

Quick Start Guide to Health Care Decision-Making

Who is the Pennsylvania Health Care Decision Maker?

(Who's on First?)

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 Professional guidance should be sought.

Competent Patient	Health Care Agent	Health Care Representative	Guardian Of the Person	Incompetent Patient
Always in charge – can override the decision of Health Care Agent or purported Health Care Representative	In charge if patient has Health Care Power of Attorney and patient has become incapacitated or if patient has “sprung” the Health Care Power of Attorney if allowed by Health Care Power of Attorney document §5454(a)	In charge if (1) patient is an adult (2) patient is incompetent (3) there is no Health Care Power of Attorney or Agent is unable or unwilling to act (4) Guardian of Person to make health care decisions not appointed §5461(a)	In charge if appointed by Orphans’ Court Division. Subject to powers and limitation in Order of Appointment §5461(a)(3)	A patient can override Living Will at any time and in any manner regardless of physical or mental condition §5444(a). A patient can countermand decision of Health Care Agent to withhold or withdraw life sustaining treatment regardless of physical or mental condition §5457(b)

What are the Powers of Pennsylvania Health Care Decision Makers?*

Power	Competent Patient	Health Agent	Health Care Representative	Guardian of the Person	Incompetent Patient
Power to sign a Health Care Power of Attorney or Living Will	Yes – an adult person of “sound mind” can execute these documents §5442(a) §5452(a)	No	No	No	No
Power to sign POLST or DNR	Yes	Yes, unless limited by Health Care Power of Attorney §5456(a)	Yes, but <u>MAY DECLINE HEALTH CARE NECESSARY TO PRESERVE LIFE ONLY IF END STAGE MEDICAL CONDITION OR PERMANENT UNCONSCIOUSNESS</u> §5462(c)	Yes – subject to limitations in Order of Court. <u>MAY DECLINE HEALTH CARE NECESSARY TO PRESERVE LIFE ONLY IF END STAGE MEDICAL CONDITION OR PERMANENT UNCONSCIOUSNESS</u> §5462(c)) and <u>In re D.L.H.*</u> Proposal by JSGC would clarify powers and process. <u>If disagreement, go to Court.</u>	No.
Power to revoke a Living Will or Health Care Power of Attorney	Yes. §5444(a); §5459(a)	No	No	Power to revoke or amend Health Care Power of Attorney but not Living Will (§5460(a))	Yes – a patient can revoke a Living Will or countermand Health Care Agent’s decision to withhold or withdraw life sustaining treatment regardless of physical or mental condition. §5444(a). §5457(b)

Power	Competent Patient	Health Agent	Health Care Representative	Guardian of the Person	Incompetent Patient
Power to revoke POLST or DNR	Yes	Yes if signed by Health Care Agent-- If signed by patient prior to incompetency, it is an “instruction” which may be entitled to substantial weight in health care decision-making as described in §5456(c). But note that instruction applies to patient’s <u>then current condition</u> .	Yes if signed by Health Care Representative – If signed by patient prior to incompetency, it is an “instruction” which may be entitled to substantial weight in health care decision-making as described in §5456(c). But note that instruction applies to patient’s <u>then current condition</u> .	Yes if signed by Guardian or Health Care Representative prior to appointment of Guardian of the Person. – If signed by patient prior to incompetency, it is an “instruction” which may be entitled to substantial weight in health care decision-making as described in §5456(c). But note that instruction applies to patient’s <u>then current condition</u> .	Yes, theoretically by parity of reasoning with the revocation of a Living Will or a countermand of a Health Care Agent’s order to withhold or withdraw life-sustaining care if POLST or DNR order directs the withholding or withdrawal of life sustaining treatment. Was there actually a “revocation”? Evaluate using best medical judgment
Power to decline health care necessary to preserve life	Yes	Yes if empowered by Health Care Power of Attorney	Yes if patient is in End Stage Medical Condition or Permanently Unconscious §5462(c). But not otherwise.	Yes if patient in End Stage medical condition or Permanently Unconscious §5462(c) and <i>In re DLH</i> ** but not otherwise. Powers and procedure of guardian will be clarified if Joint State Government Commission recommendation is adopted	No

**Concerns have been expressed that for a Guardian to withhold or withdraw health care necessary to preserve life, a Court Order is necessary even if the patient is in an End-Stage Medical Condition or is Permanently Unconscious. The author believes this is an overly restrictive reading of *In re DLH*, 2 A.3d 505 (Pa. 2010) which would be fundamentally inconsistent with our Supreme Court’s decision of *In re Fiori*, 673 A.2d 905 (Pa. 1996). *Fiori* held that a close family member could withdraw life sustaining treatment for a patient in a confirmed permanent vegetative state without a Court Order where there

was no disagreement among the parties in interest; including the physicians, the family members, the Guardian of the Person and the medical facility. The current legislative recommendation of the Joint State Government Commission would clarify and reaffirm that rule, generally equating the powers of a Guardian of the Person with those of a Health Care Representative. Where there is disagreement amongst the parties in interest, the facility should consider seeking a Court Order.

***All Health Care Decisions by anyone acting for a patient should be made as set forth in Section 5456(c) which explicitly applies to Health Care Agents and Health Care Representatives, but should also be consistently utilized by a Guardian of the Person making health care decisions for a patient.**

“ Health care decisions.--

(1) The health care agent shall gather information on the principal's prognosis and acceptable medical alternatives regarding diagnosis, treatments and supportive care.

(2) In the case of procedures for which informed consent is required under section 504 of the act of March 20, 2002 (P.L. 154, No. 13), known as the Medical Care Availability and Reduction of Error (Mcare) Act, the information shall include the information required to be disclosed under that act.

(3) In the case of health care decisions regarding end of life of a patient with an end-stage medical condition, the information shall distinguish between curative alternatives, palliative alternatives and alternatives which will merely serve to prolong the process of dying. The information shall also distinguish between the principal's end-stage medical condition and any other concurrent disease, illness or physical, mental, cognitive or intellectual condition that predated the principal's end-stage medical condition.

(4) After consultation with health care providers and consideration of the information obtained in accordance with paragraphs (1), (2) and (3), the health care agent shall make health care decisions in accordance with the health care agent's understanding and interpretation of the instructions given by the principal at a time when the principal had the capacity to understand, make and communicate health care decisions. Instructions include an advance health care directive made by the principal and any clear written or verbal directions that cover the situation presented.

(5) (i) In the absence of instruction, the health care agent shall make health care decisions that conform to the health care agent's assessment of the principal's preferences and values, including religious and moral beliefs.

(ii) If the health care agent does not know enough about the principal's instructions, preferences and values to decide accordingly, the health care agent shall take into account what the agent knows of the principal's instructions, preferences and values, including religious and moral beliefs, and the health care agent's assessment of the principal's best interests, taking into consideration the following goals and considerations:

(A) The preservation of life.

(B) The relief from suffering.

(C) The preservation or restoration of functioning, taking into account any concurrent disease, illness or physical, mental, cognitive or intellectual condition that may have predated the principal's end-stage medical condition.

(iii) (A) In the absence of a specific, written authorization or direction by a principal to withhold or withdraw nutrition and hydration administered by gastric tube or intravenously or by other artificial or invasive means, a health care agent shall presume that the principal would not want nutrition and hydration withheld or withdrawn.

(B) The presumption may be overcome by previously clearly expressed wishes of the principal to the contrary. In the absence of such clearly expressed wishes, the presumption may be overcome if the health care agent considers the values and preferences of the principal and assesses the factors set forth in subparagraphs (i) and (ii) and determines it is clear that the principal would not wish for artificial nutrition and hydration to be initiated or continued.

(6) The Department of Health shall ensure as part of the licensure process that health care providers under its jurisdiction have policies and procedures in place to implement this subsection.”