1994 REPORT
OF THE
TASK FORCE AND ADVISORY COMMITTEE ON
DECEDENTS' ESTATES LAWS

Recommending

A Health Care
Power of Attorney Statute

Other Amendments to the
Probate, Estates and Fiduciaries Code

General Assembly of the Commonwealth of Pennsylvania
JOINT STATE GOVERNMENT COMMISSION

APRIL 1994

The Joint State Government Commission was created by the act of July 1, 1937 (P.L.2460, No.459), as amended, as a continuing agency for the development of facts and recommendations on all phases of government for the use of the General Assembly.

JOINT STATE GOVERNMENT COMMISSION, 1994

OFFICERS

Roger A. Madigan, Chairman

Ivan Itkin, Treasurer

EXECUTIVE COMMITTEE

Senate Members	House Members
Robert C. Jubelirer President Pro Tempore	H. William DeWeese Speaker
F. Joseph Loeper Majority Leader	Ivan Itkin Majority Leader
Robert J. Mellow Minority Leader	Matthew J. Ryan Minority Leader
D. Michael Fisher Majority Whip	Mark B. Cohen Majority Whip
J. William Lincoln Minority Whip	John M. Perzel Minority Whip
Noah W. Wenger Chairman, Majority Caucus	Jeffrey W. Coy Chairman, Majority Caucus
Leonard J. Bodack Chairman, Minority Caucus	Richard A. Geist Chairman, Minority Caucus

MEMBER EX-OFFICIO

Roger A. Madigan, Commission Chairman

Conrad C. M. Arensberg, Counsel
David L. Hostetter, Assistant Counsel

TASK FORCE ON DECEDENTS' ESTATES LAWS

SENATE MEMBERS

Stewart J. Greenleaf, **Chairman**

Roy C. Afflerbach

Jeanette F. Reibman

Tim Shaffer

John J. Shumaker

Hardy Williams

HOUSE MEMBERS

Daniel F. Clark

Michael C. Gruitza

Edward J. Haluska

Michael K. Hanna

Jeffrey E. Piccola

Robert D. Reber Jr.

Donald W. Snyder

Gregory S. Vitali

ADVISORY COMMITTEE ON DECEDENTS' ESTATES LAWS

William McC. Houston, Esq.
Chairman

M. Paul Smith, Esq.
Secretary

Thomas A. Beckley, Esq.

Ira B. Coldren Jr., Esq.

Robert E. Diehl Jr., Esq.

Calvin S. Drayer, Esq.

Robert C. Fernandez, Esq.

Honorable Roger M. Fischer

G. Donald Gerlach, Esq.

Edward J. Greene, Esq.

Neil E. Hendershot, Esq.

James A. Humphreys III, Esq.

David J. Kaufman, Esq.

Robert P. Leiby Jr., Esq.

John J. Lombard Jr., Esq.

Edwin L. R. McKean, Esq.

Honorable Edmund S. Pawelec

Richard L. Placey, Esq.

William Campbell Ries, Esq.

James G. Schmidt, Esq.

Pam H. Schneider, Esq.

Dean John J. Sciullo

K. L. Shirk Jr., Esq.

J. Pennington Straus, Esq.

Regina O. Thomas, Esq.

Donald R. Waisel, Esq.

Edward M. Watters III, Esq.

Honorable Lawrence E. Wood

C. Thomas Work, Esq.

Honorable Vincent X Yakowicz

Honorable Paul R. Zavarella

Robert L. Freedman, Esq.
Research Consultant

Richard L. Grossman, Esq.
Research Consultant

Wm. H. Nast, Esq.
Research Consultant

Bruce A. Rosenfield, Esq.
Research Consultant

GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA
JOINT STATE GOVERNMENT COMMISSION
ROOM 108 - FINANCE BUILDING
HARRISBURG 17120

717-787-4397
FAX 717-787-7020

April 1994

TO THE MEMBERS OF THE GENERAL ASSEMBLY:

The Joint State Government Commission is pleased to present the report of the Task Force and Advisory Committee on Decedents' Estates Laws. This report includes a recommended health care power of attorney statute with official comments and a summary with official comments of other proposed amendments to the Probate, Estates and Fiduciaries Code. For nearly 50 years, the members of the task force and advisory committee have worked to ensure that our probate laws are among the most modern and efficient in the nation.

With this report, we note the retirement of George J. Hauptfuhrer Jr. as chairman of the advisory committee and the appointment of his successor William McC., Houston. Mr. Hauptfuhrer served as a member of the committee for 22 years and as its chairman for 12 years.

On behalf of the Joint State Government Commission, I would like to thank Mr. Hauptfuhrer for his service and wish Mr. Houston a successful tenure as chairman of the advisory committee.

Respectfully submitted,

Roger A. Madigan
Chairman

TABLE OF CONTENTS

INTRODUCTION

This is the tenth report of the Joint State Government Commission Task Force and Advisory Committee on Decedents' Estates Laws since the June 30, 1972 codification of the Probate, Estates and Fiduciaries Code as Title 20 of the Pennsylvania Consolidated Statutes. The task force and advisory committee recommend legislation that would make technical and substantive amendments to Title 20, including the addition of a chapter statutorily authorizing comprehensive health care powers of attorney. The task force and advisory committee also recommend legislation amending the Charitable Instruments Act of 1971.

HEALTH CARE POWER OF ATTORNEY

In summary, this recommended legislation would:

-- Statutorily authorize comprehensive health care powers of attorney and provide a framework for their operation.

-- Permit a principal to provide in a health care power of attorney for a health care attorney-in-fact to make all health care decisions for the principal, including those concerning life-sustaining treatment.

-- Provide that a family member could serve as a health care representative in order to make health care decisions, including life-sustaining treatment decisions, for an individual who does not have an effective health care power of attorney and for whom no plenary guardian of the person has been appointed.

-- Ensure that any life-sustaining treatment decision made by the health care attorney-in-fact or health care representative is subject to the applicable provisions of 20 Pa.C.S. Ch. 54 (advance directive for health care).

-- Provide an optional health care power of attorney form.

-- Permit a principal, irrespective of mental or physical capacity, to countermand individual health care decisions made by a health care attorney-in-fact or health care representative without affecting their authority to make other health care decisions.

OTHER PROPOSED AMENDMENTS TO THE PROBATE, ESTATES AND FIDUCIARIES CODE

This recommended legislation would:

-- Permit an orphans' court to consider all matters involving powers of attorney, regardless of whether the principal is deceased, disabled or incapacitated (§ 712).

-- Make the requirements regarding the determination of the situs of an inter vivos trust consistent for resident and nonresident settlors (§ 724).

-- Permit a decedent by will to expressly exclude or limit the right of an individual or class to succeed to property passing by intestate succession (§ 2101).

-- Eliminate the requirement that, regarding wills signed by mark, the testator's name be subscribed in his presence (§ 2502).

-- Confirm the abolition of the doctrine of worthier title (§§ 2517 and 6117).

-- Provide that a provision in a will or trust purporting to penalize an interested party from contesting the will or trust is unenforceable if probable cause exists for instituting proceedings (§ 2521).

-- Increase from $3,500 to $5,000 the amount of wages, salary or employee benefits an employer may pay to certain family members of the decedent employee whether or not a personal representative has been appointed (§ 3101).

-- Increase from $10,000 to $25,000 the maximum amount of the estate of a decedent (§§ 3102 and 3531) and a minor (§ 5101) which can be settled by petition.

-- Increase the family exemption from $2,000 to $3,500 (§ 3121).

-- Provide for the right of recovery of Federal estate tax (§ 3701).

-- Clarify provisions relating to the appointment of the guardian of a minor (§ 3504), effect of divorce on designation of beneficiaries (§ 6111.2) and right to disclaim (§ 6201).

-- Affirm that the cy pres doctrine applies to testamentary and inter vivos trusts (§ 6110).

-- Make the rules of abatement for decedents' estates applicable to inter vivos and testamentary trusts (§ 7183).

CHARITABLE INSTRUMENTS ACT OF 1971

The recommended legislation would:

-- Permit amendments to the governing instruments of charitable organizations without approval of any court, member, donor or beneficiary for the sole purpose of ensuring compliance with Federal tax laws.

ACTS AMENDING THE
PROBATE, ESTATES AND FIDUCIARIES CODE
THROUGH 1993

Citation	Subject
1972, P.L.1461, No.331	Change of age of majority
1973, P.L.62, No.25	Bank holding companies
1973, P.L.322, No.104	Change of age of majority*
1974, P.L.282, No.84	Increase monetary limit, § 3101
1974, P.L.383, No.130	Increase monetary limit, § 3121*
1974, P.L.720, No.242	Deposit of securities; book-entry securities
1974, P.L.816, No.271	Editorial change in title designation
1974, P.L.867, No.293	Omnibus*
1974, P.L.896, No.294	Temporary fiduciaries*
1974, P.L.899, No.295	Powers of attorney*
1975, P.L.598, No.168	Increase monetary limit, § 3101
1976, P.L.434, No.105	Self-proved wills**
1976, P.L.547, No.134	Multiple-party bank accounts*
1976, P.L.551, No.135	Omnibus*
1976, P.L.562, No.136	Disclaimers*
1976, P.L.836, No.144	Estate plan for incompetent*
1978, P.L.42, No.23	Spouse's election*
1978, P.L.77, No.37	Omnibus*
1978, P.L.202, No.53	Judiciary Act Repealer Act
1978, P.L.909, No.173	Equal Rights Amendment
1978, P.L.1269, No.303	Illegitimates
1979, P.L.255, No.86	Conforming amendment
1980, P.L.565, No.118	Omnibus*
1980, P.L.693, No.142	Repealed § 773
1982, P.L.45, No.26	Omnibus*
1982, P.L.682, No.194	Anatomical gifts
1984, P.L.103, No.21	Forfeiture of parent's share
1984, P.L.929, No.182	Omnibus*
1986, P.L.1449, No.141	Anatomical gifts
1988, P.L.553, No.99	Affidavit and oath*; authorized investments
1988, P.L.1444, No.177	Definition of inter vivos trust
1990, P.L.834, No.198	Venue of nonprofit corporations and cemetery companies
1992, P.L.108, No.24	Advance Directive for Health Care; guardianship amendments
1992, P.L.1163, No.152	Omnibus*
1993, P.L.181, No.38	Increase monetary limit, § 3101(b) and (c)

*Drafted by the advisory committee and approved and introduced by the Task Force on Decedents' Estates Laws.

**Drafted by the advisory committee without official action of the advisory committee or task force.

HEALTH CARE POWER OF ATTORNEY PROPOSAL AND COMMENTS

The task force and advisory committee recommend the enactment of a health care power of attorney statute as Subchapter B of Chapter 56 of the Probate, Estates and Fiduciaries Code. Enactment of this legislation would provide the necessary statutory framework to enable an individual to provide in a health care power of attorney that an attorney-in-fact may make all health care decisions for that individual, including decisions concerning life-sustaining treatment. This proposed legislation would also provide that certain family members could make health care decisions, including decisions concerning life-sustaining treatment, for an individual who does not have an effective health care power of attorney and for whom no plenary guardian of the person has been appointed.

This legislation is intended to supplement the provisions of 20 Pa.C.S. Ch. 54 (advance directive for health care) that provide for the execution of a declaration expressing an individual's intention regarding life-sustaining treatment decisions if the individual is incompetent and in a terminal condition or permanently unconscious. This proposed legislation would supplant and repeal the provisions of present law, regarding powers of attorney, which provide two specific powers

relating to health care: authorizing admission to a medical facility and authorizing medical and surgical procedures. (See 20 Pa.C.S. §§ 5602(a)(8) and (9) and 5603(h).)

The proposed legislation and the official comments of the advisory committee are set forth on the following pages. The official comments may be utilized in determining the intent of the General Assembly: 1 Pa.C.S. § 1939; Martin Estate, 365 Pa. 280, 74 A.2d 120 (1950).

Subchapter B

Powers of Attorney for Health Care

Sec.

5638. Validity.

§ 5621. Definitions.

The following words and phrases when used in this subchapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Attending physician." The physician who has primary responsibility for the treatment and care of the principal.

"Declaration." A writing executed by an individual pursuant to Chapter 54 (relating to advance directive for health care).

"Health care." Any care, treatment, service or procedure to maintain, diagnose, treat or provide for physical or mental health, custodial or personal care, including any medication program, therapeutical and surgical procedures, and including life-sustaining treatment.

"Health care attorney-in-fact." An individual designated by a principal in a health care power of attorney.

"Health care decision." A decision regarding an individual's health care, including:

(1) selection and discharge of health care providers and health care institutions;

(2) approval or disapproval of diagnostic tests, surgical procedures and programs of medication; and

(3) directions to initiate, continue, withhold or withdraw all forms of life-sustaining treatment, including orders not to resuscitate.

"Health care institution." An institution, facility or agency licensed, certified or otherwise authorized or permitted by law to provide health care in the ordinary course of business.

"Health care power of attorney." A writing made by a principal in accordance with the provisions of this subchapter designating an individual or individuals to make health care decisions for the principal.

"Health care provider." An individual who is licensed or certified by the laws of this Commonwealth to provide health care in the ordinary course of business or practice of a profession.

"Health care representative." An individual, other than a health care attorney-in-fact, authorized by the provisions of this subchapter to make health care decisions for a principal.

"Life-sustaining treatment." Any medical procedure or intervention that, when administered to a principal who has been determined to be in a terminal condition or to be permanently unconscious, will serve only to prolong the process of dying or to maintain the principal in a state of permanent unconsciousness. The term shall include nutrition and hydration administered by gastric tube or intravenously or any other artificial or invasive means if the health care power of attorney of the principal so specifically provides.

"Permanently unconscious." A medical condition that has been diagnosed in accordance with currently accepted medical standards and with reasonable medical certainty as total and irreversible loss of consciousness and capacity for interaction with the environment. The term includes, without limitation, a persistent vegetative state or irreversible coma.

"Principal." An individual who executes a health care power of attorney, who designates or disqualifies an individual from acting as his health care representative, or an individual for whom a health care representative is acting.

"Terminal condition." An incurable and irreversible medical condition in an advanced state caused by injury, disease or physical illness which 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.

> Comment: Health care is defined to include life-sustaining treatment, which in turn is defined consistent with Chapter 54 (advance directive for health care). The definitions of terminal condition and permanently unconscious are identical with the definitions of those terms in Chapter 54.

§ 5622. General provisions.

(a) Who may execute a health care power of attorney.--An individual of sound mind who is 18 years of age or older or has graduated from high school or has married may execute at any time a health care power of attorney authorizing an attorney-in-fact to make health care decisions for the individual.

(b) Execution.--A health care power of attorney must be signed and dated by the principal or by another on behalf of and at the direction of the principal and must be witnessed by two individuals each of whom is 18 years of age or older. A witness shall not be the person who signed the health care power of attorney on behalf of and at the direction of the principal.

> Comment: The execution requirements of subsections (a) and (b) are consistent with those for an advance directive for health care under Chapter 54 (advance directive for health care).

§ 5623. Form of health care power of attorney.

(a) Requirements.--A health care power of attorney shall:

(1) Identify the principal and appoint the health care attorney-in-fact.

(2) Declare that the principal authorizes the health care attorney-in-fact to have authority to make health care decisions on behalf of the principal.

(b) Optional provisions.--A health care power of attorney may, but need not:

(1) Describe the limitations, if any, that the principal imposes upon the authority of the health care attorney-in-fact.

(2) Indicate the intent of the principal regarding the initiation, continuation, withholding or withdrawal of life-sustaining treatment.

(3) Indicate the intent of the principal regarding nutrition and hydration administered by gastric tube, intravenously or by other artificial or invasive means.

(4) Disqualify an individual from acting as his health care representative, or prohibit the appointment of a health care representative, or provide for an order of priority of appointment of a health care representative pursuant to section 5629(c) (relating to decisions by health care representative).

(5) Nominate a guardian of the person of the principal as provided in section 5628(b) (relating to relation of health care attorney-in-fact to court-appointed guardian).

(6) Contain other provisions as the principal may specify regarding the implementation of health care decisions and related actions by the health care attorney-in-fact which are not inconsistent with the provisions of this subchapter.

(c) Optional form.--A health care power of attorney may, but need not, be in the following form:

HEALTH CARE POWER OF ATTORNEY

I, _____, hereby appoint the following individual as my health care attorney-in-fact:

_____
(Name of attorney-in-fact)

_____
(Address and telephone number
of attorney-in-fact)

If my health care attorney-in-fact named above is unwilling, unable or unavailable to serve as my health care attorney-in-fact, I appoint the following individual as my successor health care attorney-in-fact:

_____
(Name of attorney-in-fact)

_____
(Address and telephone number
of attorney-in-fact)

This health care power of attorney shall take effect when it is determined by my attending physician that I lack the capacity to make or communicate health care decisions for myself.

My health care attorney-in-fact shall have the authority to make any and all health care decisions for me, including:

(1) selection and discharge of health care providers and health care institutions;

(2) approval or disapproval of diagnostic tests, surgical procedures and programs of medication; and

(3) by signing my name in this box ( ) I signify that I authorize my health care attorney-in-fact to make decisions on my behalf about the initiation, continuation, withholding or withdrawal of all forms of life-sustaining treatment,

including nutrition and hydration administered by gastric tube, intravenously or by other artificial or invasive means, which will serve only to prolong the process of dying or to maintain me in a state of permanent unconsciousness.

I direct my health care attorney-in-fact to follow these instructions, if any:

_____

_____

_____

If a guardian of my person becomes necessary, I nominate:

_____
(Name of guardian)

_____
(Address and telephone number
of guardian)

I executed this health care power of attorney on _____.
(Date)

Principal's signature _____

Principal's address _____

The principal, or the person acting on behalf of and at the direction of the principal, knowingly and voluntarily signed this health care power of attorney in my presence.

Witness's signature _____

Witness's address _____

Witness's signature _____

Witness's address _____

Comment: Since the execution requirements for a health care power of attorney are consistent with those of an advance directive for health care under Chapter 54 (advance directive for health care), these could be prepared as a single document. The optional form in subsection (c) can be modified to embody the choices offered by this subchapter: (1) successor health care attorneys-in-fact can be named; (2) multiple health care attorneys-in-fact can act together; (3) the health care power of attorney can be effective immediately; (4) countermands of a particular decision may not be made or may be made only if the attending physician believes the principal to have capacity; (5) the power of attorney can state that it terminates at a certain time; and (6) most important, particular choices about life-sustaining treatment can be made.

§ 5624. Countermand, amendment and revocation.

(a) Countermand of health care decision.--Unless specifically provided otherwise in the health care power of attorney, a principal may countermand a health care decision made by the principal's health care attorney-in-fact at any time and in any manner without regard to the principal's mental or physical capacity by personally informing the attending physician or health care provider. The attending physician or health care provider shall inform promptly the health care attorney-in-fact of the countermand. A countermand shall not affect the authority of the health care

attorney-in-fact to make other health care decisions in accordance with the health care power of attorney at any time and from time to time.

(b) Amendment and divorce.--A principal while of sound mind may amend a health care power of attorney by a writing executed in accordance with the provisions of section 5622(b) (relating to general provisions). An amendment may include the revocation in part of the health care power of attorney or the designation of new or additional health care attorneys-in-fact. If the principal has designated his spouse as his health care attorney-in-fact and thereafter the principal and his spouse are divorced from the bonds of matrimony, the designation of the spouse as health care attorney-in-fact shall be deemed revoked as of the time the divorce decree became effective, unless it clearly appears from the health care power of attorney that the designation was intended to survive the divorce of the principal and his spouse.

(c) Revocation.--A principal while of sound mind may revoke a health care power of attorney by a writing executed in accordance with the provisions of section 5622(b) or by personally informing the attending physician, health care provider or health care attorney-in-fact that the health care power of attorney is revoked.

(d) Communication of amendment or revocation.--Any person, other than the health care attorney-in-fact, to whom a revocation or amendment is communicated or delivered shall make all reasonable efforts to inform promptly the health care attorney-in-fact of the revocation or amendment.

Comment: Subsection (a) permits the principal, irrespective of mental or physical capacity, to countermand individual health care decisions made by a health care attorney-in-fact without affecting the authority of the attorney-in-fact to make other health care decisions for the principal. Importantly, a principal can waive this right of countermand by specifically providing so in the health care power of attorney. This subsection is based on the underlying policy consideration of individual autonomy.

Subsection (b) regarding the effect of divorce on a health care power of attorney is modeled after section 5605(c) (power of attorney not revoked until notice; divorce).

§ 5625. Resignation of attorney-in-fact.

A health care attorney-in-fact may resign at any time by delivering a signed and dated written resignation to the principal and to the principal's attending physician, if any.

§ 5626. Operation of health care power of attorney.

(a) When operative.--Unless specifically provided otherwise in the health care power of attorney, a health care power of attorney becomes operative when the health care power of attorney is delivered to the attending physician and the attending physician determines that the principal lacks the capacity to make or communicate health care decisions and becomes inoperative during such time as, in the determination of the attending physician, the principal has the capacity to make and communicate health care decisions.

(b) Duration.--Unless the health care power of attorney states a time of termination, it is valid until revoked by the principal or his guardian, notwithstanding

the lapse of time since its execution. Unless specifically provided otherwise in the health care power of attorney, a health care power of attorney becomes inoperative during such time as, in the determination of the attending physician, the principal has the capacity to make and communicate health care decisions.

(c) Extent of authority of attorney-in-fact.--Except as expressly provided otherwise in a health care power of attorney, and subject to subsections (d) and (e), a health care attorney-in-fact shall have the authority to make any and all health care decisions and to exercise any and all rights and powers concerning the principal's care, custody and medical treatment that the principal, if the principal did not lack capacity, could have made and exercised on his own behalf.

(d) Life-sustaining treatment decisions.--All life-sustaining treatment decisions made by a health care attorney-in-fact shall be subject to sections 5405 (relating to when declaration becomes operative), 5408 (relating to duty of physician to confirm terminal condition) and 5414 (relating to pregnancy).

(e) Nutrition and hydration decisions.--A health care attorney-in-fact may make decisions regarding nutrition and hydration administered by gastric tube, intravenously or by other artificial or invasive means only if specifically so authorized in the health care power of attorney.

(f) Health care decisions.--After consultation with health care providers, and after consideration of the prognosis and acceptable medical alternatives regarding diagnosis, treatments and side effects, the health care attorney-in-fact shall make

health care decisions in accordance with the health care attorney-in-fact's understanding and interpretation of any instructions given by the principal at a time when the principal had the capacity to make and communicate health care decisions. Instructions shall include any declaration made by the principal and any clear written or oral directions which cover the situation presented. In the absence of instructions, the health care attorney-in-fact shall make health care decisions in conformity with the health care attorney-in-fact's assessment of the principal's preferences and values, including religious and moral beliefs. If the health care attorney-in-fact does not know enough about the principal's instructions, preferences and values to make a decision, the health care attorney-in-fact shall act in accordance with the health care attorney-in-fact's assessment of the principal's best interests.

(g) Health care information.--A health care attorney-in-fact has the same rights as the principal to request, examine, copy and consent or refuse to consent to the disclosure of medical or other health care information. Disclosure of medical or other health care information to a health care attorney-in-fact does not constitute a waiver of any evidentiary privilege or of a right to assert confidentiality.

(h) Court approval unnecessary.--A health care decision made by a health care attorney-in-fact for a principal is effective without court approval.

> Comment: The introductory clause of subsection (a) permits the principal, by specific provisions contained in the health care power of attorney, to authorize the attorney-in-fact to act on behalf of the principal even though the principal does not lack the capacity to make or communicate health care decisions.

Subsection (b) provides statutory assurance to third parties that a health care power of attorney is valid until revoked by the principal or guardian or terminated as provided in the health care power of attorney. This subsection is conceptually modeled after section 5604(b) (durable power of attorney not affected by disability or lapse of time).

Subsection (d) is designed to ensure that health care decisions regarding the initiation, continuation, withholding or withdrawal of life-sustaining treatment under a health care power of attorney are treated the same as such decisions under an advance directive for health care pursuant to Chapter 54 (advance directive for health care). Specifically, the attending physician must make a determination that the principal is in a terminal condition or in a state of permanent unconsciousness (section 5405 (when declaration becomes operative)) and arrange to have that diagnosis confirmed by a second physician (section 5408 (duty of physician to confirm terminal condition)). Furthermore, the provisions of section 5414 (pregnancy) also apply to a life-sustaining treatment decision made by a health care attorney-in-fact for a principal who is pregnant.

Subsection (e) is consistent with the requirements of Chapter 54 (advance directive for health care).

§ 5627. Appointment of health care attorneys-in-fact.

(a) Multiple and successor health care attorneys-in-fact.--A principal may in a health care power of attorney provide for:

(1) The appointment of more than one health care attorney-in-fact, who shall act jointly unless the health care power of attorney provides otherwise.

(2) The appointment of one or more successor attorneys-in-fact who shall serve in the order named in the health care power of attorney, unless the health care power of attorney provides otherwise.

(b) Limitation on appointment of attorney-in-fact.--Unless related by blood, marriage or adoption, a health care attorney-in-fact may not be the principal's attending physician or other health care provider, nor an owner, operator or employee of a health care institution in which the principal is receiving care.

Comment: Subsection (a) is patterned after section 5602(b)(1) and (2) (appointment of attorney-in-fact and successor attorney).

§ 5628. Relation of health care attorney-in-fact to court-appointed guardian.

(a) Accountability of health care attorney-in-fact.--If a principal who has executed a health care power of attorney is later adjudicated an incapacitated person and a plenary guardian is appointed for his person, the health care attorney-in-fact is accountable to the plenary guardian as well as to the principal. The plenary guardian shall have the same power to revoke or amend the health care power of attorney that the principal would have if he were not incapacitated.

(b) Nomination of guardian of person.--A principal may in a health care power of attorney nominate the guardian of his person for consideration by the court if incapacity proceedings for the principal's person are thereafter commenced. If the court determines that the appointment of a guardian is necessary, the court shall make its appointment in accordance with the principal's most recent nomination except for good cause or disqualification.

Comment: This section is patterned after section 5604(c) (relation of attorney-in-fact to court-appointed guardian). The use of the term "plenary guardian" in subsection (a) is intended to distinguish that form of guardianship from a limited guardianship.

§ 5629. Decisions by health care representative.

(a) General rule.--A health care representative may make a health care decision for an individual who has been determined by his attending physician to lack capacity to make or communicate health care decisions if:

(1) the individual is 18 years of age or older or has graduated from high school or has married;

(2) the individual does not have an effective health care power of attorney or his health care attorney-in-fact is not reasonably available; and

(3) a plenary guardian of the person has not been appointed for the individual.

(b) Extent of authority of health care representative.--The authority of a health care representative shall be the same as provided for a health care attorney-in-fact in section 5626(c), (d) and (e) (relating to operation of health care power of attorney).

(c) Who may act as health care representative.--An individual of sound mind may by a signed writing or by personally informing the attending physician or the health care provider designate one or more individuals to act as his health care representative. In the absence of a designation or if no designee is reasonably available, any member of the following classes of the individual's family who is

reasonably available, in descending order of priority, may act as his health care representative:

(1) the spouse;

(2) an adult child;

(3) a parent; or

(4) an adult brother or sister.

An individual may by a signed writing, including a health care power of attorney, provide for a different order of priority.

(d) Disqualification.--An individual of sound mind may disqualify one or more individuals from acting as health care representative in the same manner as subsection (c) provides for the designation of a health care representative. An individual may also disqualify one or more individuals from acting as health care representative by a health care power of attorney.

(e) Limitation on designation of health care representative.--Unless related by blood, marriage or adoption, a health care representative may not be the principal's attending physician or other health care provider, nor an owner, operator or employee of a health care institution in which the principal is receiving care.

(f) Decision of health care representative.--If more than one member of a class assumes authority to act as a health care representative, and they do not agree on a health care decision and the attending physician or health care provider is so informed, the attending physician or health care provider may rely on the decision of

a majority of the members of that class who have communicated their views to the attending physician or health care provider. If the class of health care representatives is evenly divided concerning the health care decision and the attending physician or health care provider is so informed, the class is disqualified from making the decision. In that event, an individual having lower priority may not act as health care representative.

(g) Alternate health care representative.--If an individual eligible to act as health care representative under subsection (c) is not reasonably available, an adult who has exhibited special care and concern for the principal, who is familiar with the principal's personal values and who is willing and able to become involved in the principal's health care may act as his health care representative and make health care decisions for him.

(h) Duty of health care representative.--Immediately upon assuming authority to act, a health care representative shall communicate the assumption of authority to the members of the principal's family specified in subsection (c) who can be readily contacted.

(i) Countermand of health care decision.--A principal may countermand a health care decision made by his health care representative at any time and in any manner without regard to the principal's mental or physical capacity by personally informing the attending physician or health care provider. The attending physician or health care provider shall inform promptly the health care representative of the

countermand. A countermand shall not affect the authority of the health care representative to make other health care decisions at any time and from time to time.

(j) Court approval unnecessary.--A health care decision made by a health care representative for a principal is effective without court approval.

(k) Written declaration of health care representative.--An attending physician or health care provider may require a person claiming the right to act as health care representative for a principal to provide a written declaration made under penalty of perjury stating facts and circumstances reasonably sufficient to establish the claimed authority.

> Comment: This section is conceptually derived from section 5 of the Uniform Health-Care Decisions Act which was approved by the National Conference of Commissioners on Uniform State Laws at its 1993 annual meeting.
>
> This section authorizes a statutorily prioritized health care representative to make health care decisions for certain individuals.
>
> Subsection (c) sets forth who may act as a health care representative in descending order of priority and provides that an individual by a signed writing including a health care power of attorney may provide for a different order of priority.
>
> Subsection (d) provides that an individual may prohibit anyone from acting as that individual's health care representative.
>
> Subsection (e) provides the same limitations on the designation of a health care representative as section 5627(b) (limitation on appointment of attorney-in-fact) provides with regard to the appointment of a health care attorney-in-fact.

Subsection (f) addresses the situation where more than one member of a class has assumed authority to act as a health care representative and agreement is not reached. In that event, the attending physician or health care provider may rely on the decision of the majority of the members of that class who have communicated their views to the attending physician or health care provider. If the class is evenly divided, the class is disqualified from making the decision and no individual of a lower priority may act. For example, if the adult children are evenly divided, neither a parent nor adult brother nor sister may act as health care representative to make that decision.

Subsection (i) permits the principal to countermand individual health care decisions made by the health care representative. This parallels the right of countermand under section 5624(a) (countermand of health care decision; health care power of attorney).

Subsection (k) permits a health care provider to require a written declaration from the person asserting the authority to act as a health care representative stating facts and circumstances reasonably sufficient to establish the claimed authority. Significantly, this subsection is not intended to impose a duty on a physician or health care provider to investigate the qualifications of the health care representative or to search for a health care representative.

§ 5630. Duties of attending physician and health care provider.

(a) Communication of health care decision.--Before implementing a health care decision made by a health care attorney-in-fact or by a health care representative, an attending physician or health care provider, whenever possible, shall promptly communicate to the principal the decision made and the identity of the person making the decision.

(b) Compliance with decisions of health care attorney-in-fact or health care representative.--An attending physician or health care provider shall comply with

health care decisions made by a health care attorney-in-fact, subject to any specific limitations contained in the health care power of attorney, or by a health care representative to the same extent as if the decisions had been made by the principal.

(c) Medical record.--An attending physician or health care provider who is given a health care power of attorney shall arrange for the health care power of attorney or a copy to be placed in the principal's medical record.

(d) Medical record entry.--An attending physician or health care provider to whom an amendment or revocation of a health care power of attorney is communicated or to whom the designation or disqualification of a health care representative is communicated shall promptly enter the information in the principal's medical record and maintain a copy if one is furnished.

(e) Record of determination.--An attending physician who makes a determination that a principal lacks or has recovered capacity to make and communicate health care decisions or makes a determination which affects the authority of a health care attorney-in-fact or health care representative shall enter the determination in the principal's medical record and, if possible, shall inform promptly the principal and any health care attorney-in-fact or health care representative of the determination.

> Comment: This section sets forth the various duties imposed on an attending physician and health care provider.
>
> Subsection (a) regarding communication of a health care decision is crucial to the operation of sections 5624(a) (countermand of health care decision made by a health care attorney-in-fact) and 5629(i)

(countermand of health care decision made by a health care representative) and is designed to preserve patient autonomy.

Subsection (b), which requires compliance with a health care decision made by a health care attorney-in-fact or a health care representative, provides statutory assurance to the principal, health care attorney-in-fact and health care representative that a decision made by an attorney-in-fact or health care representative will be treated as if the decision had been made by the principal.

Subsections (c) and (d) require that a health care power of attorney be made part of the principal's medical record and that any amendment or revocation of that power of attorney or any designation or disqualification of a health care representative be entered in the principal's medical record.

Subsection (e) serves the dual purpose of requiring that a determination that the principal lacks or has recovered capacity be entered in the principal's medical record and that the principal, health care attorney-in-fact or health care representative be informed of the determination.

§ 5631. Immunities.

(a) Attending physician, health care provider and health care institution.--An attending physician, health care provider, health care institution and any other person who acts in good faith shall not be subject to civil or criminal liability or discipline for unprofessional conduct for:

(1) complying with any direction or decision of a person having apparent authority to act as the principal's health care attorney-in-fact or health care representative so long as, in the case of a health care attorney-in-fact, the

direction or decision is not clearly contrary to the terms of the health care power of attorney;

(2) declining to comply with a direction or decision of a person based on a good faith belief that the person lacks authority to act as the principal's health care attorney-in-fact or health care representative; or

(3) complying with a health care power of attorney and assuming that it was valid when made and has not been amended or revoked.

An attending physician, health care provider, health care institution and any other person so acting is protected and released to the same extent as if dealing directly with a fully competent principal.

(b) Health care attorney-in-fact.--No health care attorney-in-fact who in good faith acts for the principal and in accordance with the terms of a health care power of attorney, or who fails to act, shall be subject to civil or criminal liability for the action or inaction.

(c) Health care representative.--No health care representative who in good faith acts for the principal, or who fails to act, shall be subject to civil or criminal liability for the action or inaction.

(d) Death not suicide or homicide.--Death resulting from the withholding or withdrawal of life-sustaining treatment in accordance with the provisions of this subchapter shall not for any purpose constitute suicide or homicide.

Comment: Subsection (a) is designed to encourage third parties, including an attending physician, a health care provider and health care institution to follow the instructions of a health care attorney-in-fact or health care representative and to be relieved of liability for doing so.

Subsections (b) and (c) are designed to provide immunity for the good faith efforts of health care attorneys-in-fact and health care representatives.

Subsection (d) is patterned after section 5410(a) (effect on suicide) regarding advance directives for health care.

§ 5632. Unwillingness to comply and transfer of principal.

(a) Attending physician or health care provider.--If an attending physician or health care provider cannot in good conscience comply with a health care decision of a health care attorney-in-fact or health care representative or if the policies of the health care institution preclude compliance with the health care decision, the attending physician or health care provider shall so inform the health care attorney-in-fact or health care representative. The attending physician or health care provider shall make every reasonable effort to assist in the transfer of the principal to another physician or health care provider who will comply with the health care decision of the health care attorney-in-fact or health care representative.

(b) Liability.--If transfer under subsection (a) is not possible, the provision of life-sustaining treatment to a principal shall not subject an attending physician, health care provider or health care institution to criminal or civil liability or administrative sanctions for failure to carry out the health care decision.

Comment: Subsections (a) and (b) are patterned after section 5409(a) and (c) (unwillingness to comply; transfer of patient), respectively, of the Advance Directive for Health Care Act.

§ 5633. Effect on life insurance.

The making of or failure to make a health care power of attorney or a designation of a health care representative in accordance with this subchapter shall not affect in any manner the sale, procurement or issuance of any policy of life insurance nor shall it be deemed to modify the terms of an existing policy of life insurance. No policy of life insurance shall be legally impaired or invalidated in any manner by the withholding or withdrawal of life-sustaining treatment from an insured principal in accordance with the provisions of this subchapter, notwithstanding any term of the policy to the contrary.

Comment: This section is patterned after section 5410(b) (effect on life insurance) of the Advance Directive for Health Care Act.

§ 5634. Conditioning services or action.

No person may require or prevent the execution of a health care power of attorney or the designation of a health care representative as a condition of insuring or providing any type of health care service.

§ 5635. Penalties.

(a) Tampering with a health care power of attorney.--Any person who, without the consent of the principal, willfully conceals, cancels or alters a health care power of attorney or any amendment or revocation or who falsifies or forges a health care power of attorney, its amendment or revocation, and, because of this act, directly changes the health care provided to the principal, commits a felony of the third degree.

(b) Tampering resulting in death.--A person who falsifies or forges a health care power of attorney or willfully conceals or withholds personal knowledge of an amendment or revocation of a health care power of attorney with the intent to cause a withholding or withdrawal of life-sustaining treatment contrary to the intent of the principal and, because of this act, directly causes life-sustaining treatment to be withheld or withdrawn and death to the principal to be hastened shall be subject to prosecution for criminal homicide as provided in 18 Pa.C.S. Ch. 25 (relating to criminal homicide).

> Comment: This section is conceptually patterned after section 5415 (penalties) of the Advance Directive for Health Care Act.

§ 5636. Effect on other State law.

(a) Health care decision.--This subchapter shall not affect the laws of this Commonwealth concerning an individual's authorization to make a health care decision for himself nor shall this subchapter affect the provisions of Chapter 54 (relating to advance directive for health care) regarding surrogate decision making.

(b) Mental health.--This subchapter shall not affect the requirements of any other laws of this Commonwealth concerning consent to observation, diagnosis, treatment or hospitalization for a mental illness.

(c) Prohibited care.--This subchapter shall not authorize a health care attorney-in-fact or health care representative to consent to any health care prohibited by the laws of this Commonwealth.

(d) Notice.--This subchapter shall not affect any requirement of notice to others of proposed health care under any other laws of this Commonwealth.

(e) Consent.--This subchapter shall not affect the laws of this Commonwealth concerning:

(1) the standard of care of a health care provider required in the administration of health care;

(2) when consent is required for health care;

(3) informed consent for health care; or

(4) consent to health care in an emergency.

(f) Preservation of religious rights.--This subchapter shall not prevent a health care attorney-in-fact or health care representative from consenting to health care administered in good faith pursuant to religious tenets of the principal or from withholding consent to health care which is contrary to religious tenets of the principal.

(g) Individual's rights.--This subchapter shall not affect the right of an individual to make health care decisions so long as the individual has capacity to do so.

§ 5637. Conflicting health care powers of attorney.

If a health care power of attorney conflicts with another health care power of attorney or with a declaration under Chapter 54 (relating to advance directive for health care), the instrument latest in date of execution shall prevail to the extent of the conflict.

> Comment: The section follows the long-standing rule that in the event of a conflict between multiple instruments, the instrument latest in date of execution prevails to the extent of the conflict.

§ 5638. Validity.

This subchapter shall not limit the validity of a health care power of attorney executed prior to the effective date of this subchapter. Except as otherwise provided by the laws of this Commonwealth, a health care power of attorney executed in another state or jurisdiction in conformity with the laws of that state or jurisdiction shall be considered to be validly executed in this Commonwealth.

[THE IMPLEMENTING LEGISLATION REPEALS 20 PA.C.S. §§ 5602(a)(8) AND (9) AND 5603(h)]

PROPOSED AMENDMENTS AND COMMENTS

This section provides explanatory materials for the proposed legislation amending the Probate, Estates and Fiduciaries Code and the Charitable Instruments Act of 1971. The official comments of the advisory committee are included and may be utilized in determining the intent of the General Assembly: 1 Pa.C.S. § 1939; Martin Estate, 365 Pa. 280, 74 A.2d 120 (1950).

Section 712. Nonmandatory exercise of jurisdiction through orphans' court division.

> Comment: The amendment to paragraph (4) permits orphans' courts to consider all matters involving powers of attorney, regardless of whether the principal is deceased, disabled or incapacitated. This eliminates the uncertainty about which court has jurisdiction when the principal's capacity is unclear.

Section 724. Situs of inter vivos trust.

> Comment: Since there is no apparent policy reason to distinguish between a resident and nonresident settlor in determining the situs of an inter vivos trust, this amendment to subsection (b)(2) makes the requirements consistent for each by providing in the case of a nonresident settlor that the situs is in any county in which any trustee resides or is located. The other changes to subsection (b)(2) are editorial.

Section 2101. Intestate estate.

Comment: New subsection (b) adopts a concept contained in the Uniform Probate Code (§ 2-101) which allows negative wills. Such a will disinherits someone but does not affirmatively give the property to someone else. There is no reason today to frustrate a testator's intent by following a common law rule for which there is no rationale. The comment to UPC § 2-101 explains this in more detail. Note that the disinherited person's children might take in his place.

UPC SECTION 2-101

COMMENT

Purpose of Revision. . . .

New subsection (b) authorizes the decedent, by will, to exclude or limit the right of an individual or class to share in the decedent's intestate estate, in effect disinheriting that individual or class. By specifically authorizing so-called negative wills, subsection (b) reverses the usually accepted common-law rule, which defeats a testator's intent for no sufficient reason. See Note, "The Intestate Claims of Heirs Excluded by Will: Should 'Negative Wills' Be Enforced?," 52 U. Chi. L. Rev. 177 (1985).

Whether or not in an individual case the decedent's will has excluded or limited the right of an individual or class to take a share of the decedent's intestate estate is a question of construction. A clear case would be one in which the decedent's will expressly states that an individual is to receive none of the decedent's estate. Examples would be testamentary language such as "my brother, Hector, is not to receive any of my property" or "Brother Hector is disinherited."

Another rather clear case would be one in which the will states that an individual is to receive only a nominal devise, such as "I devise $50.00 to my brother, Hector, and no more."

An individual need not be identified by name to be excluded. Thus, if brother Hector is the decedent's only brother, Hector could be identified by a term such as "my brother." A group or class of

relatives (such as "my brothers and sisters") can also be excluded under this provision.

Subsection (b) establishes the consequence of a disinheritance--the share of the decedent's intestate estate to which the disinherited individual or class would have succeeded passes as if that individual or class had disclaimed the intestate share. Thus, if the decedent's will provides that brother Hector is to receive $50.00 and no more, Hector is entitled to the $50.00 devise (because Hector is not treated as having predeceased the decedent for purposes of testate succession), but the portion of the decedent's intestate estate to which Hector would have succeeded passes as if Hector had disclaimed his intestate share. The consequence of a disclaimer by Hector of his intestate share is governed by section 2-801(d)(1) [PEFCode section 6205]. . . .

Section 2502. Form and execution of a will.

Comment: The requirement that, regarding wills signed by mark, the testator's name be subscribed in his presence has been eliminated. It has been a trap, since often the testator's name is typed on the will when it is drafted. The presence of two subscribing witnesses is thought to be sufficient protection against fraud.

The Uniform Probate Code, section 2-502, recognizes that the testator's mark is really his signature and does not require the testator's name to be subscribed in his presence.

Section 2517. Rule in Shelley's case and doctrine of worthier title.

Comment: New subsection (b) confirms the abolition of the doctrine of worthier title as a rule of law and as a rule of construction. This amendment is based on Uniform Probate Code section 2-710.

Section 2521. Penalty clause for contest.

Comment: This new section provides that a provision in a will or trust purporting to penalize an interested person from contesting the will or trust is unenforceable if probable cause exists for instituting proceedings. This follows section 2-517 of the Uniform Probate Code and codifies existing law. See Fiduciary Review, February 1994, p. 3.

Section 3101. Payments to family and funeral directors.

The amendment to subsection (a) increases from $3,500 to $5,000 the amount of wages, salary or employee benefits that an employer may pay to certain family members of the decedent employee whether or not a personal representative has been appointed.

Section 3102. Settlement of small estates on petition.

The maximum amount of the estate of a decedent which can be settled by petition is increased from $10,000 to $25,000. This dollar limit was last increased in 1974.

Section 3121. When allowable.

The family exemption is increased from $2,000 to $3,500. The family exemption was last increased in 1974.

Section 3504. Representation of parties in interest.

> Comment: This amendment clarifies that the court may dispense with the appointment of a guardian for a minor under certain circumstances, as it is authorized to do for the other classes of persons enumerated in this section.

Section 3531. Estates not exceeding [$10,000] $25,000.

The maximum amount of the estate of a decedent which can be settled without formal accounting is increased from $10,000 to $25,000. This dollar limit was last increased in 1974.

Section 3701. Power of decedent.

> Comment: The Internal Revenue Code provides for reimbursement to the estate of a surviving spouse for Federal estate tax attributable to qualified terminable interest property (QTIP) included in the spouse's taxable estate unless waived by the surviving spouse. This amendment requires that any such waiver of the reimbursement right must make specific reference thereto to be effective for wills and conveyances.

Section 5101. When guardian necessary.

The maximum amount of the estate of a minor which can be settled without the appointment of a guardian is increased from $10,000 to $25,000. With the

incorporation of the provisions of section 5101 into section 5505 (provisions similar to small estates of minors; incapacitated persons), the maximum amount is also increased to $25,000 for the estates of incapacitated persons. This dollar limit was last increased in 1974.

Section 6110. Administration of charitable [estates] interests.

This amendment is made at the suggestion of a representative of the Internal Revenue Service.

> Comment: This amendment is declaratory of existing law, but makes it clearer that the cy pres doctrine applies to testamentary and inter vivos trusts. Organizations that apply to the IRS for tax exempt status must have an adequate "dissolution clause" in the organizational document in order to satisfy IRS regulations. According to the IRS, in many applications the required dissolution clause is either missing or inadequate. The applicant organization is then required to amend the organizational document causing additional expense and delays. This amendment will reduce administrative burdens and conserve charitable resources for their intended purposes.

Section 6111.2. Effect of divorce on designation of beneficiaries.

> Comment: This amendment is intended to clarify the following language ". . . shall become ineffective for all purposes . . . ." It is made to provide further guidance to insurance companies so as to ensure that when a divorce has rendered a life insurance beneficiary designation ineffective for all purposes, an insurance company treats the former spouse as having predeceased the spouse making the designation for purposes of making payment to any secondary beneficiary under the policy. This amendment is made only to reinforce the result intended by the language "ineffective for all purposes" within the context of this section. This amendment should not be construed as effecting a different

result than that which is now obtained under any section of this code which employs identical or similar language. For example, see sections 6111.1 (modification by divorce; conveyances) and 2507(2) (modification by circumstances; divorces; wills).

Section 6117. Rule in Shelley's case and doctrine of worthier title.

Comment: See comment to section 2517.

Section 6201. Right to disclaim.

Comment: This amendment is declaratory of existing law.

Section 7183. Notice, audits, reviews, and distribution.

Comment: This amendment makes the rules of abatement for decedents' estates in section 3541 applicable to inter vivos and testamentary trusts. See Lange Trust, 10 Fid. Rep.2d, 46 (Allegheny, 1989). Also, see Fiduciary Review, April 1990, p. 1.

Charitable Instruments Act of 1971

In separate legislation, the task force and advisory committee recommend amendments to the Charitable Instruments Act of 1971.

Comment: The amendments to this act permit amendments to the governing instruments of charitable organizations without approval of any court, member, donor or beneficiary for the sole purpose of ensuring compliance with Federal tax laws. This will make it easier and less expensive for charities to respond to changing Federal tax requirements.

OTHER TASK FORCE APPROVED LEGISLATION

Spousal Exemption

On January 22, 1993, Task Force Chairman Senator Stewart Greenleaf introduced **Senate Bill 232, Pr.'s No. 239**, which amends the Inheritance and Estate Tax Act to exempt inter-spousal transfers from inheritance taxation. Similar legislation has been introduced in each session of the General Assembly since the 1985-86 session. Identical legislation was introduced in the House of Representatives by task force member, Representative Michael Gruitza, as **House Bill 543, Pr.'s No. 594**. These proposals would phase in the spousal exemption over a five-year period. The 1988 and 1991 task force and advisory committee reports discuss the background and substance of this recommendation.

Generation-skipping Transfer Tax

On January 22, 1993, Senator Greenleaf introduced **Senate Bill 233, Pr.'s No. 240,** which amends the Inheritance and Estate Tax Act to provide the 5 percent State credit allowed by the Internal Revenue Code for generation-skipping transfers. Representative Gruitza introduced identical legislation in the House as **House Bill 542, Pr.'s No. 593**.

The summary of this recommendation is set forth on pages 21 and 22 of the 1991 task force and advisory committee report:

> Section 2604 of the Internal Revenue Code provides that a taxpayer is allowed credit against the generation-skipping tax imposed under section 2601 of the Internal Revenue Code in an amount equal to the generation-skipping transfer tax actually paid to any state. Section 2604 further provides that the aggregate amount allowed as a credit shall not exceed 5 percent of the amount of the tax imposed under section 2601.
>
> Since present Pennsylvania law does not impose a generation-skipping transfer tax, a Pennsylvania taxpayer pays the full amount of the tax to the Federal government. The proposed amendments to the Inheritance and Estate Tax Act impose a generation-skipping tax. This new tax, like the Pennsylvania estate tax (section 2117), is designed solely to "pick up" the Federal tax credit, and therefore its cost to the Pennsylvania taxpayer is designed to be zero.