



# Advance Directives in Pennsylvania

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Life is a Story:  
*It has a Beginning and an Ending*

- **Eos & Tithonus**
  
- **Patient Autonomy & the Right to Die**
  - Competent Patients
  - Incompetent Patients

# Making Health Decisions for Incompetent Adults-

## 4 Methods

- **Leaving Instructions**
  - Living Will
- **Delegating Decisions to a Surrogate Decision Maker**
  - Health Care Power of Attorney
- **Default Decision Maker**
  - Family Consent
  - Health Care Representative
- **Court Intervention**
  - Guardianship
  - Mental Health Commitment

# Patients Need Improved Advance Planning

- **Approximately 80% of deaths will occur under the care of health professionals in some type of health organization.**
- **When the time comes to make important end-of-life decisions, approximately 50% of patients are incapable of participating.**
- **Only 12% of patients with an advance directive received input from their physician in its development.**
- **If health professionals or loved ones have not spoken with a patient about end-of-life issues, they cannot reliably predict what the patient would have chosen and they find the decision making responsibility burdensome and stressful.**
- **Physicians are only about 65% accurate in predicting patient preferences.**

# **Pennsylvania's New 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.**

# Act 169: Five Sections of the New Law

**1: Definitions**

**2: Living Wills**

**3: Health Care Agents & Representatives**

**4: Optional Form – *Combined Directive***

**5: Out of Hospital Nonresuscitation**

# **Attending Physician Must Document Medical Record if Patient is:**

- 1. Incompetent**
- 2. Permanently unconscious**
- 3. Has end-stage medical condition**

**These are the 3 conditions required to make a  
living will operative.**

# **Other Adv. Dir. Related Obligations of Physicians and Health Providers**

- 1. Communicate agent's decisions to patient;**
- 2. Comply with agent's decisions. Permanently unconscious;**
- 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 Physicians and Other Health 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.**

# Definitions

## “Competency” to make a treatment decision

- 1. Have an understanding of the risks, benefits, and alternatives;**
- 2. Be able to make a decision; and**
- 3. Be able to communicate the decision to another person.**

# 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.

# 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.

# Living Wills

- **What is a Living Will?**
  - Instructions for end of life care.
  
- **When is a Living Will Operative?**
  - Must be given to the attending physician
  - Maker (principal) must be:
    - Incompetent, and
    - End stage medical condition or permanently unconscious.

# Living Wills – Some Definitions

## “Life-Sustaining Treatment”

1. Any medical procedure or intervention that, when administered to a patient who has an end-stage medical condition or is permanently unconscious, will serve only to prolong the process of dying or maintain the individual in a state of permanent unconsciousness.
2. Preference for Nutrition & Hydration. “Life Sustaining Treatment” includes nutrition and hydration administered by gastric tube or intravenously or any other artificial or invasive means only if the advance health care directive or order so specifically provides.

# 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”).**
- **Limitations of Living Wills.**
  - **Limited applicability.**
  - **Hard to predict future circumstances.**  
**(football analogy)**
  - **Potential for confusion.**

# 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.”
- **Multiple or successor agents?**
  - Successor method usually preferred.
- **Authority of Agent.**
  - Very broad unless limited in document.

# Agent's End of Life Decisions

- **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.**
- **Serving as agent – *see tool***

# 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. During disagreement provider can treat in accordance with accepted standards of medical practice.
- **Countermand.**
- **Written declaration of claimed authority.**

# Other Directives - Out-of-Hospital DNRs

- **Prior Out of hospital DNR law has been incorporated into Act 169 with minor changes.**
  - **prior regulations are still valid.**

# Advance Directive “Example” Form

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

# Other Directives - 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.**

# **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 is a *Process*, not Documents Alone**

- **Studies reflect failure of Advance Directives alone.**
- **Advance Directives are not worth the paper they are written on without – conversations about goals, preferences, values, & beliefs**

# When Should Patients Review/Update Their Advance Directive?

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

# Picking a Health Care Agent for Your Advance Directive

- **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](http://www.paelderlaw.com)*

# Want More Information?

- **Marshall, Parker & Associates website:**  
[www.paelderlaw.com](http://www.paelderlaw.com)  
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- **Pennsylvania Department of Health website:**  
<http://www.dsf.health.state.pa.us/health/site/>
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# Questions & Discussion

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