

New Laws under Act 169 of 2006- Advance Health Care Directives and Health Care Decision Making for Incompetent Individuals

NIKOLAOS I. TSOUROS, LL.M., ESQUIRE



AT A GLANCE

ADVANCE HEALTH CARE DIRECTIVES AND HEALTH CARE DECISION MAKING FOR INCOMPETENT INDIVIDUALS

On November 30, 2006, Act 169 (the "Act") was signed into law by Governor Ed Rendell which set forth new comprehensive guidelines regarding advanced health care directives and health care decision making for incompetent patients. The new law became effective on January 29, 2007. The following is a summary of the new Act as well as other general information regarding Advance Health Care Directives. The majority of the information contained in this article comes from excerpts of the Pennsylvania Medical Society's "Guide to Act 169 for Physicians and other health care providers" which can be found online at www.pamedsoc.org.

I. General purpose of Act 169

The Act provides that health care decisions are to be made for an adult incompetent individual (the "patient") through:

1. The instructions on a patient's Living Will; Directions from the patient's health care agent appointed by a health care power of attorney; or Directions from a close family member or other health care representative designated by the patient or authorized by default designees under the new Act.

The Act also provides for out-of-hospital do-not-resuscitate (DNR) orders, which directs emergency medical service providers to withhold cardiopulmonary resuscitation (CPR) from the patient in the event of cardiac or respiratory arrest.

II. What the New Act has added as of January 29, 2007

The living will and out-of-hospital DNR order provisions are similar to the previous laws. The new provisions concern the health care power of attorney and health care representative provisions.

Additionally the Act requires the Department of Health, in consultation with an advisory committee, to consider

Under PA law there are 3 types of advance health care directives: (1) A Living Will which is a written statement of the patient's personal desires regarding life-sustaining treatment and other end of life care decision; (2) A Health Care Power of Attorney which is a written document under which the patient appoints another person to serve as the patient's health care agent to make all types of health care decisions for the patient; and (3) a combination document that incorporates both a Living Will and a Health Care Power of Attorney.

The New Act 169, created a new statutory default decision maker called a "Health Care Representative". The Health Care Representative is chosen from a priority list of individuals (i.e., a spouse, an adult child, a parent, an adult sibling) . A patient has the right to amend the statutory default list in his or her advance health care directive regarding who he or she would like to be their Health Care Representative. Under the new Act 169, if the individual first on the priority list is not available to be the Health Care Representative then the individual with the next highest priority on the statutory default list may serve as a substitute.

Unlike an agent under a Health Care Power of Attorney, a Health Care Representative may only direct the withholding or withdrawal of care necessary to preserve life only when

adoption of a standardized physician-order-for-life-sustaining treatment (POLST) form. POLST orders provide for continuity of DNR and other life-sustaining treatment orders from one setting to another, such as when a patient is transferred from a nursing facility to a hospital or vice versa. Under a POLST program, the POLST order is required by regulation to be transferred with patients when they move from one setting to another and recognized in the new setting. This assures that each patient's difficult decisions regarding end-of-life care are honored and are not dishonored by misplaced or delayed paperwork.

III. What are the basic requirements for advance health care directives

A. Types of advance health care directives in PA

Under Pennsylvania law there are 3 types of advance health care directives:

A living will, which is a written statement of the patient's personal desires regarding life-sustaining treatment and other end of life care decisions.

A health care power of attorney, which is a written document under which the patient appoints another person to serve as the patient's health care agent to make health care decisions for the patient.

A combination document, which incorporates both a living will and a health care power of attorney.

B. Requirements for a valid advance health care directive

Under PA law, only adults of sound mind may make an advance health care directive. Under the Act an adult includes an individual who is 18 years of age or older, or who has graduated from high school, or who is married, or who is an emancipated minor.

An advance health care directive must be: (i) Made in written document form that is dated and signed by the patient or, if the patient is unable to sign, by an individual acting at the patient's direction, and (ii) Witnessed by two individuals who are at least 18 year of age.

An individual who signs for the patient may not also be a witness. Health care providers and their agents, including physicians and their office staff, may not sign an advance health care directive on behalf of a patient that they are treating.

the patient is "permanently unconscious" or has "an end stage medical condition" and cannot make the extensive type of health care decisions as an agent under a Health Care Power of Attorney.

The new Act 169 only requires the attending physician to write an order declaring a patient to have an "end-stage medical condition" or in "a state of permanent unconsciousness". Prior law required a second opinion of another physician, but a patient can still require that there be a second opinion obtained if the patient specifically makes this know in his or her Living Will.

The new Act also imposes special rules for nutrition and hydration administered by gastric tube or intravenously or by other artificial or invasive means. Health care agents and representatives must make decision regarding this care based upon the assumption that the patient would have wanted this care, unless the patient expressed to the health care agent or representative that they do not want the artificial nutrition or hydration. Under the Act the use of the term "life sustaining treatment" in an advance health care directive does not include artificial nutrition and hydration unless the directive specifically provides that this care is included.

MacElree Harvey
17 West Miner Street
Post Office Box 660
West Chester, PA 19381-0660
p | 610.436.0100
f | 610.430.7885
f | 610.429.4486
e | info@macelree.com

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An advanced health care directive does not have to be notarized to be valid in Pennsylvania. But some states do impose such a requirement and if the documents is notarized it will help it to be recognized in those states that have a notary requirement.

The new Act provides an example of an advanced health care directive that is a combined health care power of attorney and living will. However, Patients in Pennsylvania are not required to use this example.

An advance health care directive remains in effect as long as the patient lives, unless it is revoked or it states a termination date. Additionally, advanced directives executed under the prior law remain valid.

A patient may amend an advance health care directive only if the patient is of sound mind. Any amendments must be in compliance with the requirements for executing an advance health care directive.

If there are several advanced health care directives that are in conflict, the latest directive prevails, unless the directive provides otherwise.

A patient may revoke a living will at any time and in any manner, regardless of the mental or physical condition of the patient. However, to revoke a health care power of attorney a patient must be of sound mind. A revocation of a living will is effective when it is communicated to the attending physician or other health care provider by either the patient or a witness to the revocation. A patient in revoking a health care power of attorney must either do so in writing in compliance with the rules for signing a health care power of attorney or personally communicate the revocation to the patient's attending physician, health care provider, or health care agent.

When a health care provider is presented with a patient's advanced health care directive they must place a copy in the patient's medical records. Also, a health care provider who is notified that a patient has amended or revoked an advance health care directive must document the amendment or revocation in the patient's medical records.

C. Decisions by Living Wills and Health Care Agents and Representatives

1. Living Wills: Living wills focus on life-sustaining treatment and other end-of-life care decisions. A living will is not effective unless: (i) the patient is incompetent; and (ii) the

patient is permanently unconscious or has an end-stage medical condition.

Key Definitions:

End of Stage Medical Condition: an incurable and irreversible medical condition in an advanced state caused by injury, disease or physical illness that will, to a reasonable degree of medical certainty, result in death, despite the introduction or continuation of medical treatment. The term is defined similarly to “terminal condition” in the prior living will law and replaces that term.

Incompetent: Not able to understand, make, and communicate health care decision, even when provided appropriate information and aids. A patient may be competent to make some simple health care decision, but incompetent to make other more complex decisions.

Life-sustaining treatment: Generally means any medical procedures 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 patient in a state of permanent unconsciousness. Examples of care that may, depending upon the circumstances, be considered life sustaining include: CPR, medical respiration, kidney dialysis, surgery, radiation therapy, chemotherapy, and antibiotics. Under the Act, artificial nutrition and hydration are not included in the term “life-sustaining treatment” in an advanced health care directive, unless the directive specifically states that this care is included.

Permanent unconscious: A medical condition in which a patient has total and irreversible loss of consciousness and capacity for interaction with environment, such as an irreversible vegetative state or an irreversible coma.

2. Health Care Power of Attorney: A health care power of attorney may give a health care agent authority to make decisions regarding a patient’s health care as if the patient were competent and making the health decisions themselves. Also, health care power of attorneys, unlike living wills, are not restricted to end-of-life decision making. Also, even though health care agents are usually given authority only when the patient is incompetent, a health care power of attorney may also become effective when the person is still competent.

A health care agent, may direct health care providers to provide, continue, withhold or withdraw all forms of medical care from the patient. However, there are some limited restrictions under the laws of Pennsylvania in the case of pregnant women and disabled patients.

The Act also does not impose a requirement that the patient

be permanently unconscious or have an end-stage medical condition for health care agent to direct the withholding or withdrawing of health care necessary to preserve the patient's life.

D. Health Care Representative

A Health Care Representative may make health care decisions for an incompetent adult patient who does not have a controlling living will, a health care agent under a health care power of attorney, or guardian of the person. Similar to a health care agent, a health care representative generally may direct health care providers to provide, continue, withhold or withdraw all forms of medical care, with limited restrictions in the case of pregnant women or disabled patients. Unlike a health care agent under a health care power of attorney, a health care representative may direct the withholding or withdrawal of care necessary to preserve life only when the patient is permanently unconscious or has an end-stage medical condition.

E. Patient's reversal of the decisions of Health Care Agent/Representative

A patient of sound mind may reverse the decision of a health care agent under a health care power of attorney or health care representative at any time, by personally informing the attending physician or health care provider. Also, regardless of the patient's mental or physical capacity, a patient may reverse the decision of a health agent or representative that would withhold or withdraw life-sustaining treatment by personally informing the attending physician.

F. Physician determinations

A patient's competence and whether a patient is permanently unconscious or has an end-stage medical condition must be made by the patient's attending physician. Under the prior living will law, determination that a patient had a terminal condition or was permanently unconscious had to be confirmed with a second opinion. The new Act does not require the determination of a terminal condition or permanently unconscious to be confirmed with a second opinion. However, the patient, in his or her advance directive, may still require a confirming second opinion.

G. Differences between Health Care Agents and Health Care Representatives

A patient's health care representative is designated by the patient or authorized by the default provisions as set forth under the new Act of Pennsylvania. A patient of sound mind

may designate a health care representative, within a signed written document or by personally informing the health care provider. This process is less formal than the appointment of a health care agent under a health care power of attorney. However, if the patient has a specific health care decision maker in mind, it is best for the patient to formally appoint that person as a health care agent in a health care power of attorney.

A patient can direct and restrict a health care agent through the provisions in a health care power of attorney. Health care agents under a health care power of attorney may also be given broader authority than health care representative under the laws of Pennsylvania.

If a patient has not designated a health care representative (and has no controlling living will, healthcare agent, or guardian of the person), the Act provides for the default designation of a health care representative. A patient's default health care representative under the new Act is determined by a priority list as follows: (a) a spouse, unless an action for divorce is pending; (ii) An adult child; (iii) a parent; (iv) an adult brother or sister; (v) an adult grandchild (vi) an adult who has knowledge of the patient's preferences and values, including, but not limited to, religious and moral beliefs, to assess how the patient would make health care decisions.

An individual may have multiple representatives in the same priority class. The Act provides for resolution of disputes among multiple representatives of the same priority. A patient may, by a signed writing or by personally informing the patient's health care provider, disqualify one or more individuals from serving as a health care representative.

A patient also may, by health care power of attorney or otherwise signed writing, provide for a different order of priority. If any member of a default health care representative class petitions the court, a judge may disqualify one or more otherwise eligible individual from serving as health care representative in appropriate circumstance.

H. Additional decision making issues under the Act

1. Unavailable health care representative: If the highest priority health care representative for a patient is not available, the individual designated or the class with the next highest priority may serve as a substitute.
2. Resolution of disputes: A patient may have joint agents of equal priority or multiple representatives in the highest

priority class. Although not required by the new Act, in such cases, a health care provider, whenever feasible, should consider the use of an ethics committee or mediation process to facilitate the class reaching a unified position. In the case of joint agents with equal priority, no decision can be made unless they agree. In contrast, if agreement cannot be reached among representatives of equal priority; the Act allows the attending physician to rely on the decision of the majority. But if the representatives are evenly divided, the Act does not allow the class to make a decision; nor does it allow an individual having lower priority to break the tie or serve as the patient's health care representative. In any event, the lack of agreement does not preclude the administration of medical treatment in accordance with accepted standards of medical practice in the meantime.

I. Special circumstances and life-preserving care

1. Permanent unconscious or End-Stage Medical Condition: Health care representatives may not direct the withholding or withdrawal of care necessary to preserve the patient's life, unless the patient is permanently unconscious or has an end-stage medical condition.

If an incompetent patient neither is permanently unconscious, nor has an end-stage medical condition, health care providers must provide life-preserving care unless the patient refused the care while competent or a duly authorized health care agent refuses the care. In most situations in which it is appropriate for a health care representative to direct a health care provider to withhold or withdraw life preserving medical care, the patient will be considered to be permanently unconscious or to have an end-stage medical condition. There is no maximum life-expectancy parameter in the definition of "end-stage medical condition". Unlike some state, in Pennsylvania here is no requirement that the patient be expected to die within 6 months. The condition need only be in an "advanced state."

2. Nutrition and Hydration: The Act also imposes special rules for nutrition and hydration administered by gastric tube or intravenously or by other artificial or invasive means. Health care agents and representatives must make decisions regarding artificial nutrition and hydration in accordance with a modified process. First, it must be assumed as a starting point that the patient would want artificial nutrition and hydration, unless the patient specifically stated otherwise in a written document, such as an advance health care directive. Second, the presumption in favor of the patient wanting artificial nutrition and hydration may be over come only if (i) the patient clearly expressed wishes to the contrary; or (ii) it is clear from the patient's preferences and values that the

patient would not want the artificial nutrition and hydration under the circumstances. It should be noted that under the Act the use of the term “life-sustaining treatment” in an advance health care directive does not include artificial nutrition and hydration unless the directive specifically provides that this care is included.

3. Pregnant women: The Act retains the provision of the prior living will law in Pennsylvania that restrict the withholding and withdrawal of life-sustaining treatment from an incompetent pregnant woman. It mandates that life sustaining medical treatment be given to an incompetent pregnant woman unless the life-sustaining treatment will: (i) not maintain the woman in such a way as to permit the continuing development and live birth of the unborn child; (ii) be physically harmful to the woman; or (iii) cause pain to the woman that cannot be alleviated by medication.

4. Disabled patients: The decision making process of the Act incorporates protections for disabled patients as well.

5. Parents of Minors: Minors are considered incompetent to make their own health care decision and their parents make their health care decisions. The Act does not affect the right of parents to make health care decision for their minor children who are not emancipated.

6. Legal Guardians: An incompetent patient may have a court-appointed “guardian of the person.” A health care agent appointed by the patient while of sound mind retains authority to make health care decisions for the patient, despite the subsequent appointment of a guardian, unless the appointment is revoked by the guardian or the court. A guardian of the person has the same authority to revoke or amend the appointment of a health care agent as a patient would have if of sound mind. However, a guardian of the person may not otherwise revoke or amend instruction in an advance health care directive executed by the patient while of sound mind (i.e., directions to withhold life sustaining care when a patient is permanently unconscious or has an end stage medical condition), unless specifically authorized by the Court.

Summary

As illustrated above, an Advanced Health Care Directive is an essential estate planning tool for Clients who would like to ensure that if they are ever unable to make health care decisions on their own behalf, they have appointed someone who they are comfortable with and who they know are familiar with their health care preferences and beliefs, to make any necessary health care decisions on their behalf.

The Estate Planning Department at MacElree Harvey has a team of experienced estate planning attorneys who can assist you in all of your estate planning needs, including updating your current estate planning documents, and discussing the advantages of having an advanced health care directive (health care power of attorney and living will) in place. Please contact us at your convenience if you would like our assistance and we will forward an Estate Planning Worksheet to you to begin the process.

