



## **Fact Sheet:** **Legal Planning for Incapacity**

As you face aging and the need to make plans for your future, you face having to make legal decisions about many aspects of your lives. These legal decisions not only protect you from others doing things you might not like to you, they also protect family and loved ones by giving them guidance in the care that you would like to receive. After completing all the legal paperwork, the next step is to sit down and talk to family about the decisions you have made and why.

### **What Are the Legal Documents Everyone Should Have?**

#### **Advance Health Care Directive**

- Gives power to a person you designate to make health care decisions for you **ONLY IF** you can't speak for yourself
- Also called Living Will, Durable Power of Attorney for Healthcare
- Each state has slightly different versions of the form, but a form from one state will be honored in another state
- Hospitals and doctor's offices have the forms
- Everyone over 18 should have one
- Must be completed while you are competent to know what you are signing, i.e. without dementia
- Often used to decide on feeding tubes, ventilators and other treatments at the end of life or when someone is unconscious

- Only needs to be witnessed; does not need to be notarized

#### *What happens if you don't have an Advance Health Care Directive?*

- Doctors will do everything to treat your condition and keep you alive
- Family will be asked what to do
- If they don't know what your wishes would be, there might be family conflict and guilt over making the wrong decision
- Physician training, hospital and nursing home policies often dictate the use of "heroic means" to sustain life, "reviving" a very ill person after a stroke or using a respirator for someone deemed medically "brain dead" are standard procedures used in many hospitals

#### **POLST**

- Stands for Physicians Orders for Life Sustaining Treatment and replaces DNR—Do Not Resuscitate
- Allows individuals with life threatening illnesses to decide with their doctors what treatment they would or wouldn't want. Since it is a physician's order, it is not open to the will of others
- Is helpful if you do not want 911 Emergency Responders to perform CPR—Cardio-pulmonary Resuscitation and expands on other treatments you might or might not want

### *What happens if you don't have a POLST?*

- If 911 is called, EMTs are required to do everything possible to resuscitate a person and keep him/her alive until they arrive at the hospital

### **Will**

Says how you want your estate (money and belongings) to be dispersed to family, friends, organizations, etc. after you die.

- Also called Last Will and Testament
- Each state has different laws about estates, but most states will honor an out state will
- Can be hand written or completed using on line forms, but necessary to be witnessed and/or notarized
- If estate is complicated or over \$100,000, it is best to have an attorney help you write the will or review what you wrote
- Must be completed while you are competent to know what you are signing, i.e. without dementia
- In a will, you appoint someone to be the executor or administrator who will pay your final bills and see that your wishes are carried out
- Probate is the transferring of property when someone dies. The probate court oversees the executor to assure that the estate is divided as stated in the will

### *What happens if you don't have a will?*

- If you die without a will, the court will probate your estate, e.g. decide how your estate should be distributed.

### **Durable Power of Attorney for Finance**

Allows someone to access your finances, including checking account, investments, property in order to pay your bills.

- A Durable Power of Attorney is valid even if you are incapacitated
- Must be completed while you are competent to know what you are signing, i.e. without dementia
- Needs to be someone you trust as this person has a lot of control over your finances. If you don't have someone you trust, you should consult a professional
- Spouses might not have access to all of your funds unless everything, including investments, is held as joint property

### *What happens if you don't have a Power of Attorney for Finance?*

- If you don't have a durable power of attorney for finance and you can't manage your finances, a judge will have to appoint someone to do so. It may mean you will have to be conserved, e.g. someone appointed by the court will oversee your care and finances.

### **Final Arrangements**

- Decide whether you would like cremation or burial and let the family know. Also let loved ones know about your wishes regarding organ donation and other special arrangements
- Put your wishes in writing in a place family members can find them
- The more decisions you make beforehand, the fewer decisions family has to make during a difficult time when they are grieving

### *What happens if you don't make your wishes known about final arrangements?*

- Family can often be in conflict about what you would have wanted

- The law can determine who has the power to make the decision if it is unclear or there is conflict
  - Generation Skipping Trust—allows grandchildren to directly inherit without paying taxes

## What Are the Other Things You Might Need?

### Trusts

A trust creates a legal entity that holds your assets for you so that your estate does not have to go through probate when you die.

- Also called a Living Trust
- You name a trustee to oversee the trust both while you are alive and to distribute the trust to beneficiaries when you die
- You may be the trustee of the trust while you are alive, in which case you name a successor trustee for the trust who will manage it after you die or become incapacitated
- A revocable trust allows you to control everything that happens in the trust while you are alive
- An irrevocable trust cannot be changed without the beneficiary's consent
- There are many options for trusts for specific purposes, such as:
  - Special Needs Trusts—puts money aside to help someone who is disabled
  - Charitable Trust—money given to a charity
  - Bypass Trust—irrevocable trust passes assets to the spouse and then the children at death of second parent, limiting estate taxes
  - Life Insurance Trust—removes life insurance from estate and thus estate taxes

*What happens if you don't have a trust?*

- Depending on the value of your assets, your estate will go through probate which can take several months and incur costs to the court.

### Beneficiary Forms

Bank accounts, investments, insurance, and retirement plans can be designated as “payable on death” to a named beneficiary, which means the funds don't have to go through probate.

- Allows access to funds immediately, rather than waiting for probate to close

*What happens if you don't have fund “payable on death?”*

- Unless funds are in a trust, the estate must be probated through the court which can take several months (when the funds might not be available) and incur costs to the court.

### Where to Find My Important Papers

Have a central place to keep wills, trusts, powers of attorney, etc. so that family members will know where to look for these documents.

*What happens if you don't have a central place?*

- Often, particularly in times of emergency and stress, we get confused and don't know where something important might be. Having a place to go to will reduce the possibility of forms being misplaced or lost. The legal forms are necessary to assure the care you or a loved one might want are carried out.

## Conclusion

In a recent survey, 81% of the people said they think about these issues, however only 33% said they had completed the necessary forms. Although it is hard to talk about and think about, it is important to take care of these matters for your own sake and for the sake of your family.

## Resources

### **Southern Caregiver Resource Center**

3675 Ruffin Road, Suite 230  
San Diego, CA 92123  
(858) 268-4432 | (800) 827-1008 (in CA)  
Fax: (858) 268-7816  
E-mail: [scrc@caregivercenter.org](mailto:scrc@caregivercenter.org)  
Website: [www.caregivercenter.org](http://www.caregivercenter.org)

The Southern Caregiver Resource Center offers services to family caregivers of adults with chronic and disabling health conditions and is for residents of San Diego and Imperial counties. Services include information and referral, counseling, family consultation and case management, legal and financial consultation, respite care, education and training, and support groups.

### **Family Caregiver Alliance National Center on Caregiving**

(415) 434-3388 | (800) 445-8106  
Website: [www.caregiver.org](http://www.caregiver.org)  
E-mail: [info@caregiver.org](mailto:info@caregiver.org)

Family Caregiver Alliance (FCA) seeks to improve the quality of life for caregivers through education, services, research and advocacy. Through its National Center on Caregiving, FCA offers information on current social, public policy and caregiving issues and provides assistance in the development of public and private programs for caregivers.

### **American Bar Association (ABA)**

[www.americanbar.org](http://www.americanbar.org)

### **National Academy of Elder Law Attorneys**

[www.naela.org](http://www.naela.org)

### **National Association of Area Agencies on Aging**

[www.n4a.org](http://www.n4a.org)

### **Compassion & Choices**

[www.compassionandchoices.org](http://www.compassionandchoices.org)