

Advance Directives in Pennsylvania



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Life is a Story

Beginning

Middle

End



Life is a Story



- **Eos & Tithonus**

- **Jack's Story**

- Age 84 – 2nd marriage – 2 children from first marriage
- COPD & Multi-Infarct Dementia
- Has major stroke
- Can't speak, often somnolent, moans when awake
- **Prognosis** – *if he survives discharge to nursing home, expect recurrent crises, death likely in months not years*

Making Decisions for Jack



- **No advance directive found**
- **Family disagrees**
 - **Wife**: No life sustaining treatment – *“Jack wouldn’t have wanted this, and he’s suffering. It’s time to stop.”*
 - **Daughter**: wants aggressive care - *“Dad was a fighter, do everything to keep him alive.”*
 - **Son** is unavailable.
- **What to do next?**
 - Who would Jack want to make the decisions?
 - What would Jack want?
 - What does Pennsylvania law provide?

Hard Choices, Hard Feelings

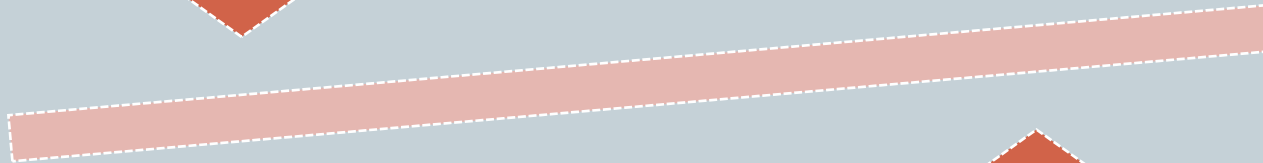


- **Are things going the way Jack would have wanted?**
 - **“I’ll just leave it to my family to decide”**
- **Will the family recover from the disagreement?**
 - **What could have prevented it?**

The Right to Die



Personal
Autonomy



The
interests of
Society



Making Health Decisions for Incompetent Adults

4 Methods

1. Leaving Instructions

- Living Will

2. Delegating Decisions to a Surrogate Decision Maker

- Health Care Power of Attorney

3. Default Decision Maker

- Family Consent
- Health Care Representative

4. Court Intervention

- Guardianship
- Mental Health commitment

How We Die



- **Suffering chronic, progressive illness**
- **Under care of health professionals**
- **50% incapable of decision making**
- **Often over treated**
- **Physicians uninvolved in advance planning**

Pennsylvania's Law on Making Health Decisions for Incompetent Adults



- **Act 169 of 2006 (Chapter 54 of Probate Code)**
- **Effective January 27, 2007**
- **Governs health care decisions for incompetent adults**
- **Says who decides if there is no advance directive**

Chapter 54: Five Parts to New Law

A: Definitions

B: Living Wills

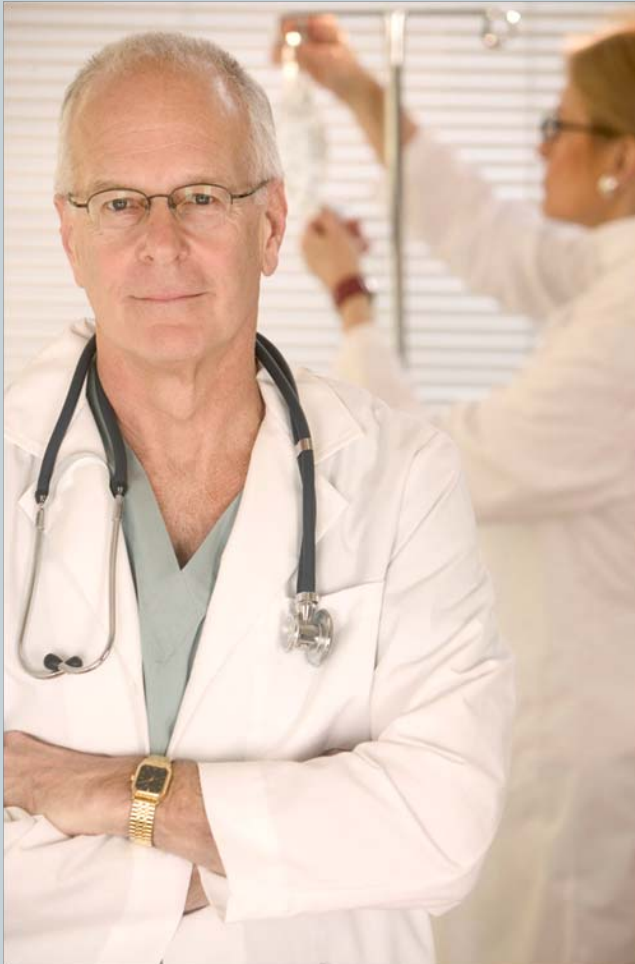
**C: Health Care Agents
& Representatives**

**D: Optional Form – Combined
Directive**

E: Out of Hospital Non-Resuscitation



Duties on Health Care Providers



Attending Physician Must Document Medical Record if Patient is

○ **permanently unconscious**

OR

○ **has end stage medical condition**

Other Duties on Health Care Providers



- 1. Communicate agent's decisions to patient;**
- 2. Comply with agent's decisions.**
- 3. Document any changes in advance directive in medical record (e.g. new agent).**
- 4. Record determinations of incompetency or regaining competency and notify agent of same.**

Protection of Health Care Providers



General Rule for dealing with Advance Directives and Patient's Agents and Representative:

So long as a health care provider acts in “good faith” it will not be subject to criminal or civil liability, discipline for unprofessional conduct or administrative sanctions.

The Term “good faith” is not defined.

Some Definitions – “*Incompetent*”



A condition in which an individual despite being provided appropriate medical information, communication supports and technical assistance, is documented by a health care provider to be:

- (1) unable to understand the potential material benefits, risks and alternatives involved in a specific proposed health care decision;
- (2) unable to make that health care decision on his own behalf; or
- (3) unable to communicate that health care decision to any other person.

Some Definitions – “Permanently Unconscious”



A medical condition that has been diagnosed in accordance with currently accepted medical standards and with reasonable medical certainty as total and irreversible loss of consciousness and capacity for interaction with the environment. The term includes, without limitation, an irreversible vegetative state or irreversible coma.

Some Definitions- “End-Stage Medical Condition”



An incurable and irreversible medical condition in an advanced state caused by injury, disease or physical illness that will, in the opinion of the attending physician to a reasonable degree of medical certainty, result in death, despite the introduction or continuation of medical treatment.

Living Wills



- **What is a Living Will**
 - Instructions for end of life care
- **Execution Requirements**
 - Dated & signed by principal or at direction of principal
 - Health care provider/employees may **not** sign for principal
 - Two witnesses (health care provider/employee can witness)

Living Wills



- **When is a Living Will Operative**
 - **Must be given to attending physician**
AND
 - **Maker (principal) must be**
 - ✦ **Incompetent**
 - ✦ **Have end stage medical condition or be permanently unconscious**

Living Wills



- **What does a Living Will Mean?**
 - Patient has expressed some preferences
 - IF**
 - Patient is ever
 - ✦ Incompetent **AND**
 - ✦ Has end stage medical condition or permanently unconscious
 - It may not be a DNR Request – *Must read the document*

Living Wills – Duties of Health Care Providers



- **Make LW part of patient’s medical record**
(consistent with normal medical records requirements)
- **Make revocation part of medical record**
- **Comply with LW or transfer patient**
- **No liability if acting in “good faith”**
 - Read the document
- **Providers:** *beware of assuming too much*

Living Wills: Other Issues



Revocation



Pre-existing & out of state documents: Valid



Form is optional
(an “example”)

The Failure of Living Wills



- **Limitations of Living Wills**
 - **Limited applicability**
 - **Non-sequitur – uninformed “informed consent”**
 - **Often Misunderstood or Ignored**
 - **Hard to predict future circumstances (football analogy)**

Informed/Prudent Caregivers Needed

Health Care Agents



- **Health Care Power of Attorney** – *the preferred advance directive*
 - **Names Agent to make decisions**
 - **Broader applicability than Living Will**
 - **Can include instructions**
 - **Statutory example form is HCPOA with LW instructions**

Health Care Power of Attorney



- **When operative**
 - Usually “springing”
 - HIPAA trap
- **Multiple or successor agents**
 - Successor method usually preferred
- **Authority of Agent**
 - Very broad unless limited in document

Health Agent: Decision Making Requirements



- **Must consult with health care providers**
- **Must make EOL decisions based on:**
 - Principal's instructions, if none then
 - Principal's beliefs & preferences, if unknown then
 - Agent's assessment of best interests
- **Act specifies methodology to be followed**
- **Presumption in favor of nutrition & hydration**

Health Care Agent: Other Issues



- **Revocation**
 - In writing
 - By notifying health care provider
- **Pre-existing & out of state documents – *valid***



Picking your Health Care Agent



- **Some factors to consider**
 - Availability
 - Reliability
 - Willingness to serve
 - Advocacy skills
 - Ability to understand medical issues
 - Understanding and respect for the principal's wishes
 - Ability to communicate with other family members

See selection tool in handout materials

Copies available at www.paelderlaw.com

When Should You Review/Update Your Advance Directive



- Priorities can change with age, experience & shifts in physical and mental condition.
- Reviewing your Advance Directive – the 5 D's.
 - **Decade**
 - **Death in family**
 - **Divorce**
 - **Diagnosis**
 - **Decline**



Health Care Representative



- **When applicable**
 - Patient is over 18 and incompetent
 - No other surrogate (Agent or Guardian) is available
- **Authority**
 - Very broad – similar to Agent
 - Cannot decline life-sustaining treatment unless patient is in end-stage medical condition or permanently unconscious
- **Should decrease court involvement**

Health Care Representative

Determining Who is Authorized to Act



- **Appointment by principal**
- **Default – in following order of priority**
 - (1) The spouse and the adult children of the principal who are not the children of the spouse
 - (2) An adult child
 - (3) A parent
 - (4) An adult brother or sister
 - (5) An adult grandchild
 - (6) An adult who has knowledge of the principal's preferences & values
- **Health care provider cannot serve unless related to principal**

Health Care Representative: Other Issues



- **Resolving disagreements**
 - Within class – majority rule
 - If no majority – no decision is made – class members must resolve the disagreement
- **Communication with family**
- **Countermand**
- **Written declaration of claimed authority**

Advance Directive “Example” Form



- **Advance directive may be in any form**
- **Old “checklist” form is gone from statute**
- **New “example” form combines Health Care POA and Living Will instructions**
- **Advance directive should be tailored to individual circumstances**

Advance Care Planning is a *Process*, not Documents Alone



- **Information**
- **Discussion**
- **Documentation**
 - Advance Directives
 - At end of life: DNR/POLST
- **Implementation**
 - Copies to Agent
 - Wallet Card
 - More Discussion

Advance Care Planning: a *Process*, not Documents Alone

- **Studies reflect failure of Advance Directives alone**
- **Advance Directives not worth the paper they are written on without – conversations**



North Central Pennsylvania Advance Care Planning Taskforce



- **Volunteers become trained facilitators**
- **Meet with families to discuss advance care planning and foster conversation**
- **Help people complete appropriate advance directives**
- **No cost to consumer**

More information:

Linkage Lycoming: 570-323-8555

Out of Hospital DNRs



- **What is a DNR?**
 - **Doctor's order – no CPR**
 - **In-hospital (“no code” “comfort care”)**
 - **Out of hospital**
 - ✦ **Orders, bracelets, necklaces**
 - ✦ **Only patient (not surrogate) can revoke**

POLST



- ***Physician's Order for Life Sustaining Treatment***
- **Next step beyond advance directives**
- **Physician's order (unlike LW and HCPOA)**
- **Advantages of POLST**
 - Requires discussion between physician and patient
 - Patient wishes are incorporated into a doctor's order
 - POLST document travels with the patient

Want more information?



- **Linkage Lycoming: 570-323-8555**
- **Marshall, Parker & Associates website:**
www.paelderlaw.com
 - Sign up for free e-mail newsletter
- **Pennsylvania Department of Health website:**
<http://www.dsf.health.state.pa.us/health/site/>
- **Pennsylvania Department of Aging website:**
<http://www.aging.state.pa.us/>

Questions and Discussion



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