AIDS LEGAL REFERRAL PANEL

Introductory Training
Simple Wills, Powers of Attorney for Health Care and Property Management

Presented by:

AIDS LEGAL REFERRAL PANEL
and the
VOLUNTEER LEGAL SERVICES PROGRAM
of the
BAR ASSOCIATION OF SAN FRANCISCO

Videotape by San Francisco AIDS Foundation
TESTAMENTARY DOCUMENTS

A volunteer attorney with an AIDS legal services program simultaneously assumes different roles of therapist, mediator, social worker, physician, priest, emotional support counselor and legal adviser. But nowhere are the demands on an attorney more challenging than in drafting testamentary documents for a person with a life-threatening illness.

Discussing testamentary documents frequently opens floodgates of emotions and forces persons with HIV infection to face death for the first time. In many instances persons with HIV infection may have to confront additional issues they had long avoided, like the gay man who has to tell his parents and siblings he is homosexual and the man at his bedside is his lover, or the newly diagnosed heterosexual who must tell his spouse that she needs to be tested.

An attorney in this emotionally charged environment has to help her client on many different levels. But throughout the attorney/client relationship, it is critical that a lawyer remain a steadfast advocate for the client's right to make his own decisions about living and dying.

Half of all cases of an AIDS legal services program involve assistance on testamentary documents, primarily simple wills, durable powers of attorney for health care, living wills, general powers of attorney for financial matters, and directives to physicians. Although some projects have instituted income eligibility requirements for their clients, AIDS legal assistance programs generally provide a package of basic testamentary documents to most Persons with AIDS and severe HIV infection at no charge.

While volunteers draft most testamentary documents without incident, occasionally attorneys face unusual situations. Examples of cases include:

- Parents challenged a durable power of attorney for health care on the grounds that they should have been present at the time of its signing, that their adult child lacked testamentary capacity, and that he was subject to undue influence or duress. Recent contest trends may suggest the need for greater participation of attorneys in the preparation of powers of attorney.

- A patient selected his religious brother to be his attorney-in-fact under a durable power of attorney for health care. The brother subsequently objected to the care the patient received in a hospital because it violated the brother's religious beliefs. The treatment, however, conform to the instructions in the DPAHC.

- A sister of a dying patient, who was appointed attorney-in-fact under a two year old durable power of attorney for health care, barred the new lover from the hospital room. Only after the person with AIDS awakened and demanded the visit was the lover allowed to say goodbye to his companion.

- A San Francisco hospital prepared to ship the remains of a person with AIDS to his parent's family cemetery in the South in conflict with the provisions in the testator's Will and durable power of attorney for health care. Only when a Panel attorney intervened did the hospital allow the lover to take the body for cremation.

* Contributing authors to this chapter were (in alphabetical order) Melinda Griffith, Clint Hockenberry, Diane D. McCabe, Virginia Palmer, Jackie Peoples, Ora Prochovnick, Fred Nagel, S. Alan Ray, and Mark Senick. 1990 Update is by Jackie Peoples, Director of the Minority Outreach Project of the AIDS Legal Referral Panel/San Francisco.
• A mother, arriving from out-of-state, discovered the attorney-in-fact under a general power was selling her son's household items and withdrawing money from her son's account in order to supply himself with drugs.

• Two sisters, arriving shortly after the intestate death of their brother, cleared out all the furnishings from the brother and lover's apartment, including items purchased jointly during their eight year relationship.

• After years of estrangement, a dying man's evangelical Christian family appeared at his apartment and moved him to their rural California home. When San Francisco friends finally reached him by phone, the man with AIDS described his new living arrangements as "a Nazi concentration camp."

Because AIDS clients have usually exhausted their resources, most wills and powers of attorney conflicts are over values—not money. The need for careful crafting of testamentary documents is no less demanding, however. The following sections are designed to assist attorneys in the preparation of simple wills and powers of attorney.
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WILLS

I. The Need for a Will

There are a number of reasons to make a Will. First, a Will enables a testator to pass property as he or she wishes. Secondly, a Will allows a testator to choose who will administer and handle his or her estate. Finally, a Will enables the testator to address a variety of important issues, such as burial or cremation arrangements, his or her funeral or memorial service, powers of the executor, bond, guardianship, and specific disinheritances.

II. Intestacy

In most cases the person whose Will you will prepare is not married and has never had children. Without a Will, this person’s assets will pass to his or her parents or sibling, or other closest heir. See California Probate Code Section 6400 et seq.

If the decedent dies while married, the surviving spouse in a community property state receives one-half of the community or quasi-community property that belonged to the decedent. The court divides the separate property as follows:

A. If the decedent did not have any surviving children, parent, brother, sister, or children of a deceased brother or sister, all the property goes to the surviving spouse. California Probate Code Section 6401(c)(1).

B. Where the decedent leaves one child or issue of a deceased child, or where the decedent leaves no issue but has a parent or parents or issue of either of them, then one-half goes to the surviving spouse and the rest is divided among those other heirs. California Probate Code 6401(c)(2).

C. Where the decedent leaves more than one child living or one child living and the issue of one or more deceased children or the issue of two or more deceased children, then the surviving spouse gets one-third and the remaining two-thirds is divided among the other heirs. California Probate Code 6401(c)(3).

As noted above, a major reason to have a Will is to choose who will administer and handle one’s estate. This person is the executor.

If someone dies without a Will, then the closest member of the family, as determined by statute, can request the court to appoint him or her as the administrator of the estate. California Probate Code Section 8461 sets out the rank and priority of persons entitled to act as the administrator of the estate. They are: (1) the surviving spouse; (2) the children; (3) the grandchildren; (4) the parents; (5) the brothers or sisters; (6) the issue of brothers or sisters; (7) the grandparents; (8) the issue of grandparents; (9) the children of a predeceased spouse; (10) other issue of a predeceased spouse; (11) other next of kin; (12) the parents of a predeceased spouse; (13) the issue of parents of a predeceased spouse; (14) a conservator or guardian; (15) a public administrator; (16) creditors; or (17) any other person.
California Medical Association
DURABLE POWER OF ATTORNEY FOR HEALTH CARE DECISIONS
(California Civil Code Sections 2410-2444)

WARNING TO PERSON EXECUTING THIS DOCUMENT

This is an important legal document. Before executing this document, you should know these important facts:

This document gives the person you designate as your agent (the attorney-in-fact) the power to make health care decisions for you. Your agent must act consistently with your desires as stated in this document or otherwise made known.

Except as you otherwise specify in this document, this document gives your agent power to consent to your doctor not giving treatment or stopping treatment necessary to keep you alive.

Notwithstanding this document, you have the right to make medical and other health care decisions for yourself so long as you can give informed consent with respect to the particular decision. In addition, no treatment may be given to you over your objection, and health care necessary to keep you alive may not be stopped or withheld if you object at the time.

This document gives your agent authority to consent, to refuse to consent, or to withdraw consent to any care, treatment, service, or procedure to maintain, diagnose, or treat a physical or mental condition. This power is subject to any statement of your desires and any limitations that you include in this document. You may state in this document any types of treatment that you do not desire. In addition, a court can take away the power of your agent to make health care decisions for you if your agent (1) authorizes anything that is illegal, (2) acts contrary to your known desires or (3) where your desires are not known, does anything that is clearly contrary to your best interests.

This power will exist for an indefinite period of time unless you limit its duration in this document.

You have the right to revoke the authority of your agent by notifying your agent or your treating doctor, hospital, or other health care provider orally or in writing of the revocation.

Your agent has the right to examine your medical records and to consent to their disclosure unless you limit this right in this document.

Unless you otherwise specify in this document, this document gives your agent the power after you die to (1) authorize an autopsy, (2) donate your body or parts thereof for transplant or therapeutic or educational or scientific purposes, and (3) direct the disposition of your remains.

If there is anything in this document that you do not understand, you should ask a lawyer to explain it to you.

1. CREATION OF DURABLE POWER OF ATTORNEY FOR HEALTH CARE

By this document I intend to create a durable power of attorney by appointing the person designated below to make health care decisions for me as allowed by Sections 2410 to 2444, inclusive, of the California Civil Code. This power of attorney shall not be affected by my subsequent incapacity. I hereby revoke any prior durable power of attorney for health care. I am a California resident who is at least 18 years old, of sound mind, and acting of my own free will.

2. APPOINTMENT OF HEALTH CARE AGENT

(Fill in below the name, address and telephone number of the person you wish to make health care decisions for you if you become incapacitated. You should make sure that this person agrees to accept this responsibility. The following may not serve as your agent: (1) your treating health care provider; (2) an operator of a community care facility or residential care facility for the elderly; or (3) an employee of your treating health care provider, a community care facility, or a residential care facility for the elderly, unless that employee is related to you by blood, marriage or adoption. If you are a conservatee under the Lanterman-Petris-Short Act (the law governing involuntary commitment to a mental health facility) and you wish to appoint your conservator as your agent, you must consult a lawyer, who must sign and attach a special declaration for this document to be valid.)

I, ___________________________, hereby appoint:

(insert your name)

Name ___________________________

Address ___________________________

Work Telephone (__________) ___________________________ Home Telephone (__________) ___________________________

as my agent (attorney-in-fact) to make health care decisions for me as authorized in this document. I understand that this power of attorney will be effective for an indefinite period of time unless I revoke it or limit its duration below.

(Optional) This power of attorney shall expire on the following date: ___________________________
3. AUTHORITY OF AGENT

If I become incapable of giving informed consent to health care decisions, I grant my agent full power and authority to make those decisions for me, subject to any statements of desires or limitations set forth below. Unless I have limited my agent's authority in this document, that authority shall include the right to consent, refuse consent, or withdraw consent to any medical care, treatment, service, or procedure; to receive and to consent to the release of medical information; to authorize an autopsy to determine the cause of my death; to make a gift of all or part of my body; and to direct the disposition of my remains, subject to any instructions I have given in a written contract for funeral services, my will or by some other method. I understand that, by law, my agent may not consent to any of the following: commitment to a mental health treatment facility, convulsive treatment, psychosurgery, sterilization or abortion.

4. MEDICAL TREATMENT DESIRES AND LIMITATIONS (OPTIONAL)

(Your agent must make health care decisions that are consistent with your known desires. You can, but are not required to, state your desires about the kinds of medical care you do or do not want, including your desires concerning life-sustaining treatment. If you do not want your agent to have the authority to make certain decisions, you must write a statement to that effect in the space provided below; otherwise, your agent will have the broad powers to make health care decisions for you that are outlined in paragraph 3 above. In either case, it is important that you discuss your health care desires with the person you appoint as your agent.

(Following are three general statements about withholding and removal of life-sustaining treatment. If, after carefully reading all of these statements, you agree with one of them, you may initial that statement. If you wish to add to one of the printed statements, or to write your own instead, you may do so in the space provided.)

I do not want efforts made to prolong my life and I do not want life-sustaining treatment to be provided or continued: (1) if I am in an irreversible coma or persistent vegetative state; or (2) if I am terminally ill and the application of life-sustaining procedures would serve only to artificially delay the moment of my death; or (3) under any other circumstances where the burdens of the treatment outweigh the expected benefits. I want my agent to consider the relief of suffering and the quality as well as the extent of the possible extension of my life in making decisions concerning life-sustaining treatment.

If this statement reflects your desires, initial here: _________

I want efforts made to prolong my life and I want life-sustaining treatment to be provided unless I am in a coma or persistent vegetative state which my doctor reasonably believes to be irreversible. Once my doctor has concluded that I will remain unconscious for the rest of my life, I do not want life-sustaining treatment to be provided or continued.

If this statement reflects your desires, initial here: _________

I want efforts made to prolong my life and I want life-sustaining treatment to be provided even if I am in an irreversible coma or persistent vegetative state.

If this statement reflects your desires, initial here: _________

Other or additional statements of medical treatment desires and limitations: ____________________________________________________________

(You may attach additional pages if you need more space to complete your statements. Each additional page must be dated and signed at the same time you date and sign this document.)

5. APPOINTMENT OF ALTERNATE AGENTS (OPTIONAL)

(You may appoint alternate agents to make health care decisions for you in case the person you appointed in Paragraph 2 is unable or unwilling to do so.)

If the person named as my agent in Paragraph 2 is not available or willing to make health care decisions for me as authorized in this document, I appoint the following persons to do so, listed in the order they should be asked:

First Alternate Agent: Name ___________________________ Work Telephone (______) ______________________
Address ___________________________ Home Telephone (______) ______________________

Second Alternate Agent: Name ___________________________ Work Telephone (______) ______________________
Address ___________________________ Home Telephone (______) ______________________
6. USE OF COPIES
I hereby authorize that photocopies of this document can be relied upon by my agent and others as though they were originals.

DATE AND SIGNATURE OF PRINCIPAL
(You must date and sign this power of attorney)
I sign my name to this Durable Power of Attorney for Health Care at __________________________, __________________________  on __________________________ . __________________________ (Signature of Principal)

STATEMENT OF WITNESSES
(This power of attorney will not be valid for making health care decisions unless it is either (1) signed by two qualified adult witnesses who are personally known to you (or to whom you present evidence of your identity) and who are present when you sign or acknowledge your signature or (2) acknowledged before a notary public in California. If you elect to use witnesses rather than a notary public, the law provides that none of the following may be used: (1) the persons you have appointed as your agent and alternate agents, (2) a health care provider or an employee of a health care provider, or (3) an operator or employee of a community care facility or residential care facility for the elderly. Additionally, at least one of the witnesses cannot be related to you by blood, marriage or adoption, or be named in your will. IF YOU ARE A PATIENT IN A SKILLED NURSING FACILITY, ONE OF THE WITNESSES MUST BE A PATIENT ADVOCATE OR OMBUDSMAN.)
I declare under penalty of perjury under the laws of California that the person who signed or acknowledged this document is personally known to me to be the principal, or that the identity of the principal was proved to me by convincing evidence,* that the principal signed or acknowledged this durable power of attorney in my presence, that the principal appears to be of sound mind and under no duress, fraud, or undue influence, that I am not the person appointed as attorney in fact by this document, and that I am not a health care provider, an employee of a health care provider, the operator of a community care facility or a residential care facility for the elderly, nor an employee of an operator of a community care facility or residential care facility for the elderly.

_________________________  __________________________
Signature                  Signature

_________________________  __________________________
Print name                  Print name

_________________________  __________________________
Date                      Date

_________________________  __________________________
Residence Address          Residence Address

(AT LEAST ONE OF THE ABOVE WITNESSES MUST ALSO SIGN THE FOLLOWING DECLARATION)
I further declare under penalty of perjury under the laws of California that I am not related to the principal by blood, marriage, or adoption, and, to the best of my knowledge I am not entitled to any part of the estate of the principal upon the death of the principal under a will now existing or by operation of law.

_________________________
Signature:

*The law allows one or more of the following forms of identification as convincing evidence of identity: a California driver’s license or identification card or U.S. passport that is current or has been issued within five years, or any of the following if the document is current or has been issued within five years, contains a photograph and description of the person named on it, is signed by the person, and bears a serial or other identifying number: a foreign passport that has been stamped by the U.S. Immigration and Naturalization Service; a driver’s license issued by another state or by an authorized Canadian or Mexican agency; or an identification card issued by another state or by any branch of the U.S. armed forces. If the principal is a patient in a skilled nursing facility, a patient advocate or ombudsman may rely on the representations of family members or the administrator or staff of the facility as convincing evidence of identity if the patient advocate or ombudsman believes that the representations provide a reasonable basis for determining the identity of the principal.
SPECIAL REQUIREMENT: STATEMENT OF PATIENT ADVOCATE OR OMBUDSMAN

(If you are a patient in a skilled nursing facility, a patient advocate or ombudsman must sign the Statement of Witnesses above and must also sign the following declaration.)

I further declare under penalty of perjury under the laws of California that I am a patient advocate or ombudsman as designated by the State Department of Aging and am serving as a witness as required by subdivision (f) of Civil Code Section 2432.

Signature: ____________________________  Address: ____________________________
Print Name: ____________________________
Date: ____________________________

CERTIFICATE OF ACKNOWLEDGMENT OF NOTARY PUBLIC

(Acknowledgment before a notary public is not required if you have elected to have two qualified witnesses sign above. If you are a patient in a skilled nursing facility, you must have a patient advocate or ombudsman sign the Statement of Witnesses on page 3 and the Statement of Patient Advocate or Ombudsman above)

State of California  
  )ss.
County of ____________________________  
On this __________ day of ____________________________, in the year __________, before me, ____________________________,

  (here insert name of notary public)
personally appeared ____________________________,

  (here insert name of principal)
personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to this instrument, and acknowledged that he or she executed it. I declare under penalty of perjury that the person whose name is subscribed to this instrument appears to be of sound mind and under no duress, fraud, or undue influence.

NOTARY SEAL

__________________________
(Signature of Notary Public)

COPIES

YOUR AGENT MAY NEED THIS DOCUMENT IMMEDIATELY IN CASE OF AN EMERGENCY. YOU SHOULD KEEP THE COMPLETED ORIGINAL AND GIVE PHOTOCOPIES OF THE COMPLETED ORIGINAL TO (1) YOUR AGENT AND ALTERNATE AGENTS, (2) YOUR PERSONAL PHYSICIAN, AND (3) MEMBERS OF YOUR FAMILY AND ANY OTHER PERSONS WHO MIGHT BE CALLED IN THE EVENT OF A MEDICAL EMERGENCY. THE LAW PERMITS THAT PHOTOCOPIES OF THE COMPLETED DOCUMENT CAN BE RELIED UPON AS THOUGH THEY WERE ORIGINALS.
III. Executor Qualifications

In order to be an executor under California Probate Code Section 8400 et seq., one needs to meet the following requirements. Persons eligible for appointment must:

* be over the age of majority;
* not be subject to a conservatorship or otherwise be unfit;
* not have committed fraud or waste, or have wrongfully neglected the estate (California Probate Code Section 8502);
* be a U.S. resident (a non-resident may become a personal representative if named in the Will);
* not be a business partner if an Interested person objects to the appointment (unless the partner is named in the Will).

California Probate Code Section 8440, et seq., deals with the appointment of executors and administrators "with the Will annexed." If the Will appointed someone as executor, but that person did not qualify or did not wish to serve, then the Court could appoint someone else not mentioned in the Will to serve as the "administrator with the Will annexed."

An executor is accountable for all of the assets he or she administers and is chargeable with losses resulting from his or her default or neglect. Estate of Gerba, 73 Cal. App. 3d, 140 Cal. Rptr. 577 (1977). Because the executor has such substantial responsibilities, the testator should select this person carefully.

The executor can be a beneficiary of the Will and may be a family member or friend. The testator may name more than one executor; in this case, the co-executors must act together in carrying out their duties. California Probate Code Section 8400. If the testator owns real property outside California, he or she should consider the appointment of a person to act as ancillary executor specifically for that non-California property, or to authorize the executor or another to appoint an ancillary executor. California Probate Code Section 8422.

IV. Bonds

The Will may require or the court may determine that the executor needs to post a bond to protect the assets of the estate. It is important to check the local rules for each county to determine whether or not the court requires a bond. For instance, Alameda County requires bond for out-of-state executors, even if the Will waives bond. Unless the testator specifically waives bond in the Will, the probate court will fix the amount of the bond subject to statutory minimums. California Probate Code Section 8480 et seq.

V. Probate

An executor must deposit the Will with the court within 30 days of the notification of the death of the testator. There are a number of reasons to admit a Will for probate. First, where the assets of the estate are worth more than $60,000, the executor must open probate. If the decedent's real and personal property in California is worth less than $60,000, the executor may want to file a declaration under California Probate Code Section 13100 et seq.

Probate may be useful, however, where there are significant debts and not enough assets to pay them all. Under Section 13000 et seq., the individual beneficiaries who receive...
the assets of the estate through summary administration are personally liable up to the amount of the asset they receive for the debts of the estate. Probate discharges the debt so that no individual is liable.

VI. Guardianship

Where the testator has minor children, he or she should include a clause in the Will nominating a guardian. There are two types of guardians. A guardian of the person takes care of the child's well-being, including education, religious upbringing, medical care and day-to-day decisions. A guardian of the estate manages the child's property and assets. See Probate Code Section 1500 et seq.

Where the testator has included guardianship provisions in the Will, the court may consider the appointment of that person as guardian. The appointment, however, is completely discretionary with the court. Will provisions are merely advisory. While a court normally gives custody of the child to the surviving parent, a court is inclined to follow the recommendations of the testator.

Where the testator has nominated a non-biological relative as the guardian, it is a good idea to include as much language as possible supporting the choice. In addition, when making a gift to a minor, the Will drafter should always consider creating a Testamentary Trust for passing property to the minor child.

VII. Life Insurance

The Will cannot change life insurance designations. The testator should make all designations for insurance with the company that issues the policy or through the place of employment. Unless the testator designates the estate as beneficiary in the insurance policy, the insurance proceeds will pass outside the will to the designated beneficiary. If the estate is the designated beneficiary, or if the designated beneficiary predeceased the testator, then the insurance proceeds will pass under the specific directions of the Will. If the testator fails to make a specific provision in the Will, the insurance proceeds pass to the residuary beneficiary.

VIII. Witnesses to a Will

There must be two witnesses to a formal Will who sign as witnesses at the end of the Will, in the testator's presence and at the testator's request. These witnesses must also have been present at the time the testator signed the Will. The probate court will not waive these formalities since they are designed to prevent fraud. Estate of Krause, 18 Cal. App. 2d 623, 625, 117 P.2d 1, 2 (1941).

Anyone over the age of eighteen may act as an attesting witness if competent to testify to the relevant facts: that the testator signed the Will or directed it to be signed, and that the testator appeared to be of sound mind and under no duress, fraud, or undue influence. Creditors of the testator or executors named in the Will can act as witnesses in California. California Probate Code Section 6112; Estate of LaMont, 39 Cal. 2d 566, 248 P.2d 1 (1952); Estate of Haupt, 200 Cal. 147, 252 P. 597 (1926). A beneficiary under the Will can act as a witness under California Probate Code Section 6112(b) under certain circumstances.
Nevertheless, it is a far better practice not to allow any beneficiary to act as a witness. Be sure to read the code section carefully before proceeding with a beneficiary as a witness.

**IX. Disinheritance Clauses**

If the testator has a spouse, children, or issue of deceased children, whom the testator intentionally wishes to leave out of his Will, the willmaker should name that disinherited person and state that the disinheritance is intentional. In addition, it is advisable to state the reason for the disinheritance (e.g., the disinherited person is well provided).

**X. Funeral and Burial Instructions**

An executor must follow the funeral and burial instructions in a Will irrespective of whether the Will is valid or whether the executor offers the Will for probate. California Health & Safety Code Section 7100. Caution the testator that no one will review the Will until after the memorial services. Therefore, the testator should give a copy of the executed Will to a third party and inform that person that the Will contains burial or cremation instructions.

**XI. Will Contests**

Basically, a Will contest is a process whereby persons may attack the provisions of a Will due to the testator’s alleged lack of capacity or because of a third party’s wrongdoing. They may attack the Will before probate, or after the executor has admitted it to probate, in an attempt to invalidate the Will. Anyone may file objections in a pre-probate contest. California Probate Code Sections 8250 et seq. and 8004. Any "interested person" may file a petition for revocation within 120 days after probate is opened. California Probate Code Section 8270 et seq.

**A. Interested Person.** California Probate Code Section 48 liberally defines "interested person" as an heir, devisee, child, spouse, creditor, beneficiary, and any other person having a property right in or claim against a trust estate or the estate of a decedent which may be affected by the proceeding, any person having priority for appointment as personal representative. An "interested person" may also vary according to the circumstances.

1. An heir at law: one entitled to a share of the decedent’s estate if the decedent had died without a Will;


3. A creditor or other person having a property right in or claim against the decedent’s estate. In re Harootenian’s Estate, 38 Cal. 2d 242, 238 P.2d 992 (1951).

B. Grounds to Contest a Will. There are typically three grounds to contest a Will: fraud; duress and undue influence; and lack of testamentary capacity.

1. *Fraud.* Fraud occurs when the testator makes a particular bequest or devise based on a third party's misrepresentations. The misrepresentation must have induced the testator to make the Will or bequest, not simply that there was a misrepresentation. Fraud also occurs when one induces the testator to sign a document which the testator does not know is a Will. *In re Lorenz's Estate,* 136 Cal. App. 2d 239, 288 P.2d 578 (1955).

2. *Duress and Undue Influence.* Often alleged together, a claim of duress or undue influence essentially asserts that someone has manipulated the testator into making a Will or particular bequest which, but for the influence or pressure exerted by that person, the testator would not have made. *Estate of Baker,* 131 Cal. App. 3d 471, 182 Cal. Rptr. 550 (1982).

The court usually evaluates undue influence in terms of the testator's susceptibility to influence; the third party's opportunity and motive to influence; and an unnatural disposition of the testator's property. The court will presume undue influence in two situations that places the burden on the beneficiary to prove the testator made the bequest voluntarily:

(a) Where the testator has made a devise or bequest to a witness of the Will, the court will presume the witness obtained the bequest through undue influence. California Probate Code Section 6112. Unless there are two other disinterested witnesses who subscribe to the Will in addition to the "interested" witness, the presumption will operate. *Id.*

(b) Where the testator has made a devise or bequest to someone who occupies a confidential relationship to the testator and that person has actively participated in the preparation or execution of the Will and unduly benefits from the Will, the court will presume that the beneficiary procured the bequest or devise by undue influence. *Estate of Baker,* supra; *Estate of Goetz,* 253 Cal. App. 2d 107, 61 Cal. Rptr. 181 (1967).

3. *Lack of Testamentary Capacity.* Testamentary has two elements: age and mental state. A testator must be over the age of 18. The testator is also required to be aware of and understand the extent of his or her property, the significance and nature of the execution of the Will (i.e., that by so doing, the testator is disposing of his or her property), and the relationship of the testator to those who would ordinarily inherit his or her estate (commonly referred to as the "objects of the testator's bounty"). *Estate of Lockwood,* 254 Cal. App. 3d 309, 309, 62 Cal. Rptr. 230 (1967); *In re Fosselman's Estate,* 48 Cal. 2d 179, 308 P.2d 336 (1957); *In re Mickelson's Estate,* 37 Cal. App. 2d 450, 99 P.2d 687 (1940).

The court presumes testamentary capacity, or competence. The burden of proof lies with the Will's challenger to show that the testator lacked the requisite capacity. See *Estate of Lockwood,* supra; *Estate of Goetz,* supra.

In an attempt to prove capacity or the lack of capacity, the court will take testimony from the following persons:

Family and close friends of the testator: In re Lingenfelter’s Estate, supra.

The attorney who drafted the Will: Estate of Goetz, supra; In re Lingenfelter’s Estate, supra.

XII. Guarding Against a Will Contest

An attorney can take precautions to lessen the chance that his or her client’s Will will be vulnerable to attack. The court may call witnesses of the Will to testify. The attorney, therefore, should know where to locate these people. The testimony of witnesses, their observations regarding the testator’s appearance or the testator’s statements at the time of the Will’s execution, may be critical. It is also important that at least two of the witnesses to the Will be impartial, that is, that they are not takers under the Will. The attorney should explain to his or her client that having a named beneficiary under the Will as a witness to its execution -- without the signatures of two other disinterested witnesses -- is an open invitation to a claim of undue influence.

The client should assume as much responsibility as is possible in creating and implementing his or her testamentary scheme. It is imperative that the client makes his or her own decisions independently, without the intervention of others. The more it appears to the court that a “committee” executed the client’s Will, the stronger an opponent’s case for undue influence becomes.

The attorney should not include a named beneficiary in discussions with the client about the Will. Therefore, discourage lovers, friends, or other prospective beneficiaries from participating in the Will’s preparation.

XIII. A Note on Holographic Wills

Often fraught with legal difficulties, a holographic Will may be the only option for an emergency client. In order for a holographic Will to be valid under California law, the testator need only handwrite the Will’s material provisions and sign the Will. Whereas a holographic Will does not require witnesses, the signatures of witnesses will not necessarily invalidate an otherwise valid holographic Will. California Probate Code Section 6111 et seq.

There are no restrictions on the content of a holographic Will. Nonetheless, it is helpful if the testator appoints an executor to administer the Will and provides for the executor’s bond. An attorney should advise the testator to identify his or her beneficiaries carefully, to describe any gifts of property fully, and to write any desired disinheritance provisions clearly. Although California law generally upholds the validity of holographic Wills, an attorney should advise the testator to handwrite all provisions and to sign and date the Will.

Despite the flexibility of California law, problems frequently occur if the testator fails to date the Will or if the Will contains some printed provisions or portions in someone else’s handwriting:

A. Undated Wills. There are two major problems with undated holographs. If the testator drafted more than one Will, the court may not be able to determine
which Will is the last Will. Furthermore, the court may not be able to determine if the testator executed the document at a time when she or he possessed testamentary capacity.

1. Conflict With Other Wills. If no one offers another Will into probate, an undated holograph is valid. If another Will exists, the undated holograph is invalid with regard to conflicting provisions, unless the court can establish that the testator executed the undated holograph after the date of the other Will. If the conflict between the two Wills involves only a portion of the decedent’s property, the holograph remains valid as it relates to the uncontested property.

Similarly, if two undated holographic Wills exist, neither is valid regarding the provisions in conflict. If, however, the two Wills are consistent on other matters, those provisions are valid.

2. Challenges to Testamentary Capacity. If the court determines the testator lacked capacity at any point during the period when the testator might have executed the undated holograph, the Will is invalid. A party of interest may introduce extrinsic evidence to show that the testator had the requisite testamentary capacity at the time of execution. For example, a person who saw the testator make the holographic Will can testify that he or she had capacity at that time. Similarly, a party can also introduce extrinsic evidence in a conflicting Will situation.

B. Wills Not Entirely Handwritten. Although only material provisions have to be in the testator’s writing, courts take many views of what is material. Where there exists a printed portion, the court must decide either that the printed matter is material, in which case the entire Will loses its validity, or that the printed matter is immaterial, in which case the court will disregard only that section. Presumably, any provision that distributes property or administers the estate is material.
AN OVERVIEW OF WILLS AND DECEDEANTS’ ESTATES

A number of situations may arise that require familiarity with the testamentary provisions from the codes of other states. A California attorney may need to know a different state’s laws in such areas as:

- how an estate passes in the absence of a valid Will (Intestate Distribution);
- how a Will is made (Execution);
- how a Will is revoked by its maker (Revocation);
- how an estate becomes subject to judicial evaluation and the objections of parties (Probate); or
- how an estate is dispersed (Administration).

The following review is intended only as an introduction to some recurring issues in wills and decedents’ estates.

Adult Adoption

In all jurisdictions an adopted person takes by intestate succession in the same manner as a child or “issue” of the decedent. Unmarried partners considering the adoption of one member of the couple by the other, however, should be sure that the code of the state of which the decedent was a resident permits adoption of adults, and if so, with what restrictions.

Spouse’s Share with Issue

If the decedent dies leaving a spouse and a child or children, the spouse’s share of the estate can range from the 1/3 to the entirety, in absolute ownership (in “fee”) or for life, and may include everything in the estate or only real property (“realty”) or personal property, i.e., tangible possessions and money (“personalty”). In those states which have not abolished “dower and curtesy,” the surviving spouse is typically entitled to a portion of the estate for life plus ownership in fee of decedent’s personalty or some share thereof.

Priorities If No Spouse

If the intestate decedent dies without a spouse, his or her estate passes automatically in the order indicated by statute. Usually a statute provides distribution of the estate to the intestate decedent’s children and to the children of those who are dead, the grandchildren taking only their deceased parent’s share. This is called taking by representation or “per stirpes.” If a statute makes no mention of “representatives,” the estate may not pass to a deceased family-member’s children, but may go only to living persons of the deceased member’s generation. Research carefully.
"Collateral heirs" or "next of kin" refer to family members outside lineal ascent and descent from the decedent, and not previously designated as representatives. Examples are cousins and great uncles and aunts.

**Survival Time**

Some states require a certain period of time to pass between the death of the decedent and the time at which the estate passes to the heirs. If the heirs fail to live to this time (usually because the same catastrophe which killed the decedent has gravely injured them), they predecease the decedent for purposes of intestate succession. Many states have adopted provisions of the Uniform Simultaneous Death Act ("USDA"); see *Uniform Laws Annotated, Master Edition, Vol. 8A*.

**Requisites of Capacity**

Every state requires a testator to be of sound mind at the time he or she executes his or her will. The testator's subsequent mental capacity is irrelevant to the validity of the will. Variations occur occasionally regarding the requisite age of the testator, and the effect of marriage or military service on the age required for making a will.

**Number of Witnesses**

Nearly every jurisdiction requires a valid will to be subscribed by at least two persons competent at the time to be witnesses in the state in which the will is executed. Some states, however, require three witnesses. When executing a will in an estate containing out-of-state property an attorney should check the requirements of that state.

**Holographic Wills**

A holographic Will is a testamentary document written entirely or in its material provisions by the testator, signed and perhaps dated. States are split in allowing the probate of holographic Wills, and those that do usually impose strict requirements on the testator.

**Self-proved Wills**

Traditionally, when a Will was admitted to probate some or all of the subscribing witnesses had to attest to their signatures before the court. To avoid this onerous requirement, many states allow a testator or an interested party to "self-prove" a Will at any time after its execution by having the witnesses declare before a notary that the signatures on the document are theirs.

**Can Witness be Beneficiary?**

To avoid fraud, duress, and undue influence in the making of Wills, many states refuse to permit a beneficiary to act as a subscribing witness. The penalty falls on the witness: the Will remains valid, but the bequest to the interested witness is void. The witness may still take so much of the estate as he or she would have been entitled to had the estate passed through the laws of intestate succession. Some states impose this condition upon the spouse of a beneficiary named in a Will, when the spouse acts as a witness.
Revocation Methods

In every state a subsequent Will revokes a prior Will, but in some, the revocation must be express. Inconsistent provisions may imply a partial revocation, leaving consistent terms intact. Most states retain all or some of the traditional means of physical revocation: burning, tearing, cancelling (i.e., crossing out), obliterating, or destroying. Obviously, the physical act cannot be inadvertent. However, the testator seeking to make a physical revocation must intend the revocation at the same moment as performing the act, and not later, for the revocation to be effective. Divorce and annulment typically revoke provisions to a former spouse. In some states, marrying or having children subsequent to the execution of a Will acts as a revocation, unless the Will provides for these status changes.

Can Executor Act Prior to Appointment?

Can a nominal executor take custody of a deceased testator's body and arrange funeral services before being officially empowered by the court? In many states the answer is yes. Since the goal of probate is to act in accord with the decedent's Will, if the decedent has named an executor, adherence to this goal requires the court to endorse acts undertaken on the decedent's behalf in good faith by the same, subsequently appointed executor.

Informal Probate

Some kind of informal or "common form" probate is available in those states which wish to facilitate the probate of uncontested estates by permitting administration after "interested parties" (the heirs at law or by devise) have been given notice.

When to Contest a Will

In most states, only an interested party can contest a Will. It may be contested before probate, on admittance to probate, within 4 to 12 months after admittance, or at any time during the probate, depending upon the jurisdiction and the grounds of the objection. Contest of an informal probate often implies the commencement of formal, or "solemn form" testacy proceedings yielding conclusive results. Appeals from judgments of the court in either formal or informal proceedings may be taken long after probate if an interested party was under a disability (minority, lunacy, nonresident status) at the time probate was begun.

Order of Claims

When a decedent's estate is insufficient to meet all financial claims outstanding at the time of death the states require the personal representative of the estate to pay debts in a statutorily prescribed order of preference. The personal representative is appointed by the court to administer the estate: collect the debts and pay the bills. Within each class, no debt or kind of debt may be preferred to another.

Summary Administration Procedure

Many states permit a decedent's spouse, next of kin, or personal representative to distribute the estate and collect debts when the real and/or personal property of the decedent has little or no net worth, or when the value of the estate is simply at or below a statutorily defined limit. Distinguish this procedure from informal probate: informal probate exists to move uncontested probates through the courts with maximum efficiency, regardless of an estate's value; summary administration is only available when the estate has a moderate-to-negative value and no contest is made. These procedures remain distinct even in those few states which group them under a single, informal probate statute.
ATTACHMENT A

Will Checklist

WILL DRAFTING CHECKLIST

A. Personal and family data

1. Full name (including middle name), aka
2. Address, telephone -- both home and business
3. County of residence; how long in California
4. Married? name of spouse
   a. If separated, when?
   b. Dissolution pending? get county and action number
   c. Divorce, when? get information on prior marriages and divorces
5. Children -- names and dates of birth
   a. Any deceased children?
   b. Any grandchildren?
6. Business or occupation; employer
7. Social Security number
8. Estimated annual income from business and other sources

B. Total assets

Find out date acquired, cost, present value, encumbrances, and forms of title, if possible; be sure to total the gross value; if the estate is not simple and of small value refer to estate planning attorney where possible

1. Real property -- in California and out-of-state
2. Bank accounts -- location
3. Stocks and bonds
4. Tangible personal property -- autos, furniture, boats, etc.
5. Life insurance -- face amounts, beneficiaries
6. Death and retirement benefits -- how much and benefits
7. Debts owed to client
8. Business interests -- partnerships, sole proprietorships, controlled corporations
9. Copyrights, patents
10. Other -- antiques, stamp collections, rare books, etc.
11. Expectancies -- beneficial interests in trusts, expected inheritances of gifts, power of appointment

C. Will provisions

1. Testamentary gifts -- name contingent beneficiaries
   a. Household effects and other tangible personal property
   b. Gift of residence
   c. Other real property -- subject to encumbrances?
   d. Gifts of money -- note if gifts to minors
   e. Gift of specific items
   f. Residue
2. Executor and alternate/successors. Bond waiver?
3. Guardian, if minor children -- guardian of children, guardian of estate
4. Funeral and burial instructions
5. No contest clause?
6. Intentional omission clause?

D. Some tips for the lawyer (and the client)

1. When interviewing the client, find out the relationship of the beneficiaries to the client, i.e., friend, mother, cousin. See the client alone whenever possible.

2. If the client leaves something to a person and then a gift over to the person's children, find out if it is by right of representation or if the gift over is to the children then living. Example: "... in equal shares to my children who survive me" (per capita distribution); "... to my issue who survive me, by right of representation" (if testator's child predeceases her/him, then that child's share would go to the child's issue, and not divided among remaining children living at death of testator).

3. Try to discourage clients attaching a list of items to the Will to be distributed or leaving the list in her/his safe deposit box and referring to it in the Will. It's a good idea to list all these items in a Codicil (if it is a long list and would make the Will lengthy). Then the client can revise the Codicil and not redo the Will at the time. As an alternative, advise clients to leave all their property to a trusted friend with written instructions for distributing the property. Advise clients that this list is not legally binding. Check to ensure clients are comfortable with this approach.

4. Advise a client that even though there are burial instructions in the Will, it is a good idea to leave the instructions with someone else or place the instructions among personal papers. Various agencies provide cards with instructions to carry in the wallet.

5. If a client lists a gift to a charity, get the full name and address of the charity, if possible.

Example: SPCA is not good enough; designate it the Society for the Prevention of Cruelty to Animals of San Francisco, 2500 16th Street, San Francisco, California 91002. (Indefinite names of charities have led to much litigation, especially in huge estates.)

6. If a client wants her/his pet "put to sleep" upon the client's death, try to discourage this. Instead, have the client leave the pet to a friend to place in a home or to Pets Are Wonderful Support (PAWS) directly. If the client still insists, the client can tell the friend to put the pet down, but at least it will not be written in the Will. This kind of informal request is not legally binding and the person to whom the client leaves the pet can do what s/he wants.

7. One reason for all the questions on the value of the assets is to determine if the estate is large enough for federal estate taxes. As you know, California no longer has inheritance taxes to worry about. If a client dies after 1987, the threshold amount for estate taxes is $600,000. If the client has a large or complex estate plan send the client to an estate planner for in-depth estate planning.
SAMPLE WILL #1
(for small estate)

LAST WILL AND TESTAMENT
OF
[NAME OF CLIENT]

I, [NAME OF CLIENT], a resident of the City of ________________, County of ________________, California, declare this to be my Will, and I hereby revoke all wills and codicils that I have previously made.

FIRST: I am unmarried and have no children. The members of my immediate family are [NAMES OF RELATIVES WHO WOULD SHARE INTESTATE ESTATE].

SECOND: To my friends, I give the following: To [FRIEND ONE], I give ___________. To [FRIEND TWO], I give ___________. I direct my executor to distribute the remainder of my personal possessions between [FRIEND ONE], [FRIEND TWO], and [FRIEND THREE] in the manner that my Executor deems appropriate, taking into consideration any wishes that I have made known to my Executor prior to my death.

THIRD: To the following relatives and friends who survive me, I give all the rest of my estate on the following shares: To [RELATIVE ONE], I give _____ share(s), to [RELATIVE TWO], I give _____ share(s), to my friend, [FRIEND ONE], I give _____ share(s), to my friend, [FRIEND TWO], I give _____ share(s), to my friend, [FRIEND THREE], I give _____ share(s). In addition, my executor shall receive _____ share(s) in compensation for my executor's services.

FOURTH: I appoint my friend, [FIRST EXECUTOR], to be my executor to serve without bond. If [FIRST EXECUTOR] is unable or unwilling to serve, I appoint [SECOND EXECUTOR] to serve without bond. If [SECOND EXECUTOR] is unable or unwilling to serve, I appoint [THIRD EXECUTOR] to serve without bond. My estate shall be administered under the California Independent Administration of Estates Act. I authorize my executor to sell or lease all or any part of the property of my estate, at public or private sale, with or without notice, as my executor, in his or her sole and absolute discretion, considers necessary for the proper administration and distribution of my estate.

FIFTH: Except as otherwise provided in this Will, I have intentionally and with full knowledge omitted to provide for my heirs. I do this, not out of a lack of affection, but because I know my family is adequately provided for. If any person who, if I died intestate would be entitled to any part of my estate, shall either directly or indirectly, alone or in conjunction with any other
person, claim in spite of my Will an intestate of my estate, I give that person One Dollar, and no more, in lieu of any other share or interest in my estate.

If any beneficiary under this Will in any manner, directly or indirectly, contests this Will or any of its provisions in any legal proceeding that is designed to thwart my wishes as expressed in this Will, any share or interest in my estate given to that contesting beneficiary under this Will is revoked and shall be disposed of in some manner provided herein as if that contesting beneficiary had predeceased me.

SIXTH: I request that my body be cremated and that my executor arrange for disposition of my body in the manner that she or he deems most appropriate unless prior arrangements have been made by my attorney-in-fact for health care decisions. To have published in any newspaper an obituary notice containing whatever information she or he may choose. I request that my executor consider my wishes in this matter if I have made my wishes known to my executor before my death.

If any provision of this Will, or of any Codicil, is invalid, it is my intention that all of the other provisions be fully effective.

IN WITNESS WHEREOF, I have executed this, my Will, on this _______ day of ________________, 19____, at ______________, ______________, California.

____________________________________[Signature]

ATTESTATION

THE FOREGOING INSTRUMENT, consisting of ______ pages, including the one signed by us, was at the date hereof, by, signed as and declared to be the testator's Will, in the presence of the testator, and in the presence of each other, have subscribed our names as witnesses thereto. Each of us observed the signing of the Will by the testator and by each other subscribing witness and knows that each signature is the true signature of the person whose name was signed.

Each of us is now more than eighteen (18) years of age and a competent witness and resides at the address set forth after each name.

We are acquainted with the testator. At this time the testator is over the age of eighteen (18) years, and to the best of our knowledge, is of sound mind and is not acting under duress, menace, fraud, misrepresentation, or undue influence.

We declare under penalty of perjury that the foregoing is true and correct.

Executed on ________________, 19____, at ______________________________________.

[Signature]

[Signature]

Address

Address
SAMPLE WILL #2

LAST WILL AND TESTAMENT

OF

[NAME OF CLIENT]

I, ________________, a resident of County, California, being of full age, sound mind and memory and under no restraint, declare this instrument to be my Last Will and Testament and hereby revoke all Wills and Codicils that I have previously made.

I.

1.a. I do hereby declare that I am single and have no living or deceased children or children of predeceased children. The members of my immediate family are ____________________________

OR

1.b. I do hereby declare that I am single, having never been married. I have ______ children, namely ________________________, born ____________________________, and namely ________________________, born ____________________________.

OR

1.c. I do hereby declare that I am married and have no living or deceased children or children of predeceased children.

OR

1.d. I do hereby declare that I am married and have _____ children, namely ________________________, born ____________________________, and namely ________________________, born ____________________________.

OR

1.e. I do declare that I am single. I was married to ____________________________ and was divorced in ____________________________ County. I have ______ children, namely ________________________, born ____________________________, and namely ________________________, born ____________________________.
I further declare that this Will is not related to any contract to make a Will or any agreement similar to such a contract to make a Will entered into by me with any other person, and I further declare that there is no such contract, written or oral.

II.

I nominate ___________________________ as Executor of this Will, to serve without bond. Should ___________________________ be unavailable to serve as Executor, I nominate ___________________________ to serve as Executor of this Will, without bond.

2.a. My Executor shall have the authority to distribute property as provided herein, and shall further have the authority to sell, with or without notice, at either public or private sale, any property belonging to my estate [, excepting the property listed in Paragraphs ______, ______, and ______ of this Will], in order to pay any of my expenses before my death or any expenses of my estate, subject only to such confirmation of the Court as may be required by law. My estate shall be administered under the California Independent Administration of Estates Act. I direct my Executor to pay all of the expenses of my last illness, of my [CHOOSE ONE: funeral and burial (OR) funeral and cremation (OR) burial (OR) cremation], and of the administration of my estate.

OR

2.b. My Executor shall have the authority to distribute property as provided herein, and shall further have the authority to sell, with or without notice, at either public or private sale, any property belonging to my estate [, excepting the property listed in Paragraphs ______, ______, and ______ of this Will], as my Executor, in his or her sole and absolute discretion, considers necessary for the proper administration and distribution of my estate. My estate shall be administered under the California Independent Administration of Estates Act. I direct my Executor to pay all of the expenses of my last illness, of my [CHOOSE ONE: funeral and burial (OR) funeral and cremation (OR) burial (OR) cremation], and of the administration of my estate.

III. [OPTIONAL]

I direct that all inheritance, estate, transfer and other death taxes (including interest and penalties) assessed or payable by reason of my death on any property or interest in property which is included in my estate for the purpose of computing taxes be paid by my Executor out of the residue of my estate disposed of by this Will, without adjustment. No such taxes shall be charged to or collected from any beneficiary of my probate estate, nor from any transferee or beneficiary of any property outside my probate estate.

IV. [OPTIONAL]

I hereby authorize my executor to utilize the services of an attorney, accountant, and any other professional as may be necessary in the administration of this, my Last Will and Testament. My Executor named herein shall be entitled to [reasonable compensation commensurate with the services actually performed and to] reimbursement for these and other expenses properly incurred. [See also paragraph 6.b.]
V.

5.a. [All Property to One Beneficiary] I give, devise and bequeath my entire estate, whether real, personal, or mixed, of every kind, nature and description whatsoever, and wherever situated, which I may now own or hereafter acquire, or have the right to dispose of at the time of my death, by the power of appointment or otherwise, to ______________, absolutely and in fee simple. If ______________ shall predecease me, then this property shall pass instead to ______________.

5.b. [All Property to One Beneficiary; Testator Hopes That Beneficiary Shall Share Property with Friends and Family] I give, devise and bequeath my entire estate, whether real, personal, or mixed, of every kind, nature and description whatsoever, and wherever situated, which I may now own or hereafter acquire, or have the right to dispose of at the time of my death, by the power of appointment or otherwise, to ______________, absolutely and in fee simple. It is my hope that ______________ shall share this bequest with my other friends and family, but ______________ shall have the sole and absolute authority to distribute any property received. If ______________ shall predecease me, then this property shall pass instead to ______________, with the same conditions and hope that ______________ will share this bequest with my other friends and family.

5.c. [Specific Bequests] To ______________, I leave ______________. Should ______________ predecease me, then this gift shall lapse and become part of the residue of my estate [OR: then this gift shall pass instead to ______________].

5.d. [Specific Bequests - Joint Beneficiaries] To ______________ and ______________ jointly, or to the survivor of them solely should either of them predecease me, I leave ______________. Should both ______________ and ______________ predecease me, then this gift shall lapse and become part of the residue of my estate.

VI.

6.a. After the payment of all my expenses before my death and estate expenses, I leave the rest, residue and remainder of my estate, of whatever character and wherever located, which I may now own or which I or my estate may hereafter acquire, or have the right to dispose of at the time of my death, by the power of appointment or otherwise, which is not otherwise disposed of by this Will, to ______________ [OR my wife, ______________, OR my husband, ______________, OR my children, to share and share alike].

6.b. To the following relatives and friends who survive me, I give all the rest of my estate in the following shares: To ______________, I give a _____ share; to ______________, I give a _____ share; to ______________, I give a _____ share, etc. In addition, my Executor shall receive a _____ share in compensation for his or her services.

VII.

7.a. [Specific Disinheritance] It is not my intention to make provision in this, my Last Will and Testament, for ______________ or for any relative, next of kin or any other person not expressly provided for herein, except for children born to or legally adopted by me after the date hereof, and if any such relative, heir or person has not been expressly mentioned herein, he or she has been omitted by me intentionally and with full knowledge of his or
her relationship and existence. I do this, not out of a lack of affection, but because I know my family is adequately provided for. If any person who, if I died intestate would be entitled to any part of my estate, shall either directly or indirectly, alone or in conjunction with any other person, claim in spite of my Will a share of my estate, I give that person One Dollar ($1.00), and no more, in lieu of any other share or interest in my estate.

7. b. If any beneficiary under this Will in any manner, directly or indirectly, contests this Will or any of its provisions in any legal proceeding that is designated to thwart my wishes as expressed in this Will, any share or interest in my estate given to that contesting beneficiary under this Will is revoked and shall be disposed of in some manner provided herein as if that contesting beneficiary predeceased me.

7. c. If any beneficiary shall object to the probate of this Will or in any manner directly or indirectly, contest or aid in the contesting of this Will, any provisions hereof or any part of the estate hereunder, then he or she shall be deemed to have predeceased me for the purposes of this Will and any provisions herein contained.

VIII.
[OPTIONAL]

(Guardian for Minor or Incapacitated Children)

I direct that __________________________ shall serve as guardian of person for __________________________ and __________________________ in the case the other parent legally entitled to custody is unavailable. If __________________________ is unavailable to serve as guardian, I direct that __________________________ shall serve as guardian.

I believe that it would not be in __________________________'s best interest to be raised to the age of majority by [any of the members of my immediate family] [by the child's other parent] for the following reason:

[LIST REASONS]

If __________________________ is not appointed as guardian, I request that s/he be granted extensive visitation rights with __________________________.

I further direct that __________________________ shall be appointed as the guardian of the estate of __________________________ in the event that he/she is still a minor at the time of my death.

IX.
[OPTIONAL]

I wish to note that I have life insurance, and that nothing in this Will is intended to contradict the designations made therein or to limit the ability to alter such designations.

X.

10. a. It is my wish that after my death my body be cremated.

OR

10. b. It is my wish that after my death my body be buried.

OR
10.c. It is my wish that after my death my body be embalmed and placed in a sealed casket for services at and burial in the family plot.

OR

10.d. It is my wish that after my death my remains be cremated and my ashes be given to __________________________ [OR: my Executor], to dispose of as sees fit unless prior arrangements have been made by my attorney-in-fact for health care decisions.

OR

10.e. I direct that my remains be cremated, that the ashes be placed in an urn and that the urn be deposited at a place selected by my Executor.

AND [OPTIONAL]

10.f. I request that my Executor arrange for disposition of my body in the manner that he or she deems appropriate unless prior arrangements have been made by my attorney-in-fact for health care decisions.

OR

10.g. I authorize my Executor to have published in any newspaper an obituary notice containing whatever information my Executor may choose.

XI. (No Funeral or Memorial Service)

I direct that no funeral or other memorial service be conducted.

XII.

If any part, class, provision or condition of this Will is held to be void, invalid or inoperative, I direct that such invalidity shall not affect any other part, clause, provision or condition of this, my Last Will and Testament, and that the remainder of this Will shall be carried into effect as though such part, clause, provision or condition had not been contained herein.

XIII.

If I and any beneficiary under this, my Last Will and Testament, should die in a common accident or disasters or under such circumstances that it is difficult or impractical to determine who survived the other, or if any beneficiary, though surviving me, should die within days from and after the date of my death, then such beneficiary shall be deemed to have predeceased me.

NOW, THEREFORE, in the presence of witnesses, I sign my name to this, my LAST WILL AND TESTAMENT, consisting of ______ typewritten pages, including the Statement of Witness page, on this ______ day of ______, 19____, at __________________________.

_____________________________________________________

Name of Testator/Testatrix
STATEMENT OF WITNESSES

Each of us declares under penalty of perjury under the law of the State of California that ______________________ declared this instrument to be his/her Will and signed this Will in our presence, all of us being present at the same time, and we now, at ______________________'s request, and in his/her presence, and in the presence of each other, sign below as witnesses, declaring that ______________________ appears to be of sound mind and under no duress, fraud or undue influence.

Date: ____________________________
Print Name: _______________________
Address: _________________________

Date: ____________________________
Print Name: _______________________
Address: _________________________

Date: ____________________________
Print Name: _______________________
Address: _________________________
SAMPLE WILL #3

LAST WILL AND TESTAMENT

OF

[NAME OF CLIENT]

I, (name), a resident of County, California, declare this to be my Will, hereby revoking all prior Wills and Codicils.

FIRST: I declare that I am not and have never been married.

[OR: I declare that I am married to (name).]

[OR: I declare that I am single. I was married to (name), and was divorced from such spouse in (year) in the County of , State of .]

I declare that no children have been born to or legally adopted by me.

[OR: I have (a child/children), namely, (name), born on (date), [and (name), born on (date)]. No other children have been born to or adopted by me.]

[If spouse to be excluded: I acknowledge the existence of my spouse, (name), and intentionally with full knowledge choose not to provide for such spouse in this Will.]

[If child/children to be excluded: I acknowledge the existence of my child (children), (names), and intentionally with full knowledge choose not to provide for such child (children), or for the issue of such child (children), in this Will.]

SECOND: I nominate (name) as Executor of my Last Will and Testament to serve without bond or surety of any kind.

[If client has an alternate Executor: If (name) fails to qualify, is unable, is unwilling, or ceases to act as Executor, then I nominate (name) as Executor to serve without bond.]

* Fred Nagel of the San Diego AIDS Legal Project developed sample will forms #3 and #4.
The term "Executor" as used in this Will shall include any personal representative(s) of my estate. I authorize my Executor to sell at either public or private sale and to lease, with or without notice, any property belonging to my estate, subject only to confirmation of court required by law.

THIRD: If at my death anyone who takes from me by my Will or by succession is under the age of eighteen (18) years, I appoint my Executor as guardian of any of the property that such minor takes from me. My Executor may, at my Executor's discretion, sell for the minor's account any part of the minor's share.

Any property or its proceeds distributable to a person under the age of eighteen (18) years may be delivered without bond to any suitable person with whom the minor resides or who has care or control of the minor.

If minor children exist and client has wishes about a guardian: If at any time after my death it is necessary to appoint a guardian for any child of mine, I nominate _______________________ (name) as guardian of the person and of the estate of such child.]

If minor children exist and client has a second choice: If _______________________ (name) fails or ceases to serve as guardian, I nominate _______________________ (name) as guardian of the estate and of the person of such child.

If minor children exist and client wants visitation rights for 1st choice guardian: If _______________________ (name) is not appointed as guardian, I request that _______________________ (name) be granted extensive visitation rights with any such child who is a minor.

FOURTH: I direct my Executor to pay all of the expenses of my last illness, of the administration of my estate, and of the disposition of my remains.

[If client has particular gifts]

FIFTH: I give all property over which I have power of testamentary disposition as follows:

A. Particular Bequests

1. [To my _______________________ (relationship), _______________________ (name), I give __________
(gift). Should _______________________ (name) predecease me, then this gift shall]

[OR To my _______________________ (relationships), _______________________]
Testamentary Documents 2.27

(names), I give _____________________ (gift), in equal shares, or all to the survivor of them. Should _____________________ (names) predecease me, then this gift shall]

[OR To the charitable organization of _____________________ (name), located at _____________________ (address), I give _____________________ (gift). Should this charitable organization cease to exist before the distribution of this gift, then this gift shall]

[pass instead to my _____________________ (relationship), _____________________ (name).]

[OR pass instead to my _____________________ (relationships), _____________________ (names), in equal shares, or all to the survivor of them.] 

[OR pass instead to the charitable organization of _____________________ (name), located at _____________________ (address).] 

[OR (name) will share this property with _____________________ (name/s and/or relationship/s), in any way that _____________________ (name/names) deem(s) appropriate, taking into account any wishes that I have made known to _____________________ (name/names) prior to my death.] 

[Go to paragraph 6.]

2. (Repeat as necessary)

B. Remainder Clause

I give all of the rest and the residual of all my property, whether real, personal, or mixed, of whatever kind and character, and wherever located, to [my _____________________ (relationship), _____________________ (name).* If _____________________ (name) predecease me, then this property shall]

[OR my _____________________ (relationships), _____________________ (names), in equal shares, or all to the survivor of them.* If _____________________ (names) predecease me, then this property shall]

[OR the charitable organization of _____________________ (name), located at _____________________ (address). Should this charitable institution cease to exist before the distribution of this property, then this property shall]

[pass instead to my _____________________ (relationship), _____________________ (name).*]

[OR pass instead to my _____________________ (relationships), _____________________ (names), in equal shares, or to the survivor of them.*]

[OR pass instead to the charitable organization of _____________________ (name), located at _____________________ (address).]

[*For optional use after any text marked with asterisk: Although _____________________ (name/names) shall have the sole and absolute authority to distribute this property, I have made this bequest on the condition and with the hope that _____________________ (name/names) will share this property with _____________________ (name/s and/or relationship/s), in any way that _____________________ (name/names) deem(s) appropriate, taking into account any wishes that I have made known to _____________________ (name/names) prior to my death.]
FIFTH: I give all property over which I have power of testamentary disposition as follows: I give my entire estate, whether real, personal, or mixed, of every kind, nature, and description whatsoever, and wherever situated, which I may now own or hereafter acquire, or have the right to dispose of at the time of my death, by the power of appointment or otherwise, to

[my (relationship), ________________ (name).] If ________________ (name) predeceases me, then this property shall]

[OR my ________________ (relationships), ________________ (names), in equal shares, or all to the survivor of them. If ________________ (names) predecease me, then this property shall]

[OR the charitable organization of ________________ (name), located at ________________ (address). Should this organization cease to exist before the distribution of this property, then this property shall]

[pass instead to my ________________ (relationship), ________________ (name).]

[OR pass instead to my ________________ (relationships), ________________ (names), in equal shares, or all to the survivor of them.]

[OR pass instead to the charitable organization of ________________ (name), located at ________________ (address).]

[*For optional use after any text marked with asterisk: Although (name/names) shall have the sole and absolute authority to distribute this property, I have made this bequest on the condition and with the hope that (name/names) will share this property with ________________ (name/names and/or relationship/s), in any way that (name/names) deem(s) appropriate, taking into account any wishes that I have made known to ________________ (name/names) prior to my death.]

[Go to paragraph 6.]

SIXTH: For the purposes of this Will, a beneficiary shall be deemed to survive me if the beneficiary does not die within sixty (60) days after the date of my death.

SEVENTH: If any person, whether or not related in any way by blood to me, shall either directly or indirectly attempt to oppose or set aside the probate of this Will, or to impair or invalidate any of its provisions in any legal proceeding that is designed to thwart my wishes as expressed in this Will, or to aid in the contesting of this Will, and such person shall establish a right to any part of my estate, any interest to that person is revoked and shall be disposed of in the same manner provided herein as if that contesting beneficiary had predeceased me without issue.

EIGHTH: I have not entered into either a contract to make wills or a contract not to revoke wills.
NINTH: As used in this Will, the masculine, feminine, or neuter gender, and the singular or plural number, shall each be deemed to include the others whenever the context so indicates.

TENTH: If any part, clause, provision, or condition of this Will is held to be void, invalid, or inoperative, I direct that such invalidity should not affect any other part, clause, provision, or condition of this Will, and that the remainder of this Will shall be carried into effect as though such part, clause, provision, or condition had not been contained herein.

Now, therefore, in the presence of witnesses, I sign my name to this, my Last Will and Testament, consisting of ____ (#) typewritten pages, including the Witness Attestation page, on this ____ day of ____________, 1990, at ________.

(name)

WITNESS ATTESTATION

On the date written below, ____________ (name), hereinafter referred to as "Testator," declared to us, the undersigned, that this instrument, consisting of ____ (#) pages, including the page on which we have signed as witnesses, was Testator's Will, and requested us to act as witness to it. Testator thereupon signed this Will in our presence, all of us being present at the same time. We now, at Testator's request, in Testator's presence, and in the presence of each other, subscribe our names as witnesses. At this time the Testator is, to the best of our knowledge, of sound mind and is not acting under duress, menace, fraud, misrepresentation, or undue influence.

We declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this instrument was executed on the date written below in ____________ (County) County, California.

Date: ____________________________ Date: ____________________________

Witness Signature

Witness Signature

Printed Name of Witness

Printed Name of Witness

Address

Address

City/State/Zip

City/State/Zip
SAMPLE WILL #4
LAST WILL AND TESTAMENT
OF
[NAME OF CLIENT]

I, ______________________________ (name), a resident of ____________ County, California, declare this to be my Will, hereby revoking all prior Wills and Codicils.

FIRST: I declare that I am not and have never been married. I declare that no children have been born to or legally adopted by me.

SECOND: I nominate ______________________________ (name) as Executor of my Last Will and Testament to serve without bond or surety of any kind. If ______________________________ (name) fails to qualify, is unable, is unwilling, or ceases to act as Executor, then I nominate ______________________________ (name) as Executor to serve without bond. The term "Executor" as used in this Will shall include any personal representative(s) of my estate. I authorize my Executor to sell at either public or private sale and to lease, with or without notice, any property belonging to my estate, subject only to confirmation of court required by law.

THIRD: If at my death anyone who takes from me by my Will or by succession is under the age of eighteen (18) years, I appoint my Executor as guardian of any of the property that such minor take from me. My Executor may, at my Executor's discretion, sell for the minor's account any part of the minor's share. Any property or its proceeds distributable to a person under the age of eighteen (18) years may be delivered without bond to any suitable person with whom the minor resides or who has care or control of the minor.

FOURTH: I direct my Executor to pay all of the expenses of my last illness, of the administration of my estate, and of the disposition of my remains. I direct my Executor to arrange for appropriate memorial services. It is my wish that my remains be cremated, that my ashes be delivered to my Executor, and that my Executor arrange for the disposition of my ashes in the manner the Executor deems most appropriate.

FIFTH: I give all property over which I have power of testamentary disposition as follows:
I give my entire estate, whether real, personal, or mixed, of every kind, nature, and description whatsoever, and wherever situated, which I may now own or hereafter acquire, or have the right to dispose of at the time of my death, by the power of appointment or otherwise, to my ______________________________ (relationship), ______________________________ (name). If ______________________________ (name) predeceases me, then this property shall pass instead to my ______________________________ (relationship), ______________________________ (name).

* Fred Nagel of the San Diego AIDS Legal Project developed sample will forms #3 and #4.
SIXTH: For the purposes of this Will, a beneficiary shall be deemed to survive me if the beneficiary does not die within sixty (60) days after the date of my death.

SEVENTH: If any person, whether or not related in any way by blood to me, shall either directly or indirectly attempt to oppose or set aside the probate of this Will, or to impair or invalidate any of its provisions in any legal proceeding that is designed to thwart my wishes as expressed in this Will, or to aid in the contesting of this Will, and such person shall establish a right to any part of my estate, any interest to that person is revoked and shall be disposed of in the same manner provided herein as if that contesting beneficiary had predeceased me without issue.

EIGHTH: I have not entered into either a contract to make wills or a contract not to revoke wills.

NINTH: As used in this Will, the masculine, feminine, or neuter gender, and the singular or plural number, shall each be deemed to include the others whenever the context so indicates.

TENTH: If any part, clause, provision, or condition of this Will is held to be void, invalid, or inoperative, I direct that such invalidity should not affect any other part, clause, provision, or condition of this Will, and that the remainder of this Will shall be carried into effect as though such part, clause, provision, or condition had not been contained herein.

Now, therefore, in the presence of witnesses, I sign my name to this, my Last Will and Testament, consisting of (#) typewritten pages, including the Witness Attestation page, on this day of ______________________, 1990, at ______________________ (city/state/zip).

(name)

WITNESS ATTESTATION

On the date written below, ______________________ (name), hereinafter referred to as "Testator," declared to us, the undersigned, that this instrument, consisting of (#) pages, including the page on which we have signed as witnesses, was Testator's Will, and requested us to act as witness to it. Testator thereupon signed this Will in our presence, all of us being present at the same time. We now, at Testator's request, in Testator's presence, and in the presence of each other, subscribe our names as witnesses. At this time the Testator is, to the best of our knowledge, of sound mind and is not acting under duress, menace, fraud, misrepresentation, or undue influence.

We declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this instrument was executed on the date written below in _______________ (County) County, California.

Date: ______________________
Witness Signature
Printed Name of Witness
Address
City/State/Zip

Date: ______________________
Witness Signature
Printed Name of Witness
Address
City/State/Zip
MAKING YOUR WILL

TAKING CARE OF YOUR LEGAL AFFAIRS

A diagnosis of HIV infection is a shattering experience for anyone. It changes your life—makes you ask questions you’ve never asked. And it forces you to pay attention to matters you may have taken for granted or simply avoided: matters like your health, relationships, living situation, or what happens when you die.

But it can also be an opportunity to take charge of your life and to make your own decisions about issues that are important to you, such as who will take care of your pet, who will receive your property, who will become the guardian of your child, or who will arrange your funeral after your death.

You need to plan for the future, regardless of your health, age, or assets. You need to make your own decisions about living and dying, and not simply allow others—a physician, judge, or distant relative—to make these critical and personal decisions for you.

But if you have a life-threatening illness you must make these decisions early. Through a document called a Durable Power of Attorney for Health Care, you may invest in someone else—a lover, spouse, close relative, or trusted friend—the right to make decisions about your medical care. Through a general power of attorney you may authorize someone to manage your financial affairs on your behalf. And through a Will you may make binding instructions on how your property will pass after your death. Your local SALSA organization can help you prepare all these documents.

WHAT IS A WILL?

A Will is a legal document that governs how your property and assets will be distributed at your death. An AIDS legal service attorney can work with you on setting up a simple Will, that is, a Will without trust provisions. The attorney will draft a formal document that sets out your specific instructions on how you wish your property to be distributed. This Will is then signed before two or more witnesses.

Certain types of property are distributed by means other than a Will. Examples of such property passing "outside" the Will include:

- real estate in which the title is held in joint tenancy;
- checking, brokerage, and other financial accounts held in joint tenancy;
- life insurance proceeds when a charity or person is named as a beneficiary;
- property held in trust, including simple savings bank trusts and living trusts.

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* Text of brochure published by California State AIDS Legal Services Association (SALSA), a statewide network of legal services for persons with HIV infection. Contributing authors were Paige Wickland, Virginia Palmer, and Clint Hockenberry of the AIDS Legal Referral Panel/San Francisco.
All your other assets—from your personal bank account to household items to real estate owned by you alone or as a tenant-in-common—pass according to the terms of your Will. In addition, you can leave valuable instructions in your Will regarding your funeral, burial or cremation, or regarding your selection of a guardian for your children.

WHAT HAPPENS IF YOU DO NOT MAKE A WILL?

If you die without a valid Will, your property passes according to a complex legal scheme to spouses, children, or blood or adopted relatives. Your lover or friend receives nothing, regardless of the length or importance of your relationship. Nor will any of your money or property go to your favorite charity, even if you told your friends and family that you wanted your money to help fund a particular non-profit service. Finally, if you die without a Will and no close relative can be found to inherit your property, it will pass to the State.

CAN YOUR WILL BE CHALLENGED?

You may be concerned that your family will try to set aside your Will. If you are 18 years old or older and have the mental capacity to make a Will, your Will should be recognized as valid. "Mental capacity" to make a Will is a legal standard that is impossible to define with certainty, but generally means that:

1) You are aware of the kind of property you own and where the property is located;

2) You are aware of the existence of your family members, spouse, or children and that they are the persons who would usually receive your assets (whether or not you finally decide to name them in your Will); and

3) You understand what property you want to give to whom.

If someone deprives you of your free will by unduly influencing you or misleading you in disposing of your property in a way you would not otherwise have done, all or part of your Will may be held invalid. One reason to execute a formal Will is the presence of witnesses who can later testify to your mental capacity and to the lack of undue influence.

You can avoid claims of "undue influence" or "lack of mental capacity" if you make your Will as soon as possible while you are reasonably healthy. Your health may rapidly change, and legal challenges to Wills are often made on the basis that the Willmaker was too weak to know what he or she was doing.

HELPING YOU MAKE YOUR WILL

If you are a person with serious HIV infection, contact the local AIDS legal service closest to you during business hours. The legal program will arrange for one of its volunteer attorneys to draft your simple Will or Durable Power of Attorney. No fees are generally charged for these basic legal services. If you are unable to make an office visit, an attorney will come to your home or hospital room.

To assist the attorney in her or his drafting of your Will, please answer the following questions before your meeting. If you do not understand a particular question, ask your attorney. He or she will answer any question you may have about your Will.
WILL INFORMATION

1) NAME: ____________________________

2) ADDRESS: ____________________________________________

3) HOME TELEPHONE: ____________ WORK TELEPHONE: ____________

4) FAMILY SITUATION: If you have never been married and have never had children, check here and proceed to Item D. Otherwise, please provide:

   A. Name of current or former spouse(s):

   ____________________________________________

   B. Date and place of divorce or separation from spouse:

   ____________________________________________

   C. Names and birth dates of all your children, whether or not they are still living:

   ____________________________________________

   ____________________________________________

   D. Names of parents, whether or not they are still living:

   ____________________________________________

   ____________________________________________

   E. Names of brothers and sisters, whether or not they are still living:

   ____________________________________________

   ____________________________________________

5) ALTERNATE FAMILY SITUATION: If you have a companion or lover, please state his or her name:

   ____________________________________________

Do you have an agreement or contract with that person about the ownership or disposition of your property? If yes, please bring the agreement with you to the interview.
6) YOUR PROPERTY: Please list all your assets, including real estate, interest in a business or professional practice, bank accounts, stocks or bonds, cars, jewelry, clothing, artwork, furniture, etc. Please number each item.

________________________

________________________

________________________

7) PROPERTY DISPOSITION: You may leave all your property to one or more persons and/or charities, or leave particular pieces of property or specific amounts of money to specific people. In any case, please consider where your property should go if the person you intended to receive the item should die before you. Your "first choice" is called the intended beneficiary and your "second choice" is called the successor or contingent beneficiary.

Using the same numbering system you used in #6 above, please list your intended and successor beneficiaries for each item listed in #6. If you wish to leave all your property to one person or charity, please so state and also list the successor beneficiary.

________________________

________________________

________________________

8) RESIDUARY BENEFICIARY: This is a person or charity who receives any of your money or property not specifically distributed in your Will, which you forgot to include in your Will, or which you acquire after you have executed the Will. This person also receives gifts to others which fail because the named beneficiary or beneficiaries die before you. Please list your intended and successor residuary beneficiaries here:

________________________

________________________

9) OTHER PROPERTY: Please list:

A. All life insurance policies you hold and who is currently listed as the beneficiary:

________________________

________________________

B. Any retirement or similar benefits you have and who are the named beneficiaries:

________________________

________________________

C. Property, bank accounts, or other assets owned with another person:

________________________

________________________
10) EXECUTOR: This person will be responsible for paying your debts from your estate, for managing your property during the probate of your estate, and for distributing your property. You may name as executor any person over the age of 18 years who is a United States resident and legally competent. You may also name someone who is a beneficiary under your Will. Please list here the person or persons you wish to become Executor(s) of your Will, along with alternate Executor(s) in case your first choice is unable or unwilling to serve:


11) FUNERAL INSTRUCTIONS: Please check your specific wishes:

_____________ Burial, or _______________ Cremation

Funeral or memorial service? _______________ Yes _______________ No

Special instructions:


Do you want your Executor to publish an obituary?

_____________ Yes _______________ No

Special instructions for obituary:


12) OTHER INFORMATION: Please note any other information useful in preparing your Will, or list any questions you have:


DATE __________________________ SIGNATURE __________________________

Please bring this Will Information Booklet with you when you meet with your attorney to prepare your Will.

If you later decide to change your Will, you may either execute an entirely new Will or merely execute a "Codicil" which changes only part of your Will. Your local AIDS legal service is available to assist you in making changes to your original Will.

Your local SALSA organization can also help you to execute a Durable Power of Attorney for Health Care, other medical directives, and a financial power of attorney—all at no charge. In addition, your local AIDS legal service provides assistance on other legal matters to persons with HIV infection.
DURABLE POWERS OF ATTORNEY FOR HEALTH CARE AND DIRECTIVES TO PHYSICIANS

Californians are able to remain in control of their health care despite the onset of incapacity. By executing a Durable Power of Attorney for Health Care [DPAHC] or a Directive to Physicians [DP] they are able to designate others to carry out their desires regarding the nature and extent of their medical treatment. While an attorney need not prepare either of these advance medical directives, recent DPAHC contests may indicate the need for greater attorney involvement in the future.

The primary reason for preparing a Durable Power of Attorney for Health Care is to document an individual's desires regarding her medical treatment. Since incompetence generally triggers a DPAHC, an individual is no longer able to speak for herself. Other people, such as family members, friends or health care providers, often have to make difficult medical choices based on what they believe the incapacitated person would have wanted. Consequently, clear written expressions of intent and careful selection of an agent are crucial considerations to ensure that an incapacitated individual is still able to be "in charge" of her health care.

Consider the case of Nancy Cruzan who has been on a feeding tube and in a permanently vegetative state for seven years. The U.S. Supreme Court affirmed the Missouri Supreme Court's denial of the parents' request to withdraw enteral alimentation. Cruzan v. Missouri Department of Health [U.S. Supreme Court, No. 88-1503, June 25, 1990]. The majority opinion in Cruzan allows states to enact laws regarding the right of a family member, legal representative, or friend to make health care decisions for an incapacitated person, including the right not to use life-sustaining treatment. States may impose a strict standard of proof [i.e., "clear and convincing evidence"] in deciding whether an incapacitated patient would have intended to withhold life support.

The Cruzan majority does, however, view the common law doctrine of informed consent "as generally encompassing the right of a competent individual to refuse medical treatment," a liberty interest derived from the Due Process Clause of the Fourteenth Amendment. Moreover, the majority opinion makes no distinction between artificially provided food and water and other forms of life-sustaining medical treatment.

A California Durable Power of Attorney for Health Care likely meets the Cruzan standard of clear and convincing evidence. A DPAHC contains a statement of intent and explicit instructions on the use of life-sustaining treatment. It also authorizes the appointment of a proxy [i.e., attorney-in-fact] to make health care decisions on behalf of an incapacitated principal. A DPAHC requires two qualified adult witnesses who personally know the principal and who are present when the principal signs the document. Alternatively, a DPAHC can be notarized [Civil Code Section 2433(b)]. Finally, a DPAHC must include certain statutory warnings.

The following section provides two different Durable Powers of Attorney for Health Care: the California Medical Association form [see Attachment G], and a lawyer-drafted sample form [see Attachment H]. Alternatively, an attorney may want to consider the statutory form [Civil Code Section 2500]. Please note: the AIDS Legal Referral Panel/San Francisco recommends the CMA form because of its popularity and acceptance among health care providers. Nevertheless, an attorney may want to include optional provisions under paragraph four of page 2 of the CMA form.

While a Durable Power of Attorney for Health Care allows a client to place crucial decision-making into the hands of a trusted friend, a Directive to Physicians may be appropriate for a person with AIDS who has no one to appoint as attorney-in-fact. The document is essentially a statement of intent about life-sustaining procedures. It advises an attending physician what a patient would want if she could speak for herself. A sample Directive to Physicians is attached.
OVERVIEW OF MEDICAL DIRECTIVE STATUTES

In forty-one states and the District of Columbia a competent adult may make health care choices in advance of incapacitating injury or illness. Medical treatment decision statutes in these jurisdictions reflect the growing consensus among lawmakers that an adult's traditional right to accept or reject medical or surgical treatment implies the right to accept or refuse so-called artificial or extraordinary life-sustaining procedures. Many states have also enacted legislation specifying the conditions under which an adult may designate a third party who will make health care decisions for the adult in the event of a terminal condition with incapacitation.

Legislation concerning medical treatment decisions has taken two predominant forms. First, and more common, are statutes providing for the construction of "living wills." A living will is a directive by an adult to his or her physician requesting that extraordinary life-sustaining procedures be withheld or withdrawn in the event that the adult, in a terminal condition, is unable to communicate responsible decisions about his or her medical care.

Typically, the patient's doctor plus one other physician must "qualify the patient," i.e., certify in writing that the person under their care is in a terminal condition and close to death, in order for life-support procedures to be withheld pursuant to the terms of a living will. Although all living will statutes proscribe penalties against a physician who knowingly fails to comply with a qualified patient's request to withhold treatment, no statutes require a doctor to qualify his or her patient.

By refusing to cross the threshold of qualification, a physician may seek to avoid implementing the terms of the living will. Because the decision to qualify is usually made under critical circumstances demanding immediate action, this loophole in the law of living wills needs a comprehensive legislative response, rather than the time-consuming, case-by-case remedy of the courts.

Most states do not require the attending physician, after qualification but before ordering termination of procedures, to receive the consent of anyone else.

When an individual has executed a living will in prescribed statutory form, his or her intent regarding treatment is clear. Problems arise when a patient in a terminal condition has executed no physician's directive, or the terms of such directive do not reveal an unequivocal intent. To terminate life-support systems in either case the physician usually must attempt to contact and consult with one of or a combination of the following: the patient's spouse, parents, adult children, guardian, designated health care surrogate, attorney in fact, clergy member, close friend, or "others with first hand knowledge of the patient's intention" (Indiana).

In states which have established an order of priorities, often the physician must first attempt to consult with the patient's attorney-in-fact, guardian, or conservator. If they are unavailable, unwilling, or incompetent to act, the physician must go to the spouse, adult child, parent, or adult sibling to discern the patient's probable intent. Because the law assumes that those closest to the patient (and thus presumed to know best the patient's intent) are associated with him or her by blood or operation of law, the lover or friend of an incapacitated adult in this situation is rarely entitled to participate in any decision to provide or deny life-sustaining procedures.

A legislative innovation which empowers nonmedical personnel to make terminal health care decisions is the durable power of attorney for health care ("DPAHC"). A competent adult who

* By S. Alan Ray of Los Angeles.
executes a DPA/HC designates another person to act as his or her agent for a specified range of health care decisions. The power thus created is "durable" because it operates despite the incapacity of the principal. By executing a DPA/HC, someone with AIDS or ARC can designate a friend or lover to be the attorney-in-fact or agent with instructions. A durable power of attorney for health care can instruct a physician to withhold life-sustaining procedures in the event that the principal (i.e., the patient with AIDS) becomes incapacitated while in a terminal state.

The DPA/HC can give the designated agent priority in visitation, authority to employ health care personnel, the right of access to the principal's medical records, the right to consent to and to authorize pain-killing drugs and unconventional therapies, the right to arrange for the release of the principal's personal effects from the police or hospital taken at the time of the principal's injury or illness, the right to receive and transport the principal's body, and the authority to carry out his or her wishes for a funeral or memorial service, and for the disposition of remains.

In short, the durable power of attorney for health care is a very effective means of insuring that all treatment decisions will be made in accord with the principal's intent, including but not limited to decisions regarding the use of extraordinary life-sustaining procedures. Of the sixteen states which currently recognize some form of surrogate health care decision-making, six have expressly adopted a durable power of attorney for health care: California (1983), Utah (1985), Rhode Island (1986), Illinois and Nevada (1987), and Idaho (1988).

As the adoption dates indicate, the DPA/HC is a recent but increasingly popular legislative response to the challenge of permitting citizens to make treatment decisions in advance of incapacitation. All sixteen surrogate health care states also have statutes allowing execution of a living will or similar device (sometimes as a section within their DPA/HC statute). Unfortunately, twenty-five other jurisdictions permit living wills but have created no provision for a DPA/HC or other surrogate care instrument. Ten more—Kentucky, Massachusetts, Michigan, Minnesota, Nebraska, New Jersey, North Dakota, Ohio, Pennsylvanian, and South Dakota—have no statutes authorizing surrogate health care decisions, or the construction of a living will.

If recent nationwide legislation is an indicator, however, the trend in favor of statutory creation of durable powers of attorney for health care will continue to gain strength and the number of states with provisions for surrogate health care decisions will increase in the future.
California Medical Association
DURABLE POWER OF ATTORNEY FOR HEALTH CARE DECISIONS
(California Civil Code Sections 2410-2444)

WARNING TO PERSON EXECUTING THIS DOCUMENT

This is an important legal document. Before executing this document, you should know these important facts:

This document gives the person you designate as your agent (the attorney-in-fact) the power to make health care decisions for you. Your agent must act consistently with your desires as stated in this document or otherwise made known.

Except as you otherwise specify in this document, this document gives your agent power to consent to your doctor not giving treatment or stopping treatment necessary to keep you alive.

Notwithstanding this document, you have the right to make medical and other health care decisions for yourself so long as you can give informed consent with respect to the particular decision. In addition, no treatment may be given to you over your objection, and health care necessary to keep you alive may not be stopped or withheld if you object at the time.

This document gives your agent authority to consent, to refuse to consent, or to withdraw consent to any care, treatment, service, or procedure to maintain, diagnose, or treat a physical or mental condition. This power is subject to any statement of your desires and any limitations that you include in this document. You may state in this document any types of treatment that you do not desire. In addition, a court can take away the power of your agent to make health care decisions for you if your agent (1) authorizes anything that is illegal, (2) acts contrary to your known desires or (3) where your desires are not known, does anything that is clearly contrary to your best interests.

Unless you specify a shorter period in this document, this power will exist for seven years from the date you execute this document and, if you are unable to make health care decisions for yourself at the time when this seven-year period ends, this power will continue to exist until the time you become able to make health care decisions for yourself.

You have the right to revoke the authority of your agent by notifying your agent or your treating doctor, hospital, or other health care provider orally or in writing of the revocation.

Your agent has the right to examine your medical records and to consent to their disclosure unless you limit this right in this document.

Unless you otherwise specify in this document, this document gives your agent the power after you die to (1) authorize an autopsy, (2) donate your body or parts thereof for transplant or therapeutic or educational or scientific purposes, and (3) direct the disposition of your remains.

If there is anything in this document that you do not understand, you should ask a lawyer to explain it to you.

1. CREATION OF DURABLE POWER OF ATTORNEY FOR HEALTH CARE

By this document I intend to create a durable power of attorney by appointing the person designated below to make health care decisions for me as allowed by Sections 2410 to 2444, inclusive, of the California Civil Code. This power of attorney shall not be affected by my subsequent incapacity. I hereby revoke any prior durable power of attorney for health care. I am a California resident who is at least 18 years old, of sound mind, and acting of my own free will.

2. APPOINTMENT OF HEALTH CARE AGENT

(Fill in below the name, address and telephone number of the person you wish to make health care decisions for you if you become incapacitated. You should make sure that this person agrees to accept this responsibility. The following may not serve as your agent: (1) your treating health care provider; (2) an operator of a community care facility or residential care facility for the elderly; or (3) an employee of your treating health care provider, a community care facility, or a residential care facility for the elderly, unless that employee is related to you by blood, marriage or adoption. If you are a conservatee under the Lanterman-Petris-Short Act (the law governing involuntary commitment to a mental health facility) and you wish to appoint your conservator as your agent, you must consult a lawyer, who must sign and attach a special declaration for this document to be valid.)

I. ____________________________, hereby appoint:

Name: ________________________ Telephone Number: (_______)

Address: _____________________

as my agent (attorney-in-fact) to make health care decisions for me as authorized in this document.
3. (Your agent must make health care decisions that are consistent with your known desires. You can, but are not required to, state your desires about the kinds of medical care you do or do not want, including your desires concerning life-sustaining treatment. If you do not want your agent to have the authority to make certain decisions, you must write a statement to that effect in the space provided below; otherwise, your agent will have the broad powers to make health care decisions for you that are outlined in paragraph 3 above. In either case, it is important that you discuss your health care desires with the person you appoint as your agent.

(Following are three general statements about withholding and removal of life-sustaining treatment. If, after carefully reading all of these statements, you agree with one of them, you may initial that statement. If you wish to add to one of the printed statements, or to write your own instead, you may do so in the space provided.)

I do not want efforts made to prolong my life and I do not want life-sustaining treatment to be provided or continued: (1) if I am in a coma or persistent vegetative state which my doctor reasonably believes to be irreversible. Once my doctor has concluded that I will remain unconscious for the rest of my life, I do not want life-sustaining treatment to be provided or continued.

If this statement reflects your desires, initial here: 

I want efforts made to prolong my life and I want life-sustaining treatment to be provided unless I am in a coma or persistent vegetative state which my doctor reasonably believes to be irreversible. Once my doctor has concluded that I will remain unconscious for the rest of my life, I do not want life-sustaining treatment to be provided or continued.

If this statement reflects your desires, initial here: 

I want efforts made to prolong my life and I want life-sustaining treatment to be provided even if I am in an irreversible coma or persistent vegetative state.

If this statement reflects your desires, initial here: 

Other or additional statements of medical treatment desires and limitations:

(You may attach additional pages if you need more space to complete your statements. Each additional page must be dated and signed at the same time you date and sign this document.)

4. MEDICAL TREATMENT DESIRES AND LIMITATIONS (OPTIONAL)

5. APPOINTMENT OF ALTERNATE AGENTS (OPTIONAL)

(You may appoint alternate agents to make health care decisions for you in case the person you appointed in Paragraph 2 is unable or unwilling to do so.)

If the person named as my agent in Paragraph 2 is not available or willing to make health care decisions for me as authorized in this document, I appoint the following persons to do so, listed in the order they should be asked:

First Alternate Agent: Name: ___________________________ Telephone: (______) Address: ____________________________________________

Second Alternate Agent: Name: ___________________________ Telephone: (______) Address: ____________________________________________
6. DURATION
I understand that this power of attorney will be effective for seven years from the date I sign this document unless I specify a shorter period of time below. However, if I am unable to make health care decisions for myself when this power of attorney expires, the authority I have granted my agent will continue to exist until I am again able to make my own health care decisions.

(Optional) This power of attorney shall expire before seven years have passed, on the following date: __________________________________________

7. USE OF COPIES
I hereby authorize that photocopies of this document can be relied upon by my agent and others as though they were originals.

DATE AND SIGNATURE OF PRINCIPAL
(You must date and sign this power of attorney)

I sign my name to this Durable Power of Attorney for Health Care at __________________________________________

(City) (State)

on __________________________________________

(Date) (Signature of Principal)

STATEMENT OF WITNESSES
(This power of attorney will not be valid for making health care decisions unless it is either (1) signed by two qualified adult witnesses who are personally known to you (or to whom you present evidence of your identity) and who are present when you sign or acknowledge your signature or (2) acknowledged before a notary public in California. If you elect to use witnesses rather than a notary public, the law provides that none of the following may be used: (1) the persons you have appointed as your agent and alternate agents, (2) a health care provider or an employee of a health care provider, or (3) an operator or employee of a community care facility or residential care facility for the elderly. Additionally, at least one of the witnesses cannot be related to you by blood, marriage or adoption, or be named in your will. IF YOU ARE A PATIENT IN A SKILLED NURSING FACILITY, YOU MUST USE WITNESSES RATHER THAN A NOTARY PUBLIC, AND AT LEAST ONE OF THE WITNESSES MUST BE A PATIENT ADVOCATE OR OMBUDSMAN.)

I declare under penalty of perjury under the laws of California that the person who signed or acknowledged this document is personally known to me to be the principal, or that the identity of the principal was proved to me by convincing evidence.* that the principal signed or acknowledged this durable power of attorney in my presence, that the principal appears to be of sound mind and under no duress, fraud, or undue influence, that I am not the person appointed as attorney in fact by this document, and that I am not a health care provider, an employee of a health care provider, the operator of a community care facility or a residential care facility for the elderly, nor an employee of an operator of a community care facility or residential care facility for the elderly.

Signature: ____________________________ Print name: ____________________________ Date: __________ Residence Address: ____________________________

Signature: ____________________________ Print name: ____________________________ Date: __________ Residence Address: ____________________________

(AT LEAST ONE OF THE ABOVE WITNESSES MUST ALSO SIGN THE FOLLOWING DECLARATION)

I further declare under penalty of perjury under the laws of California that I am not related to the principal by blood, marriage, or adoption, and, to the best of my knowledge I am not entitled to any part of the estate of the principal upon the death of the principal under a will now existing or by operation of law.

Signature: ____________________________

*The law allows one or more of the following forms of identification as convincing evidence of identity: a California driver’s license or identification card or U.S. passport that is current or has been issued within five years, or any of the following if the document is current or has been issued within five years, contains a photograph and description of the person named on it, is signed by the person, and bears a serial or other identifying number: a foreign passport that has been stamped by the U.S. Immigration and Naturalization Service; a driver’s license issued by another state or by an authorized Canadian or Mexican agency; or an identification card issued by another state or by any branch of the U.S. armed forces. If the principal is a patient in a skilled nursing facility, a patient advocate or ombudsman may rely on the representations of family members or the administrator or staff of the facility as convincing evidence of identity if the patient advocate or ombudsman believes that the representations provide a reasonable basis for determining the identity of the principal.

3
SPECIAL REQUIREMENT: STATEMENT OF PATIENT ADVOCATE OR OMBUDSMAN

(If you are a patient in a skilled nursing facility, one of your witnesses must be a patient advocate or ombudsman, who must sign the statement of witnesses above and must also sign the following declaration.)

I further declare under penalty of perjury under the laws of California that I am a patient advocate or ombudsman as designated by the State Department of Aging and am serving as a witness as required by subdivision (f) of Civil Code Section 2432.

Signature: ___________________________ Address: ___________________________
Print Name: __________________________ Date: ___________________________

CERTIFICATE OF ACKNOWLEDGMENT OF NOTARY PUBLIC

(Acknowledgment before a notary public is not required if you have elected to have two qualified witnesses sign above. Do not use a notary public if you are a patient in a skilled nursing facility.)

State of California )
)ss.
County of _____________________________

On this ______ day of ________________________, in the year __________, before me, ________________________

(here insert name of notary public)

personally appeared ________________________

(here insert name of principal)

personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to this instrument, and acknowledged that he or she executed it. I declare under penalty of perjury that the person whose name is subscribed to this instrument appears to be of sound mind and under no duress, fraud, or undue influence.

NOTARY SEAL

(Signature of Notary Public)

COPIES

YOUR AGENT MAY NEED THIS DOCUMENT IMMEDIATELY IN CASE OF AN EMERGENCY. YOU SHOULD KEEP THE COMPLETED ORIGINAL AND GIVE PHOTOCOPIES OF THE COMPLETED ORIGINAL TO (1) YOUR AGENT AND ALTERNATE AGENTS, (2) YOUR PERSONAL PHYSICIAN, AND (3) MEMBERS OF YOUR FAMILY AND ANY OTHER PERSONS WHO MIGHT BE CALLED IN THE EVENT OF A MEDICAL EMERGENCY. THE LAW PERMITS THAT PHOTOCOPIES OF THE COMPLETED DOCUMENT CAN BE RELIED UPON AS THOUGH THEY WERE ORIGINALS.

Additional forms can be purchased from: Sutter Publications, P.O. Box 7690, San Francisco, CA 94120-7690
DURABLE POWER OF ATTORNEY FOR HEALTH CARE

1. DESIGNATION OF AGENT.

I, ____________________________, a resident of ____________________________, County, State of California, designate and appoint ____________________________, who resides at ____________________________, telephone number ____________________________, as my agent to make health care decisions authorized in this document.

2. CREATION OF DURABLE POWER OF ATTORNEY FOR HEALTH CARE.

By this document I intend to create a durable power of attorney for health care as authorized by the California Civil Code. This power of attorney shall remain in force despite my subsequent incapacity.

3. GENERAL STATEMENT OF AUTHORITY.

In the event I become incapable of giving an informed consent to any health care decision, I hereby grant to my agent full power and authority to consent, refuse consent, or withdraw consent to any type of health care procedure (including any procedure to maintain, diagnose, or treat any physical or mental condition), or to make any other health care decision, to the same extent that I could if I were competent to do so, subject to the terms of this instrument. My agent shall exercise this power and authority in accordance with my expressed desires, known to my agent, whether contained in this document or not. Before acting, my agent shall attempt to communicate with me regarding my desires unless such attempt would be futile. If my desires are unknown, then my agent should decide for me, having my best interests in mind. My agent is further authorized:

To authorize, or refuse to authorize, any health care decision, or medical treatment, if I shall be physically or mentally incapacitated, or otherwise unable to make such authorization for myself, including, but not limited to authorization for emergency care, hospitalization, surgery, therapy, and/or any other kind of treatment or procedure which he/she shall, in his/her sole discretion, think necessary for my benefit and well-being.

To consult with and advise any physicians, nurses, therapists, dentists, or any other medical and/or health care institutions on my behalf, as such consultations relate to my health and welfare. All such personnel and institutions are specifically requested to abide by any and all decisions and instructions of my attorney-in-fact and to release to him any and all information which he may request concerning my health and well-being.

To receive into his/her sole possessions any and all items or personal property and effects that may be recovered from or about my person by any hospital, police agency, or any other person at the time of my illness, disability, or death, this to specifically include my remains, if applicable.

To execute all necessary instruments and to perform all necessary acts required for the execution and implementation of all authorizations contained in this document.
4. STATEMENT OF DESIRES AND SPECIAL PROVISIONS.

I declare that I wish to live as long as I can enjoy life, but I do not wish to receive medical treatment which is futile and will provide no benefit for me.

(a) If I am in a coma (and have been for at least five (5) days), which two (2) qualified physicians familiar with my condition have diagnosed as irreversible so that there is no reasonable possibility that I will ever regain consciousness, then I desire that all life-sustaining treatment be withdrawn or withheld, even if my death will result.

However, if I have been in such an irreversible coma for five (5) days, do not continue to give me food and water by any artificial means, unless I can be fed or given water manually by mouth, or unless stopping food or water will cause me to experience pain as a result.

(b) I do not wish to receive treatment which will not improve my living conditions or my health if I am incurably and terminally ill. When two (2) qualified physicians who are familiar with my condition have made such a diagnosis, then I only want treatment, including life-sustaining treatment, that offers benefits to me greater than the burdens it will impose. You should consider whether the treatment will relieve suffering or improve my prognosis, what intrusiveness, risks, and side effects it involves, whether it will extend my life and, if so, what quality of life or enjoyment of life I will be able to have.

(c) When two (2) qualified physicians who are familiar with my condition have diagnosed that I am incurably and terminally ill, I wish to receive treatment necessary for my comfort and relief of pain, even if its unintended but unavoidable side effect is to hasten the moment of my death. This includes the administration of morphine.

5. DESIGNATION OF ALTERNATE AGENT.

If the person designated as my agent in paragraph 1 is unable or unwilling to act as my agent or if I revoke that person’s appointment as my agent, then the first alternative agent named below shall become my agent with the power and authority conferred by this instrument; and if the first alternative agent shall be unable or unwilling to act as my agent or if I revoke that person’s appointment as my agent, then the second alternative agent named below shall become my agent with the power and authority conferred by this instrument:

(a) First alternative agent:

(name)
(address)
(telephone)

(b) Second alternative agent:

(name)
(address)
(telephone)
6. NOMINATION OF CONSERVATOR OF PERSON.

If it becomes necessary to appoint a conservator of my person, I nominate the following individuals to serve as conservator of my person, to serve alone in the order named:


7. AUTHORITY CONCERNING MEDICAL INFORMATION AND RECORDS.

Subject to any limitations set forth elsewhere in this document, my agent shall have the power and authority to do all of the following:

(a) Request, review, and receive any information, verbal or written, regarding my physical or mental health, including, but not limited to, medical and hospital records;

(b) Execute on my behalf any releases or other documents that may be required in order to obtain information;

(c) Consent to the disclosure of medical information;

(d) Execute documents such as "Refusal to Permit Treatment," "Leaving Hospital Against Medical Advice," or any necessary waiver or release from liability required by hospital or physician.

8. DURATION.

This power of attorney is effective immediately and shall remain in force for seven years, unless I am incapable of making health care decisions when this power otherwise expires, in which case it will continue in force until I regain the capacity to make health care decisions for myself.

9. WARNING.

This is an important legal document. It creates a durable power of attorney for health care. Before executing this document, you should know these important facts:

(a) This document gives the person you designate as your attorney-in-fact the power to make health care decisions for you, subject to any limitations or statement of your desires that you include in this document. The power to make health care decisions for you may include consent, refusal of consent, or withdrawal of consent to any care, treatment, service, or procedure to maintain, diagnose, or treat a physical or mental condition. You may state in this document any types of treatment or placements that you do not desire.

(b) The person you designate in this document has a duty to act consistent with your desires as stated in this document or otherwise made known or, if your desires are unknown, to act in your best interests.
(c) Except as you otherwise specify in this document, the power of the person you designate to make health care decisions for you may include the power to consent to your doctor not giving treatment or stopping treatment which would keep you alive.

(d) Unless you specify a shorter period in this document, this power will exist for seven years from the date you execute this document and, if you are unable to make health care decisions for yourself at the time when this seven-year period ends, this power will continue to exist until the time when you become able to make health care decisions for yourself.

(e) Notwithstanding this document, you have the right to make medical and other health care decisions for yourself so long as you can give informed consent with respect to the particular decision. In addition, no treatment may be given to you over your objection, and health care necessary to keep you alive may not be stopped if you object.

(f) You have the right to revoke the appointment of the person designated in this document by notifying that person of the revocation orally or in writing.

(g) You have the right to revoke the authority granted to the person designated in this document to make health care decisions for you by notifying the treating physician, hospital, or other health care provider orally or in writing.

(h) The person designated in this document to make health care decisions for you has the right to examine your medical records and to consent to their disclosure unless you limit this right in this document.

(i) If there is anything in this document that you do not understand, you should ask a lawyer to explain it to you.

10. AUTOPSY AND DISPOSITION OF MY REMAINS.

I understand that my agent will be able to authorize autopsy (examination of my body after my death to determine the cause of my death) and to direct the disposition of my remains unless I limit that authority in this document. I also understand that my agent or any other person who directs the disposition of my remains must follow any instructions that I have given in a written contract for funeral services, my will, or by some other method.

11. DECLARATION OF PRINCIPAL.

I declare that my lawyer has explained to me my rights in connection with this instrument, and the consequences of signing it and not signing it, and that I have read the warnings contained herein.

Executed this _____ day of ____________, 1990, at ____________.

California.

____________________________
Client
STATEMENT OF WITNESSES

I declare under penalty of perjury under the laws of California that the principal is personally known to me, that the principal signed or acknowledged this durable power of attorney in my presence, that the principal appears to be of sound mind and under no duress, fraud, or undue influence, that I am not the person appointed as attorney-in-fact by this document, and that I am not a health care provider, an employee of a health care provider, the operator of a community care facility, nor an employee of an operator of a community care facility; further, I am not related to the principal by blood, marriage, or adoption, and to the best of my knowledge I am not entitled to any part of the estate of the principal upon the death of the principal under a Will now existing or by operation of law.

Date: __________________________ [Signature]
Print Name: __________________________
Residence Address: __________________________

Date: __________________________ [Signature]
Print Name: __________________________
Residence Address: __________________________

CERTIFICATE OF LAWYER

I am a lawyer authorized to practice law in the state where this power of attorney was executed, and the principal was my client at the time this power of attorney was executed. I have advised my client concerning his or her rights in connection with this power of attorney and the applicable law and the consequences of signing or not signing this power of attorney, my client, after being so advised, has executed this power of attorney. I certify under penalty of perjury that the foregoing is true and correct.

Executed this ____ day of __________, 1990, at ________________
California.

________________________________________
Signature
DIRECTIVE TO PHYSICIANS


I, ____________________________, being of sound mind, willfully, and voluntarily make known my desire that my life shall not be artificially prolonged under the circumstances set forth below, and I do hereby declare:

1. If at any time I should have an incurable and irreversible condition that has been diagnosed by two physicians and that will result in my death within a relatively short time without the administration of life-sustaining treatment, or that has produced an irreversible coma or persistent vegetative state, and I am no longer able to make decisions regarding my medical treatment, I direct my attending physician, pursuant to the Natural Death Act of California, to withhold or withdraw treatment, including artificially administered nutrition and hydration, that only prolongs the process of dying or the irreversible coma or persistent vegetative state and is not necessary for my comfort or to alleviate pain.

2. If I have been diagnosed as pregnant and that diagnosis is known to my physician, this declaration shall have no force or effect during my pregnancy.

NAME

City, County and State of Residence:
The Declarant voluntarily signed this writing in my presence. I am not entitled to any portion of the estate of the declarant upon his or her death under any will or codicil thereto of the declarant now existing or by operation of law. I am not a health care provider, an employee of a health care provider, the operator of a community care facility, an employee of an operator of a community care facility, the operator of a residential care facility for the elderly, or an employee of an operator of a residential care facility for the elderly.

Executed on _______________________, at San Francisco, California.

[NAME]  
_____________________________, residing at  
[ADDRESS]

[NAME]  
_____________________________, residing at  
[ADDRESS]
DIRECTIVE TO PHYSICIANS

BY [NAME OF CLIENT]

I, [NAME OF CLIENT], a resident of [NAME OF CITY], [NAME OF COUNTY] County, California, being of sound mind, willfully and voluntarily make known my desire that my life shall not be artificially prolonged under the circumstances set forth below, and do hereby declare:

FIRST. If at any time I should have an incurable injury, disease, or illness certified to be a terminal condition by two (2) physicians, and where the application of life-sustaining procedures would serve only to artificially prolong the moment of my death, and where my physician determines that my death is imminent whether or not life-sustaining procedures are utilized, I direct that such procedures be withheld or withdrawn, and that I be permitted to die naturally.

SECOND. In the absence of my ability to give directions regarding the use of such life-sustaining procedures, it is my intention that this directive shall be honored by my physician(s) and by my designated attorney-in-fact for health care decisions as the final expression of my legal right to refuse medical or surgical treatment. I accept the consequences of such refusal.

THIRD. If I have been diagnosed as pregnant and that diagnosis is known to my physician, this directive shall have no force or effect during the course of my pregnancy.

FOURTH. I have been diagnosed and notified at least fourteen (14) days ago as having a terminal condition by [NAME OF PHYSICIAN], whose address is [NAME OF ADDRESS], and whose phone number is [PHONE NUMBER].

FIFTH. This directive shall have no force or effect five (5) years from the date filled in below.

SIXTH. I understand the full import of this directive, and I am emotionally and mentally competent to make this directive.

SIGNED on this _____ day of [MONTH], 19___, at [NAME OF CITY], California.

[NAME OF CLIENT]

The declarant has been personally known to me, and I believe him to be of sound mind.
ADVANCE MEDICAL DIRECTIVES

TAKING CHARGE OF YOUR HEALTH CARE

After discovering you are HIV positive or have AIDS, you are likely to find yourself thrust into the world of health care; a world which may seem overwhelming and unfamiliar.

You may be faced with issues you never knew existed and you may be required to make difficult decisions about your medical treatment.

Despite these obstacles, you can help the situation by taking an active, participatory role in determining your course of care. Working with your health care provider, you can be involved in creating a treatment regime appropriate for you.

This involves two Important steps: (1) educating yourself about your rights regarding health care decisions, and (2) taking steps to inform others about your decisions.

The Right to Decide

As a competent adult, you have a constitutionally protected right to make decisions about your health care. This includes the right to accept or reject treatment, and the right to consent to treatment. For example, you have the right to request that life support equipment (i.e., a respirator) be withheld and/or withdrawn.

Your right to decisions over your medical care survives even if you become incompetent and unable to make informed health care decisions for yourself.

Should there be a time when your ability to make medical decisions is impaired, others (such as a family member and/or a significant other) can assist your physician in executing your wishes.

Educate Yourself

Before creating any formal legal documents or making decisions about your health care, it is important to know all the options. A good first step is to discuss the issues with the physician who is primarily responsible for your care.

Although it may be difficult for you to confront such issues as withdrawing medical treatment, the importance of early evaluation cannot be overstated. It allows you to participate in your care and helps others understand what you want.

* Text of brochure published by California State AIDS Legal Services Association [SALSA], a statewide network of legal services for persons with HIV infection. Audrey Covener, Esq., of AIDS Legal Services/Santa Clara County is the author of this brochure.
Other sources of education include: books and articles about medical treatment, talking with friends about the issues of treatment options, and attending support groups to hear various views on the subject.

Once you have gathered sufficient information and have had a chance to review the various choices, you will be ready to take the next step: informing others of what you want.

**INFORMING OTHERS OF YOUR DECISIONS**

**Using Advance Medical Directives**

In order for your desires regarding medical treatment to be carried out, you have to make them known. This can be done both formally and informally.

The most common informal way for making your views known is through discussions with friends, family, and your health care providers. Despite the importance of these conversations, using the formal process of creating written documentation of your wishes is the best way to make them known.

**Documents used for this purpose are:**

The Durable Power of Attorney for Health Care and the Directive to Physicians.

1. **The Durable Power of Attorney for Health Care**

The Durable Power of Attorney for Health Care ("DPAHC") allows you to designate a person to make medical decisions for you during any period of time when you are incompetent and unable to make such decisions.

Referred to as the "agent," this person must make decisions based on the instructions included in your DPAHC and in consultation with your physician.

**The basic requirements necessary for executing a DPAHC are:**

- You must be a competent adult at the time of executing the document.
- You must name an agent to serve when you become incompetent (there are restrictions on who can be the agent).
- The document must be witnessed by two individuals (there are important restrictions on who can be witnesses) or notarized by a notary public.
- If the document is a printed form document which you purchase, it must contain certain statutory warnings.

There are several places to obtain printed form DPAHC's which you can execute. Your physician and/or hospital may have some or you can usually obtain one from the California Medical Association. Be sure to follow all the instructions on the form when executing the documents.
2. The Directive to Physicians

The Directive to Physicians is a document allowing you to tell your doctor your desires regarding withholding or withdrawing "life sustaining" procedures. A valid Directive requires the following:

- You must be a competent adult.
- The form and wording of the document must comply with the law.
- The document must be witnessed by two individuals (there are important restrictions on who can be witnesses).

In addition, a Directive is only binding if:

(a) It is prepared after you have been diagnosed with a terminal "incurable" condition, and

(b) You have waited 14 days after being diagnosed before executing the document.

A binding directive means that your physician is required to comply with your desires and if unable to do so, should make necessary arrangements to transfer you to a physician who will comply with your requests.

A non-binding directive can be executed at any time even if you have not been diagnosed with a terminal condition, however, a physician is not legally obligated to follow it.

3. DPAHC or Directive to Physicians?

You are probably asking yourself whether you should execute a DPAHC or a Directive to Physicians. Both documents are valuable tools, but the DPAHC has several advantages over the Directive to Physicians:

- It allows you to designate a person to assist your physician in making decisions about your care. This person can make those decisions based on your known wishes in light of your medical condition at the time and after reviewing all the factors involved.
- It is binding even if signed when you have not been diagnosed with a terminal illness.
- You can include a variety of information about various aspects of your care (not just your views on life-sustaining treatment).

4. Competency

In order for your advance medical directive to be valid, you must be competent at the time you signed it. In other words, you must be of sound mind and have a clear understanding of your actions at the time you signed the document.

The following steps may be useful to help establish competency:
• Discuss your desires regarding treatment with your physician or other health care provider. This helps them understand what you want and reinforces that the document is an accurate reflection of your intent.

• If appropriate, seek assistance from a neutral party (such as an attorney or other person not named as the agent) when drafting and executing the document. This allows a neutral person to witness your state of mind and creates an opportunity for them to review the document with you to be sure it says what you want it to say.

• If you are in the hospital when executing the document, ask the health professionals to make a note in your medical record regarding your mental status.

• Do not execute the document when you are taking medications which alter your ability to make decisions.

• Discuss your wishes with your family, significant other, and others who will be involved in your care. Helping people to understand what you want reinforces your decisions and eases the process for others.

Preparing the Document

A lawyer is not required to prepare either of these advance medical directives, and printed forms are available for your use. However, if you are a person with AIDS or are HIV positive and you want assistance executing these documents, contact the AIDS legal service in your area during business hours.

The program will arrange for a volunteer attorney to assist you in drafting either a Durable Power of Attorney for Health Care or a Directive to Physicians. There is no charge for those who meet the financial eligibility guidelines. If you are unable to make an office visit, a panel attorney will come to your home or hospital room.

To assist the attorney in drafting a document regarding your medical decisions, please review this pamphlet and take the time to educate yourself about what type of information you want in the document. If you have a particular question, write it down and be sure to ask the attorney. The attorney will be happy to answer any questions which you have.

Optional Items to Include in Your DPAHC

In addition to the information contained on the printed form DPAHC, you can include various other statements pertaining to your medical care which are of concern to you. (NOTE: This is a sample of desires, special provisions, and limitations to the California Medical Association's form for the Durable Power of Attorney for Health Care ("DPA/HC"). The statement is illustrative, not exhaustive, of the powers recognized by Cal.Civ.C. 2410-2443.)

(Name of Principal), of (City, State), do hereby nominate, constitute and appoint (Name of Agent), of (City, State), as my true and lawful attorney-in-fact, to act for me in and in my name, place and stead, with regard to any and all medical and health care decisions to be made concerning my medical condition, treatment and care, including, but not limited to the following powers:
A. **Priority in Visitation.** To be given first priority in visitation should I be a patient in any hospital, health care facility, or institution including, but not limited to, any intensive care or coronary care units of any medical facility, and should I be unable to express a preference on account of my illness or disability.

B. **Employment of Health Care Personnel.** To employ such physicians, dentists, nurses, therapists, and other professional or non-professionals, as my attorney-in-fact may deem necessary or appropriate for my physical or mental well-being; and to pay from my funds reasonable compensation for all services performed by such persons.

C. **Gain Access to Medical and Other Personal Information.** To request, review, and receive any information, verbal or written, regarding my personal affairs or my physical or mental health, including medical and hospital records, and to execute any releases or other documents that may be required in order to obtain this information.

D. **Receive Items of Personal Property and Effects.** To receive into (his/her) possession any and all items of personal property and effects which may be recovered from, on, or about my person by any hospital, police agency or any other person at the time of my illness, disability or death.

E. **Consent or Refuse Consent to Medical Care.** To give or withhold consent to medical care, surgery, or any other medical procedures to tests; to arrange for my hospitalization, convalescent care or home care; and to revoke, withdraw, modify or change consent to such medical care, surgery, or any other medical procedures or test, hospitalization, convalescent care or home care which I or my attorney-in-fact may have previously allowed or consented to.

I ask my attorney-in-fact to be guided in making such decisions by what I have told my attorney-in-fact about my personal preferences regarding such care.

Based on those same preferences, my attorney-in-fact may also summon paramedics or other emergency medical personnel and seek emergency treatment for me, or choose not to do so, as my attorney-in-fact deems appropriate given my wishes and my medical status at the time of the decision. My attorney-in-fact is authorized, when dealing with hospitals and physicians, to sign documents entitled or purporting to be "Refusal to Permit Treatment" and "Leaving Hospital Against Medical Advice" as well as any necessary waivers of or releases from liability required by the hospitals or physicians to implement my wishes regarding medical treatment or non-treatment.

F. **Refuse Life-Prolonging Treatment or Procedures.** To request that aggressive medical therapy not be instituted or be discontinued, including (but not limited to) cardiopulmonary resuscitation, the implantation of cardiac pacemaker, renal dialysis, parenteral feeding, the use of respirators or ventilators, nasogastric tube use, endotracheal tube use, and organ transplants. My attorney-in-fact should try to discuss the specifics of any such decision with me if I am able to communicate in any manner.

If I am unconscious, comatose, senile, or otherwise unreachable by such communication, my attorney-in-fact should make the decision guided by any preferences which I may have previously expressed and the information given by the physicians treating me as to my medical diagnosis and prognosis. My attorney-in-fact may specifically request and concur the writing of a "no-code" (do not resuscitate) order by the attending or treating physician.

G. **Provide Relief from Pain.** To consent to and arrange for the administration of pain-relieving drugs of any type, or other surgical or medical procedures calculated to relieve any pain even though their use may lead to permanent physical damage, addiction, or even hasten the moment of (but not intentionally cause) my death.
My attorney-in-fact may also consent to and arrange for unconventional pain-relief therapies such as biofeedback, guided imagery, relaxation therapy, acupuncture, skin stimulation or cutaneous stimulation, and other therapies which I or my attorney-in-fact believe may be helpful to me.

H. Protect My Right of Privacy. To exercise my right of privacy to make decisions regarding my medical treatment and my right to be left alone even though the exercise of my right may hasten death or be against conventional medical advice.

My attorney-in-fact may take appropriate legal action, if necessary in the judgment of my attorney-in-fact, to enforce my right in this regard.

I. Authorize Release of My Body. To authorize the release of my body from any hospital or any other authority having possession of my body at the time of my death and to make all decisions necessary for the removal and transportation of my body from the place of death.

J. (OPTIONAL) Authorize Cremation of My Body and Disposition of My Remains. To authorize the cremation of my body and to receive my ashes, whereupon my attorney-in-fact is to place (QUANTITY) in an urn, and place this urn with its contents in an appropriate site at (LOCATION), which I hereby select as my final resting place.

It is my hope and desire that (NAME OF PARTNER) will arrange that (his/her) body will be cremated after (his/her) death, and will be placed in an urn next to my own ashes in the same site as (LOCATION), and that we will share a plaque bearing our names and dates of birth and death. My attorney-in-fact may, as (he/she) chooses, dispose of, keep, or distribute any of my ashes which (he/she) does not inter at (LOCATION). If it is impossible or highly impracticable for my attorney-in-fact to perform any of the instructions I have given regarding my cremation or interment, my attorney-in-fact may, at (his/her) discretion, dispose of my body in such manner as (he/she) deems appropriate under the circumstances.

K. (OPTIONAL) Authorize Funeral or Memorial Service. I authorize my attorney-in-fact to make such arrangements for a funeral or memorial service in the (name of religious affiliation or tradition) as are not inconsistent with the wishes I have expressed above regarding my cremation and interment.

L. Execute Documents and Contracts. To sign, execute, deliver, acknowledge, and make declaration in any document(s) that may be necessary or proper in order to exercise any of the powers described in this document, to enter into contracts and to pay reasonable compensation or costs in the exercise of any such powers.

This Durable Power of Attorney shall take effect upon my incapacity. Said incapacity shall be defined as my failure, due to deteriorating physical or mental health, to be able to make informed decisions regarding the cause of my medical treatment, or my failure, due to deteriorating physical or mental health, to be able to sign any documents or perform any act necessary to decisions regarding the cause of my medical treatment.

IN WITNESS WHEREOF, I have hereunto signed my name this ______________ day of _____________________, 19_.

Principal's Signature
ADDITIONAL DURABLE POWERS OF ATTORNEY

A power of attorney is a written instrument authorizing another person (an "agent") to act for the principal in the conduct of his or her affairs. A principal can empower an agent (called an "attorney-in-fact") to perform transactions relating to real estate, tangible personal property, bonds, shares, commodities, business operations, insurance, retirement plans, and estates. Perhaps the most common function an attorney-in-fact can perform is financial institution transactions: depositing and withdrawing funds on accounts belonging to the principal.

In addition, a power of attorney can permit an agent to handle tax matters, records, reports and statements, to receive military service benefits, and to deal with personal affairs and relationships of the principal (see Cal. Civil C. 2450). In short, the power of an attorney in fact is limited only by law and by the restrictions imposed by the principal.

Traditionally, however, if the principal became incapacitated through injury or illness, or died, the power of attorney automatically ended, since in theory the agent was merely the executor of the principal's orders. The reality of disabling or terminal illness and the desire to prepare for incapacity and death has prompted lawmakers of every state and the District of Columbia to enact legislation permitting attorneys in fact to act despite the incapacity of principals. The result is the statutory creation of the durable power of attorney (DPA).

Statutory DPAs retain the predominantly commercial-or financial-transactional character of the traditional power of attorney (16 states currently permit surrogate medical treatment decisionmaking through durable power of attorney for health care or similar Instruments). State statutes enacted in the 1970s typically track the provisions of the Uniform Probate Code (UPC) dealing with durable power of attorney (UPC 5-501 et seq. in Uniform Laws Annotated, Master Edition, Vol. 8). This section was incorporated into the later Uniform Durable Power of Attorney Act (UDPA), which has provided the model for state legislation in the 1980s (Uniform Laws Annotated, Master Edition, Vol. 8A; see most recent pocket supplement for interjurisdictional variations on the UDPA by states which have adopted it).

A DPA may be effective upon execution or only upon the disability of the principal, as the definition of "durable power of attorney" accepted by the UPC and UDPA makes clear:

A durable power of attorney is a power by which a principal designates another [their] attorney-in-fact in writing and the writing contains the words "This power of attorney shall not be affected by subsequent disability or incapacity of the principal, or lapse of time," or "This power of attorney shall become effective upon the disability or incapacity of the principal."

The UPC and UDPA specifically provide that the power of attorney is not affected by lapse of time after execution of the instrument, nor by the disability or mental incapacity of the principal. The acts of the attorney-in-fact bind the principal and his or her successor as if the principal were competent and not disabled.

If the court names a conservator for the principal, the UPC provides that the attorney-in-fact will account to the conservator "rather than" to the principal (the UDPA holds the agent responsible to principal "as well as" to conservator). The UDPA permits the principal, in executing the durable power of attorney, to nominate his or her selection of conservator, should the court decide to name one.
Under both the UPC and the UDPA, if a principal dies or revokes the power of attorney, and the attorney in fact has no actual knowledge of the death or revocation, the agent's acts are nonetheless valid and binding on the principal and successors.

Finally, a durable power of attorney is also an effective means of communicating to newspapers the principal's desire that on his or her death, the attorney-in-fact may request that obituaries include the name of the decedent's partner in life and such other information as the agent chooses. Newspapers are typically reluctant to name as survivors persons not related by blood or marriage to the decedent. This reluctance may be overcome by a DPA with a provision empowering the attorney in fact "To have published in any newspaper an obituary notice containing whatever information [he or she] may choose."
UNLESS YOU DIRECT OTHERWISE ABOVE, THIS POWER OF ATTORNEY IS EFFECTIVE IMMEDIATELY AND WILL CONTINUE UNTIL IT IS REVOKED.

This power of attorney will continue to be effective even though I become incapacitated.

STRIKE THE PRECEDING SENTENCE IF YOU DO NOT WANT THIS POWER OF ATTORNEY TO CONTINUE IF YOU BECOME INCAPACITATED.

EXERCISE OF POWER OF ATTORNEY WHERE MORE THAN ONE AGENT DESIGNATED

If I have designated more than one agent, the agents are to act

IF YOU APPOINTED MORE THAN ONE AGENT AND YOU WANT EACH AGENT TO BE ABLE TO ACT ALONE WITHOUT THE OTHER AGENT JOINING, WRITE THE WORD "SEPARATELY" IN THE BLANK SPACE ABOVE. IF YOU DO NOT INSERT ANY WORD, OR IF YOU INSERT THE WORD "JOINTLY", THEN ALL OF YOUR AGENTS MUST ACT OR SIGN TOGETHER.

I agree that any third party who receives a copy of this document may act under it. Revocation of the power of attorney is not effective as to a third party until the third party has actual knowledge of the revocation. I agree to indemnify the third party for any claims that arise against the third party because of reliance on this power of attorney.

Signed this _______ day of _________, 19_____.

__________________________
(your signature)

__________________________
(your social security number)

State of ____________________
County of ____________________

CERTIFICATE OF ACKNOWLEDGEMENT OF NOTARY PUBLIC
State of California            ss.
County of ____________________ On this ______ day of __________, 19____ before me,_____________________, personally appeared

__________________________
(name of notary public)

__________________________
(name of principal)

known to me (or proved on the basis of satisfactory evidence) to be the person whose name is subscribed to this instrument, and acknowledged that he or she executed it.

NOTARY SEAL

__________________________
(signature of notary public)

BY ACCEPTING OR ACTING UNDER THE APPOINTMENT, THE AGENT ASSUMES THE FIDUCIARY AND OTHER LEGAL RESPONSIBILITIES OF AN AGENT.
HOSPITAL VISITATION AUTHORIZATION

I, __________________________, a resident of [NAME OF CITY], [NAME OF COUNTY] County, California, do hereby give notice and authorize that, if any injury or illness, or any incapacity through any other cause necessitates my hospitalization or treatment in a medical facility, it is my wish that __________________________ be given first preference in being admitted to visit me in such facility, whether or not there are parties related to me by blood or by law or other parties desiring to visit me, unless and until I freely give contrary instructions to competent medical personnel on the premises involved.

Signed on this ______ day of ______________, 19__, in [NAME OF CITY], [NAME OF COUNTY] County, California.

______________________________
[Signature]

STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

On this ______ day of ______________, 19__, before me, __________________________, personally appeared __________________________, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to this instrument, and acknowledged that he or she executed it. I declare under penalty of perjury that the person whose name is subscribed to this instrument appears to be of sound mind and under no duress, fraud, or undue influence.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal in the State aforesaid, the day and year in this certificate first above written.

______________________________
Notary Public
ATTACHMENT M
Disposition of Remains

DURABLE POWER OF ATTORNEY FOR
DISPOSITION OF REMAINS

I, ____________________________, a resident of [NAME OF CITY], [NAME OF
COUNTY] County, California, pursuant to California Civil Code Section 2434(b), do hereby
designate the following person: ____________________________ as my
attorney-in-fact (hereinafter referred to as my "agent"), to arrange for the disposition of my
body in the manner that my agent deems to be most appropriate. I request that my agent
consider my wishes in this matter if I have made my wishes known to my agent before my
death.

This Durable Power of Attorney is effective immediately and shall continue for an
indefinite period of time until I revoke or terminate it.

Signed on this ___________ day of _____________, 19__, in [NAME OF CITY],
[NAME OF COUNTY] County, California.

[Signature]

STATE OF CALIFORNIA
) ss.
COUNTY OF SAN FRANCISCO
)

On this ___________ day of _____________, 19__, before me,
personally appeared ____________________________, personally known to me (or proved to me on the basis of satisfactory evidence) to be the
person whose name is subscribed to this instrument, and acknowledged that he or she
executed it. I declare under penalty of perjury that the person whose name is subscribed to
this instrument appears to be of sound mind and under no duress, fraud, or undue influence.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal
in the State aforesaid, the day and year in this certificate first above written.

________________________________________
Notary Public
Women infected with HIV virus need access to care, help from employers

BY LISA CAPALDINI

When an employee is infected with Human Immunodeficiency Virus (HIV) or develops Acquired Immunodeficiency Syndrome (AIDS) or AIDS-related complex (ARC), it creates a profound effect on the employer, co-workers, vendors and customers. Businesses in San Francisco are among the most supportive in the country for individuals with AIDS. And companies such as Pacific Bell, Chevron Corp., and Levi Strauss and Co. lead in the development of comprehensive, effective policies for workers with AIDS.

But policies and research on AIDS generally focus on men; women living with HIV-related conditions experience additional staggering problems.

More than 40 percent of the women who have AIDS are between 25 and 34 years of age, when they are most likely to be caring for young children. Because women with AIDS have the additional burden of worrying about pregnancy and child care, they may have difficulty focusing on their responsibilities at work. In addition, women with AIDS often experience social stigma.

The public incorrectly assumes that most women develop AIDS because they use intravenous drugs. In truth, the majority of women who contracted the disease did so through heterosexual contact with an HIV-infected partner.

Homosexual men have widespread social and personal support through San Francisco's large and active gay community. But women diagnosed with AIDS do not have that assistance. They are frequently isolated and through a lack of identification with a specific group, are nearly invisible. Yet experts say that more than 150 women in San Francisco have been diagnosed with the disease. In addition to a lack of general social support, there is almost no formal support network for women with AIDS. Research and experimental treatments for AIDS are frequently offered only to men. Medical and social services for women with AIDS are not always available. Many men do not have primary care physicians prior to their diagnosis with AIDS; consequently, they are likely to turn to specialists who understand the disease. Women generally receive primary medical care through their gynecologists and may require a referral for additional medical assistance and treatment. Some statistics indicate that women diagnosed with AIDS live only one-sixth as long from the time of diagnosis as men with the same diagnosis, a result of the limited health resources available to women with AIDS.

When women discover they have AIDS while employed, they may experience an extra large share of the cost of treatment in terms of health insurance and lost productivity. A company policy recognizing the practical reality of employees with AIDS can mitigate some of these costs.

San Francisco has long led in the support of individuals with AIDS. And work place assistance for individuals with AIDS is offered by businesses to employees with HIV-related conditions and adjusting the work place accordingly.

Individuals with advanced HIV disease such as ARC or AIDS are protected class under local, state and federal disability laws. Employers need to develop a disability policy that includes AIDS but are not exclusively designed for the disease. A separate policy on AIDS will only serve to increase the sense of isolation persons with AIDS (PWAs) may already feel. The policies should recognize that anyone can be diagnosed with AIDS thereby addressing the specific needs of women as well as men.

Employee education about the disease, its transmission and the legal ramifications of discrimination should be supported by labor and management and supported by the highest executive levels in a company. Employee education must be interactive. The more questions about AIDS that can be answered, the more likely the employee will be able to maintain a productive work force.

Education will dispel the myths surrounding AIDS, eliminating the fear of sharing telephones, restrooms and work stations with PWAs and lessening co-worker's request for excessive nominalization. Employers need to encourage and allow time for individuals with AIDS to obtain regular medical care. Preventive measures will prolong health.

Lisa Capaldivi, M.D., M.P.H., treats women with AIDS at San Francisco General. She is an instructor in the Department of Medicine at the University of California, San Francisco.

CITIZENS COMMISSION ON AIDS

Principles for the Work Place:

• People with AIDS (PWAs) or HIV (human immunodeficiency virus) are entitled to the same rights and opportunities as people with other serious or life-threatening illnesses.

• Employment policies must comply with federal, state and local laws and regulations.

• Employment policies should be based on the evidence that people with AIDS or HIV infection do not pose a risk of transmission of the virus to co-workers through ordinary work place contact.

• The highest level of management and union leadership should provide clear-cut employment policies and educational programs about AIDS.

• Employers and employees should communicate their commitment to these policies to workers in simple, clear, and unambiguous terms.