

	MEDICAL ASSISTANCE BULLETIN COMMONWEALTH OF PENNSYLVANIA * DEPARTMENT OF PUBLIC WELFARE	
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SUBJECT: Revised Medical and Treatment Self-Directive Statement		BY:  Robert S. Zimmerman, Jr., M.P.H. Deputy Secretary for Medical Assistance Programs

PURPOSE:

To issue an updated copy of the advance care directive description which must be distributed to patients or residents in your care.

SCOPE:

This bulletin applies to hospitals, nursing facilities, home health agencies, hospices, and managed care organizations participating as providers or seeking to enroll as providers in the Pennsylvania Medical Assistance Program.

BACKGROUND/DISCUSSION:

Congress enacted the Patient Self-Determination Act in 1990. Under this Act, the Commonwealth must provide you with a statement which describes the current Pennsylvania law on "advance directives."

This bulletin replaces bulletins: 11-92-10, 12-92-10, 13-92-06, 14-92-03, 17-92-02, 23-92-03, 34-92-06, 35-92-08, 36-92-08, 37-92-01, 38-92-01, and 53-92-04; issued June 23, 1992, titles "Patient Self-Determination Act: OBRA-90 (Revised)" The attached information entitled "Your Rights as a Patient in Pennsylvania: Making Decisions About Your Care and Treatment" contains revisions to the previously issued directive and includes a written description of all current Pennsylvania law (Acts 24 and 152 of 1992, and Act 102 of 1994) concerning advanced directives. Most notably, the new written description notes that all powers of attorney are deemed to be durable, and that individuals may designate whether they wish to make an anatomical gift of all or part of their body in their advance directives.

In addition to distributing the written description of the law on advance directives, you must meet other requirements under the Federal law. Specifically, you must continue to do the following:

- a. Maintain written policies and procedures concerning the State law rights of your adult patients or residents to make decisions concerning their medical care, including the right to accept or refuse medical or surgical treatment and the right to formulate advance directives;
- b. Provide written information to your adult patients or residents on your policies concerning implementation of such rights;
- c. Document in the patient or resident's medical records whether or not he or she has executed an advance directive;
- d. Not condition the provision of care, or otherwise discriminate against an individual, based on whether or not the individual has executed an advance directive; and
- e. Ensure compliance with requirements of State law (whether statutory or recognized by the courts) concerning advance directives.

Failure to comply with these Federal requirements may adversely affect your participation in the Medical Assistance Program and the Medicare Program. Consequently, if you have not already done so, you should become familiar immediately with your legal obligations under the Patient Self-Determination Act. You should consult with your professional staff, including your legal counsel, to establish a mechanism for implementation of the law, as well as to deal with individual situations as they arise. You should keep in mind that distribution of the written description of the law does not relieve you of any obligation you may have to ascertain the competence of an individual to execute an advance directive or to determine the validity of a document presented to you as an advance directive.

YOUR RIGHTS AS A PATIENT IN PENNSYLVANIA: MAKING DECISIONS ABOUT YOUR CARE AND TREATMENT

I. INTRODUCTION

In Pennsylvania, competent adults have the right to decide whether to accept, reject or discontinue medical care and treatment. If you do not wish to undergo a certain procedure or to receive a certain type of treatment, you have the right to make your wishes known to your doctor or other health care provider and generally to have those wishes respected.

There may be times, however, when a person cannot make his or her wishes known to a health care provider. For example, a person may be unconscious or too badly injured to tell his or her doctor what kind of care or treatment he or she would like to receive or under what circumstances that doctor should withhold care or treatment.

The purpose of this document is to let you know what the law currently has to say about your rights as a competent adult to make your wishes known regarding whether or not you want to receive types of care and treatment. This document tells you your options on how to tell people ahead of time how you would like to receive medical care and treatment from a health care provider in the event that you need medical attention but become physically or mentally unable to give instructions about your care and treatment later on. It also tells you what Pennsylvania law has to say about the duty of a health care provider to follow your advance instructions.

To make these complex issues easier to understand, they are addressed through a series of questions and answers. Before you make any decisions about the issues addressed in this document, you may wish to discuss them with your doctor, members of your family, close friends, and where appropriate, your lawyer.

II. QUESTIONS AND ANSWERS

GENERAL INFORMATION ABOUT YOUR RIGHT

1. *What are my rights to accept, reject or stop medical care or treatment?*

In Pennsylvania, adults have the right to decide if they want to accept, to reject or to discontinue medical care and treatment. In order to protect and safeguard this right, however, it may be necessary to execute an advance directive for health care (also known as a living will) and/or a durable power of attorney for health care. For example, under a criminal law known as Act 28 of 1995, caretakers such as owners, managers, or employees of nursing homes and other health care institutions have an affirmative duty to provide necessary medical care to individuals within their care. Caretakers are relieved of this duty only if they can demonstrate that the patient has competently refused the medical care or treatment, or the person, if incompetent, previously executed a living will or durable power of attorney for health care indicating that he or she does not wish to receive the medical care or treatment in question.

2. *What does my doctor have to tell me about my care and treatment?*

Your doctor should provide you with all of the information which a person in your situation reasonably would want to know in order to make an informed decision about a proposed procedure or course of treatment. This means that your doctor should tell you about the risks and benefits of the medical procedure or course of treatment which he or she is recommending, possible side effects, and alternatives, if any, to the proposed procedure or course of treatment. You may accept or reject your doctor's advice and you may seek a second opinion.

3. *Does my health care provider have to tell me if it will not honor my wishes?*

Yes. The law requires your health care provider (hospital, nursing home, home health care service, hospice or HMO) to give you a written statement of its policies. For example, upon admission to a hospital, you must be informed as to whether the hospital will not honor your wish to have food and water withheld or withdrawn under certain circumstances.

4. *If I become physically or mentally unable to make a decision about my medical care or treatment, what can I do now to guarantee that my wishes will be followed later?*

There is no law in Pennsylvania which guarantees that a health care provider will follow your instructions in every circumstance. There are, however, steps you can take to express your wishes about future treatment. One of these steps is to write and sign an **advance directive**.

5. *What is an advance directive?*

An advance directive is a written document that you may use, under certain circumstances, to tell others what care you would like to receive or not receive should you become unable to express your wishes at some time in the future. An advance directive may take many forms. In Pennsylvania, two types are specifically authorized: (1) a **living will**, also known as an **advance directive for health care** and (2) a **durable power of attorney for health care**.

LIVING WILLS

6. *What is a living will?*

In Pennsylvania, a living will is a written document that describes the kind of life-sustaining treatment you want or do not want if you are later unable to tell your doctor what kind of treatment you wish to receive. For your convenience, we have attached a sample living will to this pamphlet.

It is important for you to know that Pennsylvania's living will law does not recognize all types of instructions which might be contained in a person's living will. Rather, instructions must relate to situations where medical treatment would serve only to prolong the process of dying or to maintain you in a state of permanent unconsciousness. **A living will would apply only in cases where your condition or illness is terminal or you are permanently unconscious.** So, for example, Pennsylvania does not specifically recognize living wills which direct a health care provider to withhold medically beneficial, nonfutile care.

You should also understand that a living will is not a last will and testament. A last will and testament tells your survivors what to do with your property after your death.

7. *Who can make a living will?*

Any competent person can make a living will who: 1) is at least 18 years old; 2) is a high school graduate; or 3) is married.

8. *When does a living will take effect?*

A living will only takes effect when:

1. your doctor has a copy of it; **and**
2. your doctor has concluded that you are incompetent and therefore no longer able to make decisions about the medical care you wish to receive; **and**
3. you doctor and a second doctor have determined that you are in a terminal condition or in a state or permanent unconsciousness.

9. *What does it mean to be "incompetent"?*

"Incompetence" means the "lack of sufficient capacity for a person to make or communicate decisions concerning himself either due to physical or mental impairment." The law allows your doctor to decide if you are incompetent for purposes of implementing a living will.

10. *What should my living will contain?*

There is no single correct way to write a living will. Your living will may have additional or different directions than the directions which appear in the sample living will attached to this pamphlet. Your living will is not valid, however, unless you have taken the following steps:

1. You must sign your living will. If you are unable to do so, you must have someone else sign it for you; **and**
2. Two people who are at least 18 years old must sign your living will as witnesses. Neither of those witnesses may be the person who signed your living will on your behalf if you were unable to sign it

yourself. You should also date your living will, even though the law does not require it. In Pennsylvania, you are not required to have your living will notarized, however, if you are contemplating using the document in another state you should find out if the other state requires notarization.

11. *What if I already have a living will?*

Pennsylvania's living will law went into effect on April 16, 1992. You should review any living will drafted before that date to see that it meets the two requirements described in the answer to number 10.

12. *To whom should I give a living will?*

You should give a copy of your living will to your doctor, hospital, nursing home or other health care provider. When you enter a hospital or nursing facility, the law requires your doctor or other health care provider to ask you if you have a living will. If you give a copy of your living will to your doctor or other health care provider, that document must be made a part of your medical record. You may also want to give a copy to an immediate family member or a close friend.

13. *What if my doctor or health care provider refuses to follow the directions of my living will?*

Your doctor and any other health care provider must inform you if they cannot in good conscience follow your wishes or if the policies of the institution prevent them from honoring your wishes. This is one reason why you should give a copy of your living will to your doctor or to those in charge of your medical care and treatment.

If you are incompetent when you are admitted for medical care and have named someone in your living will to make decisions for you, that person must be informed if the wishes contained in your living will cannot be honored. If you have not named anyone in your living will, your family, guardian or other representative must be informed that your living will cannot be honored.

The doctor or other health care provider who cannot honor your wishes must then help transfer you to another health care provider willing to carry out your directions - if they are the kind of directions which Pennsylvania recognizes as valid. It is advisable, as soon as possible after you have written your living will, to make sure your doctor will follow your wishes as stated in your living will.

14. *Is a living will effective when I am pregnant?*

Pennsylvania law generally does not permit a doctor or other health care provider to honor the living will of a pregnant woman who has directed that she not be kept alive. The terms of such a living will may be honored, however, if the woman's doctor determines that life-sustaining treatment: 1) will not maintain the woman in a manner that will allow for the continued development and birth of the unborn child; 2) will physically harm the pregnant woman; or 3) cause her pain which could not be relieved by medication.

If your living will is not honored because you are pregnant, the Commonwealth must pay all usual, customary and reasonable expenses of your care.

15. *What if I change my mind after I have written a living will?*

Pennsylvania's living will law states that you may revoke a living will at any time and in any manner. All that you must do is tell your doctor or other health care provider that you are revoking it. Someone who saw or heard you revoke your living will may also tell your doctor or other health care provider.

You can also change or rewrite your living will. If you change your mind after you have written down your instructions, you should destroy your written instructions and all copies or revoke them and write new ones. You should also consider telling everyone who participated in your decision-making process that you have changed your mind and give a copy of any new instructions to your doctor, health care provider, and anyone else who had a copy of your old instructions.

DURABLE POWERS OF ATTORNEY FOR HEALTH CARE

16. *What is a durable power of attorney for health care?*

A durable power of attorney for health care is a document which allows you (the **principal**) to name another person (the **attorney-in-fact**) to make certain medical decisions for you if you are unable to make them for yourself. The person you choose as your attorney-in-fact does not have to be a lawyer. The law says that the

attorney-in-fact can:

1. authorize your admission to a medical, nursing, residential or other facility;
2. enter into agreements for your care; and
3. authorize medical and surgical procedures.

The power to "authorize medical and surgical procedures" means that your attorney-in-fact may arrange for and consent to medical, therapeutic, and surgical procedures for you, including the administration of drugs.

As of this writing, courts in Pennsylvania have not decided if the law permits an attorney-in-fact to refuse treatment on your behalf, especially if the attorney-in-fact is refusing potentially beneficial care.

17. *Why do they call it a "durable power of attorney?"*

A **durable power of attorney** is a power of attorney which continues to be effective or takes effect if or when you become incapacitated. All powers of attorney are presumed to be durable, unless specifically provided otherwise.

18. *What are some of the major differences between a living will and a durable power of attorney?*

1. Unlike a durable power of attorney for health care, a living will only takes effect when you are in a terminal condition or permanent state of unconsciousness. A **durable power of attorney for health care** generally names someone to make health care decisions for you without necessarily describing what those decisions should be. A **living will**, on the other hand, often spells out what kind of life-sustaining treatment you want to receive and may or may not name someone to make those decisions for you should you become incompetent and in a terminal condition or permanent state of unconsciousness.
2. A **durable power of attorney for health care** is designed to give your named representative the authority to make all sorts of medical care decisions for you, such as whether you should be admitted to a particular kind of health care facility. A **living will**, on the other hand, is generally used to tell your health care provider what kind of medical care and treatment you want to receive or not receive in the event you become unable to tell the provider yourself.
3. It is unclear if your representative under a durable power of attorney for health care can refuse or stop life-sustaining treatment for you; a living will clearly can be used for that purpose.

19. *May I have both a durable power of attorney for health care and a living will?*

Yes, you may have both in either one document or in separate documents, although having both in one document may be recommended in many cases. There are certain factors you should consider in making the decision to have both, or either one of these documents.

Because the grant of powers in a durable power of attorney for health care may be very broad and will continue even if you become incompetent, it is very important that you exercise great care in both selecting the person to be your attorney-in-fact and in spelling out the power and guidelines for the attorney-in-fact to follow. While the grant of powers in a living will is more specific, great care should still be taken in both writing your living will and especially in selecting a surrogate if you decide to select one.

ANATOMICAL GIFTS

20. *What if I wish to donate my organs or other body parts after my death? Can I include this wish in my living will?*

Yes. If you are at least 18 years old, you may make an anatomical gift of the entire body or of body parts (including organs, tissues, eyes, bones, arteries, or blood) by expressing an intent to do so in your living will. You may also grant your attorney-in-fact the specific power to make an anatomical donation in a durable power of attorney for health care.

DISCUSSING YOUR INSTRUCTIONS WITH OTHERS

21. *With whom should I discuss my instructions before I write them down?*

Before you write your instructions down, you may wish to discuss them with your doctor, member of your family, friends or other appropriate persons, such as a member of the clergy. If you are writing a durable power of attorney for health care, you should also discuss your wishes with the person you are naming as your attorney-in-fact. Similarly, if you are writing a living will and naming someone in that document to carry out your wishes, you should discuss your wishes with that person.

22. *To whom should I give my written instructions?*

You should give your written instructions to your family doctor and, if applicable, to your hospital, nursing home or other health care provider. You may also want to give a copy to your family or anyone else involved in your health care decision-making process, and you should keep a copy for your own records.

23. *What if I don't leave instructions or name a person who will make a decision for me?*

If you become unable to express your wishes about your medical care or treatment and do not leave instructions regarding your wishes or name a person who will make decisions for you, a health care provider may ask your family or the courts to make decisions about your care and treatment.

24. *What if I have expressed my wishes orally about treatment, but have not put my wishes in writing?*

Oral directions which you have given to your physician or your family will sometimes be followed by health care providers, depending on how detailed and recent those instructions were. Thus, you may wish to tell your personal physician and your family your wishes about future treatment, even if you choose not to sign some sort of advance directive.

25. *Do I have to write a living will or durable power of attorney for health care?*

No. It's your decision. Under the law, a health care provider may not determine the type of care needed for you, or otherwise discriminate against you, on the basis of whether you have written such a document. Moreover, under Pennsylvania law, no health care provider or insurer may charge a different fee or rate depending on whether you have executed a living will.

26. *Are living wills and durable powers of attorney which were written in other states recognized in Pennsylvania?*

The law in Pennsylvania is unclear. It is possible, however, that at the very least your doctor, hospital or a judge may use such documents to determine who will make decisions about your care and what those decisions will be.

27. *Who should I contact if I have more questions about living wills or durable powers of attorney for health care?*

In addition to a lawyer, there are many individuals and groups that can provide you with information about such documents. Here are some that you may wish to consult:

1. Your local long term care ombudsman, who can be reached by calling your community's Area Agency on Aging. The telephone number is in the blue pages of your telephone book.
2. Office of the State Long Term Care Ombudsman
PA Department of Aging
400 Market Street, 7th Floor
Harrisburg, PA 17101-2301 (717) 783-7247
3. Pennsylvania Counsel on Aging
400 Market Street, 6th Floor
Harrisburg, PA 17101-2301 (717) 783-1924
4. American Association of Retired Persons (AARP)
225 Market Street
Harrisburg, PA 17101 (717) 238-2277

ATTACHMENT:

- Living Will Sample

COMMENTS AND QUESTIONS REGARDING THIS BULLETIN SHOULD BE DIRECTED TO:

Bureau of Program Policy and Services Development

P.O. Box 8043

or call the appropriate Toll free number for assistance.

Visit the Office of Medical Assistance Programs website at www.dpw.state.pa.us/omap