or resist fraud or undue influence.

Conservatorship of the Person - A conservator of the person is appointed by a court for an adult person who is unable to provide for their personal needs for food, clothing, shelter, or health care.

Discuss Pros and Cons of Conservatorships

Benefits of Conservatorships

- Court supervision adds an extra layer of protection, ensuring transparency and accountability.
- Provides a structured mechanism for managing the Conservatee's affairs, offering protection against self-neglect or exploitation.
- The Conservator manages the Conservatee's finances, pays bills, and makes sound investments, ensuring financial stability and preventing financial hardship.

Problems With Conservatorships

- Court involvement
- Public record
- Time consuming
- Significant expense
- Emotionally trying
- Loss of control & civil liberties
- Indignity & intrusion
- Difficult to lift
- Potential for abuse

Thank you!



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