



What Is An Advance Health Care Directive?

An *Advance Health Care Directive* (“**AHCD**”) is a legal document that you sign, in your capacity as the “Principal,” and by which you appoint another person to serve as your “Agent” to make medical decisions on your behalf if you are unable to communicate – in some measurable way – with your physicians and other medical providers.

Your Health Care Agent communicates your medical care instructions that are contained within your AHCD to your medical providers. Such instructions would typically include your health care preferences, including the types of special medical treatments you want or do not want were you to be in a state in which you are unable to communicate such instructions yourself. An **AHCD** is the best way to ensure that your health care wishes are known and considered if for any reason you are unable to speak for yourself. Your AHCD can also contain your instructions regarding medical treatment(s) at the end of your life, your desire for diagnostic testing, surgical procedures, cardiopulmonary resuscitation, and organ donation.

By having an **AHCD** in place, you can prevent the difficult situation of your family and loved ones having to “guess” what you would want in the way of health care and resuscitative measures, if you were unable to communicate in some measurable way to your health care providers. Thus, your **AHCD** saves your family and loved ones the stress and emotional turmoil that results when faced with guessing your wishes.

How Is An AHCD Different From A “Living Will”? Your **AHCD** is the legally recognized format for a *living will* in California. Your **AHCD** replaces the *Natural Death Act Declaration*, which is the formal title of a living will. Your **AHCD** allows you to do more than you can with the traditional living will, which only states your desire not to receive life-sustaining treatment if you are terminally ill or permanently unconscious. By contrast, an **AHCD** allows you to state your wishes regarding the refusal or acceptance of life-sustaining treatment *in any situation*, not just if you are terminally ill or permanently unconscious. In addition, an **AHCD** allows you to appoint someone you trust (known as your Health Care Agent) to speak for you and act on your behalf when you are incapacitated. You do not need a separate living will if you have already stated your wishes about life-sustaining treatment in your **AHCD**.

What are the Advantages of Advance Health Care Directives (AHCDs)? There are many advantages to having an **AHCD** in place. **First**, an **AHCD** is inexpensive to execute. An **AHCD** can be executed without judicial intervention. All that is needed to properly execute an **AHCD** are you, the Principal, and *either* two unrelated witnesses (who witness that you appear to have sufficient capacity to sign your **AHCD**) or a notary public (who acknowledges your signature). **Second**, your **AHCD** is a private legal document and need not be shared with others (although you should provide a copy of your **AHCD** to all of the Agents you have designated to serve on your behalf and all of your medical providers). **Third**, your **AHCD** gives you the option of choosing your preferred Agent(s) to make health care decisions for you, rather than having a judge – who has never seen you – appoint a *surrogate decision-maker* – who also has never seen you – to make health care decisions on your behalf. **Finally**, a physician or other health care provider who follows your Health Care Agent’s instructions

regarding your health care is protected from civil liability, criminal prosecution, and professional discipline.

What are the Disadvantages of an Advance Health Care Directive (AHCD)? Some people have serious reservations about the potential abuses that could occur when one grants broad authority to his or her Agent to make health care decisions on his or her behalf. The concern is that a Health Care Agent may abuse his or her authority to act on the Principal's (i.e., your) behalf for the Agent's own benefit with little or no oversight to prevent such abuses. Another concern is the possibility of abuse by a Health Care Agent who has no idea of his or her duties and responsibilities under the **AHCD** and who therefore exceeds the authority granted to him or her by an **AHCD**.

An **AHCD** is a type of power of attorney and most of the time powers of attorney can operate without court supervision. This is both good news and bad news. An alternative to your **AHCD** – a Conservatorship of Your Person – requires frequent court approval, which is cumbersome, time-consuming, and expensive. However, having a Health Care Agent acting under one's **AHCD** who makes unwise or self-interested decisions can be disastrous for the incapacitated person. For example, a Health Care Agent might decide to place the incapacitated person in a nursing home rather than keep the person at home (with in-home help, which is more expensive than nursing home care) based on the expectation that the Health Care Agent might inherit more property at the death of the incapacitated person (since less of his or her assets were depleted by the cost of providing care at the end of his/her life).

Discuss Your End-Of-Life Decisions With Key People. As part of the process of creating your **AHCD**, you will find it useful to discuss your health care preferences and decisions with your physician(s), your family, your friends, and anyone else who is close to you. Some of the questions to address might include the following:

- (a) What is important to you when you are dying?
- (b) Are there specific medical treatments you especially want or do not want?
- (c) When you are dying, do you want to be in a nursing home, hospital, or at home?
- (d) What are the options in Palliative Care and Pain Management and Hospice Care?

Who May I Appoint As My Health Care Agent? You can appoint almost any adult to serve as your Health Care Agent. You can choose a member of your family such as your spouse or an adult child, a friend, or someone else you trust. You can also appoint one or more "alternate Agents" in case the person you select as your initial Health Care Agent is unavailable or unwilling to make a decision. (Note that if you appoint your spouse as your Initial Agent and later get divorced, your **AHCD** itself remains valid, but your first alternate Agent will replace your former spouse as your Health Care Agent.). It is important that you talk to the people you plan to appoint as your Health Care Agents to be sure that they understand your wishes and agree to accept this responsibility. Your Health Care Agent will be immune from any liability so long as s/he acts in good faith on your behalf.

Note, however that California law prohibits you from choosing certain people to act as your Health Care Agent(s). For example, you may not usually choose your doctor, or a person who operates a community care facility (sometimes called a "board and care home") or a residential care facility in which you receive care. The law also prohibits you from appointing a person who works for the health facility in which you are being treated, or the community care or residential care facility in which you receive care, unless that person is related to you by blood, marriage, or adoption, or is a co-worker.

Can I Appoint More Than One Person To Share The Responsibility Of Being My Health Care Agent?

We strongly recommend that you name only one person as your Health Care Agent. If you appoint two or more people to have concurrent and equal authority to act on your behalf and they should happen to disagree about a health care decision, then one of the important purposes of your **AHCD**—to identify clearly who has authority to speak for you—will be defeated. If you are afraid of offending people close to you by choosing one over the other to serve as your initial Health Care Agent, ask them to decide among themselves who will be the initial Health Care Agent, and list the other as an alternate Agent.

What is My Health Care Agent's Authority Under My AHCD? In exercising authority under your **AHCD**, your Health Care Agent has a duty to act consistently with your desires as expressed in your **AHCD** or that you have otherwise made known to the Health Care Agent at any time, or, if your desires are not known, to act in your best interests. Your personal values are to be taken into consideration when determining what would be in your best interest. It may be helpful, therefore, for your **AHCD** to include statements about your values for the purpose of providing guidance to your Health Care Agent and your health care providers in the event that they will need to make future health care decisions on your behalf.

A Health Care Agent under an **AHCD** can act on your behalf to give consent, refuse to give consent, or withdraw already given consent to any health care service or procedure. California law specifically includes the right of a Health Care Agent to provide, withhold, or withdraw artificial nutrition and hydration within the definition of health care decisions. In other words, California law authorizes your Health Care Agent to make health care decisions for you to the same extent that you could make those health care decisions if you had the capacity to do so. Your Health Care Agent is also authorized to make decisions regarding the disposition of your remains after your death, the authorization of an autopsy, and the donation of all or part of your body for transplant, education, or research purposes.

Artificially Administered Food & Hydration. Anytime one must decide whether to deny a dying or comatose patient food or water is emotionally traumatic for the patient's family. Thus, knowing the patient's wishes can be very comforting to family members as they face this difficult decision. If you wish for your Health Care Agent to have the power to make decisions to withhold or withdraw life-sustaining treatment in certain situations, it is important to ask yourself whether you wish to include your wishes regarding artificially administered nutrition and hydration in your **AHCD**. Documenting these wishes has become glaringly important in the wake of the tragic Florida case of Terri Schiavo.

California law defines health care decisions specifically to include directions to provide, withhold, or withdraw artificial nutrition and hydration and all other forms of health care, including cardiopulmonary resuscitation. The law recognizes that an adult has the fundamental right to control the decisions relating to his or her own health care, including the decision to have life-sustaining treatment withheld or withdrawn in order "to permit the natural process of dying." Therefore, your **AHCD** should explicitly define health care decisions not to include administration of artificial nutrition and hydration if that is your wish.

Limitations on The Health Care Agent's Powers. It is important to note that your **AHCD** does not give your Health Care Agent the power to commit you to a mental health treatment facility, or to authorize convulsive treatment, psychosurgery, sterilization, or abortion.

California law provides that the authority of your Health Care Agent under your **AHCD** becomes effective only on a determination that you (the principal) lack capacity, unless your **AHCD** provides otherwise. If you object to any treatment or object to withholding or withdrawing any treatment, and if

you understand the consequences of making such objections, nothing can be given, withdrawn, or withheld over your objections regardless of what your **AHCD** states.

Will My Health Care Agent Be Responsible For My Medical Bills? Your Health Care Agent will not be responsible for your medical bills, unless s/he is otherwise responsible for your debts. This would be the case if your Health Care Agent was your spouse, your Health Care Agent under a Durable Power of Attorney for Financial Affairs, or the Trustee of your trust. Your **AHCD** deals only with the making of medical decisions on your behalf; it has no effect on the financial responsibility for your health care. Please note, however, that unless you have made other arrangements, your Health Care Agent *may* be responsible for the costs or expenses that are related to the disposition of your body and/or remains after your death.

For How Long Is An AHCD Valid? Since 1994, California law has provided that, once executed, your **AHCD** remains valid and in effect for the rest of your life (regardless of your future mental capacity), unless you expressly revoke it or have indicated within your **AHCD** itself that it will expire on a specific date. Prior to 1994, a health care directive (known as that time as a Durable Power of Attorney for Health Care) remained valid for only seven (7) years. If you executed a health care directive prior to 1994, it is likely that the directive has expired and you should execute a new **AHCD** as soon as possible.

What Should I Do With Your AHCD After I Complete and Sign It? Make sure that your AHCD has been properly signed, dated, and either notarized or witnessed by two qualified individuals. Keep the original **AHCD** in a safe place where your loved ones can find it quickly. Give a copy of your **AHCD** to each of the persons you have appointed as your initial and alternate Agents. Give a copy to each of your treating physicians, to the administrators of your health plan, to your close family members, and to anyone else who is likely to be called if you have a medical emergency. You should inform your Health Care Agents to present a copy of your **AHCD** at the request of your health care providers or emergency medical personnel. Finally, if you are planning to have surgery, be sure to take a copy of your **AHCD** with you and present it to the staff of the hospital, outpatient surgery center, or any other medical facility. California law provides that a copy of your original **AHCD** has the same legal force and effect as does the original. **JC**

Contact **Creighton Law Offices** (Tel: 650/344-0700 or info@creightonlaw.com) for assistance in the preparation of an **Advance Health Care Directive** for you or a loved one.