

Often due to Alzheimer's or other forms of dementia, some residents of Residential Care Facilities for the Elderly (RCFEs) are no longer competent to make informed decisions, including health care decisions. In these instances, it's important for the resident to be represented by a health care surrogate decision maker—someone who participates in health care decision making on behalf of an incapacitated resident.



# Three Types of HEALTH CARE SURROGATE DECISION MAKERS

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There are three general methods by which someone can become a health care surrogate decision maker for a resident:

- ▶ An appointment by a court
- ▶ A formal appointment made by a resident when he or she is competent for when he or she becomes incompetent
- ▶ An informal appointment established by a familial or other relationship with a resident

According to section 87101(h)(4) of Title 22, a staff member of an RCFE cannot be appointed as the health care surrogate decision maker of a resident.

## Conservatorship

A conservatorship is an appointment by a court for a conservator to take over the personal and/or financial matters of a resident. Conservatorship is a complex process that begins with the filing of a petition regarding the proposed conservator, the resident, the resident's relatives, and the reasons why the conservatorship is necessary. A court may not grant a conservatorship if it determines that there are alternatives. For example, if a resident has the capacity and willingness to formally appoint someone to help with his or her health care decisions, a court may not appoint a conservator to make health care decisions.

Any number of people can file a petition for a conservatorship, including a resident's spouse or relative, an interested state or local agency, or a friend of the resident. A resident may even file a petition to nominate someone else to be his or her conservator.

Once the petition is filed and the filing fee is paid, the clerk of the court will schedule a court date. The person who filed the petition with the court must personally deliver the citation and a copy of the petition to the resident and inform the resident's relatives. A court investigator will then talk to the proposed conservator, the resident, and others who may be familiar with the resident's condition, and give neutral information about the case to a judge. At a hearing, a judge will determine whether all interested parties have been properly notified and whether an attorney needs to be appointed to represent the resident. The judge may then grant or deny the conservatorship. If a judge grants a conservatorship, an order appointing the conservator will be filed.

Typically, conservatorships are permanent arrangements. However, a court may remove a conservator who is not doing the job or is unable to do the job. A conservatorship may also be terminated if a resident becomes able to handle his or her affairs, such as if a resident recovers from a serious medical condition. A conservatorship for solely financial needs may terminate if the resident no longer has any assets. In certain circumstances, a judge may appoint a temporary conservator to take care of a resident's more immediate needs that cannot wait until a general conservator is appointed.

One important distinction between a conservatorship and the other methods by which someone can become a health care surrogate decision maker is that a conservator has exclusive control over the resident's affairs. In contrast, a power of attorney for health care is not necessarily binding if a resident is competent. This distinction may be important if a resident is in the early stages of dementia and is competent at some times but not at others.

It is also important to note that recent legislation, AB 937, which took effect January 1, 2014, provides that an RCFE cannot restrict a resident's visitors, mail, or phone calls upon the request of a conservator unless specifically authorized by court order.

**Advance Health Care Directive**

An advance health care directive is a legal document signed by a resident when competent to name someone else to make health care decisions for them when they become incompetent. California Probate Code (Ca. Prob. Code) section 4701 provides an advance health care directive template. Residents are free to complete or modify any part of the template form or use a different form.

Part 1 of the advance health care directive template is the power of attorney for health care. This allows a resident to name an agent and optional alternate agents to make health

care decisions for the resident when the resident's primary physician determines that he or she is unable to do so. The alternate agents' authority to make these decisions becomes effective if the higher ranked agents are not willing, able, or reasonably available to do so. The power of attorney for health care also allows a resident to limit the agent's post-death authority and the agent's authority with respect to certain health care decisions. A person cannot have more than one person serve simultaneously as his or her agent for health care decisions.

Part 2 of the advance health care directive template allows a resident to identify his or her choices regarding end-of-life decisions. Part 3 allows a resident to identify whether he or she would like to donate organs at death. Part 4 allows a resident to designate a primary physician and alternate primary physician to determine when he or she is unable to make health care decisions.

While the template form is a helpful tool to ensure that all pertinent decisions are made when a resident is competent, it is not necessary. According to Ca. Prob. Code 4673(a), a written advance health care directive or power of attorney for health care requires only the date of its execution, the signature of the resident, and the signature of either two adult witnesses or the acknowledgement of a notary in order to be legally valid. An employee of an RCFE cannot act as a witness, according to Ca. Prob. Code 4674(c).

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Unlike the lengthy process for a conservatorship, the appointment of an agent under an advance health care directive or power of attorney is effective once signed by all appropriate parties. Although it does not take effect unless and until a resident becomes incompetent, the actual completion of the documents is a relatively quick process. A competent resident has the right to revoke or replace an advance health care directive or power of attorney for health care at any time. The designation of the agent may be revoked by a signed writing or by personally informing the resident's supervising health care provider. Any other part of the advance health care directive may be revoked in any manner that communicates the resident's intent to revoke.

#### **Informal Health Care Surrogate Decision Maker**

If there is no court-ordered or formally appointed health care surrogate decision maker, a resident's next of kin may informally fill that role. In California, there is no hierarchy or authority about which relatives may make decisions on behalf of the resident. In some cases, it may be obvious or natural; for example, if a resident's spouse is deceased and he or she has a good relationship with his or her only child. In other situations where there are multiple relatives who have strong and different opinions, it may be problematic or confusing.

The RCFE regulations are replete with references to "Responsible Person." Section 87101 defines "Responsible Person" as "that individual or individuals, including a relative, health care surrogate decision maker, or placement agency, who assist the resident in placement or assume varying degrees of responsibility for the resident's well-being."

"Health Care Surrogate Decision Maker" is defined by Section 87101 to mean "an individual who participates in healthcare decision making on behalf of an incapacitated resident." The regulation states that, in the absence of a formal appointment, the surrogate decision maker "may be recognized by virtue of a relationship with the resident" (e.g. the resident's next of kin). Unfortunately, this regulation is not particularly helpful as it provides minimal guidance when an RCFE is confronted with a potential resident who has been determined by his or her physician to be incompetent and lacks a formally appointed surrogate decision maker. The RCFE must simply do the best it can to determine who may be an appropriate "Responsible Person" if it wishes to admit the resident. ■

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