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Documenting Decisionmaking In a Pandemic

There is hardly an element of life that has not gone untouched or completely upended by COVID-19. With ubiquitous “shelter in place” orders and worldwide “social distancing,” finding notaries public and other witnesses for the signing of legal documents in California has become challenging for many folks and nearly impossible for long term care facility residents. The burdens for these residents include:

- National, state, county, and city orders essentially prohibiting on-site visitors for nursing home and assisted living facility residents;
- Law that bars health care providers from acting as witnesses of Advance Health Care Directives (AHCDs);
- Fellow residents who cannot serve as witnesses because of varying degrees of infirmity and cognitive impairment;
- Law requiring AHCDs be witnessed by a long term care Ombudsman at a time when Ombudsmen are not able to go into facilities.

For notaries, the California legislature recently drafted a Governor’s proclamation permitting remote notarization through the use of e-signatures. While the proclamation has not been signed as of April 5, many states have adopted remote notarization laws in response to COVID-19. Until then, documents can only be notarized in long term care facilities if the notary can gain access to the resident to observe their signature and obtain their thumbprint.

For non-notary witnesses to documents other than AHCDs, such as financial powers of attorney, health care providers in the facility may serve as witnesses and should be (politely) asked to fill this role. If that will not work, the signing can be witnessed through a window or through a video streaming app such as FaceTime or Skype. Video witnessing raises concerns about verifying the document the facility resident signed but perhaps this can be managed by sending pictures of each page of the document to the witnesses in advance. The witnesses can then compare the pictures to the signed document to verify they are the same. If the resident’s cognitive capacity is impaired and their ability to meaningfully sign the document is in question, the witnesses should be sure to take notes as to their observations the resident understood what they were signing.

For health care, there are multiple alternatives for directing care in advance besides having a witnessed AHCD. Probate Code 4673 requires AHCDs to be witnessed in order to be “legally sufficient” (and subsection b refers to electronic forms and signatures so that may be an option) but advance health care instructions are not confined to AHCDs. End of life care instructions can still be made through a Physician Order for Life Sustaining Treatment (POLST) form, which does not require witnesses, while other instructions can simply be written and shared by the resident. Health care surrogates, whether designated orally through Probate Code 4711 or a family member serving as a surrogate by virtue of their relationship, are bound to honor all health care instructions regardless of how they are communicated; i.e., whether in an AHCD or not. (See Probate Code 4684 and 4714) Health care providers are similarly required to follow a patient’s instructions per Probate Code 4733.

For health care decision making in nursing homes, perhaps the best option is to have the resident fill out the AHCD form, sign it with whatever witnesses that can be mustered (through onsite presence or video “presence”) and video record the signing. Without an Ombudsman signature, the form is not “valid” but it can be made operational by giving a copy of the completed form to the facility and requesting the agent designation be entered as the Probate Code 4711 surrogate designation. The rest of the document, the health care instructions component, will bind the surrogate and health care providers. In these times, this do-it-yourself AHCD should be good enough.