

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) executed by residents of Skilled Nursing Facilities (SNFs) and 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. Ombudsman representatives do not witness AHCDs or property transfers for residents of other facility types.

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 wishes about medical care and by 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, 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 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)]. In California, a health care institution that declines to comply with an individual health care decision must promptly inform the patient and any person authorized to make health care decisions for the patient, and, unless the patient or agent refuses assistance, immediately make all reasonable efforts to assist in the transfer of the patient to another health care provider or institution that is willing to comply. The health care institution must provide continuing care until the transfer can be accomplished (Probate Code § 4736).

A. AHCD Forms and Other Powers of Attorney

Probate Code section 4701 includes a statutory AHCD form and directions. Additional information and a fillable statutory AHCD form are located on the California Attorney General's website <http://ag.ca.gov/consumers/pdf/AHCDS1.pdf>

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 forms may include other powers of attorney within the same document. The Ombudsman Program does not have the authority to witness financial or other powers of attorney unrelated to health care. When financial or other powers of attorney are included in the same document with the AHCD, the Ombudsman representative shall only witness the AHCD portion of the document.

When witnessing a document that includes other powers of attorney in addition to the AHCD, 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 S102). To be valid, the resident must also initial this addendum. 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 OSLTCO.

B. The 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 two hours of witnessing training (see Chapter 7, Training Requirements). Local Ombudsman Program Coordinators submit a Request for Registration of Ombudsman Witness for Advance Health Care Directives and Property Transfers (OSLTCO S103) to the OSLTCO in order to register an Ombudsman representative as having completed the required two-hour training.

Although some complaints may require a more immediate response than a request for witnessing, Ombudsman representatives should keep in mind that residents of SNFs 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).

The responsibility of the Ombudsman representative in witnessing the AHCD is to verify the identity of the resident and 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 the document at length to the resident, but is to ensure that the resident is signing it freely, knowingly, and voluntarily; and that what is contained in the document reflects the resident's wishes.

Probate Code section 4675(b) states that an Ombudsman witness may rely on the representations of SNF administrators or staff or of family members to verify the resident's identity if the Ombudsman witness believes the representations provide a reasonable basis for determining the identity of the resident.

Prior to witnessing an AHCD, an Ombudsman representative shall ensure that the AHCD meets the following statutory requirements found in Probate Code sections 4673-4675:

- The AHCD must contain the date it was signed.
- It must be signed by the resident or another adult in the presence of the resident and acting upon the direction of the resident.
- In addition to the Ombudsman signature the AHCD must either be notarized or signed by one other witness.
- The witness 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.

It is preferable for the Ombudsman representative to witness the AHCD at the time the resident signs it. However, there may be circumstances when a resident signs the AHCD with a notary or other witness(es) and the Ombudsman representative is unable to be present. In those cases, the Ombudsman representative will complete the normal review process with the resident and ask the resident to acknowledge his or her signature on the AHCD.

C. Reviewing Capacity and Voluntariness

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 speak with him or her privately and confidentially. However, if the resident requests that a friend or family member remain present during the conversation, the Ombudsman representative shall honor that wish.

Probate Code section 4609 defines capacity 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. Some sample questions to ask include:

- Have you read this document or has someone read it to you?
- Describe the document. What does it do?
- Do you have any concerns about the document?
- If, at some point, you cannot make your own health care decisions, is there someone you would like to make them for you? (Is the same person named as the health care agent?)
- Have you executed a similar document in the past? Was the same person named to make health care decisions for you?
- If you have an existing document, why do you want to make changes?
- Were you influenced by any employee of this facility, the agent, a family member, or anyone else to make (name of agent) your health care agent?

If the Ombudsman representative has doubts about the resident's capacity, he or she *shall not* witness the document. SNF residents frequently have fluctuating capacity, so ask the resident whether there is a better time to complete the witnessing. With the resident's permission, ask the resident's family and/or facility staff whether there is a time of day when the resident has better capacity. If the resident did not initiate the AHCD, the Ombudsman representative should go back to the person who did, and discuss conservatorship as an alternate option.

If the Ombudsman representative has concerns about whether the resident is signing the document willingly and voluntarily, or if the resident names a different agent or different directives in the confidential discussion with the Ombudsman representative, the Ombudsman representative *shall not* witness the document.

As a witness to the AHCD, the Ombudsman representative will complete and sign the AHCD in up to three different places:

- The Statement of Patient Advocate or Ombudsman, which is required for AHCDs executed by nursing home residents
- As a witness, if the AHCD is not notarized
- The declaration certifying that one witness is not a relative or beneficiary

The Ombudsman representative shall also complete and sign the Long-Term Care Ombudsman Witnessing of an Advance Health Care Directive (OSLTCO S101) documenting his or her actions in witnessing or attempting to witness the AHCD.

D. Disposition of Completed AHCD and Other Related Forms

The local LTCOP must retain the completed Ombudsman Witness Intake Form (OSLTCO S101) as a record. The local LTCOP does not retain a copy of the signed AHCD.

Offer the original AHCD to the resident so that he or she can keep it in a safe place or can provide it directly to the named agents or other loved ones. Assist the resident to work with facility staff to ensure that copies of the completed AHCD are included in the resident's medical record, given to those persons the resident has appointed as his or her agent and alternate agents, to the resident's doctor, and to family members of the resident's choosing, or anyone else who is likely to be called if there is a medical emergency.

E. The 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.

F. Revocation of an AHCD

A resident may revoke an AHCD at any time as long as he or she 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 (Probate 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.

G. Living Wills and Other Forms that Document Treatment Decisions

The AHCD is now the legally recognized format for an advance directive in California. It replaces the Natural Death Act Declaration and the traditional living will. Living wills, per se, are not witnessed by Ombudsman staff and volunteers. The AHCD allows residents 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 residents to state their wishes about refusing life-sustaining treatment in any situation. It also allows residents to appoint someone they trust to speak for them in the event that they become 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 may have expiration dates or may name agents who are no longer available or capable. If a resident has capacity and questions the validity of his or her AHCD from another state or jurisdiction, it is advisable that the resident execute a new AHCD.

I. The Patient Self-Determination Act

The Patient Self-Determination Act, a part of OBRA 1990, became effective on December 1, 1991. This law encourages communications 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 take effect, 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.

As of January 1, 2016, Assembly Bill 637 (Campos, Chapter 217, Statutes of 2015) authorizes a nurse practitioner or physician assistant, acting under the supervision of a physician, to sign the POLST in place of the physician.

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. The PIC documented the resident's preferences regarding the goals and intensity of treatment and provided instructions 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 similar to what would have been 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 representative in order to make sure it is consistent with the AHCD. This provides an opportunity to discover and correct inconsistencies between the two documents. If there are inconsistencies, the Ombudsman representative can help to facilitate the resident's conversation with the Social Services Director or other appropriate facility staff to make any needed revisions.

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. If 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 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 the conservatorship to make medical decisions, he or 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 order 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.

VI. Property Transfers

Health and Safety Code section 1289 prohibits certain parties from purchasing or receiving property with a fair market value greater 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). Owners, employees, agents, and consultants of the resident's long-term health care facility and members of their immediate families may not receive property from residents without Ombudsman witnesses. Representatives of public agencies operating within the long-term health care facility and their immediate family members also may not receive property from residents without an Ombudsman witness. Long-term health care facilities include SNFs, Nursing Facilities, Intermediate Care Facilities, and Congregate Living Health Facilities.

A. The Ombudsman Representative'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 of the resident and others to ensure its appropriateness. Through confidential discussion with the resident and by asking questions about the transaction, the Ombudsman representative shall determine whether the resident is signing the transfer document willingly and voluntarily and is not signing under duress, fraud, or undue influence. Documentation of this determination shall be included in the health records of the resident as part of the written comments on the Transfer of Property Witnessing form (OSLTCO S104). If the Ombudsman representative believes that fraud, coercion or undue duress is present, he or she *shall not* witness the document and should consider

referral to the appropriate authority (for example: legal services, law enforcement). Remember that the Ombudsman representative may not share information identifying the resident with anyone outside of the Ombudsman Program without the resident's consent.

B. Guidelines for Witnessing Property Transfers

1. A certified Ombudsman representative must be registered with the OSLTCO before serving as a witness to property transfers.
2. The witnessing requirement applies to transfers involving property with a fair market value greater than \$100.00 and not to craft items made by facility residents. 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 & Safety Code § 1289(a,c)].
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 shall explain to the resident that he or 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 Ombudsman representative shall interview the resident 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 shall 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 shall 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 or her signature on the document in the presence of the Ombudsman representative witnessing the transfer.

8. If the Ombudsman representative determines that the resident has capacity and is willingly completing the transaction, he or she shall document the transaction using the OSLTCO S104. This form is signed by the resident, the witnessing Ombudsman representative, and the purchaser or recipient of the property. The documentation on the OSLTCO S104 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. While at the facility, the Ombudsman representative will make sure that a copy of the OSLTCO S104 is made. The facility must file the original OSLTCO S104 as a permanent part of the resident's health records. The Ombudsman representative will keep a copy of the OSLTCO S104 for Ombudsman Program files.
9. If the Ombudsman representative determines that the resident is incapable of willingly and voluntarily executing the document, or if there appears to be fraud or coercion present, he or she must explain this determination to the resident. The Ombudsman representative must then refuse to witness the transfer document, thereby preventing the transfer of property. This determination shall be noted in the "Comments of Witness" section of the Transfer of Property Witnessing Record form.

VII. Recording AHCDs and Property Transfers in the Ombudsman Data Integration Network (ODIN)

Record witnessing of AHCDs and property transfers as Information and Consultation activities, not as complaints, in ODIN. Upload the OSLTCO S101 and the OSLTCO S102 to the appropriate ODIN activity records.