
**PROPOSED HEALTH CARE
DECISION-MAKING PROVISIONS UNDER
CHAPTER 54 OF TITLE 20 OF THE
PENNSYLVANIA CONSOLIDATED STATUTES**

**2002 SENATE BILL 1265
(PRINTER'S NO. 1682)**

**STAFF REPORT OF THE
JOINT STATE GOVERNMENT COMMISSION**

General Assembly of the Commonwealth of Pennsylvania
JOINT STATE GOVERNMENT COMMISSION

February 2002

The release of this report should not be interpreted as an endorsement by the members of the Executive Committee of the Joint State Government Commission of all the findings, recommendations and conclusions in this report.

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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.

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INTRODUCTION

Senate Bill 1265 of 2002 (Printer's No. 1682) amends Title 20 of the Pennsylvania Consolidated Statutes by revising the advance directive provisions for health care and providing a comprehensive framework for health care powers of attorney. This senate bill is the product of many discussions over the last three legislative sessions. Therefore, a historical perspective on the provisions contained in the bill, as well as those excluded from the bill, is helpful to understand the purpose of the legislation.

In March 1998, the Joint State Government Commission Task Force and Advisory Committee on Decedents' Estates Laws recommended a health care decision-making proposal, which included the following recommendations.¹

- w Amend and restructure Chapter 54 of Title 20
- w Provide a comprehensive statutory framework for health care powers of attorney
- w Permit a principal to provide in a health care power of attorney for a health care agent to make all health care decisions for the principal, including those concerning life-sustaining treatment
- w Provide a statutory framework for health care representatives who may make health care decisions for certain individuals who lack the ability to make or communicate health care decisions

¹ See the report of the Joint State Government Commission titled *A Health Care Decision-Making Proposal, A Prudent Investor Rule [and] Other Proposed Amendments* (March 1998).

- w Establish who may act as a health care representative in descending order of priority
- w Ensure that any life-sustaining treatment decision made by a health care agent or health care representative complies with the applicable provisions for advance directives
- w Repeal the optional advance directive form
- w Amend and clarify the definitions relating to advance directives, health care powers of attorney and health care representatives

Senate Bill 1357 of 1998 incorporated the recommendations of the task force and advisory committee into legislation. The bill was later amended in the Senate Public Health and Welfare Committee to add provisions relating to out-of-hospital do-not-resuscitate orders. However, the bill was not enacted during the 1997-1998 legislative session.

On January 21, 1999, the provisions contained in Senate Bill 1357 of 1998 were introduced as Senate Bill 172 of 1999. Senate Bill 172, later amended to remove the out-of-hospital do-not-resuscitate provisions, passed the Senate on May 15, 2000. The bill was then referred to the House Judiciary Committee where it remained until the end of the 1999-2000 legislative session.

In early 2001, Senator Stewart J. Greenleaf, chair of the task force and prime sponsor of Senate Bill 1357 of 1998 and Senate Bill 172 of 1999, convened an ad hoc group to consider issues raised during the preceding several years concerning advance directives, health care powers of attorney, health care representatives and out-of-hospital do-not-resuscitate orders. The ad hoc group included legislative staff and representatives from the Department of Public

Welfare, the Pennsylvania Medical Society, the Pennsylvania Bar Association, the Pennsylvania Catholic Conference and the Advisory Committee on Decedents' Estates Laws.

As a result of the discussions of the ad hoc group, the provisions contained in Senate Bill 172 of 1999 were introduced as Senate Bill 1265 of 2002. However, because the ad hoc group could not reach consensus on the concept of health care representatives, Senate Bill 1265 does not incorporate that concept. It also excludes the provisions concerning out-of-hospital do-not-resuscitate orders, which are addressed instead in House Bill 96 of 2001.

The following pages contain the legislation and official comments. The official comments are derived from the relevant comments that appeared in the March 1998 Joint State Government Commission report,² with technical amendments reflecting the proposed statutory changes that occurred after the issuance of the report and before the introduction of Senate Bill 1265 of 2002. The official comments may be used to determine the intent of the General Assembly.³

²*Id.*

³*See* 1 Pa.C.S. § 1939 and *In re Martin's Estate*, 365 Pa. 280, 74 A.2d 120 (1950).

SUMMARY OF RECOMMENDATIONS

The proposed revision of Chapter 54 of Title 20 of the Pennsylvania Consolidated Statutes includes the following recommendations.

- w Repeal present Chapter 54 and provide a revised and restructured Chapter 54
- w Provide a subchapter to reduce repetitive provisions for general health care decision-making relating to both declarations and health care powers of attorney (Subchapter A)
- w Amend and clarify the definitions relating to declarations and health care powers of attorney (§ 5402)
- w Create an optional form combining a declaration and health care power of attorney into one health care document (§ 5411)
- w Restructure the declaration provisions (Subchapter B)
- w Modify the optional declaration form (§ 5423)
- w Provide a comprehensive statutory framework for health care powers of attorney (Subchapter C)
- w Specify the requirements for a health care power of attorney and create an optional health care power of attorney form (§ 5433)
- w Permit a principal to appoint multiple and successor health care agents (§ 5435(a))
- w Specify who may not be appointed a health care agent (§ 5435(b))
- w Permit a principal to provide in a health care power of attorney for a health care agent to make all health care decisions for the principal, including those concerning life-sustaining treatment (§ 5436)

- w Outline the authority of health care agents (§ 5436)
- w Provide that a principal may countermand a health care decision made by the principal's agent regardless of the principal's mental or physical capacity (§ 5437)
- w Explain how a health care power of attorney may be amended (§ 5438)
- w Explain the effect of divorce proceedings on the status of a health care agent (§ 5439)
- w Explain how to revoke a health care power of attorney and the effect of a revocation (§ 5440)
- w Outline the duties of attending physicians and other health care providers (§ 5442)

PROPOSED LEGISLATION AND COMMENTS

CHAPTER 54

HEALTH CARE

Subchapter

- A. General provisions
- B. Declarations
- C. Health care powers of attorney

SUBCHAPTER A

GENERAL PROVISIONS

Sec.

- 5401. Applicability.
- 5402. Definitions.
- 5403. Legislative findings and intent.
- 5404. Compliance.
- 5405. Death not suicide or homicide.
- 5406. Life insurance.
- 5407. Health care instruments optional.
- 5408. Pregnancy.
- 5409. Liability.
- 5410. Penalties.
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§ 5401. Applicability.

(a) General rule.--This chapter applies to declarations and health care powers of attorney.

(b) Preservation of existing rights.--The provisions of this chapter shall not impair or supersede any existing rights or responsibilities not addressed in this chapter.

Comment: Subsection (b) is identical to former section 5412.

§ 5402. Definitions.

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

“Attending physician.” A physician who has primary responsibility for the treatment and care of the declarant or principal.

“Declarant.” An individual, including an emancipated minor, who makes a declaration in accordance with this chapter.

“Declaration.” A writing made in accordance with this chapter which expresses a declarant’s wishes and instructions for health care and health care directions and which may contain other specific directions.

“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 procedure and life-sustaining treatment.

“Health care agent.” 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, but not limited to, the following:

- (1) Selection and discharge of a health care provider.
- (2) Approval or disapproval of a diagnostic test, surgical procedure or program of medication.
- (3) Directions to initiate, continue, withhold or withdraw all forms of life-sustaining treatment, including instructions not to resuscitate.

“Health care power of attorney.” A writing made by a principal designating an individual to make health care decisions for the principal.

“Health care provider.” A person who is licensed, certified or otherwise authorized by the laws of this Commonwealth to administer or provide health care in the ordinary course of business or practice of a profession. The term includes personnel recognized under the act of July 3, 1985 (P.L.164, No.45), known as the Emergency Medical Services Act.

“Incompetent.” Lacking sufficient capacity to make or communicate decisions concerning oneself.

“Life-sustaining treatment.” Any medical procedure or intervention that, when administered to a declarant or principal who has been determined to be in a terminal condition or permanently unconscious, will serve only to prolong the process of dying or maintain the individual in a state of permanent unconsciousness. Life-sustaining treatment includes nutrition and hydration administered by gastric tube or intravenously or any other artificial or invasive

means if the declaration or health care power of attorney of the individual so specifically provides.

“Medical command physician.” A licensed physician who is authorized to give medical command under the act of July 3, 1985 (P.L.164, No.45), known as the Emergency Medical Services Act.

“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, an irreversible vegetative state or irreversible coma.

“Person.” Any individual, corporation, partnership, association or other similar entity, or any Federal, State or local government or governmental agency.

“Principal.” An individual who makes a health care power of attorney in accordance with this chapter.

“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: The following definitions are derived from former section 5403: attending physician, declarant, declaration, health care provider, incompetent, life-sustaining treatment, medical command physician, permanently unconscious, person and terminal condition. The following definitions are new: health care, health care agent, health care decision, health care power of attorney and principal.

The addition of the term “principal” in the definition of attending physician is intended to make the definition applicable to the entire chapter.

With respect to the definition of life sustaining treatment, the term “qualified patient” is deleted from the definition because the definition and use of the term is deleted from the chapter. However, the substance of that term is contained within the definition of life-sustaining treatment. In addition, the deletion of the term is only editorial in nature and is not intended to alter the substance conveyed by the term. Under former section 5403, the term “qualified patient” was defined as “[a] person who has executed a declaration and who has been determined to be in a terminal condition or to be permanently unconscious.” The addition of the term “principal” in the definition of life-sustaining treatment is intended to make the definition applicable to the entire chapter.

It is arguable that the last sentence of the definition of life-sustaining treatment is inconsistent with the holding of *In re Fiori*, 543 Pa. 592, 673 A.2d 905 (1996), in that it imposes a more stringent standard for the exercise of an individual’s right to refuse artificial nutrition and hydration by requiring that a declaration *specifically reference* that it applies to such care. Artificial nutrition and hydration are recognized as medical treatment. *In re Fiori*, 543 Pa. at 598 n.2, 673 A.2d at 908 n.2. Consequently, the court analyzed an individual’s right to refuse such care using the same standards applicable to other types of medical care. *Id.* at 600-08, 673 A.2d at 909-13.

Under the definition of permanently unconscious, the term “irreversible” replaces “persistent” with respect to a vegetative state. Current medical terminology generally uses the term “permanent” when describing an irreversible vegetative state. *In re Fiori*, 543 Pa. at 598 n.1, 673 A.2d at 908 n.1 (quoting the Multi-Society Task Force on PVS, *Medical Aspects of the Persistent Vegetative State* (Pts. 1 and 2), 330 *New Eng. J. Med.* 1499, 1501 (1994)). In that article published by the *New England Journal of Medicine*, a distinction was drawn between a “persistent” and “permanent” vegetative state. A “persistent vegetative state” was defined as “[a] wakeful unconscious state that lasts longer than a few weeks,”

whereas a “permanent vegetative state” was characterized by an “irreversible state.”

Under the definition of terminal condition, the final phrase “regardless of the continued application of life-sustaining treatment” suggests that an individual does not have a terminal condition if life-sustaining treatment could keep the individual alive. The phrase should be interpreted as meaning “whether life-sustaining treatment would prolong the individual’s life.”

§ 5403. Legislative findings and intent.

(a) Intent.--This chapter provides a statutory means for competent adults to control their health care either directly through instructions written in advance or indirectly through a health care agent. Nothing herein is intended to:

(1) condone, authorize or approve mercy killing, euthanasia or aided suicide; or

(2) permit any affirmative or deliberate act or omission to end life other than as defined in this chapter.

(b) Presumption not created.--This chapter does not create any presumption regarding the intent of an individual who has not executed a declaration or health care power of attorney to consent to the use or withholding of life-sustaining treatment in the event of a terminal condition or state of permanent unconsciousness.

(c) Findings in general.--The General Assembly finds that all competent adults have a qualified right to control decisions relating to their own medical care. This right is subject to certain interests of society, such as the maintenance of ethical standards in the medical profession and the preservation and protection

of human life. Modern medical technological procedures make possible the prolongation of human life beyond natural limits. The application of some procedures to an individual suffering a difficult and uncomfortable process of dying may cause loss of patient dignity and secure only continuation of a precarious and burdensome prolongation of life.

Comment: This section is based on former section 5402.

§ 5404. Compliance.

(a) Notification by attending physician or health care provider.--If an attending physician or other health care provider cannot in good conscience comply with a declaration or health care decision of a health care agent or if the policies of a health care provider preclude compliance with a declaration or health care decision of a health care agent, the attending physician or health care provider shall so inform the following:

(1) The declarant, if the declarant is competent.

(2) The substitute named in the declaration, if the declarant is incompetent.

(3) The family, guardian or other representative of the declarant, if the declarant is incompetent and a substitute is not named in the declaration.

(4) The health care agent of the principal.

(b) Transfer.--The attending physician or health care provider under subsection (a) shall make every reasonable effort to assist in the transfer of the

declarant or principal to another physician or health care provider who will comply with the declaration or health care decision of the health care agent.

(c) Employee or staff member of health care provider.--

(1) An employee or a staff member of a health care provider may not be required to do either of the following:

(i) Participate in the withholding or withdrawal of life-sustaining treatment.

(ii) Comply with a health care decision of a health care agent if the good conscience of the employee or staff member dictates otherwise.

(2) A health care provider employer may not discharge or in any other manner discriminate against its employee or staff member who informs the employer of either of the following:

(i) A wish not to participate in the withholding or withdrawal of life-sustaining treatment.

(ii) An unwillingness to comply with a health care decision of a health care agent based on the good conscience of the employee or staff member.

(3) A health care provider employer may require its employee or staff member to express in writing the wishes or unwillingness of the employee or staff member as set forth in this subsection.

(d) Liability.--If transfer under subsection (b) is impossible, the provision of life-sustaining treatment to a declarant or principal may not subject an attending physician or a health care provider to criminal or civil liability or administrative

sanction for failure to carry out either the provisions of a declaration or a health care decision.

Comment: This section is based on former section 5409.

§ 5405. Death not suicide or homicide.

Death resulting from the withholding or withdrawal of life-sustaining treatment in accordance with this chapter does not for any purpose constitute suicide or homicide.

Comment: This section is based on former section 5410(a).

§ 5406. Life insurance.

The making of or failure to make a declaration or health care power of attorney in accordance with this chapter may not affect in any manner the sale, procurement or issuance of a policy of life insurance and does not modify the terms of an existing policy of life insurance. A policy of life insurance may not be legally impaired or invalidated in any manner by the withholding or withdrawal of life-sustaining treatment from an insured declarant or principal, notwithstanding a term of the policy to the contrary.

Comment: This section is based on former section 5410(b).

§ 5407. Health care instruments optional.

A physician or another health care provider, a health care service plan, a health maintenance organization, an insurer issuing disability insurance, a self-insured employee welfare benefit plan, a nonprofit hospital plan and a Federal,

State or local government sponsored or operated program may not do the following:

(1) Require an individual to execute a declaration or health care power of attorney as a condition for being insured for or receiving health care services.

(2) Charge an individual a different rate or fee whether or not the individual executes or has executed a declaration or health care power of attorney.

Comment: This section is based on former section 5411.

§ 5408. Pregnancy.

(a) Declarations and health care decisions.--Notwithstanding the existence of a declaration, a health care decision by a health care agent or any other direction to the contrary, life-sustaining treatment, nutrition and hydration shall be provided to a pregnant woman who is incompetent and has a terminal condition or who is permanently unconscious unless, to a reasonable degree of medical certainty as certified on her medical record by her attending physician and an obstetrician who has examined her, life-sustaining treatment, nutrition and hydration:

(1) will not maintain her in such a way as to permit the continuing development and live birth of the unborn child;

(2) will be physically harmful to her; or

(3) will cause her pain that cannot be alleviated by medication.

(b) Pregnancy test.--Nothing in this chapter shall require a physician to perform a pregnancy test unless the physician has reason to believe that the woman may be pregnant.

(c) Payment of expenses by Commonwealth.--

(1) Notwithstanding the existence of a declaration, a health care decision by a health care agent or any other direction to the contrary, if treatment, nutrition and hydration are provided to a pregnant woman who is incompetent and has a terminal condition or who is permanently unconscious, the Commonwealth shall pay all usual, customary and reasonable expenses directly, indirectly and actually incurred by the pregnant woman to whom the treatment, nutrition and hydration are provided.

(2) The Commonwealth has the right of subrogation against all moneys paid by a third-party health insurer on behalf of the pregnant woman.

(3) The expenditures incurred on behalf of the pregnant woman constitute a grant, and a lien may not be placed upon the property of the pregnant woman, her estate or her heirs.

Comment: This section is based on former section 5414.

§ 5409. Liability.

(a) General rule.--A physician, another health care provider or another person that acts in good faith and consistent with this chapter may not be subject to criminal or civil liability, discipline for unprofessional conduct or administrative

sanctions and may not be found to have committed an act of unprofessional conduct as a result of any of the following:

(1) Causing or participating in the initiating, continuing, withholding or withdrawal of life-sustaining treatment from a declarant who has been determined to be in a terminal condition or to be permanently unconscious and who is incompetent, if the attending physician or other health care provider has followed the wishes of the declarant as expressed in a declaration made under this chapter.

(2) Complying with a direction or decision of an individual who the health care provider believes in good faith has authority to act as a principal's health care agent so long as the direction or decision is not clearly contrary to the terms of the health care power of attorney.

(3) Refusing to comply with a direction or decision of an individual based on a good faith belief that the individual lacks authority to act as a principal's health care agent.

(4) Complying with a health care power of attorney under the assumption that it was valid when made and has not been amended or revoked.

(5) Disclosing health care information to another person based upon a good faith belief that the disclosure is authorized, permitted or required by this chapter.

(b) Same effect as if dealing with principal.--Any attending physician, health care provider and other person acting under subsection (a) is protected and released to the same extent as if dealing directly with a competent principal.

(c) Good faith of health care agent.--A health care agent acting according to the terms of a health care power of attorney may not be subject to civil or criminal liability for acting in good faith for a principal or failing in good faith to act for a principal.

Comment: Subsection (a)(1) is based on former section 5407(a). Subsection (a)(2) to (5) and subsection (b) are designed to encourage third parties, including an attending physician and another health care provider, to follow the instructions of a health care agent and to be relieved of liability for doing so. Subsection (c) is designed to provide immunity for the good faith efforts of a health care agent.

§ 5410. Penalties.

(a) Felonies of the third degree.--A person commits a felony of the third degree by willfully doing any of the following proscribed actions:

(1) Concealing, canceling, altering, defacing, obliterating or damaging a declaration without the consent of the declarant.

(2) Concealing, canceling, altering, defacing, obliterating or damaging a health care power of attorney or any amendment or revocation thereof without the consent of the principal.

(3) Causing a person to execute a declaration under this chapter, by undue influence, fraud or duress.

(4) Falsifying or forging a health care power of attorney or any amendment or revocation thereof, the result of which is a direct change in the health care provided to the principal.

(b) Prosecution for criminal homicide.--A person shall be subject to prosecution for criminal homicide as provided in 18 Pa.C.S. Ch. 25 (relating to criminal homicide) for doing any of the following proscribed actions if the person intends to cause the withholding or withdrawal of life-sustaining treatment contrary to the wishes of the declarant or principal and, because of the proscribed action, directly causes life-sustaining treatment to be withheld or withdrawn and death to be hastened:

(1) Falsifying or forging the declaration or health care power of attorney of another individual.

(2) Willfully concealing or withholding personal knowledge of a revocation of a declaration under this chapter.

(3) Willfully concealing or withholding personal knowledge of an amendment to or a revocation of a health care power of attorney.

Comment: This section is based on former section 5415.

§ 5411. Combining health care instruments.

(a) General rule.--A declaration and health care power of attorney may be combined into one health care document.

(b) Form.--A combined declaration and health care power of attorney may be in the following form or any other written form which contains the information

required under Subchapters B (relating to declarations) and C (relating to health care powers of attorney).

DECLARATION AND HEALTH CARE POWER OF ATTORNEY

I, (insert name of declarant/principal), being of sound mind, willfully and voluntarily make this declaration and health care power of attorney.

I. DECLARATION

Part I of this document indicates my intention to create a declaration. This declaration shall become effective if I become incompetent and lack sufficient capacity to make or communicate decisions concerning myself. This declaration reflects my firm and settled commitment to refuse life-sustaining treatment under the circumstances indicated in this declaration.

I understand that “life-sustaining treatment” means any medical procedure or intervention that, when administered to me when I am determined to be in a terminal condition or permanently unconscious, will serve only to prolong the process of my dying or maintain me in a state of permanent unconsciousness. I understand that “terminal condition” means an incurable and irreversible medical condition in an advanced state caused by injury, disease or physical illness which will, in the opinion of my attending physician to a reasonable degree of medical certainty, result in my death regardless of the continued application of life-sustaining treatment. I understand that “permanently unconscious” means a medical condition that has been diagnosed with currently accepted medical standards and with reasonable medical certainty as

total and irreversible loss of consciousness and capacity for interaction with my environment.

I understand that unless I specify otherwise in this declaration, nutrition and hydration will be provided to me and administered by gastric tube or intravenously, or by any other artificial or invasive means.

I direct my attending physician to withhold or withdraw life-sustaining treatment that serves only to prolong the process of my dying if I lack sufficient capacity to make or communicate decisions concerning myself and I am in either a terminal condition or state of permanent unconsciousness. Under these medical circumstances, I direct that my treatment be limited to measures which keep me comfortable and relieve my pain, including any pain which may occur as a result of the withholding or withdrawal of life-sustaining treatment.

I also wish to make the following intentions known by marking the appropriate areas if I lack sufficient capacity to make or communicate decisions concerning myself and I am in either a terminal condition or state of permanent unconsciousness:

1. I want nutrition and hydration administered by gastric tube or intravenously, or by any other artificial or invasive means.

YES _____ NO _____

2. I want to designate another individual to make medical treatment decisions for me.

YES _____ NO _____

a. Name and address of the designated individual (if I answered “yes” to Item 2): (insert name and address)

b. If the individual designated in Item 2(a) is unable or unwilling to serve as the designated individual, then I designate the following substitute: (insert name and address of substitute)

3. I want to make an anatomical gift of all or part of my body, subject to the following limitations, if any.

YES _____ NO _____

(insert a list of limitations, if any)

4. I wish to make additional instructions.

YES _____ NO _____

(insert other instructions)

I understand that I may revoke this declaration at any time and in any manner, regardless of my mental or physical condition. I understand that my revocation is effective upon communication to my attending physician or other health care provider, either by me or a witness to my revocation.

II. HEALTH CARE POWER OF ATTORNEY

Part II of this document represents my intention to create a health care power of attorney.

1. I understand that this health care power of attorney may become effective either immediately or after a particular condition is met, such as

when I may become incompetent and lack sufficient capacity to make or communicate health care decisions concerning myself.

a. I want this health care power of attorney to take effect immediately.

YES _____ NO _____

b. I want this health care power of attorney to take effect after a particular condition is met.

YES _____ NO _____

Condition that must be met before this power of attorney is effective (if I answered “yes” to the preceding statement): (insert condition(s))

2. I understand that I must designate at least one health care agent to act when this health care power of attorney becomes effective. I also understand that I may designate more than one health care agent to act together.

a. I designate the following to serve as my health care agent(s) to make health care decisions on my behalf:

(insert name and address of health care agent(s))

b. If the individual(s) designated previously cannot or will not serve as my health care agent(s), then I designate the following substitute(s):

(insert name and address of substitute(s))

3. I understand that I may specify when this health care power of attorney terminates. The following specifies when I want this health care power of attorney to terminate:

(insert termination occurrence or date)

4. I understand that I may nominate a guardian of my person for consideration by the court if incapacity proceedings are commenced. I understand that the court shall appoint a guardian in accordance with my most recent nomination except for good cause or disqualification. I want to nominate the following individual as a guardian of my person:

(insert name and address)

5. I understand that I may limit the authority of my health care agent(s). I want to impose the following limitations on my health care agent(s):

(insert limitations on health care agent(s))

6. I also wish to specify the following conditions regarding the implementation of health care decisions and other related actions by my health care agent:

(insert conditions)

7. I understand that regardless of my mental or physical capacity, I may countermand a health care decision made by my agent at any time and in any manner by personally informing my attending physician or health care provider. I understand that my attending physician or health care provider shall make reasonable efforts to promptly inform my health care agent of my countermand. I also understand that my countermand shall not affect the authority of my health care agent to make other health care decisions in accordance with my health care power of attorney.

8. I understand that while I am of sound mind I may revoke my health care power of attorney either (i) by a writing which is dated, signed and witnessed in the same manner as this health care power of attorney or (ii) by personally informing my attending physician, health care provider or health care agent that this health care power of attorney is revoked.

I am making this declaration and health care power of attorney on the (insert day) day of (insert month), (insert year).

My signature:

My address: (insert address)

If the declarant/principal is unable to sign this declaration and health care power of attorney, another individual may sign on behalf of and at the direction of the declarant/principal.

Signature of individual signing on my behalf and at my direction:

Name and address of individual: (insert name and address)

This declaration and health care power of attorney must be witnessed by two individuals, each of whom is 18 years of age or older.

Signature of Witness 1:

Name and address of Witness 1: (insert name and address)

Signature of Witness 2:

Name and address of Witness 2: (insert name and address)

Comment: Separate forms may be created for a declaration and a health care power of attorney. See sections 5423 and 5433 and the accompanying comments. With respect to the combined form, it is anticipated that as a practical matter the

individual named in Item 2 of the declaration portion will be the same individual named in Paragraph (2) of the health care power of attorney portion. However, two different individuals may be named.

SUBCHAPTER B

DECLARATIONS

Sec.

5421. Short title of subchapter.

5422. Execution.

5423. Form.

5424. Operation.

5425. Revocation.

5426. Emergency medical services.

§ 5421. Short title of subchapter.

This subchapter shall be known and may be cited as the Advance Directive for Health Care Act.

Comment: A declaration and an advance directive for health care are generally considered to be synonymous. For the sake of convenience, this subchapter, based on former Chapter 54, retains the term “advance directive for health care” in its short title even though the statutory language uses the term “declaration.”

§ 5422. Execution.

(a) Who may make.--An individual of sound mind may make a declaration governing the initiation, continuation, withholding or withdrawal of life-sustaining treatment if the individual:

(1) is 18 years of age or older;

(2) has graduated from high school; or

(3) has married.

(b) Requirements.--A declaration must be:

(1) dated and signed by the declarant by signature or mark or by another individual on behalf of and at the direction of the declarant; and

(2) witnessed by two individuals, each of whom is 18 years of age or older.

(c) Witnesses.--

(1) An individual who signs a declaration on behalf of and at the direction of a declarant may not witness the declaration.

(2) A health care provider and its agent may not sign a declaration on behalf of and at the direction of a declarant if the health care provider or agent provides health care services to the declarant.

Comment: This section is based on former section 5404(a). Subsection (c)(2) prohibits a health care provider, or anyone acting on its behalf, from signing a declaration for the declarant if the declarant receives health care services from such provider. The intent of this provision is to avoid potential conflicts of interest for a health care provider.

§ 5423. Form.

A declaration may be in the following form or any other written form expressing the wishes of a declarant regarding the initiation, continuation, withholding or withdrawal of life-sustaining treatment and may include other specific directions, including, but not limited to, designation of another individual to make medical treatment decisions for the declarant if the declarant is incompetent and determined to be either in a terminal condition or permanently unconscious.

DECLARATION

I, (insert name of declarant), being of sound mind, willfully and voluntarily make this declaration, which shall become effective if I become incompetent and lack sufficient capacity to make or communicate decisions concerning myself. This declaration reflects my firm and settled commitment to refuse life-sustaining treatment under the circumstances indicated in this declaration.

I understand that “life-sustaining treatment” means any medical procedure or intervention that, when administered to me when I am determined to be in a terminal condition or permanently unconscious, will serve only to prolong the process of my dying or maintain me in a state of permanent unconsciousness. I understand that “terminal condition” means an incurable and irreversible medical condition in an advanced state caused by injury, disease or physical illness which will, in the opinion of my attending physician to a reasonable degree of medical certainty, result in my death regardless of the continued application of life-sustaining treatment. I understand that “permanently unconscious” means a medical condition that has been diagnosed with currently accepted medical standards and with reasonable medical certainty as total and irreversible loss of consciousness and capacity for interaction with my environment.

I understand that unless I specify otherwise in this declaration, nutrition and hydration will be provided to me and administered by gastric tube or intravenously, or by any other artificial or invasive means.

I direct my attending physician to withhold or withdraw life-sustaining treatment that serves only to prolong the process of my dying if I lack sufficient capacity to make or communicate decisions concerning myself and I am in either a terminal condition or state of permanent unconsciousness. Under these medical circumstances, I direct that my treatment be limited to measures which keep me comfortable and relieve my pain, including any pain which may occur as a result of the withholding or withdrawal of life-sustaining treatment.

I also wish to make the following intentions known by marking the appropriate areas, if I lack sufficient capacity to make or communicate decisions concerning myself and I am in either a terminal condition or state of permanent unconsciousness:

1. I want nutrition and hydration administered by gastric tube or intravenously, or by any other artificial or invasive means.

YES _____ NO _____

2. I want to designate another individual to make medical treatment decisions for me.

YES _____ NO _____

a. Name and address of the designated individual (if I answered “yes” to Item 2): (insert name and address)

b. If the individual designated in Item 2(a) is unable or unwilling to serve as the designated individual, then I designate the following substitute: (insert name and address of substitute)

3. I want to make an anatomical gift of all or part of my body, subject to the following limitations, if any.

YES _____ NO _____

(insert a list of limitations, if any)

4. I wish to make additional instructions.

YES _____ NO _____

(insert other instructions)

I understand that I may revoke this declaration at any time and in any manner, regardless of my mental or physical condition. I understand that my revocation is effective upon communication to my attending physician or other health care provider, either by me or a witness to my revocation.

I am making this declaration on the (insert day) day of (insert month), (insert year).

My signature:

My address: (insert address)

If the declarant is unable to sign this declaration, another individual may sign on behalf of and at the direction of the declarant.

Signature of individual signing on my behalf and at my direction:

Name and address of individual: (insert name and address)

This declaration must be witnessed by two individuals, each of whom is 18 years of age or older.

Signature of Witness 1:

Name and address of Witness 1: (insert name and address)

Signature of Witness 2:

Name and address of Witness 2: (insert name and address)

Comment: This form is based on the form set forth in former section 5404(b) and revised to make it more understandable.

There is no prescribed or preferred form of the declaration because the declaration should be tailored to meet the declarant's individual circumstances, preferably after consulting a physician. The form set forth in this section is not mandatory but merely intended to provide some guidance into the provisions that could be included in a declaration. For example, the form set forth in this section illustrates how a declarant could include the following directions in a declaration:

(1) To initiate, continue, withhold or withdraw life-sustaining treatment.

(2) To limit treatment to measures that keep the declarant comfortable and relieve pain, including any pain that might occur by withholding or withdrawing life-sustaining treatment.

(3) To provide for specific forms of treatment.

(4) To designate another individual to make life-sustaining treatment decisions if the declarant is incompetent and in a terminal condition or state of permanent unconsciousness.

(5) To provide for the making of an anatomical gift of all or part of the declarant's body.

Section 5411 contains a combined declaration and health care power of attorney form.

The form set forth in former section 5404(b) provided a checklist of treatment options. However, the checklist tended to invite a declarant to engage in self-diagnosis by choosing future treatment options without fully considering the medical consequences of those choices. A declaration could be made long before the onset of a serious illness that would effectuate the declaration, thereby potentially making the declaration counterproductive to the declarant. In addition, the checklist failed to recognize that medical treatment could be merely life-sustaining in one instance but beneficial in another. For example, surgery, one of the check-off categories, is sometimes appropriate to make an individual with a terminal condition more comfortable. However, an individual who used the form and checked off surgery as a treatment option removed surgery as a beneficial treatment option, perhaps without truly understanding the potential consequences.

§ 5424. Operation.

(a) When operative.--A declaration becomes operative when:

(1) a copy is provided to the attending physician; and

(2) the declarant is determined by the attending physician to be incompetent and in a terminal condition or in a state of permanent unconsciousness.

(b) Compliance.--When a declaration becomes operative, the attending physician and other health care providers shall act in accordance with its provisions or comply with the transfer provisions of section 5404 (relating to compliance).

(c) Invalidity of specific direction.--If a specific direction in the declaration is held to be invalid, the invalidity does not negate other directions in the declaration that can be effected without the invalid direction.

(d) Medical record.--Any physician or other health care provider to whom a copy of a declaration is furnished shall make it a part of the medical record of the declarant and, if unwilling to comply with the declaration, promptly so advise the declarant.

(e) Duration.--Unless a declaration states a time of termination, it is valid until revoked by the declarant, notwithstanding the lapse of time since its execution.

(f) Absence of declaration.--If an individual does not make a declaration, a presumption does not arise regarding the intent of the individual to consent to or to refuse the initiation, continuation, withholding or withdrawal of life-sustaining treatment.

(g) Duty of physician to confirm terminal condition.--Without delay after a diagnosis that the declarant is in a terminal condition or in a state of permanent unconsciousness, the attending physician shall certify in writing that the declarant is in a terminal condition or in a state of permanent unconsciousness and arrange for the physical examination and confirmation of the terminal condition or state of permanent unconsciousness of the declarant by a second physician.

Comment: Subsections (a) and (b) are based on former section 5405. Subsection (c) is based on former section 5404(c). Subsection (d) is based on former section 5404(d).

Subsection (e) is new. Subsection (f) is based on former section 5407(b). Subsection (g) is based on former section 5408.

§ 5425. Revocation.

(a) When declaration may be revoked.--A declaration may be revoked at any time and in any manner by the declarant regardless of the mental or physical condition of the declarant.

(b) Effect of revocation.--A revocation is effective upon communication to the attending physician or other health care provider by the declarant or a witness to the revocation.

(c) Medical record.--The attending physician or other health care provider shall make the revocation part of the medical record of the declarant.

Comment: This section is based on former section 5406.

§ 5426. Emergency medical services.

(a) Care given prior to declaration taking effect.--Nothing in this subchapter shall be construed to make the provisions of a declaration apply to care given to a patient by emergency medical services personnel before the declaration becomes operative under sections 5424 (relating to operation).

(b) Care given after declaration takes effect.--The provisions of a declaration shall apply to care given to a patient by emergency medical services personnel after the declaration becomes operative under section 5424 only if:

(1) an original declaration, signed by the declarant or other authorized person, is presented to the emergency medical services personnel, in which

case the emergency medical services personnel shall immediately notify the medical command physician of the presence of the declaration; or

(2) the medical command physician, based on prior notification by the attending physician or other health care provider that a valid and operative declaration exists, directs the emergency medical services personnel according to the provisions of the declaration.

(c) Uncertainty regarding validity of declaration.--Emergency medical services personnel confronted with conflicting information regarding the declarant's wishes for life-sustaining treatment shall act according to the accepted treatment protocols and standards appropriate to their level of certification.

Comment: This section is based on former section 5413.

SUBCHAPTER C

HEALTH CARE POWERS OF ATTORNEY

Sec.

5431. Short title of subchapter.

5432. Execution.

5433. Form.

5434. Operation.

5435. Appointment of health care agents.

5436. Authority of health care agent.

5437. Countermand.

5438. Amendment.

5439. Effect of divorce.

5440. Revocation.

5441. Relation of health care agent to court-appointed guardian and other agents.

5442. Duties of attending physician and health care provider.

5443. Effect on other State law.

5444. Conflicting health care powers of attorney.

5445. Validity.

§ 5431. Short title of subchapter.

This subchapter shall be known and may be cited as the Health Care Agents Act.

§ 5432. Execution.

(a) Who may make.--An individual of sound mind may make a health care power of attorney if the individual:

- (1) is 18 years of age or older;
- (2) has graduated from high school; or
- (3) has married.

(b) Requirements.--A health care power of attorney must be:

- (1) dated and signed by the principal by signature or mark or by another on behalf of and at the direction of the principal; and
- (2) witnessed by two individuals, each of whom is 18 years of age or older.

(c) Witnesses.--

(1) An individual who signs a health care power of attorney on behalf of and at the direction of a principal may not witness the health care power of attorney.

(2) A health care provider and its agent may not sign a health care power of attorney on behalf of and at the direction of a principal if the health care provider or agent provides health care services to the principal.

Comment: Subsection (a) describes those individuals who may execute a health care power of attorney. The execution

requirements for a health care power of attorney are the same as those for a declaration under section 5422. Absent clear evidence to the contrary, there is a presumption of sound mind to execute a health care power of attorney. A health care provider may rely in good faith on the presumption of a principal's sound mind.

Subsection (b)(2) requires that a health care power of attorney must be witnessed by two individuals. Although this is consistent with the witness requirement under section 5422(b)(2), it is inconsistent with Chapter 56 (powers of attorney), which does not require witnesses for a general power of attorney executed by a principal. Therefore, to the extent that a power of attorney authorizes the exercise of health care powers, the power of attorney must be witnessed for it to be effective. If the power of attorney authorizes the exercise of financial powers under Chapter 56 and health care powers under this chapter, the notice and acknowledgment requirements set forth in section 5601(c) and (d) are applicable. In that instance, an agent would be required to execute an acknowledgment only when the agent is exercising non-health care powers.

Subsection (c)(2) prohibits a health care provider, or anyone acting on its behalf, from signing a health care power of attorney for the principal if the principal receives health care services from such provider. The intent of this provision is to avoid potential conflicts of interest for a health care provider.

Finally, it should be noted that this section does not require notarization for a health care power of attorney to be effective.

Note: Section 5601(e.2) of Senate Bill 1014 of 2001 (Printer's No. 1431) clarifies that the statutory requirement in section 5601(c) and (d) that a power of attorney must contain a notice and acknowledgment does not apply to a power of attorney which exclusively provides for health care decision-making.

§ 5433. Form.

- (a) Requirements.--A health care power of attorney must do the following:
 - (1) Identify the principal and appoint the health care agent.

(2) Declare that the principal authorizes the health care agent to make health care decisions on behalf of the principal.

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

(1) Describe any limitations that the principal imposes upon the authority of the health care agent.

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

(3) Indicate whether the principal wants tube feeding or any other artificial or invasive form of nutrition or hydration.

(4) Nominate a guardian of the person of the principal as provided in section 5441 (relating to relation of health care agent to court-appointed guardian and other agents).

(5) Contain other provisions as the principal may specify regarding the implementation of health care decisions and related actions by the health care agent.

(c) Written form.--A health care power of attorney may be in the following form or any other written form identifying the principal, appointing a health care agent and declaring that the principal authorizes the health care agent to make health care decisions on behalf of the principal.

HEALTH CARE POWER OF ATTORNEY

I, (insert name of principal), being of sound mind, willfully and voluntarily make this health care power of attorney.

1. I understand that this health care power of attorney may become effective either immediately or after a particular condition is met, such as when I may become incompetent and lack sufficient capacity to make or communicate health care decisions concerning myself.

a. I want this health care power of attorney to take effect immediately.

YES _____ NO _____

b. I want this health care power of attorney to take effect after a particular condition is met.

YES _____ NO _____

Condition that must be met before this power of attorney is effective (if I answered “yes” to the preceding statement): (insert condition(s))

2. I understand that I must designate at least one health care agent to act when this health care power of attorney becomes effective. I also understand that I may designate more than one health care agent to act together.

a. I designate the following to serve as my health care agent(s) to make health care decisions on my behalf:

(insert name and address of health care agent(s))

b. If the individual(s) designated previously cannot or will not serve as my health care agent(s), then I designate the following substitute(s):

(insert name and address of substitute(s))

3. I understand that I may specify when this health care power of attorney terminates. The following specifies when I want this health care power of attorney to terminate:

(insert termination occurrence or date)

4. I understand that I may nominate a guardian of my person, for consideration by the court if incapacity proceedings are commenced. I understand that the court shall appoint a guardian in accordance with my most recent nomination except for good cause or disqualification. I want to nominate the following individual as a guardian of my person:

(insert name and address)

5. I understand that I may limit the authority of my health care agent(s). I want to impose the following limitations on my health care agent(s):

(insert limitations on health care agent(s))

6. I also wish to specify the following conditions regarding the implementation of health care decisions and other related actions by my health care agent:

(insert conditions)

7. I understand that regardless of my mental or physical capacity, I may countermand a health care decision made by my agent at any time and in any manner by personally informing my attending physician or health care provider. I understand that my attending physician or health care provider

shall make reasonable efforts to promptly inform my health care agent of my countermand. I also understand that my countermand shall not affect the authority of my health care agent to make other health care decisions in accordance with my health care power of attorney.

8. I understand that while I am of sound mind I may revoke my health care power of attorney either (i) by a writing which is dated, signed and witnessed in the same manner as this health care power of attorney or (ii) by personally informing my attending physician, health care provider or health care agent that this health care power of attorney is revoked.

I am making this health care power of attorney on the (insert day) day of (insert month), (insert year).

My signature:

My address: (insert address)

If the principal is unable to sign this health care power of attorney, another individual may sign on behalf of and at the direction of the principal.

Signature of individual signing on my behalf and at my direction:

Name and address of individual: (insert name and address)

This health care power of attorney must be witnessed by two individuals, each of whom is 18 years of age or older.

Signature of Witness 1:

Name and address of Witness 1: (insert name and address)

Signature of Witness 2:

Name and address of Witness 2: (insert name and address)

Comment: There is no prescribed or preferred health care power of attorney form because the health care power of attorney should be tailored to meet the principal's individual circumstances. A health care power of attorney may be adapted so that the principal may provide for the following, available under this chapter: (1) the designation of successor health care agents, (2) the ability of multiple health care agents to act together, (3) a health care power of attorney that is effective immediately, (4) a health care power of attorney that terminates at a certain time and (5) most important, particular choices about health care, including life-sustaining treatment. Section 5411 contains a combined declaration and health care power of attorney form.

§ 5434. Operation.

(a) When operative.--Unless otherwise specified in the health care power of attorney, a health care power of attorney becomes operative when:

(1) a copy is provided to the attending physician; and

(2) the attending physician determines that the principal is unable to make or communicate health care decisions.

(b) When inoperative.--Unless otherwise specified 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 ability to make and communicate health care decisions.

(c) Invalidity of specific direction.--If a specific direction in the health care power of attorney is held to be invalid, the invalidity does not negate other directions in the health care power of attorney that can be effected without the invalid direction.

(d) Duration.--Unless the health care power of attorney states a time of termination, it is valid until revoked by the principal or the principal's guardian of the person, notwithstanding the lapse of time since its execution.

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

Comment: Subsection (a) permits the principal, by specific provisions contained in the health care power of attorney, to authorize the agent to act on behalf of the principal even though the principal is able to make or communicate health care decisions. Otherwise, the health care power of attorney becomes operative when provided to the attending physician and the attending physician determines that the principal is unable to make and communicate health care decisions.

Subsection (d) 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).

§ 5435. Appointment of health care agents.

(a) Multiple and successor health care agents.--A principal may appoint the following in a health care power of attorney:

(1) More than one health care agent who shall act jointly unless the health care power of attorney provides otherwise.

(2) One or more successor agents who shall serve in the order named in the health care power of attorney, unless the principal expressly directs to the contrary.

(b) Who may not be appointed health care agent.--Unless related to the principal by blood, marriage or adoption, a health care agent of the principal may not be any of the following:

(1) The principal's attending physician or other health care provider.

(2) An owner, operator or employee of a health care provider in which the principal is receiving care.

Comment: Subsection (a) is patterned after section 5602(b)(1) and (2) (appointment of agent and successor agent).

§ 5436. Authority of health care agent.

(a) Extent of authority.--Except as expressly provided otherwise in a health care power of attorney and subject to subsection (b), a health care agent shall have the authority to make any health care decision and to exercise any right and power regarding the principal's care, custody and health care treatment that the principal could have made and exercised. The health care agent's authority may extend beyond the principal's death to make anatomical gifts, dispose of the remains and consent to autopsies.

(b) Life-sustaining treatment decisions.--A life-sustaining treatment decision made by a health care agent is subject to this section and sections 5408 (relating to pregnancy), 5434 (relating to operation) and 5442(a) (relating to duties of attending physician and health care provider).

(c) 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 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 make and communicate health care decisions. Instructions include a declaration made by the principal and any clear written or verbal directions that cover the situation presented. In the absence of instructions, the health care agent shall make health care decisions conforming with the health care agent's assessment of the principal's preferences and values, including religious and moral beliefs. 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 act in accordance with the health care agent's assessment of the principal's best interests.

(d) Health care information.--

(1) Unless specifically provided otherwise in a health care power of attorney, a health care agent has the same rights and limitations as the principal to request, examine, copy and consent or refuse to consent to the disclosure of medical or other health care information.

(2) Disclosure of medical or other health care information to a health care agent does not constitute a waiver of any evidentiary privilege or of a right to assert confidentiality. A health care provider that discloses such information to a health care agent in good faith shall not be liable for the disclosure. A health care agent may not disclose health care information regarding the

principal except as is reasonably necessary to perform the agent's obligations to the principal or as otherwise required by law.

Comment: Subsection (b) 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 a declaration pursuant to Subchapter B. Section 5424(a)(2) provides that the attending physician must determine that the principal is incompetent and in a terminal condition or in a state of permanent unconsciousness. Section 5424(g) provides that the attending physician must arrange to have that diagnosis confirmed by a second physician. Furthermore, the provisions of section 5408 (pregnancy) also apply to a life-sustaining treatment decision made by a health care agent for a principal who is pregnant.

Subsection (c) is consistent with the principles regarding “substituted judgment” enunciated by the court in *In re Fiori*, 543 Pa. 592, 673 A.2d 905 (1996). However, the last sentence of subsection (c) is an extension of the *Fiori* holding to account for a situation not present in *Fiori*, namely where the agent does not know enough about the principal's instructions, preferences and values to make a decision. In that case, the health care agent shall act in accordance with the health care agent's assessment of the principal's best interests.

In *Fiori*, the court explained that in exercising “substituted judgment,” a surrogate decision maker “considers the patient's personal value system for guidance. The surrogate considers the patient's prior statements about and reactions to medical issues, all the facets of the patient's personality that the surrogate is familiar with -- with, of course, particular reference to his or her relevant philosophical, theological, and ethical values -- in order to extrapolate what course of medical treatment the patient would choose.” *In re Fiori*, 543 Pa. at 603, 673 A.2d at 911 (quoting *In re Jobes*, 108 N.J. 394, 414, 529 A.2d 434, 444 (1987)).

Subsection (d) recognizes that health care agents may be provided otherwise confidential medical information necessary for them to make health care decisions for the principal. Section 5443(f) (effect on other State law) makes it clear that

this subsection supersedes other State laws that impose stringent patient consent requirements. The confidentiality of the information is protected by the re-disclosure limitation on health care agents.

§ 5437. Countermand.

Regardless of the principal's mental or physical capacity, a principal may countermand a health care decision made by the principal's health care agent at any time and in any manner by personally informing the attending physician or health care provider. The attending physician or health care provider shall make reasonable efforts to promptly inform the health care agent of the countermand. A countermand shall not affect the authority of the health care agent to make other health care decisions in accordance with the health care power of attorney.

Comment: This section permits the principal, irrespective of mental or physical capacity, to countermand individual health care decisions made by a health care agent without affecting the authority of the agent to make other health care decisions for the principal. This section recognizes the underlying policy consideration of individual autonomy.

§ 5438. Amendment.

While of sound mind, a principal may amend a health care power of attorney by a writing executed in accordance with the provisions of section 5432 (relating to execution). An amendment may include the revocation in part of the health care power of attorney or the designation of new or additional health care agents.

§ 5439. Effect of divorce.

If the spouse of a principal is designated as the principal's health care agent and thereafter either spouse files an action in divorce, the designation of the

spouse as health care agent shall be revoked as of the time the action is filed, unless it clearly appears from the health care power of attorney that the designation was intended to continue to be effective notwithstanding the filing of an action in divorce by either spouse.

§ 5440. Revocation.

(a) When health care power of attorney may be revoked.--While of sound mind, a principal may revoke a health care power of attorney by a writing executed in accordance with the provisions of section 5432 (relating to execution) or by personally informing the attending physician, health care provider or health care agent that the health care power of attorney is revoked.

(b) Reliance on health care power of attorney.--A physician or other health care provider may rely on the effectiveness of a health care power of attorney unless notified of its revocation.

(c) Subsequent action by agent.--A health care agent, knowing of the revocation of the health care power of attorney, may not make or attempt to make health care decisions for the principal.

Comment: Subsection (a) provides two methods of revocation. A principal may revoke a health care power of attorney either (1) by a writing or (2) orally by personally informing the attending physician, health care provider or health care agent of the revocation.

Subsection (b) incorporates two important concepts. First, it provides a degree of certainty for physicians or other health care providers by permitting them to rely on a health care power of attorney until notified of its revocation. Second, it does not foreclose the ability of physicians or other health care providers to challenge the validity of a health care power of

attorney, if, for example, they have reason to believe that the health care power of attorney was forged.

Subsection (c) prohibits a health care agent from acting under a health care power of attorney if that agent knows of its revocation.

§ 5441. Relation of health care agent to court-appointed guardian and other agents.

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

(b) Nomination of guardian of person.--In a health care power of attorney, a principal may nominate the guardian of the person for the principal 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 appoint in accordance with the principal's most recent nomination except for good cause or disqualification.

(c) Reasonable expenses.--In fulfilling the health care needs for the principal, a health care agent may incur reasonable expenses, including the purchase of health care insurance, to the extent the expenses are not otherwise covered by insurance or other similar benefits. Payment for the expenses or reimbursement

to the health care agent for the expenses from the principal's funds shall be made by either of the following:

(1) A guardian of the estate of the principal.

(2) An agent acting on behalf of the principal under a power of attorney if the agent has the power to disburse the funds of the principal.

Comment: Subsections (a) and (b) are patterned after section 5604(c) (relation of agent to court-appointed guardian). Since a health care agent may not have access to the principal's funds, subsection (c) provides a means of payment for health care provided to the principal.

§ 5442. Duties of attending physician and health care provider.

(a) Duty to confirm terminal condition.--Without delay after a diagnosis that the principal is in a terminal condition or in a state of permanent unconsciousness, the attending physician shall certify in writing that the principal is in a terminal condition or in a state of permanent unconsciousness and arrange for the physical examination and confirmation of the terminal condition or state of permanent unconsciousness of the principal by a second physician.

(b) Communication of health care decision.--Whenever possible before implementing a health care decision made by a health care agent, an attending physician or health care provider shall promptly communicate to the principal the decision and the identity of the person making the decision.

(c) Compliance with decisions of health care agent.--Subject to any limitation specified in the health care power of attorney, an attending physician or health care provider shall comply with a health care decision made by a health care agent

to the same extent as if the decision had been made by the principal. Health care necessary to preserve life shall be provided to an individual who is neither in a terminal condition nor permanently unconscious except if the individual is competent and objects to such care or a health care agent objects on behalf of the principal. In all circumstances, this subsection shall be construed so as to be consistent with the Americans with Disabilities Act of 1990 (Public Law 101-336, 104 Stat. 327).

(d) Medical record.--

(1) Any 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 medical record of the principal.

(2) Any attending physician or health care provider to whom an amendment or revocation of a health care power of attorney is communicated shall promptly enter the information in the medical record of the principal and maintain a copy if one is furnished.

(e) Record of determination.--Any attending physician who determines that a principal is unable or has regained the ability to make and communicate health care decisions or makes a determination that affects the authority of a health care agent shall enter the determination in the medical record of the principal and, if possible, promptly inform the principal and any health care agent of the determination.

Comment: This section sets forth the various duties imposed on an attending physician and health care provider.

Subsection (b) regarding communication of a health care decision is crucial to the operation of section 5437 (countermand) and is designed to preserve patient autonomy.

Subsection (c), which requires compliance with a health care decision made by a health care agent, provides statutory assurance to the principal and health care agent that a decision made by the agent will be treated as if the decision had been made by the principal.

Subsection (d) requires 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 be entered in the principal's medical record.

Subsection (e) serves the dual purpose of requiring that a determination that the principal is unable or has regained the ability to make and communicate health care decisions be entered in the principal's medical record and that the principal and health care agent be informed of the determination.

§ 5443. Effect on other State law.

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

(b) Prohibited care.--This subchapter does not authorize a health care agent to consent to any health care prohibited by the laws of this Commonwealth.

(c) Consent.--This subchapter does not affect the laws of this Commonwealth regarding any of the following:

(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.

(4) Consent to health care in an emergency.

(d) Preservation of religious rights.--This subchapter does not prevent a health care agent from consenting to health care administered in good faith pursuant to religious beliefs of the principal or from withholding consent to health care that is contrary to religious beliefs of the principal.

(e) Rights of individuals.--This subchapter does not affect the right of an individual to make health care decisions.

(f) Disclosure.--

(1) The disclosure requirements of section 5436(d) (relating to authority of health care agent) supersede any provision in any other State statute or regulation that requires the principal to consent to disclosure or which otherwise conflicts with section 5436(d), including, but not limited to, the following:

(i) Section 8 of the act of April 14, 1972 (P.L.221, No.63), known as the Pennsylvania Drug and Alcohol Abuse Control Act.

(ii) Section 111 of the act of July 9, 1976 (P.L.817, No.143), known as the Mental Health Procedures Act.

(iii) Section 15 of the act of October 5, 1978 (P.L.1109, No.261), known as the Osteopathic Medical Practice Act.

(iv) Section 41 of the act of December 20, 1985 (P.L.457, No.112), known as the Medical Practice Act of 1985.

(v) Section 7 of the act of November 29, 1990 (P.L.585, No.148), known as the Confidentiality of HIV-Related Information Act.

(2) The disclosure requirements under section 5436(d) shall not apply to the extent that the disclosure would be prohibited by Federal laws and implementing regulations.

Comment: Subsection (a) provides that this subchapter does not affect the requirements of any other laws of this Commonwealth concerning consent to observation, diagnosis, treatment or hospitalization for a mental illness, including, but not limited to, the following list of statutory and regulatory provisions:

- 1. The act of July 9, 1976 (P.L.817, No.143), known as the Mental Health Procedures Act, specifically--**
 - a. Section 201 (relating to persons who may authorize voluntary treatment).**
 - b. Section 207 (relating to transfer of person in voluntary treatment).**
 - c. Section 301 (relating to persons who may be subject to involuntary emergency examination and treatment).**
 - d. Section 302 (relating to involuntary emergency examination and treatment authorized by a physician--not to exceed one hundred twenty hours).**
 - e. Section 303 (relating to extended involuntary emergency treatment certified by a judge or mental health review officer--not to exceed twenty days).**
 - f. Section 304 (relating to court-ordered involuntary treatment not to exceed ninety days).**
 - g. Section 305 (relating to additional periods of court-ordered involuntary treatment).**

2. **The relevant sections of the act of October 20, 1966, Special Sess. No. 3 (P.L.96, No. 6), known as the Mental Health and Mental Retardation Act of 1966.**
3. **The relevant provisions of Part VII of 55 Pa. Code, sections 5100-5100.93, known as the Public Welfare Code--Mental Health Manual.**

The intent of subsection (f) is to remove any uncertainty as to whether the disclosure requirements of section 5436(d) control in the event of a conflict with present State law or regulations. The list of State statutes in subsection (f) is not meant to be exclusive.

§ 5444. Conflicting health care powers of attorney.

If a provision of a health care power of attorney conflicts with another provision of a health care power of attorney or with a provision of a declaration, the provision of the instrument latest in date of execution shall prevail to the extent of the conflict.

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

§ 5445. Validity.

This subchapter does not limit the validity of a health care power of attorney executed prior to the effective date of this subchapter. A health care power of attorney executed in another state or jurisdiction and in conformity with the laws of that state or jurisdiction shall be considered valid in this Commonwealth, except to the extent that the health care power of attorney executed in another state or jurisdiction would allow a health care agent to make a health care decision inconsistent with the laws of this Commonwealth.

Repealers

The implementing legislation will repeal the following:

- (1) Chapter 54 in its entirety (§§ 5401 - 5416)
- (2) 20 Pa.C.S. §§ 5602(a)(8) and (9) and 5603(h)

Validity of declaration

The repeal of the form of the declaration in section 5404(b) shall not affect the validity of any declaration executed, pursuant to that form, before, on or after the effective date of this act.

Effect of repeal

The repeal of 20 Pa.C.S. §§ 5602(a)(8) and (9) and 5603(h) shall not affect the authority of an agent operating under any power of attorney relying on those provisions, executed before the effective date of the repeal of those provisions.

Effect on case law

Nothing in this act is intended to affect or supersede the holdings in *In re Fiori*, 543 Pa. 592, 673 A.2d 905 (1996).

Effective date

This act shall take effect in 60 days.

CONFORMING AMENDMENTS

Title 18

§ 2713. Neglect of care-dependent person.

* * *

(e) Treatment in conformance with care-dependent person's right to accept or refuse services.--A caretaker or any other individual or facility may offer an affirmative defense to charges filed pursuant to this section if the caretaker, individual or facility can demonstrate through a preponderance of the evidence that the alleged violations result directly from:

(1) the caretaker's, individual's or facility's lawful compliance with a care-dependent person's [advance directive for health care] declaration as provided in 20 Pa.C.S. Ch. 54 (relating to [advance directive for] health care);

(2) the caretaker's, individual's or facility's lawful compliance with the care-dependent person's written, signed and witnessed instructions, composed when the care-dependent person is competent as to the treatment he wishes to receive;

(3) the caretaker's, individual's or facility's lawful compliance with the direction of the care-dependent person's [attorney-in-fact] agent acting pursuant to a lawful durable power of attorney; [or]

(4) the caretaker's, individual's or facility's lawful compliance with a "Do Not Resuscitate" order written and signed by the care-dependent person's attending physician[.]; or

(5) the caretaker's, individual's or facility's lawful compliance with the direction of the care-dependent person's health care agent acting pursuant to a lawful health care power of attorney.

* * *

Title 20

§ 711. Mandatory exercise of jurisdiction through orphans' court division in general.

Except as provided in section 712 (relating to nonmandatory exercise of jurisdiction through the orphans' court division) and section 713 (relating to special provisions for Philadelphia County), the jurisdiction of the court of common pleas over the following shall be exercised through its orphans' court division:

* * *

(22) Agents.--All matters pertaining to the exercise of powers by agents acting under powers of attorney as provided in Chapter 56 (relating to powers of attorney) or in Subchapter C of Chapter 54 (relating to health care powers of attorney).

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CROSS-REFERENCE TABLE

Section of Proposed Chapter 54 Contained in Senate Bill 1265*	Analogous Section in Present Chapter 54 to be Repealed by Senate Bill 1265	Analogous Section in Senate Bill 172 of 1999 (Printer's No. 1933)
5401(b)	5412	5412
5402 "attending physician"	5403	5401
5402 "declarant"	5403	5401
5402 "declaration"	5403	5401
5402 "health care"	--	5401
5402 "health care agent"	--	5401
5402 "health care decision"	--	5401
5402 "health care power of attorney"	--	5401
5402 "health care provider"	5403	5401
5402 "incompetent"	5403	5401
5402 "life-sustaining treatment"	5403	5401
5402 "medical command physician"	5403	5401
5402 "permanently unconscious"	5403	5401
5402 "person"	5403	5401
5402 "principal"	--	5401
5402 "terminal condition"	5403	5401
5403(a) (second sentence)	5402 (b) (first sentence)	5403(b) (first sentence)
5403(b)	5402(b) (second sentence)	5403(b) (second sentence)
5403(c)	5402(a)	5403(a)

*A provision not listed in this column does not have an analogous section in either present Chapter 54 to be repealed by Senate Bill 1265 or Senate Bill 172 of 1999.

Section of Proposed Chapter 54 Contained in Senate Bill 1265*	Analogous Section in Present Chapter 54 to be Repealed by Senate Bill 1265	Analogous Section in Senate Bill 172 of 1999 (Printer's No. 1933)
5404(a)	5409(a) (first sentence)	5409(a) (first sentence) and 5431(a) (first sentence)
5404(b)	5409(a) (second sentence)	5409(a) (second sentence) and 5431(a) (second sentence)
5404(c)(1)	5409(b) (first sentence)	5409(b) (first sentence) and 5431(b) (first sentence)
5404(c)(2)	5409(b) (second sentence)	5409(b) (second sentence) and 5431(b) (second sentence)
5404(c)(3)	5409(b) (third sentence)	5409(b) (third sentence) and 5431(b) (third sentence)
5404(d)	5409(c)	5409(c) and 5431(c)
5405	5410(a)	5410(a) and 5430(d)
5406	5410(b)	5410(b) and 5432
5407	5411	5411 and 5433
5408(a)	5414(a)	--
5408(b)	5414(b)	--
5408(c)	5414(c)	--
5409(a)	5407(a)	5407(a) and 5430(a)
5409(b)	--	5430(a)
5409(c)	--	5430(b)
5410(a)	5415	5415 and 5434(a)
5410(b)	5415	5415 and 5434(b)
5421	5401	5402
5422	5404(a)	5404(a)
5423	5404(b)	5404(b)
5424(a)	5405	5405
5424(b)	5405	5405
5424(c)	5404(c)	5404(c)

*A provision not listed in this column does not have an analogous section in either present Chapter 54 to be repealed by Senate Bill 1265 or Senate Bill 172 of 1999.

Section of Proposed Chapter 54 Contained in Senate Bill 1265*	Analogous Section in Present Chapter 54 to be Repealed by Senate Bill 1265	Analogous Section in Senate Bill 172 of 1999 (Printer's No. 1933)
5424(d)	5404(d)	5404(d)
5424(f)	5407(b)	5407(b)
5424(g)	5408	--
5425(a)	5406(a) (first sentence)	--
5425(b)	5406(a) (second sentence)	--
5425(c)	5406(b)	--
5426	5413	5413
5431	--	5421
5432(a)	--	5422(a)
5432(b)	--	5422(b) (first two sentences)
5432(c)	--	5422(b) (last two sentences)
5433(a)	--	5423(a)
5433(b)	--	5423(b)
5434(a)	--	5425(a)
5434(b)	--	5425(a) and (b)
5434(c)	--	5423(c)
5434(d)	--	5425(b)
5434(e)	--	5425(g)
5435(a)	--	5426(a)
5435(b)	--	5426(b)
5436(a)	--	5425(c)
5436(b)	--	5425(d)
5436(c)	--	5425(e)
5436(d)	--	5425(f)

*A provision not listed in this column does not have an analogous section in either present Chapter 54 to be repealed by Senate Bill 1265 or Senate Bill 172 of 1999.

Section of Proposed Chapter 54 Contained in Senate Bill 1265*	Analogous Section in Present Chapter 54 to be Repealed by Senate Bill 1265	Analogous Section in Senate Bill 172 of 1999 (Printer's No. 1933)
5437	--	5424(a)
5438	--	5424(b)
5439	--	5424(c)
5440	--	5424(d) and (e)
5441	--	5427
5442(b)	--	5429(a)
5442(c)	--	5429(b)
5442(d)	--	5429(c) and (d)
5442(e)	--	5429(e)
5443	--	5435
5444	--	5436
5445	--	5437

*A provision not listed in this column does not have an analogous section in either present Chapter 54 to be repealed by Senate Bill 1265 or Senate Bill 172 of 1999.