



Estate Planning Basics

Palisades Alliance for Seniors

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Bet Tzedek Legal Services – Elder Justice Unit

For more than 30 years, Bet Tzedek has been the only provider of elder law services in the City and County of Los Angeles. Today, Bet Tzedek is a nationally-recognized leader and continues to serve low-income seniors, and those who care for them.

Our team helps with:

- Conservatorships
- Elder abuse restraining orders
- Financial elder abuse
- Real estate fraud
- IHSS and other administrative hearings
- Medi-Cal estate planning
- Power of Attorney for finances and health
- Simple, Statutory Wills



Advance Planning Tools

- Advance Health Care Directives
 - Compare DNR and POLST
- Powers of Attorney for Finances
 - Compare Representative Payee, joint tenancy, community property
- Wills
 - Compare property transferred by POD, joint tenancy, assets with designated beneficiaries
- Trusts
- Transfer on Death Deeds
 - Compare transfer with life estate or outright transfer.

Capacity

California law sets out a judicial standard for general competency to make decisions. The law is known as the Due Process in Competency Determinations Act or DPCDA. PC §810-813.

- Advanced Health Care Directive - ability to understand the nature and consequences of a decision and to make and communicate a decision.
- Financial Power of Attorney - understand the nature, purpose, and effect of the terms.
- Will – understand what you have and to whom you pass it when you pass.

Advance Health Care Directive



A legal document that allows a person to make decisions *now* for health care treatment *in the future* if and when he or she is unable to make such decisions.



What are the main components of an Advance Directive?

- 1) The appointment of an agent and up to two alternate agents who will make decisions for the principal when the principal can no longer make decisions for him/herself.
- 2) Instructions for health care treatment preferences.

Who decides when a person lacks capacity?



The client's primary care physician will determine when they are unable to make decisions about their health care (unless the client specifies someone else on the Advance Directive).

Appointing a Health Care Agent

Who CAN be an agent:

- Any adult who is NOT the client's physician or an employee of a health care facility where the client receives care.
- Can be more than one agent. Must act unanimously.

Who SHOULD be an agent:

- A person that is trusted by the client and who knows of the client's personal values and beliefs.
- Typical agents:
 - ✓ Family members
 - ✓ Spouse
 - ✓ Partners
 - ✓ Close friends



Agent's Authority

- Right to receive medical information
- Make medical decision for principal if principal cannot make his/her own decisions.
- No express right to receive compensation.
- No power to place principal in mental health facility (unless principal agrees).
- No power to place principal in locked dementia facility if principal refuses.
- Withdrawing or withholding life sustaining treatment
- Disposition of Remains
- Authorize autopsy
- Make anatomical gifts if specified in Directive.

Must the agent follow the client's health care instructions?

- YES – The agent must follow all instructions and wishes to the best of his or her knowledge.

What if the client does not wish to appoint an Agent?

- The client can still have an Advance Directive.
- Instead of appointing an agent, the client can make specific written instructions to his or her health care provider for future health care following the loss of capacity.

Making an Advance Directive VALID

1. The client must sign and date the Advance Directive.

AND

2. The document must be either notarized *OR* witnessed by **two** individuals.

Witnesses: Cannot be the agents and cannot be the client's health care provider, employee of the health care provider, or employee of a community or residential care facility. The ombudsman must be a witness if the principal is in a skilled nursing facility.



Is the Advance Directive valid everywhere?

- The Advance Directive that you sign in California is valid in California.
- Other states may NOT recognize a legally executed California Advance Directive.
- California, however, DOES recognize legally executed Advance Directives from other states.

How long will the Advance Directive be valid?

- The Advance Directive is valid **forever**, UNLESS
 - It is revoked
- OR**
- The client sets a date for it to expire.
- If the client executed an Advance Directive before 1992, it may no longer be valid.
 - The client should execute a new Advance Directive.

Can an Advance Directive be revoked or changed?

The client may revoke any portion or all of the Advance Directive at any time.

- Must communicate the intent to revoke.
 - E.g, telling the health care provider, signing a revocation, or tearing up the Advance Directive.
- The client should inform all agents and health care providers of any changes.
- Signing a new Advance Directive form will revoke any previous Advance Directive.



Will an Advance Directive stop paramedics from giving the principal CPR?

NO – the Advance Directive does not have legal effect on emergency medical personnel.

DNR and POLST

- **Prehospital Do Not Resuscitate (DNR)** – a state document that instructs emergency medical personnel regarding a patient's decision to forgo resuscitative measures in the event of cardiopulmonary arrest. The form does not affect the provision of life sustaining measures.
- **Physician's Orders for Life-Sustaining Treatment (POLST)** - a medical order that gives seriously ill patients more control over their care by specifying the type of medical treatment a patient wishes to receive at the end of life. The POLST form **must** be signed and dated by a physician, or a nurse practitioner or a physician assistant acting under the supervision of the physician, and the patient or legally recognized health care decision-maker.



Durable Power of Attorney for Financial Matters

California Uniform Statutory Form Power of Attorney

- Statutory Form Power of Attorney (Probate Code § 4401) allows you to grant an agent the authority to manage your finances.
 - This may include bank accounts, real property, insurance, tax matters, legal matters, or other financial transactions.

Financial Elder Abuse

- Powers of Attorney for Financial Matters are very important planning tools.
 - Paying bills, maintaining property
 - Preventative tools to protect against elder abuse
- However, these documents must be handled cautiously as they can also be tools for abuse.



Types of Powers of Attorney for Finances

- Durable v. Non-Durable
 - **This power of attorney will continue to be effective even though I become incapacitated.**
- General v. Limited (e.g. for only transaction only)
- Immediate v. Springing
 - This power of attorney is effective immediately and will continue until it is revoked VS. This power of attorney shall take effect upon my incapacity. My incapacity shall be determined by my primary care physician in writing.
- Terms for Specific Assets and Issues
 - Trusts
 - Gifting
 - Loans to agent
 - Changing beneficiaries



POWER OF ATTORNEY FOR FINANCES

I, _____ appoint _____, as my agent (attorney-in-fact) to act for me in any lawful way with respect to the following initialed subjects:

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



Agent's Standard of Care

Agent shall observe the standard of care that would be observed by a prudent person dealing with property of another. If agent breaches this standard of care or another duty in bad faith, he or she is chargeable for any loss or depreciation in value of the property.



Agent's Duties

- Duty of care
- Duty of loyalty
- Duty to keep principal's property separated and identified
- Duty to keep principal informed and follow instructions
- Duty to keep records of transactions on behalf of principal
- Duty to use special skills
- Duty to deliver property on termination of agent's authority.



Termination

- Revocation by principal
- Agent lacks capacity to act
- Dissolution or annulment
- Principal regains capacity
- Principal's death
- By court order (can use court action to compel accounting, revoke agent's authority, etc.)



Sometimes a Conservatorship Cannot be Avoided!

- Abuse of powers of attorney.
- Multiple, conflicting powers of attorney.
- Third party non-acceptance.
- Principal's refusal to cooperate, may continue to act to his/her own detriment even with POA in place.
 - Can still manage accounts, give property away.
 - Can refuse to enter into a care facility, can refuse healthcare assistance.



Wills & Trusts

What is a Will?

- A legal document, drafted or executed in accordance with state law, that becomes irrevocable upon death.
- In a Will, you may designate who will receive your assets at your death.
- Different types of wills, including a hand-written will, statutory will, or attorney prepared will.



What is a Statutory Will?

- California “fill in the blanks” will form, governed by California Probate Code Section 6240.
- Provides simple instructions for distributing your assets after death.
- Designed only for California residents age 18 or older and of sound mind.

What can I do with a Statutory Will?

- Designate beneficiaries of personal residence.
- Designate beneficiaries of all personal effects.
- Provide specific gifts of cash.
- Designate beneficiaries of remaining assets.
- Designate guardian(s) for minor children.
- Designate executor(s).
- DO NOT use a statutory will if you want to leave specific items to specific people or if you want to split your estate unequally.

Does a Will give away all my assets?

NO. Some “nonprobate” assets are not covered by a Will, such as:

- Life insurance
- Retirement plans, such as a 401(k) or an IRA
- Assets owned as joint tenants
- “Transfer on death” or “pay on death”
- “Community property with right of survivorship”
- Living trusts
- Your spouse’s or registered domestic partner’s half of community property



Advantages of Statutory Will

- Simple and cheap
- Most common and readily understood
- Only takes effect after testator's death
- Easy to amend



Disadvantages of Statutory Will

- Must be administered through the court, so the will becomes a public record and the court fees can be costly.
- Generally need to pay an attorney to file for a probate, not many free services.
- Does not avoid Medi-Cal estate claims



Trusts

- *Inter vivos* revocable trust = allows for management during a person's lifetime and serves as a testamentary instrument after person's death.
- Settlor = person who creates the trust
- Trustee = person who manages the trust
- Successor trustee = person who takes over management of the trust once the settlor loses capacity or dies.



Trust Advantages

- Supposed to avoid need for probate/court intervention.
- Private. No need to lodge trust anywhere or give to court.
- Avoids Medi-Cal estate claims.
- Good way to manage a lot of property during life and after death for multiple beneficiaries (minors, adults with developmental disabilities) and avoid conservatorship and guardianship.
- May be tax planning opportunities.



Trust Disadvantages

- Can be expensive to create.
- Very easy for trustee to abuse power because no court oversight.
- Trustees don't often understand their duties and inadvertently create problems.
- People forget to put property in the trust.



Transfer on Death Deeds (TODD)

A law that became effective January 1, 2016 creates a Revocable Transfer on Death Deed (“TOD Deed”) as a way for California residents to transfer residential property to named beneficiaries, effective upon death.

The new law requires use of a specific form with specific provisions, and includes a “frequently asked questions” provision. The statutory deed form and revocation form are in the California Probate Code, Sections 5642 and 5644.

Recording requested by (name):

When recorded, mail to
and mail tax statements to:

Recorder's Use Only

SIMPLE REVOCABLE TRANSFER ON DEATH (TOD) DEED

Assessor's Parcel No.: _____

This document is exempt from documentary transfer tax under Rev. & Tax. Code § 11930. This document is exempt from preliminary change of ownership report under Rev. & Tax. Code § 480.3.

IMPORTANT NOTICE: THIS DEED MUST BE RECORDED ON OR BEFORE 60 DAYS AFTER THE DATE IT IS SIGNED AND NOTARIZED

Use this deed to transfer the residential property described below directly to your named beneficiaries when you die. YOU SHOULD CAREFULLY READ ALL OF THE INFORMATION ON THE OTHER PAGES OF THIS FORM. You may wish to consult an attorney before using this deed. It may have results that you do not want. Provide only the information asked for in the form. DO NOT INSERT ANY OTHER INFORMATION OR INSTRUCTIONS. This form MUST be RECORDED on or before 60 days after the date it is signed and notarized or it will not be effective.

PROPERTY DESCRIPTION

Print the legal description of the residential property affected by this deed:

BENEFICIARY(IES)

Print the FULL NAME(S) of the person(s) who will receive the property on your death (DO NOT use general terms like "my children") and state the RELATIONSHIP that each named person has to you (spouse, son, daughter, friend, etc.):

TRANSFER ON DEATH

I, _____, transfer all of my interest in the described property to the named beneficiary(ies) on my death. I may revoke this deed. When recorded, this deed revokes any TOD deed that I made before signing this deed.

Sign and print your name below (your name should exactly match the name shown on your title documents):

Date: _____

(Signature of declarant)

(Typed or written name of declarant)



TODD Advantages

- Avoids Medi-Cal recovery claims.
- May be simple to use, will be less expensive than creating a living trust, and may eliminate the waiting and expense of a probate.
- Can be revoked at any time during the lifetime of the Grantor.
- Should simplify the transfer process at death, as long as the deed is not voided by a drafting error in the part of the Grantor.
- Retains the tax advantages of a transfer via trust or inheritance under a will.
- Less potential for abuse than simply transferring property to another family member (either with or without a life estate) to avoid Medi-Cal claims and probate.



TODD Disadvantages

- Offers no protection from the Grantor's creditors (except from Medi-Cal), so the beneficiary may end up with nothing if the debts of the Grantor are larger than the worth of the property.
- Can only be used to transfer one to four residential dwelling units or condominium units, or a single-family residence with < 40 acres of land.
- Cannot be used to transfer residential property held as Joint Tenancy or as Community Property with Right of Survivorship, and cannot be used to create split interests such as a life estate.
- Does not permit the designation of beneficiaries by class description (e.g., "my children"); the beneficiary or beneficiaries have to be specifically named.
- Cannot designate "contingent beneficiaries": if a beneficiary dies before the Grantor, the property goes to the other surviving beneficiaries in equal shares or, if no other beneficiaries, then it reverts to the Grantor estate and may then require a probate.



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