



Talbot Law Group, P.C.

Trusts & Estates | Elder Law

Your Guide to The Advance Healthcare Directive in California:

What it is and Why You Need One



If you're over 50, having an Advance Healthcare Directive is a must. One out of seven people will develop some form of dementia by age 70, and the numbers are increasing*. In addition, new concerns, such as the Covid19 Pandemic create further risk. Having someone who can make healthcare decisions for you, should you lose mental capacity, is critical. In this guide, I'll tell you exactly what an Advance Healthcare Directive is, and why you need one ASAP.

1. What *exactly* is an Advance Healthcare Directive?

An "Advance health care directive" or "advance directive" is also known as an individual health care instruction or a power of attorney for health care, and is

governed by [Probate Code 4605](#). The primary goal of the Advance Healthcare Directive (or power of attorney for healthcare) is to authorize an agent to make healthcare decisions for the principal, or person executing the document [see Probate Code § 4629].

2. When does an Advance Healthcare Directive or Power of Attorney for Healthcare typically become effective?

A Healthcare Directive can grant an agent power to act on behalf of the principal at any time, but the document is typically effective only “upon the incapacity of the principal.” In most cases, an Advance Healthcare Directive will become effective when the principal (person whom document is for) develops dementia or related condition, but it can also be used for short term incapacity such as one might experience if they had a serious accident or other medical condition. The term “incapacitated” applies to anyone who is mentally incapacitated, which essentially means the person is no longer capable of making his or her own healthcare decisions. If the condition is short term, upon recovery the individual can begin making their own decisions again and the Advance Health Care Directive is mute.

3. Why is having an Advance Healthcare Directive Essential?

Having a legally valid [Advance Healthcare Directive](#) in place avoids possible complication and the need for a Conservatorship. With the rates of Alzheimer’s and related conditions on the rise, as well as pandemics such as the Coronavirus, the Advance Healthcare Directive is only becoming more relevant.

A conservatorship is a costly, cumbersome court process in which an agent is appointed by the court to act on someone’s behalf. Many conservatorships become litigated because family members or friends cannot agree on who should

be the designated agent, or “Conservator”. This gives rise to high attorney fees and court costs.

4. Why is it better to have an Attorney draft your Healthcare Directive as opposed to a document preparer or pre-printed form?

An Advance Healthcare Directive drafted by an attorney is:

1. Done correctly so as to be **Legally Valid**
2. Drafted **specifically for your circumstances**
3. Held to a **higher standard in a Court of Law**. Should there ever be any question about your designated agent, a document drafted and obtained with the counsel of an attorney is by its nature presumed more legally defensible than a document prepared without legal counsel.

5. Is an Advance Directive "durable"?

Durable means a legal document that it is not affected by the principal’s (person who document is for) subsequent incapacity. Thus, the document is still valid and holds true when and if that person should become incapacitated. While the term “durable” is not used in reference to the Healthcare Directive, all Powers of Attorney for Healthcare in California are covered by the Health Care Decisions Law (Probate Code § 4600) and as such, are durable.

6. In addition to appointing an agent to make healthcare decisions in the event of incapacity, what else does a typical Advance Healthcare document include?

An Advance Healthcare Directive typically includes: individual health care instructions, provisions for personal care, decisions about anatomical gifts (organ donation), designation of physicians, and wishes for burial.

7. What powers are granted to the designated agent?

An Advance Directive typically gives the agent power to make health care decisions to the same extent the principal (person who document is made for) could make those decisions if they had the capacity to do so. It also includes decisions to provide, withhold or withdraw hydration and artificial nutrition, as well as all other forms of health care to keep the principal alive.

8. Can you designate more than one agent for your Advance Directive?

Yes. You can designate two or more “co-agents” to act together, and you can also designate “successor agents” to act if the primary agent is unable or unwilling to do so.

9. Why do attorneys not typically recommend designating co-agents?

If you want to designate two or more persons to act together to make your healthcare decisions, you have to be certain that those people can and will work together. In general, I always recommend designating only one person at a time to avoid complication and possible disagreement. It is often this type of personal disagreement which lands people in court.

10. When parents have multiple children, what is a good way to choose who will be their primary agent, so as not to offend the other children?

In a situation where parents would trust all of their children to act as their agents, it is advisable to name them in order of age. It is also advisable to communicate to all children that this has been done, and the reason the oldest was chosen was simply because of age, not preference.

11. What is the healthcare agent’s scope of powers when it comes to “Personal Care”?

An advance healthcare directive typically bestows power upon the agent to make personal care decisions to the same extent that the principal would make those decisions if they had the capacity to do so. It includes determining where the principal will live, making provisions for meals, hiring household employees, providing for transportation, handling mail, and arranging recreation and entertainment. The person executing the Directive can be as specific as they would like in terms of outlining how they would like their care to be.

12. Who decides that someone is no longer able to make their own healthcare decisions?

Generally, it is the primary physician who will make the determination of incapacity. If there is any reason to think someone may contest the physician’s statement, it is best to get multiple doctor’s opinions. In certain cases, the decision may be made by the Court.

13. Does the Advance Healthcare Directive allow one to elect a Conservator, in the event that one is needed?

In the event that a Conservatorship becomes necessary, the Advance Healthcare Directive elects someone to be nominated as Conservator. Generally this is the same person as the agent.

14. In terms of “near death planning,” what does the Advance Directive provide for?

A. Relief from Pain - Your Advance Healthcare Directive allows you to state the level of pain relief you wish to be granted as you near death. Most people will elect to have “treatment and alleviation of pain and discomfort” provided for at all times, but someone opposed to painkillers may elect a different choice.

B. Whether or not to “pull the plug” - Your Advance Directive allows you to say whether or not you want to be kept in a persistent vegetative state, or “artificially delay” your death through the means of modern technology. This one is particularly important and became extremely relevant in the [case of Terry Schiavo](#), whose husband and parents fought for years in court regarding whether or not to keep her alive. Had Terry done an Advance Healthcare Directive, the court would have had direction as to her wishes regarding her own life.

15. Does an Advance Healthcare Directive allow someone to state lifestyle preferences, such as where they want to live and activities they enjoy?

Yes. An Advance Healthcare Directive is used to express how one wishes to live and where one wishes to live, should he or she become incapacitated. Most people will elect to stay in their homes for as long as possible, and continue social interactions regardless of the ability to fully participate. One can also specify his or her wishes regarding religion or religious practices, as well as activities they wish to continue. For example, a person who particularly enjoys nature or spending time outside could express a wish to spend a significant amount of time outdoors.

16. What three main topics does the Advance Healthcare Directive address in terms of Death Planning?

Your Advance Healthcare Directive specifies your wishes regarding:

1. Organ Donation

2. Autopsy (if necessary)
3. Burial/Funeral
4. Religious or Non-Religious Preferences
5. Any other wishes you may have

18. How specific can you make your Health Care Directive?

You can make your Advance Healthcare Directive as specific as you want. You can also attach a letter to your agent, further specifying your wishes should you become incapacitated. Your Advance Healthcare Directive is about you and for you, and therefore should reflect your values, wishes, and personal preferences.

True Stories

We have witnessed countless examples of sad situations which could have been greatly benefitted by having the proper Estate Planning documents in place. Here are three examples of cases, in short.

Non-litigated. A husband, his wife, and daughter live in the East Bay. The couple is in their 70's and the wife had become extremely demented. She was unable to feed herself, bathe herself, seldom would wear clothing, and was continuously escaping from their home and being found by the police. Her husband and daughter felt helpless and completely overwhelmed. She could not be kept in a hospital or residential care facility, where she could be properly cared for, because it was her decision whether or not to leave. She had no Healthcare Directive, and thus her husband had to obtain a Conservatorship. In their situation, the main downside to the Conservatorship was the cost. Unfortunately, a Conservatorship is not just a one time fee. It has to be managed and overseen by the Court. While people can get Conservatorships without an attorney, they often find themselves

overwhelmed by the process and unable to understand the plethora of forms and Court requirements. Many begin without an attorney, but find themselves unable to move forward at some point and are forced to obtain professional assistance. **In short, the main downside to a Non-litigated, straightforward Conservatorship is Significant Cost, Time, and Energy.**

Litigated. This is what I see most often in my practice. *Litigation* is the legal way of saying “fought over.” To litigate means to fight. Most of us would prefer not to fight, but this is what can happen with no Estate Planning documents.

When there is no Advance Healthcare Directive in place to specify an agent to make healthcare decisions on one’s behalf, family members may not be able to agree who takes care of mom and dad (or aunt and uncle as the case may be). If the family member has become demented, or developed another form of mental incapacity, then a Conservatorship becomes necessary. In addition to the cost and burden of obtaining a Conservatorship, families find themselves spending thousands on lawyers just to figure out who will be Conservator (the court-appointed agent). Here’s an example of a recent case:

An elderly woman lives in the East Bay with her daughter, who is taking care of her. She has two other children. One of them decides that her level of care is poor, and she should be in a residential facility. She is diagnosed with moderate dementia and found unable to make her own healthcare decisions. A Conservatorship is necessary in order to appoint someone to act on her behalf. The two daughters cannot agree who should become Conservator, and each hire an attorney to plead their case. A temporary Conservator, called a Professional Fiduciary, is appointed to care for the mother while they work out their differences. The cost and emotional burden is significant here. There are four attorneys - one

for the Professional Fiduciary, one for the Conservatee (the mother), and one for each daughter. These types of cases go on until they are resolved by mediation or trial. **In short, a litigated Conservatorship creates a significant financial burden, and takes a terrible emotional toll on families.** While having the proper estate planning documents in place does not always prevent family members from fighting or going to court, litigation can often be significantly minimized with valid legal documents.

It's possible that you or your parents/family members may never need to use a Power of Attorney or Health Care Directive. It's always a gamble. It's also possible you'll never get in a car accident - but you feel safer knowing you have car insurance. I think of having a Power of Attorney for Finances and healthcare like having insurance - you hope you never need it, but if you do - you're sure glad you had it. Many Estate Planning attorneys in the San Francisco East Bay offer Estate Planning Packages that include powers of attorney. This is usually the simplest and most cost effective way to ensure you have a plan in place.

For questions about the Power of Attorney for Healthcare or Advance Health Care Directive, contact our [Walnut Creek Estate Planning Law Firm](#) at 925-322-1795 or email us directly at info@matthewbtalbot.com.