

## Incorporating Personal Values into Advance Healthcare Directives

**THE PATIENT PROTECTION AND AFFORDABLE CARE ACT,**<sup>1</sup> health insurance, Medicare, deductibles, prescription medication, copays, portability, stop-loss caps—the components of healthcare in California are a mélange dizzying enough to confuse most people. Nevertheless, the California Health Care Decisions Law<sup>2</sup> grants individuals the power to make their own decisions about their healthcare plans, including decisions regarding future incapacity. Attorneys advising clients with respect to the designation of a healthcare agent or agents, end-of-life decisions, alleviation of pain directions, and other aspects of medical care, should encourage discussion of these issues with family members and ensure that their decisions are recorded with specific and appropriate documentation.

The U.S. healthcare system is costly. America’s total healthcare bill for 2014 was \$3 trillion.<sup>3</sup> The complicated insurance maze also adds to the stress that a spouse or family member faces when making healthcare decisions for another person. Given this daunting landscape, an advance personal healthcare directive can help prevent uncertainty, family tensions, and decisions that may run contrary to the patient’s wishes. A completed advance healthcare directive should be given to and discussed with one’s designated agent(s), primary care physician, and personal attorney. Many hospitals will scan an advance directive into one’s personal medical record for ready reference and safekeeping.

As the legislative findings set forth in Probate Code Section 4650(a) acknowledge, “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decisions relating to his or her own health care, including the decision to have life-sustaining treatment withheld or withdrawn.”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 furtherance of this policy, Probate Code sections 4670 et seq. provide the statutory guidance for advance healthcare directives. The key term “healthcare decisions” is defined in specific statutory provisions.<sup>4</sup>

Selection and appointment of an agent or agents<sup>5</sup> to make healthcare decisions is a threshold consideration. In the event of one’s incapacity, an advance healthcare directive authorizes that agent or agents to follow the directive’s detailed instructions, including end-of-life-decisions, relief from pain, organ donation, and the designation of a primary care physician.<sup>6</sup> The statutory form may be modified or supplemented as an individual may desire<sup>7</sup> to include personal preferences and values, treatment desires and directives, and requested consultations. Preprinted forms are available from the California Medical Association (CMA),<sup>8</sup> the California Hospital Association (CHA),<sup>9</sup> and local hospitals such as Cedars-Sinai Medical Center.<sup>10</sup>

It can be instructive (and personally beneficial) for attorneys, before counseling clients, to complete our own advance healthcare directives.<sup>11</sup> The decisions to be made include:

- Whom should I choose to be my healthcare agent(s)?
- Which decisions can my healthcare agent make?
- What guidelines will I set for the selection or dismissal of healthcare

providers and the consent or refusal of particular medications, tests, and treatments?

- What should happen to my body and organs after I die?
- What legal action(s) may be needed to carry out my wishes?
- What end-of-life care steps do I wish to direct to my physician and designated agent(s) to take?

This last question involves many choices. An advance healthcare directive addresses whether a person elects to prolong his or her life artificially under certain circumstances such as: 1) the person is close to death, which mechanical life support would only delay, 2) the

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person is unconscious or in a persistent vegetative state, and the treating doctors do not expect the person to recover, 3) the person has a terminal illness, and there is little or no likelihood of improvement, 4) the person’s quality of life would not be acceptable to the person under standards described in the directive. Alternatively, the advance healthcare directive may specify that the person has chosen to prolong his or her life as long as possible within the limits of generally accepted healthcare standards. Whatever one’s choices are about artificially prolonging life, additional decisions may be made about its end. Hospice and palliative care preferences may be specified in an advance healthcare directive.

### Recent Cases

To validly execute an advance healthcare directive, however, a person must have legal capacity.<sup>12</sup> The mental capacity of a client is measured by the standards set forth in the Due Process in Competence Determination Act,<sup>13</sup> and the attorney’s role in assessing a client’s capacity to sign an advance directive is not without ethical considerations.<sup>14</sup> In addition, the scope of a designated healthcare agent’s authority has been the subject of recent California appellate court decisions, particularly regarding the scope of an agent’s authority to consent to arbitration of healthcare disputes. These cases offer guidance for the drafting of advance directives and counseling of clients about how to set forth their healthcare goals.

In *Garrison v. Superior Court*,<sup>15</sup> the court held that a daughter who had a durable power of attorney to make healthcare decisions for her mother could bind her mother to an arbitration agreement

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in the admission documents of a residential care facility. In so holding, the court reasoned that the decision whether to agree to an arbitration provision in an admissions document was “part of the health care decision making process.” The *Garrison* court concluded that under the terms of the durable power of attorney and the applicable provisions of the Health Care Decisions Law,<sup>16</sup> the daughter had the authority to enter into the arbitration agreement on behalf of her mother. The opinion referenced three provisions in the Probate Code. First, Probate Code Section 4683(a) provides that, subject to any limitations in the power of attorney for healthcare, “An agent designated in the Power of Attorney may make health care decisions for the principal to the same extent the principal could make health care decisions if the principal had the capacity to do so.” Second, Probate Code Section 4684 provides that “[a]n agent shall make a health care decision in accordance with the individual’s health care instructions, if any, and other wishes to the extent known to the agent. Otherwise, the agent shall make the decision in accordance with the agent’s determination of the principal’s best interests.” Third, Probate Code Section 4688 provides: “Where this division does not provide a rule governing agents under powers of attorney, the law of agency applies.”

In *Hogan v. Country Villa Health Services*,<sup>17</sup> following *Garrison*, the court held that a mother’s designation of her daughter in a durable power of attorney for healthcare authorized the daughter to enter into a binding arbitration agreement. The *Hogan* court explained that “an agent under a health care power of attorney...is empowered to execute arbitration agreements as part of a long-term health care facility’s admissions package, without violating the principal’s constitutional right to a jury trial.”<sup>18</sup> In this case, the mother signed a healthcare power of attorney designating her daughter as her agent, but chose not to limit the authority of her agent to select or discharge healthcare providers or institutions. The court considered whether that grant of authority included the right of the daughter to sign an admission agreement that contained an arbitration provision. Applying the general law of agency and Probate Code Section 4617 (which addresses the selection and discharge of healthcare providers and institutions as a healthcare decision), the *Hogan* court answered in the affirmative. The daughter had the authority to sign an admissions agreement containing an arbitration provision. In following the analysis in *Garrison*, the *Hogan* court determined that in the suit for elder abuse filed by children of the decedent against the nursing home, the arbitration clause in the admissions contract should have been enforced.

*Flores v. Evergreen at San Diego LLC*<sup>19</sup> reached a different result on different facts. The court of appeal affirmed the trial court’s denial of the nursing home’s motion to compel arbitration, finding that there was no evidence that a wife, suffering from dementia and other ailments, had authorized her husband to act as her agent to bind her to a nursing home arbitration agreement. In this case, there was no advance healthcare directive, and husband did not have power of attorney, and he had not been declared her conservator or guardian. The *Flores* court rejected the nursing home’s contention that the husband’s act of signing the arbitration agreement created agency status, explaining that the conduct of the principal was necessary to show agency. The *Flores* opinion further explained that although the nursing home presented evidence that the husband had acted as if he were his wife’s agent, establishment of agency required conduct on the part of the wife conferring that status. A person cannot become the agent of another merely by representing himself or herself as such. To be an agent, a person must actually be so empowered by the principal.<sup>20</sup>

A different result was seen in an unpublished case.<sup>21</sup> *Waterman v. Evergreen at Petaluma LLC*<sup>22</sup> was a civil action for personal injuries and elder abuse brought by Waterman as successor-in-interest to her deceased father and for wrongful death brought in her individual capacity. She had signed two arbitration agreements at the time she admitted her father into Evergreen Skilled Nursing Facility. Her father had signed an advance healthcare directive containing a power of attorney for healthcare. Waterman was his designated agent for healthcare decisions and his attorney-in-fact. In this case, the wording of the arbitration agreement signature lines was ambiguous, leaving it unclear whether Waterman signed the agreement as her father’s agent or merely as the responsible party. She also signed the resident agreement with the nursing home as her father’s responsible party, not as his agent or attorney-in-fact. In addition, neither the advance healthcare directive nor the financial power of attorney had been triggered so as to empower Waterman to waive her father’s jury trial rights by binding him to arbitration. The advance healthcare directive provided that her authority as her father’s agent became effective only when his primary physician determined that he was unable to make his own healthcare decisions. The financial power of attorney provided that it would take effect only if Waterman’s father became incapacitated or unable to manage his own financial affairs, and that his incapacity was required to be determined by written declaration of two licensed physicians. None of the trigger events occurred.

The court of appeal affirmed the trial court’s conclusion that there was no statutory or contractual basis for concluding that Waterman was authorized to waive her father’s right to pursue legal action rather than arbitration. Consequently, no valid arbitration contract existed, and the Evergreen Nursing Home’s petition to compel arbitration was properly denied.

Another unpublished but instructive case found no agency authority and no right to bind the patient to arbitration. In *Hatley v. Superior Court*,<sup>23</sup> the Hanford Nursing and Rehabilitation Hospital sought arbitration of two civil actions for negligence and elder abuse. The trial court ordered arbitration of the entire case, but the court of appeal granted a writ and held that the petition to compel arbitration should not have been granted. (The Supreme Court had granted a hearing, then ordered the case transferred back to the appellate court with directions.) As in the Waterman case, there was no advance healthcare directive signed by the patient. The evidence made it not difficult to conclude that the decedent’s nephew did not have authority to bind the decedent to an arbitration contract. Another question was whether the decedent’s spouse validly executed the arbitration agreement on the decedent’s behalf. The answer was no; the evidence established no such authority. The court, following *Flores*, held that no statutory basis existed for a person, including a spouse, to agree to arbitration based solely on a familial relationship with the patient absent express authority to do so.<sup>24</sup>

The *Flores* and *Hatley* opinions further illustrate that a detailed and comprehensive statutory scheme exists in the Health and Safety Code<sup>25</sup> regarding the signature of a patient’s agent, responsible party, or legal representative on an admission contract to a nursing home and the authority for medical decisions if a patient lacks capacity. However, the statute does not define the precise scope of that authority, and case law holds that it does not include the right to consent and bind the patient to an arbitration provision.<sup>26</sup>

### Spousal Authority

As the cases above indicate, it is often family members who become agents for patients who lack capacity. It is a common misperception, however, that spouses assume agency when their spouses become unable to make medical decisions. In reality, there is no automatic right or entitlement of a spouse to make such decisions. Probate Code section 4717 places a spouse in the generic category of family member with no expressly provided priority. In addition, case law provides that marital status alone does not create an agency relationship between spouses.<sup>27</sup> Without

direct agency authority (i.e., express appointment of a spouse as designated agent), federal and state law create obstacles for healthcare decisions by limiting access to a patient's medical information and records.<sup>28</sup> The chief goal of these laws is to guarantee protection of an individual patient's health information while balancing the need to provide quality healthcare. Good practice dictates that when drafting advance healthcare directives, express HIPAA<sup>29</sup> and California's PAMRA<sup>30</sup> authorization is to be included.<sup>31</sup>

### Gray Areas

Even if a healthcare agent is properly designated, the reach of the agent's authority is often less than certain. For example, it is unclear whether an agent can consent to the off-label administration of a drug or to the principal's enrollment in a clinical trial. Another issue is if the patient's wishes for treatment for an unanticipated condition are unknown, may the agent apply his or her own values to make a decision, or can the agent base a decision on the substituted judgment standard of Probate Code sections 2580-86? These decisions often have no clear guidelines, which is why hospitals and medical centers have ethics committees to guide healthcare providers, assess risk management, and advise healthcare agents and families who struggle in the emotionally difficult gray area in which many critical decisions affecting loved ones are made. Another potential source of guidance for agents and family members is a hospital's chaplaincy service, which offers consultation with clergy of diverse faiths in times of stress and ultimate decision making.<sup>32</sup>

The UCLA Medical Center and Cedars-Sinai Medical Center, for example, have chaplaincy programs with clergy from a diversity of faiths. It has been wisely observed that "[c]onversations around the hospital bed cut through the intellectual subtleties of theology into hard core of being."<sup>33</sup> Probate Code section 4700 allows an individual to set forth provisions and values regarding personal healthcare preferences other than those set forth in the statutory form. Well-informed counsel often suggest to clients that they add their own personal healthcare wishes and values, including consultation with clergy if they so desire, to assist their designated agents in making future healthcare decisions in unanticipated medical situations.

Personal healthcare planning in anticipation of future incapacity should be made in good health. Designation of a healthcare agent or agents, end-of-life decisions, alleviation-of-pain directions, and other aspects of medical care should be the subject of sober reflection, discussion with family, and specific and appropriate documentation. The Book of Ecclesiastes provides appropriate guidance in this regard:

"So appreciate your vigor in the days of your youth, before those days of sorrow come and those years arrive of which you will say: 'I have no pleasure in them.'"<sup>34</sup> ■

<sup>1</sup> Patient Protection and Affordable Care Act, 124 Stat. 119; 42 U.S.C. §§18001 *et seq.*; *see also* National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566 (2012); King v. Burwell, 135 S. Ct. 2480 (2015).

<sup>2</sup> PROB. CODE §§4600 *et seq.*

<sup>3</sup> STEVEN BRILL, AMERICA'S BITTER PILL, 473 (2013).

<sup>4</sup> PROB. CODE §§4615, 4617.

<sup>5</sup> PROB. CODE §4607.

<sup>6</sup> PROB. CODE §4701.

<sup>7</sup> PROB. CODE §4700.

<sup>8</sup> *See* California Medical Association (CMA), at <http://www.cmanet.org>.

<sup>9</sup> *See* California Hospital Association (CHA), at [http://www.calhospital.org/sites/main/files/file-attachments/forms\\_3.pdf](http://www.calhospital.org/sites/main/files/file-attachments/forms_3.pdf).

<sup>10</sup> *See* <http://cedars-sinai.edu/AdvanceHealthcareDirective>.

<sup>11</sup> *See* Cedars-Sinai Medical Center Advance Healthcare Directive booklet, available at <http://cedars-sinai.edu/AdvanceHealthcareDirective>.

<sup>12</sup> PROB. CODE §4609 (capacity); *see also* PROB. CODE §§4120, 4657; CIV. CODE §2296; *In re Marriage of Greenway*, 217 Cal. App. 4th 628 (2013).

<sup>13</sup> PROB. CODE §§810-813; PROB. CODE §§1801, 1881, 3201, 3204.

<sup>14</sup> Marshall S. Zolla, *The California Lawyer's Grey Fog of Uncertainty: Assessing a Client's Diminished Mental Capacity*, CAL. FAM. L. MONTHLY (Nov. 2014).

<sup>15</sup> *Garrison v. Superior Court*, 132 Cal. App. 4th 253 (2005).

<sup>16</sup> *See* PROB. CODE §§4600-4643.

<sup>17</sup> *Hogan v. Country Villa Health Servs.*, 148 Cal. App. 4th 259 (2007).

<sup>18</sup> *Id.* at 269.

<sup>19</sup> *Flores v. Evergreen at San Diego LLC*, 148 Cal. App. 4th 581 (2007).

<sup>20</sup> *Pagarigan v. Libby Care Center*, 99 Cal. App. 4th 298 (2002); *Van't Rood v. County of Santa Clara*, 113 Cal. App. 4th 549 (2003).

<sup>21</sup> Cal. R. of Ct. 8.1105, 8.1110, 8.1115.

<sup>22</sup> *Waterman v. Evergreen at Petaluma LLC*, 2008 WL 4359556 (2008).

<sup>23</sup> *Hatley v. Superior Court*, 2008 WL 240841 (unpublished).

<sup>24</sup> *Cf. Flores v. Evergreen at San Diego LLC*, 148 Cal. App. 4th 581, 589 (2007).

<sup>25</sup> HEALTH & SAFETY CODE §§1250(c), 1326, 1418(a)(1), 1430(b), 1599, 1599.60(b).

<sup>26</sup> *Cf. Flores*, 148 Cal. App. 4th at 549.

<sup>27</sup> *Id.* at 589.

<sup>28</sup> The Federal Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No 104-191, 45 C.F.R. ¶160, 164 (Aug. 21, 1996, amended 2002); Patient Access to Medical Records Act (PAMRA), codified at HEALTH & SAFETY CODE §§123110-123149.5.

<sup>29</sup> HIPAA, Pub.L. No 104-191, 45 C.F.R. ¶160, 164.

<sup>30</sup> HEALTH & SAFETY CODE §§123110-123149.5.

<sup>31</sup> *See* Cozette Vergari, *Providing Spouses with the Power to Make Healthcare Decisions*, LOS ANGELES LAWYER 18 (Nov. 2007); Marshall S. Zolla & Deborah E. Zolla, *Lasting Wishes*, LOS ANGELES LAWYER 42 (Dec. 2000).

<sup>32</sup> *See, e.g.*, JEFF LEVIN & MICHELE F. PRINCE, JUDAISM AND HEALTH (2013); WILLIAM CUTTER & MICHELE F. PRINCE, MIDRASH AND MEDICINE (2012).

<sup>33</sup> Rabbi Harold M. Schulweis, *Conversation with the Angel of Death* (1991), available at <http://www.jewishjournal.com> (quoted with permission).

<sup>34</sup> *Ecclesiastes* 12.1-12:2.