

## **RECENT CHANGES IN THE LAW REGARDING HEALTH CARE POWERS OF ATTORNEY AND LIVING WILLS**

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On November 29, 2006 the Governor approved an Act, which became effective on January 28, 2007, changing certain aspects of the law with regard to Health Care Powers of Attorney and Advanced Health Care Directives or, as they are more commonly known, Living Wills.

### **Health Care Powers of Attorney:**

A Health Care Power of Attorney is a document in which you would give another person, called your "Health Care Agent", the authority to speak with medical personnel and obtain documents relating to your medical/mental health care; to employ or discharge medical, social service or other support personnel to care for your physical, mental and emotional well-being; to consent to or refuse consent for your medical and psychiatric care; and, if necessary, to take any legal action necessary to require a third party to comply with the actions taken by the Health Care Agent. The document is only operative after it has been provided to your physician and your physician determines you are unable to understand, make or communicate your choices regarding your medical treatment. It has no expiration date, unless you specifically place one in the document or you notify your physician, preferably in writing, that you revoke the previous Power of Attorney.

The recent changes to this statute include a provision that if you do not have a Health Care Power of Attorney, or do not name a Health Care Agent, the Commonwealth of Pennsylvania has determined the following people, in the order stated below, will be appointed to make your medical decisions on your behalf:

- a. Your spouse, unless a divorce is pending, and your adult children who are not also the children of your spouse.
- b. An adult child.
- c. A parent.
- d. An adult brother or sister.
- e. An adult grandchild.
- f. An adult with knowledge of your preferences and values, including, but not limited to, your religious and moral beliefs, to assess how you would make health care decisions.

This makes it extremely important to have a Health Care Power of Attorney, if you want to nominate different people or a different order for the people listed above. Also, please note that the final person capable of making decisions about your medical treatment is any adult who says they have knowledge of your preferences. The statute does not give limits or guidelines as to what proof must be offered to show one has "knowledge of your preferences." Therefore, if you do not currently have a Health Care Power of Attorney, you should seriously consider having one drafted on your behalf.

### **Advance Health Care Directive or Living Will:**

A living will is a statement by you that indicates your wishes regarding the initiation, continuation, withholding or withdrawal of life-sustaining treatment to keep you artificially alive in the event that you are in a terminal, vegetative state. It becomes effective when a copy is provided to your physician and your physician determines you are incompetent and in a terminal condition or a state of permanent unconsciousness. According to the statute "incompetent" is when a person lacks sufficient capacity to make or communicate decisions about himself or herself. A "terminal condition" is an incurable and irreversible medical condition that "will, in the opinion of the attending physician, to a reasonable degree of

medical certainty, result in death regardless of the continued application of life-sustaining treatment.” “Permanent unconsciousness” is a medical condition diagnosed according to “currently accepted medical standards and with reasonable medical certainty as total and irreversible loss of consciousness and capacity for interaction with the environment.”

Therefore it is important for you to consider preparing a Living Will and naming an individual or individuals who you trust to go to bat for you, if you are in a terminal condition, etc., who will insist to the doctor that if there is absolute assurance you will not regain consciousness and you will remain vegetative, that none of the efforts which you have requested to not be performed on you be performed. In other words, if necessary, they will go into court to get a court order asking that you not be kept alive artificially.

An exception to a Living Will taking precedence in determining one’s medical treatment is when the person who made the Living Will is pregnant, incompetent and in a terminal condition or a state of permanent unconsciousness. A physician is not required to perform a pregnancy test to all female patients in a terminal condition or state of permanent unconsciousness, only to those patients there is a reason to believe may be pregnant. This is because the statute states, if these factors are true, “life-sustaining treatment, cardiopulmonary resuscitation, nutrition and hydration must be provided to the pregnant patient unless, to a reasonable degree of medical certainty as certified by the patient’s medical record by the attending physician and an obstetrician who has examined the patient, life-sustaining treatment, nutrition and hydration:”

- 1) will not maintain the patient to permit development and live birth of the unborn child;
- 2) will be physically harmful to the patient; or
- 3) would cause pain which could not be alleviated by medication.

The statute further states that under these conditions, the Commonwealth of Pennsylvania “shall pay all usual, customary and reasonable expenses directly or indirectly incurred.”

A change in the statute states that if a spouse is listed as the person responsible for making health care decisions in the Living Will and the parties are now in the process of divorce the designation of the spouse is considered to be revoked as of the time the action in divorce was filed, “unless it clearly appears from the advance health care directive that the designation was intended to continue to be effective notwithstanding the filing of an action in divorce by either spouse.”

### **Comments:**

The statute is not clear as to whether the changes regarding order of persons to be appointed if you do not have a Health Care Power of Attorney also applies when you do not have a Living Will; nor is the statute clear that the provisions relating to divorce also apply to Health Care Powers of Attorney. Therefore, you should consider making both a Health Care Power of Attorney and a Living Will and naming persons to make your medical choices for you, if you are no longer able to do so. The changes to the statute do not invalidate any Health Care Power of Attorney or a Living Will prepared and signed prior to the effective date of the statute. However, it may affect who is eligible to act on your behalf, if you did not previously set forth this information in your Health Care Power of Attorney or Living Will.