



Planning for Incapacity

by
Fay Blix, Attorney at Law

Planning for Incapacity

- **Durable Power of Attorney for Finances**
- **Advance Health Care Directives**
- **Conservatorship**

If I am unable to decide or speak for myself, who is going to be my substitute decision maker and what guidelines do I wish my substitute to follow?

Power of Attorney for Finances

- Durable vs. Regular
- General vs. Limited
- Immediate vs. Springing

Forms

- Bank Forms/Printed Forms
- Statutory Forms
- Attorney Drafted Forms
- Combination Forms

Choice of Agent

- Family member/Friend
- Professional Advisor, Fiduciary
- Multiple Agents
- Alternate Agents

Issues

- Proper execution
- Record or not record?
- Acceptance
- Misuse
- Termination/Revocation

Advance Health Care Directive

- Power of Attorney for Health Care
- HIPAA Release
- Do Not Resuscitate Form
- POLST

End of Life Has Changed!

1900	2000
Age of Death-46 years	Age of Death-78 years
Top Causes-Infection, Accident, Childbirth	Top Causes-Cancer, Organ System Failure, Stroke, Dementia
Disability-Very little	Disability-2-4 years prior to death
Financing-Modest, private pay	Financing-Substantial, public financing, 83% have Medicare

Power of Attorney for Health Care

1. Choose a medical decision maker.
2. Decide what matters most in life.
3. Choose flexibility for your decision maker.
4. Tell others about your medical wishes.
5. Ask doctors the right questions.

Top Priority!

The most important decision you need to make is the choice of who will act as your health care agent!

Choice of Agent

- Does your proposed agent live nearby?
- Does your proposed agent have religious or other beliefs that would prevent her or him from carrying out your wishes about health care?
- Is your proposed agent in good health?
- Can your proposed agent withstand pressure from relatives and friends?

Choice of Agent-2

- Has your proposed agent consented to act?
- Will your proposed agent benefit from your will or estate plan? Does it matter?
- Will your proposed agent be a forceful but diplomatic advocate on your behalf with your medical providers?
- Does your proposed agent know your personal values and wishes?

Choice of Agent-3

- Do you trust the proposed agent to make the "right" decisions for you?
- Is the proposed agent responsible, trustworthy and available?
- Is the proposed agent medically knowledgeable, and if not, is the agent willing to learn about your medical status and history?

What about Co-Agents?

- The statutory power of attorney for health care makes no allowance for co-agents.
- The Health Care Decisions Law is silent on the appointment of multiple agents, but its definition of "agent" includes a successor or alternate agent.
- Multiple agents increase the risk of conflict.
- Most health care providers prefer dealing with just one individual.

Alternate Agents

- You should be encouraged to name alternate agents to allow for succession in case the first named agent becomes incapacitated, dies or resigns.
- It is prudent to name someone younger in the agent lineup
- The naming of alternate agent can give you peace of mind knowing someone you trust will always be in charge of your health care decisions.

Who Can Be An Agent?

- Almost anyone over the age of 18 who has capacity can be appointed as a health care agent.
- A person who is related by blood, marriage or who is a registered domestic partner, may serve as an agent even if that person is an employee of the treating health care institution, community care facility or residential care facility for the elderly

Who Cannot Be An Agent?

- The supervising health care provider or an employee of a health care institution where the patient is receiving care;
- An operator or employee of a community care facility where the patient is receiving care;
- An operator or employee of a residential care facility for the elderly where the patient is receiving care;

Who Cannot Be An Agent?-2

- A supervising health care provider is not allowed to serve as an agent regardless of whether she or he is related to the patient;
- A conservator may not serve as agent under a power of attorney for health care signed by a person who is a LPS conservatee, unless the conservatee is represented by legal counsel and legal counsel signs a declaration

Scope of Agent's Authority

- Unless restricted by law or by you, the agent has the same powers with respect to health care matters as you would have absent incapacity;
- When serving, the agent has the right to receive information on your medical condition from the physicians, therapists, dentists and other treating health care providers and is authorized to review your medical records and consent to their disclosure;

Agent's Authority-2

- The agent can admit you to a hospital or sign an authorization removing you from a hospital against medical advice;
- The agent may consent to withholding or withdrawing health care necessary to keep you alive;
- Probate Code Section 4617 specifically includes the authority to withhold or withdraw artificial nutrition and hydration;

Agent's Authority-3

- The agent has a duty to act in accordance with your wishes as expressed in the power of attorney for health care or otherwise known to the agent or, if your wishes are not known, to determine what would be in your best interests within the context of your known personal values.

Postdeath Authority

- Power to authorize an autopsy;
- Power to donate your body or body parts for transplant or for therapeutic, educational or scientific purposes;
- Power to direct the disposition of your remains;
- Power to authorize release of your medical records to the extent necessary to fulfill the agent's post death duties.

Signing Requirements

- Two Witnesses-one of whom must sign a declaration indicating he or she is not related by blood or marriage
- Agents and health care providers cannot be witnesses
- Notarization eliminates witnessing requirements
- LTC Ombudsperson must be a witness if you are a resident of a skilled nursing facility

What Matters Most?

- My goals for my health care. . . .
- My fears about my health care. . . .
- My spiritual or religious beliefs and traditions. . .
- My beliefs about when my life would be no longer worth living. . .
- My thoughts about how my medical condition might affect my loved ones. . .

What I Want and Do Not Want

I have these views about my health care in these situations:

- If I had a reasonable chance of recovery, and were temporarily unable to decide or speak for myself, I would want. . .
- If I were dying and unable to decide or speak for myself, I would want. . .

What I Want and Do Not Want-2

- If I were permanently unconscious and unable to decide or speak for myself, I would want . . .
- If I were completely dependent on others for my care and unable to decide or speak for myself, I would want . . .
- This is how I feel about pain relief if it would affect my alertness or if it could shorten my life...

What I Want and Do Not Want-3

- Where I would like to die or other wishes I have about dying . . .
- My wishes about donating parts of my body when I die . . .
- My wishes about what happens to my body when I die . . .
- Any other things . . .

Choose Flexibility for Your Decisionmaker

- How much leeway would you want your agent to have?
- Do you want your agent to adhere strongly to your advance directive or do you prefer to allow for flexibility?
- How would you want your agent to make a decision if it involved a medical treatment or situation you had not previously discussed with your agent?

Choose Flexibility for Your Decisionmaker-2

- What if the doctor wasn't sure if a treatment would work, what would you want your agent to do?
- How would you feel if your agent made the "wrong" decision about a medical treatment?

Tell Others About These Medical Wishes

- Talk to your agent.
- Talk to your loved ones and friends
- Talk to your health care providers
- Put your wishes in writing and sign an advance health care directive
- Give a copy to all your important people and keep a copy in the glove compartment of your car

Ask Doctors the Right Questions

- Write down questions ahead of time.
- Bring someone with you.
- Tell doctors at the beginning of your visit that you have questions
- Ask about the good things that could happen, the bad things that could happen, options for different kind of treatment and what your life will be like after treatment

Ask Doctors the Right Questions-2

Be sure you understand what the doctors tell you:

“What I am hearing you say is. . . Is that correct?”

Considerations if giving specific instructions

- People change their minds.
- Recent medical condition/history is important.
- Focus on quality of life that is acceptable or unacceptable to the client.
- What does "quality of life" mean to you?.
- Never say Never!.
- Recognize that secondary illness can complicate situations

What Happens After The Signing

- An invisible advance directive=NO advance directive
- Circulate the advance directive liberally: all agents, all family, all physicians, hospital, nursing home, residential care facility for the elderly, home health agency, hospice, HMO office, clergy
- Discussion with agent
- Discussion with physician

Advance Directives Must Be Revisited-The 5 D's

- Decade
- Death of a loved one
- Divorce
- Diagnosis
- Decline

POLST

(Physician Orders for Life-Sustaining Treatment)

POLST

- Aim-to improve the quality of care that people receive at end of life
- See polst.org
- Utilized in 14 states: some have different acronyms-MOLST, MOST, POST

POLST Required Actions

- Discussion between the physician and patient regarding patient's goals/wishes that apply to crisis decisions: CPR, Pain control, Nutrition/Hydration, Comfort vs. Treatment
- Translates discussion/directive into doctor's orders on a visually distinct (bright pink) medical file cover sheet
- Ensures orders follow the patient across care settings
- Review orders as appropriate

POLST	ADVANCE DIRECTIVE
Advanced progressive illness	All adults
Current advanced illness-crisis decisions	Current or future conditions-all medical decisions
In a medical setting	In all settings
Targeted plan of care in the form of medical orders	Instructions/guidance-patient/agent has primary responsibility

POLST-2	ADVANCE DIRECTIVES-2
Surrogate can communicate patient's goals of care and give informed consent	Only the individual can execute
Physician has primary responsibility for portability	Patient/agent have primary responsibility for portability
Provider has responsibility for periodic review	Patient/agent have responsibility for periodic review

Advance care planning is a process, not an event and not a document!

Conservatorship

- Conservatorship is a court procedure that gives another the authority to act on behalf of an incapacitated person when there has been no advance legal planning
- Three types of conservatorship: 1) Probate conservatorship; 2) Limited conservatorship (for the developmentally disabled); 3) LPS (Lanterman-Petris-Short) conservatorship (for the gravely mentally disabled)
- Each type can be a conservatorship of the person or a conservatorship of the estate or both.

Conservatorship of the Person

A conservator of the person may be appointed for a person who is unable to provide properly for his or her personal needs for food, clothing or shelter as well as health care

A conservator of the person is given the authority to make personal decisions for the incapacitated person, but not the authority to make financial decisions or arrangements.

An agent of an advance health care directive trumps a conservator of the person unless a court specifically revokes the advance health care directive.

Conservatorship of the Estate

A conservator of the estate may be appointed for a person who is substantially unable to manage his or her financial affairs or to resist fraud or undue influence.

A conservator of the estate is required to provide regular accountings to the court and all other interested parties as to how the financial resources of the conservatee are being managed.

A conservator of the estate is usually required to post bond.

Conservatees With Dementia

For those Conservatees who have been diagnosed with dementia, the Conservator must specifically request the court to grant authority for the following: 1) to place the Conservatee in a residential care facility with a secured perimeter against his or her will; 2) to give the Conservatee psychotropic/dementia medications against his or her will.

An attorney is required to represent the Conservatee when these dementia powers are requested.

Choice of Conservator

- Nomination of the Conservatee-good idea to include a nomination in every advance health care directive and durable power of attorney for finances.
- Family members have priority.
- Professional fiduciary.
- Public guardian.

Pros of Conservatorship

- Court supervision of Conservator actions
- Eliminates dueling documents/family kidnapping wars
- Professional neutralizes feuding family dysfunction.

Cons of Conservatorship

- Indignity and intrusion of public finding of incapacity
- Red tape of court involvement as well as other strangers
- Significant expense
- Loss of control

“If you plan for the best case and the worst case happens, you are in bad shape. But if you plan for the worst and you end up with the best, then you are only slightly inconvenienced.” David Petersen

Fee-Blic, Attorney at Law
24031 El Toro Road, Suite 301
Laguna Hills, California 92653
(949) 544-7211
