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Serving: Del Norte, Humboldt, Mendocino, Lake, Sonoma,
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Fact Sheet

Finding an Attorney to Help with Estate Planning

Before you or a loved one is faced with a life limiting illness or cognitive impairment, it is important to have completed the legal paperwork necessary for estate planning. Unfortunately, this often not the case, and family is trying to get the necessary legal documents completed under difficult circumstances, such as cognitive impairment, where someone is no longer able to manage his/her affairs or a medical crisis. (See FCA tip sheet, [Making Decisions: What Are Your Important Papers?](#).)

When seeking legal advice, finding a knowledgeable, competent attorney is extremely important. You want someone with whom you feel comfortable and who has the expertise to advise you on these matters. Consult an attorney as early as possible--the maximum number of planning options will be available while you or your loved one still has the legal capacity to make your own decisions. The question of capacity is a gray area and is determined on a case by case basis by the attorney.

Why do you need an Attorney?

There are several legal issues to consider when a person is or may become incapacitated:

- Options for paying for long term care
- Arranging for payment of long term health care: private insurance, Medicare,
- Medicaid (Medi-cal in California), Supplemental Security Income (SSI)
- Management of financial affairs during lifetime, ability to pay bills for another

- Preserving family assets—ensuring spouse or disabled family members are
- protected (see Spousal Impoverishment Law in glossary)
- Wills, revocable living trusts, joint tenancy accounts, payable on death accounts, transfers with a retained life estate
- Management of personal care and medical decisions
- Housing options—staying at home, can it be done physically and financially.
- Out of home placement choices, e.g. assisted living or nursing home
- (See FCA Fact Sheets in Resources)
- Distribution of assets upon death

Locating an Attorney

- Personal recommendation from friend, relative, co-worker, others in a support group or disease specific organization, another attorney whom you trust
- Senior legal services, provided by your local Area Agency on Aging
- Legal Aid in your county
- Attorney Referral Service in your area or your local Bar Association
- CANHR Legal Referral Service

Check qualifications and experience, compare fees, ask about familiarity with laws in your state for issues you are dealing with.

Types of Attorneys

Most attorneys concentrate on one or two areas of law. In planning for incapacity, you would ask for an “elder law” attorney or an

“estate planning” attorney. It is important for the family caregiver to find an attorney who has the appropriate expertise. Attorneys advising caregivers on planning for long term care should have knowledge of the following areas of law:

- Medicaid (Medi-cal in California), SSI (Supplemental Security Income),
 - IHSS (In Home Supportive Services)
 - Attorneys who specialize in Medicaid eligibility for nursing home care can help with converting non exempt assets into exempt assets, transfer of the family residence to a spouse, transfer of the principal residence with the retention of a life estate, use of court orders to increase the amount of resources and/or income the spouse of a nursing home resident can retain.
- Social Security, designation of a representative payee
- Trusts (including revocable and irrevocable living trusts and special needs trusts)
- Conservatorship of estate or person
- Durable powers of attorney for health care and asset management (finances)
- Tax planning—income tax, estate tax, gifting, probate
- Housing and health care contracts/long term care insurance
- Wills
- Elder law
- Veteran’s Benefits

What to bring to a consultation

- List of major assets—real estate, stocks, cash, jewelry, insurance, investments
- Any documents of title—copies of deeds, stock certificates, loan papers
- Contracts or other legally binding documents
- Lists of all major debts
- Existing wills or durable powers of attorney for health care or finance

- Bank statements, passbooks, CDs
- Income—social security, pensions, IRAs, etc.

Glossary

Advance Health Care Directive. An Advance Health Care Directive is a document in which you can: 1) instruct your physician as to the kinds of medical treatment you might want or not want in the future (in many states, this is called a *Living Will*); and 2) choose someone to make medical decisions for you in the event you are unable to make those decisions yourself (in many states, this is called a *Durable Power of Attorney for Health Care*, or just a *Power of Attorney for Health Care*). For additional information on advance directives, see FCA Fact Sheets, [End-of-Life Decision Making](#), and [Making Decisions: What Are Your Important Papers?](#)

Agent. Person you designate to act for you or in place of you to carry out your business.

Attorney-in-Fact. The person named in a Durable Power of Attorney to act as an agent. This person need not be an attorney.

Beneficiary. An individual who receives the benefit of a transaction, for example, a beneficiary of a life insurance policy, a beneficiary of a trust, beneficiary under a Will.

Conservatee or Ward. The incapacitated person for whom a conservatorship or guardianship has been established.

Conservator or Guardian. An individual who is appointed by the court to act on behalf of an incapacitated person.

Conservatorship or Guardianship. A court proceeding in which the court supervises the **management of an incapacitated person’s affairs and/or personal care.**

Directive to Physicians. A written document in which an individual states his or her desire to have life-sustaining procedures with-

held or withdrawn under certain circumstances. This document must meet certain requirements under the law to be valid. See POLST in FCA Fact Sheet, *Making Decisions: What Are Your Important Papers*

Durable Power of Attorney for Health Care. A type of Advance Health Care Directive, this is a document in which individuals nominate a person as their agent to make health care decisions for them if they are not able to give medical consent. This document can give the agent the power to withdraw or continue life-sustaining procedures.

Durable Power of Attorney for Asset Management. (Durable Power of Attorney for Finance). A document in which individuals (the “principal”) nominate a person as their agent (attorney-in-fact) to conduct financial transactions on their behalf. This document can be either “springing,” which means that it is effective only upon the principal’s incapacity, or “fixed,” which means that the document becomes effective when it is signed.

Executor. The individual named in a Will who is responsible for administering an estate during probate. The Executor is the person responsible for making sure all taxes and other expenses are paid and distributing the property of the deceased person in accordance with the Will.

Federal Estate Taxes. A tax is due at death if the estate exceeds a certain amount and is calculated on the value of the deceased person’s estate at the time of death.

Health Insurance Portability and Accountability Act of 1996 (aka HIPAA). Federal legislation which limits the formal and informal communication of information from doctors and other health care providers to persons other than the patient.

In-Home Supportive Services (IHSS). A program in California that pays for non-

medical services for persons who meet certain financial criteria and who could not remain safely at home without such services.

Irrevocable Trust. A trust that has terms and provisions which cannot be changed.

Joint Tenancy. A form of property ownership by two or more persons designated as “joint tenants.” When a joint tenant dies, his or her interest in the property automatically passes to the surviving joint tenant and is not subject to probate.

Life Estate. An interest in property (usually a house) that lasts for the life of the person retaining the life estate. When a person who has a life estate interest dies, the property passes to the person holding the remainder interest, without the need for probate.

Living Will. A written document in which an individual conveys his or her desire to die a natural death and not be kept alive by artificial means. Unlike a Durable Power of Attorney for Health Care, the wishes in this document are not legally enforceable in many states.

Long-Term Care Insurance. Private insurance which, depending on the terms of the policy, can pay for home care, or care in an assisted living facility or skilled nursing facility.

Medicaid. A state and federally financed program that provides medical care to low income persons. In California it’s called Medi-Cal.

Medicare. A federal medical coverage program for persons who are over 65 years old or who are disabled. It is funded by Social Security deductions and has no income or resource restrictions. It does *not* pay for long-term custodial care.

Probate. The court proceeding which oversees the administration of a deceased person’s estate. Wills are subject to probate

(which incurs costs); living trusts (if properly funded) are not.

Revocable Living Trust. A device that describes certain property, names a trustee (who manages the property) and names a beneficiary who receives benefit from the trust. A living trust is an effective means of avoiding probate and providing for management of assets. It can be revoked by the person who created it during that person's lifetime.

Social Security Retirement Benefits. Benefits, which eligible workers and their families receive when the worker retires. The worker must work for a specified period at a job that is covered by Social Security in order to be eligible for benefits. A worker must be at least 62 years old to begin to receive retirement benefits; the amount received increases the longer someone works.

Social Security Disability Benefits. Social Security benefits payable to disabled workers and their families.

Special Needs Trust. A specially drafted trust that provides a fund to supplement the governmental benefits of a beneficiary (someone who is disabled and receiving Social Security Disability or Supplemental Security Income) while not affecting that beneficiary's eligibility for public benefits (usually Medicaid).

Spousal Impoverishment Law Federal legislation that provides a minimum income and savings for one member of a married couple when the other member goes to a nursing home and that care is being paid for by Medicaid.

Supplemental Security Income (SSI). A federal program which provides cash assistance to the aged, blind and disabled who have limited income and resources.

Testator. The person who writes and executes a Will.

Trustor (Settlor). A person who creates a trust.

Trustee. The individual who is responsible for managing the property in the trust for the benefit of the beneficiary.

Will. The document a person signs which tells how he or she wants his or her estate administered and distributed upon death. It must conform to certain legal requirements in order to be valid. The terms of a Will become operational only upon the testator's death.

RESOURCES

Family Caregiver Alliance
785 Market Street, Suite 750
San Francisco, CA 94103
(415) 434-3388
(800) 445-8106
www.caregiver.org
info@caregiver.org

Family Caregiver Alliance (FCA) seeks to improve the quality of life for caregivers through education, services, research and advocacy.

FCA's National Center on Caregiving offers information on current social, public policy and caregiving issues and provides assistance in the development of public and private programs for caregivers.

For residents of the greater San Francisco Bay Area, FCA provides direct family support services for caregivers of those with Alzheimer's disease, stroke, ALS, head injury, Parkinson's disease and other debilitating health conditions that strike adults.

American Bar Association (ABA)
Commission on Legal Problems of the Elderly
(202) 662-8690 (Washington, DC)
www.americanbar.org

CANHR (California Advocates for Nursing Home Reform)

(800) 474-1116 (San Francisco, CA)
www.canhr.org

National Academy of Elder Law Attorneys
703-942-5711 (Vienna, VA)
www.naela.com

National Association of Area Agencies on Aging
(202) 872-0888 (Washington, DC)
www.n4a.org

National Senior Citizens Law Center
(202) 289-6976 (Washington, DC)
www.nsclc.org/

Compassion & Choices
(800) 247-7421 (Denver, CO)
www.compassionandchoices.org

National Hospice and Palliative Care Organization
(703) 837-1500 (Alexandria, VA)
www.nhpco.org