

# Drafting Advance Planning Documents to Reduce the Risk of Abuse or Exploitation

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**August 29, 2023**

# Housekeeping

- All on mute. Use Questions function for substantive questions and for technical concerns.
- Problems getting on the webinar? Send an e-mail to [NCLER@acl.hhs.gov](mailto:NCLER@acl.hhs.gov).
- Written materials and a recording will be available at [NCLER.acl.gov](http://NCLER.acl.gov). See also the chat box for this web address.

# About NCLER

The National Center on Law and Elder Rights (NCLER) provides the legal services and aging and disability communities with the tools and resources they need to serve older adults with the greatest economic and social needs. A centralized, one-stop shop for legal assistance, NCLER provides Legal Training, Case Consultations, and Technical Assistance on Legal Systems Development. Justice in Aging administers the NCLER through a contract with the Administration for Community Living's Administration on Aging.

# About ABA COLA

The ABA Commission on Law and Aging is a collaborative and interdisciplinary leader of the American Bar Association's work to strengthen and secure the legal rights, dignity, autonomy, quality of life, and quality of care of aging persons.

The Commission accomplishes its work through research, policy development, advocacy, education, training, and through assistance to lawyers, bar associations, and other groups working on issues of aging.

# Key Lessons

1. Extra care in the creation of advance care planning documents can reduce the risk of abuse and exploitation.
2. Requiring accountability, additional checks and balances, limited authority, are drafting tools lawyers can utilize to limit risk of abuse.
3. Attorneys should advise clients to be extra diligent when selecting of the agent(s) named in advance planning documents.
4. Third party revocation can help to limit the damage done by named agents who start to abuse or exploit the client.

# Section 1: Rethinking the Planning Process

# Reminder

- Powers of attorney and health care advance directive laws are state specific.
- All changes or additions to a power of attorney or advance health care directive form should be done by an attorney with expertise in the laws of the state the person is in.
- Examples offered may not work in your state.

# Advance Planning Basics

- Injury or illness can result in anyone needing support in decision-making and carrying out health care decisions.
  - Advance planning provides a preference for who will support and assist the person
  - Some areas require legal authority
- Can help avoid more restrictive measures, such as guardianship
- Learn More: [NCLER Advance Planning Basics](#)
  - Stay tuned for upcoming training: *Promoting Independence and Autonomy for Older Adults through Decisional and Other Supports*



# Duties and Responsibilities Come First

- If we start the selection of agents before we know what we are asking them to do, how can we select the best agents to do that work?
  - Define the task
  - Discuss with the possible agents
  - Then select the best
- See the Conversation Project
  - [Who Will Speak For You?](#)

# Careful Selection of Agents

- Agents are often selected by tradition, obligation, or default
- Agents are often unaware they have been named until called on to help.
- To help select better agents
  - Define tasks
  - Discuss Values, Goals
  - Consider
    - Character
    - Personal challenges
    - Availability

# What Are The Risks?

- Powers of Attorney and Advance Health Care Directives are tools to help plan for the future
- But, these tools provide powers or authority that may be used to for abusive purposes
  - Financial agents may financially exploit
  - Health care agents may make inappropriate health care decisions

# Agent Responsibilities

- Understanding goals and values of the person
- Keeping the person informed
  - Supporting the person in making a choice or expressing a preference
- If the person is unable to make a decision
  - Make decisions as the person would
- Safeguarding the person and their property
- Avoid conflicts of interest
- Acting as a fiduciary

# Characteristics to Look For

- Trustworthy
- Commitment
- Listener
- Available
- Organized
- Emotional Strength
- Diplomatic Advocate

# Committed to Supporting the Person in Making Decisions

- Always informing and involving person in decisions
- Explaining issues in an understandable manner
- Offering advice and guidance
- Allowing to person to make a choice as long as possible
- Voicing concerns over choices, without being demeaning
- Helping to implement decisions as needed

# Characteristics to Consider Avoiding

- Personal financial challenges
- Substance abuse or dependency
- A sense of entitlement
- Lack of emotional stability or strength
- In conflict with other family members
- Unlikely to be able to support
- Unavailable

# Section 2: Drafting Health Care Directives

Discussing Health Care Values



# Values, Goals, and Preferences

- Available treatments are rapidly expanding and changing
- Specific directions created far in advance are often of little guidance at the time decisions need to be made
- Values = strongly held personal beliefs
- Goals = shorter term wishes (aka goals of care)
- Preferences = if given a choice, I'd prefer

# Personal and Health Care Values

- Values surveys
  - [Five wishes](#)
  - [Conversation project](#)
  - [Stanford Letter Project](#)
  - [Go Wish Cards](#)
  - [PREPARE for Your Care™](#)
- Encouraging development and discussion of values should be incorporated into drafting documents

# Improving Health Care Directives

- Careful selection of the agent or proxy
- Instructing the agent in supporting the decision making of the person
- And in communicating with other family/friends what is happening
- Make available
  - Lots of copies – give to all health care providers
  - Give to all family or close friends
  - Registries?

# End of Life Care Decisions

- Are driven by values and goals
- Cause the greatest distress in families
- Consider requiring a family meeting when considering starting or ending life prolonging care.
- Draft wording:
  - If the need for decisions about life prolonging or end of life decisions arises, I ask that my agent, in consultation with my health care professionals, invite the following family and friends to a briefing on what decisions are being made and why those choices are being made.

# Living Wills

- Illness or injury is terminal
- Death is imminent
- Permanent unconsciousness or persistent vegetative state
- Life prolonging care
- Artificially provided nutrition or hydration

# POLST – Physicians or Providers Orders on Life Sustaining Treatment

- Now in all 50-states – name and acronym vary slightly
- Medical or health care orders
- The care a person wants or does not want,
- Made in consultation between the patient or proxy and the health care professional when serious or terminal illness is being treated
- More accurately reflects the values and goals at the time

# Advantages of POLST

- Is based on known facts and options concurrent with time the time of creation
- Are recognized medical care orders
- Are portable across treatment venues
- The patient should always be involved
- May be consented to by the patient or the health care proxy if the patient is unable to give informed consent.

# Section 3: Drafting Powers of Attorney



# Update: Pre-Designated Representative Payee

- Social Security now allows pre-designation of a person to serve as Representative Payee if SSA ever determines that a payee is needed
  - When benefits begin, the person is asked to name someone
  - Periodic reminders
- Every person receiving benefits administered by Social Security should think who would best to manage their benefits
  - And name the person and a back-up
  - Update the selection when changes happen

# Five Safeguards to Consider Adding to a Power of Attorney for Finances



# 5 Safeguards to Add to POA

- Third Party Accounting
- Second Signature
- Power to Revoke
- Define Gifting Power
- Limited Powers

# #1 Third Party Accounting

- Name a trusted third party
- Require full accounting
  - Inventory
  - Accounts
  - Documents
  - Transactions
- Arrange access to financial records
  - Read Only Access to Financial Accounts
  - Shared Email Addresses

# Sample Language for Accounting

- My agent shall keep complete records of all transactions on my behalf and provide a quarterly accounting to \_\_\_\_\_. The quarterly accounting shall include copies of all financial statements, credit card, or loan statements.

# #2 Second Signature

- Name a person, or class of persons for a second signature
- Dollar amount alert
  - Cover serial transactions
- Certain transactions such as sale or encumbering real estate
- Sale of investments

# Sample Language Requiring 2<sup>nd</sup> Signature

- The sale, pledge, mortgage, transfer, rental, or lease of any real estate shall require, in addition to the signature of my agent named in this document, the signature of \_\_\_\_\_ or \_\_\_\_\_.
- Any transaction or series of related transactions totaling more than \$\_\_\_\_\_ shall require two signatures, the signature of my agent named in this document and the signature of \_\_\_\_\_.

# #3 Power to Revoke Authority

- Give a trusted third party the power to revoke the authority granted in an advance directive, if the third party believes the grantor is being abused or neglected by the agent or proxy.



# Sample Revocation Language

- I authorize \_\_\_\_\_ to revoke this power of attorney on my behalf, if they believe the powers granted in this document are being abused.
- Revocation shall be in writing with a copy served on the agent named in the document and recording in the county records.
- What about APS or Law Enforcement?

# #4 Define Gifting Power

- Deny or specifically limit gifting
- Specific categories of gifts
- To specific persons or classes or persons
- In limited amounts and frequencies
- Tax planning?
  - 1% of the population
- Medicaid asset planning?
  - Talk about it, plan for it, design terms that allow it, without allowing exploitation.

# Sample Gifting Language

- My agent may only make gifts to my children or grandchildren, at Christmas or on their birthdays, in keeping with my traditions, no gift shall exceed \$100 in value, of cash, real or personal property.
- No gifts shall be made of my money, real or personal property by my agent to anyone for any reason.
- Gifting shall only be allowed as part of a plan to minimize taxes or qualify for public benefits, designed by my attorney and reviewed and approved by an independent attorney with similar expertise.

# #5 Limited Powers

- Limit any changes to beneficiary rights under accounts or contracts:
  - Life insurance, bank accounts, securities accounts
- Changing the beneficiary undermines the estate plan of the person
  - Is a stealth form of financial exploitation
- Limit to paying for funeral and burial arrangements incident to applying for Medicaid or similar benefit programs

# Sample Language on Beneficiaries

- My agent is not authorized to change the beneficiary, payable on death, or transferable on death designations on any bank account, financial account, life insurance policy, pension, trust, annuity or similar contract or instrument, with the exception that my agent may assign a life insurance policy for the limited purpose of pre-paying funeral arrangements for me incident to an application for Medicaid benefits.

# Practice Tips

- Provide back ups for agents and 2<sup>nd</sup> signers
- Read Only Access makes financial accounting easier
- Shared email addresses provide access to statements and invoices without providing access to the account.
- Monitor not just bank statements but credit card statements and other bills.
- Limit on contracts, arbitration agreements
- Secure valuable items that are easily removed

# Questions?



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# Case Consultations

Case consultation assistance is available for attorneys and professionals seeking more information to help older adults. Contact NCLER at [ConsultNCLER@acl.hhs.gov](mailto:ConsultNCLER@acl.hhs.gov).