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# TESTAMENTARY DOCUMENTS

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## INTRODUCTION<sup>1</sup>

A volunteer attorney with an AIDS legal services program simultaneously assumes different roles of therapist, mediator, social worker, emotional support counselor and legal adviser. But nowhere are the demands on an attorney more challenging than in drafting testamentary documents for a person with a life-threatening illness.

Discussing testamentary documents frequently opens floodgates of emotions and forces persons with HIV infection to face the reality of death. This may be particularly difficult when HIV often affects young people, who have not anticipated coping with this at their age. In many instances persons with HIV infection may have to confront additional issues; a gay man with AIDS may need to tell his parents and siblings he is homosexual and the man at his bedside is his lover, or a newly diagnosed heterosexual man must tell his wife she is at risk for HIV infection.

An attorney in this emotionally charged environment has to help her client on many different levels. But throughout the attorney/client relationship, it is critical that a lawyer remain a steadfast advocate for the client's right to make his own decisions about living and dying.

Almost a third of all cases at the AIDS Legal Referral Panel used to involve assistance with testamentary documents, primarily simple wills, Advance Healthcare Directives, and general powers of attorney for financial matters. Because so many clients need these basic documents, ALRP does not charge people with HIV for simple wills and powers of attorney. For more complex wills involving trusts and numerous bequests and for extensive estate planning, ALRP attorneys use income guidelines to determine the cost to the client.

While ALRP volunteers draft most testamentary documents without incident, occasionally attorneys or their clients have faced unusual situations, such as when:

Parents challenged a durable power of attorney for health care (DPAHC) (now called an Advance Healthcare Directive) on the grounds that they should have been present at the time of its signing, that their adult child lacked testamentary capacity, and that he was subject to undue influence or duress. Recent contest trends may suggest the need for greater participation of attorneys in the preparation of powers of attorney.

A patient selected his religious brother to be his attorney-in-fact under a DPAHC. The brother subsequently objected to the care the patient received in a hospital because it violated the brother's religious beliefs. The treatment, however, conformed to the instructions in the DPAHC.

A sister of a dying patient, who was appointed attorney-in-fact under a two-year old DPAHC, barred the patient's new lover from the hospital room. Only after the person with AIDS

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<sup>1</sup> This chapter was prepared based on work by many people, including Diane Cash, Kristin Chambers, Melinda Griffith, Clint Hockenberry, Diane D. McCabe, Virginia Palmer, Jackie Peoples, Fred Nagel, S. Alan Ray, Janet Seldon and Mark Senick. Betsy Johnsen and Ora Prochovnick prepared the 1995 update.

This 2004 update is by Boone Callaway, Esq.

awakened and demanded the visit was the lover allowed to say goodbye to his companion.

A San Francisco hospital prepared to ship the remains of a person with AIDS to his parent's family cemetery in the South in conflict with the provisions in the testator's will and DPAHC. Only when an ALRP attorney intervened did the hospital allow the lover to take the body for cremation.

A mother, arriving from out of state, discovered the attorney-in-fact under a general power of attorney was selling her son's household items and withdrawing money from her son's account in order to supply himself with drugs.

Two sisters, arriving shortly after the intestate death of their brother, cleared out all the furnishings from the brother and lover's apartment, including items purchased jointly during their eight-year relationship.

After years of estrangement, a dying man's evangelical Christian family appeared at his apartment and moved him to their rural California home. When San Francisco friends finally reached him by phone, the man with AIDS described his new living arrangements as "a Nazi concentration camp."

Most conflicts involving wills and powers of attorney are about values - not money. This is often because clients with AIDS have exhausted their resources, leaving few assets to argue over. Moreover, due to the still-existing prejudice against people with AIDS, many clients need written documentation so that their wishes are taken seriously and followed, whether the issue involves money, medical care or burial instructions. The need for careful crafting of testamentary documents is demanding, no matter what the potential conflict. The following sections are designed to assist attorneys in the preparation of simple wills and powers of attorney.

## **PART ONE: ATTORNEY RESPONSIBILITIES AND ETHICS**

### **I. Responsibilities of the Attorney**

One major responsibility of a lawyer drafting testamentary documents is to thoroughly explain the nature and impact of these documents, and describe any alternate options. The client needs to understand how a will may be crucial after her death in order to dispose of her body and distribute her possessions as she desires. An attorney must explain how a client's testamentary scheme can be strengthened by other acts on the client's part, such as supporting documents and the clarity of the client's statements. In the case of powers of attorney, a client needs to think through the implications of being incapacitated, and the strength of the authority she is conferring on another person to carry out her wishes regarding her health care and financial resources.

To help the attorney ensure that he has effectively communicated these issues to the client, we have enclosed a number of forms and pamphlets. The first of these is a Sample Letter to Client (*see* APPENDIX A). A letter outlining what you and your client have talked about and the

client's decisions will help confirm that the client understood all that transpired. Such a letter has the added advantage of helping to validate the testamentary documents later if any questions arise regarding the client's true wishes.

In addition to the letter, which is for your files, we have several brochures for the client (*see* APPENDICES Q, R *and* S). The brochures discuss making a will, settling a small estate, and writing an advance medical directive. If your clients are interested in any of these topics, you may want to give them copies at your first interview in order to help them organize needed information and make decisions. You are welcome to photocopy these brochures, or call ALRP for the most current printed versions.

## **II. Ethical Decisions**

Aside from basic communication problems, an attorney handling testamentary documents for a client may also easily run into ethical dilemmas. We suggest that an attorney give some thought to these issues before she takes on clients and suddenly discovers herself in the middle of an unforeseen predicament.

### **A. Capacity**

An attorney faces a major ethical problem when she suspects her client is not mentally competent to make a will or sign a power of attorney. While the standards for competency are straightforward, applying them, especially in the case of HIV disease, may be complicated. One reason is that clients with advanced HIV disease often pass through periods of competency and incompetency. How to determine capacity and guard against will challenges is discussed in detail under PART TWO, SECTION IV: PROBATE AND DISTRIBUTION.

Because of the difficulty in determining capacity, an attorney may be initially unsure of her client's status. Nonetheless, the attorney may best serve the client's interests by executing the documents despite the client's competency being questionable. The client may deteriorate further, and this may be the only chance for the client to make his wishes known. If the client does appear later to have greater capacity to make clear decisions and changes his mind about any issues, the documents may be redone at that time. Simply waiting for such an event to happen, without signing documents when possible, guarantees that the client will die intestate or without current powers of attorney.

If an attorney absolutely determines that her client lacks capacity, she must decide how to respond in order to best maintain her duty to the client. The answer is far from intuitive, and the rules developed by the American Bar Association (ABA) on professional responsibility differ sharply from the guidelines under the California Rules of Professional Conduct.

Although California attorneys must follow State Bar rules, we mention the ABA guidelines to illustrate the dilemma. According to the ABA, if an attorney reasonably believes the client cannot adequately act in his own interest, "a lawyer may seek the appointment of a guardian or take other protective action with respect to a client..." ABA Model Rules of Professional Conduct, Rule 1.14. The Comments accompanying ABA Rule 1.14 analyze the situation where the lawyer has an incompetent client. In that case, the attorney may end up acting as *de facto* guardian for some time, but should ultimately see to the appointment of a legal guardian.

Nonetheless, since it is the role of the attorney to safeguard and advance the interests of his client, she may have to balance the obligation to seek a guardian with the client's desire to avoid the expense and trauma of a court hearing on conservatorship, as well as the client's need for privacy.

In contrast, the California State Bar Rules of Professional Conduct are *unequivocal*: when the attorney has concluded the client is incompetent, "it is unethical for an attorney to institute conservatorship proceedings contrary to the client's wishes, since by doing so the attorney will be divulging the client's secrets and representing either conflicting or adverse interests. However, should the client's conduct interfere with or unduly inhibit the attorney's ability to carry out the purpose for which the attorney was retained, withdrawal may be appropriate." Formal Opinion No. 1989-112 (April 1991) of the State Bar, interpreting California Rules of Professional Conduct 3-110, 3-310, 3-700 and 5-210, and California Business and Professions Code section 6068(e).

Thus, even when the attorney genuinely believes that conservatorship is in the client's best interests, if the client does not consent to conservatorship proceedings then the attorney's only option is to withdraw. Withdrawal is necessary in order to protect secrets, including observation of the client's behavior, obtained as part of the confidential attorney-client relationship. The notes to this Opinion refer to California Probate Code Sections 1801 and 1828.5 and provide guidance to the attorney in deciding when a conservatorship is appropriate. Attorneys seeking further guidance on this issue may also call the ethics hotlines maintained by the State Bar and the Bar Association of San Francisco, and possibly other local bars, when they face these ethical dilemmas. In addition, there is an excellent reference guide available called the California Compendium of Professional Responsibility, which lists opinions of the State Bar as well as local legal ethics committees.

Capacity is discussed in more detail below but attorneys should remember that, under present standards, the level of competency used in determining testamentary capacity differs from the level used in determining the need for a conservatorship. A person under a conservatorship lacks capacity to sign a contract, but may still be competent enough to sign a will. The attorney should not confuse these two standards: Her client may not be competent enough to comprehend and sign a contract, but the attorney need only evaluate whether her client can understand and sign a will, which is a much lower threshold.

### **B. Attorney's primary duty to client/testator**

A further ethical dilemma is raised regarding the attorney's duty to the testator as the client. ALRP frequently responds to calls for a referral from the client's lover rather than the client himself. During discussions with the client/testator about the testamentary scheme, the companion may be in the room with the client, at the testator's request. The companion, attempting to assist a weakened lover, may even speak for the client.

In this situation, the attorney faces the ethical problem of whose interests she is serving. The attorney must be sure she is responding to the best interests of the client and not anyone else. The attorney can solve this problem by reviewing, while alone with the testator, the proposed testamentary scheme and making sure that it fully complies with his wishes. Of course, this

situation may also lead to a later will challenge based on the charge of undue influence, which could lead to the will being invalidated. *See* PART TWO, SECTION IV.D: WILL CONTESTS, *below*, for further discussion of undue influence.

### **C. Undue influence by the attorney**

Attorneys often face uncertainty when clients ask them to make decisions for them. The attorneys making these decisions could result in a charge of undue influence *by the attorney*. Undue influence, whether by the attorney or other person with a relationship to the client, may lead to a will challenge. Refuting a charge of undue influence requires showing that the client has determined his own course of action. This creates a conflict for an attorney who has made the client's decisions for him. (*See* PART TWO, SECTION IV.D for discussion of undue influence by people who have a non-attorney relationship.)

Undue influence by attorneys is most obvious when lawyers use their influence and access to the client's confidence to obtain undeserved financial gain, for example, buying a client's assets at a huge discount. In that situation, the California statutes are clear. "The commission of any act involving moral turpitude, dishonesty or corruption, whether ...the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension." Cal. Bus. & Prof. Code § 6105.

The laws are less clear regarding a well-meaning attorney who merely makes a decision for a client, perhaps at the client's request. It is ALRP's position that the attorney who determines the client's course of action, even with the client's best interests in mind, is using his authority incorrectly. These problems arise in several contexts. At ALRP, we have seen several examples of this, such as when a client asked her lawyer to make a difficult decision regarding which of two candidates to choose as guardian for her child. The lawyer correctly refused to give her opinion. Clients have also asked ALRP attorneys whom to name as executor, where to direct bequests, or what health care response to make in the case of incapacity. At that point attorneys should state only what the legal options and implications are, in light of the client's circumstances and condition.

In our observation of attorney-client relationships, we have seen the importance of maintaining the distinction between attorney and friend. The best support an ALRP attorney can give is to provide the most information possible, and allow the client to come to the conclusion that is best for him.

### **D. Medical decisions and suicide**

A primary problem for many clients is what to do in the case of future incapacity, when they are unable to make medical decisions for themselves. There are several written "medical directives" available, which the client can use to tell medical personnel either what he would like done in specific situations, or who will have the power to make medical decisions when he is unable. These medical directives are discussed in more detail below in PART THREE: POWERS OF ATTORNEY and ADVANCE DIRECTIVES.

An attorney can be very helpful to his client in filling out those forms, while still preserving the client's autonomy in decision making. One way an attorney can help her client is to raise some

important issues to consider, for example, whether to use artificial nutrition and hydration, when the client would like to have pain medication, and under what circumstances the client would want to be resuscitated. It might also benefit the client to arrange for one of the client's medical personnel to talk with him directly to ensure that he gets current, complete information on medical options. Hospitals and hospices often have on staff a social worker or ethicist who is specially trained to discuss these issues.

In extreme cases, clients have requested more than an attorney's help in making a medical decision - some have gone so far as to request assistance with suicide. A desire to kill oneself is not unheard of among clients who suffer from painful and terminal diseases. Several issues, both practical and ethical, arise if a client asks the attorney for advice about attempted suicide or assisted suicide.

As a practical matter, the attorney should inform the client that his suicide may jeopardize his life insurance. When a death is determined to be suicide, life insurance companies may not pay out the expected settlements to the beneficiaries. These benefits may represent a substantial amount of what the person who kills himself wishes to leave to his lover, friends and family. (If an insurer attempts to not pay, the attorney might then argue that the suicide was a result of AIDS dementia, and therefore not of the client's volition.)

Another practical problem arises with the risk of failure. Unless the person who wants to kill himself is sure of the method, an unsuccessful attempt could leave him in worse condition than before: in more pain, perhaps, or in a coma, and would also affect the person caring for him.

When the client asks a partner or friend, other questions come up. While it is not illegal in California to attempt or to commit suicide, it is illegal to help someone kill himself. Even if the potential suicide is too weak to do it himself, and it is his desire to kill himself, providing assistance is considered illegal. Under California law, "Every person who deliberately aids, or advises, or encourages another to commit suicide, is guilty of a felony." Health and Saf. Code § 401. In the case where the initial attempt failed or was only partially successful, a person assisting the suicide might be tempted to take even more active measures to ensure that the suicide succeeded, leading to a greater possibility of prosecution.

Another conflict arises for the attorney because the attorney's role is to serve the client's best interests: the client wants to kill himself, which is not a crime, and the only way it can be done in his weakened state is to have his lover help him, which is illegal. In that case, the attorney should certainly tell the client of the potential consequences to the companion, including loss of insurance or other benefits, and criminal prosecution. The ethical issue arises as to whether the attorney should advise the companion directly, who is not the attorney's client, of the consequences of helping the client. The law provides no explicit answer.

Finally, the attorney may be harmed if it is determined that she provided direct assistance to help the person kill himself. Conviction of a felony involving moral turpitude constitutes a cause for disbarment or suspension in California. Bus. & Prof. Code § 6101. Nonetheless, although it is illegal for the attorney to directly assist the person who wants to kill himself, it is all right to give information. Several legal cases have established this. One way an attorney may provide information is to refer to a doctor who is knowledgeable and sympathetic to the client's wishes.



Another source of information is the Planetree Health Resource Center, which offers an extensive library on conventional and alternative medical resources free to the public. It is located in San Francisco, and can be reached by phone at (415) 923-3680.

## PART TWO: WILLS AND DECEDENTS' ESTATES

### Introduction: The Need for a Will

There are a number of reasons to make a will. First, a will enables a testator to pass property as he wishes. Secondly, a will allows a testator to choose who will administer and handle his estate. Finally, a will enables the testator to address a variety of important issues, such as burial or cremation arrangements, funeral or memorial services, powers of the executor, bond, guardianship of a minor, and specific disinheritances.

We have divided this discussion into four sections: how an estate passes in the absence of a valid will (Intestacy); what are the basic parts of a will (Testamentary Provisions); how a will is made (Execution); and how an estate becomes subject to judicial evaluation and how the estate is dispersed (Probate and Distribution).

### I. Intestacy

There are two major issues for the courts to deal with when a person dies without leaving a valid will: how the statutes divide the estate, and who will distribute the estate.

#### A. Division of assets

In many cases the person whose will you prepare is not married and has never had children, and is not a registered Domestic Partner. Without a will, this person's assets pass to his or her parents or siblings, or other closest heirs. *See* Prob. Code § 6400 *et seq.* If the person would rather have his estate, of whatever size, go to others than those specified below, he or she must prepare a will.

If the decedent dies intestate while *married*, the surviving spouse in California, a community property state, receives all of the community and quasi-community property that belonged to the decedent. Prob. Code § 6401(a) and (b).

The court divides the remaining separate property as follows:

1. If the decedent did not have any surviving children, parent, brother, sister, or children of a deceased brother or sister, all the property goes to the surviving spouse. Prob. Code § 6401(c)(1).
2. Where the decedent leaves one child or issue of a deceased child, or where the decedent leaves no issue but has a parent or parents or issue of either of them, then one-half goes to the surviving spouse and the rest is divided among those other heirs. Prob. Code § 6401(c)(2).
3. Where the decedent leaves more than one child living or one child living and the issue of one or more deceased children or the issue of two or more deceased children, then the surviving spouse gets one-third and the remaining two-thirds is divided among the other heirs. Prob. Code § 6401(c)(3).

If the decedent dies intestate while in a registered Domestic Partnership, the surviving domestic partner will inherit:

1. The entire intestate estate if the decedent did not leave any surviving issue, parent, brother, sister, or issue of deceased brother or sister.
2. One-half of the intestate estate in the following cases: (a) where the decedent leaves only one child or the issue of one deceased child; (b) where the decedent leaves no issue but leaves a parent or parents or their issue or the issue of either of them.
3. One-third of the intestate estate in the following cases: (a) where the decedent leaves more than one child; (b) where the decedent leaves one child and the issue of one or more deceased children; (c) where the decedent leaves issue of two or more deceased children.

If the decedent dies intestate while unmarried, all of the property is divided similarly to the order listed above, but under the authority of Probate Code § 6402(a) through (g).

## **B. Administrator**

As noted above, a major reason to have a will is to choose who will handle one's estate. Although the court ultimately oversees the administration of the estate, the person in charge of distributing the estate's assets helps determine the speed of this distribution, and has the ability to be of more or less assistance to the beneficiaries in obtaining their bequests. It goes without saying that the testator would also want to choose a person who will not deplete the estate by charging large fees, and who will be completely honest.

When there is a will and it names an executor, and the court appoints the person named, he or she is called the "executor." If the testator dies without appointing an executor in his or her will, or if the will names someone who does not wish to serve or does not qualify (*see* SECTION II.A: EXECUTOR QUALIFICATIONS), then the Court appoints someone not named in the will who serves as the "administrator with the will annexed." When there is no will at all, the person who handles the estate is called the "administrator." While an executor and administrator serve the same function, the testator who names a known and trusted executor can assume his wishes will be carried out as intended and as rapidly as possible, since there is no need to wait for court review and appointment.

When someone dies without providing for a qualified executor in their will, the closest member of the family, as determined by statute, can request the court to appoint him or her as the administrator. California Probate Code section 8461 sets out the rank and priority of persons entitled to act as the administrator of the estate. They are: (1) the surviving spouse; (2) the children; (3) the grandchildren; (4) other issue; (5) the parents; (6) the brothers or sisters; (7) the issue of brothers or sisters; (8) the grandparents; (9) the issue of grandparents; (10) the children of a predeceased spouse; (11) other issue of a predeceased spouse; (12) other next of kin; (13) the parents of a predeceased spouse; (14) the issue of parents of a predeceased spouse; (15) a conservator or guardian; (16) a public administrator; (17) creditors; or (18) any other person.

## **II. Testamentary Provisions**

Numerous facts are required when constructing a will. The attorney should check as much as possible on the accuracy of these facts because errors may invalidate parts of the will. The will

itself should state, at a minimum, the information contained in Sample Will #1 (APPENDIX C). This includes: the identity of the testator; the names of the testator's relatives; the name of the executor and alternate executor; the major testamentary gifts; the names of those to receive these bequests and alternate beneficiaries; the residuary clause; and funeral and burial instructions. The Will Drafting Checklist (APPENDIX B) is designed to help you elicit all the necessary information from a client. The client brochure on making a will (APPENDIX Q) asks for most of the same facts, and can save time by having the client prepare the information in advance of your interview.

### **A. Executor qualifications**

In order to be an executor under California Probate Code section 8400 *et seq.*, one needs to meet the following requirements. Persons eligible for appointment must:

- be over the age of majority;
- not be subject to a conservatorship or otherwise be unfit;
- not have committed fraud or waste, or have wrongfully neglected the estate (Prob. Code § 8502);
- be a U.S. resident (a non-resident may become a personal representative if named in the will);
- not be a business partner if an interested person objects to the appointment (unless the partner is named in the will).

California Probate Code section 8440 *et seq.* deals with the appointment of executors and administrators "with the will annexed." An executor (or administrator) is accountable for all of the assets he or she administers and is chargeable with losses resulting from his or her default or neglect. *Estate of Gerba*, 73 Cal.App.3d, 140 Cal.Rptr. 577 (1977).

In addition to the above statutory requirements, the executor needs to be trustworthy. The testator should be aware of the level of authority he is vesting in an executor: despite the legal implications of an executor committing fraud, it is not unheard of for an executor to deplete bank accounts and sell property for his own gain.

Moreover, the executor needs to be reliable and competent. He or she will have to file simple court papers, publish notices to creditors, pay bills and distribute property. The testator should choose an executor carefully because of these important responsibilities. It is also important to name a successor executor in case the first executor named does not meet the statutory requirements, or is unwilling or unable to serve, perhaps because of his own illness.

The executor may be a beneficiary of the will and may be a family member or friend. Normally, the primary beneficiary will serve as executor. Clients with domestic partners will normally designate the partner.

The testator may also name more than one executor with equal priority; in this case, the co-executors must act together in carrying out their duties. Prob. Code § 8400. If the testator owns real property outside California, he or she should consider the appointment of a person to act as ancillary executor specifically for that non-California property, or to authorize the executor or

another to appoint an ancillary executor. Prob. Code § 8422.

## **B. Executor bond**

The will may require or the court may determine that the executor needs to post a bond to protect the assets of the estate. Unless the testator specifically waives bond in the will, the probate court will fix the amount of the bond subject to statutory minimums. Prob. Code § 8480 *et seq.* It is important to check the local rules for each county to determine whether the court requires a bond. For instance, Alameda County requires bond for out-of-state executors, even if the will waives bond.

## **C. Bequests**

All major property should be listed in the will. This includes financial assets such as bank accounts, stocks and bonds and valuable pieces of personal property, as well as any real property. It is recommended that the will not detail all the testator's minor personal property and who is to receive it. These smaller bequests could change frequently, either as the testator's desires change (deciding to give a picture to one friend instead of another, for example), or the property itself changes (as when a lamp is accidentally broken), requiring the will to be rewritten or the court to approve changes in bequests. Instead, there are several other ways a testator could distribute numerous articles of property with low economic value. First, the testator could list these items separately in a codicil, and rewrite the codicil as needed, although this also requires testamentary formalities (*see* SECTION III: EXECUTION *below*). Second, the testator could give the items away before death. A third solution is for the testator to give as a bequest all minor items of personal property to a single trusted friend, along with a list (outside the will) of how to distribute the items after his death. That precatory distribution list will not be legally enforceable, but if the testator has a reliable friend to carry out his instructions, it is the simplest solution.

## **D. Beneficiaries**

It is not uncommon for a named beneficiary to be unable to accept a bequest, either because he has not survived the testator (*see below*) or because he cannot be found. In California, any unclaimed assets will go to the residuary. If no residuary is named and available, the assets are divided via intestacy. In light of this, every will should name an alternate beneficiary for all major assets, unless the client would want the assets to go to the residual beneficiary or alternate if the specific gift failed.

### **1. Survivorship**

California does not require that the heirs and beneficiaries outlive the decedent by a certain period of time. In states with this requirement, if the heirs and beneficiaries fail to live that long (perhaps because the same catastrophe that killed the decedent has gravely injured them, or because they are also ill), they predecease the decedent for purposes of intestate succession. Instead, California has adopted provisions of the federal Uniform Simultaneous Death Act into the California Probate Code, *creating the presumption of simultaneous death, unless proven otherwise*. This could result in a great deal of confusion and time spent trying to figure out exactly who drew the last breath in the case of a car accident, for example. When the beneficiary dies soon after the testator, such as when both the testator and beneficiary are ill, it also results in

double probate of the same assets within a short period of time. Moreover, it means that the beneficiary's will controls distribution of the assets instead of the testator's. To avoid these outcomes, wills should include a survivorship clause requiring heirs and beneficiaries to outlive the testator by a specified length of time, typically 30 or 45 days.

## **2. Disinheritance clauses**

If the testator has a spouse, children, or issue of deceased children whom the testator intentionally wishes to leave out of his will, the testator should name that disinherited person and state that the disinheritance is intentional. In addition, it is advisable to state the reason for the disinheritance (for example, the disinherited person is well provided for, or the testator wishes to provide for his partner whom has loved and cared for him for many years). The testator might even leave the family member with some small item of personal property to indicate that he had thought about how he wanted his property distributed. Without such a clause, a will could be contested on the grounds that the testator would normally have made some provision for this relative, but for some undue influence. It is also very important to name a spouse or child because, under California law, a spouse or child entirely unmentioned in the will may be entitled to a statutory share of the assets.

## **E. Residuary clause**

Every will, no matter how small the estate, should contain a residuary clause. This names the person who receives any property not identified in the will, any after acquired property, and any unclaimed bequests. The will should also name at least one alternate residual beneficiary. Without a valid residuary, failed gift property passes under the rules of intestacy.

## **F. Funeral and burial instructions**

The funeral and burial instructions in a will must be followed, irrespective of whether the will is valid or whether the executor offers the will for probate. Health & Saf. Code § 7100. Caution the testator, however, that the will might not be reviewed until after the memorial services.

Therefore, the testator should give a copy of the executed will to a third party and inform him that the will contains burial or cremation instructions. In addition, these instructions may be included in a Advance Health Care Directive. (*See* PART THREE, SECTION II: DURABLE POWERS OF ATTORNEY, and ADVANCE DIRECTIVES, *below*.)

As an aside, clients should be aware that, in California, if they own any cemetery lots or grave sites and wish to bequeath them, they should be specifically devised. Heirs-at-law will otherwise inherit only the right to interment, losing, e.g., the right to sale. Health & Saf. Code § 603 (descent to heirs), § 625 (vested rights to interment), § 8500 *et seq.*, § 8650 (family plots).

## **G. Guardianship**

In the event that you are referred an ALRP client with minor children, you should read carefully the following overview of legal issues and authority relating to the guardianship. Law and procedure are discussed in greater detail in CHAPTER 9: FAMILY LAW, PART THREE: GUARDIANSHIP.

When the testator has minor children, he or she should include a clause in the will nominating a guardian. There are two types of guardians. A "guardian of the person" takes care of the child's well-being, including education, religious upbringing, medical care and day-to-day decisions. A "guardian of the estate" manages the child's property and assets. *See Prob. Code § 1500 et seq.*

When the testator has included guardianship provisions in the will, the court may appoint that person as guardian. The appointment, however, is completely discretionary with the court; will provisions are merely advisory. While a court normally gives custody of the child to the surviving parent, a court is inclined to follow the recommendations of the testator. If the testator has nominated a non-biological relative as the guardian, it is a good idea to include as much language as possible supporting the choice. The person chosen, for example, has an established relationship to the child. The testator should also explain why the other biological parent is *not* a good choice, for example, he is abusive or alcoholic.

In addition, when making a gift to a minor, the will drafter should always designate the gift to a "custodian" through the California Uniform Transfer to Minors Act (C.U.T.M.A.). Prob. Code § 3900 *et seq.* This way, a guardianship of the estate, which is a court-run procedure, may be avoided.

It is a wise practice when naming a guardian of a minor in a will to also execute a separate Nomination of Guardian form. This is important because a will does not take effect until the testator dies. A Nomination of Guardian form may need to be used prior to the parents' death, in the event the testator is unable to care for their child due to illness.

A parent may nominate the guardian of a minor when:

- (a) the other parent nominates the same person or gives written consent to the nomination; or
- (b) at the time the petition is filed, the other parent is dead or lacks legal capacity to consent to the nomination, or consent of the other parent would not be required for adoption of the child. Prob. Code § 1502. A sample form for Nomination of Guardian is attached (*see APPENDIX I*).

Two important new laws were enacted in the area of guardianships in 1994.

SB 592 was enacted in the summer of 1994 and allows an adult with whom a child is living ("caregiver") to enroll the child in school and, if the caregiver is a relative, to authorize medical care for the child by signing an affidavit, without the need for a power of attorney or guardianship. The form of the affidavit is provided in the statute. The new law will allow non-parents who are caring for children of terminally ill parents to have the authority to provide for the education of minors without the need for a guardianship proceeding. Ed. Code § 48204.

As of January 1, 1994, the passage of a "joint-guardianship" statute allows a parent to establish a guardianship for her child without losing any of her parental rights. Prob. Code § 2105(f). Joint guardianship allows a terminally ill custodial parent and a person nominated by the custodial parent to act as joint guardians of the minor child. Upon the death of the parent, the guardianship will automatically continue in the co-guardian, without having to petition the court for a temporary guardianship, easing the transition of custody for the child.

### **III. Execution**

It is very important to follow the formalities required in executing a will. The technicalities will not be ignored because they are designed to prevent fraud and abuse. If a will is found invalid, it may result in the passing of property as though the client had died intestate. And of course for a will to be followed, it must be found; make extra copies of the completed and executed will and advise clients to keep them in places they will be readily discovered.

#### **A. Capacity**

Testamentary capacity has two elements: age and mental state. A testator must be over the age of 18. The testator is also required to be aware of and understand the extent of his or her property, the significance and nature of the execution of the will (i.e. by so doing, the testator is disposing of his or her property), and the relationship of the testator to those who would ordinarily inherit his or her estate (commonly referred to as the "objects of the testator's bounty"). *Estate of Lockwood*, 254 Cal.App.3d 309, 62 Cal.Rptr. 230 (1967); *In re Fosselman's Estate*, 48 Cal.2d 179, 308 P.2d 336 (1957); *In re Mickelson's Estate*, 37 Cal.App.2d 450, 99 P.2d 687 (1940). The necessary mental state is required only at the time of execution of the will; prior or subsequent capacity is irrelevant.

Due to the possibility of a client's swift decline in the later stages of the disease, it is best to create all testamentary documents as soon as possible. The client may be competent for some periods of time and incompetent other times. Whether a client with AIDS is competent may be complicated by the possibility that the client suffers from dementia, from the effects of drugs, or other medicines or pain killers. In the latter case, the attorney may be able to arrange a delay in administering medication, allowing for a period of clarity. If unsure of the client's condition, the lawyer may seek the client's permission to discuss her state with her medical team. The doctor's and nurse's observations on competency, particularly on the date that the will is executed, should also be entered into the client's medical records.

When executing the will, the attorney should ask the client questions that demonstrate the client's capacity, such as the purpose of the will, the nature and value of the estate, and the names of family members. Other issues relating to competency are discussed elsewhere: what an attorney should do if he determines that the client is incompetent is discussed above under PART ONE, SECTION II: ETHICAL DECISIONS; how to avoid will challenges based on testamentary capacity is discussed below under SECTION IV.D: WILL CHALLENGES.

#### **B. Witnesses to a will**

There must be two witnesses to a formal will who sign the end of the will, in the testator's presence and at the testator's request. These witnesses must also have been present at the time the testator signed the will. The probate court will not waive these formalities since they are designed to prevent fraud. *Estate of Krause*, 18 Cal.App.2d 623, 625, 117 P.2d 1, 2 (1941).

Anyone over the age of eighteen may act as an attesting witness if competent to testify to the relevant facts: that the testator signed the will or directed it to be signed, and that the testator appeared to be of sound mind and under no duress, fraud, or undue influence. Creditors of the testator or executors named in the will can act as witnesses in California. Prob. Code § 6112;



*Estate of LaMont*, 39 Cal.2d 566, 248 P.2d 1 (1952); *Estate of Haupt*, 200 Cal. 147, 252 P. 597 (1926). A beneficiary under the will can act as a witness under California Probate Code section 6112(b) under certain circumstances. Nevertheless, it is a far better practice not to allow any beneficiary to act as a witness, because it creates a presumption of undue influence. Therefore, be sure to read the code section carefully if you feel you need to use a beneficiary as a witness, and see the section below on SECTION IV.D: WILL CONTESTS. In other states, when an interested witness signs, some states would void the gift to the interested witness; still others would void the whole will.

### **C. Self-proved wills**

Traditionally, when a will was admitted to probate, some or all of the subscribing witnesses had to attest to their signatures before the court. To avoid this onerous requirement, many states, including California, allow a testator or an interested party to "self-prove" a will by simply including the appropriate language. The method of self-proving a will in California is stated in Probate Code section 8221.

### **D. Holographic wills**

A holographic will is a testamentary document written entirely or in its material provisions by the testator, signed and, it is hoped, dated.

Often fraught with legal difficulties, a holographic will may be the only option for an emergency client. In order for a holographic will to be valid under California law, the testator need only handwrite the will's material provisions and sign the will. Although a holographic will does not require witnesses, the signatures of witnesses will not necessarily invalidate an otherwise valid holographic will. Prob. Code § 6111 *et seq.*

There are no restrictions on the content of a holographic will. Nonetheless, it is helpful if the testator appoints an executor to administer the will and provides for the executor's bond. An attorney should advise the testator to identify his or her beneficiaries carefully, to describe any gifts of property fully, and to write any desired disinheritance provisions clearly. Although California law generally upholds the validity of holographic wills, an attorney should advise the testator to handwrite all provisions and to sign and date the will.

Despite the flexibility of California law, problems frequently occur if the testator fails to date the will or if the will contains some printed provisions or portions in someone else's handwriting.

### **E. Revocation**

A will can be revoked in several ways. One method is to destroy the will with the concurrent intent of revoking it. Revocation also occurs if a subsequent will is written containing an express revocation of the prior will. If there is no statement expressly revoking previous wills, they remain in effect with respect to consistent terms. There is, however, partial revocation regarding any inconsistent terms. Marriage or having children subsequent to the execution of a will may alter stated bequests, unless the will provides for these status changes, because the law mandates that one's spouse and offspring receive specified shares. These are "permitted heirs."

## **IV. Probate and Distribution**

### **A. Judicial evaluation**

Technically, the will must be lodged with the court within 30 days of the notification of the death of the testator, even if it is a non-probate estate. In actual practice, this is rarely done for small estates. The will is admitted to probate upon the filing of the petition of probate to the court and the court's issuance of letters of administration.

There are a number of reasons to admit a will for probate. First, where the assets of the estate are worth more than \$100,000, the executor must open probate. If the decedent's real and personal property in California is worth less than \$100,000, the executor may instead want to utilize the Probate Code process of summary administration. Prob. Code § 13000 *et seq.* (See SECTION C.1: SUMMARY ADMINISTRATION *below.*)

Probate may be useful, moreover, where there are significant debts and not enough assets to pay them all. Probate discharges the debts so that no individual is liable.

### **B. Executor acting prior to appointment**

Can a nominal executor take custody of a deceased testator's body and arrange funeral services before being officially empowered by the court? In California, the answer is yes. Since the goal of probate is to act in accord with the decedent's will, if the decedent has named an executor, adherence to this goal requires the court to endorse acts undertaken on the decedent's behalf in good faith by the same, subsequently appointed executor.

### **C. Avoiding probate**

Probate can be expensive, and it is subject to the supervision of the Superior Court. It can also be time consuming; it takes at least six months, and could take well over a year in some circumstances. Therefore, if it is possible, the executor and the beneficiaries of the will probably should choose to avoid it completely if possible. There are several ways to do this.

#### **1. Summary administration**

Summary administration allows for the collection or transfer of a small estate without going through probate. It is very commonly used. The client brochure on settling a small estate provides a good synopsis of the how it works. (See APPENDIX R.) Under summary administration, if the decedent's real and personal property in California is worth less than \$100,000, the beneficiary can collect the property by executing an affidavit under California Probate Code section 13000 *et seq.* (See APPENDIX H.) This affidavit may be used to collect any kind of personal property, including any evidence of a debt, obligation, interest, right, security or chose in action. The affidavit must be signed by all persons who have an interest in the property sought to be collected, and a certified copy of the death certificate must be attached.

It is important to recognize that the affidavit provides for informal distribution of the assets and payment of debts. However, it does not give the will's named executor any authority to act if he or she assists the beneficiaries in collecting the assets. Unless the will is admitted to probate by the court, the person named as executor in the will is not acting in a legal, official role, but is only acting informally.

It should also be noted that, under § 13000 *et seq.*, the individual beneficiaries who receive the assets of the estate through summary administration are personally liable up to the amount of the asset they receive for the debts of the estate.

## **2. Valuing the estate**

Not all of the decedent's actual property is included when determining whether the estate is worth at least \$100,000. There are several ways to decrease the value of one's estate so that it does not reach this level.

### **(a) Gifts**

The first and most obvious way is to give away parts of the estate before death. A donor may give away assets valued up to \$10,000 per person per year without incurring federal tax liability. However, a person with AIDS may need those assets before death, and it may not be obvious when death is close. Moreover, large gifts given immediately before death might create concerns about lack of capacity, leading to a potential will challenge.

### **(b) Joint tenancy**

Assets held by two joint tenants will pass automatically to the surviving joint tenant when the first one dies, and the assets will not be considered when valuing the estate. Assets which can be held in joint tenancy typically include bank accounts, stocks and bonds, cars, and real estate. Therefore, it is very important to know how title is held and if the testator wants the other joint tenant to receive this property. If he or she does not, the title must be changed.

Transferring assets into joint tenancy avoids probate proceedings and potential will challenges. Because the property does not pass through probate, it is not subject to debts of the estate, and the survivor or survivors do not have to wait for distribution. As far as federal tax consequences, transferring assets into joint tenancy is treated like gifts. There is no gift tax liability if both joint tenants contribute equally to the jointly held asset. But gift tax liability is incurred when the value of the assets contributed by the deceased exceeds the value of the survivor's contribution by more than \$10,000. Since the federal unified gift/estate tax does not apply to estates valued at less than \$1,000,000 (as of 2003), it is unlikely that any ALRP client will incur estate tax liability. Although transfer of assets to joint tenancy is relatively easy to carry out, the client should be warned that transferring property may require recording fees, and may cost money to prepare the deeds of transfer.

If the client does wish to transfer a bank account or other asset to a joint tenant, he should choose someone in whom he has complete trust: a joint tenant has the power to completely deplete an account without the original owner's approval. Transferring title on a house could have an even worse result. If the original owner added his lover's name to the house as joint tenant, and then later broke up with the lover or tried to sell the house, he would need the lover's consent to change title. Creating joint tenancy should always be done carefully and thoughtfully. (An alternative to two people owning property together as joint tenants is to own property as "tenants in common," in which case there is no right of survivorship and the property still goes through probate.)

### **(c) Pay on Death Accounts**

Also known as “Totten Trust” accounts. Many typical bank accounts can be directed to pay the proceeds to a specified person upon the account holder’s death. Such an account is not controlled by the will, and thus will not be considered when valuing the estate.

**(d) Life insurance**

Life insurance purchased with the testator's resources acts like a bank account that is available after death. Unless the testator designates the estate as beneficiary in the insurance policy, the insurance proceeds will pass outside the will to the designated beneficiary. If the estate is the designated beneficiary, or if the designated beneficiary predeceased the testator, then the insurance proceeds will be considered when valuing the estate. The proceeds will then pass under the specific directions of the will. If the testator fails to make a specific provision in the will, the insurance proceeds would then pass to the residuary beneficiary. The will itself cannot change life insurance designations. The testator should make all the insurance designations with the company that issues the policy or through the place of employment that provides for life insurance.

Individuals who are HIV-positive will have a difficult time obtaining life insurance outside of an employment or other group situation. *See* CHAPTER 6: INSURANCE AND EMPLOYEE BENEFITS, which discusses obtaining and keeping life insurance coverage in more detail.

**(e) Inter vivos trusts**

Creating an inter vivos trust with a successor trustee in the case of incapacity is another method of avoiding probate. It also avoids the need for a conservatorship, as well as a durable power of attorney for finances. It is mainly used for tax avoidance. The main disadvantage is that it can be expensive to create and difficult to maintain. Ultimately, trusts are only useful when there is a fairly large estate to begin with. If an ALRP attorney thinks that one would help his client, the attorney may consult with a mentor through the Panel or seek an additional referral for the client.

**D. Will contests and how to avoid them**

A will contest is a process whereby persons may attack the provisions of a will due to the testator's alleged lack of capacity or because of a third party's wrongdoing. They may attack the will before probate, or after the executor has admitted it to probate, in an attempt to invalidate the will. Anyone may file objections in a pre-probate contest. Prob. Code §§ 8250 *et seq.* and 8004. Any "interested person" may file a petition for revocation within 120 days after probate is opened. Prob. Code § 8270 *et seq.*

**1. Interested person**

California Probate Code § 48 liberally defines an "interested person" as an heir, devisee, child, spouse, creditor, beneficiary, any other person having a property right in or claim against a trust estate or the estate of a decedent which may be affected by the proceeding, and any person having priority for appointment as personal representative. An "interested person" may also vary according to the circumstances.

An heir at law: one entitled to a share of the decedent's estate if the decedent had died without a will.

A child or spouse of the decedent whom the testator explicitly disinherited. Spouses and children whose names simply do not appear in the testator's will must seek recourse by way of an omitted heir statute, and not by way of a contest. *Estate of Leonetti*, 115 Cal.App.3d 378, 171 Cal.Rptr. 303 (1981).

A creditor or other person having a property right in or claim against the decedent's estate. *In re Harootenian's Estate*, 38 Cal.2d 242, 238 P.2d 992 (1951).

Beneficiaries under an earlier or later will where bequests under the admitted will impair their interests. *Estate of Powers*, 91 Cal.App.3d 715, 154 Cal.Rptr. 366 (1979); *In re Plaut's Estate*, 27 Cal.2d 424, 164 P.2d 765 (1945).

## **2. Grounds to contest a will**

There are typically three grounds to contest a will: fraud; duress and undue influence; and lack of testamentary capacity.

### **(a) Fraud**

Fraud occurs when the testator makes a particular bequest or devise based on a third party's misrepresentations. The misrepresentation must have induced the testator to make the will or bequest; it is not enough that there was a misrepresentation. Fraud also occurs when one induces the testator to sign a document that the testator does not know is a will. *In re Lorenz's Estate*, 136 Cal.App.2d 239, 288 P.2d 578 (1955).

### **(b) Duress and Undue Influence**

Often alleged together, a claim of duress or undue influence essentially asserts that someone has manipulated the testator into making a will or particular bequest which, but for the influence or pressure exerted by that person, the testator would not have made. *Estate of Baker*, 131 Cal.App.3d 471, 182 Cal.Rptr. 550 (1982).

The court usually evaluates undue influence in terms of the testator's susceptibility to influence, the third party's opportunity and motive to influence, and an unnatural disposition of the testator's property. The court will presume undue influence in two situations, both of which place the burden on the beneficiary to prove the testator made the bequest voluntarily:

Where the testator has made a devise or bequest to a witness of the will, the court will presume the witness obtained the bequest through undue influence. Prob. Code § 6112. Unless there are two other disinterested witnesses who subscribe to the will in addition to the "interested" witness, the presumption will operate. *Id.*

Where the testator has made a devise or bequest to someone who occupies a confidential relationship to the testator and that person has actively participated in the preparation or execution of the will and unduly benefits from the will, the court will presume that the beneficiary procured the bequest or devise by undue influence. *Estate of Baker, supra; Estate of Goetz*, 253 Cal.App.2d 107, 61 Cal.Rptr. 181 (1967).

In order to avoid any claims of undue influence, it is important that at least two of the witnesses to the will be impartial, that is, that they are not takers under the will. The attorney will normally be one of these witnesses. A beneficiary should not be used as a witness. The client should

assume as much responsibility as is possible in creating and implementing his or her testamentary scheme. It is imperative that the client makes his or her own decisions independently, without the intervention of others. The more it appears to the court that a "committee" executed the client's will, the stronger an opponent's case for undue influence becomes. The attorney should not include a named beneficiary in discussions with the client about the will. Therefore, discourage lovers, friends, or other prospective beneficiaries from participating in the will's preparation. The attorney should meet alone with the client as much as possible. If the client comes to the attorney's office, the client should be brought by someone other than a prospective beneficiary, if possible.

### **(c) Lack of Testamentary Capacity**

The court presumes testamentary capacity, or competence. The burden of proof lies with the will's challenger to show that the testator lacked the requisite capacity. *See Estate of Lockwood, supra; Estate of Goetz, supra.*

In an attempt to prove capacity or the lack of capacity, the court will take testimony from the following persons:

The witnesses who subscribed the will; *In re Lingenfelter's Estate*, 38 Cal.2d 571, 241 P.2d 990 (1952).

Family and close friends of the testator; *In re Lingenfelter's Estate, supra.*

The attorney who drafted the will; *Estate of Lockwood, supra; Estate of Goetz, supra.*

Because the court may call the witnesses of the will to testify, the attorney should know where to locate these people. The address of each witness should appear below his or her signature. The testimony of the witnesses, their observations regarding the testator's appearance or the testator's statements at the time of the will's execution, may be critical. Therefore, it is important in cases of a potential will challenge that the witnesses know the testator well enough to be able to say he was competent at the time of signing the will. Strangers in a hospital, for example, may not be the best witnesses in those cases.

An attorney's testimony will also be used to determine capacity. Therefore, the attorney should keep notes of all conversations and observations. Although videotaping the will's execution is acceptable as evidence in court, it may defeat the purpose of proving competency. First, judges or juries might view a very ill person near death as incapable of making informed decisions. Second, unless the attorney regularly videotapes all wills being signed, the fact that he selected this one for a special type of proof may highlight his own uncertainty regarding the client's competency.

## **PART THREE: POWERS OF ATTORNEY AND ADVANCE DIRECTIVES**

### **I. Recent Legal Changes**

The Health Care Decisions Law (Prob. C. §§4600-4805) governs Advance Healthcare Directives. The Power of Attorney Law no longer applies to powers of attorney for health care (Prob. C. §4050(a)). The advance directive has replaced the former Durable Power of Attorney for Health Care and the Declaration under the California Natural Death Act (Living Will). The Health Care Decisions Law, operative July 1, 2000, however, did not invalidate any valid preexisting documents. *See* Prob. C. §4665.

### **II. Advance Healthcare Directives**

Californians are able to remain in control of their health care despite the onset of incapacity. By executing an Advance Healthcare Directive, they are able to identify their preferences regarding the nature and extent of their medical treatment, and designate others to carry out their desires. If a valid advance health care directive is not available when someone becomes incapacitated, loved ones may have to seek a conservatorship to obtain the authority to make critical health care decisions. Most clients prefer to avoid court involvement and the expense of a conservatorship. By preplanning, the client can usually avoid that eventuality.

An Advance Healthcare Directive will include a power of attorney for health care designating an agent to make health care decisions for the principal as well as individual health care instructions. Prob. C. §4629. Health care decisions include selection and discharge of health care providers and institutions; approval or disapproval of diagnostic tests, surgical procedures, and programs of medication; and directions to provide, withhold, or withdraw artificial nutrition and hydration and all other forms of health care, including cardiopulmonary resuscitation. Prob. C. §4617.

Incompetence generally triggers the authority of an Advance Directive, at which point an individual is no longer able to speak for herself. Without instructions from an Advance Directive, family members and health care providers have to make difficult medical choices based on what they believe the incapacitated person would have wanted. Without the authority of an Advance Directive unrelated friends and lovers cannot make decisions, even if they know what the individual would have wanted. Consequently, clear written expressions of intent and careful selection of an agent are crucial to ensure that an incapacitated individual is still able to be "in charge" of her health care.

While California registered Domestic Partners do have the right to make healthcare decisions for one another in the event of incapacity, Domestic Partners should still execute Advance Directives. It is only in an Advance Directive that one can state in writing his or her wishes for the circumstances where life support would be withdrawn, for example. And without an Advance Directive, there will be no alternate agent in the event that the partner is unable to act.

An Advance Directive contains a statement of intent and explicit instructions on the use of life-sustaining treatment. There are many different types of treatment that can be provided in response to specific health conditions. We have provided a chart of many of these medical options which the attorney may wish to offer to the client for consideration. (*See APPENDIX L.*) Especially if the Advance Directive is to be executed when the client is in an advanced stage of illness, the client should discuss with her physician the types of treatment that may be offered and what their effects are. For example, does the client want to have artificial nourishment and hydration? Does she want to have a "Do Not Resuscitate" (DNR) order put in her medical chart? Does she want to be intubated or put on a mechanical ventilator? Ideally, this discussion would take place in the presence of the designated agent.

When executing an Advance Directive, the principal designates someone, such as a lover, relative or friend, to be the agent (attorney-in-fact) to make health care decisions for the principal who has become incompetent. The agent must act consistently with any instructions that are included in the Advance Directive or that the principal otherwise has made known. It is not recommended that the agent be the client's attorney, because this may lead to a conflict of interest. The agent cannot be the health care provider or an employee of the health care provider. In addition to the designated agent, the client should also select an alternate agent in case the designated agent is unable to serve.

An Advance Directive requires that the principal be competent when it is executed. An Advance Directive also requires two qualified adult witnesses who personally know the principal and who are present when the principal signs the document. Alternatively, a DPAHC can be notarized. Finally, a DPAHC must include certain statutory warnings.

Included in the appendix are two different DPAHC's: the California Medical Association 1992 form (hereinafter referred to as "CMA" form) (*see APPENDIX J*), and a sample form drafted by a lawyer (*see APPENDIX K*). The AIDS Legal Referral Panel recommends the CMA form simply because of its popularity and acceptance among providers: it will more easily be recognized, and therefore followed, when seen in a client's medical records. Nonetheless, the CMA form by itself is somewhat limiting, and an attorney should include optional provisions requested by the principal, such as those on the checklist noted above. The attorney-drafted form should also specify any decisions the client has made.

In addition to medical care decisions, Advance Directives may include instructions regarding other actions to be taken regarding aspects of health care. Several of these possibilities are discussed in the client brochure we have included on Advance Healthcare Directives. (*See APPENDIX S.*) The Advance Directive can give the designated agent priority in hospital visitation, authority to employ health care personnel, right of access to the principal's medical records, the right to consent to and to authorize pain-killing drugs and unconventional therapies, the right to arrange for the release of the principal's personal effects from the police or hospital taken at the time of the principal's injury or illness, the right to receive and transport the principal's body and the authority to carry out his or her wishes for a funeral or memorial service, and for the disposition of remains. Another important power is the "Right to Remove from Hospital Against Advice from Physician." This power allows the agent to take the patient home from the hospital to spend his last days with family and friends.



Important note: All Advance Directives and documents containing health care instructions should be distributed as widely as possible to the client's medical personnel, as well as given to a lover and relatives to ensure they know of its existence. Copies should be put in all medical records and provided to medical institutions used by the patient.

### **III. Durable Powers of Attorney for Finances (DPA)**

#### **A. Functions of the DPA**

A power of attorney is a written instrument authorizing an agent, called an attorney-in-fact, to act for the principal in the conduct of his or her affairs. A principal can empower an agent to perform transactions relating to real estate, tangible personal property, bonds, shares, commodities, business operations, insurance, retirement plans, and estates. Perhaps the most common function an agent can perform involves transactions with financial institutions: depositing and withdrawing funds on accounts belonging to the principal.

In addition, a power of attorney can permit an agent to handle tax matters, records, reports and statements, to receive benefits, and to deal with personal affairs and relationships of the principal.

In short, the power of an attorney-in-fact is limited only by law and by the restrictions imposed by the principal. Another important use for a DPA can occur after the principal's death: a DPA is an effective means of communicating to newspapers the principal's desire that obituaries include the name of the decedent's partner and other information the agent chooses. Newspapers are typically reluctant to name as survivors persons not related by blood or marriage to the decedent. This reluctance may be overcome by a DPA with a provision empowering the attorney-in-fact "to have published in any newspaper an obituary notice containing whatever information [the agent] may choose."

Most financial institutions upon request provide customers with a pre-printed form for designating powers of attorney. The branch of the institution where the customer has an account maintains the completed forms, which by their terms govern only accounts at that institution. Frequently, bank personnel have been instructed to honor only the institution's pre-printed form. Therefore, in order to save time and future difficulty, it is advisable for the client to execute in-house powers of attorney at each financial institution where she has an account. If the principal does not execute separate in-house forms and a financial institute fails to honor a transaction undertaken by a lawful attorney-in-fact, the principal (or her estate) may have a cause of action for wrongful dishonor under the Uniform Commercial Code. UCC § 4-402, but this problem is almost always remedied with an attorney's call.

#### **B. Creation of the DPA**

Traditionally, powers of attorney were not "durable": If the principal became incapacitated through injury or illness or died, the power of attorney automatically ended, since in theory the agent was merely the executor of the principal's orders. The reality of disabling or terminal illness and the desire to prepare for incapacity and death have prompted lawmakers of each state and the District of Columbia to enact legislation permitting attorneys-in-fact to act despite the incapacity of principals. The result is the statutory creation of the durable power of attorney

(DPA).

To create a DPA in California, the principal may use the Statutory Form provided in Probate Code section 4401 (*see* APPENDIX M for a copy) or may have an attorney draft one. In California, a DPA may either be witnessed by two people or may be notarized. (It is recommended that if the financial powers cover real property, it should be notarized.)

A DPA may be effective upon execution *or* only upon the disability of the principal (springing power). If the principal wishes the power of attorney to be effective upon execution but continue beyond incapacity, it should contain the words "This power of attorney will continue to be effective even though I become incapacitated." If the principal wishes it to be effective only upon her disability or incapacity, the DPA should contain the words such as "This power of attorney shall become effective upon the disability or incapacity of the principal." In both cases, the DPA is not affected by lapse of time after execution of the instrument, nor by the disability or mental incapacity of the principal. The attorney should review with the client which option she prefers. Most clients who are fully capable prefer a springing DPA.

Incapacity for the sake of a DPA can be defined by the occurrence of an event as determined by a single individual, such as a treating physician or an attorney. Alternatively, the effective date of the power can be delayed informally by having the attorney physically retain the document until the client becomes incapacitated.

In this way, a DPA differs from conservatorship proceedings, whereby a client is declared by the court to be incapacitated and a conservator is appointed by the court. Conservatorships are time-consuming, expensive, and result in considerable loss of privacy and control by the client. Because a DPA and a Advance Healthcare Directive can substitute for a conservatorship, it is highly recommended that these forms be completed for every client.

When establishing a DPA, the client should choose the agent carefully, and should provide for a successor agent in case the first one chosen is unavailable. The acts of the attorney-in-fact bind the principal and his or her successor as if the principal were competent and not disabled. Every client must be advised that powers of attorney are subject to abuse; an agent has the power to wipe out someone's bank account. Although this would be a fiduciary breach, the estate would not necessarily be able to sue. If the principal dies or revokes the power of attorney, and the attorney-in-fact has no actual knowledge of the death or revocation, the agent's acts are nonetheless valid and binding on the principal and successors. Even after an attorney in fact is notified of a revocation, third parties are still exempt from liability for honoring a DPA, absent actual notice. Thus choosing an agent and alternate who the client trusts absolutely is key.

## APPENDICES

### Appendix A: Sample Letter to Client With a Large Estate

DATE

CLIENT

ADDRESS

CITY, STATE, ZIP CODE

Dear Client:

This letter will serve to confirm our recent conversation in my office regarding the preparation of your will. I advised you that in an estate as large as yours, it would be prudent to obtain advice on the current tax situation and perhaps do more sophisticated estate planning, rather than rely upon a simple will to dispose of your estate.

I have no expertise in complex estate planning or taxation. More complex estate planning devices might be available to you which could lessen the tax liabilities of your beneficiaries or estate, or avoid delay and fees in the transfer of your assets after death. I understand that you do not wish to seek such estate planning at this time, even though you understand that there may be tax and other implications for your beneficiaries and estate.

I have included a short statement at the end of this letter for you to sign, indicating that you understand and agree to what is set forth above.

Very truly yours,

PANEL ATTORNEY

I, CLIENT, have read the above letter, fully understand its contents and meaning, and agree to what is set forth above. It remains my desire to dispose of my estate by a simple will.

DATED: SIGNATURE:

## **Appendix B: Will Drafting Checklist**

### **A. Personal and family data**

1. Full name (including middle name), or any other name used on bank accounts, deeds, etc.
2. Address, telephone; both home and business
3. County of residence; how long in California
4. Married? name of spouse
  - a. If separated, when?
  - b. Dissolution pending? get county and action number
  - c. Divorce, when? get information on prior marriages and divorces
5. Children; names and dates of birth
  - a. Any deceased children?
  - b. Any grandchildren?
6. Business or occupation; employer
7. Social Security number
8. Estimated annual income from business and other sources
9. Brothers or sisters? Parents?

### **B. Total assets**

Find out date acquired, cost, present value, encumbrances, and forms of title, if possible; be sure to total the gross value; if the estate is not simple and of small value refer to estate planning attorney where possible.

1. Cemetery plot
2. Real property - in California and out-of-state; approx. value today; amount of remaining mortgage; other names on deed
3. Bank accounts - location; single or joint; estimated amount; safety deposit boxes
4. Stocks and bonds
5. Tangible personal property - autos, furniture, boats, etc.
6. Life insurance - face amounts, beneficiaries
7. Death and retirement benefits - how much and benefits
8. Debts owed to client
9. Business interests - partnerships, sole proprietorships, controlled corporations
10. Copyrights, patents

11. Other - antiques, stamp collections, rare books, etc.
12. Expectancies - beneficial interests in trusts, expected inheritances of gifts, power of appointment; is client the beneficiary of anyone's life insurance?

**C. Will provisions**

1. Testamentary gifts; name contingent beneficiaries
  - a. Household effects and other tangible personal property
  - b. Gift of residence
  - c. Other real property; subject to encumbrances?
  - d. Gifts of money; note if gifts to minors
  - e. Gift of specific items
  - f. Residue
2. Executor and alternate/successors. Bond waiver?
3. Guardian, if minor children; guardian of children, guardian of estate
4. Funeral, cremation and burial instructions
5. No contest clause?
6. Intentional omission clause?

**D. Other questions to ask**

1. Have you ever made prior wills? When? Where are they now? Were they revoked?
2. Have you made prepaid funeral arrangements?
3. Maximum amount to spend on funeral?
4. Taxes: who should pay inheritance taxes? (Each recipient of property pays own share of taxes, or estate pays all taxes, or some other arrangement.)
5. Client debts: to whom and how much?
6. If you own real estate, do you want the real estate to pass subject to all mortgages, liens and encumbrances? If not, do you want the estate to pay off all mortgages, liens and encumbrances?
7. Do you want all jointly owned property (bank accounts, stock, bonds, real estate, cars) to go to joint owner?

**Appendix C: Sample Will # 1 (for small estates)**

**LAST WILL AND TESTAMENT OF  
[NAME OF CLIENT]**

I, [NAME OF CLIENT], a resident of the City of \_\_\_\_\_, County of \_\_\_\_\_, California, declare this to be my will, and I hereby revoke all wills and codicils that I have previously made.

**FIRST:** I am unmarried and have no children. The members of my immediate family are [NAMES OF RELATIVES WHO WOULD SHARE INTESTATE ESTATE].

**SECOND:** To my friends, I give the following: To [FRIEND ONE], I give my \_\_\_\_\_. To [FRIEND TWO], I give my \_\_\_\_\_. I direct my executor to distribute the remainder of my personal possessions between [FRIEND ONE], [FRIEND TWO], and [FRIEND THREE] in the manner that my Executor deems appropriate, taking into consideration any wishes that I have made known to my Executor prior to my death.

**THIRD:** To the following relatives and friends who survive me, I give all the rest of my estate on the following shares: To [RELATIVE ONE], I give \_\_\_\_\_ share(s), to [RELATIVE TWO], I give \_\_\_\_\_ share(s), to my friend, [FRIEND ONE], I give \_\_\_\_\_ share(s), to my friend, [FRIEND TWO], I give \_\_\_\_\_ share(s), and to my friend [FRIEND THREE], I give \_\_\_\_\_ share(s). In addition, my executor shall receive \_\_\_\_\_ share(s) in compensation for my executor's services.

**FOURTH:** I appoint my friend, [FIRST EXECUTOR], to be my executor to serve without bond. If [FIRST EXECUTOR] is unable or unwilling to serve, I appoint [SECOND EXECUTOR] to serve without bond. If [SECOND EXECUTOR] is unable or unwilling to serve, I appoint [THIRD EXECUTOR] to serve without bond. My estate shall be administered under the California Independent Administration of Estates Act. I authorize my executor to sell or lease all or any part of the property of my estate, at public or private sale, with or without notice, as my executor, in his or her sole and absolute discretion, considers necessary for the proper administration and distribution of my estate.

**FIFTH:** Except as otherwise provided in this will, I have intentionally and with full knowledge omitted to provide for my heirs. I do this, not out of a lack of affection, but because I know my family is adequately provided for. If any person who, if I died intestate, would be entitled to any part of my estate, shall either directly or indirectly, alone or in conjunction with any other person, claim in spite of my will an intestate share of my estate, I give that person One Dollar, and no more, in lieu of any other share or interest in my estate. If any beneficiary under this will in any manner, directly or indirectly, contests this will or any of its provisions in any legal proceeding that is designed to thwart my wishes as expressed in this will, any share or interest in my estate given to that contesting beneficiary under this will is revoked and shall be disposed of in some manner provided herein as if that contesting beneficiary had predeceased me.

**SIXTH:** I request that my body be cremated and that my executor arrange for disposition of my body in the manner that she or he deems most appropriate unless prior arrangement have been

made by my attorney in fact for health care decisions, and to have published in any newspaper an obituary notice containing whatever information she or he may choose. I request that my executor consider my wishes in this matter if I have made my wishes known to my executor before my death. If any provision of this will, or any codicil, is invalid, it is my intention that all of the other provisions be fully effective. Signature

Signed on this \_\_\_\_ day of \_\_\_\_\_, 2\_\_\_\_, at \_\_\_\_\_, California.

**ATTESTATION**

On the date written below, the testator, [NAME OF CLIENT], declared to use that this instrument, consisting of \_\_\_\_ pages including this page, was the testator's will and asked us to witness it. The testator then signed this will in our presence, all of us being present at the same time. At the testator's request, in the testator's presence, and in the presence of one another, we subscribe our names as witnesses. We believe that the testator is over the age of 18, is of sound mind, and is under no constraint or undue influence. We declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on \_\_\_\_, 2\_\_\_\_, at \_\_\_\_\_, California.

\_\_\_\_\_  
[Signature of Witness]

\_\_\_\_\_  
[Name of Witness]

\_\_\_\_\_  
[Address]

\_\_\_\_\_  
[Signature of Witness]

\_\_\_\_\_  
[Name of Witness]

\_\_\_\_\_  
[Address]

\_\_\_\_\_  
[Signature of Witness]

\_\_\_\_\_  
[Name of Witness]

\_\_\_\_\_  
[Address]  
\_\_\_\_\_

**Appendix D: Sample Will # 2 (with provisions for minor child/children)**

**LAST WILL AND TESTAMENT OF  
[NAME OF CLIENT]**

I, \_\_\_\_\_, a resident of \_\_\_\_\_  
County, California, being of full age, sound mind and memory and under no restraint, declare  
this instrument to be my Last Will and Testament and hereby revoke all Wills and Codicils that I  
have previously made.

**I.** I do hereby declare that I am single and have no living or deceased children or children of  
predeceased children. The members of my immediate family are

**OR**

I do hereby declare that I am single, having never been married. I have \_\_\_\_\_ children, namely  
\_\_\_\_\_, born \_\_\_\_\_ and  
namely \_\_\_\_\_, born \_\_\_\_\_.

**OR**

I do hereby declare that I am married to \_\_\_\_\_ and have no living or  
deceased children or children of predeceased children.

**OR**

I do hereby declare that I am married \_\_\_\_\_ and have \_\_\_\_\_ children,  
namely \_\_\_\_\_, born \_\_\_\_\_  
and namely \_\_\_\_\_, born \_\_\_\_\_  
\_\_\_\_\_.

**OR**

I do declare that I am single. I was married to \_\_\_\_\_ and was  
divorced in \_\_\_\_\_ in \_\_\_\_\_  
County. I have \_\_\_\_\_ children, namely \_\_\_\_\_, born \_\_\_\_\_  
\_\_\_\_\_ and namely \_\_\_\_\_, born  
\_\_\_\_\_. I further declare that this will is not related to any  
contract to make a will or any agreement similar to such a contract to make a will entered into by  
me with any other person, and I further declare that there is no such contract, written or oral.

**II.**

I nominate \_\_\_\_\_ as Executor of this will, to serve without  
bond. Should \_\_\_\_\_ be unavailable to serve as Executor, I



nominate \_\_\_\_\_ to serve as Executor of this will, without bond. My Executor shall have the authority to distribute property as provided herein, and shall further have the authority to sell, with or without notice, at either public or private sale, any property belonging to my estate [, excepting the property listed in Paragraphs \_\_\_\_, \_\_\_\_, \_\_\_\_, and \_\_\_\_ of this will], in order to pay any of my expenses before my death or any expenses of my estate, subject only to such confirmation of the Court as may be required by law. My estate shall be administered under the California Independent Administration of Estates Act. I direct my Executor to pay all of the expenses of my last illness, of my [CHOOSE ONE: funeral and burial (OR) funeral and cremation (OR) burial (OR) cremation], and of the administration of my estate.

**OR**

My Executor shall have the authority to distribute property as provided herein, and shall further have the authority to sell, with or without notice, at either public or private sale, any property belonging to my estate [excepting the property listed in Paragraphs \_\_\_\_, \_\_\_\_, \_\_\_\_, and \_\_\_\_ of this will], as my Executor, in his or her sole and absolute discretion, considers necessary for the proper administration and distribution of my estate. My estate shall be administered under the California Independent Administration of Estates Act. I direct my Executor to pay all of the expenses of my last illness, of my [CHOOSE ONE: funeral and burial (OR) funeral and cremation (OR) burial (OR) cremation], and of the administration of my estate.

**III.**

[OPTIONAL] I direct that all inheritance, estate, transfer and other death taxes (including interest and penalties) assessed or payable by reason of my death on any property or interest in property which is included in my estate for the purpose of computing taxes be paid by my Executor out of the residue of my estate disposed of by this will, without adjustment. No such taxes shall be charged to or collected from any beneficiary of my probate estate, nor from any transferee or beneficiary of any property outside my probate estate.

**IV.**

[OPTIONAL] I hereby authorize my executor to utilize the services of an attorney, accountant, and any other professional as may be necessary in the administration of this, my Last Will and Testament. My Executor named herein shall be entitled to [reasonable compensation commensurate with the services actually performed and to] reimbursement for these and other expenses properly incurred.

**V.**

[All Property to One Beneficiary] I give, devise and bequeath my entire estate, whether real, personal, or mixed, of every kind, nature and description whatsoever, and wherever situated, which I may now own or hereafter acquire, or have the right to dispose of at the time of my death, by the power of appointment or otherwise, to \_\_\_\_\_, absolutely and in fee simple. If \_\_\_\_\_ shall predecease me, then this property shall pass instead to \_\_\_\_\_.

**OR** [All Property to One Beneficiary; Testator Hopes That Beneficiary Shall Share Property with Friends and Family] I give, devise and bequeath my entire estate, whether real, personal, or

mixed, of every kind, nature and description whatsoever, and wherever situated, which I may now own or hereafter acquire, or have the right to dispose of at the time of my death, by the power of appointment or otherwise, to \_\_\_\_\_, absolutely and in fee simple. It is my hope that \_\_\_\_\_ shall share this bequest with my other friends and family, but \_\_\_\_\_ shall have the sole and absolute authority to distribute any property received. If \_\_\_\_\_ shall predecease me, then this property shall pass instead to \_\_\_\_\_, with the same conditions and hope that \_\_\_\_\_ will share this bequest with my other friends and family.

**OR**

[Specific Bequests] To \_\_\_\_\_, I leave \_\_\_\_\_. Should \_\_\_\_\_ predecease me, then this gift shall lapse and become part of the residue of my estate [OR: then this gift shall pass instead to \_\_\_\_\_].

**OR**

[Specific Bequests; Joint Beneficiaries] To \_\_\_\_\_ and \_\_\_\_\_ jointly, or to the survivor of them solely should either of them predecease me, I leave \_\_\_\_\_. Should both \_\_\_\_\_ and \_\_\_\_\_ predecease me, then this gift shall lapse and become part of the residue of my estate.

**AND**

After payment of all my expenses before my death and estate expenses, I leave the rest, residue and remainder of my estate, of whatever character and wherever located, which I may now own or which I or my estate may hereafter acquire, or have the right to dispose of at the time of my death, by the power of appointment or otherwise, which is not otherwise disposed of by this will, to \_\_\_\_\_ [OR my wife, \_\_\_\_\_, OR my husband, \_\_\_\_\_, OR my children, to share and share alike].

**OR**

To the following relatives and friends who survive me, I give all the rest of my estate in the following shares: To \_\_\_\_\_, I give a \_\_\_\_\_ share; to \_\_\_\_\_, I give a \_\_\_\_\_ share; to \_\_\_\_\_, I give a \_\_\_\_\_ share, etc. In addition, my Executor shall receive a \_\_\_\_\_ share in compensation for his or her services.

**VI.**

[Specific Disinheritance] It is not my intention to make provision in this, my Last Will and Testament, for \_\_\_\_\_ or for any relative, next of kin or any other person not expressly provided for herein, except for children born to or legally adopted by

me after the date hereof, and if any such relative, heir or person has not been expressly mentioned herein, he or she has been omitted by me intentionally and with full knowledge of his or her relationship and existence. I do this, not out of a lack of affection, but because I know my family is adequately provided for. If any person who, if I died intestate would be entitled to any part of my estate, shall either directly or indirectly, alone or in conjunction with any other person, claim in spite of my will a share of my estate, I give that person One Dollar (\$1.00), and no more, in lieu of any other share or interest in my estate.

**AND**

If any beneficiary under this will in any manner, directly or indirectly, contests this will or any of its provisions in any legal proceeding that is designated to thwart my wishes as expressed in this will, any share or interest in my estate given to that contesting beneficiary under this will is revoked and shall be disposed of in some manner provided herein as if that contesting beneficiary predeceased me.

**OR**

If any beneficiary shall object to the probate of this will or in any manner directly or indirectly, contest or aid in the contesting of this will, any provisions hereof or any part of the estate hereunder, then he or she shall be deemed to have predeceased me for the purposes of this will and any provisions herein contained.

**VII.**

[OPTIONAL]

(Guardian for Minor or Incapacitated Children)

I direct that \_\_\_\_\_ shall serve as guardian of person for \_\_\_\_\_ and \_\_\_\_\_ in the case the other parent legally entitled to custody is unavailable. If \_\_\_\_\_ is unavailable to serve as guardian, I direct that \_\_\_\_\_ shall serve as guardian.

I believe that it would not be in \_\_\_\_\_'s best interest to be raised to the age of majority by [any of the members of my immediate family] [by the child's other parent] for the following reason:

[LIST REASONS]

If \_\_\_\_\_ is not appointed as guardian, I request that s/he be granted extensive visitation rights with \_\_\_\_\_.

I further direct that \_\_\_\_\_ shall be appointed as the guardian of the estate of \_\_\_\_\_ in the event that he/she is still a minor at the time of my death.

**OR**

(Custodianship for Person Under Age [list age - up to 25])

If under any provision of this will any property would go upon distribution of my estate outright

to a person who is under the age of \_\_\_\_\_ [age at the time you want distribution, e.g., 18 to 25] at the time of such distribution, said property shall instead go to [an individual designated by the executor/OR [name someone] as custodian for such person under the Uniform Transfers to Minors Act to act \_\_\_\_\_, of either the state of California or the state in which such person or such custodian is then living (as the executor may determine), and said property shall be transferred to the custodian in compliance with and subject to such Act.

**VIII.**

[OPTIONAL]

I wish to note that I have life insurance [and assets in joint tenancy], and that nothing in this will is intended to contradict the designations [or title] made therein or to limit the ability to alter such designations [or title].

**IX.**

It is my wish that after my death my body be cremated.

**OR**

It is my wish that after my death my body be buried.

**OR**

It is my wish that after my death my body be embalmed and placed in a sealed casket for services at and burial in the family plot.

**OR**

It is my wish that after my death my remains be cremated and my ashes be given to \_\_\_\_\_ [OR: my Executor], to dispose of as \_\_\_\_\_ sees fit unless prior arrangements have been made by my attorney-in-fact for health care decisions.

**OR**

I direct that my remains be cremated, that the ashes be placed in an urn and that the urn be deposited at a place selected by my Executor.

**AND**

[OPTIONAL]

I request that my Executor arrange for disposition of my body in the manner that he or she deems appropriate unless prior arrangements have been made by my attorney-in-fact for health care decisions.

**OR**

I authorize my Executor to have published in any newspaper an obituary notice containing whatever information my Executor may choose.

**X.**

(No Funeral or Memorial Service)

I direct that no funeral or other memorial service be conducted.

**XI.**

If any part, class, provision or condition of this will is held to be void, invalid or inoperative, I direct that such invalidity shall not affect any other part, clause, provision or condition of this, my Last Will and Testament, and that the remainder of this will shall be carried into effect as though such part, clause, provision or condition had not been contained herein.

**XII.**

If I and any beneficiary under this, my Last Will and Testament, should die in a common accident or disasters or under such circumstances that it is difficult or impractical to determine who survived the other, or if any beneficiary, though surviving me, should die within \_\_\_\_\_ days from and after the date of my death, then such beneficiary shall be deemed to have predeceased me.

Signed on this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, at \_\_\_\_\_, California.

\_\_\_\_\_  
[Signature of the Testator]

**ATTESTATION**

On the date written below, the testator, [name], declared to use that this instrument, consisting of \_\_\_\_\_ pages including this page, was the testator's will and asked us to witness it. The testator then signed this will in our presence, all of us being present at the same time. At the testator's request, in the testator's presence, and in the presence of one another, we subscribe our names as witnesses.

We believe that the testator is over the age of 18, is of sound mind, and is under no constraint or undue influence. We declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on \_\_\_\_, 2 \_\_\_\_, at \_\_\_\_\_, California.

\_\_\_\_\_  
[Signature of Witness] [Signature of Witness]

\_\_\_\_\_  
[Name of Witness] [Name of Witness]

\_\_\_\_\_  
[Address] [Address]

\_\_\_\_\_

\_\_\_\_\_  
[Signature of Witness]

\_\_\_\_\_

[Name of Witness]

---

[Address]

**Appendix E: Sample Declaration**

[NOTE: The following form is to be used by people in the State of California for collecting property when the estate was less than \$100,000, per Probate Code Section 13101. California law allows for the use of two witnesses instead of a notary, but banks my demand that it be notarized. If used out of state, the form needs to be an "Affidavit" instead of a "Declaration" and needs to be notarized.]

**DECLARATION FOR COLLECTION OR  
TRANSFER OF PERSONAL PROPERTY**

The undersigned declares:

1. The decedent's name is \_\_\_\_\_.
2. Said decedent died on \_\_\_\_\_, 20\_\_, at \_\_\_\_\_.
3. At least 40 days have elapsed since the death of the decedent, as shown in a certified copy of the decedent's death certificate attached to this affidavit or declaration.
4. [Either of the following, as appropriate:]
  - A. No proceeding is now being or has been conducted in California for administration of the decedent's estate.

**OR**

- B. The decedent's personal representative has consented in writing to the payment, transfer, or delivery to the affiant or declarant of the property described in the affidavit or declaration. (Copies of personal representative's written consent and letters testamentary must be attached.)
5. The current gross fair market value of the decedent's real and personal property in California, excluding the property described in Section 13050 of the California Probate Code, does not exceed sixty thousand dollars (\$100,000).
6. The property to be paid (transferred or delivered) to declarant is as follows:

\_\_\_\_\_  
\_\_\_\_\_

7. The name of decedent's successor to the above described property is \_\_\_\_\_.
8. [Either of the following, as appropriate:]
  - A. The affiant or declarant is the successor of the decedent (as defined in Section 13006 of the California Probate Code) to the decedent's interest in the described property.
  - B. The affiant or declarant is authorized under Section 13051 of the California Probate Code to act on behalf of the successor of the decedent (as defined in Section 13006 of the California Probate Code) with respect to the decedent's interest in the described property.
9. No other person has a superior right to the interest of the decedent in the described property.

10. The affiant or declarant requests that the described property be paid, delivered, or transferred to the affiant or declarant.

11. The affiant or declarant affirms or declares under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: \_\_\_\_\_

(Signature)

**ATTESTATION**

On the date written below, [name] signed this declaration in our presence, all of us being present at the same time. At the declarant's request, in the declarant's presence, and in the presence of one another, we subscribe our names as witnesses. We believe that the declarant is over the age of 18, is of sound mind, and is under no constraint or undue influence. We declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on \_\_\_\_\_, 2\_\_\_\_, at \_\_\_\_\_, California.

\_\_\_\_\_  
[Signature] [Signature]

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

[Address] [Address]



**Appendix F: Nomination of Guardian Form**

**Nomination of Guardian**

I, \_\_\_\_\_ [name], the undersigned parent [or father or mother] of \_\_\_\_\_ [name(s) of proposed ward(s)], hereby nominate a Guardian of the person [or estate or person and estate] [or a Guardian of the person and a Guardian of the estate] of such minor(s), as follows:

In the event that a Guardian of the person or estate or person and estate) should be necessary for any minor child of mine, I nominate \_\_\_\_\_ [name], of \_\_\_\_\_ [street address, city, state, zip], as Guardian [or if more than one identified, as Joint Guardians] of the person [or estate or person and estate] of my child [or son(s) or daughter(s) or children] \_\_\_\_\_ [names][or I nominate \_\_\_\_\_ (name), of \_\_\_\_\_ [street address, city, state, zip], as Guardian of the person of my child (or son(s) or daughter(s) or children) and \_\_\_\_\_ (name), of \_\_\_\_\_ (street address, city, state, zip) (or for bank: \_\_\_\_\_ [full and exact name of bank]), as Guardian of the estate of my child (or son(s) or daughter(s) or children) (name(s) of minor(s)), so long as [, with respect to any such child,] such child remains a minor [if other parent is alive and not consenting, add: , and only in the event that the mother (or father) of such child, \_\_\_\_\_ (name of other parent), fails to survive me or lacks legal capacity to consent to this nomination or that the consent of the mother (or father) is not required for an adoption of such child].

(Authority of Guardian of Person)

The nominee for Guardian of the person [or person and estate] shall have the same authority with respect to my child [or son(s) or daughter(s) or children] as I have [or the following authority with respect to my child (or son(s) or daughter(s) or children): (describe extent of authority to be given to nominee)].

[Add optional provisions, as appropriate:]

**Successor Guardian**

In the event that the [or any] nominee is unable or unwilling to act or to continue to act as Guardian of the person [or estate or person and estate], then I nominate \_\_\_\_\_ [name], or \_\_\_\_\_ [street address, city, state, zip], as such Guardian.

**OR**

In the event that the [or any] nominee is unable or unwilling to act or to continue to act as Guardian of the person [or estate or person and estate], then I nominate \_\_\_\_\_ [name], of [street address, city, state, zip], as such Guardian.

In the event that \_\_\_\_\_ [name of nominee for Guardian of estate] is unable or unwilling to act or to continue to act as Guardian of the estate, then I nominate \_\_\_\_\_ [name], of \_\_\_\_\_ [street address, city, state, zip], as such Guardian.

**Bond**

No bond shall be required of any Guardian nominated herein.

Dated: \_\_\_\_\_, 2\_\_\_\_. \_\_\_\_\_

(Signature)

STATE OF CALIFORNIA COUNTY OF

**NOTARIZATION**

On this \_\_\_\_\_ day \_\_\_\_\_, 2\_\_\_\_, before me, the undersigned Notary Public, personally appeared \_\_\_\_\_, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument, and [he/she] acknowledged to me that [he/she] executed the same in [his/her] authorized capacity, and that, by [his/her] signature on the instrument, the person or the entity upon behalf of which [he/she] acted, executed the instrument.

WITNESS my hand and official seal.

\_\_\_\_\_  
Notary Public

My commission expires

## **Appendix G: California Statutory form for Advance Health Care Directive**

On the following pages we have reprinted the California Statutory form for a Advance Health Care Directive. This form is easily recognized by hospitals and other health care providers, and asks all the most basic questions necessary when creating an Advance Directive. Extra sheets can also be attached.

If it or any other Advance Directive is used, a copy should be placed in all of the client's medical records so that a health care provider can readily see the decisions made by the client.

### **ADVANCE HEALTH CARE DIRECTIVE**

(California Probate Code Section 4701)

Explanation: You have the right to give instructions about your own health care. You also have the right to name someone else to make health care decisions for you. This form lets you do either or both of these things. It also lets you express your wishes regarding donation of organs and the designation of your primary physician. If you use this form, you may complete or modify all or any part of it. You are free to use a different form. Part 1 of this form is a power of attorney for health care. Part 1 lets you name another individual as agent to make health care decisions for you if you become incapable of making your own decisions or if you want someone else to make those decisions for you now even though you are still capable. You may also name an alternate agent to act for you if your first choice is not willing, able, or reasonably available to make decisions for you. (Your agent may not be an operator or employee of a community care facility or a residential care facility where you are receiving care, or your supervising health care provider or employee of the health care institution where you are receiving care, unless your agent is related to you or is a coworker.) Unless the form you sign limits the authority of your agent, your agent may make all health care decisions for you. This form has a place for you to limit the authority of your agent. You need not limit the authority of your agent if you wish to rely on your agent for all health care decisions that may have to be made. If you choose not to limit the authority of your agent, your agent will have the right to: (a) Consent or refuse consent to any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect a physical or mental condition. (b) Select or discharge health care providers and institutions. (c) Approve or disapprove diagnostic tests, surgical procedures, and programs of medication. (d) Direct the provision, withholding, or withdrawal of artificial nutrition and hydration and all other forms of health care, including cardiopulmonary resuscitation. (e) Make anatomical gifts, authorize an autopsy, and direct disposition of remains. Part 2 of this form lets you give specific instructions about any aspect of your health care, whether or not you appoint an agent. Choices are provided for you to express your wishes regarding the provision, withholding, or withdrawal of treatment to keep you alive, as well as the provision of pain relief. Space is also provided for you to add to

the choices you have made or for you to write out any additional wishes. If you are satisfied to allow your agent to determine what is best for you in making end-of-life decisions, you need not fill out Part 2 of this form. Part 3 of this form lets you express an intention to donate your bodily organs and tissues following your death. Part 4 of this form lets you designate a physician to have primary responsibility for your health care. After completing this form, sign and date the form at the end. The form must be signed by two qualified witnesses or acknowledged before a notary public. Give a copy of the signed and completed form to your physician, to any other health care providers you may have, to any health care institution at which you are receiving care, and to any health care agents you have named. You should talk to the person you have named as agent to make sure that he or she understands your wishes and is willing to take the responsibility. You have the right to revoke this advance health care directive or replace this form at any time.

**PART 1**  
**POWER OF ATTORNEY FOR HEALTH CARE**

(1.1) DESIGNATION OF AGENT: I designate the following individual as my agent to make health care decisions for me:

---

(name of individual you choose as agent)

---

(address)	(city)	(state)	(ZIP Code)	
				(home
phone)		(work phone)		

OPTIONAL: If I revoke my agent's authority or if my agent is not willing, able, or reasonably available to make a health care decision for me, I designate as my first alternate agent:

---

(name of individual you choose as first alternate agent)

---

(address)	(city)	(state)	(ZIP Code)	
				(home
phone)		(work phone)		

OPTIONAL: If I revoke the authority of my agent and first alternate agent or if neither is willing, able, or reasonably available to make a health care decision for me, I designate as my second alternate agent:

---

(name

of individual you choose as second alternate agent)

---

(address) (city) (state) (ZIP Code) (home  
phone) (work phone)

---

(1.2) AGENT'S AUTHORITY: My agent is authorized to make all health care decisions for me, including decisions to provide, withhold, or withdraw artificial nutrition and hydration and all other forms of health care to keep me alive, except as I state here:

---

---

---

(Add additional sheets if needed.)

(1.3) WHEN AGENT'S AUTHORITY BECOMES EFFECTIVE: My agent's authority becomes effective when my primary physician determines that I am unable to make my own health care decisions unless I mark the following box. If I mark this box ( ), my agent's authority to make health care decisions for me takes effect immediately.

(1.4) AGENT'S OBLIGATION: My agent shall make health care decisions for me in accordance with this power of attorney for health care, any instructions I give in Part 2 of this form, and my other wishes to the extent known to my agent. To the extent my wishes are unknown, my agent shall make health care decisions for me in accordance with what my agent determines to be in my best interest. In determining my best interest, my agent shall consider my personal values to the extent known to my agent.

(1.5) AGENT'S POSTDEATH AUTHORITY: My agent is authorized to make anatomical gifts, authorize an autopsy, and direct disposition of my remains, except as I state here or in Part 3 of this form:

---

---

---

(Add additional sheets if needed.)

(1.6) NOMINATION OF CONSERVATOR: If a conservator of my person needs to be appointed for me by a court, I nominate the agent designated in this form. If that agent is not willing, able, or reasonably available to act as conservator, I nominate the alternate agents whom I have named, in the order designated.

**PART 2**  
**INSTRUCTIONS FOR HEALTH CARE**

If you fill out this part of the form, you may strike any wording you do not want.

(2.1) END-OF-LIFE DECISIONS: I direct that my health care providers and others involved in my care provide, withhold, or withdraw treatment in accordance with the choice I have marked below:

(a) Choice Not To Prolong Life

I do not want my life to be prolonged if (1) I have an incurable and irreversible condition that will result in my death within a relatively short time, (2) I become unconscious and, to a reasonable degree of medical certainty, I will not regain consciousness, or (3) the likely risks and burdens of treatment would outweigh the expected benefits.

(b) Choice To Prolong Life

I want my life to be prolonged as long as possible within the limits of generally accepted health care standards.

(2.2) RELIEF FROM PAIN: Except as I state in the following space, I direct that treatment for alleviation of pain or discomfort be provided at all times, even if it hastens my death:

---

---

(Add additional sheets if needed.)

(2.3) OTHER WISHES: (If you do not agree with any of the optional choices above and wish to write your own, or if you wish to add to the instructions you have given above, you may do so here.) I direct that:

---

---

(Add additional sheets if needed.)

**PART 3**  
**DONATION OF ORGANS AT DEATH (OPTIONAL)**

(3.1) Upon my death (mark applicable box):

(a) I give any needed organs, tissues, or parts, OR

\_\_\_\_\_ (b) I give the following organs, tissues, or parts only.

(c) My gift is for the following purposes (strike any of the following you do not want):

- (1) Transplant
- (2) Therapy
- (3) Research
- (4) Education

**PART 4**  
**PRIMARY PHYSICIAN**  
**(OPTIONAL)**

(4.1) I designate the following physician as my primary physician:

\_\_\_\_\_  
(name of physician)

\_\_\_\_\_  
(address) (city) (state) (ZIP Code)

\_\_\_\_\_  
(phone)

OPTIONAL: If the physician I have designated above is not willing, able, or reasonably available to act as my primary physician, I designate the following physician as my primary physician:

\_\_\_\_\_  
(name of physician)

\_\_\_\_\_  
(address) (city) (state) (ZIP Code)

\_\_\_\_\_  
(phone)

**PART 5**

(5.1) EFFECT OF COPY: A copy of this form has the same effect as the original. (5.2)

SIGNATURE: Sign and date the form here:

\_\_\_\_\_  
(sign your name) (date)

\_\_\_\_\_  
(address) (print your name)

---

(city)

(state)

(zip)

(5.3) STATEMENT OF WITNESSES: 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 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.

First witness

Second witness

\_\_\_\_\_  
(print name)

\_\_\_\_\_  
(print name)

\_\_\_\_\_  
(address)

\_\_\_\_\_  
(address)

\_\_\_\_\_  
(state)

\_\_\_\_\_  
(zip)

\_\_\_\_\_  
(city)

\_\_\_\_\_  
(state)

\_\_\_\_\_  
(zip)

\_\_\_\_\_  
(city)

\_\_\_\_\_  
(signature of witness)

\_\_\_\_\_  
(signature of witness)

\_\_\_\_\_  
(date)

\_\_\_\_\_  
(date)

(5.4) ADDITIONAL STATEMENT OF WITNESSES: At least one of the above witnesses must also sign the following declaration: 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.

\_\_\_\_\_  
(signature of witness)

\_\_\_\_\_  
(signature of witness)



**PART 6**  
**SPECIAL WITNESS REQUIREMENT**

(6.1) The following statement is required only if you are a patient in a skilled nursing facility--a health care facility that provides the following basic services: skilled nursing care and supportive care to patients whose primary need is for availability of skilled nursing care on an extended basis. The patient advocate or ombudsman must sign the following statement:

**STATEMENT OF PATIENT ADVOCATE OR OMBUDSMAN**

I declare under penalty of perjury under the laws of California that I am a patient advocate or ombudsman as designated by the State Department of Aging and that I am serving as a witness as required by Section 4675 of the Probate Code. \_\_\_\_\_

\_\_\_\_\_ (date) (sign  
your name)

\_\_\_\_\_ (address) \_\_\_\_\_ (print your name)

\_\_\_\_\_ (city) \_\_\_\_\_ (state) \_\_\_\_\_ (zip)

**Appendix H: Uniform Statutory Short Form Power of Attorney**

**NOTICE:** The powers granted by this document are broad and sweeping. They are explained in the uniform statutory form power of attorney act (California Probate Code sections 4401-4465, inclusive). If you have any questions about these powers, obtain competent legal advice. This document does not authorize anyone to make medical and other health care decisions for you. You may revoke this power of attorney if you later wish to do so.

I,

\_\_\_\_\_

(your name and address)

do hereby appoint \_\_\_\_\_

(name and address of the person appointed, or of each  
person appointed if you want to designate more than one)

as my agent (attorney-in-fact) to act for me with respect to the following initialed subjects:

TO GRANT ALL OF THE FOLLOWING POWERS, INITIAL THE LINE IN FRONT OF (N)  
AND IGNORE THE LINES IN FRONT OF THE OTHER POWERS.

TO GRANT ONE OR MORE, BUT FEWER THAN ALL, OF THE FOLLOWING POWERS,  
INITIAL THE LINE IN FRONT OF EACH POWER YOU ARE GRANTING.

TO WITHHOLD A POWER, DO NOT INITIAL THE LINE IN FRONT OF IT. YOU MAY,  
BUT NEED NOT, CROSS OUT EACH POWER WITHHELD.

INITIAL

\_\_\_\_\_ (A) Real property transactions.

\_\_\_\_\_ (B) Tangible personal property transactions.

\_\_\_\_\_ (C) Stock and bond transactions.

\_\_\_\_\_ (D) Commodity and option transactions.

\_\_\_\_\_ (E) Banking and other financial institution transactions.

\_\_\_\_\_ (F) Business operating transactions.

\_\_\_\_\_ (G) Insurance and annuity transactions.

\_\_\_\_\_ (H) Estate, trust, and other beneficiary transactions.

- \_\_\_\_\_ (I) Claims and litigation.
- \_\_\_\_\_ (J) Personal and family maintenance.
- \_\_\_\_\_ (K) Benefits from Social Security, Medicare, Medicaid, or other governmental programs, or civil or military service.
- \_\_\_\_\_ (L) Retirement plan transactions.
- \_\_\_\_\_ (M) Tax matters.
- \_\_\_\_\_ (N) ALL OF THE POWERS LISTED ABOVE.

YOU NEED NOT INITIAL ANY OTHER LINES IF YOU INITIAL LINE (N).

**SPECIAL INSTRUCTIONS:**

ON THE FOLLOWING LINES YOU MAY GIVE SPECIAL INSTRUCTIONS LIMITING OR EXTENDING THE POWERS GRANTED TO YOUR AGENT.

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UNLESS YOU DIRECT OTHERWISE ABOVE, THIS POWER OF ATTORNEY IS EFFECTIVE IMMEDIATELY AND WILL CONTINUE UNTIL IT IS REVOKED.

This power of attorney will continue to be effective even though I become incapacitated.

STRIKE THE PRECEDING SENTENCE IF YOU DO NOT WANT THIS POWER OF ATTORNEY TO CONTINUE IF YOU BECOME INCAPACITATED.

**EXERCISE OF POWER OF ATTORNEY WHERE  
MORE THAN ONE AGENT DESIGNATED**

If I have designated more than one agent, the agents are to act

---

IF YOU APPOINTED MORE THAN ONE AGENT AND YOU WANT EACH AGENT TO BE ABLE TO ACT ALONE WITHOUT THE OTHER AGENT JOINING, WRITE THE WORD "SEPARATELY" IN THE BLANK SPACE ABOVE. IF YOU DO NOT INSERT ANY WORD, OR IF YOU INSERT THE WORD "JOINTLY", THEN ALL OF YOUR AGENTS MUST ACT OR SIGN TOGETHER.

I agree that any third party who receives a copy of this document may act under it. Revocation of the power of attorney is not effective as to a third party until the third party until the third party has actual knowledge of the revocation. I agree to indemnify the third party for any claims that arise against the third party because of reliance on this power of attorney.

Signed this \_\_\_\_ day of \_\_\_\_\_, 20 \_\_.

\_\_\_\_\_

(Your signature)

\_\_\_\_\_

(Your social security number)

State of \_\_\_\_\_

County of \_\_\_\_\_

**CERTIFICATE OF ACKNOWLEDGEMENT OF NOTARY PUBLIC**

STATE OF CALIFORNIA

COUNTY OF \_\_\_\_\_

On this \_\_\_\_ day of \_\_\_\_\_, 20 \_\_, before me \_\_\_\_\_,

(Name of Notary Public)

personally appeared \_\_\_\_\_, personally known to me

(Name of Principal)

(or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to this instrument, and acknowledged that he or she executed it.

NOTARY SEAL

\_\_\_\_\_

(Signature of Notary Public)

BY ACCEPTING OR ACTING UNDER THE APPOINTMENT, THE AGENT ASSUMES THE FIDUCIARY AND OTHER LEGAL RESPONSIBILITIES OF AN AGENT.

**Appendix I: Hospital Visitation Authorization**

I, \_\_\_\_\_, a resident of [NAME OF CITY], [NAME OF COUNTY] County, California, do hereby give notice and authorize that, if any injury or illness, or any incapacity through any other cause necessitates my hospitalization or treatment in a medical facility, it is my wish that \_\_\_\_\_ be given first preference in being admitted to visit me in such facility, whether or not there are parties related to me by blood or by law or other parties desiring to visit me, unless and until I freely give contrary instructions to competent medical personnel on the premises involved.

Signed on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_, in [NAME OF CITY], [NAME OF COUNTY] County, California.

\_\_\_\_\_  
[Signature]

STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

On this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_, before me, \_\_\_\_\_, personally appeared \_\_\_\_\_, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to this instrument, and acknowledged that he or she executed it. I declare under penalty of perjury that the person whose name is subscribed to this instrument appears to be of sound mind and under no duress, fraud, or undue influence.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal in the State aforesaid, the day and year in this certificate first above written.

\_\_\_\_\_  
Notary Public

[SEAL]

**Appendix J: Durable Power of Attorney for Disposition of Remains**

I, \_\_\_\_\_, a resident of [NAME OF CITY], [NAME OF COUNTY] County, California, pursuant to California Probate Code section 4720, do hereby designate the following person: \_\_\_\_\_ as my attorney-in-fact (hereinafter referred to as my "agent"), to arrange for the disposition of my body in the manner that my agent deems to be most appropriate. I request that my agent consider my wishes in this matter if I have made my wishes known to my agent before my death.

This Durable Power of Attorney is effective immediately and shall continue for an indefinite period of time until I revoke or terminate it. Signed on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_, in [NAME OF CITY], [NAME OF COUNTY] County, California.

\_\_\_\_\_  
[Signature]

STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

On this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_, before me, \_\_\_\_\_, personally appeared \_\_\_\_\_, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to this instrument, and acknowledged that he or she executed it. I declare under penalty of perjury that the person whose name is subscribed to this instrument appears to be of sound mind and under no duress, fraud, or undue influence.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal in the State aforesaid, the day and year in this certificate first above written.

\_\_\_\_\_  
Notary Public

[SEAL]

## **Appendix K: Client Brochure - Making Your Will**

### **Taking Care of Your Legal Affairs**

You need to plan for the future, regardless of your health, age, or assets. You need to make your own decisions about living and dying, and not simply allow others -- a physician, judge, or distant relative -- to make these critical and personal decisions for you. Through a document called an Advance Healthcare Directive, you may give to someone else -- a lover, spouse, close relative, or trusted friend -- the right to make decisions about your medical care. Through a general power of attorney you may authorize someone to manage your financial affairs on your behalf. And through a will you may make binding instructions on how your property will pass after your death. Your local legal services organization can help you prepare all these documents.

### **What Is a Will?**

A will is a legal document that governs how your property and assets will be distributed at your death. An ALRP attorney can work with you on setting up a simple will, that is, a will without trust provisions. The attorney drafts a formal document that sets out your specific instructions on how you wish your property to be distributed. This will is then signed before two or more witnesses.

Certain types of property are distributed by means other than a will. Examples of such property passing "outside" the will include: real estate in which the title is held in joint tenancy; checking, brokerage, and other financial accounts held in joint tenancy; life insurance proceeds when a charity or person is named as a beneficiary; and property held in trust, including simple savings, bank trusts and living trusts.

All your other assets -- from your personal bank account to household items to real estate owned by you alone or as a tenant-in-common -- pass according to the terms of your will. In addition, you can leave valuable instructions in your will regarding your funeral, burial or cremation, or regarding your selection of a guardian for your children.

### **What Happens If You Do Not Make a Will?**

If you die without a valid will, your property passes according to a complex legal scheme to spouses, children, or blood or adopted relatives. Your lover and friends receive nothing, regardless of the length or importance of your relationships. Nor can any of your money or property go to your favorite charity, even if you told your friends and family that you wanted your money to help fund a particular non-profit service. Finally, if you die without a will and no close relative can be found to inherit your property, it passes to the state.

### **Can Your Will Be Challenged?**

You may be concerned that your family will try to set aside your will. If you are 18 years old or older and have the mental capacity to make a will, your will should be recognized as valid.

"Mental capacity" to make a will is a legal standard that is impossible to define with certainty, but generally means that: (1) you are aware of the kind of property you own and where the property is located; (2) you are aware of the existence of your family members, spouse, and children and that they are the persons who would usually receive your assets (whether or not you finally decide to name them in your will); and (3) you understand what property you want to give to whom. If someone deprives you of your free will by unduly influencing you or misleading you in disposing of your property in a way you would not otherwise have done, all or part of your will may be held invalid. One reason to execute a formal will is the presence of witnesses who can later testify to your mental capacity and to the lack of undue influence. You can avoid charges of "undue influence" or "lack of mental capacity" if you make your will as soon as possible while you are reasonably healthy. Your health may rapidly change, and legal challenges to wills are often made on the basis that the will maker was too weak to know what he or she was doing.

### **Helping You Make Your Will**

If you have serious HIV infection, contact the AIDS legal services organization closest to you. The legal program will arrange for one of its volunteer attorneys to draft your simple will or Durable Power of Attorney. No fees are generally charged for these basic legal services. If you are unable to make an office visit, an attorney can come to your home or hospital room. To assist the attorney in drafting your will, please answer the following questions before your meeting. If you do not understand a particular question, ask your attorney. He or she will answer any questions you may have.

### **WILL INFORMATION**

- 1) Name
- 2) Address
- 3) Home and work telephone
- 4) Family Situation - If you have never been married and have never had children, check here \_\_\_\_\_ and proceed to item D. Otherwise, please provide:
  - A. Name of current or former spouse(s)
  - B. Date and place of divorce or separation from spouse
  - C. Names and birth dates of all your children, whether or not they are still living
  - D. Names of parents, whether or not they are still living
  - E. Names of brothers and sisters, whether or not they are still living
- 5) Alternate Family Situation - If you have a companion or lover, please state his or her name. Do you have an agreement or contract with that person about the ownership or disposition of



your property? If yes, please bring the agreement with you to the interview.

6) Your Property - On a separate piece of paper, please list all your assets, including real estate, interest in a business or professional practice, bank accounts, stocks or bonds, cars, jewelry, clothing, artwork, furniture, etc. Please number each item.

7) Property Disposition - You may leave all your property to one or more persons and/or charities, or leave particular pieces of property or specific amounts of money to specific people. In any case, please consider where your property should go if the person you intend to receive the item should die before you. Your "first choice" is called the intended beneficiary and your "second choice" is called the successor or contingent beneficiary. Using the same numbering system you used above, please list your intended and successor beneficiaries for each item listed. If you wish to leave all your property to one person or charity, please so state and also list the successor beneficiary.

8) Residuary Beneficiary - This is a person or charity who receives any of your money or property not specifically distributed in your will, which you forgot to include in your will, or which you acquire after you have executed the will. This person also receives gifts to others which fail because the named beneficiary or beneficiaries die before you. Please list your intended and successor residuary beneficiaries here:

9) Other Property - Please list:

- A. All life insurance policies you hold and who is currently listed as the beneficiary
- B. Any retirement or similar benefits you have and who are the named beneficiaries
- C. Property, bank accounts, or other assets owned with another person

10) Executor - This person will be responsible for paying your debts from your estate, for managing your property during the probate of your estate, and for distributing your property. You may name as executor any person over the age of 18 years who is a United States resident and legally competent. You may also name someone who is a beneficiary under your will. Please list here the person or persons you wish to become Executor(s) of your will, along with alternate Executor(s) in case your first choice is unable or unwilling to serve:

11) Funeral Instructions - Please check your specific wishes:

- A. Burial or cremation?
- B. Funeral, memorial service, or neither?
- C. Special instructions - Do you want your Executor to publish an obituary?
- D. Special instructions for obituary

12) Other Information - Please note any other information useful in preparing your will, or list any questions you have:

---

DATE SIGNATURE

Please bring this Will Information Booklet with you when you meet with your attorney to prepare your will.

If you later decide to change your will, you may either execute an entirely new will or merely execute a "Codicil" which changes only part of your will. Your local AIDS legal service is available to assist you in making changes to your original will.

The service can also help you execute a Durable Power of Attorney for Health Care, other medical directives, and a financial power of attorney - all at no charge. In addition, your local AIDS legal service provides assistance on other legal matters to persons with HIV infection.

## **Appendix M: Client Brochure - Settling a Small Estate**

**WHEN A PERSON DIES**, family and friends are left to cope with many details. During this difficult period, the process of settling the affairs of the deceased can be overwhelming. This brochure is designed to prepare the survivors for some of the administrative procedures they can expect to encounter. A glossary of legal terms used in this brochure is provided below to help you understand the process of settling a small estate.

### **GLOSSARY**

**DECEDENT** - The person who has died, whether or not he or she left a will. Also called the deceased.

**ESTATE** - Property and belongings held by the decedent at the time of death.

**WILL** - Formal document representing the instructions of the deceased for the distribution of the estate.

**INTESTATE** - A person is said to have died intestate when he or she dies without a valid will. In this case, state laws of "intestate succession" determine who inherits decedent's property.

**PROBATE** - The process of transferring the possessions/assets of the deceased to those persons who "inherit" them. Some of the decedent's assets automatically transfer to a named individual (e.g., joint tenancy) and do not need to pass through the probate procedure.

**ESTATE ADMINISTRATION** - Formal procedures for probating the estate. Through probate the debts of the decedent are paid and the remaining assets are distributed according to the will or intestate law.

**SUMMARY ADMINISTRATION** - An alternative way to transfer property outside formal probate procedures when an estate is less than \$100,000.

**EXECUTOR** - Person named in the will to manage the administration of the estate. If there is no will, the probate court will appoint a person, called the administrator. An administrator and an executor serve the same function. The duly appointed executor or administrator has had letters of administration or letters testamentary issued to them.

**LETTERS** - Letters of administration or testamentary are formal documents issued by the court. Letters of administration are issued when the court appoints an administrator. Letters testamentary are issued when the court appoints an executor. The letters are the executor's or administrator's "license" to act for the estate. Letters are not issued when summary administration is used.

**AFFIDAVIT** - Written/printed declaration or statement of facts made voluntarily under oath.

## **PRELIMINARY STEPS**

There are certain agencies which should be contacted directly after the death of a loved one. Direct contact allows certain assets, such as life insurance policies or survivor's benefits from Social Security, to be transferred to the proper beneficiaries more quickly than if the property were to be transferred in a probate proceeding. Most agencies can be contacted after the death certificate have been received from the coroner. The following is a list of agencies which can or must be contacted directly by the executor or administrator. In addition, do not overlook the possibility that the decedent may have had benefits payable to survivors through work. Contact the decedent's employer directly.

### **FUNERAL HOMES**

If the deceased arranged for burial instructions prior to death, contact that funeral home or cremation society. Burial instructions are usually located in the will. The person authorized to carry out these instructions will be named either in the will or the durable power of attorney for health care. For persons who are unmarried or in a same sex relationships, and who wish their surviving lover to carry out their burial instructions, it is wise to make these arrangements in advance. If there are no burial instruction, the next of kin is considered responsible for the arrangements.

### **OBTAINING DEATH CERTIFICATES FROM THE CORONER**

The first step in the probate process involves obtaining copies of the death certificate from the coroner. These are usually provided by the funeral home or cremation society. In some instances, the coroner also may have personal belongings of the deceased including cash, copies of the will, documents referring to bank accounts, keys, etc.

If the estate is to be probated the coroner must be presented with identification and either a certified copy of letters testamentary or letters of administration before the personal effects will be released to you. If only a small estate is involved and is not going through probate, the claimant must be able to present identification indicating that he or she is the next of kin or evidence that he or she is the legal claimant (via the will) with a completed affidavit for collection of personal property. See description of affidavit in Summary Administration section of this brochure.

You may need to obtain as many as ten to fifteen certified copies of the death certificate. Every financial institution where the decedent kept money or assets will need a copy of the death certificate. Life insurance companies also require a copy. In San Francisco you may have to wait several weeks before you can obtain copies of the death certificate. If the cause of death is uncertain you can expect to wait longer.

### **POST OFFICE**

Notify the post office that you would like the decedent's mail forwarded to your address. This

will make it easier to determine what bills the decedent may have owed at the time of death.

### **SOCIAL SECURITY ADMINISTRATION**

The Social Security Office must be notified of the death if the decedent was receiving Social Security benefits. Also, any check(s) received during the month the decedent died must be returned.

If the decedent was entitled to Social Security, there will be a lump sum death benefit. The death benefit can only be collected by the surviving spouse or surviving children under the age of 18. Children up to 22 years of age may also collect "survivor's benefits" if they are enrolled full time in college. The death benefit will NOT be paid automatically. Contact your nearest Social Security Office to apply. Application must be made within two years of the death. A copy of the death certificate will be required. The lump sum death benefit does not apply to Supplemental Security Income (SSI).

### **DIRECTOR OF HEALTH SERVICES**

The Director of the State Health Services must be notified within 90 days of death if the decedent was receiving benefits under MediCal. See "Health Services Department" listed under state government in your telephone book.

### **VETERAN'S ADMINISTRATION**

Benefits are available through the Veteran's Administration to help pay the burial expenses for deceased veterans. In addition, many veterans have life insurance policies through the Veteran's Administration. Contact the nearest Veteran's Administration Office.

### **LIFE INSURANCE COMPANIES**

Contact the life insurance company directly if the decedent left a life insurance policy with a named beneficiary other than the estate. The proceeds can usually be quickly obtained by the beneficiary once the company is sent a completed "form of death" along with a copy of the death certificate and the original policy of insurance. Obtain the "form of death" directly from the insurer.

It is important to note that if there is not a named beneficiary for the policy, the proceeds are considered part of the decedent's probate estate. Therefore, probate may be required if the policy causes the gross value of the estate to exceed \$60,000. Note that with some policies, if there is no named beneficiary, the proceeds go to persons named by the insurance carrier, such as the surviving spouse or decedent's parents.

### **DECEDENT'S EMPLOYER**

You should contact the decedent's employer to determine whether the decedent had participated in any benefit plans. See discussion of retirement and death benefits under the heading "Direct Transfer of Property Outside Probate" in this brochure.

## **TAXES DUE AT DEATH**

The IRS holds the duly appointed executor or administrator responsible for the proper and timely filing and payment of taxes. Generally, there are three types of federal taxes due at death. First, a federal estate tax is imposed on large estates, currently those over \$1,000,000. Second, a final federal income tax return (Form 1040) must be filed which reports any income earned by the decedent during the part of the year in which he or she was alive. The third tax involved is an income tax for income accrued by the estate from date of death to date of distribution (use Form 1041). See a tax preparer to determine if these tax returns are due.

Generally, the State of California does not levy an estate tax. The State may require the filing of a state income tax return for the decedent (Form 540) for income received before date of death. The State also may require an income tax return for the estate (Form 541) for income accrued by the estate from date of death to the end of the taxable year. You should contact the federal and state tax agencies to determine the correct forms and filing procedures. You should also consider consulting a tax attorney. Again, call ALRP for referrals.

Once the independent agencies have been contacted, the next step is to determine the best method of transferring the decedent's property. Locate what type of assets were owned by the decedent at the time of death. Do not overlook the possibility that the decedent kept information about assets somewhere other than in his or her home (such as a safe-deposit box). Also, if a lawyer drafted decedent's will, he or she may have a copy of it.

## **UNDERSTANDING WILLS AND PROBATE**

The will gives you directions for carrying out the last wishes of the deceased. If the decedent died intestate (without a will), California law defines the persons who are to receive the decedent's property. Basically, the decedent's property will go to the next of kin. One of the reasons for making a will, even if you have only a few belongings is to ensure that your property will be distributed according to your wishes, particularly if you want your property to go to someone other than your family. When a person in a same sex relationship dies without a will, the surviving lover may have to rely on the "good intentions" of the decedent's family to collect any of the decedent's belongings.

Determining the type of assets owned by the decedent will help guide you through the process of estate administration. If the property in the estate that does not pass directly to a named individual is greater than \$100,000, probate is generally required (whether or not there is a will). Because of the time and expense involved in a probate procedure, you may want to avoid probate, if the decedent did not leave many assets. The following sections will discuss 1) the types of property that pass directly to the beneficiaries without going through formal probate procedures and 2) summary administration of the estate.

## **FORMAL PROBATE PROCEDURES**

If the gross value of the decedent's estate is more than \$100,000, probate will be required and an

attorney should be consulted. Formal probate requires an appearance in superior court, documents must be filed, and the process can often take six months or more. Time and money can be saved if the decedent's property can be transferred by mean other than a formal probate procedure. Several types of property which can be transferred outside of probate are discussed below.

## **DIRECT TRANSFER OF PROPERTY OUTSIDE PROBATE**

Certain types of assets may be transferred directly to the beneficiaries without going through a formal probate procedure even if the value of the assets is over \$100,000. Also, the property, can be directly transferred even if there is a formal probate action. The following is a list of assets which may be transferred directly.

### **Life Insurance Policy With Named Beneficiary Other Than Estate**

The preceding section discusses how to collect the policy directly from the life insurance company.

### **Community Property Which Passes Outright To The Surviving Spouse**

Because California is considered a "community property" state, a surviving spouse is entitled to receive community property. Community real property can be claimed via a simple affidavit. Otherwise, the surviving spouse can obtain a Spousal Property Order from superior court.

### **Joint Tenancy Property**

Property held in joint tenancy passes directly to the survivor at the moment of death. You need only complete an Affidavit of Death of Joint Tenant. This document should be filed with the county recorder.

For purposes of the Department of Motor Vehicles, an automobile registered in the name of two persons joined by an "or" is considered to be held in joint tenancy (e.g., "John Smith or Joe Jackson"). Fill out a form which can be obtained directly from the DMV to transfer title to yourself.

Bank accounts held in joint tenancy may be transferred by writing a check for the balance and presenting a certified copy of the death certificate to the bank. When a money market account is held in joint tenancy, contact the transfer agency to change ownership.

### **Money in Payable On Death Bank Accounts**

Money held in payable on death accounts will be released to the beneficiary when a copy of the death certificate is presented along with a savings accounting passbook or a check drawn for the balance.

### **Retirement and Death Benefits**

Retirement and death benefits should be collected directly from the company carrying the plan. Individual Retirement Accounts (IRA'S) can also be collected directly from the institution handling the account unless the benefit is payable to the decedent's estate. Because death benefits

are usually obtained through the employer, contact the decedent's employer to determine whether the decedent had participated in any benefit plans. Often, death benefits go to next of kin if there is no named beneficiary.

### **Property Held In Inter Vivos Trust**

Property held in inter vivos trust is transferred directly to the beneficiary of the trust without going through probate. Inter vivos trusts have usually been created for the express purpose of avoiding probate.

## **SUMMARY ADMINISTRATION**

When the gross value of the decedent's estate is less than \$100,000, the estate may be distributed without going through probate. However, there may be situations where even "simple" estates should go through probate. For example, if the decedent's debts are greater than his or her assets, probate may be a better choice because all debts are discharged under a probate proceeding.

Under the California Probate Code there are three sections, referred to as "summary administration," which allow for the collection or transfer of property without a filing for formal probate. The next section will specifically address how to obtain the decedent's property using these sections of the Probate Code.

### **1) Section 13100: Collection or Transfer of Personal Property**

Unlike formal probate, the transfer of personal property under Section 13100 does not require a court appearance. In fact, Section 13100 allows the beneficiaries to obtain the property from institutions (such as banks) by presenting an affidavit along with a certified death certificate and a description of the property.

Section 13100 can only be used to transfer personal property such as money, furniture, or automobiles. Real estate cannot be transferred using this section.

#### **Who Can Use Section 13100?**

Section 13100 can be used whether or not the decedent left a will. If you are a beneficiary under a will you can use Section 13100 to obtain the property that has been left to you. If the decedent did not bequeath specific property that has been left to beneficiaries, all of the beneficiaries under the will must sign the affidavit before the property will be transferred. For example, if the decedent left "all personal property to my children," all of the children must sign the Section 13100 affidavit.

In addition, property can be obtained by persons acting on "behalf of" the beneficiaries under a will. This would include executors named in the will or guardians of minor children.

If the decedent did not leave a will, only certain people are entitled to obtain the decedent's property under California Probate Section 13100. The laws of intestate succession govern who is entitled to the property. Under California law, who is entitled to the property depends on whether



the decedent was married. If the decedent was not married the "next of kin" are entitled to the property depending on their relationship to the decedent. Note that several people may be required to sign the affidavit if the decedent died intestate. (**Note:** the same persons eligible to use Section 13100 are also eligible to use Section 13200.)

### **What is the affidavit?**

California Probate Code Section 13100 sets forth precisely what the affidavit must contain. But, while all affidavits contain the same language, different banks and institutions have different formats for this language which they prefer to use. Always check with the institution beforehand and get their version of the form.

### **At Least 40 Days Have Elapsed**

Unlike a formal probate action (which can be initiated immediately after death), property cannot be transferred using Section 13100 of the California Probate Code until 40 days have elapsed from the time of death. The 40 day wait allows any creditors who may have a claim against the decedent's estate to submit any bills (which should be paid before the beneficiaries receive any money).

## **2) Section 13200: Collection or Transfer of Real Property**

Like Section 13100, Section 13200 does not require a court appearance. However, there are some major differences between these two sections of the Probate Code. First, Section 13200 allows for collection or transfer of California real property only. The total gross value of the decedent's California real property must not exceed \$10,000. The value of decedent's personal property has no bearing on calculating the \$10,000 maximum. Also, real property held in joint tenancy and real property located outside California are not included.

Second, at least six months must have passed since the date of the decedent's death.

Third, an "Affidavit of Real Property of Small Value" must be filed with the superior court of the county where decedent lived along with a mandatory inventory and appraisal of the decedent's California realty, a copy of the death certificate, and a mandatory notary public's certificate of acknowledgement identifying the person executing the affidavit. Unlike Section 13100, the affidavit and attachments are not presented to the holder of the property. Once the affidavit and attachments are filed with superior court and they comply with all the requirements, the court clerk will return a certified copy to the person claiming title to be recorded in the proper county.

Remember, under California law, the assets you are taking are obligated to be used to pay the decedent's debts.

## **3) Section 13150: Court Order Determining Succession to Property**

Title to decedent's personal and real property may be cleared by a court order under Section 13150 when the total gross value of both real and personal property in California does not exceed \$60,000. Section 13150 is an effective "non-probate alternative" when the value of decedent's

real property is over \$10,000 (so that Section 13200 cannot be used) and yet the total size of the estate is relatively small (up to \$100,000) making a formal probate unnecessary.

Although a court proceeding is required when using Section 13150, it is not nearly as costly and lengthy as a formal probate proceeding. A "Petition to Determine Succession to Property" is filed in superior court by the person entitled to the property along with a copy of the will (if one exists). You must include an inventory and appraisal of all property (real and personal) to be considered in determining the \$100,000 limitation.

Like Section 13100, you need only wait 40 days from the date of death before you can begin a Section 13150 proceeding. This is true even though it includes real property, which makes it a good alternative to the six month wait required by Section 13200.

Remember that this brochure has been designed to give you a broad overview of the administrative procedures that you may encounter while trying to settle the affairs of a loved one who has died. This brochure is not meant to take the place of consulting with an attorney or with the various agencies mentioned.

Do not overlook your own needs during this difficult and confusing period. There are support agencies which can help you. Social workers can provide tremendous support and help, especially for things such as filing for survivor's benefits. Look for support agencies and organizations in your area.

## **Appendix N: Client Brochure - Advance Medical Directives**

### **TAKING CHARGE OF YOUR HEALTH CARE**

After discovering you are HIV positive or have AIDS, you are likely to find yourself thrust into the world of health care, a world which may seem overwhelming and unfamiliar.

You may be faced with issues you never knew existed and you may be required to make difficult decisions about your medical treatment.

Despite these obstacles, you can help the situation by taking an active, participatory role in determining your course of care. Working with your health care provider, you can be involved in creating a treatment appropriate for you.

This involves two important steps: (1) educating yourself about your rights regarding health and care decisions, and (2) taking steps to inform others about your decisions.

#### **The Right to Decide**

As a competent adult, you have a constitutionally protected right to make decisions about your health care. This includes the right to accept or reject treatment and the right to consent to treatment. For example, you have the right to request that life support equipment (e.g., a respirator) be withheld or withdrawn.

Your right to decisions over your medical care survives even if you become incompetent and unable to make informed health care decision for yourself.

Should there be a time when your ability to make medical decisions is impaired, others (such as a family member or a significant other) can assist your physician in executing your wishes.

#### **Educate Yourself**

Before creating any formal legal documents or making decisions about your health care, it is important to know all the options. A good first step is to discuss the issues with the physician who is primarily responsible for your health care.

Although it may be difficult for you to confront such issues as withdrawing medical treatment, the importance of early evaluation cannot be overstated. It allows you to participate in your care and helps others understand what you want.

Other sources of education include: books and articles about medical treatment, talking with friends about the issues of treatment options, and attending support groups to hear various views on the subject.

Once you have gathered sufficient information and have had a chance to review the various choices, you will be ready to take the next step: informing others of what you want.

## **USING ADVANCE MEDICAL DIRECTIVES**

In order for your desires regarding medical treatment to be carried out, you have to make them known. This can be done both formally and informally.

The most common informal way for making your views known is through discussions with friends, family, and your health care provider. Despite the importance of these conversations, using the formal process of creating written documentation of your wishes is the best way to make them known.

The document used for this purpose are the Advance Healthcare Directive.

### **The Advance Healthcare Directive**

The Advance Healthcare Directive allows you to designate a person to make medical decisions for you during any period of time when you are incompetent and unable to make such decisions. These decisions include the full range of decisions, such as whether to be hospitalized, what medications, tests, and procedures you should have. Perhaps most importantly, your Advance Directive will state your wishes for being maintained on artificial life support, and under what circumstances you would want to be kept alive with nutrition and hydration from tubes.

Referred to as "agent" this person must make decisions based on the instructions included in your Advance Directive and in consultation with your physicians.

The basic requirements necessary for executing an Advance Directive are:

You must be a competent adult at the time of executing the document.

You must name an agent to serve when you become incompetent (there are restrictions on who can become an agent).

The document must be witnessed by two individuals (there are important restrictions on who can be witnesses) or notarized by a public notary.

If the document is a printed form document that you purchase, it must contain certain statutory warnings.

There are several places to obtain a printed form Advance Healthcare Directive that you can use. First, hospitals must notify you of your right to sign an advance medical directive and provide you with a form. Second, your personal physician may have such forms. And, third, you can purchase forms from most stationery stores or from the California Medical Association, located in San Francisco, California.

## Competency

In order for your Advance Directive to be valid, you must be competent at the time you signed it. In other words, you must be of sound mind and have a clear understanding of your actions at the time you signed the document.

The following steps may be useful to help establish competency:

Discuss your desires regarding treatment with your physician or other care provider. This helps them understand what you want and reinforces that the document accurately reflects your intent.

If appropriate, seek assistance from a neutral party (such as an attorney or other person not named as the agent) when drafting and executing the document. This allows a neutral person to witness your state of mind and creates an opportunity for them to review the document with you to be sure it says what you want it to say.

If you are in the hospital when executing the document, ask the health professionals to make a note in your medical record regarding your mental status.

Don't execute the document while taking medication that alters your ability to make decisions.

Discuss your wishes with your family, significant other, and others who will be involved in your care. Helping people to understand what you want reinforces your decisions and eases the process for others.

## Preparing the Document

A lawyer is not needed to prepare an Advance Directive, and printed forms are available for your use. However, if you are a person with AIDS or are HIV positive and you want assistance executing these documents, contact the AIDS legal service in your area.

The program will arrange for a volunteer attorney to assist you in drafting your Advance Healthcare Directive. There is no charge for those who meet the financial eligibility guidelines. If you are unable to make an office visit, a panel attorney will come to your home or hospital room.

To assist the attorney in drafting a document regarding your medical decisions, please review this pamphlet and take the time to educate yourself about what type of information you want in the document. If you have a particular question, write it down and be sure to ask the attorney. The attorney will be happy to answer questions you have.

## OPTIONAL ITEMS TO INCLUDE IN YOUR ADVANCE HEALTHCARE DIRECTIVE

In addition to the information contained on the printed DPAHC, you can include various other statements pertaining to your medical care that are of concern to you.

The following is a sample of desires, special provisions and limitations to the California Medical Association's form for the Advance Healthcare Directive. The statement is illustrative, not exhaustive.

I, (Your Name), of (City, State) do hereby nominate and appoint (Name of Agent, of City, State) as my true and lawful agent for me in my name, place and stead, with regard to any and all medical and health care decisions to be made concerning my medical condition, treatment and care, including, but not limited to the following powers:

**A. Priority in Visitation.**

To be given first priority visitation should I be a patient in any hospital, health care facility, or institution including, but not limited to, any intensive care or coronary units of any medical facility, and should I be unable to express a preference on account of my illness or disability.

**B. Employment of Health Care Personnel.**

To employ such physicians, dentists, nurses, therapist, and other professional or non-professional, as my attorney-in-fact may deem necessary or appropriate for my physical or mental well being; and to pay from my funds reasonable compensation for all services performed by such persons.

**C. Gain Access to Medical and Other Personal Information.**

To request, review and receive any information, verbal or written, regarding my personal affairs or my physical or mental health, including medical and hospital records, and to execute any releases or other documents that may be required in order to obtain this information.

**D. Receive Items of Personal Property and Effects.**

To receive into (his/her) possession any and all items of personal property and effects that may be recovered from, on, or about my person by any hospital, police agency or any other person at the time of my illness, disability or death.

**E. Consent or Refuse Consent to Medical Care.**

To give or withhold consent to medical care, surgery, or any other medical procedures tests; to arrange for my hospitalization, convalescent care or home care; and to revoke, withdraw, modify or change consent to such medical care, surgery, or any other medical procedures or test, hospitalization, convalescent care or home care that I or my agent may have previously regarding such care.

I ask my agent to be guided in making such decisions by what I have told my agent about my personal preferences regarding such care.

Based on those same preferences, my agent may also summon paramedics or other emergency personnel and select emergency treatment for me, or choose not to do so, as my attorney-in-fact deems appropriate given my wishes and my medical status at the time of the decision. My agent is authorized, when dealing with hospital and physicians, to sign documents entitled or

purporting to be "Refusal to Permit Treatment" and "Leaving Hospital Against Medical Advice" as well as any necessary waivers of or releases from liability required by the hospitals or physician to implement my wishes regarding medical treatment or non-treatment.

**F. Refuse Life-Prolonging Treatment or Procedures.**

To request that aggressive medical therapy not be instituted or be discontinued, including (but not limited to) cardiopulmonary resuscitation, the implantation of cardiac pacemaker, renal dialysis, parental feeding, the use of respirators or ventilators, nasogastric tube use, endotracheal tube use, and organ transplants. My agent should try to discuss the specifics of any such decision with me if am able to communicate any manner.

**G. Provide Relief from Pain.**

To consent to and arrange for the administration of pain relieving drugs of any type, or other surgical or medical procedures calculated to relieve any pain even though their use may lead to permanent physical damage, addiction, or even hasten the moment of (but not intentionally cause) my death. My attorney-in-fact may also consent and arrange for unconventional pain relief therapies such as biofeedback, guided imagery, relaxation therapy, acupuncture, skin stimulation or cutaneous stimulation, and other therapies that I may or my attorney-in-fact believe may be helpful to me.

**H. Protect My Right of Privacy.**

To exercise my right of privacy to make decisions regarding my medical treatment and my right to be left alone even though the exercise of my right may hasten death or be against conventional medical advice. My agent may take appropriate legal action, if necessary in the judgment of my attorney, to enforce my right in this regard.

**I. Authorize Release of My Body.**

To authorize the release of my body from any hospital or any other authority having possession of my body at the time of my death and to make all decisions necessary for the removal and transportation of my body from the place of death.

**J. (OPTIONAL) Authorize Cremation of My Body and Disposition of My Remains.**

To authorize cremation of my body and to receive my ashes, whereupon my agent is to place (QUANTITY) in an urn, and place this urn with its contents in an appropriate site at (LOCATION), which I hereby select as my final resting place.

It is my hope and desire that (NAME OF PARTNER) will arrange that (his/her) body will be cremated after (his/her) death, and will be placed in an urn next to my own ashes in the same site as (LOCATED), and that we will share a plaque bearing our name date of birth and death. My attorney-in-fact may, as (he/she) chooses of, keep, or distribute any of my ashes that (he/she) does not inter at (LOCATION). If it is impossible or highly impracticable, my agent (he/she) may, at (his/her) discretion, dispose of my body in such manner as (he/she) deems appropriate under the circumstances.

**K. (OPTIONAL) Authorize Funeral or Memorial Service.**

I authorize my agent to make such arrangements for a funeral or memorial service in the (name or religious affiliation or tradition) as are not inconsistent with the wishes I have expressed above regarding my cremation and interment.

**L. Execute Documents and Contracts.**

To sign, execute, deliver, acknowledge, and make declaration in any document(s) that may be necessary or proper in order to exercise any of the powers described in this document, to enter into contracts to pay reasonable compensation or costs in the exercise of any such powers.

This Durable Power of Attorney shall take effect upon my incapacity. Said incapacity shall be defined as my failure, due to deteriorating physical or mental health, to be able to make informed decisions regarding the cause of my medical treatment, due to deteriorating physical or mental health, to be able to sign any documents or perform any act necessary decisions regarding the cause of my medical treatment.

IN WITNESS WHEREOF, I have hereunto signed my name this day of\_, 20\_.

Principal's Signature

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