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**"Frequently Asked Questions"**

**Advance Health Care Directive and Durable Power of Attorney for Health Care**

**Q: WHAT IS AN ADVANCE HEALTH CARE DIRECTIVE?**

A: An Advance Health Care Directive (previously referred to as a Durable Power of Attorney for Health Care) is a planning tool for addressing beforehand your health care needs should you become incapacitated. An Advance Health Care Directive allows you to authorize an agent to make decisions about your health care.

**Q: WHY DO I NEED AN ADVANCE HEALTH CARE DIRECTIVE?**

A: Society has given the medical profession a mandate to exert every effort to eradicate disease and push back the moment of death. To facilitate this effort, modern science has created a wealth of technology directed toward this noble goal. Today, many people who are leading productive lives would have either been disabled or deceased a generation ago. Effective as medical technology may be in eradicating disease and postponing death, it remains increasingly costly, complicated, and intrusive to the patient. Society is coming to realize that the use of medical advances must also take into account the effect on the individual, and the relationship of the individual to society. More and more it is recognized that many people prefer to "let nature take its course," and when death is imminent, "to die with dignity." The legal issue presented by modern medical technology is: "once undertaken, at what point does it cease to perform its intended function, and who should have the authority to decide that any further prolongation of the dying process is of no benefit to either the patient or his or her family?" An Advance Health Care Directive allows you to decide the answer to this question in advance.

**Q: HOW DOES AN ADVANCE HEALTH CARE DIRECTIVE WORK?**

A: The first step is for you to determine your desires concerning personal health care needs. You may wish to consult your physician or your family members in this regard. The next step is to appoint an agent to carry out your desires in the event that you are unable to do so. The agent will then make health care decisions on your behalf according to the Advance Health Care Directive you have signed.

**Q: HOW DO I SELECT MY AGENT?**

A: This is a decision you must carefully consider. Depending on your personal circumstances, a spouse, child, other relative, close friend, or neighbor may be an appropriate choice as your agent. You should select someone with whom you believe has the integrity, ability, and willingness to carry out your desires according to your Health Care Directive.

**Q.: WHAT ARE MY AGENT'S DUTIES?**

A: Your agent is obligated to implement your desires and to act in your best interest. The agent's duties may include making all your medical decisions as well as caring for your clothing, feeding, place of residence, and taking charge of other personal needs. Therefore, it is an excellent idea to discuss your wishes with the individuals you designate as your agent. If your wishes are unknown, the agent is bound to act in your best interest by law.

**Q: DOES MY AGENT NEED TO HAVE PREQUALIFICATIONS?**

A: There are no preset qualifications. However, you must consider the health, life expectancy, decision-making ability, and diplomacy of the prospective agent since the primary reason for the Advance Health Care Directive is to give the agent the power to make decisions in the event you are unable to do so.

**Q: IS THERE ANYONE WHO CANNOT SERVE AS MY AGENT?**

A: Under California law, any adult person may be an agent. However, California law prohibits the following from serving as an agent under a Advance Health Care Directive: a treating Health Care Provider, an employee of a treating Health Care Provider, a Community Care Facility Operator, an employee of a Community Care Facility Operator, the Operator of a Residential Care Facility for the Elderly, and the employee of the Operator of a Residential Care Facility for the Elderly. However, a relative by blood, marriage or adoption may serve as an agent under an Advance Health Care Directive, even if he or she is an employee of the treating Health Care Provider, the employee of a Community Care Facility, or the employee of a Residential Care Facility for the Elderly. Additionally, a conservatee under the Lanterman-Petris-Short Act has special requirements. Should your agent fit into any of the above categories, you should specifically inform the attorney preparing your Advance Health Care Directive.

**Q: WHAT IF MY DESIGNATED AGENT REFUSES TO ACT?**

A: An agent who has not accepted your appointment, may, without liability, decline to act. You may designate successors or alternate agents to allow for succession in case an agent declines to act, becomes incapacitated, dies, or resigns. Without the designation of a successor or alternate agent, the agent who accepted the appointment would not be allowed to resign if doing so would be detrimental to your best interests. If no successors or alternate agents are designated, the only available course of action may be to seek instructions in a court proceeding.

**Q: IS MY AGENT, OR ALTERNATE/SUCCESSOR AGENTS, REQUIRED TO SIGN/MY ADVANCE HEALTH CARE DIRECTIVE?**

A: An agent is not required to sign the Advance Health Care Directive instrument. However, it is a good idea to consult your agent to gain their consent and to insure their understanding as your agent, their active participation is required. An agent should be prepared to initiate discussions with Health Care Providers concerning options, and insist on being consulted with respect to all major medical treatment decision.

**Q: CAN I APPOINT CO-AGENTS?**

A: Appointment of co-agents seems legally permissible. However, we strongly discourage the use of co-agents due to potential difficulties. In the event you feel the absolute need to appoint co-agents, further consultation is necessary to explore the circumstances.

**Q: WHAT ARE MY AGENT'S LEGAL RIGHTS REGARDING MY MEDICAL INFORMATION?**

A: Your agent has the same rights as you to receive information regarding proposed health care, to receive and review medical records, and to consent to the disclosure of medical records. As a practical matter, Health Care Providers will not release medical information to agents unless the patient has been determined legally incapacitated. Furthermore, you may limit the right of your agent to receive medical records, such as prohibiting the examination of specified medical records or by providing that the examination of medical records be authorized only if you lack the capacity to give informed consent.

**Q: WHAT IS THE AUTHORITY OF MY AGENT?**

A: An agent who is authorized to make health care decisions under a Advance Health Care Directive can consent, refuse to consent, or withdraw consent to provide you with health care. The agent who is given the broadest possible powers virtually steps into your shoes and can authorize any care, treatment, service, or procedure to maintain, diagnose or treat your physical or mental condition. Generally, the agent has no authority to act when you are not incapacitated.

**Q: WHAT ARE THE LIMITATIONS ON MY AGENT'S AUTHORITY?**

A: Under California law, your agent may not be authorized to consent to your commitment to, or placement in, mental health treatment facility, convulsive treatment, psychosurgery, sterilization, or abortion.

**Q. WHEN DOES MY ADVANCE HEALTH CARE DIRECTIVE BECOME EFFECTIVE?**

A. Your Advance Health Care Directive can take effect immediately or when you become legally incapacitated. In practice, most Advance Health Care Directives are drafted to take immediate effect, but the agent is not authorized to make health care decisions as long as you are able to give informed consent, unless you otherwise specify in the instrument. Under the law, you are able to give informed consent as long as you understand the nature and consequences of that to which you are asked to consent.

**Q: HOW LONG IS MY ADVANCE HEALTH CARE DIRECTIVE VALID?**

A: Your Advance Health Care Directive remains valid indefinitely from the date of its execution. However, you may specify a shorter period for the effective time of the Advance Health Care Directive.

**Q: CAN I REVOKE MY ADVANCE HEALTH CARE DIRECTIVE?**

A: So long as you have the capacity to give an Advance Health Care Directive, you may also revoke the appointment of the agent under an Advance Health Care Directive by (1) notifying the agent orally or in writing, or (2) notifying your Health Care Provider orally or in writing. The Health Care Provider who has been given notice that the authority granted to an agent to make health care decisions is revoked, must make the revocation part of your records and make a reasonable effort to notify the agent of the revocation. Additionally, an Advance Health Care Directive is automatically revoked, unless it provides otherwise, if a new, valid Advance Health Care Directive is signed, or if a former spouse is designated as the agent to make health care decisions when a marriage is dissolved or annulled.

**Q: WHAT ARE THE RIGHTS OF THE HEALTH CARE PROVIDER UNDER MY ADVANCE HEALTH CARE DIRECTIVE?**

A: Health care providers are not subject to criminal prosecution, civil liability, or professional discipline if they follow the directions of your agent if: (1) the provider has a good faith belief that the agent is authorized to make the decision; (2) the provider has a good faith belief that the decision is not inconsistent with your expressed desires; and (3) when the decision is to withhold life support, the provider has made a good faith effort to determine your desires, has documented the effort, and the results are in your medical records, and the decision is not inconsistent with any of your expressed desires. The immunity granted the Health Care Provider does not relieve the Health Care Provider from liability for malpractice. Additionally, the health provider is not protected from liability for failing to provide the agent necessary information for the agent to give informed consent. A Health Care Provider is not authorized to do anything illegal. In some circumstances, Health Care Providers are authorized to act without informed consent, such as an emergency. These situations continue to be governed by the law otherwise applicable. In short, the Health Care Providers have the same rights and duties towards your agent as towards you.

**Q: DOES MY ADVANCE HEALTH CARE DIRECTIVE HAVE ANY EFFECT AFTER MY DEATH?**

A: If you so choose, your agent has the power to make a disposition under the Uniform Anatomical Gift Act (Health and Safety Code §§ 7150-7156.5), to authorize an autopsy under Health and Safety Code § 7113, and to direct disposition of your remains under Health and Safety Code § 7100. In the event of your death, your agent under an Advance Health Care Directive takes priority over all individuals and can act to the same extent as you could act if living and competent regarding these issues.

**Q: WHAT IS THE RELATIONSHIP BETWEEN MY ADVANCE HEALTH CARE DIRECTIVE AND A CONSERVATORSHIP?**

A: An Advance Health Care Directive should effectively avoid the need for a conservatorship in the event you become incapacitated and do not object to the agent's actions. If both a conservatorship and an Advance Health Care Directive are in existence, the agent under an

Advance Health Care Directive is not accountable to the conservator and takes priority over the conservator of the person in making health care decisions. However, the court has discretion, on showing of good cause, to issue a temporary order prescribing the health care to be dispensed. Furthermore, there are some situations in which the Advance Health Care Directive may not avoid the need for a conservatorship. For example, if the incapacity is through a condition such as Alzheimer's disease, the person who suffers from this condition may have moments of lucidity in which he or she rejects the agent's assistance or challenges the agent's decisions, often in an effort to preserve personal autonomy. In circumstances such as this, there may be no alternative to the conservatorship of the person if objections are made to the agent's actions.

**Q: MAY A PETITION FOR COURT SUPERVISION BE FILED ON MY ADVANCE HEALTH CARE DIRECTIVE?**

A: When you have executed the Advance Health Care Directive, a petition for court supervision would be allowed to determine whether the acts or proposed acts of your agent are consistent with your desires or are in your best interests, if your desires are not clear.

**Q: ARE THERE ANY LIMITATIONS ON THE COURT'S POWER WITH RESPECT TO MY ADVANCE HEALTH CARE DIRECTIVE?**

A: You may eliminate the authority of any person, except the court appointed conservator, to petition the court to enforce the duties of your agent. However, this is a complicated matter and not advisable. Limiting the court enforcement power requires absolute faith and trust in the agent, because the agent's acts cannot be openly questioned. To limit the power in this manner reduces the safeguards that protect the principal from abuse by the agent. If you feel an absolute need to limit the court's power of review of agent's acts, further consultation would be necessary to explore the specific circumstances.

**Q: WHAT IS THE RELATIONSHIP BETWEEN MY ADVANCE HEALTH CARE DIRECTIVE AND MY OTHER ASSET MANAGEMENT TOOLS?**

A: The Advance Health Care Directive is an independent instrument and will not by itself impact the management of your assets. However, it's best to appoint agents to make health care and asset-management decisions who will share the common goal of providing for your well being. The duties and powers of the individual making health care decisions may differ distinctly from those of the person making asset management decisions, although there are areas of overlap. However, the health care decisions should always take priority. In fact, it may be improper for an agent to make decisions based on financial concerns. The agent under the Advance Health Care Directive should be prepared to outline the intended course of action and present it to the asset manager who will then have an opportunity to review the proposal in advance, and make an informed decision about the money that must be budgeted and spent. The reason for this procedure is so that the asset manager is not allowed to "second guess" the agent under the Advance Health Care Directive, but to minimize surprise and conflict. This conflict may be nonexistent if you trust an agent to act as both asset manager and health care decision-maker.