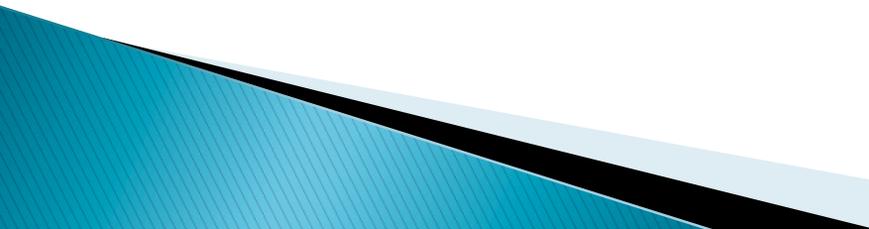
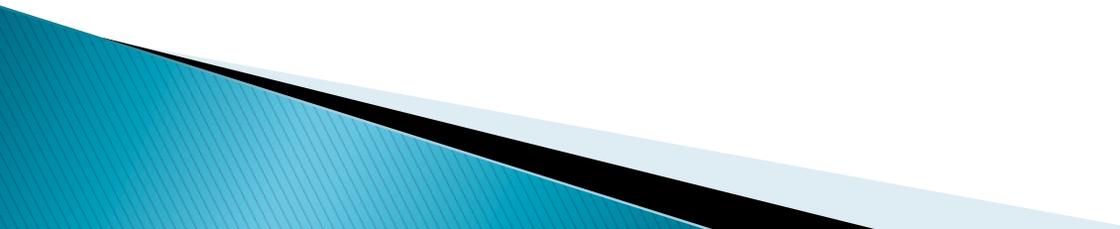


Legal Strategies:
Planning Ahead For
Possible Incapacity

Palos Verdes Baptist Church
May 16, 2015



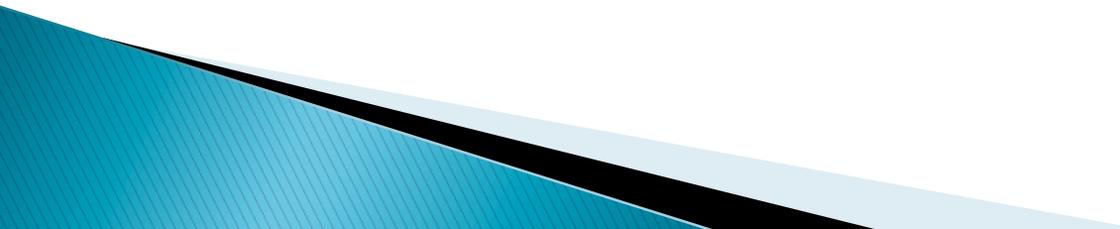
Do you provide care for:

- ▶ A spouse or domestic partner?
 - ▶ An adult child?
 - ▶ An adult developmentally disabled child?
 - ▶ An adult relative?
 - ▶ A adult non-relative?
- 

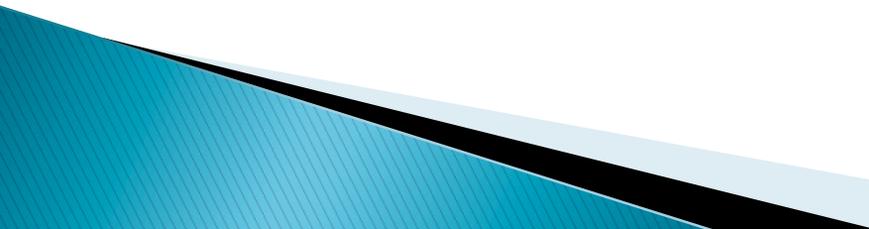
What Happens if that person..... ?

- ▶ ...becomes unable to manage his or her own money, write and sign checks, etc.
 - ▶ ...becomes unable to make health care decisions, such as consent to treatment or surgery.
 - ▶ Many causes of incapacity: Cognitive impairment, illness, injury, etc.
- 

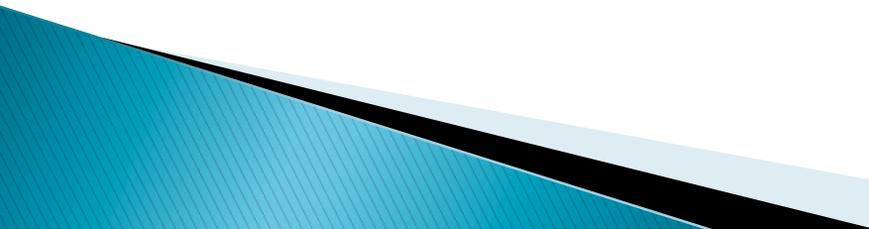
How You Can Help Now?

- ▶ Depends on whether the person has legal “Capacity” to make decisions.
- 

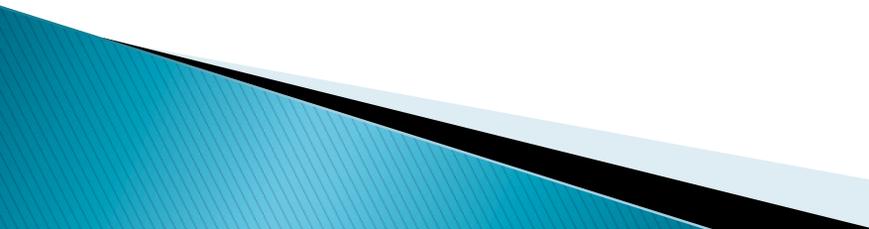
What level of capacity is needed?

- ▶ For Financial Matters:
 - ▶ Person must be able to manage his or her own financial resources or resist fraud or undue influence.
 - ▶ (California Civil Code 39)
- 

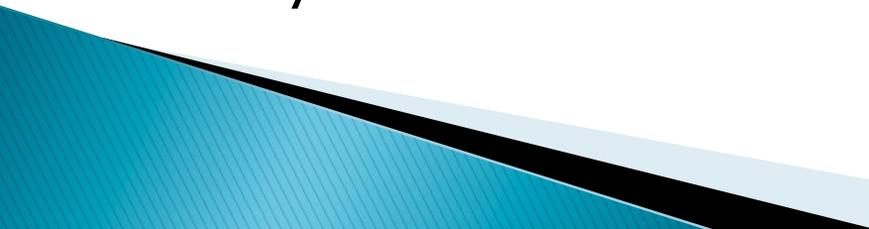
We are presumed to have capacity.

- ▶ A person who has a mental or physical disorder may still be capable of contracting, conveying, marrying, making medical decisions, executing wills or trusts, and performing other actions.
 - ▶ A medical diagnosis of a person's mental or physical disorder does not always mean that a person lacks capacity.
 - ▶ Probate Code 810
- 

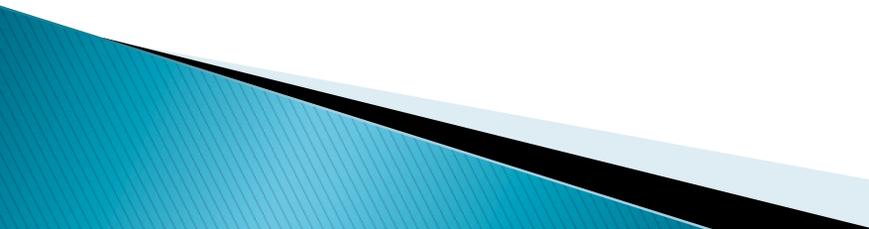
How You Can Help

- ▶ Assisting persons with “Capacity”:
 - Encourage the person to sign:
 - Durable Power of Attorney
 - Advance Health Care Directive
 - Estate planning documents, such as a living trust and will.
- 

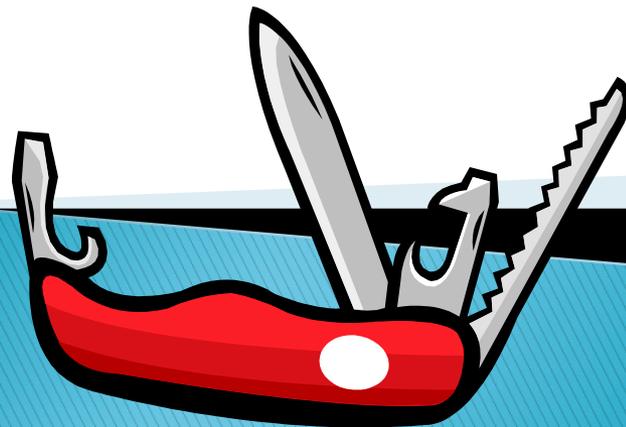
How You Can Help

- ▶ Assisting persons without “Capacity”:
 - Acting as Agent under a Durable Power of Attorney or Advance Health Care Directive. (Signed while the person had capacity).
 - Acting as representative payee for Social Security.
 - Petitioning the Court to be appointed Conservator by the Court.
- 

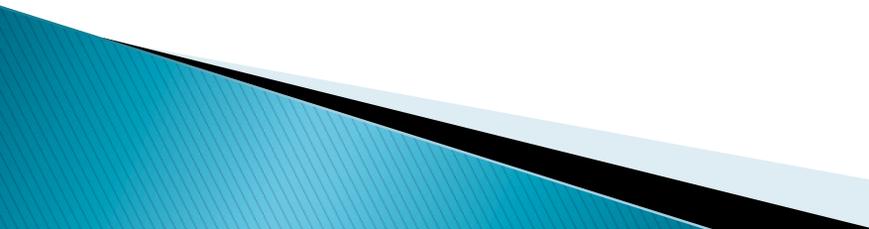
Legal Tools to Help our Loved Ones

- ▶ **Durable Powers of Attorney
Financial matters.**
 - ▶ **Advance Health Care Directive
Medical decisions.**
- 

Durable Powers of Attorney for Financial Management (DPOA)



What is a Power of Attorney?

- ▶ Legal document in which you appoint an agent to act on your behalf.
 - ▶ The agent's powers will be specified in the Power of Attorney.
 - ▶ Can be general or limited (special)
 - ▶ Can be limited in duration.
- 

Durable Power of Attorney General vs. Limited

- Extremely Powerful! Very Broad Scope!
- Sign contracts and checks
- Litigation
- Real Estate
- Tax Matters
- Banking
- Insurance & Annuity Transactions
- Business Transactions
- Estate Planning / Gifting (Express)
- Medi-Cal Planning (Express)

General vs. Limited

- ▶ Limited or “Special” Power of Attorney
 - Limited to one or more specific tasks or areas, such as a real estate sale.

What does “Durable” mean?

- ▶ Effective even if the principal is incapacitated.
- ▶ For any Power of Attorney:
 - ▶ Principal (w/ capacity) can terminate it at any time.
 - ▶ DPOA will terminate on the death of the principal.

Effective Immediately or Springing

▶ Immediate

- Effective Right Now!
- Your agent can act immediately.

Effective Immediately or Springing

▶ Springing

◦ Triggering Event

- Illness
- Accident
- Physician declaration

- May not be easy to implement.
- E.g. getting physician to declare incompetence.

Parties to a Power of Attorney

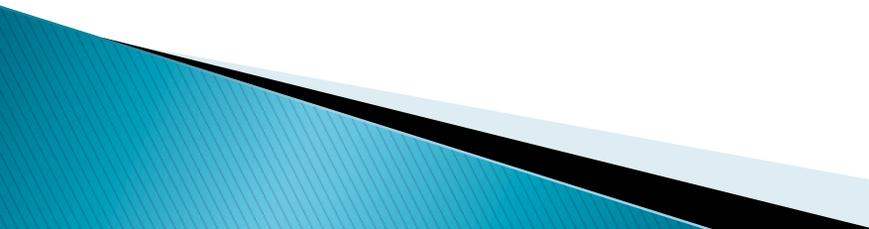
▶ Principal

- Person signing the Power of Attorney, and granting powers to the agent.
- Natural Person – Legal capacity to make a contract.

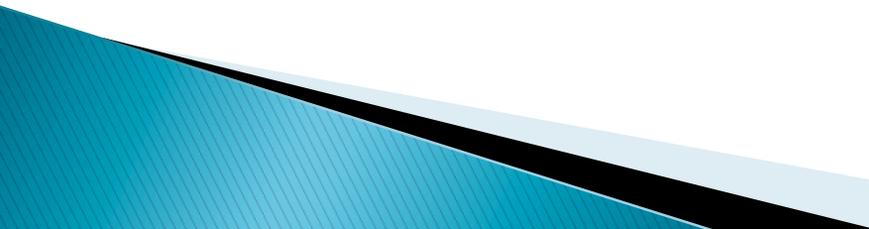
Parties to a Power of Attorney

- ▶ Agent, or “Attorney-in-fact”
 - Person with capacity to contract
 - Can be a human, or a corporation, organization or other legal person
 - Operates as the surrogate of the principal
 - Must be very trustworthy

Who Should be the Agent?

- ▶ Someone very trustworthy and dependable.
 - ▶ Someone knowledgeable about finances.
 - ▶ Can designate multiple agents.
 - ▶ Can designate a professional fiduciary, such as a fiduciary service, bank or trust company.
- 

Express Authorization Required

- ▶ To Make Gifts of Principal's Property
 - ▶ Create Modify or Revoke a Trust
 - ▶ Exercise a Disclaimer
 - ▶ Create or Change Survivorship Interest in Principal's Property
 - ▶ Designate or Change the Designation of Beneficiaries to Receive Property, Benefit or Right
 - ▶ Make a Loan to the Attorney-in-Fact
- 

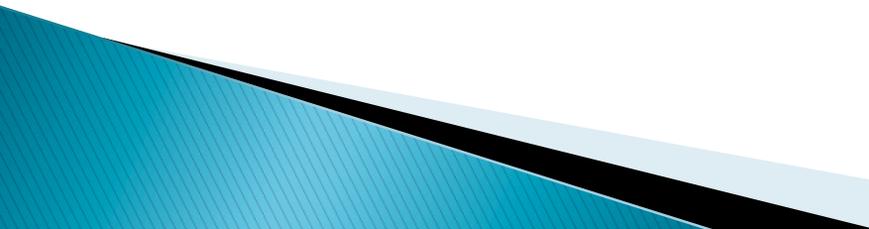
Incapacity Without a DPOA

- ▶ Conservatorship of the Estate
 - ▶ Substituted Judgment Petition
 - ▶ *Both are costly and involve court action*
- 

Requirements for DPOA

- ▶ Custom or Attorney Drafted
 - contain the date of its execution;
 - signed by the principal or in the principal's presence and at the principal's direction; and
 - either notarized or signed by at least two witnesses.
- ▶ Uniform Statutory Form Power of Attorney Prob C § 4401
 - Must be notarized.

Review Older Powers of Attorney

- ▶ May be of Limited Duration.
 - ▶ May designate the wrong people as agent.
 - ▶ Old POA's may be viewed by banks as "stale."
- 

The Good

- The trusted Agent is ready to act for the principal without the expense and time delay of court action.

Sign checks, contracts, manage money, etc.

- Estate & Tax Planning
 - Medi-Cal Planning
 - Private
 - Low cost
 - No formal transfer of assets
- 

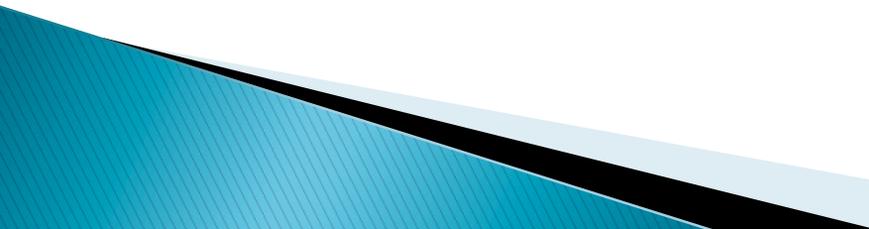
The Bad

- “License to Steal.” Potential theft.
 - Unintended Tax Consequences of transfers.
 - Financial Abuse (Elder Financial Abuse)
 - Not court supervision
 - No accounting required
 - Third Party Acceptance – Banks may hesitate or not accept.
- 

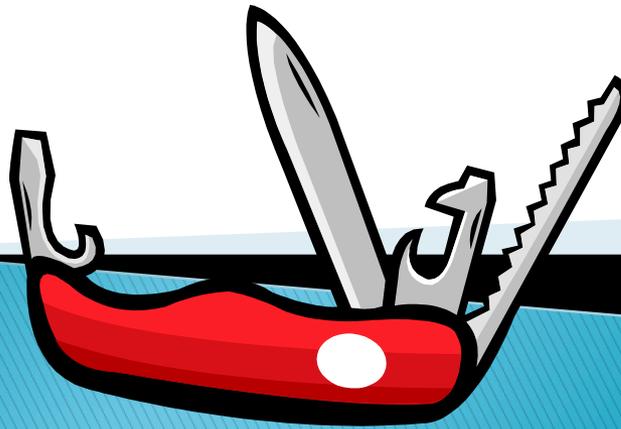
DPOA forms

- ▶ Public law library or regular library
 - ▶ Probate Code 4401
 - ▶ Legal stationery store
 - ▶ Internet – but beware!
 - ▶ Attorney drafted.
- 

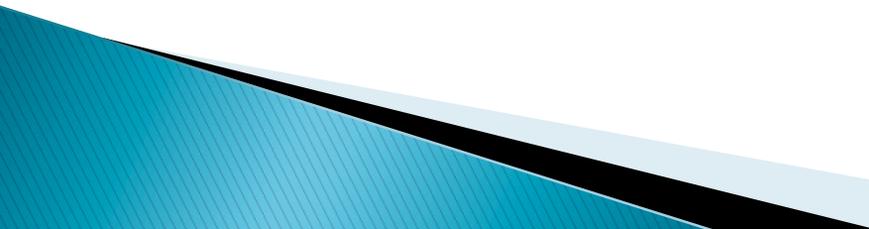
Avoid Disputes and Litigation

- ▶ Can be a thankless job.
 - ▶ “No Good Deed Goes Unpunished”
 - ▶ Keep good records!
 - ▶ Keep all receipts.
 - ▶ Do not commingle funds!
 - ▶ Work with tax professionals.
 - ▶ Keep family members informed!
- 

Advance Health Care Directives (AHCD)



Purposes

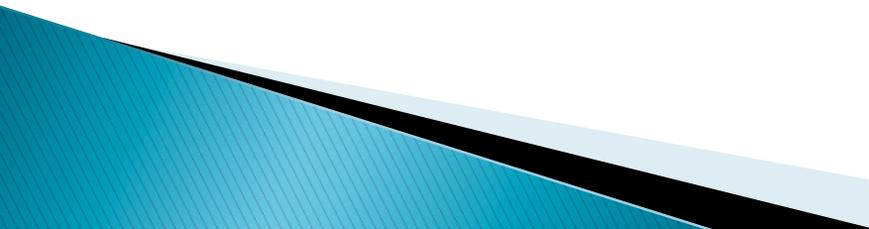
- ▶ Make your wishes about health care known.
 - ▶ Appoint an agent to make health care decisions when you are not able.
 - ▶ Express your wishes regarding end-of-life decisions.
 - ▶ Authorize organ donation (or not).
 - ▶ Designate a physician to have primary responsibility for your health care.
- 

What is a “health care decision”?

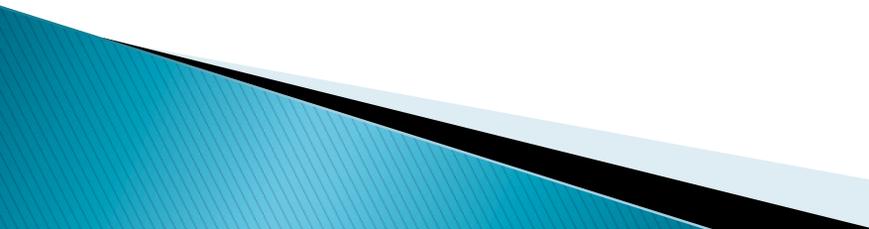
- ▶ Any decision regarding the patient’s health care.
- ▶ Selection of health care providers and institutions;
- ▶ Approval of diagnostic tests, surgical procedures, and programs or medications;
- ▶ Directions to provide, withhold, or withdraw artificial nutrition and hydration, including cardiopulmonary resuscitation.

Probate Code §4617.

What level of capacity is needed?

- ▶ For Health Care Matters:
 - ▶ Ability to understand the nature and consequences of a decision and to make and communicate a decision, and;
 - ▶ Ability to understand significant benefits, risks, and alternatives of health care decisions.
- 

Who should be the Agent?

- ▶ Someone very trustworthy and dependable.
 - ▶ Someone who knows the principal well.
 - ▶ Can designate multiple agents.
 - ▶ Can designate a professional fiduciary.
- 

Agent's Authority May Include

- ▶ Withholding or withdrawing medical treatment to permit the natural process of dying, including artificial nutrition and hydration.

- ▶ After Death
 - Disposition of remains
 - Authorize an autopsy
 - Anatomical gifts
 - Receive confidential information

The Good

- ▶ Low Cost
 - ▶ Private
 - ▶ Personal dignity
 - ▶ No court supervision
 - ▶ Principal selects agent (s)
 - ▶ Personal care authority
 - ▶ Promotes discussion of family values and end-of-life decision making
- 

The (Possible) Bad

- ▶ Principal must have capacity to sign.
- ▶ Agent might abuse powers or ignore patient's wishes.

Coordination

- ▶ DPOA typically pays the bills
- ▶ AHCD/PAHC directs the medical care

Sometimes there is a conflict between the two positions. It is important to delineate duties of each agent and to coordinate their efforts for the benefit of the principal.

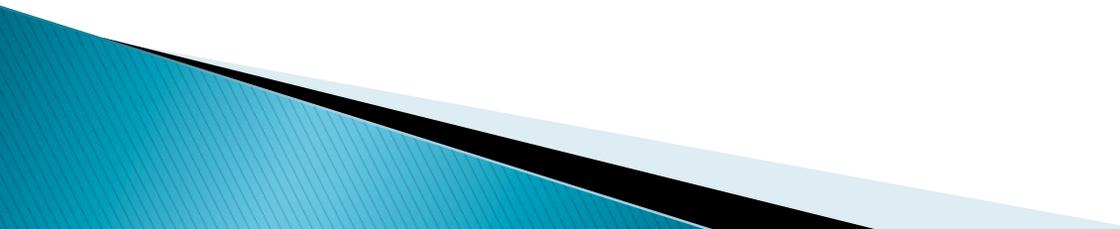
AHCD Forms

- Statutory Form (fill-in-the blanks)
 - <http://ag.ca.gov/consumers/pdf/AHCDS1.pdf>
- California Medical Association (Fee based)
 - <http://www.cmanet.org/>
- California Hospital Association
 - <http://www.calhospital.org/resource/advance-health-care-directive>
- Attorney Drafted
- Statutory form – Probate Code 4701

Incapacity Without an AHCD

- ▶ Conservatorship of the Person
- ▶ *Costly and involves court action*

What's my point?

- ▶ Do the planning now!
 - ▶ Choose your agents.
 - ▶ Avoid delays court proceedings.
 - ▶ Consider a complete estate plan, including a living trust and will.
- 

Legal Stuff to Cover My Behind

- ▶ This program is intended to provide general information only, and not specific legal advice.
 - ▶ You are encouraged to seek legal assistance before executing any power of attorney.
- 