

California's "Health Care Decisions Law"

California's "Health Care Decisions Law", which became effective July 1, 2000, changed the way we talk about authorizing someone else to make health care decisions for us when we are unable to do so. That law introduced the Advanced Health Care Directive, which expanded greatly on the more limited concept of a Health Care Power of Attorney that was prevalent in estate plans before enactment of the law.

Under this relatively new law, a person given authority to make health care decisions for another is referred to as a health care agent, even if the document (such as a Health Care Power of Attorney) refers to the agent as an attorney-in-fact or in some other manner. Under the Advanced Health Care Directive ("AHCD"), an agent can be given authority by the principal not only to consent to medical procedures or treatment for the principal, but can also be empowered to make end-of-life decisions according to the principal's written desires (such as whether to employ artificial means to prolong the life of a patient who is comatose or suffering from an incurable condition).

The AHCD may also designate a primary physician for the principal, provide authority for post-death anatomical gifts, authorize an autopsy, and direct the disposition of the principal's remains. The legislature has provided us with a statutory form of AHCD that addresses all of the above. Many estate planning attorneys, however, with good reason, will draft greatly expanded versions of Directives that close some of the holes left open by the "bare bones" statutory form.

Under the law the AHCD may also grant authority to the agent to make decisions relating to the personal care of the principal, including, but not limited to, determining where the principal will live, providing meals, hiring household employees, providing transportation, and arranging recreation and entertainment. This additional authority, and the principal or patient's instructions limiting or explaining the permissible use of this additional authority, is often found in Directives drafted by estate planning attorneys in consultation with their clients.

Clear instructions to the agent in the AHCD about the principal's wishes in these additional areas can go a long way toward avoiding litigation over an elderly parent's care and living arrangements, and, conversely, can provide a means to promptly correct the failure of an agent to comply with an elderly parent's directions. As an example, if an elder specifies that he or she wishes to remain at home and to pay for in-home services for so long as the elder can safely remain at home and afford such services, those directions can be enforced in the local probate court against an agent who may also be an heir and whose attention may instead be improperly focused on preserving the elder's assets for distribution at death to the next generation.

The same Health Care Decisions Law authorizes, among others, a relative or "any interested person or friend" to file a petition in the probate court to ask the judge to make a legal determination whether the acts of the agent are consistent with the patient's desires as expressed in an AHCD or otherwise made known to the court. Where the

patient's desires are not expressed in an AHCD, or are not addressed, as in an older Health Care Power of Attorney or "bare bones" statutory AHCD, witnesses and evidence will need to be presented to the court to enable the court to determine the patient's desires. If there is controversy in the family over the patient's desires, often brought about by the inability of the elder to explain those desires, such an evidentiary proceeding (or "mini-trial") can take a tremendous toll on family relationships. Children named as agents for their elderly parents typically do not react well to being removed by the court, at the behest of a relative or friend, for failing to act in the best interest of their elderly parent.

Such proceedings can take their toll on family finances as well. Witnesses may necessarily include health care professionals called to testify as experts by both petitioner and agent. And, as in most other areas of American civil law, there is no automatic provision in the Health Care Decisions Law for an award of attorney's fees to the winner.

If the AHCD does not address the patient's desires on a topic of his or her care, such as where the patient wants to live during a terminal illness, the patient's desires may be unknown or at least unclear. In that case the petition may ask the court to determine whether the acts or proposed acts of the agent are in the patient's best interest. In this case also an expensive evidentiary hearing or "mini-trial" may ensue, along with a lot of hurt feelings and injured pocketbooks.

Pending a hearing on the intentions of the patient and/or the patient's best interest, a temporary order may be issued by the court prescribing what provisions shall be made for the health care of the patient until the case can be heard and decided. Both the petitioner and the agent may apply to the court for that temporary order pending the hearing.

Here is a Checklist for a review of your AHCD:

Does your Health Care Power of Attorney or Advance Health Care Directive provide:

- For an alternate agent if your first choice is unavailable or cannot serve
- For your preferences regarding a funeral, memorial service or Celebration of Life
- Directions to your agent regarding the circumstances under which he or she should "pull the plug" or refuse artificial means of life support
- For your preferences regarding independent or group living arrangements, convalescence, etc.
- For your preferences regarding organ donation and anatomical gifts
- Authorization for the disclosure to your agent (and possibly others, such as your attorney) of your medical records and information under the Health Insurance Portability and Accountability Act

Estate planning attorneys recommend that you frequently review your estate planning documents, and that you give information and instructions to your health care agent regarding your wishes on all of the above health care and end-of-life decisions in your AHCD. Encourage your elder relatives to do the same. Giving information and instructions in the AHCD on all of these issues will not only help protect an elder from abuse, but will also help avoid family strife over an elder's care and living arrangements.

Doing so can also reduce or eliminate the risk that expensive legal proceedings will be the result of an incomplete or unclear AHCD.

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