

# Advance Care Planning in California

## What is Advance Care Planning and Who Should Do It?

Advance care planning is a process for thinking about and documenting goals and preferences. Advance care planning is for all adults and can encompass near term planning, long-term care planning, and end-of-life planning. It is important that people with dementia engage in advance care planning, *especially to name medical and financial decision-makers*. People with cognitive impairment or otherwise at risk of incapacity should engage in advance care planning as soon as possible.

## Who Can Make Medical Decisions?

### A Person with Legal Capacity

- All adults have the right to make their own medical decisions until they lose legal capacity to do so.
- A diagnosis of dementia or other mental health condition does not automatically mean they cannot make medical decisions. Further assessment is required.
- People with dementia and other conditions should be asked and supported in making decisions. Hearing loss, medications, medical conditions, language, and literacy can affect one's ability to make decisions and should be addressed first.
- Only if a person truly cannot participate should we turn to other decision-makers.

### Health Care Agent in Advance Health Care Directive

- Person named in a legal document to make health care decisions for another person once they can no longer do so themselves.
- Must have been appointed by an adult with capacity.
- Authority given depends on the document, can be broad or limited.
- Does not have automatic decision-making authority over health insurance, housing, and other financial and legal matters, even if they affect the person's health.

As of November 2022, California has a default surrogate medical decision-making law. If an adult has not named a health care agent in an advance health care directive, the health care provider or institution may choose an adult who has demonstrated special care and concern for the patient, is familiar with the patient's personal values and beliefs to the extent known, and is reasonably available and willing to serve as a decision maker. The person may be chosen from a spouse, partner, adult child, parent, sibling, grandchild, relative or close personal friend.

## **Supporter/s in Supported Decision-Making Agreements (New as of 2023)**

- Person named to support another person in decision-making by (for example) assisting with communication or gathering information.
  - Unlike a health care agent, a supporter cannot make decisions "for" a patient or sign forms for them.
  - A supporter can be named in any writing that is signed by the adult, supporter, two witnesses and a notary. There is no standardized form.
- Supported decision-making is one alternative to conservatorship and is for people with disabilities, including mental disabilities.

## **Conservator of the Person**

- A person or agency appointed by a judge to make decisions for another person.
- A conservator of the person can make health and personal care decisions for the adult.
- A conservator is different from an agent or supporter because they can make decisions over the objection of the conserved person.
- Conservatorship is a last resort and requires that other, less restrictive options have been tried first.

## **What About POLST?**

- POLST stands for "Physicians Order for Life Sustaining Treatment." It is a standardized document
  - in which someone chooses what they want to happen at the end of their life.
- A POLST does not appoint a health care agent or supporter. The other tools above are required to do that.
- A person who has a POLST but no other planning documents should complete other documents as soon as possible.

## **What If There is No One to Name?**

- Decision-makers do not have to be family or friends, but they must be trusted and trustworthy. Some people name professionals, such as geriatric care managers, fiduciaries, or others, to serve as their medical decision-makers.
- A person's goals and preferences should be documented in advance directives, POLSTs, and other planning tools. Especially if there is no surrogate, these should be revisited and updated with the person often and as their status changes.
- Proactively reach out to places where the person is likely to receive care to share their planning documents. This could include primary care, hospitals, and long-term care facilities.
- Conservatorship of the person may be an option if the person has lost capacity to participate in decision-making and other alternatives have been unsuccessful. The county public guardian/conservator would need to agree to pursue this with the local probate court.

### **Key Resource:**

[Prepar eforyourcare.org](https://www.prepar.org/eforyourcare.org)

- Free, online resource for understanding and completing an Advance Health Care Directive

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## Who Can Make Financial Decisions?

### A Person with Legal Capacity

- All adults have the right to make their own financial or legal decisions until they lose legal capacity to do so.
- A diagnosis of dementia or other mental health condition does not automatically mean they cannot make financial decisions. Further assessment is required.
- People with dementia and other conditions should be asked and supported in making decisions. Hearing loss, medications, medical conditions, language, and literacy can affect ability to make decisions and should be addressed first. Only if a person truly cannot participate should we turn to other decision-makers.
- There is no default financial surrogate in California.
- A family member does not have automatic authority to make financial and legal decisions for a person living with dementia.
- A person with dementia, who has capacity, must give authority to someone in a legal document. If they do not, then a court may become involved in appointing a legal or financial decision-maker.

### Agents in a Durable Power of Attorney for Finances

- One or more people appointed in a legal document by a person with legal capacity.
- Can cover personal care and long-term care decisions, finances, public benefits, housing, legal matters and more. Authority varies and depends on what the document itself says.
- Agents may be able to make decisions as soon as the document is signed or may have to wait until the person loses capacity or some other event happens. It will say in the document. Agents can act with and for another person until that person dies or their authority is taken away. The person who created the document can take away their authority as long as they have capacity.
- These documents are easily abused, so agents must be chosen carefully.
- Agents should be trusted and trustworthy and prepared to take the role seriously. They can face serious legal consequences for misusing their authority.

### Social Security Administration Representative Payee ("Rep Payee")

- A person or agency who can manage benefits for another person. These include all benefits that come from the Social Security Administration, which can include retirement, disability, health insurance (e.g., Medi-Cal), and spousal benefits.

- A Rep Payee can be named in advance. If someone has not named a Rep Payee, a person or agency must request this status from the Social Security Administration.
  - The Social Security Administration has to approve the Rep Payee and has its own process.
  - Rep Payees do not have authority to access anything beyond benefits (e.g., no other bank accounts, housing, or other documents).
- The Social Security Administration will not recognize a Durable Power of Attorney for Finances.

### **Veterans Administration (VA) Fiduciary**

- A person or agency who can manage benefits for a veteran. These include all benefits that come from the VA, which can include retirement, health care, and spousal benefits.
  - A VA fiduciary cannot be named in advance, only after a veteran is no longer able to manage on their own.
  - The VA has to approve the Fiduciary and has its own process.
- VA Fiduciaries do not have authority to access anything beyond VA benefits (e.g., no other bank accounts, housing, or other documents).
- The VA will not recognize a Durable Power of Attorney for Finances.

### **Trustees in a Living Trust**

- Named by a person with capacity to manage money and property placed in a trust.
  - In a living trust, a trustee can manage money and property during a person's lifetime and after death. (This is not true of all trusts, some are only for after someone dies.)
  - A trustee can only manage assets in the trust. If something is left out of the trust, they have no authority.
- Trusts can be very helpful to people with disabilities, people with assets, and others. However, they cost money to create and should be done with the help of an experienced attorney.
- Not everyone needs a trust. Beware of trust mills.

### **Supporter/s in Supported Decision-Making Agreements (New as of 2023)**

- A person named to support another person in decision-making by (for example) assisting with communication or gathering information.
  - Unlike an agent in a durable power of attorney for finances, a supporter cannot make decisions "for" the person or sign forms for them.
  - A supporter can be named in any writing that is signed by the adult, supporter, two witnesses and a notary. There is no standardized form.
- Supported decision-making is one alternative to conservatorship and is for people with disabilities, including mental disabilities.
- A person named as a supporter cannot participate in a decision in which they have a conflict of interest. This includes, but is not limited to, any decision in which the supporter has a financial or other tangible stake in the outcome.

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## Conservator of the Estate

- A person or agency appointed by a judge to make decisions for another person.
  - A conservator is different from an agent or supporter because they can make decisions over the objection of the conserved person.
  - May not be needed if an adult has named a legal and financial decision-maker, such as an agent in a power of attorney for finances, rep payee, VA fiduciary, and/or trustee.
  - Authority of a conservator depends on what the judge approved.
- Can cover personal care decisions, finances & benefits, housing, legal matters and more.
- Conservators do not provide additional money or resources. They use the money and resources of the conserved person. They cannot create new housing or beds that the person was not already eligible for.
- Conservatorship is a last resort and requires that other, less restrictive options have been tried first.

### **Key Resource:**

- California Advocates for Nursing Home Reform (CANHR) runs an elder law referral service that is regulated by the State Bar. They will refer to free and low-cost legal services as well as paid services. Call 1-800-474-1116 or visit [www.canhr.org](http://www.canhr.org).