Pennsylvania Advance Directives for Health Care: Twelve Practical Facts Not Commonly Known

John Ehman (john.ehman@uphs.upenn.edu), 7/7/14 (revised)

The following is a select list of provisions in Pennsylvania's Act 169 that may be little known and potentially misunderstood by people considering an Advance Directive. This listing is not intended to be comprehensive or authoritative but rather a practical entrée for discussions with appropriate legal counsel, medical providers, and others who may be involved with one's health care. For each point, at least one exemplary reference has been given to sections of Act 169.

1) An Advance Directive in Pennsylvania may include a Living Will, but it may also just be an authorization of a Health Care Agent (through a Durable Health Care Power of Attorney, which is *different* from a Durable Financial Power of Attorney). [§5422]

2) Pennsylvania law does not mandate any specific Advance Directive form, and Pennsylvania honors any form from other states to the extent possible under the provisions of Pennsylvania law. The form does not have to be notarized, though it should be witnessed. [§5433, §5442, §5446, §5447, §5452, §5464, §5471]

3) A patient may revoke a Living Will at any time and in any manner, even after a patient has been assessed as incompetent to make medical decisions. [§5444]

4) A Health Care Agent, who may speak with the full authority of the patient *whenever* the patient cannot speak for himself/herself (i.e., not just in end-of-life care situations), must be authorized *in writing* by the patient. Multiple and successive Health Care Agents may be designated. No one is automatically a Health Care Agent, not even a spouse or parent. [§5452, §5455(a), §5456]

5) If Health Care Agent has not been designated by a patient, then the patient's treating physician may identify a Health Care *Representative*, according to a specific hierarchy mandated in Act 169. That order of Health Care Representatives is based primarily upon family relationship and may not necessarily reflect who might know best the patient's values/wishes for medical treatment. [§5461]

6) Health Care Agents and Health Care Representatives are not the same. A Health Care Representative cannot authorize the withholding or withdrawing of life-sustaining treatment unless the patient is in an end-stage medical condition or permanently unconscious (--though a Health Care Agent may normally do so). [§5462(c)(1)]

7) A person may specify or restrict the authority of a Health Care Agent. Also, if a person does not designate a Health Care Agent but instead prefers that a treating physician identify a Health Care Representative according to a hierarchy of decision-makers, the order of that hierarchy may be customized (in writing). [§5453, §5461(d)(2)]

8) Children from a previous marriage share equal authority as the current spouse in the first class of decision-makers in the standard hierarchy/rule for Health Care Representatives. If a spouse is not designated as a Health Care Agent, then children from a previous marriage can potentially stalemate or outvote the current spouse on decisions (since decisions can be authorized by a *majority vote* of the applicable class of Health Care Representatives). [§5461(d)(1)(i) and §5461(g)(1)]

9) A physician cannot be a patient's Health Care Agent or Health Care Representative, unless related by blood, marriage, or adoption. The same restriction applies to any owner, operator, or employee of a provider where the patient is receiving care. [§5455, §5461(f)]

10) If a divorce is pending, any authorization of the spouse as a Health Care Agent is automatically revoked, unless the Advance Directive makes clear that the authorization is intended to continue in those circumstances. [§5430]

11) Special rules apply that restrict and guide decision-making regarding the withholding and withdrawing of nutrition/hydration and in cases where the patient is known to be pregnant. [§5429, §5453(b)(3), §5456(c)(5)(III)]

12) A patient assessed to be incompetent to make medical decisions still has the right to be informed of -- and to *countermand* -- any specific decision made by a Health Care Agent or Health Care Representative to withhold or withdraw a life-sustaining treatment. (If a specific decision has been countermanded by the patient, the overall authority of the Health Care Agent or Health Care Representative nevertheless remains in place.) [§5457(b) & (d), §5461(i)(2) & (4)]