

The Basics of Pennsylvania Advance Directives for Post-Acute Facilities and Staff

***An educational presentation for
Pennsylvania Health Care Association***

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- **Types of Advance Directives**
 - Living Will
 - Healthcare Power of Attorney
- **Specifics about Living Will**
- **Specifics about Healthcare Power of Attorney**
- **FAQs**

WHAT IS AN ADVANCE DIRECTIVE?

Defined – Advance Directive

- *Pennsylvania: A health care power of attorney, living will or a written combination of a health care power of attorney and living will. 20 Pa. C.S. 5422 (Definitions).*
- **Advance directive-** set of written instructions that a person gives that specifies what actions should be taken for their health, if they are no longer able to make decisions for themselves due to illness or incapacity.
 - A living will is one kind of advanced directive
 - A healthcare power of attorney (POA) is another

What are They?

- 1. Living Will – The first type of advance directive.**
 - A way for an individual to control health care decisions about himself when he is unable to speak for himself
 - Drawing from law of wills - Because individual is still alive = living will
 - Can forbid certain treatment; nutrition
 - Focused on hypothetical situations
- 2. Healthcare POA - Developed later to address scope issues with living will issues**
 - Drawing upon business law of power of attorney for business decisions
 - Person can appoint an individual to make health care decisions on their behalf if they become unable to make their own health care decisions
 - Benefit: ability to make real-time decisions involving real scenarios
 - Drawback: ability of patient to have informed proxy of their wishes in a meaningful way

Note a third generation advanced directive (medical directive) was created to try to address the drawbacks of both the living will and POA. Ex. Five Wishes.

Living Will

- written statement
- by a competent patient
- **that expresses the patient's instructions for health care and health care directives**
- when the patient is determined to be
 - incompetent **and**
 - **has an end-stage medical condition or is permanently unconscious.**

Healthcare POA

- written statement
- by a competent patient
- **designating another person to serve as the patient's health care agent and to make health care decisions for the patient**
- if the patient is determined to be incompetent.

Advance Health Care Directive: Execution Requirements

An advance health care directive must have been executed by a patient who was “of sound mind” and who also:

- was 18+ years of age;**
- graduated from high school;**
- was married; or**
- was an emancipated minor.**

An advance health care directive must be:

- in writing;**
- dated and signed (by signature or mark) by the patient; and**
- witnessed by two individuals who are 18 + years of age.**

20 Pa.C.S.A. 5442(a)(b) (Living Will); 5452(a)(b) (Health Care Power of Attorney)

Practical Tip #1

File the written advance health care directive in the resident's medical record.

- Most recent directive prevails.
 - A directive executed in another state is valid if it complies with that state's law and if the health care decision does not violate PA law.
 - Directive can identify a termination date.
 - Notarization is not required in PA.
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- 20 Pa.C.S.A. 5425; 5443(e); 5446(b), 5464

LIVING WILLS

PART II - HEALTH CARE TREATMENT INSTRUCTIONS IN THE EVENT OF END-STAGE MEDICAL CONDITION OR PERMANENT UNCONSCIOUSNESS (LIVING WILL)

The following health care treatment instructions exercise my right to make my own health care decisions. These instructions are intended to provide clear and convincing evidence of my wishes to be followed when I cannot understand, make or communicate my treatment decisions:

END-STAGE MEDICAL CONDITION OR PERMANENT UNCONSCIOUSNESS

If I have an end-stage medical condition (which will result in my death, despite the introduction or continuation of medical treatment) or am permanently unconscious such as in an irreversible coma or an irreversible vegetative state, and there is no realistic hope of significant recovery, then I choose the following (indicate your choice by initialing your preference):

Initials _____ **I do not want aggressive medical care**, and give the following instructions (cross out any treatment instructions with which you do not agree):

1. I direct that I be given health care treatment to relieve pain or provide comfort even if such treatment might shorten my life, suppress my appetite or my breathing, or be habit forming. Medical or surgical treatment to relieve pain or provide comfort may be given even though I do not want it as a life prolonging procedure.
2. I direct that all life prolonging procedures be withheld or withdrawn.
3. I specifically do not want any of the following as life prolonging procedures: heart-lung resuscitation (CPR), mechanical ventilation (breathing machine), dialysis (kidney machine), surgery, chemotherapy, radiation treatment or antibiotics.

Initials _____ **I do want aggressive medical care**, and give the following instructions.

I wish to receive all medical and surgical treatment needed to keep me alive as long as possible, even though my doctor believes that it will only delay the time of my death or maintain me in a state of permanent unconsciousness. In addition, I direct that I be given health care treatment to relieve pain or provide comfort provided that it does not hasten my death.

Tube Feeding

I have indicated below, by my initials, whether I want nutrition (food) or hydration (water) medically supplied by a tube into my nose, stomach, intestine, arteries, or veins if I have an end-stage medical condition or I am permanently unconscious and there is no realistic hope of significant recovery.

Initials _____ **I do want tube feedings to be given.**

OR

Initials _____ **I do not want**

Focuses on the initiation, continuation, withholding, or withdrawal of **life-sustaining treatment** for **incompetent patients** who have an **end-stage medical condition** or **who are permanently unconscious**.

20 Pa.C.S.A. 5422; 5442(a).

Life Sustaining Treatment - Defined

Any medical procedure or intervention that, when administered to a patient or principal 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.**

In the case of an individual with an advance health care directive or order, the term includes nutrition and hydration administered by gastric tube or intravenously or any other artificial or invasive means if the advance health care directive or order so specifically provides.

20 Pa.C.S. 5422 (Definitions)

Nutrition and Hydration

Presumption in favor of artificial nutrition and hydration, unless the patient stated otherwise in a written document such as an advance health care directive.

Presumption can be overcome if:

**The patient clearly expressed wishes to the contrary; or
it is clear from patient's preferences and values that the patient
would not want artificial nutrition and hydration.**

20 Pa.C.S.A. 5456(c).

When does a living will become operative?

When a written copy is provided to the **attending physician**;
(attending physician defined: The physician who has primary responsibility for the health care of a principal or patient)

When the **attending physician** determines the patient to be **incompetent**; and

When the **attending physician** determines that the patient has an **end-stage medical condition** or is **permanently unconscious**.

20 Pa.C.S.A. 5443(a).

Competent – A condition in which an individual, when provided appropriate medical information, communication supports and technical assistance, is documented by a health care provider to do all of the following:

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

Medical Conditions: Defined

- **End-stage medical condition** - an incurable and irreversible medical condition in an advanced state caused by injury, disease, or physical illness that will result in death, in the opinion of the attending physician to a reasonable degree of medical certainty, despite the introduction or continuation of medical treatment.
 - Note: There is no maximum life-expectancy parameter in the definition of end-stage medical condition. For example, there is no requirement, as in some states, that the patient be expected to die within six months. The condition need only be “advanced.”
- **Permanently unconscious** - a medical condition in which the patient has total and irreversible loss of consciousness and capacity for interaction with the environment, such as an irreversible vegetative state or an irreversible coma.

20 Pa.C.S.A. 5422 (Definitions)

- Physicians – Certify in the patient’s medical record:
 - (i) when the patient is deemed to be incompetent or has become competent; and
 - (ii) when the patient is determined to be permanently unconscious or has an end-stage medical condition.

Note: Second opinion is not required unless so delineated in the advance health care directive.

20 Pa.C.S.A. 5443(d), 5444(c), 5462(a)(d)(e)

Health care providers and their agents may not sign a living will on behalf of and at the direction of a patient they are treating.

The individual who “marks” the advance health care directive at the patient’s direction may not also be a witness.

20 Pa.C.S.A. 5442(c) (Living Will); 5452(c) (Health Care Power of Attorney)

HEALTH CARE POWER OF ATTORNEY

PART I - DURABLE HEALTH CARE POWER OF ATTORNEY

I, _____, of _____ County, Pennsylvania, appoint the person named below to be my health care agent to make health and personal care decisions for me whenever I cannot understand, make or communicate a choice regarding a health care decision as determined by my doctor or whenever I personally inform my doctor. My agent may not delegate the authority to make decisions.

APPOINTMENT OF HEALTH CARE AGENT:

I appoint the following health care agent: *You may not appoint your doctor or other health care provider as your health care agent unless related to you by blood, marriage or adoption.*

Health Care Agent: _____
(Name and Relationship)

Address: _____

Telephone Numbers

Home

Work

E-Mail: _____ Cell

If my health care agent is not reasonably available, or is unable or unwilling to act in a timely manner, or if my health care agent is my spouse and an action for divorce is filed by either of us after the date of this document, I appoint the person or persons named below in the order named. (It is helpful, but not required, to name alternative health care agents).

1 ST ALTERNATE	Name and Relationship		
	Address		
	City	State	Zip
	Home Phone	Cell Phone	
	Work Phone	E-Mail	

2 ND ALTERNATE	Name and Relationship		
	Address		
	City	State	Zip
	Home Phone	Cell Phone	
	Work Phone	E-Mail	

What is it?

Gives a designated health care agent the authority to make health care decisions for the incompetent patient and, unlike the living will, is not restricted to end-of-life decisions.

Incompetent

Incompetent - when the patient is unable to understand the material benefits, risks, and alternatives of a specific proposed health care decision; is unable to make that health care decision on his own behalf; or is unable to communicate that health care decision to any other person despite being provided with appropriate supports and technical assistance.

20 Pa.C.S.A. 5454, 5422 (Definitions)



When does a health care power of attorney become operative?

**When a copy of provided to the attending physician and
The attending physician determines the patient to be
incompetent.**

20 Pa.C.S.A. 5454, 5422 (Definitions)

Must identify the patient and appoint the health care agent;

Must declare that the principal authorizes the agent to make health care decisions for the patient.

20 Pa.C.S.A. 5453

APPOINTMENT OF HEALTH CARE AGENT

I appoint the following health care agent:

Health Care Agent: _____
(Name and relationship)

Address: _____

Telephone Number: Home _____ Work _____

E-mail: _____

Health Care Power of Attorney: Revocation

A health care power of attorney can be revoked by a patient “of sound mind” by a properly executed writing or by the patient personally informing the attending physician, the health care provider, or health care agent of the revocation.

20 Pa.C.S.A. 5454(b); 5459

**WHEN NO ADVANCE DIRECTIVE
EXISTS...AND RESIDENT/PATIENT IS
INCOMPETENT TO MAKE OWN
HEALTHCARE DECISIONS**

Identify the Health Care Representative(s)

A competent patient may designate or disqualify a potential health care representative in signed writing or by personally informing the attending physician or the health care provider of the patient's preference.

Absent that, the following order applies;

- a) Spouse and adult blood-related children of patient;**
- b) An adult child;**
- c) A parent;**
- d) An adult brother or sister;**
- e) An adult grandchild;**
- f) An adult with knowledge of the patient's preference and values.**

Note: Court approval is not necessary.

20 Pa.C.S.A. 5461(d)(e).

Unless related by blood, marriage, or adoption, neither the patient's attending physician or other health care provider or an owner, operator, or employee of a health care provider where the patient receives care can serve as a health care agent.

20 Pa.C.S.A. 5461(f)

Obtain a written declaration from the proposed health care representative(s) stating facts and circumstances supporting designation and file the declaration in the medical record.

20 Pa.C.S.A. 5461(k).

Health Care Representative: Decision-making

A health care representative may make health care decisions for an incompetent patient if the patient:

Is 18+ years of age; graduated from high school; is married; or is an emancipated minor;

does not have a health care power of attorney or the health care agent is unavailable or is unwilling to act; and

The patient does not have a guardian of the person.

Note: A health care representative cannot withhold or withdraw life sustaining treatment of an incompetent patient who does not have an end-stage medical condition or is not permanently unconscious.

20 Pa.C.S.A. 5461(a); 5462(c).

Disagreement Among Health Care Representatives

Only individuals in the highest priority class may serve as the health care representative/decision maker.

- The care decisions are based on the majority opinion of the members of the highest priority class who have communicated their understanding of the patient's views to the physician or health care provider;

If members of the highest priority class are evenly divided regarding the best course of action (based on their perception of the patient's wishes), then no decisions will be made to change the course of treatment plan, nor withdraw or withhold treatment, until the parties resolve the disagreement.

- Medical care must be provided during disagreement.

20 Pa.C.S.A. 5461(g).

Countermand by patient

A competent patient may countermand any health care decision by the health care agent or representative by personally informing the attending physician or health care provider.

A patient, regardless of the patient's mental or physical capacity, may countermand a health care decision by the health care agent or representative to withhold or withdraw life-sustaining treatment at any time and in any manner by personally informing the attending physician.

**The physician or health care provider shall make reasonable efforts to inform the health care agent or representative of a countermand.
20 Pa.C.S.A. 5457; 5461(i).**

Duties of physician or health care provider: Communicate and document

Physician:

Certify that patient is incompetent, has an end-stage medical condition, or is permanently unconscious in the record;

Inform patient and agent or representative that patient is incompetent, that patient became competent, or of decisions that affects authority of agent or representative.

Physician or health care provider:

Communicate decision of agent or representative to patient before implementation;

Provide health care necessary to preserve life to patient who has neither end-stage medical condition nor is permanently unconscious unless a competent patient or an agent who is authorized by a living will or health care power of attorney objects to the care;

Inform the health care agent or representative of a countermand by the patient.

20 Pa.C.S.A. 5443(a); 5454(a)(b), **5457(c); 5461(i), 5462(a)(b);** 5457; 5461(i).

Comfort care

A direction to withhold or withdraw life-sustaining treatment generally does not prohibit the provision of comfort care or other beneficial care.

FAQS

What if the health care provider cannot comply with the advance health care directive in good conscience?

The health care provider must:

notify the patient (if competent) or the health care agent (if the patient is incompetent);

make every reasonable effort to transfer the patient to another health care provider who will comply with the advance directive.

Note: If transfer is impossible, the provision of life sustaining treatment will not result in criminal or civil liability.

20 Pa.C.S.A. 5424

Can an employer require an employee to withhold or withdraw life-sustaining treatment?

No. The employer cannot discharge or discriminate against an employee, but the employer can require the employee to express in writing the wishes or unwillingness to withhold or withdraw life-sustaining treatment.

20 Pa.C.S.A. 5424

Can a health care provider be subject to criminal, civil, or administrative liability related to the provision or withholding of life sustaining treatment?

Good faith. Good faith. Good faith.

No liability if:

The healthcare provider acts in good faith to follow the wishes of the patient or the health care agent or representative;

The health care provider believes in good faith that the health care agent or representative has legal authority;

The health care provider refuses in good faith to comply with the direction or decision of an individual whom the health care provider lacks authority;

The healthcare provider believes that the health care directive was valid and was not subsequently amended or revoked;

The healthcare provider discloses information to a health care agent or representative in good faith;

The health care provider refuses to comply with a decision or direction that is unethical or that would result in medical care having no medical basis to address a medical need.

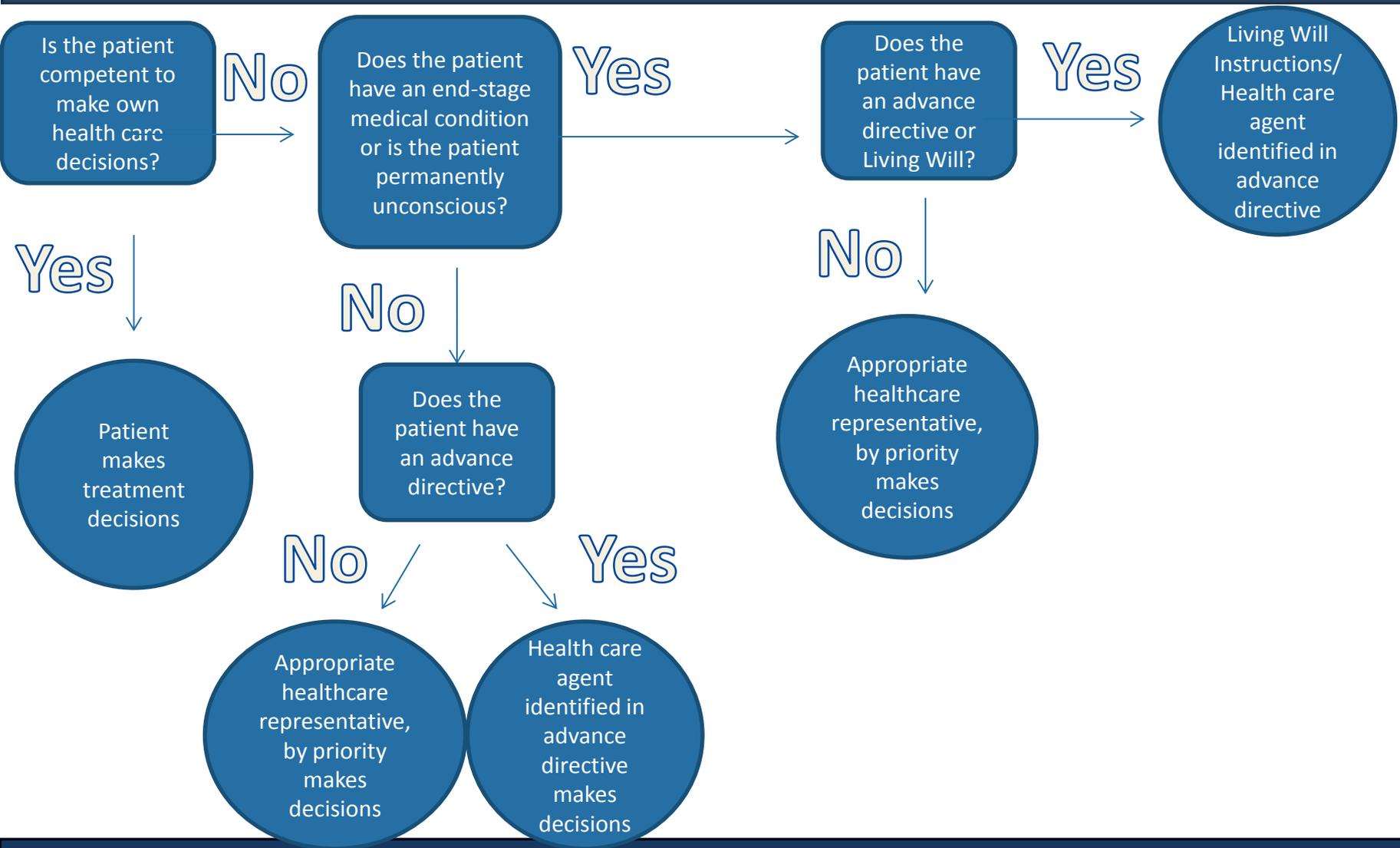
20 Pa.C.S.A. 5431(a).

Can a guardian revoke or amend an advance health directive?

The guardian can revoke or amend the appointment of a health care agent, but cannot revoke or amend other instructions in the advance health directive or decisions by the health care agent without judicial authorization.

20 Pa.C.S. A 5460(a).

Patient Decision-Maker Flow Chart



THANK YOU!