Disability Rights California
California's protection & advocacy system

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M E M O R A N D U M

TO: **Interested Persons**

FROM: **Elizabeth Zirker, Kim Swain, Maggie Roberts**

RE: **Categories of Legal Decision Makers for Individuals – Conservatorship and Alternatives**

DATE: **Updated July 31, 2014**

Independence, freedom, respect, and equality are values important to all people. These values help define the concepts of autonomy and self-determination (the right to make decisions for oneself). Because these rights are so valued in our society the least restrictive alternative must always be sought before taking away, or *amending*, a person's civil and legal rights to make decisions. Courts are required to make an express finding that the granting of a conservatorship is the least restrictive alternative needed for the protection of the proposed conservatee.[1]

There are a number of different programs and/or individuals that can assume or be appointed responsibility for people who need some or total assistance in making decisions about their health, safety, and finances. Adults, including adults with mental or physical disabilities, are legally

[1] Cal. Prob. Code § 1800.3(b).

resumed to be competent to make informed decisions unless that right has specifically been removed by a court. [2]

The most restrictive options include Probate Conservatorships, Temporary Conservatorships, Orders for Medical Treatment, Lanterman Petris-Short (hereinafter "LPS") Conservatorships. Limited Conservatorships are an option for individuals with Developmental Disabilities and generally allow individuals more independence and autonomy than other types of conservatorships.

Less restrictive alternatives to conservatorships provide more autonomy for individuals. These less restrictive alternatives include Representative Payee Programs, Durable Powers of Attorney, and Advance Health Care Directives (formerly known as a "Power of Attorney for Health Care") and appointment of Guardian Ad Litems. An additional option for special education students is an Assignment of Educational Decision-Making Authority.

I. CONSERVATORSHIPS

A. Probate Conservatorship[3]

A probate conservatorship involves a court proceeding in which a judge appoints a responsible person ("conservator") to care for another adult who cannot care for himself/herself or his/her finances ("conservatee.") Conservatorships can only be established by order of the superior court, and are generally administered through county agencies.[4, 5] The three types of entities responsible for conservatorship and estate administration

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[2] Cal. Prob. Code § 810.

[3] Cal. Prob. Code §§ 1800 et seq.

[4] California State Associations of Counties, *County Offices: Public Guardian-Conservator-Administrator*, http://www.csac.counties.org/default.asp?id=141 (last visited June 13, 2011).

[5] Individuals eligible to be conservators include spouses, family members, private professional conservator, and any individual who meets the requirements of Cal. Prob. Code § 2340. Cal. Prob. Code § 1812. When selecting a conservator, the court must consider the best interests of the conservatee. *Id.*; *see also* Cal. Prob. Code § 2340 (unless the individual qualifies for an exemption, he or she must hold a valid license in order to be a professional fiduciary.)

services are the public guardian, public conservator, and/or public administrator.[6]

These programs are generally provided through what is known as the office of the Public Guardian and may be provided through a separate county department, an elected official, or may be incorporated into a larger department such as health or human services.[7] Public Conservator responsibilities for LPS Conservatorships are oftentimes provided by the Public Guardian, but may also be shared with mental health departments.[8]

"The Public Administrator may be an elected official, a separate department, or housed within another county department such as sheriff-coroner, treasurer, or public guardian-conservator." [9] The Public Administrator is responsible for administering the estate of a county resident who dies without a will or family in California.[10] Estate administration may include marshaling all assets, selling real or personal property, performing heir searches, and overseeing the distribution of the estate.[11] The activities are supervised by the superior court. The Public Administrator may also supervise the county's indigent burial program.

A probate conservatorship can be of the person, the estate, or both.[12] A person who is conserved as to his or her person and estate may have different conservators, who must work together.[13] For conservatorship of the person, there must be evidence that the proposed conservatee "is unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter."[14] For conservatorship of the estate, there must be evidence that the proposed conservatee "is substantially unable to manage his or her financial resources or resist fraud or undue influence."[15]

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6 California State Associations of Counties, *supra* fn.3.

7 The two types of conservatorships are Lanterman-Petris-Short and probate. *Id.*

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

13 State of California Judicial Council Form GC-348, "Duties of Conservator and Acknowledgement of Receipt of Handbook." *available at* http://www.courtinfo.ca.gov/forms/documents/gc348.pdf.

14 Cal. Prob. Code § 1801.

15 *Id.*

1. Conservator of the Person

a. Conservatee's Rights

All indivduals under conservatorship have the right to be treated with understanding and respect, the right to have their wishes considered, and the right to be well cared for by their conservator. A conservatee KEEPS the following rights unless a judge has specifically determined that the right must be taken away because the individual is unable to exercise it:

- The right to vote;
- The right to control their salary;
- The right to marry;
- The right to receive personal mail;
- The right to be represented by a lawyer;
- The right to ask a judge to change their conservator;
- The right to ask a judge to end the conservatorship;
- The right to control personal spending money;
- The right to make or change a will;
- The right to control medical decisions.[16]

b. Living Arrangement

Under a probate conservatorship of the person, the conservator may decide where the conservatee may live.[17] In deciding where the conservatee will live, the conservator must choose the least restrictive appropriate living situation that is safe and allows the conservatee as much independence as possible.[18] A probate conservator does not have the

16 Cal. Prob. Code at §§ **1870-76; 1880-98; 1900-01; 1910; 2350-e.**

17 Cal. Prob. Code § 2352.

18. *Id.*.

authority to commit a conservatee to a psychiatric facility against the conservatee's wishes.[19]

c. Medical Care

Generally the conservator is responsible for ensuring that the conservatee's health needs are met, but may not give or withhold consent for medical treatment over the conservatee's objection.[20] However, special types of conservatorships can be established which give a conservator authority to consent to medical treatment:

1) *Conservatorship of the person and estate with medical powers.*[21]

If the court determines that the conservatee lacks the capacity to make informed health care decisions, the conservator may be given exclusive authority to make health care decisions "that the conservator in good faith based on medical advice determines to be necessary."[22] Although the conservator is required to consider the conservatee's values to the extent the conservator is aware of them, the conservator may require the conservatee to receive the health care, whether or not the conservatee objects.[23]

2) *Conservatorship of the person and estate with dementia powers.*

If a conservatee has been diagnosed with dementia, a conservator with dementia powers may be appointed.[24] Under this type of conservatorship, a conservator may place the conservatee in a secure ward or facility, provided that this is the least restrictive placement appropriate to the needs of the conservatee.[25]

A conservator with dementia powers may also authorize the use of psychotropic medications to treat dementia and the behaviors associated

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19. Cal. Prob. Code § 2356.
20 Cal. Prob. Code § 2354.
21 Cal. Prob. Code §§ 2354-55.
22 Cal. Prob. Code § 2355.
23 *Id.*
24 Cal. Prob. Code § 2356.5.
25 *Id.*

with it.[26] If the conservator has been given authority to approve the use of psychotropic medications to treat dementia and the behaviors associated with it, other less intrusive options must be explored first.[27]

d. Length of Conservatorship

A conservatorship is reviewed by the court six months after the initial appointment of the conservator, one year after the appointment, and annually thereafter.[28] The court has discretion to set the review at every two years if it determines that "the conservator is acting in the best interests of the conservatee."[29]

If a conservatee wishes to challenge the conservatorship or some aspect of the conservatorship—for instance a denial of his or her right to vote—the conservatee may petition the court.[30] The court must then notify the conservatee's private attorney or appoint a public defender to file a petition for termination or modification of the letters of conservatorship on behalf of the conservatee.[31]

2. Conservator of the Estate

a. Duties

If a conservator is appointed for a conservatee's estate, the conservator must manage the conservatee's finances, protect their income and assets, make an inventory of the assets, make sure the bills are paid, invest the conservatee's money, make sure that the conservatee is receiving all the income and benefits he or she is entitled to, ensure that tax returns are filed on time, keep accurate financial records, and regularly report financial accounts to the court.[32]

b. Timelines

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26 *Id.*

27 *Id.*

28 Cal. Prob. Code § 1850 (a).

29 *Id.*

30 Cal. Prob. Code § 1852.

31 *Id.*

32 ADMINISTRATIVE OFFICE OF THE COURTS ET AL., E 77 (Judicial Council of California, rev. ed. 2002), *available at* http://www.courtinfo.ca.gov/selfhelp/additionalinfo/documents/conshand-chap5.pdf; Cal. Prob. Code §§ 2400 et seq., § 2620.

Within 90 days of appointment as a conservator of the estate, the conservator must file an inventory and appraisal of all the assets in the estate.[33] Additionally, the conservator must file a petition with the court one year after appointment and at least once every two years after that asking for court review and approval of the conservator's accounting of the estate.[34] If the conservator does not do so, the court will order them to do so, and if the conservator fails to comply, he or she may be removed by the court.[35]

c. Temporary Conservatorship[36]

To obtain a temporary conservatorship, there must be evidence of an urgent need for the temporary conservatorship. An urgent need might be the need for a medical procedure or the need to safeguard assets in imminent danger of loss. There can be no petition for a temporary conservatorship without a petition for permanent conservatorship on file. Generally, the temporary conservator has all of the same duties as a general conservator, except that the conservatorship will end on the date specified in the Letters of Temporary Conservatorship.[37] A temporary conservator may not move a conservatee from his or her home or sell or give away the conservatee's home or any other assets without court approval.[38]

d. Order for Medical Treatment

Instead of a temporary conservatorship, a court may also, on a showing of good cause, issue a temporary order for medical treatment.[39] This temporary order will be in effect for a period determined by the court, but cannot be longer than the period required to determine the capacity of the individual to make their own healthcare decision.[40]

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33 *Id.* at 90.

34 *Id.* at 131.

35 *Id.* at 133 (even if conservator is removed by the court, he or she still has to complete and file an account and report).

36 Cal. Prob. Code §§ 2250 et. seq.

37 Cal. Prob. Code § 2251

38 Cal. Prob. Code § 2252 (approval may be granted upon a showing that that action is necessary "to avert irreparable harm to the conservatee").

39 Cal. Prob. Code § 4770.

40 *Id.*

B. Lanterman-Petris-Short (L.P.S.) Conservatorship[41]

"A conservator of the person, of the estate, or of the person and estate may be appointed for any person who is gravely disabled."[42] "Gravely disabled" means that the person is, as a result of a mental disorder or, as a result of impairment by chronic alcoholism, unable to provide for their basic personal needs for food, clothing or shelter.[43] The term "Lanterman-Petris-Short" comes from the name of the California Act that made this kind of conservatorship part of the Welfare and Institutions Code.[44]

1. LPS Conservatee's Rights

Under a LPS Conservatorship the court may make specific findings denying an individual:

- The right to possess a driver's license;
- The right to enter into contracts;
- The right to vote;
- The right to refuse or consent to mental health treatment;
- The right to refuse or consent to medical treatment for an existing condition;
- The right to possess firearms; and
- The right to make medical treatment decisions.[45]

A conservatee retains these rights unless the conservatorship order indicates that a particular right has been taken away.[46]

The law ensures the protection of certain basic rights of people under a LPS conservatorship, such as the right to wear one's own clothing, to keep

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41 Cal. Welf. & Inst. Code §§ 5350 et seq.

42 Cal. Welf. & Inst. Code § 5350.

43 *Id.*; *see* Cal. Welf. & Inst. Code § 5008.

44 *See* Cal. Welf. & Inst. Code § 5000.

45 Cal. Welf. & Inst. Code § 5357.

46 *Id.*; The conservatee has the right to petition the court to contest the rights that were taken away. Cal. Welf. & Inst. Code § 5358.3.

and use personal possessions, to have visitors of one's own choice, and the right to specified procedures regulating the refusal of certain forms of treatment.[47] These rights may be denied, but **only** upon a **properly documented** showing of **good cause**.[48] These rights may not be waived by the person's parent, guardian or conservator.[49]

The following rights may not be denied under an LPS conservatorship:

- The right to refuse psychosurgery;
- The right to refuse ECT[50];
- The right to see and receive the services of a patients' rights advocate.[51]

2. Duration of LPS Conservatorship

A permanent LPS conservatorship automatically terminates after one year (excluding the period of temporary conservatorship).[52] If at that time the conservatee is still gravely disabled, the conservator must obtain the opinion of two physicians and initiate further Court proceedings to reestablish the conservatorship for another year.[53]

Persons subject to a conservatorship may petition the court at any time during the conservatorship to contest certain rights denied to them or powers granted to the conservator.[54] However, once the person has had this hearing, the person cannot have another such hearing for six months.[55]

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47 Cal. Welf. & Inst. Code § 5325.
48 Cal. Welf. & Inst. Code § 5326.
49 Cal. Welf. & Inst. Code § 5325.
50 Under certain limited circumstances, ECT may be administered without consent. *See,* Cal. Welf. & Inst. Code §§ 5325-56, 5326.7.
51 Cal. Welf. & Inst. Code §§ 5325-26. Additional rights that cannot be denied are found at Cal. Welf. & Inst. Code § 5325.1.
52 Cal. Welf. & Inst. Code § 5361.
53 *Id.*
54 Cal. Welf. & Inst. Code § 5358.3.
55 *Id.*

When progress under the treatment plan reveals that the conservatee is no longer gravely disabled, the conservator shall notify the court, which will then terminate the conservatorship.[56]

C. Limited Conservatorship[57]

A limited conservatorship may be appointed for an adult who has a **developmental disability** (the limited conservatee).[58] The limited conservator's duty is to help the limited conservatee develop "maximum self-reliance and independence."[59]

The limited conservator's role is to assist developmentally disabled individuals to manage their personal and/or financial needs.[60] Unless specifically requested in the petition and granted in the court's order, a limited conservator DOES NOT have any of the following powers or controls:

- To determine place of residence;
- To have access to confidential records;
- To control the right to marry;
- To control the right to enter into contracts;
- To give consent for medical treatment;
- To control social and sexual contacts and relationships;
- To make decisions concerning education.[61]

II. ALTERNATIVES TO CONSERVATORSHIP

A. Representative Payee Programs

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56 Cal. Welf. & Inst. Code § 5352.6.

57 Cal. Prob. Code § 1801.

58 *Id.*

59 *Id*; ADMINISTRATIVE OFFICE OF THE COURTS ET AL., *supra* fn. 33, at 19, *available at* http://www.courtinfo.ca.gov/selfhelp/additionalinfo/documents/conshand-chap3.pdf.

60 Cal. Prob. Code § 1828.5.

61 ADMINISTRATIVE OFFICE OF THE COURTS ET AL., *supra* fn. 31, at 21-22, *available at* http://www.courtinfo.ca.gov/selfhelp/seniors/handbook.htm.

1. Requirements for the Appointment of a Payee

The law requires that some Social Security beneficiaries have a representative payee.[62] Those required by the Social Security Administration (SSA) to have a payee include legally incompetent adults and disabled adults who are determined by SSA to be incapable, and who SSA has determined to have a drug addiction or alcohol (DAA) condition.[63]

Additionally, the Veteran's Administration (VA) provides for representative payee services.[64] The VA allows for the appointment of a payee for a beneficiary who is incompetent or unable to manage his or her own affairs, "regardless of any legal disability on the part of the beneficiary."[65] Under the governing statute, whenever it appears that the interest of a beneficiary would be served by the appointment of a payee, payment of benefits may be made to a relative or some other person or entity for the use and benefit of the beneficiary.[66]

Forms for appointment of representative payees under the Social Security Administration program can be found at http://ssa.gov/online/ (Request to be Selected as Payee, Form SSA-11).[67]

2. Duties of a Representative Payee[68]

A payee receives payments on the beneficiary's behalf, and must use the money to pay for their current needs, which include: housing and utilities; food; medical and dental expenses; personal care items; clothing; and rehabilitation expenses (if the beneficiary is disabled.)[69]

"After those expenses are paid, the payee can use the rest of the money to pay any past-due bills the beneficiary may have, to support [their]

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62 42 USC § 1383; 20 CFR § 416.601.

63 *Id.*

64 38 USC § 5502 (a).

65 *Id.*

66 *Id.*

67 SOCIAL SECURITY ONLINE, SOCIAL SECURITY FORMS (May 11, 2011), http://ssa.gov/online/.

68 Social Security Online, Representative Payee Program (February 09, 2011), http://www.ssa.gov/payee/bene.htm.

69 *Id.*

dependents or provide entertainment If there is money left over, the payee should save it for [the beneficiary."[70]

The payee must keep accurate records of payments and how they are spent and regularly report that information to Social Security.[71] The payee also should share that information with the beneficiary.[72] If the beneficiary lives in an institution (e.g. a nursing home or a hospital), the payee should pay the cost of care and provide money for personal needs.[73]

3. **Who can be a Payee**

According to the SSA, a representative payee can be a family member, a friend, a legal guardian, or a lawyer.[74] Additionally, social service agencies, nursing homes, and other organizations can be payees.[75]

B. Power of Attorney[76]

A "power of attorney" is a document that allows an individual to appoint someone to represent him or her.[77] The individual signing the power of attorney is the "principal."[78] The person appointed to represent the principal is called the "agent" or "attorney-in-fact."[79] Depending on how it is written, a power of attorney can go into effect immediately or only if an individual loses the ability to make financial decisions. A power of attorney can expire on a certain date, or after an agent does a specific task.[80]

A power of attorney can be also be "durable."[81] A "durable power of attorney" means it will continue when the principal becomes incompetent or

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70 *Id.*
71 *Id.*
72 *Id.*
73 *Id.*
74 *Id.*
75 *Id.*
76 Cal. Prob. Code §§4000 et. seq.; *see also*, http://www.scselfservice.org/probate/finan/powersatty.htm#decisions
77 Cal. Prob. Code § 4022.
78 Cal. Prob. Code § 4026.
79 Cal. Prob. Code § 4014.
80 Cal. Prob. Code § 4152.
81 Cal. Prob. Code § 4022.

incapacitated. [82] A durable power of attorney lasts until the principal cancels it or dies.[83]

The California Uniform Statutory Form Power of Attorney can be found at Probate Code section 4401.

1. What can an Agent Do?

The agent can do almost anything that the power of attorney document permits.[84] The principal can limit the kinds of financial decisions that the agent is able to make. Even once the power of attorney is in effect, the principal can continue to make all the financial decisions they used to before having a power of attorney.

The power of attorney can authorize an agent to handle on-going tasks, including: make bank deposits, withdrawals or other transactions, paying bills, buying or selling property, hiring care takers, filing tax returns, arranging the distribution of retirement benefits, negotiating and signing contracts, and applying for benefits like SSI or Medi-Cal. [85]

2. The Agent CANNOT:

- Write or change a will, although the agent may establish a trust.[86]

- Use assets for his or her own purposes; unless the principal specifically makes a gift to the agent, it is against the law for an agent to make gifts to him or herself.[87]

If the principal is 65 or older, and their agent takes his or her property without authorization, s/he can be charged with elder abuse.[88]

3. Other Requirements

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82 Cal. Prob. Code § 4404.
83 Cal. Prob. Code §§ 4128, 4151-53.
84 Cal. Prob. Code § 4123.
85 Cal. Prob. Code § 4123.
86 Cal. Prob. Code § 4265 (power of attorney cannot make, revoke, or modify the principal's will); Cal. Prob. Code § 4264 (express authorization in the power of attorney is required in order for an agent to establish a trust).
87 Cal. Prob. Code § 4128.
88 Cal. Welf. & Inst. Code § 156.10.30.

- The power of attorney document must be acknowledged by a notary public or signed by at least 2 adult witnesses.[89] An agent cannot be a witness. [90]

- For a power of attorney to be durable, it must say either:

"This power of attorney shall not be affected by subsequent incapacity of the principal" or "This power of attorney shall become effective upon the incapacity of the principal" or similar words that show the principal's intent for the document to be valid even if he or she becomes incapacitated.[91]

- An individual can cancel or change a power of attorney, and should do so in writing.[92] The statement should also be given to any institutions (banks, etc.) that had the information about the old power of attorney.[93]

- If friends, relatives or officials are aware of problems with a power of attorney, they can file a petition with the Probate Department.[94] The petition can ask the court to review what the agent has done, and then the court can decide whether or not to investigate further.[95]

- If the agent is having problems getting others to recognize the power of attorney the agent can ask the court for help by filing a petition to ask the Court for confirmation that they are acting as the principal's lawful agent.[96]

4. Conservators and Power of Attorney

If a power of attorney is a durable power of attorney, it remains effective upon the principal's incapacity, and a conservator of the estate can revoke

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89 Cal. Prob. Code § 4121.
90 *Id.*
91 Cal. Prob. Code § 4124.
92 Cal. Prob. Code § 4128.
93 Cal. Prob. Code § 4152.
94 Cal. Prob. Code § 4541.
95 *Id.*
96 *Id.*

a durable power of attorney created by the conservatee only with prior authority of the court.[97]

Non-durable powers of attorney do not remain effective upon the establishment of a conservatorship.[98]

C. Advance Health Care Directive (Formerly known as Power of Attorney for Health Care)[99]

An advance health care directive allows an individual to name someone else to make decisions and give instructions to others about his or her health care and treatment.[100] This includes instructions about an individual's wishes regarding donation of organs and the designation of a primary physician.[101] California's Statutory Advance Health care Directive/Power of Attorney for Health Care Form can be found at Probate Code section 4701.[102] See Disability Rights California's website for more information on advance directives, including in languages other than English.[103]

An Advance Directive is made of up two parts, (1) Appointment of an Agent for Healthcare and (2) Individual Health Care Instructions. A person may choose to complete either one or both of these parts. Either part is legally binding by itself.

California law governing advance health care directives provides a form for an individual to appoint a "power of attorney for health care."[104] An individual can name someone else as agent to make health care decisions on his or her behalf if he or she becomes incapable of making these decisions or if he or she wants someone else to make those decisions now even though the individual is still capable.[105] The standard form provides

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97 Cal. Prob. Code § 4404.
98 Cal. Prob. Code § 4206.
99 Cal. Prob. Code §§ 4670 et seq.
100 Cal. Prob. Code § 4670.
101 Cal. Prob. Code § 4701.
102 *Id.*
103 http://www.disabilityrightsca.org/issues/conservatorship_pubs.htm
104 Cal. Prob. Code § 4701.
105 *Id.*

an opportunity for an individual to name an agent to be their conservator, should a conservatorship become necessary.[106]

1. Authority of the Agent

Unless the form the individual signs limits the authority of the agent, the agent may make all health care decisions for that individual.[107] However, an agent cannot make decisions for an individual regarding their health care if the individual objects.[108] If an individual chooses not to limit the authority of the agent, the agent will have the right to:

(a) Consent or refuse consent to any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect a physical or mental condition.
(b) Select or discharge health care providers and institutions.
(c) Approve or disapprove diagnostic tests, surgical procedures, and programs of medication.
(d) Direct the provision, withholding, or withdrawal of artificial nutrition and hydration and all other forms of health care, including cardiopulmonary resuscitation.
(e) Make anatomical gifts; authorize an autopsy, and direct disposition of remains.[109]

2. Validity of Directive

"If an individual is a patient in a skilled nursing facility when a written advance health care directive is executed, the advance directive is not effective unless a patient advocate or ombudsman signs the advance directive as a witness, either as one of two witnesses or in addition to notarization."[110]

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106 *Id.*
107 Cal. Prob. Code § 4681.
108 Cal. Prob. Code § 4689.
109 Cal. Prob. Code § 4701.
110 Cal. Prob. Code § 4675.

3. Revocation

An individual with an advance health care directive has the right to revoke the advance health care directive or replace it at any time.[111]

D. Assignment of Educational Decision-Making Authority

Under California Education Code law, when a student in special education reaches age 18, rights which were previously held by his/her parent or guardian transfer to the student.[112] However, the student, provided s/he has not been determined incompetent by the court, can designate his/her parent or other adult to assist in educational advocacy. Such participation can, for example, include attending IEP meetings, obtaining records, initiating administrative hearings or complaints.

E. Guardian Ad Litem Appointments by the Court[113]

When a minor, incompetent person or person for whom a conservator has been appointed is a party to a court action, the court can appoint a Guardian Ad Litem to represent the individual in the matter.[114] The Guardian Ad Litem stands in the shoes of the individual and can compromise, agree to, satisfy or release or discharge any claim. Any monetary payout must be handled in accordance with the Probate Code. The Judicial Form for Application and Order for Appointment of a Guardian Ad Litem can be accessed at http://www.accesslaw.com/jcforms/civ010.pdf.

111 Cal. Prob. Code §§ 4695, 4701.
112 Cal. Educ. Code § 56041.5.
113 Cal. Prob. Code § 372.
114 Cal. Prob. Code § 2462.