



Southern Caregiver Resource Center

Caring for those who care for others

Fact Sheet: **Legal Issues and Consultation**

Introduction

When an adult member of your family has been diagnosed with a medical condition, which has led or can lead to impairment in brain functioning, legal consultation is extremely important. It is important to find an attorney with whom you feel comfortable and who has the expertise to advise you on these matters.

Planning for future health care decisions and management of assets is important because the adult with a brain impairment may reach the point that he/she is not able to make decisions and not legally competent to manage financial affairs. Appropriate legal procedures and documents drafted ahead of time, before the patient becomes incapacitated, will prevent the need for conservatorship proceedings and allow the client the opportunity to clearly state his/her desires.

Areas of Concern

There are several legal issues to consider when a person is (or may become) incapacitated:

1. Management of the person's financial affairs during his or her lifetime.

Options for managing assets include:

- Durable Powers of Attorney
- Revocable living trusts
- Designation of a representative payee

- Conservatorship (or Guardianship) of the estate

Each of these has advantages and disadvantages, which should be discussed thoroughly with an attorney.

2. Management of the person's medical decisions:

- Advance Healthcare Directive:
 - Durable Power of Attorney for Healthcare
 - Healthcare directive
- Conservatorship of the Person

3. Management of the person's long-term personal care: What level of care does the person need? Is it physically and financially feasible for the person to live at home or will they relocate to a residential care facility or skilled nursing facility?

Options for paying for long-term care include:

- Long-Term Care Insurance
- Medicare
- Medicaid or Medi-Cal
- Supplemental Security Income (SSI)
- In-Home Supportive Services (IHSS)
- Veterans' Benefits

4. Preserving the family assets: ensuring that the patient's spouse and

any disabled family members are adequately protected.

5. The distribution of the person's assets upon his or her death. Special arrangements need to be made if the person has a disabled spouse, child or other family member they wish to provide for.

The options for distributing assets upon death include:

- Will
- Revocable Living Trust
- Joint Tenancy Accounts
- Payable on Death Accounts
- Transfer with a Retained Life Estate

Each of these has significant legal ramifications and should be discussed with a knowledgeable advisor. Also, some financial products, such as life insurance, IRA's and annuities, provide for the distribution upon death to a designated beneficiary.

Protection of Assets if a Person Needs Long-Term Custodial Care in a Skilled Nursing Facility

Public benefits planning is essential if the impaired person will eventually require care in a skilled nursing facility. Medicare and most private insurance plans do not cover custodial and long-term care in nursing homes. In the majority of instances, this type of care has to be paid by one's private resources or by Medi-Cal. Medi-Cal has very specific income and resource eligibility requirements. Planning in advance can ensure Medi-Cal eligibility and provide for the adult needing skilled nursing facility placement as well as for the spouse who will continue to reside at home.

Planning options can include:

- Converting non-exempt assets into exempt assets
- Transferring the family residence to a spouse
- Transferring the principal residence with the retention of a life estate
- Use of court orders to increase the amount of resources and/or income the spouse of a nursing home resident can retain
- Specific types of Trusts;
- Gifting of assets
- Spending down

Each of these options has significant implications and should be thoroughly discussed with an attorney who is knowledgeable in Medicaid (Medi-Cal) law.

Preparing for a Legal Consultation

It's helpful to have a clear idea of the outcome you would like for your legal consultation. What you would like to gain from the appointment? Learning as much as possible ahead of time will help ensure a productive consultation.

Things to Discuss with the Attorney

Specific items to discuss in relation to your needs are:

- Health Care Decisions:
 - Durable Power of Attorney for Health Care/Advance Health Care Directive (California)
 - Conservatorship of the Person

- Management of Assets:
 - Durable Power of Attorney for Property Management
 - Living Trusts
 - Conservatorship of the Estate
- Public Benefits Planning:
 - Conversion to Exempt Assets
 - Spending Down
 - Allocation of Assets

Items to Bring with You to the Consultation

- List of major assets (real estate, stocks, jewelry, insurance, etc.)
- Lists of all major debts
- Any titles you may have and stocks and bonds that are community property
- Contracts or other legally binding documents. List of major debts.
- Bank statements, passbooks, CDs—again showing who the owners are and how title is held
- Existing wills and Durable Powers of Attorney, if possible, changes are to be discussed

After Your Consultation

After you have had a chance to discuss your needs with an attorney, you will need to decide what planning measures are appropriate for you. Southern Caregiver Resource Center has a list of attorneys who are familiar with this area of law.

Glossary

Advance Health Care Directive. A document in which you can: 1) instruct

your physician as to the kinds of medical treatment you might want or not want in the future (sometimes called a *Living Will*); and 2) choose someone to make medical decisions for you in the event you are unable to make those decisions yourself (in many states, this is called a *Durable Power of Attorney for Health Care*, or *Power of Attorney for Health Care*).

Agent. Person you designate to act for you or in place of you to carry out your business. Attorney-in-fact. The person named in a Durable Power of Attorney to act as an agent. This person need not be an attorney.

Beneficiary. An individual who receives the benefit of a transaction, for example, a beneficiary of a life insurance policy, a beneficiary of a trust, beneficiary under a Will.

Conservatee or Ward. The incapacitated person for whom a conservatorship or guardianship has been established.

Conservator or Guardian. An individual who is appointed by the court to act on behalf of an incapacitated person.

Conservatorship or Guardianship. A court proceeding in which the court supervises the management of an incapacitated person's affairs and/or personal care.

Directive to Physicians. A written document in which an individual states his or her desire to have life-sustaining procedures withheld or withdrawn under certain circumstances. This document must meet certain requirements under the law to be valid. For more information on POLST, see fact sheet, *Legal Planning for Incapacity*.

Durable Power of Attorney for Health Care. A type of Advance Health Care Directive, this is a document in which an individual nominates a person as his or her agent to make health care decisions for him or her if he or she is unable to give medical consent. This document can give the agent the power to withdraw or continue life-sustaining procedures.

Durable Power of Attorney for Asset Management. (Durable Power of Attorney for Finance). A document in which individuals (the “principal”) nominate a person as their agent (attorney-in-fact) to conduct financial transactions on their behalf. This document can be either “springing,” which means that it is effective only upon the principal’s incapacity, or “fixed,” which means that the document becomes effective when it is signed.

Executor. The individual named in a Will who is responsible for administering an estate during probate. The Executor is the person responsible for making sure all taxes and other expenses are paid and distributing the property of the deceased person in accordance with the Will.

Federal Estate Taxes. A tax is due at death if the estate exceeds a given amount and is calculated on the value of the deceased person’s estate at the time of death.

Health Insurance Portability and Accountability Act of 1996 (aka HIPAA). Federal legislation which limits the informal communication of information from doctors and other health care providers

In-Home Supportive Services (IHSS). A program in California that pays for non-medical services for persons who

meet certain financial criteria and who could not remain safely at home without such services.

Irrevocable Trust. A trust that has terms and provisions which cannot be changed.

Joint Tenancy. A form of property ownership by two or more persons designated as “joint tenants.” When a joint tenant dies, his or her interest in the property automatically passes to the surviving joint tenant and is not controlled by the Will of the deceased joint tenant and is not subject to probate.

Life Estate. An interest in property that lasts for the life of the person retaining the life estate. When a person who has a life estate interest dies, the property passes to the person holding the remainder interest, without the need for probate.

Living Will. A written document in which an individual conveys his or her desire to die a natural death and not be kept alive by artificial means. Unlike a Durable Power of Attorney for Health Care, the wishes in this document are not legally enforceable in many states.

Long-Term Care Insurance. Private insurance, which, depending on the terms of the policy, can pay for home care, or care in an assisted living facility or skilled nursing facility.

Medicaid. A state and federally financed program that provides medical care to low income persons. In California it’s called Medi-Cal.

Medicare. A federal medical coverage program for persons who are over 65 years old or who are disabled. It is funded by Social Security deductions and has no income or resource

restrictions. It does *not* pay for long-term custodial care.

Probate. The court preceding that oversees the administration of a deceased person's estate. Wills are subject to probate; living trusts (if properly funded) are not.

Revocable Living Trust. A device that describes certain property, names a trustee (who manages the property) and names a beneficiary who receives benefit from the trust. A living trust is an effective means of avoiding probate and providing for management of assets. It can be revoked by the person who created it during that person's lifetime.

Social Security Retirement Benefits. Benefits, which eligible workers and their families receive when the worker retires. The worker must work for a specified period at a job that is covered by Social Security in order to be eligible for benefits. A worker must be at least 62 years old to receive retirement benefits.

Social Security Disability Benefits. Social Security benefits payable to disabled workers and their families.

Special Needs Trust. A specially drafted trust that provides a fund to supplement the governmental benefits of a beneficiary (someone who is disabled and receiving Social Security Disability or Supplemental Security Income) while not affecting that beneficiary's eligibility for public benefits (usually Medicaid).

Spousal Impoverishment Law. Federal legislation that provides a minimum income and savings for one member of a married couple when the other member goes to a nursing home and that care is being paid for by Medicaid.

Supplemental Security Income (SSI). A federal program which provides cash assistance to the aged, blind and disabled who have limited income and resources.

Testator. The person who executes a Will.

Trustor (Settlor). A person who creates a trust.

Trustee. The individual who is responsible for managing the property in the trust for the benefit of the beneficiary.

Will. The document a person signs that tells how he or she wants his or her estate administered and distributed upon death. It must conform to certain legal requirements in order to be valid. The terms of a Will become operational only upon the testator's death.

Resources

Southern Caregiver Resource Center
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Southern Caregiver Resource Center offers free support services to caregivers of adults with chronic and disabling conditions in San Diego and Imperial counties. Services include information and referral, needs assessments, care planning, family consultation, case management, individual counseling, legal and financial consultation, respite care, education and training, and support groups.

Elder Law and Advocacy
www.seniorlaw-sd.org

Free legal services and health insurance counseling for San Diego County seniors.

National Academy of Elder Law Attorneys

(703) 942-5711

www.naela.com

Provides information on how to choose an elder law attorney and referrals to elder law attorneys.

San Diego County Bar Association

(800) 464-1529

www.sdcba.org

Programs help clients find qualified lawyers, resolve disputes and educate San Diegans on their legal rights and responsibilities.

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