Advance Health Care Directives: California’s Health Care Decisions Law

Introduction
California’s Health Care Decisions Law [Probate Code Sections 4600-4805] sets forth the requirements for executing a written advance health care directive. An advance directive may do one or more of the following:

1. Authorize another person (called the “agent”) to make health care decisions for a patient (technically called the “principal,” herein called the “patient”), either immediately upon execution, or when the patient is no longer able to make decisions for himself or herself. This portion of an advance directive is sometimes called a durable power of attorney for health care.

2. Contain information about a patient’s desires concerning health care decisions, particularly end-of-life care. This information, if any, may be called an “individual health care instruction.”

3. Authorize the agent to make personal care decisions, such as determining where the patient will live, hiring household help, providing meals/transportation, handling mails, arranging recreation and entertainment.

4. Nominate a conservator or guardian for consideration by the court if conservatorship proceedings are later commenced.

The patient may complete one or more of these portions of the advance directive form.

Health care providers are generally required to comply with an advance directive. Exceptions exist when an agent is not acting in the best interest of the patient; when an agent’s decision requires medically ineffective (futile) health care or health care contrary to generally accepted health care standards; or when a provider declines to provide certain care based on reasons of conscience.

The California Attorney General has posted some basic information about advance directives at https://oag.ca.gov/consumers/general/care#advance.

Definitions

“Advance health care directive” or “advance directive” means either an individual health care instruction or a power of attorney for health care.

“Agent” means an individual designated in a power of attorney for health care to make a health care decision for a patient. A patient may also designate a successor or alternate agent.

“Capacity” means a person’s ability to understand the nature and consequences of a decision and to make and communicate a decision, and includes in the case of proposed health care, the ability to understand its significant benefits, risks and alternatives.

“Health care” means any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect a patient’s physical or mental condition.

“Health care decision” means a decision made by a patient or the patient’s agent, conservator, or surrogate, regarding the patient’s health care, including the following:

1. Selection and discharge of health care providers and institutions.

2. Approval or disapproval of diagnostic tests, surgical procedures, and programs of medication.

3. Directions to provide, withhold, or withdraw artificial nutrition and hydration and all other forms of health care, including cardiopulmonary resuscitation.

“Health care provider” means an individual licensed, certified, or otherwise authorized or permitted by California law to provide health care in the ordinary course of business or practice of a profession.
“Individual health care instruction” means a patient’s written or oral direction concerning a health care decision.

“Power of attorney for health care” means a written instrument designating an agent to make health care decisions for the principal (the patient).

“Primary physician” means a physician designated by a patient (or the patient’s agent, conservator, or surrogate) to have primary responsibility for the patient’s health care or, in the absence of a designation or if the designated physician is not reasonably available or declines to act as primary physician, a physician who undertakes the responsibility.

“Principal” means an adult who executes a power of attorney for health care. In this document, the word “patient” is used.

“Reasonably available” means readily able to be contacted without undue effort and willing and able to act in a timely manner considering the urgency of the patient’s health care needs.

“Supervising health care provider” means the primary physician, or, if there is no primary physician or the primary physician is not reasonably available, the health care provider who has undertaken primary responsibility of a patient’s health care.

“Surrogate” means an adult, other than a patient’s agent or conservator, authorized under the Health Care Decisions Law to make a health care decision for the patient. This is a person who has been designated orally by a patient pursuant to Probate Code Section 4711. This might be done, for example, when a patient has an advance directive, but the designated agent is not available during a particular hospitalization. The patient might in that case orally designate another person to be the surrogate decision-maker. This type of oral designation is valid only during the course of treatment or illness or during the stay in the institution when the designation is made, or for 60 days, whichever is shorter. An orally designated surrogate has priority over an agent during that time period.

Prerequisites to a Valid Advance Directive
An advance directive may be executed by a person over 18 years of age who has capacity. It is legally sufficient if all of the following requirements are satisfied.

1. **Date:** The advance directive must contain the date of its execution.

2. **Patient’s signature:** The advance directive must be signed either by the patient, or (if the patient cannot write) in the patient’s name by another adult, in the patient’s presence and at the patient’s direction.

3. **Notary/Witnesses:** The advance directive must be acknowledged before a notary public. Alternatively, it may be signed by at least two adult witnesses who satisfy the following requirements:
   a. Each witness must witness either the signing of the advance directive by the patient, or the patient’s acknowledgment of his or her signature on the advance directive. The witnesses do not have to be told what the advance directive says; they just must watch the patient sign the advance directive, or must see and hear the patient state that the signature on the advance directive is indeed his or hers.
   b. Neither witness may be:
      - The patient’s health care provider or an employee of the patient’s health care provider,
      - The operator or an employee of a community care facility,
      - The operator or an employee of a residential care facility for the elderly, or
- The agent (if the advance directive includes a power of attorney for health care).

c. Each witness must make the following declaration in substance:

I declare under penalty of perjury under the laws of California (1) that the individual who signed or acknowledged this advance health care directive is personally known to me, or that the individual’s identity was proven to me by convincing evidence, (2) that the individual signed or acknowledged this advance directive in my presence, (3) that the individual appears to be of sound mind and under no duress, fraud, or undue influence, (4) that I am not a person appointed as agent by this advance directive, and (5) that I am not the individual’s health care provider, an employee of the individual’s health care provider, the operator of a community care facility, an employee of an operator of a community care facility, the operator of a residential care facility for the elderly, nor an employee of an operator of a residential care facility for the elderly.

d. At least one of the witnesses must be an individual who is neither related to the patient by blood, marriage, or adoption, nor entitled to any portion of the patient’s estate upon the patient’s death under a will existing when the advance directive is executed or by operation of law then existing. This witness must sign the following declaration in substance:

I further declare under penalty of perjury under the laws of California that I am not related to the individual executing this advance health care directive by blood, marriage, or adoption, and, to the best of my knowledge, I am not entitled to any part of the individual’s estate upon his or her death under a will now existing or by operation of law.

Who May Be an Agent
The agent named in an advance directive may be any person designated by the patient, subject to the following limitations:

1. Except as provided in paragraph 2., below, the following persons may not make a health care decision for a patient as an agent:
   a. The patient’s supervising health care provider.
   b. An employee of the health care institution where the patient is receiving care.
   c. An operator or employee of a community care facility or residential care facility where the patient is receiving care.

2. The prohibition in paragraph 1., above, does not apply to the following persons:
   a. An employee, other than the supervising health care provider, who is related to the patient by blood, marriage, or adoption, or is a registered domestic partner of the patient.
   b. An employee who is employed by the same health care institution, community care facility, or residential care facility for the elderly as the patient. This exception exists so that a patient employed by a health facility can name a colleague as the agent, if desired.

3. The patient’s conservator appointed under the Lanterman-Petris-Short Act (which differs from a conservator appointed under the Probate Code) may not be designated as an agent or make health care decisions, unless the advance directive is otherwise valid and the conservatee was represented by an attorney who signed a certificate stating in substance:
I am a lawyer authorized to practice law in the state where this advance health care directive was executed, and the principal or patient was my client at the time this advance directive was executed. I have advised my client concerning his or her rights in connection with this advance directive and the applicable law and the consequences of signing or not signing this advance directive, and my client, after being so advised, has executed this advance directive.

Agent’s Capacity
The agent must have the mental capacity to make a health care decision on behalf of the patient. The same standards used to determine a patient’s capacity should be used to determine the capacity of an agent.

Duration of an Advance Directive
The advance directive has an unlimited duration, unless it states otherwise.

Revocation of an Advance Directive
A patient having capacity may revoke all or part of an advance directive, other than the designation of an agent, at any time and in any manner that communicates an intent to revoke. However, the designation of an agent may be revoked only by a written, signed document or by personally informing the supervising health care provider. Execution of a new (more recent) valid power of attorney is sufficient to revoke the previous power of attorney.

An advance directive that conflicts with an earlier advance directive revokes the earlier advance directive to the extent of the conflict.

An advance directive may also be revoked or modified by a court.

Effect of Divorce if Spouse is the Agent
If after executing a power of attorney for health care, the patient’s marriage to the agent is dissolved or annulled, the patient’s designation of the former spouse as agent to make health care decisions for the patient is revoked. If the advance directive also contains individual health care instructions, they remain valid. The agent’s authority to make health care decisions is revived if the patient remarries the agent.

Steps to Take After Executing an Advance Directive
Inform Agents, Physicians, and Others
Once the advance directive is signed, the patient should:
1. Give a copy to the agent and any successor or alternate agent. The patient should also discuss his or her preferences for care, including end-of-life care, with those persons. The patient should consider letting other family/friends know who the designated agent is.
2. Give a copy to his or her primary care physician.
3. Put the original advance directive in a safe place, but not in a safe or safety deposit box. The patient should put the advance directive in a place that will be easy for family and friends to locate in case the patient is unexpectedly hospitalized and cannot communicate.

Register with Secretary of State
A person who has executed an advance directive may register it with the California Secretary of State. The registration form is found at www.sos.ca.gov/registries/advance-health-care-directive-registry. Each
registrant receives a wallet card from the Secretary of State indicating that an advance directive is on file at the registry. A hospital that receives an unconscious patient in its emergency department will check the patient’s purse or wallet for a wallet card. The Secretary of State will transmit the advance directive, upon request, to a health care provider, the public guardian, or the legal representative of the registrant (the patient).

There is no requirement to register an advance directive with the Secretary of State. Failure to do so does not affect its validity.

**Effect of an Advance Directive**

When the primary physician has determined the patient lacks capacity to make health care decisions, the agent has the authority and responsibilities detailed below.

**Agent’s Authority**

Unless a power of attorney for health care states otherwise, the authority of an agent becomes effective only on a determination that the patient lacks capacity, and ceases to be effective on a determination that the patient has recovered capacity. A patient may choose to give the agent decision-making authority immediately. Sometimes elderly persons who suffer from extreme exhaustion prefer to have a trusted relative make their health care decisions for them, even though they legally have the capacity to make their own decisions.

Unless the power of attorney for health care states otherwise, an agent may make all health care decisions for the patient to the same extent the patient could make those decisions if he or she had the capacity to do so, subject to the restrictions discussed below. This includes decisions affecting the patient before and after death. Specifically, an agent may:

1. Select and discharge health care providers and institutions.
2. Approve or disapprove diagnostic tests, surgical procedures, and programs of medication.
3. Direct a provider to provide, withhold, or withdraw artificial nutrition and hydration and all other forms of health care, including cardiopulmonary resuscitation.
4. Make a disposition under the Uniform Anatomical Gift Act [Health and Safety Code Section 7150 et seq.].
5. Authorize an autopsy.
6. Direct the disposition of remains.
7. Receive and review medical records and information, and authorize its release, to the extent necessary for the agent to fulfill his or her duties as agent. However, the right of the agent is subject to any limitations that exist on the right of the patient to obtain his or her own medical records.
8. Consent to HIV testing and information about test results, when necessary to render appropriate care or to practice preventative measures [Health and Safety Code Section 121020].

In addition, an agent may be able to bind the patient to arbitration of medical malpractice claims.

Before implementing a health care decision made for a patient, a supervising heath care provider, if possible, must tell the patient the decision made and the identity of the person who made the decision.

**Emergency Exception**

The Health Care Decisions Law does not affect the laws about obtaining consent in an emergency. If a patient lacks the capacity to give consent and treatment is immediately needed to prevent the patient’s death or serious disability, or to alleviate severe pain, a hospital/physician may provide treatment without
obtaining consent from an agent or other decision-maker. If there is time to do so before treatment must be provided, the providers will try to contact a known agent. However, emergency treatment may be provided if the agent is unavailable or there is insufficient time to contact him or her.

Restrictions on an Agent’s Authority
An agent may not consent to the following on behalf of a patient:

1. Commitment to or placement in a mental health treatment facility.
3. Psychosurgery.
4. Sterilization.
5. Abortion.

Agent’s Responsibilities
An agent must make a health care decision in accordance with the patient’s individual health care instructions that are indicated in the advance directive, if any, and other wishes to the extent known to the agent. If the patient’s wishes are not known, the agent must make the decision in accordance with the agent’s determination of the patient’s best interest. In determining the patient’s best interest, the agent must consider the patient’s personal values to the extent known to the agent.

If the advance directive requires it, the agent must notify any persons whose names are provided by the patient of the patient’s death.

Special Considerations Regarding Withholding and Withdrawing Life-Sustaining Treatment
An agent may authorize the withholding or withdrawing of life-sustaining treatment. This authority is subject to the following limitations:

1. The agent must act in accordance with the patient’s desires regarding the withholding or withdrawal of life-sustaining treatment. Thus, life-sustaining treatment may not be withheld or withdrawn in the situations noted below:
   a. Where the patient objects.
   b. Where the patient expressed a desire to have life-sustaining treatment continued. Such desires may be expressed in the advance directive or in another written form or orally to the agent or health care provider. The law specifies that an attempted suicide must not be construed to indicate a desire of the patient that health care be restricted or inhibited.

This provision should not be interpreted to require futile care to be provided.

2. This law must not be construed to condone, authorize, or approve mercy killing, assisted suicide, or euthanasia. This law is not intended to permit any affirmative or deliberate act or omission to end life other than withholding or withdrawing health care pursuant to an advance health care directive so as to permit the natural process of dying. An agent may not authorize the administration of aid-in-dying medication.

3. The health care provider must make a good faith effort to determine the desires of the patient, to the extent the patient is able to communicate these desires.

Court Review When Questions Arise
The Health Care Decisions Law explicitly states that in the absence of controversy, a court is normally not the proper forum in which to make health care decisions, including decisions regarding life-sustaining treatment. The law also states that an advance directive is effective and exercisable free of judicial intervention. In addition, a health care decision made by an agent for a patient is effective without judicial approval. However, court direction may be sought for the following purposes:

1. Determining whether or not the patient has capacity to make health care decisions.
2. Determining whether an advance directive is in effect or has terminated.
3. Determining whether the acts or proposed acts of an agent are consistent with the patient’s desires as expressed in an advance directive or otherwise made known to the court or, when the patient’s desires are unknown or unclear, whether the acts or proposed acts of the agent are in the patient’s best interest.
4. Declaring that the authority of an agent is terminated, if the court determines that the agent made a health care decision for the patient that authorized anything illegal, or the court determines both of the following:
   a. The agent has violated, has failed to perform, or is unfit to perform, the duty under an advance directive to act consistent with the patient’s desires or, where the patient’s desires are unknown or unclear, is acting (by action or inaction) in a manner that is clearly contrary to the patient’s best interest.
   b. At the time of the determination by the court, the patient lacks capacity to execute or to revoke an advance directive.
5. Compelling a third person to honor individual health care instructions or the authority of an agent.

**Psychiatric Advance Directives**

A psychiatric advance directive is an instrument that mental health patients may use to document their preferences regarding future mental health treatment, in preparation for the possibility of losing capacity to give or withhold consent to treatment in the future. The mental health advocacy community advocates the use of such documents, particularly with respect to involuntary treatment, psychiatric medications, restraint and seclusion.

Neither California nor federal law recognizes a special document called a “psychiatric advance directive.” The California advance health care directive laws and statutory form were created with end-of-life issues in mind, not mental health matters. However, the law does not prohibit a person who executes an advance health care directive from including instructions regarding mental health treatment. Whether such wishes are required to be followed by a health care provider if the patient loses capacity depends upon several factors, including:

1. Whether the patient would have the legal ability to consent or withhold consent to the recommended treatment if he or she were competent. For example, a patient who is detained pursuant to Welfare and Institutions Code Section 5150 et seq. is, by law, unable to withhold consent to be evaluated for a mental disorder and may not leave the facility. Therefore, if such a patient has executed an advance directive denying consent to such care, a hospital need not comply with this instruction.
2. Whether the wishes stated in the advance directive are medically ineffective or contrary to generally accepted health standards. In such a case, the hospital or other provider need not comply with the patient’s instructions.

There are no statutes, regulations, or judicial decisions regarding psychiatric advance directives in California. However, California law does contain one reference to advance directives in the context of mental health care. Health and Safety Code Section 1180.4(a) requires psychiatric units of general acute
care hospitals, acute psychiatric hospitals, skilled nursing facilities, and other specified facilities to conduct an assessment of each patient prior to a placement decision or upon admission, or as soon thereafter as possible. This assessment must include, based on the information available at the time, the patient’s advance directive regarding de-escalation or the use of seclusion or behavioral restraints. This law does not authorize “psychiatric advance directives,” nor does it require a provider to comply with a patient’s stated preferences. It merely requires the specified providers to assess a patient’s advance directive, if any.