

Powers of Attorney Health Care Powers of Attorney & Guardianships

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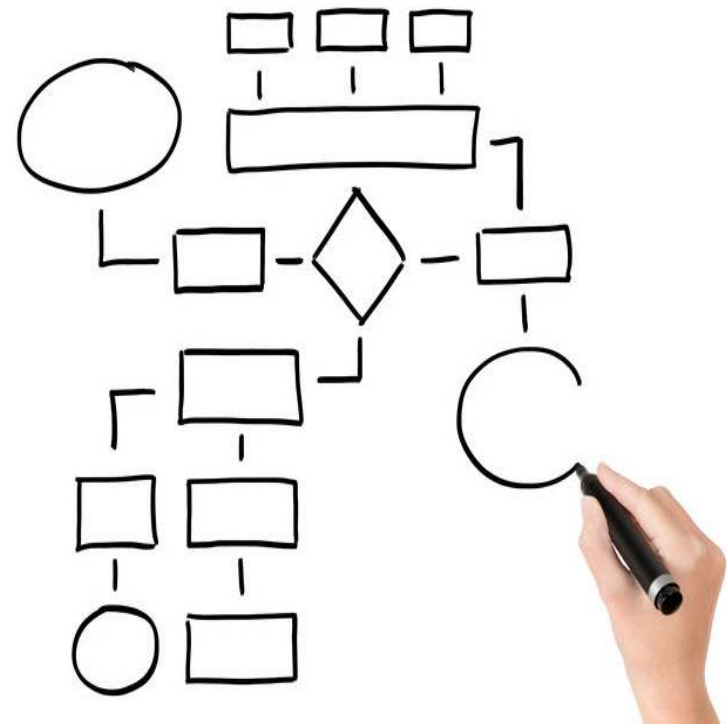
Estate Planning and
Administration of Estates &
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Why? How? Huh?

- Durable Powers of Attorney for financial decisions
- Health Care Powers / Living Wills
- Guardianships (and avoiding them)
- Practical issues to consider



Why Is This Important?

An individual can set forth his/her wishes regarding who can act on his behalf, if he possesses legal capacity.

- Last Will and Testament
- Power of Attorney for Financial Decisions (POA)
- Health Care Power of Attorney and Living Will (Health Care POA)



Why Is This Important?

An individual cannot sign a legal document if he or she lacks legal capacity.

No Capacity → Possible Guardianship

Most people want to avoid the time, cost and burden of filing a guardianship action.



How Does One Appoint Agents?

- **The Agents you want to name might not be the Agents appointed under a Court-supervised Guardianship
- Naming Agents under a duly-executed POA to assist with financial affairs
- Naming Agents under a duly-executed Health Care POA to assist with medical decisions
- Signing documents!



Other Considerations

- An individual can always remove or change an Agent if he possesses legal capacity.
- If one does not have legal capacity, the Agent can generally be removed by resigning or via Court order.



Powers of Attorney Under PA Law

Basics

- Dated, signed by the Principal
- POAs executed on or after 1/1/2015 need to be witnessed by 2 individuals over age 18, in the presence of a Notary Public
- Include the “notice” signed by the Principal
- Include an “acknowledgement” signed by the Agent



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Powers of Attorney Under PA Law

Complexities

- Can be durable (presumed under the law), springing, or with an expiration date
- More than one agent can be appointed to serve concurrently – AND versus OR
- Disagreements by Agents?



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Powers of Attorney Under PA Law

Agent as Fiduciary

- Acting loyally for Principal's benefit
- Agent can only act within the scope of the authority granted
- "Care, competence and diligence"
- No commingling of funds
- No self-dealing or conflicts of interest



Powers of Attorney Under PA Law

Broad Powers of Agent

- Real and tangible property transactions
- Power over financial accounts, including ability to write checks
- Power to apply for and receive government benefits
- Ability to sign/file tax returns



Powers of Attorney Under PA Law

Relation of Agent to Guardian

- A Principal may nominate the Guardian of his estate under a POA
- A Court will appoint that person except for “good cause or disqualification”
- Court can determine whether an incapacitated person’s POA remains in effect, if guardianship proceedings have been initiated



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Powers of Attorney Under PA Law

Revocation of POA

- At death of Principal
- Revoked by Principal as long as he has legal capacity
- Upon Court Order
- Upon expiration of Limited POA



Health Care Powers of Attorney/ Living Wills Under PA Law

Basics of Health Care POAs

- Must identify the Principal and appoint the Agent
- Declares that the Principal authorizes the Agent to make health care decisions on behalf of the Principal



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Health Care Powers of Attorney/ Living Wills Under PA Law

Basics of Health Care POAs

- Dated and signed by the Principal and witnessed by 2 individuals over age 18
- **A “health care provider” may not sign a Health Care POA on behalf of and at the direction of the Principal

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Health Care Powers of Attorney/ Living Wills Under PA Law

Basics of Health Care POAs

- Unless specified, the Agent can make decisions only upon the determination that the Principal is incompetent.
- Agency can be revoked by the Principal, a Court, or the Principal's Guardian (if applicable)



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Health Care Powers of Attorney/ Living Wills Under PA Law

Authority of Health Care POAs

- To make any health care decision that the Principal could have made, in accordance with Agent's understanding and interpretation of Principal's instructions (written and/or verbal)



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Health Care Powers of Attorney/ Living Wills Under PA Law

Authority of Health Care POAs

- An Agent has the same rights and limitations as the Principal to request, examine, copy and consent/refuse to consent to disclosure of medical information.



Health Care Powers of Attorney/ Living Wills Under PA Law

Authority of Health Care POAs

- A competent Principal may overrule any decision made by an Agent
- A Principal who is incompetent may overrule any decision by an Agent that would withhold or withdraw life-sustaining treatment by informing his attending physician



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Health Care Powers of Attorney/ Living Wills Under PA Law

Relation of Agent to Guardian

- A Principal may nominate the Guardian of his person under a Health Care POA
- A Court will appoint that person except for “good cause or disqualification”
- Court can determine whether an incapacitated person’s Health Care POA remains in effect, if guardianship proceedings have been initiated



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Health Care Powers of Attorney/ Living Wills Under PA Law

Duties of Care Providers

- Upon determining that a Principal has an end-stage medical condition or is permanently unconscious, the attending physician must so certify in writing
- Physician is required to communicate to a Principal regarding decisions made by an Agent



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Health Care Powers of Attorney/ Living Wills Under PA Law

Who may act as representative?

- In the absence of a duly-executed Health Care POA, spouse, then adult children, then parents, then siblings, then adult grandchildren, then an adult who “has knowledge of the principal’s preferences and values.”



Health Care Powers of Attorney/ Living Wills Under PA Law

Living Wills

- While a Health Care POA appoints an Agent to make health care decisions for the Principal, a Living Will sets forth the wishes of the Principal in the event he cannot speak for himself
- In PA, the Living Will and Health Care POA are often one document
- Agent should follow the instructions set forth in the Living Will



Health Care Powers of Attorney/ Living Wills Under PA Law

Living Wills - Contents

- End of life care and life-prolonging procedures
- Handling a persistent vegetative state
- Feeding tubes / hydration
- Organ donation
- Anything else the Principal cares about



Health Care Powers of Attorney/ Living Wills Under PA Law

Living Wills

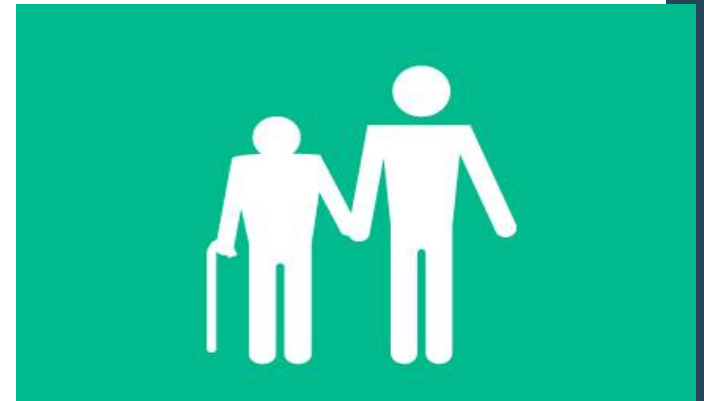
- An example Health Care POA / Living Will is part of PA statutes
- A Principal can “choose your own adventure” when creating a Health Care Directive or Living Will



Guardianships Under PA Law

Basics of Guardianships

- Upon petition and presentation of “clear and convincing evidence,” a Court may declare a person incapacitated and appoint a guardian of his person or estate
- Petitioner may be any person interested in the alleged incapacitated person’s welfare



Guardianships Under PA Law

Basics of Guardianships

- A person is incompetent if “either he cannot manage his financial resources or if he cannot effectively communicate so as to meet the essential requirements for his physical health and safety.”
- A “person is presumed to be mentally competent, and the burden is on the petitioner to prove incapacity by clear and convincing evidence.”



Guardianships Under PA Law

Issues considered by Court

- Nature and extent of condition impairing the capacity to make and communicate decisions
- The need for guardianship services in light of other assistance available and existence of POAs and Health Care POAs
- Type of guardian needed (limited or plenary) based on the situation
- Duration of guardianship needed



Guardianships Under PA Law

Issues considered by Court

- Courts prefer not to issue guardianship orders or, if necessary, implement a limited guardianship order
- Court will appoint a plenary guardian of the person and/or estate only upon concluding that a person is totally incapacitated



Guardianships Under PA Law

Who may be appointed?

- Any qualified individual, corporate fiduciary, nonprofit, guardianship support agency or county agency
- **Not a person or entity providing residential services for a fee, or anyone whose interests conflict with the incapacitated person



Guardianships Under PA Law

Powers of Guardian

- Generally (with some exceptions), the Guardian of the person/property of an incapacitated person is able to make the same decisions that the individual could make on his own



Practical Issues to Consider

To the extent possible, Guardianships should be avoided. Implementation of POAs and Health Care POAs is a big step in the right direction.

There are significant litigation costs to filing a Guardianship petition, and ongoing court involvement even if the petition is successful.

Avoiding Court is a good thing!



Questions ?

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Advance Healthcare Directives



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What Are We Dealing With?

- **62%:** Adults aged 60 or older reported having discussed care preferences with a loved one
- **Only 54%** reported having an advance directive



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*2013 National Council on Aging (NCOA)-United Healthcare-USA Today
national survey of respondents aged 60 or older*

More Statistics

- Only 20% of Americans have an advanced directive documenting end-of-life medical care
- 60% of Americans would like their end-of-life preferences followed
- More than 1/3 of physicians cannot predict patient end-of-life wishes
- 44% of patients who discuss end-of-life care with their provider complete a directive
- Top reasons for no advance directive:
 - Lack of familiarity (60%)
 - Believe too young or healthy (14%)
 - Uncertainty (11%)
- 84% of Medicare patients did not want life-prolonging drugs if it lowered their quality of life
- 77% of Medicare patients indicated no ventilator, even it would extend their life by 1 month
- 25% of healthcare costs spent on patients in last months of life
- 67% less expensive to treat hospice patient, than patient in non-hospice setting



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General Obligations

The resident representative has the right to exercise the resident's rights to the extent those rights are delegated to the resident representative.

The resident retains the right to exercise those rights not delegated to a resident representative, including the right to revoke a delegation of rights, except as limited by State law

- For example, a representative might have the power to make financial decisions, but not health care decisions.

General Obligations

The facility must treat the decisions of a resident representative as the decisions of the resident to the extent required by the court or delegated by the resident, in accordance with applicable law.

The facility shall not extend the resident representative the right to make decisions on behalf of the resident beyond the extent required by the court or delegated by the resident, in accordance with applicable law.



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General Obligations

The resident's wishes and preference must be considered in the exercise of rights by the representative.

To the extent practicable, the resident must be provided with opportunities to participate in the core planning process.



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General Obligations



If the facility has reason to believe that a resident representative is making decisions or taking actions that are not in the best interests of a resident, the facility shall report such concerns in the manner required under State law.

Federal Patient Self-Determination Act

A facility which participates in Medicare or Medicaid must give written information to a new resident about the resident's right under Pennsylvania law to make decisions about her or his medical care, and the right to sign an advance directive.

Federal Patient Self-Determination Act

If an incoming resident does not have the capacity to understand this information, the facility has an obligation to give the information to family or a surrogate for the resident empowered under state law to receive information about a nursing home's policies and procedures.



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Federal Patient Self-Determination Act

The facility is not relieved of its obligation to provide this information to the individual once he or she is able to receive such information.

Follow-up procedures must be in place to provide the information to the individual directly at the appropriate time (i.e. if there is a change of condition).



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Federal Patient Self-Determination Act

A facility should instruct a resident about options for completing an advance directive, including how to obtain fill-in-the-blanks forms and ensure residents are aware there is no standard form for a durable power of attorney for health care, and that the resident has other options.



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Federal Patient Self-Determination Act

A facility must “offer assistance if a resident wishes to execute one or more directive(s).” **CMS Surveyor Guidance to F Tag 155, p. 4.**

Surveyors must interview staff to determine “how staff help the resident or legal representative document treatment choices and formulate an advance directive.” **CMS Surveyor Guidance Investigative Protocol for 42 CFR 483.10(B)(4) and (8).**

Federal Patient Self-Determination Act

A facility cannot:

- Condition admission or continued stay on a resident having or not having an advance directive.
- Require a resident to replace an advance directive with one written on the nursing home's own form.



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Federal Patient Self-Determination Act

Facilities are permitted to contract with other entities to furnish this information but are still legally responsible for ensuring that the requirements are met.

Medical Record

- The facility must make an advance directive a prominent part of the resident's medical record.
- HIPAA provides a personal representative with the same rights to access health information as the patient.
- Exception: If the provider believes that the patient has been or may be subject to violence, abuse, or neglect and the provider determines, in the exercise of professional judgment, that it is not in the best interests of the patient to treat the person as the personal representative.



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Federal Patient Self-Determination Act

- When a surveyor does a record review, he or she must determine “whether any treatments or interventions have been ordered (e.g., unplanned hospitalizations or placement of a feeding tube) that are inconsistent with the resident’s documented acceptance or refusal of treatment or with any advance directive.” **CMS Guidance to Surveyors.**
- The facility must have “monitored the care and services given to the resident to ensure they are consistent with the resident’s documented choices and goals.” **CMS Guidance to Surveyors.**



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Policy Requirements

The facility is required to establish, maintain, and implement written policies and procedures regarding the resident's right to:

- Formulate an advance directive;
- Refuse medical or surgical treatment; and
- Refuse to participate in experimental research.



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Policies & Procedures

Facility policies and procedures delineate the various steps necessary to promote and implement these rights. Such as:

- Identifying the primary decision-maker (resident and/or legal representative);
- Identifying situations where health care decision-making is needed; and
- Establishing mechanisms for communicating the resident's choices to the interdisciplinary team.



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Policies & Procedures

At admission, the facility is required to:

- Provide written information concerning the resident's rights in these areas; and
- Provide a written description of the facility's policies that govern the exercise of resident rights.

Admissions Procedures

At admission, the facility must determine if the resident has an advance directive. Examples of advance directives include:

- Living will
- Directive to the attending physician
- Durable power of attorney for health care
- Medical power of attorney
- Pre-existing physician's order for "do not resuscitate" (DNR)
- Portable order form re: life-sustaining treatment



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Facility as Personal Representative

28 Pa. Code § 201.26. Power of attorney.

Power of attorney may not be assumed for a resident by the licensee, owner/operator, members of the governing body, an employee or anyone having a financial interest in the facility unless ordered by a court of competent jurisdiction

Findings of the Pennsylvania General Assembly

- Individuals have a qualified right to make decisions relating to their own health care.
- This right is subject to certain interests of society, such as the maintenance of ethical standards in the medical profession and the preservation and protection of human life.
- Modern medical technological procedures make possible the prolongation of human life beyond natural limits
- The application of some procedures to an individual suffering a difficult and uncomfortable process of dying may cause loss of dignity and secure only continuation of precarious and burdensome prolongation of life



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Findings of the Pennsylvania General Assembly

- It is in the best interest of individuals under the care of health care providers if health care providers initiate discussions with them regarding living wills and health care powers of attorney during initial consultations, annual examinations, at diagnosis of a chronic illness or when an individual under their care transfers from one health care setting to another so that the individuals under their care may make known their wishes to receive, continue, discontinue or refuse medical treatment in the event that they are diagnosed with an end-stage medical condition or become permanently unconscious
- Health care providers should initiate such discussion, including discussion of out-of-hospital do-not-resuscitate orders, with individuals under their care at the time of determination of an end-stage medical condition and should document such discussion in the individual's medical record



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Compliance

If a health care provider cannot in good conscience comply with a living will or health care decision of a health care agent or health care representative or if the policies of a health care provider preclude compliance with a living will or health care decision of a health care agent or health care representative, the health care provider shall so inform the principal if the principal is competent or the principal's agent or health care representative if the principal is incompetent

20 Pa.C.S.A. § 5424(a)

Compliance

- An employee or staff member of a health care provider may not be required to participate in the withholding or withdrawal of life-sustaining treatment
- A health care provider that is an employer may not discharge or in any manner discriminate against its employee or staff member as a result of informing the employer of the employee's choice not to participate in the withholding or life-sustaining treatment
- A health care provider that is an employer may not require its employee or staff member to express in writing the wishes or unwillingness of the employee or staff member

20 Pa.C.S.A. § 5424(c).



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Optional Nature of Health Care Instruments

Health care providers in Pennsylvania may not:

1. Require an individual to execute an advance health care directive or order or to designate or disqualify a health care representative as a condition for receiving health care services
2. Charge an individual a different rate or fee whether or not the individual executes or has executed an advance health care directive or order or designated or disqualified a health care representative.

20 Pa.C.S.A. § 5428.



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Liability

A healthcare provider may not be subject to civil or criminal liability, discipline for unprofessional conduct or administrative sanctions and may not be found to have committed an act of unprofessional conduct as a result of any of the following:

- Causing or participating in the initiating, continuing withholding or withdrawal of life-sustaining treatment provided he/she acts with a good faith belief that the patient's or principal's wishes have been met
- Complying with a direction or decision of an individual who the health care provider believes in good faith is authorized to act as a principal's health care agent or representative
- Refusing to comply with a direction or decision of an individual based on a good faith belief that the individual lack's authority to act as a principal's health care agent or representative



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Liability

- Complying with an advanced health care directive under the assumption that it was valid when made and the health care provider believes in good faith that it has not been amended or revoked
- Disclosing health care information to another person based upon the good faith belief that disclosure is authorized, permitted or required by law
- Refusing to comply with a direction or decision of an individual based on a good faith belief that compliance with the direction or decision would be unethical or result medical care having no basis in the medical need or condition of the patient



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