

CHAPTER 4 OMBUDSMAN WITNESSING OF ADVANCE HEALTH CARE DIRECTIVES AND PROPERTY TRANSFERS

I. Introduction

Ombudsman staff and volunteers are required by State law to witness Advance Health Care Directives (AHCDs) when executed by residents of Skilled Nursing Facilities (SNFs) or Distinct Part SNFs; and property transfers with a fair market value greater than \$100 between residents and employees (or family members of employees) of long-term health care facilities.

II. Legal Authority

STATE Probate Code sections 4609, 4617, 4673-4676, 4695, 4701 et seq., and 4780-86.
Health and Safety Code sections 1289 and 1418

FEDERAL Title 42 United States Code sections 1395cc(f) and 1396a(w)

III. Advance Health Care Directive (AHCD)

Residents of SNFs (including distinct part SNFs) who have capacity, retain the right to make their own medical and health care decisions and/or to designate someone else (an agent) to make those decisions for them if they become incapable of making decisions for themselves. A resident with capacity can also choose to have the agent's authority become effective immediately.

The document used for this purpose is called an Advance Health Care Directive (AHCD). An AHCD ensures that a resident's wishes are known, and allows the resident to have maximum control over future medical decisions by expressing his or her wishes about medical care and selecting an agent to make medical decisions immediately or in the event the resident becomes incapacitated.

California Probate Code section 4609 defines capacity as an individual's ability to understand the nature and consequences of a decision, to make and communicate the decision, and in the case of proposed health care, the ability to understand its significant benefits, risks, and alternatives. A long-term care (LTC) facility resident's capacity may fluctuate. For ombudsman representatives, determining a resident's capacity to execute an AHCD consists of determining whether or not the resident has the ability to understand the AHCD and its ramifications at the time it is signed. A resident who is not able to care for himself or herself physically or financially may still be able to execute an AHCD.

California Probate Code section 4675 provides that when a resident of a SNF executes an AHCD, the AHCD is not effective unless an ombudsman

representative signs as either one of two witnesses or in addition to a notary. Federal law is silent on ombudsman responsibility with reference to the execution of advance directives. However, the Patient Self-Determination Provisions of the federal Omnibus Reconciliation Act (OBRA) of 1990 [42 U.S.C. §§1395cc(f) and 1396a(w)] identify the right of a LTC facility resident to execute an advance directive and to have its provisions followed. LTC facilities are mandated to implement the provisions of an advance directive; but there is a federal allowance for an exemption on the basis of conscience for Medicaid certified facilities and facility staff if provided for in State law [42 U.S.C. §1396a(w)(3)].

A. Approved Forms - AHCD

An AHCD form and directions can be found in California Probate Code section 4701. Additional information and a sample AHCD form are located on the California Attorney General's website http://www.ag.ca.gov/consumers/general/adv_hc_dir.htm.

Acceptable versions of the AHCD form can also be obtained from most stationers, office supply stores, and legal bookstores; as well as from organizations such as the California Coalition for Compassionate Care and the California Medical Association.

Many attorneys prefer to develop their own AHCD forms on their own letterhead. These AHCD forms may include powers of attorney other than health care powers within the same document. The Ombudsman Program does not have the authority to witness financial or other powers of attorney unrelated to health care. In situations where other powers of attorney are included with the AHCD, the ombudsman representative should only witness the AHCD portion of the document. When witnessing an AHCD that includes other powers of attorney, the ombudsman representative must write in the Advocate or Ombudsman signature block, "signature attached." The ombudsman representative must then sign and attach a "Long-Term Care Ombudsman Witness Addendum for an Advance Health Care Directive," OSLTCO form S102 (Exhibit 4-A). This addendum must also be initialed by the resident to be valid. The addendum states that the ombudsman representative is only witnessing the AHCD portion of the document. Any question as to whether the ombudsman representative should witness a non-standard AHCD should be directed to the local LTCOP's legal services provider, if available, or to the OSLTCO.

B. Ombudsman Representative's Role as a Witness to an AHCD

A certified ombudsman representative who witnesses an AHCD must have special training and be registered by the OSLTCO as having completed the OSLTCO two-hour witnessing training (see Chapter 7). The Request for Registration of Ombudsman Witness for Advance Health Care Directives and Property Transfers (OSLTCO form S103, Exhibit 4-B)

is used to register an ombudsman representative as having completed the required two-hour training.

Prior to witnessing an AHCD, an ombudsman representative should ensure that it meets the following statutory requirements found in Probate Code sections 4673-4675: The AHCD must contain the date it is signed and the signature of the resident or another adult in the presence of the resident and acting upon the direction of the resident. For SNF residents, the AHCD must be witnessed by an ombudsman representative and one other witness, who must be 18 or older. The witness cannot be the resident's health care provider, the facility operator, or an employee of the health care provider or facility.

The responsibility of the ombudsman representative in witnessing the AHCD is to attest to the identity of the resident, assure that he or she is capable of understanding the document being signed, and that no coercion or undue influence is involved. The ombudsman representative is not required to explain or re-read the document to the resident but is to ensure that the resident is signing it freely, knowingly, and voluntarily.

In order to determine whether a resident has the capacity to sign an AHCD and is signing it willingly, the ombudsman representative must meet with the resident and should speak with him or her privately and confidentially. If the resident requests that a friend or family member remain present during the conversation, the ombudsman representative should honor that wish.

Capacity is defined in Probate Code section 4609 as "the ability to understand the nature and consequences of a decision and to make and communicate the decision." The ombudsman representative's private meeting with the resident should focus on those issues. OSLTCO form S101 (Exhibit 4-C) provides questions that the ombudsman representative can ask a resident during the meeting to help determine the resident's capacity and willingness to execute the AHCD.

If there are doubts about the resident's capacity, the ombudsman representative may request permission from the resident or the resident's legal representative to review the resident's medical record. This process helps protect vulnerable residents from undue influence. However, the ombudsman representative should remain aware that a resident whose attending physician has noted in the medical record that he or she is not capable of the informed consent required for medical decisions may still have the capacity to designate a person to make those decisions on his or her behalf. Probate Code section 4609 treats capacity to consent to health care treatment differently from general capacity, such as that required to execute an AHCD.

Some local LTCOPs may have a waiting list for non-urgent activities because of the number of complaints received each day. However, a waiting list is not appropriate for witnessing an AHCD. SNF residents are often in a very fragile state that can deteriorate quickly. Because an AHCD is invalid without an ombudsman witness, a waiting list could delay or prevent a resident from executing the document as soon as it is needed. Setting an appointment for a few days in advance is acceptable unless there is reason to believe the person may become incapable of signing within that time period (e.g., an imminent surgery).

As a witness to the AHCD, the ombudsman representative will complete and sign the AHCD "Statement of Patient Advocate or Ombudsman." If the other witness to the AHCD is a relative or beneficiary of the resident (one who is named in the will to receive personal property), the ombudsman representative will also sign the witness section certifying that he/she is not a relative or beneficiary of the resident. In instances of a notarized document, the ombudsman representative may be the third witness and sign only as the identified ombudsman witness.

C. Disposition of Completed AHCD and Other Related Forms

The completed Ombudsman Witness Intake Form (OSLTCO form S101, attached as Exhibit 4-C) should be retained by the local LTCOP as a record. The local LTCOP should not retain a copy of the signed AHCD.

The resident should keep the original AHCD in a safe place where loved ones can access it quickly. Copies of the completed AHCD should be given to those persons the resident has appointed as his or her agent and alternate agents, to the resident's doctor, to the facility, and to family members or anyone else who is likely to be called if there is a medical emergency.

D. Natural Death Act

The California Natural Death Act was repealed July 1, 2000. Nothing in the Health Care Decisions Law affects the validity of a durable power of attorney for health care (DPAHC) or a declaration under the Natural Death Act executed before July 1, 2000. A DPAHC executed on a printed form that was valid under prior law will continue to be valid if executed before July 1, 2000.

E. Revocation of AHCD

An AHCD may be revoked at any time as long as the resident retains capacity. The legal presumption is that the resident has capacity to revoke the AHCD. A resident may revoke an AHCD, other than the designation of an agent, by any action that communicates the intent to revoke. The designation of an agent may only be revoked by a resident in

signed writing or by personally informing the supervising health care provider of the wish to revoke the designation (Prob. Code § 4695). Completing a new AHCD revokes all previous inconsistent directives. Anyone who wishes to challenge the resident's capacity to revoke an AHCD has the burden of proof to show the resident's lack of capacity. This form of challenge will likely occur in a court proceeding.

F. Living Wills and Other Forms that Document Treatment Decisions

The AHCD is now the legally recognized format for a living will in California. It replaces the Natural Death Act Declaration. Living wills, per se, are not witnessed by ombudsman staff and volunteers. The AHCD allows a resident to do more than the traditional living will, which only states a resident's desire not to receive life-sustaining treatment if he or she is terminally ill or permanently unconscious. An AHCD allows a resident to state his or her wishes about refusing life-sustaining treatment in any situation. It also allows a resident to appoint someone he or she trusts to speak for him or her when he or she becomes incapacitated. A separate living will is not necessary if a resident has already stated his or her wishes about life-sustaining treatment in an AHCD.

H. Advance Health Care Directives from Other States

California Probate Code section 4676 provides that AHCDs and similar instruments executed in other states and jurisdictions in compliance with the laws of those states or jurisdictions are valid and enforceable in California and do not need to be re-executed. However, such documents should be carefully examined in light of possible expiration dates which could invalidate the documents. Ombudsman representatives may inquire as to whether the agents are still available and/or capable. If a resident has capacity and questions the validity of his or her AHCD from another state or jurisdiction, a new AHCD should be executed.

I. The Patient Self-Determination Act

The Patient Self-Determination Act, a part of OBRA 1990, became effective on December 1, 1991. Under this law, communications are encouraged between families, physicians, and professional health caregivers on the matter of an AHCD. The Act broke new ground in acknowledging the right to medical self-determination for residents of SNFs.

IV. Physician Orders for Life-Sustaining Treatment (POLST)

In January 2009, the POLST was added to the Probate Code as a legally recognized written document for use by physicians to record the wishes of residents regarding cardiopulmonary resuscitation and the intensity of other end-of-life medical intervention. This form replaces the Do Not Resuscitate (DNR)

form. As stated in Probate Code sections 4780-4786, the POLST was designed to complement an AHCD by taking an individual's wishes regarding life-sustaining treatment, such as those set forth in the AHCD, and converting those wishes into a medical order. The AHCD documents the resident's wishes regarding life-sustaining treatment, but it is not a physician's order or a request for resuscitative measures as is the POLST. The POLST can be revoked or modified at any time by a physician in consultation with a resident who has capacity or with the resident's legal representative when the resident lacks capacity. If the POLST conflicts with the AHCD, the most recent order or instruction is effective. To be effective, the POLST must be signed by a physician, the resident, or if the resident is not capable of making his or her own health care decisions, the legally recognized healthcare decision-maker.

The POLST is intended to be used by individuals who are nearing the end of life. Use of the POLST is always voluntary; and LTC facilities cannot require residents to have them.

The POLST may also replace a form known as the Physician Documentation of Preferred Intensity of Care (PIC). This form was exclusively for physician use, and clarified the physician's discussion with the resident and/or the resident's legal representative. Preferences regarding the goals and intensity of treatment are addressed and instructions are provided to hospital and SNF staff on the use of interventions such as cardiopulmonary resuscitation, hospitalization, intravenous fluids, tube feeding, and antibiotics. If a SNF resident does not wish to have a POLST, the physician will still document information such as what was recorded in the PIC.

When witnessing an AHCD, an ombudsman representative may ask the resident whether he or she also has a POLST and if so, whether the resident would like to review the POLST with the ombudsman to make sure it is consistent with the AHCD. This provides an opportunity to discover and correct inconsistencies between the two documents.

V. Special Considerations: Conservatorships

The presence of a conservatorship may affect a resident's legal right to make health care decisions and/or transfer property. Before witnessing an AHCD or property transfer, an Ombudsman representative should find out whether a resident is conserved. The administrator of the SNF should have a copy of the court document creating the conservatorship, and be able to give this information to the Ombudsman representative. A conservatorship may be of the estate only, or of the person only, or of both; and may or may not include the right of the conservator to make major medical decisions for the conservatee. A conservatorship of the estate does not affect a resident's ability to execute an AHCD. However, it does limit the legal ability of a resident to transfer property. A conservatorship of the person may indicate that the person is not able to make decisions, but if the resident retains the right under conservatorship to make major medical decisions, he/she may be able to execute an AHCD. A

conservatorship that occurs after an AHCD is executed does not negate the AHCD unless that is specified in the terms of the conservatorship.

Unless the conservatorship document states otherwise, an agent under an AHCD has priority over a conservator in making medical decisions. The AHCD agent represents the wishes of the resident while that person was still capable of making decisions and, therefore, is a more direct resident representative than a conservator, who is usually chosen and approved by a court.

A resident with a current symptomatic mental health diagnosis should be referred to the local Mental Health Patient Rights Advocate to assure that the resident is legally empowered to execute an AHCD. There are special rules that must be considered if a Lanterman-Petris-Short (LPS) conservatorship exists.

A resident with a developmental disability that seriously impairs judgment should be referred to the local Regional Center Client's Rights Advocate to ensure the protection of the resident's rights within the framework of that system. An AHCD would not usually be appropriate in this case.

VI. Property Transfers

Health and Safety Code section 1289 prohibits certain parties from purchasing or receiving property with a fair market value of more than \$100 from a resident of a long-term health care facility unless the purchase or receipt is made or conducted in the presence of a representative of the State Long-Term Care Ombudsman (a local ombudsman staff member or volunteer). Parties who may not receive property from residents without ombudsman witnesses include owners, employees, agents, and consultants of the resident's long-term health care facility and members of their immediate families. Representatives of public agencies operating within the long-term health care facility and their immediate family members may also not receive property from residents without an ombudsman witness.

A. Ombudsman's Role as a Witness to Transfer of Property

The role of the ombudsman representative in property transfers is to witness the transaction and ask questions to ensure its appropriateness. The ombudsman representative should ensure that the resident is signing the transfer document willfully and voluntarily. Willful and voluntary execution is a determination that relates only to whether the resident is signing under duress, fraud, or undue influence. Documentation of this determination should be included in the health records of the resident as part of the written comments on the Transfer of Property Witnessing form. If the ombudsman representative believes that fraud, coercion or undue duress is present, referral to the appropriate authority should be considered (for example: legal services, law enforcement).

B. Guidelines for Witnessing Property Transfers

1. An ombudsman must be certified by the OSLTCO before serving as a witness to property transfers.
2. The transfers must involve property with a fair market value greater than \$100.00. The property transfer must occur between a resident and individuals, or members of their immediate families who are connected with a long-term health care facility or operating within a facility or on behalf of a public agency or organization. [Health & Saf. Code § 1289(a)].
3. The ombudsman representative serving as a witness must not be a relative of either party to the transaction and must not have any interest in the property or consideration exchanged in the transaction. The ombudsman representative must not be a party to the transaction or a third party beneficiary of the transaction.
4. The ombudsman representative should explain to the resident that he/she will not just witness the transaction, but will also ask questions of the resident and others to ensure the appropriateness of the transaction. The interview with the resident should be conducted privately unless the presence of a third party, such as an interpreter, is necessary or unless the resident requests to have another person present.
5. The ombudsman representative should inform the resident that communications between the resident and the ombudsman representative will be kept confidential unless the resident consents to disclosure of information to a third party.
6. The ombudsman representative should read the transfer document (sales agreement, contract, deed, etc.), but need not make any judgment about its validity or the validity of any of its parts. The transfer document or sales agreement is not part of the transfer of property record maintained in the resident's health records.
7. The resident must sign the transfer document or acknowledge his/her signature on the document in the presence of the ombudsman representative witnessing the transfer.
8. The ombudsman representative should document the transaction using the Transfer of Property Witnessing Record form (OSLTCO S104, Exhibit 4-D). This form is signed by the resident, the witnessing ombudsman representative, and the purchaser or recipient of the property. The documentation must include the name and address of the purchaser/recipient of the property, date and location of the transaction, description of the property sold or

transferred, and the purchase price. The record of the transaction is to be filed as a permanent part of the resident's health records.

9. If the ombudsman representative determines that the resident is incapable of willfully and voluntarily executing the document, this determination should be explained to the resident. The ombudsman representative will then refuse to witness the transfer document, thereby preventing the transfer of property. This determination should be noted in the "Comments of Witness" section of the Transfer of Property Witnessing Record form.

VII. Recording AHCDs and Property Transfers in NORS

AHCDs and property transfers are recorded as activities, not as complaints, in the National Ombudsman Reporting System (NORS). They are mapped to the activity, Information & Consultation to Individuals.