LEGAL IMPLICATIONS REGARDING END-OF-LIFE DECISIONS

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ACT 169:
ADVANCE HEALTH CARE DIRECTIVES
Historical Overview

- The Federal Patient Self-Determination Act
- Act 169 (effective 1-29-07)

Old Law
- Terminal illness
- Only a surrogate, pursuant to valid and operative living will, could withhold or withdraw life-sustaining treatment
- No guidance re: individuals who have no advance directive

Act 169
- End-stage medical condition
- Health care agent or health care rep. may withhold/withdraw life-sustaining treatment under certain circumstances
- Provides guidance re: individuals who have no advance directive
Relevant Definitions Under Act 169

- End-stage medical condition

- Competent vs. Incompetent

- Permanently Unconscious

- Life-sustaining treatment

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. Except as specifically set forth in an advance health care directive, the term is not intended to preclude treatment of a disease, illness or physical, mental, cognitive or intellectual condition, even if incurable and irreversible and regardless of severity, if both of the following apply:

i) the patient would benefit from the medical treatment, including palliative care.

ii) such treatment would not merely prolong the process of dying.
Relevant Definitions Under Act 169

- Competent vs. Incompetent

**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:

i) Understand the potential material benefits, risks and alternatives involved in a specific proposed health care decision.

ii) Make that health care decision on his/her own behalf.

iii) Communicate that health care decision to any other person.

NOTE: This term is intended to permit individuals to be found competent to make some health care decisions, but incompetent to make others.

- Incompetent

**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:

i) unable to understand the potential material benefits, risks and alternatives involved in a specific proposed health care decision;

ii) unable to make that health care decision on his own behalf; or

iii) unable to communicate that health care decision to any other person.

NOTE: The term is intended to permit individuals to be found incompetent to make some health care decisions, but competent to make others.
Relevant Definitions Under Act 169

- 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.

- Life-sustaining treatment:
  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.
A Health Care Provider May NOT:

- Require an individual to execute an advance health care directive as a condition of admission or receipt of nursing care services.
- Charge an individual a different rate or fee whether or not the individual has executed an advance health care directive.

Living Wills

Who can execute a living will?

- An individual of sound mind who:
  - is 18 years of age or older;
  - has graduated from high school;
  - has married; or
  - is an emancipated minor.
Living Wills

• Signatures required

  • Dated and signed by the principal by signature or mark or by another individual on behalf of and at the direction of the principal if the principal is unable to sign, but specifically directs another individual to sign the living will; and

  • Witnessed by two individuals, each of whom is 18 years of age or older.

Living Wills

• Witnesses

  • An individual who signs a living will on behalf of and at the direction of a principal may not witness the living will.

  • A health care provider and its agent may not sign a living will on behalf of and at the direction of a principal if the health care provider or agent provides health care services to the principal.
Living Wills

• A living will becomes operative when:
  • A copy is provided to the attending physician; and
  • The principal is determined by the attending physician to be incompetent and to have an end-stage medical condition or is permanently unconscious.

Health Care Power of Attorney

• Who can execute a health care power of attorney?
  • An individual of sound mind who:
    • is 18 years of age or older;
    • has graduated from high school;
    • has married; or
    • is an emancipated minor.
Health Care Power of Attorney

• Signatures required:
  
  • Dated and signed by the principal by signature or mark or by another individual on behalf of and at the direction of the principal if the principal is unable to sign, but specifically directs another individual to sign the HCPOA; and
  
  • Witnessed by two individuals, each of whom is 18 years of age or older.

Health Care Power of Attorney

• Witnesses
  
  • An individual who signs a HCPOA on behalf of and at the direction of a principal may not witness the HCPOA.
  
  • A health care provider and its agent may not sign a HCPOA on behalf of and at the direction of a principal if the health care provider or agent provides health care services to the principal.
Health Care Power of Attorney

• Requirements for HCPOA:
  • Identify the principal and appoint the health care agent
  • Declare that the principal authorizes the health care agent to make health care decisions on behalf of the principal

• Optional provisions
  • limit authority of health care agent
  • indicate intent of the principal regarding the initiation, continuation, withholding or withdrawal of life-sustaining treatment
  • indicate whether principal wants tube feeding or any artificial/invasive form of nutrition or hydration
  • disqualify an individual from acting as a health care representative (HCR), prohibit the appointment of a HCR or provide a priority list as to who may serve as a HCR
  • nominate an individual to serve as a guardian
  • other miscellaneous provisions
Health Care Power of Attorney

- **When is it operative?**
  - Unless otherwise specified in the HCPOA, a HCPOA becomes operative when:
    - a copy is provided to the attending physician; and
    - the attending physician determines that the principal is incompetent.

- **When is it inoperative?**
  - Unless otherwise specified in the HCPOA, a HCPOA becomes inoperative when the attending physician determines that the principal is competent.

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Health Care Power of Attorney

- **Authority of Health Care Agent**
  - Unless expressly provided otherwise in the HCPOA and to the extent permitted under Act 169, a health care agent has the authority to make any health care decision and to exercise any right and power regarding the principal’s care, custody and health care treatment that the principal could have made and exercised.
Health Care Power of Attorney

- Authority of Health Care Agent
  - With respect to life-sustaining treatment decisions, a health care agent, unless contrary to an operative Living Will, not only has the authority to initiate and continue all forms of life-sustaining treatment, but also has the authority to withhold or withdraw all forms of life-sustaining treatment, including instructions not to resuscitate, when the principal is deemed by the attending physician to be incompetent and to have an end-stage medical condition or is permanently unconscious.

- A health care agent may also object on behalf of a principal to health care that is necessary to preserve life even if the principal is not in an end-stage medical condition or permanently unconscious BUT ONLY if the principal authorizes the health care agent to do so pursuant to an operative HCPOA.
Health Care Power of Attorney

- Countermand
  - Competent principal
    - A principal of sound mind may countermand any health care decision made by the principal’s health care agent at any time and in any manner by personally informing the attending physician or health care provider.
  - Incompetent principal
    - Regardless of the principal’s mental or physical capacity, a principal may countermand a health care decision made by the principal’s health care agent that would withhold or withdraw life-sustaining treatment at any time and in any manner by personally informing the attending physician.

Health Care Representatives

- An individual may act as a health care representative if:
  - the attending physician has determined that the principal is incompetent;
  - the principal does not have a HCPOA or the principal’s health care agent is not reasonably available or is unwilling to act and no alternate health care agent is reasonably available; **AND**
  - no guardian has been appointed to make health care decisions.
Health Care Representatives

Who may act as a health care representative:

- Spouse, unless action for divorce, and any adult children of the principal who are not the children of the spouse
- An adult child
- A parent
- A sibling
- An adult grandchild
- An adult who has knowledge of the principal’s preferences and values, including religious and moral beliefs

Health Care Representative

Extent of authority of health care representatives:

- A health care representative, to the extent permitted by law, has the authority to make health care decisions, including, but not limited to, life-sustaining treatment decisions on behalf of the principal.
Health Care Representative

- Extent of authority of health care representatives:
  - With respect to life-sustaining treatment decisions, a health care representative, unless contrary to an operative Living Will, not only has the authority to initiate and continue all forms of life-sustaining treatment, but also has the authority to withhold or withdraw all forms of life-sustaining treatment, including instructions not to resuscitate, **BUT ONLY** when the principal is deemed by the attending physician to be incompetent and to have an end-stage medical condition or is permanently unconscious.

Health Care Representatives

- Countermand of health care decision made by health care representative
  - Competent principal
    - A principal of sound mind may countermand any health care decision made by the principal's health care representative at any time and in any manner by personally informing the attending physician or health care provider.
  - Incompetent principal
    - Regardless of the principal's mental or physical capacity, a principal may countermand a health care decision made by the principal's health care representative that would withhold or withdraw life-sustaining treatment at any time and in any manner by personally informing the attending physician.
Health Care Decisions

- Health care decisions of health care agent and health care representative

- Statutory requirements:
  - Information gathering
  - Compliance with principal’s advance health care directive
  - Guidance in the absence of an advance health care directive
  - Artificial nutrition/hydration

DNR Orders

- Nursing Facility
  - PSDA – Requires nursing facilities that participate in Medicare/Medicaid to provide residents with information about their right to make health care decisions and formulate advance directives under state law
  - CMS issued guidance to State Survey Agency Directors, dated 10-18-13, regarding CPR in nursing homes (S&C: 14-01-NH)
  - Pursuant to Long-Term Care Final Rule (effective 11/28/16), a facility must ensure that its personnel provide basic life support, including CPR, to a resident requiring such emergency care prior to arrival of EMS and subject to related physician orders and the resident’s advance directives. (42 CFR §483.24(a)(3))
DNR Orders

Summary of guidance pursuant to S&C:14-01-NH and Appendix PP of SOM:

- Prior to the arrival of EMS, nursing homes must provide basic life support, including initiation of CPR, to a resident who experiences cardiac arrest in accordance with that resident's advance directives or in the absence of advance directives or a DNR order.
- CPR certified staff must be available at all times to provide CPR when needed.
- Nursing homes are prohibited from establishing and implementing a facility wide “no CPR” policy.

DNR Orders

- Personal Care
  - Pursuant to 55 Pa. Code § 2600.63(d), a staff person who is trained in first aid or certified in obstructed airway techniques or CPR shall provide such services in accordance with his/her training, unless the principal has a “do not resuscitate” order.
  
  - DHS recognizes the following as acceptable DNR orders:
    - POLST form (completion of Section A indicates no CPR)
    - out-of-hospital DNR
    - any document accepted by the home's local EMS responders
DNR Orders

- Risk management issues?
  - Private liability
  - Training and availability of CPR certified staff
  - DNR orders: competent vs. incompetent residents
  - Implementation of policies/procedures

Out-of-Hospital DNR Order

- Resident or resident’s surrogate, if so authorized, can request the issuance of an out-of-hospital DNR order if the resident:
  - has an end-stage medical condition OR
  - is permanently unconscious

- Issued by resident’s attending physician

- **Format** – Order, bracelet or necklace
POLST Form

- Purpose

- Legal implications
  - To whom does the POLST form apply
  - Authority of health care agent vs. health care representative
  - Compliance challenges regarding implementation of POLST form

POWERS OF ATTORNEY
Powers of Attorney

Act 95: Relevant Changes to the Powers of Attorney Act (20 Pa. C.S.A. §5601, et. seq.)

• Execution Requirements 20 Pa. C.S.A. §5601(b)(1) & (2):
  • A power of attorney shall be dated, and it shall be signed by the principal by signature or mark, or by another individual on behalf of and at the direction of the principal if the principal is unable to sign but specifically directs another individual to sign the power of attorney.
  • If the POA is executed by mark or by another individual, then it shall be witnessed by two individuals, each of whom is 18 years of age or older. (NOTE: A witness shall not be the individual who signed the POA on behalf of and at the direction of the principal).

Act 95: Relevant Changes to the Powers of Attorney Law (20 Pa. C.S.A. §5601, et. seq.)

• Execution Requirements cont’d. 20 Pa. C.S.A. §5601(b)(3) (effective 1/1/2015):
  • For a POA executed on or after 1/1/2015, the signature or mark of the principal, or the signature of another individual signing a POA on behalf of and at the direction of the principal, shall be:
    • Acknowledged before a notary public or other individual authorized by law to take acknowledgments. The notary public or other individual authorized by law to take acknowledgments shall not be the agent designated in the POA. (NOTE: Requirement not applicable to health care POA’s or mental health care POA’s.)
  • Witnessed by two individuals, each of whom is 18 years of age or older. A witness shall not be the individual who signed the POA on behalf of and at the direction of the principal, the agent designated in the POA or the notary public or other person authorized by law to take acknowledgments before whom the POA is acknowledged.
Powers of Attorney

**Notice/Acknowledgement requirements under the Powers of Attorney Act** (20 Pa. C.S.A. §5601 (c))

- April 12, 2000 – Effective date of notice/acknowledgement requirements.
- Notice Requirement – The notice must be in capital letters and signed by the principal. In the absence of a signed notice, upon a challenge to the authority of an agent to exercise a power under the POA, the agent shall have the burden of demonstrating that the exercise of his authority is proper.
- Acknowledgement – An agent shall have no authority to act as an agent under the POA unless the agent has first executed and affixed to the POA an Acknowledgement.
- Notice/Acknowledgement not applicable to a power of attorney which exclusively provides for health care decision-making or mental health care decision-making.
- Act 95 revises the content of the Notice and Acknowledgment (effective 1/1/2015).

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**NOTICE**

Revised Version (Effective 1/1/2015)

The purpose of this power of attorney is to give the person you designate (your "agent") broad powers to handle your property, which may include powers to sell or otherwise dispose of any real or personal property without advance notice to you or approval by you.

This power of attorney does not impose a duty on your agent to exercise granted powers, but when powers are exercised, your agent must use due care to act for your benefit and in accordance with this power of attorney.

Your agent may exercise the powers given here throughout your lifetime, even after you become incapacitated, unless you expressly limit the duration of these powers or you revoke these powers or a court acting on your behalf terminates your agent's authority.

Your agent must act in accordance with your reasonable expectations to the extent actually known by your agent and, otherwise, in your best interest, act in good faith and act only within the scope of authority granted by you in the power of attorney.

The law permits you, if you choose, to grant broad authority to an agent under power of attorney, including the ability to give away all of your property while you are alive or to substantially change how your property is distributed at your death. Before signing this document, you should seek the advice of an attorney at law to make sure you understand it.

A court can take away the powers of your agent if it finds your agent is not acting properly.

The powers and duties of an agent under a power of attorney are explained more fully in 20 Pa. C.S. Ch. 56.

If there is anything about this form that you do not understand, you should ask a lawyer of your own choosing to explain it to you.

I have read or had explained to me this notice and I understand its contents.

__________________________  ______________________________
Date                          Principal: John Doe
ACKNOWLEDGEMENT OF AGENT
Revised Version (Effective 1/1/2015)

I, Jane Doe, have read the attached power of attorney and am the person identified as the agent for the principal. I hereby acknowledge that when I act as agent:

I shall act in accordance with the principal's reasonable expectations to the extent actually known by me and, otherwise, in the principal's best interest, act in good faith and act only within the scope of authority granted to me by the principal in the power of attorney.

_____________________________  ________________________
Date                                              Agent: Jane Doe

Powers of Attorney

• Distinction between agents acting independently and agents acting jointly

• If no designation in POA document, agents shall only act jointly

• Resolving conflicts between co-agents
Hypothetical 1

Ms. Jones is a resident of Sunnyside Nursing Home. Her attending physician has determined that she is incompetent and has an end-stage medical condition. While Ms. Jones was competent, she executed a Health Care Power of Attorney (“HCPOA”) on June 15, 2008, designating her daughter as her health care agent. Pursuant to the HCPOA, the daughter has the authority to make health care decisions on behalf of Ms. Jones, including the withholding or withdrawal of life-sustaining treatment. Ms. Jones did not execute a living will while she was competent. The daughter has requested a DNR order on behalf of her mother.

Hypothetical 2

Mr. Vale is a resident of Hollybrook Nursing Facility. Mr. Vale has been deemed by his attending physician to be incompetent and to have an end-stage medical condition. Mr. Vale is currently receiving hydration and nutrition through a feeding tube. Mr. Vale did not execute a living will or health care power of attorney while he was competent and no guardian has been appointed. Furthermore, Mr. Vale never expressed his wishes as to whether he would want life-sustaining treatment if he were suffering an end-stage medical condition. Mr. Vale’s wife is deceased, but he has two children – a son and a daughter. Mr. Vale’s daughter would like the feeding tube removed as she feels her father is suffering a prolonged death. Mr. Vale’s son, however, believes that his father is a fighter and, therefore, wants the feeding tube to remain in place.
Hypothetical 3

Ms. Smith is admitted to ABC Nursing Facility from the hospital due to a fractured hip. Ms. Smith has dementia and has been deemed to lack decision making capacity. Upon admission, Ms. Smith’s daughter provides the staff at ABC Nursing Facility with a POLST form. The POLST form is signed by a physician and Ms. Smith’s daughter, and the POLST form specifies that Ms. Smith is not to be resuscitated. Ms. Smith does not have a health care power of attorney nor does she have a living will. Can ABC Nursing Facility comply with the POLST form?

QUESTIONS?
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