POWERS OF ATTORNEY AND HEALTH CARE DECISION-MAKING

PROPOSED AMENDMENTS to the PROBATE, ESTATES and FIDUCIARIES CODE

REPORT of the ADVISORY COMMITTEE on DECEDENTS' ESTATES LAWS

June 2011

General Assembly of the Commonwealth of Pennsylvania
JOINT STATE GOVERNMENT COMMISSION
108 Finance Building
Harrisburg, PA 17120

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
Room 108 Finance Building
Harrisburg, PA 17120-0018

Telephone: 717-787-4397
Fax: 717-787-7020

E-mail: jntst02@legis.state.pa.us
Website: http://jsg.legis.state.pa.us

Project Manager: Stephen F. Rehrer, Counsel
srehrer@legis.state.pa.us
(717) 787-6422

Project Staff: Ronald D. Grenoble, Attorney
Wendy L. Baker, Administrative Assistant

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INTRODUCTION

The Advisory Committee and Task Force Process

The Joint State Government Commission Advisory Committee on Decedents' Estates Laws is a standing group of attorneys and judges from across the Commonwealth who assist the General Assembly by recommending improvements to Pennsylvania's Probate, Estates and Fiduciaries Code[1] and related statutes. Since 1945, the Advisory Committee has provided expertise and advice to formulate legislation aimed at modernizing Pennsylvania law.

Over the years, the Advisory Committee has formed various subcommittees to assist in reviewing specific topics and developing statutory recommendations involving the Probate, Estates and Fiduciaries Code for consideration by the Advisory Committee. The Subcommittee on Guardianships and Powers of Attorney[2] was formed to review, among other things, 20 Pa.C.S. Chapters 54 (health care), 55 (incapacitated persons) and 56 (powers of attorney).

After reaching consensus[3] on its legislative recommendations, the Advisory Committee presents its recommendations to the Task Force on Decedents' Estates Laws, which is a bicameral and bipartisan panel of legislators. The Task Force authorizes the Joint State Government Commission to publish a report containing the recommendations, which serve as a basis for legislation.[4]

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[1] Title 20 of the Pennsylvania Consolidated Statutes (20 Pa.C.S.).

[2] The subcommittee consists of John F. Meck, Esq., Chair; Robert Clofine, Esq.; William R. Cooper, Esq.; The Honorable Calvin S. Drayer, Jr.; Jay C. Glickman, Esq.; Neil E. Hendershot, Esq.; The Honorable Anne E. Lazarus; John J. Lombard, Jr., Esq.; James F. Mannion, Esq.; Michael J. Mullaugh, Esq.; R. Thomas Murphy, Esq.; The Honorable Paula Francisco Ott; The Honorable Stanley R. Ott; William Campbell Ries, Esq. and Robert B. Wolf, Esq.

[3] Consensus does not necessarily reflect unanimity among the Advisory Committee members on each individual legislative recommendation. However, it does reflect the views of a substantial majority of the Advisory Committee, gained after lengthy review and discussion.

[4] However, the inclusion of any recommendation in this report does not necessarily reflect the endorsement of the Task Force.

Contents of Report

In response to the *Vine*[5] and *D.L.H.*[6] rulings of the Pennsylvania Supreme Court, the Subcommittee on Guardianships and Powers of Attorney reviewed the topics of powers of attorney and health care decision-making and presented its recommendations at the 2011 annual meeting of the Advisory Committee. The Advisory Committee reached consensus on the recommendations, and the Subcommittee subsequently finalized specific statutory amendments to the Probate, Estates and Fiduciaries Code, which are contained in this report.

The major statutory amendments that form the basis of this report concern the following:[7]

(1) Third party liability and immunity regarding powers of attorney under 20 Pa.C.S. Chapter 56, in light of the *Vine* ruling.[8]

(2) An acknowledgment by the principal and affidavits of the two witnesses for powers of attorney.[9]

(3) Health care decision-making by guardians under 20 Pa.C.S. Chapters 54 and 55, in light of the *D.L.H.* ruling.[10]

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[5] *Vine v. Commonwealth*, 9 A.3d 1150 (Pa. 2010).

[6] *In re D.L.H.*, 2 A.3d 505 (Pa. 2010).

[7] The statutory recommendations are set forth *infra* pp. 45-58. Transitional language, which includes applicability and effective date provisions, is set forth *infra* p. 59. *See also* pp. 21-28 & 37-43. A discussion of powers of attorney is set forth *infra* pp. 9-28, and a discussion of health care decision-making by guardians is set forth *infra* pp. 29-43.

[8] This topic involves the amendment of 20 Pa.C.S. § 5608 (liability).

[9] This topic involves the addition of 20 Pa.C.S. § 5601(b.1) (acknowledgment and affidavits). Consequently, the Advisory Committee agreed to the amendment of 20 Pa.C.S. § 5601(e.1) and (e.2) regarding the limitation on applicability in commercial transactions and in health care powers of attorney. The Advisory Committee previously agreed on amendments regarding the execution of a power of attorney under 20 Pa.C.S. § 5601(b), which it agreed to modify slightly for the purposes of this report, and regarding the use of a copy of a power of attorney under proposed new 20 Pa.C.S. § 5602(d), which also entails the amendment of 20 Pa.C.S. § 5602(c) regarding the filing of a power of attorney. The proposed amendments regarding §§ 5601(b) and 5602 appear in *Powers of Attorney: Proposed Amendments to the Probate, Estates and Fiduciaries Code* (J. State Gov't Comm'n, Mar. 2010), Senate Bill No. 1358 of 2010 and Senate Bill No. 96 of 2011.

[10] This topic involves the restructuring of 20 Pa.C.S. § 5511, which includes the addition of a new subsection (e)(3) regarding the contents of a petition, and the addition of a new 20 Pa.C.S. § 5521(d.1) regarding health care decisions.

Along with the proposed legislation, this report contains official comments, which may be used in determining the intent of the General Assembly.[11]

Finally, this report contains select 20 Pa.C.S. Chapter 54 provisions[12] and a list of the members of the Advisory Committee since its inception in 1945.[13]

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[11] 1 Pa.C.S. § 1939 ("The comments or report of the commission . . . which drafted a statute may be consulted in the construction or application of the original provisions of the statute if such comments or report were published or otherwise generally available prior to the consideration of the statute by the General Assembly").

[12] Appendix, *infra* pp. 63-72. Included in this report are 20 Pa.C.S. §§ 5422, 5423, 5429, 5456, 5460, 5461 and 5462.

[13] Appendix, *infra* pp. 73-77.

SUMMARY OF RECOMMENDATIONS

This report contains the following amendments to Title 20 of the Pennsylvania Consolidated Statutes (the Probate, Estates and Fiduciaries Code):

§ 5511. Subsection (e) is amended to provide that a petition that is filed for the appointment of a guardian of the person on or after the effective date of the act must state whether it is proposed that the guardian of the person shall have the power to make health care decisions and, if so, whether the guardian shall have all the powers of a health care representative to make such decisions, and any limitation of those powers.[14]

§ 5521. Subsection (d.1)(1) is added to provide that a guardian of the person for an incapacitated person shall have the same authority to make health care decisions on behalf of the incapacitated person as a health care representative, and a decision shall be effective without court approval, subject to (1) any limitations and conditions set forth in the order of appointment; (2) the same health care decision-making process as prescribed in the statutory provisions regarding the authority of a health care agent in making health care decisions; (3) the same limitations regarding pregnancy and regarding the duties of an attending physician and health care provider under Chapter 54; (4) the statutory provisions regarding powers and duties only granted by the court and regarding powers and duties not granted to a guardian; and (5) any other provision regarding health care representatives as set forth in Chapter 54, except the statutory provisions regarding who may act as a health care representative.[15]

Subsection (d.1)(2) is added to specify that, to the extent practicable, a guardian of the person must consult with close family members of the incapacitated person in making a health care decision, particularly one involving end-of-life decision-making.[16]

[14] *Infra* p. 43.

[15] *Infra* pp. 39-40.

[16] *Infra* p. 40.

Subsection (d.1)(3) is added to require that a petition that is filed for the appointment of a guardian of the person on or after the effective date of the act must state whether it is proposed that the guardian of the person shall have the power to make health care decisions and, if so, whether the guardian shall have all the powers of a health care representative to make such decisions, and any limitation of those powers.[17]

Subsection (d.1)(4) is added to require that the notice of a petition or hearing must contain the information under the previous paragraph.[18]

Subsection (d.1)(5) is added to require that an order of appointment of a guardian of the person that is issued on or after the effective date of the act must specify whether the guardian of the person shall have the power to make health care decisions and, if so, whether the guardian shall have all the powers of a health care representative to make such decisions, and any limitation of those powers.[19]

Subsection (d.1)(6) is added to specify that a guardian of the person appointed before the effective date of the act shall have the same powers as a health care representative unless (1) a prior court order has limited the power of the guardian to make health care decisions or (2) a health care representative is available and assumes authority to act by agreement between the health care representative and the guardian, in which case the guardian thereafter has no health care decision-making powers.[20]

§ 5601. Subsection (b) is amended to provide that two witnesses are required when any power of attorney is executed, thereby changing current law, which provides that two witnesses are only required when the power of attorney is executed by mark or by another individual. The amendment makes the execution of a power of attorney under Chapter 56 consistent with the execution of a health care power of attorney under Chapter 54. However, an agent appointed under a Chapter 56 power of attorney may not be a witness, whereas that limitation is not present for a health care power of attorney under Chapter 54. A notary may not act as one of the required witnesses. Subsection (b) is also amended to specify that a power of attorney "shall be dated, and it shall be signed by the principal," thereby replacing "shall be

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[17] *Id.*

[18] *Id.*

[19] *Infra* pp. 40-41.

[20] *Infra* p. 41.

signed and dated by the principal." This amendment clarifies that the power of attorney may be dated by a person other than the principal.[21]

Subsection (b.1) is added to require that a power of attorney be acknowledged by the principal and that the two witnesses to the power of attorney provide the specified affidavits. A witness may not be the individual who takes the principal's acknowledgment. The acknowledgment and affidavits must be made before a notary (or other authorized officer) or an attorney at law, who must later certify to a notary (or other authorized officer) that the acknowledgment and affidavits were made according to the provisions of the statute. The new subsection specifies the general form and content for the acknowledgment, affidavits and certification.[22]

Subsections (e.1) and (e.2) are amended to specify that the execution requirements under subsection (b) and the acknowledgment and affidavit requirements under subsection (b.1) do not apply to (1) a power or a power of attorney contained in an instrument used in a commercial transaction which simply authorizes an agency relationship or (2) a power of attorney which exclusively provides for health care decision making.[23]

§ 5602. Subsection (c) is amended to change the reference from "executed copy of the power of attorney" to "originally executed power of attorney."[24]

Subsection (d) is new and specifies that, except for the purpose of filing at the courthouse, a photocopy or electronically transmitted copy of an originally executed power of attorney has the same effect as the original.[25]

§ 5608. Subsection (a) is amended to provide that any person who is given instructions by a person claiming to be an agent acting under a document appearing to be a valid power of attorney must comply with the instructions if the action requested is authorized under the terms of the document. Reasonable cause for failing to so comply is amended to include a reasonable good faith belief that (1) the document presented is void, invalid or terminated; (2) the agent's apparent authority is void, invalid or terminated or (3) the agent is exceeding or improperly exercising the agent's apparent authority. Under the proposed amendments, reasonable cause also includes a good faith report having been

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[21] *Infra* pp. 24-25.

[22] *Infra* pp. 25-27.

[23] *Infra* p. 28.

[24] *Infra* p. 23.

[25] *Id*.

made by the person to whom instructions have been given by the agent (instead of the current language of "a good faith report having been made by the third party") to the local protective services agency. In light of the enactment of the Adult Protective Services Act in October 2010, an amendment is made to cite that act along with the Older Adults Protective Services Act.[26]

Subsection (b) is amended to provide that any person who reasonably acts in good faith reliance on a document appearing to be a valid power of attorney shall incur no liability as a result of acting in accordance with the instructions of the person claiming to be an agent.[27]

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[26] *Infra* pp. 22-23.

[27] *Id*.

Immunity and Liability

Pennsylvania's power of attorney statute addresses third party liability and third party immunity as follows:

> § 5608. Liability.
>
> (a) Third party liability.--Any person who is given instructions by an agent in accordance with the terms of a power of attorney shall comply with the instructions. Any person who without reasonable cause fails to comply with those instructions shall be subject to civil liability for any damages resulting from noncompliance. Reasonable cause under this subsection shall include, but not be limited to, a good faith report having been made by the third party to the local protective services agency regarding abuse, neglect, exploitation or abandonment pursuant to section 302 of the act of November 6, 1987 (P.L.381, No.79), known as the Older Adults Protective Services Act.
>
> (b) Third party immunity.--Any person who acts in good faith reliance on a power of attorney shall incur no liability as a result of acting in accordance with the instructions of the agent.

A power of attorney is presumptively valid if the required statutory notice is executed with the power of attorney:

> § 5601. General provisions.
>
> * * *
>
> (c) Notice.--All powers of attorney shall include the following notice in capital letters at the beginning of the power of attorney. The notice shall be signed by the principal. In the absence of a signed notice, upon a challenge to the authority of an agent to exercise a power under the power of attorney, the agent shall have the burden of demonstrating that the exercise of this authority is proper.
>
> NOTICE
>
> The purpose of this power of attorney is to give the person you designate (your "agent") broad powers to handle your property, which may include powers to sell or otherwise dispose of any real or personal property without advance notice to you or approval by you.
>
> This power of attorney does not impose a duty on your agent to exercise granted powers, but when powers are exercised, your agent

must use due care to act for your benefit and in accordance with this power of attorney.

Your agent may exercise the powers given here throughout your lifetime, even after you become incapacitated, unless you expressly limit the duration of these powers or you revoke these powers or a court acting on your behalf terminates your agent's authority.

Your agent must keep your funds separate from your agent's funds.

A court can take away the powers of your agent if it finds your agent is not acting properly.

The powers and duties of an agent under a power of attorney are explained more fully in 20 Pa.C.S. Ch. 56.

If there is anything about this form that you do not understand, you should ask a lawyer of your own choosing to explain it to you.

I have read or had explained to me this notice and I understand its contents.

……………………………………………………………………..
………………………………………… ……………………………...
(Principal) (Date)

* * *

Vine v. Commonwealth

The *Vine* case "involves the statutory immunity afforded to third parties who act on the instructions of an [agent]."[28]

Teresa Vine (Mrs. Vine) worked for the state for 29 years and is a member of the State Employee's Retirement System (SERS). She was permanently injured in an automobile accident and shortly thereafter suffered a stroke that rendered her unable to speak or comprehend. Four days after her stroke, she executed a power of attorney purporting to make her then-husband Robert Vine (Mr. Vine) her agent and authorizing him to engage in retirement plan transactions on her behalf. Her signature on the power of attorney consisted of an "x," accompanied by the notation "her mark." At the time, Mrs. Vine was suffering from traumatic brain injury, intubated and being treated with sedatives. A hospital nurse witnessed the execution of the power of attorney, which was notarized.[29]

[28] *Vine,* 9 A.3d at 1151.

[29] *Id.* at 1151-52. Although Mrs. Vine subsequently recovered mentally, she remains a paraplegic. *Id.*

Two weeks later, Mrs. Vine retired, and soon thereafter Mr. Vine met with a SERS retirement counselor, who knew of the accident but not the extent of Mrs. Vine's health condition. The retirement counselor reviewed the power of attorney and discussed retirement options, from which Mr. Vine selected an option that allowed him to withdraw her accumulated deductions. He did not select the disability retirement option, which would have increased Mrs. Vine's monthly payments but would not have enabled him to make the withdrawals. Five years later when Mr. Vine filed for divorce, Mrs. Vine discovered that she had not retired on disability. Accordingly, she wrote to SERS requesting to change her election to disability retirement. SERS denied her request, noting that she could select another survivor option because of her divorce but could not change to disability retirement.[30]

At an administrative hearing, Mrs. Vine argued that she was incapacitated at the time she allegedly placed the "x" on the power of attorney[31] and that the document was invalid, meaning that SERS should not have relied on it. The hearing examiner agreed and stated that SERS must return her to the position she occupied prior to Mr. Vine's use of the invalid power of attorney, which would allow her to make her own retirement elections.[32]

Although SERS did not challenge the finding that Mrs. Vine lacked the capacity to execute a valid power of attorney or that her power of attorney was invalid, it argued that § 5608 provided it with immunity for good faith reliance on a power of attorney and that

> it should not be put in a position where it must investigate the facts underlying a facially valid [power of attorney]. . . . [T]he imposition of such an investigatory duty would place it in an untenable position, as the undertaking of any inquiry into the circumstances of the [power of attorney's] execution could cause it to risk incurring liability under Section 5608(a) . . .[33]

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[30] *Id.* at 1152.

[31] Mrs. Vine argued that at the time of her alleged execution by mark, her medical condition affected her reasoning and judgment, leaving her unable to make important life decisions. *Id.*

[32] *Id.* at 1152-53. The hearing examiner also specified that such relief should be conditioned on Mrs. Vine "returning all withdrawals taken since her accident, so that SERS would not incur any liability as a result of its reliance on the [power of attorney]." *Id.* at 1153.

[33] *Id.* SERS also argued that returning the parties to the *status quo ante* would result in SERS suffering liability because of administrative difficulties. *Id.*

The SERS board, however, concluded that Mr. Vine had the apparent authority to act as agent for Mrs. Vine and, therefore, his actions were binding and § 5608 immunized SERS from liability.[34] The Commonwealth Court affirmed,[35] and Mrs. Vine appealed.

The Pennsylvania Supreme Court reversed the Commonwealth Court, first stating that § 5608 "facially applies only to situations where an 'agent' gives instructions pursuant to a 'power of attorney'" but

> there is no indication in the statutory text that it is intended to apply where a person who is not an agent, but purports to be one or erroneously believes he is one, provides instructions pursuant to a document that is not a valid power of attorney, but appears to be one.[36]

The dissenting opinions "proffer a policy-based rationale to support extending Section 5608(b) immunity to situations involving fraud" and suggest that the majority "interpretation places an unwarranted investigatory burden upon third parties."[37] Although the majority opinion acknowledged that powers of attorney "facilitate useful transactions by freeing the principal to be elsewhere when the transaction occurs," it noted that powers of attorney "also create opportunities for self-dealing by unscrupulous persons."[38] The majority opinion agreed with Mrs. Vine that "the broader construction of Section 5608(b) advocated by SERS and the dissents would deprive incapacitated persons of the ability to require third parties to reverse actions affecting their legal rights that were falsely undertaken in their name."[39] Accordingly, the majority concluded that § 5608 did not apply in the present case and relief should not have been denied on the grounds that Mrs. Vine failed to demonstrate that SERS acted in bad faith or had reasonable cause to question the validity of the power of attorney or Mr. Vine's apparent authority.[40] Therefore, the matter was remanded so that SERS might assess Mrs. Vine's mental capacity to execute the power of attorney and make the necessary adjustments to her retirement benefits consistent with the majority opinion.

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[34] *Id.* at 1153-54. The Board noted that signed retirement applications are contracts with SERS, which are generally binding and irrevocable, and in this case, SERS was provided with a facially valid power of attorney that designated Mr. Vine as the agent and authorized him to conduct retirement transactions on Mrs. Vine's behalf. *Id.*

[35] 956 A.2d 1088 (Pa. Commw. Ct. 2008).

[36] *Vine*, 9 A.3d at 1158.

[37] *Id.* at 1161.

[38] *Id.* (citation omitted).

[39] *Id.*

[40] *Id.* at 1163.

The dissenting opinion by Justice Eakin observed that "the SERS counselor had no reasonable cause to do anything but that which [Mr. Vine] instructed. As the legislature created specific statutory liability for not acting in compliance with those instructions, SERS had to act in accordance with them, on pain of statutory liability."[41] Because SERS acted in good faith reliance on the power of attorney, § 5608(b) specifies that SERS shall incur no liability in Mr. Vine's instructions.[42] Justice Eakin stated that the intent of the legislature

> is clearly established by the requirement of good faith. If actual authority were required, the good faith element necessary for immunity would be irrelevant -- there can never be liability for acting on the instructions of an agent with actual authority. There simply is no need for any statute to require good faith as a precursor for immunity, if immunity attaches because actual authority exists. A good faith requirement for immunizing the third party only makes sense if it contemplates a situation where there was no actual authority.[43]

The dissenting opinion by Justice Todd addressed the impracticality of the majority opinion that the statute was supposed to avoid:

> Powers of attorney may empower an agent to engage in a broad range of activities on behalf of the principal, such as real property transactions, financial transactions, and authorizing medical care. Yet, in all these endeavors, by narrowing the immunity provisions to apply only where the power of attorney is in fact valid, the majority has imposed a substantial investigatory burden on the many and varied entities that receive instructions from a putative agent under a power of attorney: to avoid potential liability for following the agent's instructions, a third party must, even where there is no indication that the power of attorney was defectively executed, first assure themselves that the principal was competent at execution and/or have the principal ratify the instructions. (Obviously, requiring the principal to ratify the agent's instructions renders the power of attorney pointless.) . . . Thus, to avoid liability down the road, the majority's interpretation effectively mandates such an investigation before a third party takes even the most routine actions pursuant to a power of attorney. To make matters worse, the third party is potentially liable for damages resulting from any delay in executing the agent's instructions necessitated by such an investigation.[44]

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[41] *Id.* at 1168.

[42] *Id.*

[43] *Id.* at 1169.

[44] *Id.* at 1172-73 (citations and footnotes omitted).

Furthermore, Justice Todd stated that performing this investigation is complicated by the burden shifting in § 5601(c) because if the required statutory notice has been executed, the agent "has no obligation to demonstrate his authority."[45]

Accordingly, Justice Todd "would find SERS was immune from liability under Section 5608(b)."[46]

Experiences of Other States

California

California law provides the following regarding liability and the good faith reliance on a power of attorney:

> 4303. (a) A third person who acts in good faith reliance on a power of attorney is not liable to the principal or to any other person for so acting if all of the following requirements are satisfied:
>
> (1) The power of attorney is presented to the third person by the attorney-in-fact designated in the power of attorney.
>
> (2) The power of attorney appears on its face to be valid.
>
> (3) The power of attorney includes a notary public's certificate of acknowledgment or is signed by two witnesses.
>
> (b) Nothing in this section is intended to create an implication that a third person is liable for acting in reliance on a power of attorney under circumstances where the requirements of subdivision (a) are not satisfied. Nothing in this section affects any immunity that may otherwise exist apart from this section.[47]

[45] *Id.* at 1173 n.8.

[46] *Id.* at 1174.

[47] Cal. Prob. Code § 4303. The official comment states that "[t]his section is intended to ensure that a power of attorney, whether durable or non-durable, will be accepted and relied on by third persons."

Illinois

In 1994, the Illinois Appellate Court held that where a power of attorney is forged, no principal-agent relationship exists; therefore, a third party's good-faith reliance on an apparently valid power of attorney could not shield the third party from liability under the relevant statute immunizing third parties who act "in good faith reliance on a copy of the agency."[48]

After this appellate ruling, Illinois amended its Power of Attorney Act in 1997 to make the immunity apply to "purported" powers of attorney. At that time, Illinois did not require that powers of attorney be witnessed or acknowledged. Currently, Illinois law provides the following regarding reliance on a document purporting to establish an agency:

> (a) Any person who acts in good faith reliance on a copy of a document purporting to establish an agency will be fully protected and released to the same extent as though the reliant had dealt directly with the named principal as a fully-competent person. The named agent shall furnish an affidavit or Agent's Certification and Acceptance of Authority to the reliant on demand stating that the instrument relied on is a true copy of the agency and that, to the best of the named agent's knowledge, the named principal is alive and the relevant powers of the named agent have not been altered or terminated; but good faith reliance on a document purporting to establish an agency will protect the reliant without the affidavit or Agent's Certification and Acceptance of Authority.
>
> (b) Upon request, the named agent in a power of attorney shall furnish an Agent's Certification and Acceptance of Authority to the reliant in substantially the following form:
>
> AGENT'S CERTIFICATION AND ACCEPTANCE OF AUTHORITY
>
> I, ... (insert name of agent), certify that the attached is a true copy of a power of attorney naming the undersigned as agent or successor agent for .... (insert name of principal).
>
> I certify that to the best of my knowledge the principal had the capacity to execute the power of attorney, is alive, and has not revoked the power of attorney; that my powers as agent have not been altered or terminated; and that the power of attorney remains in full force and effect.

[48] *In re Estate of Davis*, 632 N.E.2d 64, 66 (Ill. App. Ct. 1994).

I accept appointment as agent under this power of attorney.
This certification and acceptance is made under penalty of perjury.*

Dated: ……………

……….………………………
(Agent's Signature)
……………………………
(Print Agent's Name)
……………………………
(Agent's Address)

*(NOTE: Perjury is defined in Section 32-2 of the Criminal Code of 1961, and is a Class 3 felony.)

(c) Any person dealing with an agent named in a copy of a document purporting to establish an agency may presume, in the absence of actual knowledge to the contrary, that the document purporting to establish the agency was validly executed, that the agency was validly established, that the named principal was competent at the time of execution, and that, at the time of reliance, the named principal is alive, the agency was validly established and has not terminated or been amended, the relevant powers of the named agent were properly and validly granted and have not terminated or been amended, and the acts of the named agent conform to the standards of this Act. No person relying on a copy of a document purporting to establish an agency shall be required to see to the application of any property delivered to or controlled by the named agent or to question the authority of the named agent.

(d) Each person to whom a direction by the named agent in accordance with the terms of the copy of the document purporting to establish an agency is communicated shall comply with that direction, and any person who fails to comply arbitrarily or without reasonable cause shall be subject to civil liability for any damages resulting from noncompliance. A health care provider who complies with Section 4-7 shall not be deemed to have acted arbitrarily or without reasonable cause.[49]

In 2000, Illinois amended the act to require that (1) its statutory short form powers of attorney for property and financial matters be witnessed and notarized (in 2000) and (2) all powers of attorney (statutory and non-statutory) be witnessed by at least one witness and acknowledged (in 2010).[50]

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[49] 755 Ill. Comp. Stat. 45/2-8.

[50] *Id.* 45/3-3. Even after the change in 2000, a non-statutory power of attorney did not need to be witnessed or notarized, yet third party immunity still applied.

Virginia

The Code of Virginia provides the following:[51]

§ 26-90. Acceptance of and reliance upon acknowledged power of attorney.

A. For purposes of this section and § 26-91, "acknowledged" means verified before a notary public or other individual authorized to take acknowledgments.

B. A person that in good faith accepts an acknowledged power of attorney that has been signed in accordance with § 26-76 without actual knowledge that the power of attorney is void, invalid, or terminated, that the purported agent's authority is void, invalid, or terminated, or that the agent is exceeding or improperly exercising the agent's authority may rely upon the power of attorney as if the power of attorney were genuine, valid, and still in effect, the agent's authority were genuine, valid, and still in effect, and the agent had not exceeded and had properly exercised the authority. The preceding sentence shall not apply to an acknowledged power of attorney that contains a forged signature of the principal.

C. A person that is asked to accept an acknowledged power of attorney may request, and rely upon, without further investigation, any or all of the following:

1. An agent's certification under oath of any factual matter concerning the principal, agent, or power of attorney;
2. An English translation of the power of attorney if the power of attorney contains, in whole or in part, language other than English; and
3. An opinion of the counsel for the principal or the agent, or the opinion of counsel for the person, as to any matter of law concerning the power of attorney if the person making the request provides in a writing or other record the reason for the request.

D. An English translation or an opinion of counsel for the principal or the agent requested under this section shall be provided at the principal's expense.

E. An agent's certification, an English translation, or an opinion of counsel shall be in recordable form if the exercise of the power requires recordation of any instrument under the laws of the Commonwealth.

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[51] The Virginia statute regarding powers of attorney is based on the Uniform Power of Attorney Act, © 2006 by the National Conference of Commissioners on Uniform State Laws. *See*, *e.g.*, §§ 119 & 120 of the uniform act, which provide the basis for Va. Code Ann. §§ 26-90 & 26-91.

F. For purposes of this section and § 26-91, a person that conducts activities through employees and exercises commercially reasonable procedures to communicate information concerning powers of attorney among its employees is without actual knowledge of a fact relating to a power of attorney, a principal, or an agent if the employee conducting the transaction involving the power of attorney has followed such procedures and is nonetheless without actual knowledge of the fact.[52]

§ 26-91. Liability for refusal to accept acknowledged power of attorney.

A. Except as otherwise provided in subsection B:

1. A person shall either accept an acknowledged power of attorney or request a certification, a translation, or an opinion of counsel under subsection C of § 26-90 no later than seven business days after presentation of the power of attorney for acceptance;

2. If a person requests a certification, a translation, or an opinion of counsel under subsection C of § 26-90, the person shall accept the power of attorney no later than five business days after receipt of the certification, translation, or opinion of counsel; and

3. A person may not require an additional or different form of power of attorney for authority granted in the power of attorney presented.

B. A person is not required to accept an acknowledged power of attorney for a transaction if:

1. The person is not otherwise required to engage in the transaction with the principal in the same circumstances, or the principal has otherwise relieved the person from an obligation to engage in the transaction with an agent representing the principal under a power of attorney;

2. Engaging in the transaction with the agent or the principal in the same circumstances would be inconsistent with federal law;

3. The person has actual knowledge of the termination of the agent's authority or of the power of attorney before exercise of the power;

4. A request for a certification, a translation, or an opinion of counsel under subsection C of § 26-90 is refused;

5. The person in good faith believes that the power is not valid or that the agent does not have the authority to perform the act requested, whether or not a certification, a translation, or an opinion of counsel under subsection C of § 26-90 has been requested or provided; or

6. The person makes, or has actual knowledge that another person has made, a report to the local adult protective services department or adult protective services hotline stating a good faith belief that the principal may be subject to physical or financial abuse, neglect,

[52] Va. Code Ann. § 26-90.

exploitation, or abandonment by the agent or a person acting for or with the agent.

C. A person that refuses in violation of this section to accept an acknowledged power of attorney is subject to:

1. A court order mandating acceptance of the power of attorney; and

2. Liability for reasonable attorney fees and costs incurred in any action or proceeding that confirms the validity of the power of attorney or mandates acceptance of the power of attorney.

D. For purposes of this section, "business day" shall refer to any day other than Saturday, Sunday or any day designated as a holiday by the Commonwealth of Virginia or the federal government.[53]

Therefore, Virginia specifies that, except where an acknowledged power of attorney contains a forged signature of the principal, a person may rely on a power of attorney if the person acts in good faith and has no actual knowledge that (1) the power of attorney or the agent's authority is void, invalid or terminated or (2) the agent is exceeding or improperly exercising authority. Except as provided in the statutory exception, if the person refuses to accept an acknowledged power of attorney, the person is subject to (1) a court order mandating acceptance of the power of attorney and (2) liability for reasonable attorney fees and costs incurred to confirm the validity of the power of attorney or mandate the acceptance of the power of attorney.[54]

Washington

Washington provides the following regarding liability for reliance on a power of attorney document:

(1) Any person acting without negligence and in good faith in reasonable reliance on a power of attorney shall not incur any liability.

(2) If the attorney-in-fact presents the power of attorney to a third person and requests the person to accept the attorney-in-fact's authority to act for the principal, and also presents to the person an acknowledged affidavit or declaration signed under penalty of perjury in the form designated in RCW 9A.72.085, signed and dated contemporaneously with

[53] *Id.* § 26-91.

[54] Virginia law requires powers of attorney to be signed and "[a] signature on a power of attorney is presumed to be genuine if the principal acknowledges the signature before a notary public or other individual authorized by law to take acknowledgments." *Id.* § 26-76. *See also* § 105 of the Uniform Power of Attorney Act.

presenting the power of attorney, which meets the requirements of subsection (3) of this section, and the person accepting the power of attorney has examined the power of attorney and confirmed the identity of the attorney-in-fact, then the person's reliance on the power of attorney is presumed to be without negligence and in good faith in reasonable reliance, which presumption may be rebutted by clear and convincing evidence that the person accepting the power of attorney knew or should have known that one or more of the material statements in the affidavit is untrue. It shall not be found that an organization knew or should have known of circumstances that would revoke or terminate the power of attorney or limit or modify the authority of the attorney-in-fact, unless the individual accepting the power of attorney on behalf of the organization knew or should have known of the circumstances.

(3) An affidavit presented pursuant to subsection (2) of this section shall state that:

(a) The person presenting himself or herself as the attorney-in-fact and signing the affidavit or declaration is the person so named in the power of attorney;

(b) If the attorney-in-fact is named in the power of attorney as a successor attorney-in-fact, the circumstances or conditions stated in the power of attorney that would cause that person to become the acting attorney-in-fact have occurred;

(c) To the best of the attorney-in-fact's knowledge, the principal is still alive;

(d) To the best of the attorney-in-fact's knowledge, at the time the power of attorney was signed, the principal was competent to execute the document and was not under undue influence to sign the document;

(e) All events necessary to making the power of attorney effective have occurred;

(f) The attorney-in-fact does not have actual knowledge of the revocation, termination, limitation, or modification of the power of attorney or of the attorney-in-fact's authority;

(g) The attorney-in-fact does not have actual knowledge of the existence of other circumstances that would limit, modify, revoke, or terminate the power of attorney or the attorney-in-fact's authority to take the proposed action;

(h) If the attorney-in-fact was married to the principal at the time of execution of the power of attorney, then at the time of signing the affidavit or declaration, the marriage of the principal and the attorney-in-fact has not been dissolved or declared invalid; and

(i) The attorney-in-fact is acting in good faith pursuant to the authority given under the power of attorney.

> (4) Unless the document contains a time limit, the length of time which has elapsed from its date of execution shall not prevent a party from reasonably relying on the document.
>
> (5) Unless the document contains a requirement that it be filed for record to be effective, a person may place reasonable reliance on it regardless of whether it is so filed.[55]

Legislative Recommendations

Liability

The majority opinion in *Vine* stated "that the arguments articulated by the dissent are best made to the legislative body, which possesses the resources to study the likely effects of broader third-party immunization" and "to balance social policy considerations."[56] The majority added that the General Assembly can amend Pennsylvania law "if it judges the same to be in the best interests of Pennsylvania citizens."[57]

The Advisory Committee believes that Pennsylvania's durable power of attorney law, which was designed to allow an individual to create a system of property and personal management, has worked reasonably well over the years and that any proposed amendment to the law should be thoughtfully considered, so as not to adversely affect the privacy, expediency and efficiency of powers of attorney.

The Advisory Committee first considered amending 20 Pa.C.S. § 5608(b) to add the word "purported," analogous to 755 Ill. Comp. Stat. 45/2-8(a): "A person who acts in good faith reliance on a purported power of attorney shall incur no liability as a result of acting in accordance with the instructions of the agent." However, this amendment would place the risk of loss on the principal in all cases, even in the case of a forged power of attorney; a third party would always immediately accept a power of attorney. Currently, third parties justifiably want some reasonable assurance that a power of attorney is valid, and many already engage in some level of due diligence before accepting a power of attorney. The Advisory Committee believed that this due diligence should continue.

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[55] Wash. Rev. Code § 11.94.040.

[56] *Vine*, 9 A.3d at 1162 (citations omitted).

[57] *Id.* The majority noted that "the Illinois legislature modified its statute to supply greater protection to third parties after *Estate of Davis* was decided. It is possible that our own General Assembly will eventually do likewise. The point here is that it is not our function to make such a revision." *Id.* n.17.

Therefore, the Advisory Committee favored a more comprehensive approach regarding liability and recommends the following amendments to § 5608, along with a comment:

§ 5608. Liability.

(a) Third party liability.--

(1) Any person who is given instructions by a person claiming to be an agent [in accordance with the terms of a] acting under a document appearing to be a valid power of attorney shall comply with the instructions if the action requested is authorized under the terms of the document.

(2) Any person who without reasonable cause fails to comply with those instructions shall be subject to civil liability for any damages resulting from noncompliance.

(3) Reasonable cause under this subsection shall include, but not be limited to, [a] any of the following:

(i) A reasonable good faith belief that:

(A) the document presented is void, invalid or terminated;

(B) the agent's apparent authority is void, invalid or terminated; or

(C) the agent is exceeding or improperly exercising the agent's apparent authority.

(ii) A good faith report having been made by the [third party] person to whom instructions have been given by the agent to the local protective services agency regarding abuse, neglect, exploitation or abandonment pursuant to section 302 of the act of November 6, 1987 (P.L.381, No.79), known as the Older Adults Protective Services Act, or section 302 of the act of October 7, 2010 (P.L.484, No.70), known as the Adult Protective Services Act.

(b) Third party immunity.--Any person who reasonably acts in good faith reliance on a document appearing to be a valid power of attorney shall incur no liability as a result of acting in accordance with the instructions of the person claiming to be an agent.

Comment

The amendment of this section reverses the Supreme Court's decision in *Vine v. Commonwealth*, 9 A.3d 1150 (Pa. 2010) to provide, as originally intended, full immunity for third parties who rely in good faith on a power of attorney and to maintain the continued widespread acceptance by third parties of powers of attorney. This immunity is intended to apply even in the case of a power of attorney that is forged, signed by an incapacitated person or the product of undue influence, provided that the third party reasonably relies upon it in good faith. This amendment retroactively applies to existing powers of attorney.

The Advisory Committee agreed that the amendment of § 5608 should apply to (1) a power of attorney executed before, on or after the effective date of the act and (2) an action, by a third party or person to whom instructions have been given by an agent, occurring before, on or after the effective date of the act. In addition, the Advisory Committee agreed that the amendment of § 5608 should take effect immediately.

Copy of Power of Attorney

In determining how to amend the liability provisions, the Advisory Committee considered whether to specifically address *a copy* of a document appearing to be a valid power of attorney. The Advisory Committee resolved that its previously recommended amendment of 20 Pa.C.S. § 5602 adequately addressed the issue:[58]

> § 5602. Form of power of attorney.
>
> * * *
>
> (c) Filing of power of attorney.--An originally executed [copy of the] power of attorney may be filed with the clerk of the orphans' court division of the court of common pleas in the county in which the principal resides, and if it is acknowledged, it may be recorded in the office for the recording of deeds of the county of the principal's residence and of each county in which real property to be affected by an exercise of the power is located. The clerk of the orphans' court division or any office for the recording of deeds with whom the power has been filed, may, upon request, issue certified copies of the power of attorney. Each such certified copy shall have the same validity and the same force and effect as if it were the original, and it may be filed of record in any other office of this Commonwealth (including, without limitation, the clerk of the orphans' court division or the office for the recording of deeds) as if it were the original.
>
> (d) Copy of power of attorney.--Except for the purpose of filing under subsection (c), a photocopy or electronically transmitted copy of an originally executed power of attorney has the same effect as the original.

The Advisory Committee agreed that the foregoing amendments to § 5602 should take effect immediately.

[58] *See supra* note 9.

Execution of Power of Attorney

The Advisory Committee previously recommended the amendment of 20 Pa.C.S. § 5601(b) regarding the execution requirements for a power of attorney, which it revised slightly following the 2011 annual meeting:[59]

> § 5601. General provisions.
> * * *
> (b) Execution.--A power of attorney shall be dated, and it shall be signed [and dated] by the principal by signature or mark, or by another individual on behalf of and at the direction of the principal if the principal is unable to sign but specifically directs another individual to sign the power of attorney. [If the power of attorney is executed by mark or by another individual, then it] The power of attorney shall be witnessed by two individuals, each of whom is 18 years of age or older. A witness shall not be an agent appointed in the power of attorney or the individual who signed the power of attorney on behalf of and at the direction of the principal.
> * * *

Subsequent to the 2011 annual meeting, the Advisory Committee developed the following comment regarding § 5601(b):[60]

Comment

> Two witnesses are now required for powers of attorney under Chapter 56, not just for a principal whose power of attorney is executed by mark or by another individual at the principal's direction. This execution requirement is the same as that under Chapter 54, which concerns health care powers of attorney. However, an agent appointed under a Chapter 56 power of attorney may not be a witness, whereas that limitation is not present for a health care power of attorney under Chapter 54. A notary may not act as one of the required witnesses.

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[59] *See supra* note 9. The Advisory Committee modified the first sentence by replacing "dated and signed" with "dated, and it shall be signed" to clarify that the power of attorney may be dated by a person other than the principal.

[60] Although the comment to § 5601(b) is similar to the one set forth in the March 2010 Joint State Government Commission report, it is modified in light of the newly proposed provisions regarding an acknowledgment and affidavits. The first two sentences of the previous comment are the same. However, the previous comment continued as follows:

> However, an agent appointed under a Chapter 56 power of attorney may not be a witness. Notarization is still not required for a power of attorney, though it is universally viewed as good practice where the specific circumstances permit. A notary may act as one of the required witnesses because the notary is only taking the acknowledgment of the principal, not the witnesses.

The Advisory Committee agreed that the amendment of § 5601(b) should take effect in six months and only apply to powers of attorney executed on or after the effective date of the act.

Acknowledgment and Affidavits

The Advisory Committee favored the inclusion of statutory provisions regarding an acknowledgment by the principal and affidavits by the two witnesses.[61] Accordingly, the Advisory Committee recommends the following new 20 Pa.C.S. § 5601(b.1) and a comment:

(b.1) Acknowledgment and affidavits.--

(1) In addition to the requirements under subsection (b):

(i) A power of attorney shall be acknowledged by the principal as provided in this subsection.

(ii) The witnesses to a power of attorney shall provide affidavits as provided in this subsection. A witness may not be the individual who takes the principal's acknowledgment. A separate affidavit may be used for each witness whose affidavit is not taken at the same time as the principal's acknowledgment.

(2) The acknowledgment of the principal and the affidavits of the witnesses shall be:

(i) Made before:

(A) an officer authorized to administer oaths under the laws of this Commonwealth or under the laws of the state where execution occurs; or

(B) an attorney at law and certified to such an officer as provided in paragraph (3).

(ii) Evidenced by the officer's certificate, under official seal.

(iii) Attached or annexed to the power of attorney.

(iv) In substantially the same form and content as follows:

Acknowledgment by Principal

Commonwealth of Pennsylvania (or State of ____________)
County of ____________

The principal whose name is signed to the attached or foregoing instrument, having been duly qualified according to law, did hereby acknowledge that he or she signed the instrument as a power of attorney willingly and as a free and voluntary act for the purposes therein expressed.

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[61] These provisions are analogous to those regarding a self-proving affidavit for a will under 20 Pa.C.S. § 3132.1(b) and (c). However, the principal under new § 5601(b.1) does not need to sign the acknowledgment for the power of attorney, since he or she will have already signed the power of attorney itself.

Sworn to or affirmed and acknowledged before me by ______________________________, the principal, this ______ day of ______________, 20____.

____
(Signature of officer or attorney)
(Seal and official capacity of officer or state of admission of attorney and Supreme Court Identification No.)

Affidavit by Witnesses

Commonwealth of Pennsylvania (or State of ____________)
County of ____________

We (or I) ________________ and ________________, the witness(es) whose name(s) are (is) signed to the attached or foregoing instrument, being duly qualified according to law, do depose and say that we were (I was) present and saw the principal sign the instrument as a power of attorney willingly and as a free and voluntary act for the purposes therein expressed, that we (or I) signed the power or attorney as witness(es) in the hearing and sight of the principal, and that to the best of our (my) knowledge the principal was at that time 18 or more years of age, of sound mind and under no constraint or undue influence.

Sworn to or affirmed and subscribed before me by ________________ and ________________, witness(es), this ______ day of ______________, 20____.

____
Witness

____
Witness

____

____
(Signature of officer or attorney)
(Seal and official capacity of officer or state of admission of attorney and Supreme Court Identification No.)

(3) The acknowledgment of the principal and the affidavit of a witness required by this subsection may be made before a member of the bar of the Supreme Court of Pennsylvania or of the highest court of the state in which execution of the power of attorney occurs who certifies to an officer authorized to administer oaths that the acknowledgment and affidavits were made before that member of the bar. In such case, in addition to the acknowledgment and affidavits required by this subsection, the attorney's certification shall be

evidenced by the officer before whom it was made substantially as follows:

Commonwealth of Pennsylvania (or State of ____________)
County of ____________
On this, the ________________ day of _______________, 20____, before me ________________, the undersigned officer, personally appeared ________________, known to me or satisfactorily proven to be a member of the bar of the highest court of (Pennsylvania or the state in which execution of the power of attorney took place), and certified that he or she was personally present when the foregoing acknowledgment and affidavits were made by the principal and witnesses.
In witness whereof, I hereunto set my hand and official seal.

____
(Signature, seal and official capacity of officer)

Comment

An acknowledgment is now required for the principal, and affidavits are now required for the witnesses, similar to a self-proving affidavit for a will, in order to heighten the formality required and the responsibility of the witnesses for execution in the situation of the invalidity of the power of attorney. Unlike a self-proving affidavit, the principal does not need to sign the acknowledgment under subsection (b.1) since the principal will have already signed the power of attorney at the end as well as the required notice at the beginning of the power of attorney. The acknowledgment and affidavits should serve as additional protection for the principal who is bearing this risk of loss.

Under 42 Pa.C.S. § 327, certification by an attorney must be in accordance with section 7(5) of the Uniform Acknowledgment Act and include the attorney's Supreme Court identification number.

Section 5608(b) imposes upon the principal the risk of loss vis-à-vis a third party as to a forged power of attorney or an invalid power of attorney due to the principal's incapacity or where procured through undue influence.

The Advisory Committee agreed that the addition of § 5601(b.1) should take effect in six months and only apply to powers of attorney executed on or after that effective date.

Limitation on Applicability

The Advisory Committee further stated that § 5601(b) and (b.1) should not apply to (1) a power or a power of attorney contained in an instrument used in a commercial transaction which simply authorizes an agency relationship or (2) a power of attorney which exclusively provides for health care decision making. Accordingly, the Advisory Committee recommends the amendment of § 5601(e.1) and (e.2) to include those limitations:

§ 5601. General provisions.

* * *

(e.1) Limitation on applicability in commercial transaction.--

(1) Subsections (b), (b.1), (c), (d) and (e) do not apply to a power or a power of attorney contained in an instrument used in a commercial transaction which simply authorizes an agency relationship. This paragraph includes the following:

(i) A power given to or for the benefit of a creditor in connection with a loan or other credit transaction.

(ii) A power exclusively granted to facilitate transfer of stock, bonds and other assets.

(iii) A power contained in the governing document for a corporation, partnership or limited liability company or other legal entity by which a director, partner or member authorizes others to do other things on behalf of the entity.

(iv) A warrant of attorney conferring authority to confess judgment.

(v) A power given to a dealer as defined by the act of December 22, 1983 (P.L.306, No.84), known as the Board of Vehicles Act, when using the power in conjunction with a sale, purchase or transfer of a vehicle as authorized by 75 Pa.C.S. § 1119 (relating to application for certificate of title by agent).

(2) Powers and powers of attorney exempted by this subsection need not be dated.

(e.2) Limitation on applicability in health care power of attorney.-- Subsections (b), (b.1), (c) and (d) do not apply to a power of attorney which exclusively provides for health care decision making.

* * *

The Advisory Committee agreed that the foregoing amendments should take effect in six months.

Guardianships and Health Care

A guardian of the person must "assert the rights and best interests of the incapacitated person."[62] The guardian shall:

(1) Respect the expressed wishes and preferences of the incapacitated person as much as possible.

(2) Appropriately assure and participate in the development of a plan of supportive services to meet the person's needs which explains how services will be obtained.

(3) Encourage the incapacitated person to participate as much as he can in all decisions that affect him, to act on his own behalf whenever he can and to develop or regain his highest capacity to manage his personal affairs.

However, some powers and duties of a guardian of the person regarding health care are statutorily limited:

> (d) Powers and duties only granted by court.--Unless specifically included in the guardianship order after specific findings of fact or otherwise ordered after a subsequent hearing with specific findings of fact, a guardian or emergency guardian shall not have the power and duty to:
>
> (1) Consent on behalf of the incapacitated person to an abortion, sterilization, psychosurgery, electroconvulsive therapy or removal of a healthy body organ.
>
> (2) Prohibit the marriage or consent to the divorce of the incapacitated person.
>
> (3) Consent on behalf of the incapacitated person to the performance of any experimental biomedical or behavioral medical procedure or participation in any biomedical or behavioral experiment.[63]

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[62] 20 Pa.C.S. § 5521(a). An incapacitated person is a person who has been determined to be "an adult whose ability to receive and evaluate information effectively and communicate decisions in any way is impaired to such a significant extent that he is partially or totally unable to manage his financial resources or to meet essential requirements for his physical health and safety." *Id.* § 5501.

[63] *Id.* § 5521(d).

In addition, "[t]he court may not grant to a guardian a power that is controlled by other statute," which includes the power "[t]o admit the incapacitated person to an inpatient psychiatric facility or State center for the mentally retarded."[64]

There is no general power to make health care decisions listed in 20 Pa.C.S. § 5521. Nevertheless, an emergency guardian of the person is often appointed precisely to decide emergency medical care.

Under the Health Care Agents and Representatives Act,[65] a health care agent is defined as an individual designated by a principal in a health care power of attorney, living will or a written combination of the two.[66] The act provides for the accountability of a 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 by a court, 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 appointment of a health care agent that the principal would have if the principal were not incapacitated but may not revoke or amend other instructions in an advance health directive absent judicial authorization.[67]

The Advisory Committee previously recommended the amendment of 20 Pa.C.S. § 5460(a) regarding the court's determination of the extent of the health care agent's authority when a guardian is appointed:[68]

> § 5460. 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 by a court, 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 appointment of a health care agent that the principal would have if the principal were not incapacitated but may not

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[64] *Id.* § 5521(f)(1). Procedures for such admission are governed by the Mental Health and Mental Retardation Act of 1966 (Act of Oct. 20, 1966, Sp. Sess. 3, P.L. 96, No.6); 50 P.S. §§ 4101-4704.

[65] 20 Pa.C.S. §§ 5451-65.

[66] *Id.* § 5422.

[67] *Id.* § 5460(a). Although this provision might imply that a guardian should have greater authority than a health care agent, rather than less, the court in *In re D.L.H.*, *infra* pp. 35-36, holds otherwise.

[68] The proposed amendment of § 5460(a) appears in the March 2010 report and Senate Bill Nos. 96 and 1358. *See supra* note 9.

> revoke or amend other instructions in an advance health directive absent judicial authorization.] <u>In its guardianship order and determination of a person's incapacity, the court shall determine the extent to which the health care agent's authority to act remains in effect.</u>
>
> * * *

The Health Care Agents and Representatives Act also expressly preserves existing rights and responsibilities.[69] Importantly, the act provides for a new category of health care decision-maker -- a health care representative. A health care representative may make a health care decision for an individual if:

> (1) The individual's attending physician has determined that the individual is incompetent.
>
> (2) The individual is at least 18 years old, has graduated from high school, has married or is an emancipated minor.
>
> (3) The individual does not have a health care power of attorney or (if the individual does have one) the individual's agent is not reasonably available or has indicated an unwillingness to act and no alternate health care agent is reasonably available.
>
> (4) A guardian of the person to make health care decisions has not been appointed for the individual.[70]

The phrase "to make health care decisions"[71] is used more than once in the Health Care Agents and Representatives Act with a description of "guardian of the person," reflecting the fact that often it is precisely for the purpose of making health care decisions that a guardian of the person is appointed. On the other hand, routine guardianship petitions may simply request the appointment of a guardian of the estate and the guardian of the person without particular thought to whether the guardian of the person is to decide specific medical care, particularly involving end-of-life care.

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[69] 20 Pa.C.S. § 5421(b).

[70] *Id.* § 5461(a).

[71] A health care decision is a decision regarding an individual's health care, including, but not limited to, the (1) selection and discharge of a health care provider; (2) approval or disapproval of a diagnostic test, surgical procedure or program of medication and (3) directions to initiate, continue, withhold or withdraw all forms of life-sustaining treatment, including instructions not to resuscitate. *Id.* § 5422.

The act addresses compliance with the decisions of a health care agent or representative as follows:

> Health care necessary to preserve life shall be provided to an individual who has neither an end-stage medical condition nor is permanently unconscious, except if the individual is competent and objects to such care or a health care agent objects on behalf of the principal if authorized to do so by the health care power of attorney or living will. In every other case, 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 or health care representative to the same extent as if the decision had been made by the principal.[72]

Finally, the act specifies that a health care decision made by a health care representative for a principal is effective without court approval.[73]

The act offers no specific guidance with respect to the power of a guardian of the person to decide health care at the end of life of a principal (*e.g.*, does, or should, the act require a court order in all cases?).

In re Fiori

Pennsylvania's seminal case of *In re Fiori*[74] provides the necessary background to the common law of life-sustaining treatment decided by a surrogate for an incompetent patient with no hope of recovery. The Supreme Court held that with the certification of two physicians but without court involvement, a close relative acting as substitute decision maker may remove life-sustaining treatment from an adult patient who is in a permanent vegetative state where the patient left no advance directive.[75]

Daniel Fiori suffered severe head injuries when he was approximately 20 years old, causing his cognitive abilities to become severely limited; four years later, he suffered a second head injury, leaving him in a persistent vegetative state.[76]

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[72] *Id.* § 5462(c)(1).

[73] *Id.* § 5461(j).

[74] 673 A.2d 905 (Pa. 1996).

[75] *Id.* at 912-13.

[76] *Id.* at 908. A vegetative state describes a body that is functioning entirely in terms of its internal controls and maintains temperature, heart beat and pulmonary ventilation, digestive activity and reflex activity of muscles and nerves for low level conditioned responses. However, there is no behavioral evidence of self-awareness or awareness of the surroundings in a learned manner. *Id.*

> In this condition, all Fiori's cognitive brain functions were inoperative. He felt no pain or pleasure, and he was unable to communicate with others. Since Fiori had no capacity for voluntary muscular movements, his life functions were maintained by the provision of medications, fluids, and nutrition through a gastrostomy tube, a tube which is surgically inserted in the stomach. There was no hope of Fiori ever recovering.[77]

Several years after Fiori's second accident, his mother was appointed guardian of his person. More than a decade after becoming Fiori's guardian and 20 years after his initial injuries, his mother requested that the nursing center remove his gastrostomy tube. Because the nursing home refused to comply with this request without a court order, she petitioned the Court of Common Pleas for an order to terminate treatment.[78]

The Attorney General appeared in the proceedings to request an independent medical expert; the court granted that request and made the appointment.[79]

Entered into evidence were the opinions of two neurologists, one retained by Fiori's mother and the other the court-appointed independent expert. Both neurologists agreed that within a reasonable degree of medical certainty, Fiori's condition would not improve and he would remain in a persistent vegetative state. Although Fiori never spoke to his mother about his wishes should he ever be in a persistent vegetative state, she believed that he would want the gastrostomy tube removed. The trial granted the motion by Fiori's mother, and the Attorney General appealed.[80]

The Superior Court affirmed, holding "that the decision to remove life sustaining treatment from an adult in a [persistent vegetative state] who did not leave directions as to the maintenance of life support may be made by a close family member and two qualified physicians without court approval."[81]

The Supreme Court affirmed the decisions below after review of the history of the right to refuse medical treatment and its deep roots in our common law.[82] It reviewed the four state interests most commonly recognized by the courts: (1) protection of third parties and dependents, (2) prevention of suicide, (3) protection of the ethical integrity of the medical community and (4) preservation of life.[83] It then held that a persistent vegetative state "patient's right to self-determination outweighs any interest the state may

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[77] *Id.*

[78] *Id.* at 908-909.

[79] *Id.* at 909.

[80] *Id.*

[81] *Id.*

[82] *Id.* at 909-10.

[83] *Id.* at 910.

have in maintaining life sustaining treatment for the patient."[84] The Court rested its decision on the common law right to self-determination, avoiding a constitutional holding and not relying on or requiring statutory support.[85]

Having recognized that right, the Supreme Court addressed how the patient's wishes may be carried out. The Supreme Court concluded that the substituted judgment approach, rather than a best interests approach, is proper.[86] The Court held "that a close family member is well-suited to the role of substitute decision-maker"[87] because "[c]lose family members are usually the most knowledgeable about the patient's preferences, goals and values; they have an understanding of the nuances of our personality that set us apart as individuals."[88]

The final and critical question decided in *Fiori* is the role the judiciary should play in situations such as this:

> We believe that where the physicians and the close family member are in agreement, and there is no dispute between "interested parties," there is no need for court involvement. . . . The court's involvement in "substantive decisions concerning medical treatment should be limited to resolving disputes . . . Where . . . all affected parties concur in the proposed plan of medical treatment, court approval of the proposed plan of medical treatment is neither necessary nor required."[89]

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[84] *Id.*

[85] *Id.* at 909.

[86] *Id.* at 912.

[87] *Id.*

[88] *Id.* (citation omitted).

[89] *Id.* at 913 (citations omitted). The Supreme Court quoted the Superior Court's opinion in *Fiori*, which stated that the judiciary has no role to play:

> where there is a loving family, willing and able to assess what the patient would have decided as to his or her treatment, all necessary medical confirmations are in hand, and no one rightfully interested in the patient's treatment disputes the family decision. Those who disagree with this view and who favor court intervention in every case often cite the need for the court to protect the patient. Underlying this rationale is the philosophy that only courts can provide the necessary safeguards to ensure protection of life. This is a narrow and unhealthy view. It violates the essential and traditional respect for family. It is yet another expansion of the idea that courts in our society are the repository of wisdom and the only institution available to protect human life and dignity.

Id. (citations omitted), *quoting In re Fiori*, 652 A.2d 1350, 1358 (Pa. Super. Ct. 1995).

The General Assembly intended to preserve the rights established by *Fiori* and specifically provided that nothing in Chapter 54 (Health Care) is intended to "affect or supersede the holdings of *In re Fiori.*"[90]

In re D.L.H.

The court in *D.L.H.* considered whether a plenary guardian "can refuse life-preserving medical treatment on behalf of a person who lacks -- and has always lacked -- the capacity to make personal healthcare decisions, where the person is neither suffering from an end-stage medical condition nor permanently unconscious."[91]

D.L.H. (David), a 53-year old man, "has suffered from profound mental retardation since birth and has resided at . . . a Department of Public Welfare ("DPW") facility, for nearly his entire life."[92] He was adjudicated incapacitated, and his parents were appointed his plenary guardians.[93] When David developed aspiration pneumonia which required him to be placed on a mechanical ventilator, his parents attempted to decline that treatment on his behalf, asserting that it was not in his best interest.[94] The hospital denied the parents' request to withhold that treatment, and David remained on the ventilator for several weeks, after which time his condition improved and the ventilator was no longer required.[95]

Because of the dispute over David's medical care, his parents petitioned to be appointed his health care agents.[96] They argued that "although David had been incapacitated since birth, he retained the inherent right to make medical decisions under *Fiori* -- including the right to refuse life-preserving treatment -- and such right extended to them as his plenary guardians."[97]

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[90] 20 Pa.C.S. § 5423(a) (citation omitted).

[91] *D.L.H.*, 2 A.3d at 507.

[92] *Id.*

[93] *Id.* Under Pennsylvania law, "[t]he court may appoint a plenary guardian of the person only upon a finding that the person is totally incapacitated and in need of plenary guardianship services." 20 Pa.C.S. § 5512.1(c).

[94] *D.L.H.*, 2 A.3d at 507.

[95] *Id.*

[96] *Id.* A health care agent "normally has the same authority as a competent principal to make health care decisions concerning the principal's care with no requirement of court approval." *Id.* at 508. The Supreme Court noted that "[d]espite the technical mootness of the issues raised [by David's parents], the [orphans'] court decided to resolve the matter." *Id.*

[97] *Id.*

The orphans' court appointed counsel for David, who "expressed concern that a guardian's decision-making should be consistent with the medical recommendations where the life of the incapacitated person is at stake."[98]

DPW successfully opposed the petition of David's parents, based on 20 Pa.C.S. § 5462(c)(1).[99] Although DPW acknowledged that *Fiori* vindicates the rights of incompetent persons to make medical decisions via a surrogate in certain situations, that holding "was closely and carefully limited by the Court to circumstances in which the incompetent person is in a permanent vegetative state."[100]

The orphans' court agreed with DPW's position, and the petition of David's parents was denied. David's parents appealed to the Superior Court, which affirmed on different grounds.[101] The Superior Court held that when a lifelong incapacitated person does not have an end-stage medical condition or is not in a permanent vegetative state, his plenary guardians have no implicit authority to decline life-preserving medical treatment, and they may be so empowered only if they can establish to the satisfaction of the court, by clear and convincing evidence, that death is in the incapacitated person's best interest; in the present case, David's parents did not meet this burden of proof.[102]

The Supreme Court held "where . . . life-preserving treatment is at issue for an incompetent person who is not suffering from an end-stage condition or permanent unconsciousness, and that person has no health care agent, the [Health Care Agents and Representatives] Act mandates that care must be provided."[103]

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[98] *Id.*

[99] *Infra* p. 71.

[100] *D.L.H.*, 2 A.3d at 509 (citation omitted).

[101] 967 A.2d 971 (Pa. Super. Ct. 2009).

[102] *D.L.H.*, 2 A.3d at 509-10.

[103] *Id.* at 515. The Supreme Court found no authority for anyone other than a competent patient or a duly authorized agent to decline care necessary to preserve life, in the absence of an end-stage medical condition or permanent unconsciousness. The Supreme Court rejected the argument of David's parents that since a guardian can modify or terminate a health care agent's authority, the guardian's power must be at least as great as that of an agent. Therefore, a guardian cannot create that agency or subsume its full powers in a matter of life and death. *Id.*

Legislative Recommendations

The *D.L.H.* ruling has prompted controversy and uncertainty as to whether a court-appointed guardian has the power to make a decision to withhold or withdraw health care necessary to preserve life even when the incapacitated person is in an end-stage medical condition, unless there is a specific court order granting that power to the guardian. As a result, some physicians are not entering a Do-Not-Resuscitate order for an incapacitated patient even when the patient is in the process of actively dying, because there is no court order specifically granting the guardian that power. This may result in unnecessary suffering while this uncertainly exists.[104]

At its 2011 annual meeting, the Advisory Committee favored statutory clarity for the courts and medical profession and specifically addressed the issue of whether a guardian of the person should have the same powers as a health care representative. The Advisory Committee considered a new § 5521(d.1) regarding health care decisions to provide that a guardian of the person has the same authority to make health care decisions on behalf of the incapacitated person as a health care representative under § 5461(c)[105] subject to (1) any limitations and conditions set forth in the order of appointment; (2) the same health care decision-making process as prescribed in §§ 5456(c);[106] (3) the same limitations under §§ 5429[107] and 5462(c),[108] including the requirement that health care necessary to preserve life be given to an individual who has neither an end-stage medical condition nor is permanently unconscious; (4) § 5521(d) and (f)[109] and (5) any other

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[104] In some instances, the guardianship for such an incapacitated person has been terminated in favor of the appointment of a health care representative, who could exercise that power without further court order.

[105] *Infra* p. 69.

[106] *Infra* pp. 67-68.

[107] *Infra* pp. 66-67.

[108] *Infra* p. 71.

[109] Section 5521(d) and (f) provide the following:

> (d) Powers and duties only granted by court.--Unless specifically included in the guardianship order after specific findings of fact or otherwise ordered after a subsequent hearing with specific findings of fact, a guardian or emergency guardian shall not have the power and duty to:
>
> (1) Consent on behalf of the incapacitated person to an abortion, sterilization, psychosurgery, electroconvulsive therapy or removal of a healthy body organ.
>
> (2) Prohibit the marriage or consent to the divorce of the incapacitated person.
>
> (3) Consent on behalf of the incapacitated person to the performance of any experimental biomedical or behavioral medical procedure or participation in any biomedical or behavioral experiment.
>
> (f) Powers and duties not granted to guardian.--The court may not grant to a guardian powers controlled by other statute, including, but not limited to, the power:

provision regarding health care representatives as set forth in Chapter 54, except § 5461(d).[110]

The Advisory Committee also considered a comment to new § 5521(d.1), specifying that (1) the provision clarifies and coordinates the exercise of health care decision-making powers of a guardian consistent with the Health Care Agents and Representatives Act[111] and the *D.L.H.* decision; (2) neither a guardian nor a health care representative can refuse or withdraw health care necessary to preserve life for a person who is not in an end-stage medical condition nor permanently unconscious (only a competent patient or a duly authorized health care agent can do that); (3) the special limitations relating to pregnancy in § 5429 continue to apply, and the present requirement of a prior court order is preserved for certain intrusive and irreversible treatment, such as abortion, sterilization, electroconvulsive therapy or experimental medical treatment; and (4) inpatient psychiatric admissions continue to be governed separately under the Mental Health and Mental Retardation Act of 1966.[112]

In discussing this topic of health care decision-making powers, the Advisory Committee reviewed two alternatives, one recognizing the ability of a guardian of the person to make most health care decisions without a prior court order (including the withdrawal of life-sustaining treatment for a person who is in an end-stage medical condition or permanently unconscious, provided that the protective decision-making process required by § 5456 is followed), and the other requiring a guardian of the person to obtain an order of court, based on specific findings of fact, to withhold or withdraw care necessary to preserve the life of the incapacitated person (even if the incapacitated person has an end-stage medical condition or is permanently unconscious).

After considerable discussion, the Advisory Committee agreed that the health care decision-making powers of a guardian should be equivalent to those of a health care representative. The Advisory Committee concluded that to require a court order in every case involving a guardian, even where the incapacitated person is in an end-stage medical condition or is permanently unconscious, would specifically overrule the *Fiori* decision for a patient who was in a persistent vegetative state. While *Fiori* involved a persistent vegetative state and not an end-stage medical condition, the Advisory Committee reasoned that there should be no distinction between a state of permanent unconsciousness and the far more common end-stage medical condition, a state into which almost everyone eventually descends.

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(1) To admit the incapacitated person to an inpatient psychiatric facility or State center for the mentally retarded.

(2) To consent, on behalf of the incapacitated person, to the relinquishment of the person's parental rights.

[110] *Infra* pp. 69-70.

[111] 20 Pa.C.S. §§ 5451-65.

[112] 50 P.S. §§ 4101-4704.

The Advisory Committee held that clearly equating the powers of the guardian of the person to the health care representative provides the simplest and most easily understandable rule for health care decision-making. But more importantly, it is likely the best rule to effectuate the most personal right of individuals -- the right to determine their own medical care. The decision in such cases should be made in the home (and where necessary, the hospital) and not in the courtroom, unless there is an active disagreement which is brought to the court's attention. The appointment of a guardian of the person already has significantly more safeguards than the statute requires of a health care representative, who is generally self-elected based upon the order of priority provided by the statute. The requirement of a court order in every case for an incapacitated party is likely to significantly interfere with the delivery of appropriate care to the incapacitated person at the end of life.

The Advisory Committee also recommended that: (1) a petition for a guardianship of the person that is filed on or after the effective date of the amendment should contain an averment as to the health care decision-making powers that the proposed guardian of the person will have if appointed, with specific reference to any applicable limitation on end-of-life decision-making; (2) notice of a petition or hearing should contain this same information; (3) on or after the effective date of the amendment, every order of appointment for a guardian of the person should specify whether the guardian of the person has all the powers of a health care representative and whether there is any limitation on those powers and (4) a guardian of the person should consult as much as practicable with the incapacitated person's close family members in making health care decisions, particularly those involving end-of-life health care.

Furthermore, with respect to existing guardianships, the Advisory Committee generally agreed that a guardian of the person should have the same powers as a health care representative and that health care decisions by the guardian should be able to be made without court order. However, in recognition of the situation where a guardian of the person is appointed without particular or specific consideration of whether he or she is the best person to make important health care decisions -- particularly end-of-life decisions -- the Advisory Committee favored flexibility to allow a health care representative to assume authority if there is agreement that the health care representative is the more appropriate health care decision-maker.

Accordingly, the Advisory Committee recommends the following new § 5521(d.1), along with a comment, and the following amendment of § 5511(e), to take effect in 60 days:

§ 5521. Provisions concerning powers, duties and liabilities.

* * *

(d.1) Health care decisions.--

(1) Subject to the following, a guardian of the person shall have the same authority to make health care decisions on behalf of the incapacitated person as a health care representative under section 5461(c) (relating to decisions by health care representative), and a

health care decision by the guardian of the person shall be effective without court approval as with a health care representative under section 5461(j):

(i) Any limitations and conditions set forth in the order of appointment.

(ii) The same health care decision-making process as prescribed in section 5456(c) (relating to authority of health care agent).

(iii) The same limitations under sections 5429 (relating to pregnancy) and 5462(c) (relating to duties of attending physician and health care provider), including the requirement that health care necessary to preserve life be given to an individual who has neither an end-stage medical condition nor is permanently unconscious.

(iv) Subsection (d).

(v) Subsection (f).

(vi) Any other provision regarding health care representatives as set forth in Chapter 54 (relating to health care), except section 5461(d) regarding who may act as health care representative.

(2) To the extent practicable, a guardian of the person shall consult with close family members of the incapacitated person in making a health care decision, particularly one involving end-of-life decision-making.

(3) A petition that is filed for the appointment of a guardian of the person under section 5511 (relating to petition and hearing; independent evaluation) on or after (in preparing this act for printing in the Laws of Pennsylvania and the Pennsylvania Consolidated Statutes, the Legislative Reference Bureau shall insert here, in lieu of this statement, the effective date of this section) shall state whether it is proposed that the guardian of the person shall have the power to make health care decisions and, if so, whether the guardian shall have all the powers of a health care representative to make health care decisions as defined in section 5422 (relating to definitions), including decisions involving health care necessary to preserve life if the incapacitated person were to be in an end-stage medical condition or be permanently unconscious, and any limitation of those powers.

(4) Notice of a petition or hearing under section 5511 shall contain the information under paragraph (3).

(5) An order of appointment of a guardian of the person that is issued on or after (in preparing this act for printing in the Laws of Pennsylvania and the Pennsylvania Consolidated Statutes, the Legislative Reference Bureau shall insert here, in lieu of this statement, the effective date of this section) shall specify whether the guardian of the person shall have the power to make health care decisions and, if so, whether the guardian shall have all the powers of a health care representative to make health care decisions as defined in

section 5422, including decisions involving health care necessary to preserve life if the incapacitated person were to be in an end-stage medical condition or be permanently unconscious, and any limitation of those powers.

(6) A guardian of the person appointed before (in preparing this act for printing in the Laws of Pennsylvania and the Pennsylvania Consolidated Statutes, the Legislative Reference Bureau shall insert here, in lieu of this statement, the effective date of this section) shall have the same powers as a health care representative unless:

(i) a prior court order has limited the power of the guardian of the person to make health care decisions; or

(ii) a health care representative is available and assumes authority to act by agreement between the health care representative and the guardian of the person, in which case the guardian of the person shall thereafter have no health care decision-making powers.

* * *

Comment

Subsection (d.1) clarifies and coordinates the exercise of health care decision-making powers of a guardian consistent with the provisions of the Health Care Agents and Representatives Act (20 Pa.C.S. §§ 5451-5465) and *In re D.L.H.*, 2 A.3d 505 (Pa. 2010). Neither a guardian nor a health care representative can refuse or withdraw health care necessary to preserve life for a person who is not in an end-stage medical condition nor permanently unconscious. Only a competent patient or a duly authorized health care agent can do that. At the same time, this subsection clarifies that unless limited or conditioned in the order appointing the guardian, the powers of the guardian of the person allow most health care decisions to be made without a prior court order, including the withdrawal of life-sustaining treatment for a person who is in an end-stage medical condition or permanently unconscious, provided that the protective decision-making process required by § 5456 is followed. This rule is consistent with the Supreme Court decision of *In re Fiori*, 673 A.2d 905 (Pa. 1996), which confirmed the power in a close family member to withdraw life-sustaining care without a prior order of court from a patient in a persistent vegetative state where there was no disagreement among the parties in interest, including the physicians, the family members, the guardian and the medical facility. Subsection (d.1) is not intended to undermine the importance of those close family members in this decision-making process. In such cases, it is particularly important that the guardian consult with those close family members, especially where the health care decision involves end-of-life decision-making.

With respect to a guardianship petition and order of appointment filed or issued on or after the effective date of subsection (d.1), the issue of whether the guardian of the person should have the same health care decision-making powers as a health care representative should be addressed in the petition, notice and order of appointment. The court has the discretion to appoint the guardian of the person without the power to make health care decisions, in which case a health care representative may assume that role.

With respect to a guardianship petition and order of appointment filed or issued before the effective date of subsection (d.1), the guardian of the person is intended to have all the powers of a health care representative, except where the court order limits those powers or where a health care representative has assumed authority to act by agreement with the guardian of the person. This concept is intended to introduce flexibility where a third party or agency is appointed as the guardian of the person and a health care representative (who is a family member or close friend) is available to act as a health care decision-maker. In such a case, if the health care representative and the guardian of the person agree, the health care representative may act without further court action. This agreement is not intended as a veto power in the guardian of the person. Rather, it reflects the policy of allowing decisions to be made without court action as in *Fiori* wherever there is no dispute among the parties in interest, which must include the guardian of the person and the proposed health care representative. If there is disagreement as to who should make the health care decisions, the matter must then be brought before the court. The agreement is not required to be in writing, but some written evidence of the agreement signed by the guardian of the person would be helpful to reflect the proper health care decision-maker in the patient's medical records.

The special limitations relating to pregnancy in § 5429 continue to apply, and the present requirement of a prior court order is preserved for certain intrusive and irreversible treatment, such as abortion, sterilization, electroconvulsive therapy or experimental medical treatment. Inpatient psychiatric admissions continue to be governed separately under the Mental Health and Mental Retardation Act of 1966 (50 P.S. §§ 4101-4704).

§ 5511. Petition and hearing; independent evaluation.

* * *

(e) Petition contents.--

<u>(1)</u> The petition, which shall be in plain language, shall include the name, age, residence and post office address of the alleged incapacitated person, the names and addresses of the spouse, parents

and presumptive adult heirs of the alleged incapacitated person, the name and address of the person or institution providing residential services to the alleged incapacitated person, the names and addresses of other service providers, the name and address of the person or entity whom petitioner asks to be appointed guardian, an averment that the proposed guardian has no interest adverse to the alleged incapacitated person, the reasons why guardianship is sought, a description of the functional limitations and physical and mental condition of the alleged incapacitated person, the steps taken to find less restrictive alternatives, the specific areas of incapacity over which it is requested that the guardian be assigned powers and the qualifications of the proposed guardian.

(2) If a limited or plenary guardian of the estate is sought, the petition shall also include the gross value of the estate and net income from all sources to the extent known.

(3) A petition that is filed for the appointment of a guardian of the person on or after (in preparing this act for printing in the Laws of Pennsylvania and the Pennsylvania Consolidated Statutes, the Legislative Reference Bureau shall insert here, in lieu of this statement, the effective date of this section) shall state whether it is proposed that the guardian of the person shall have the power to make health care decisions and, if so, whether the guardian shall have all the powers of a health care representative to make health care decisions as defined under section 5422 (relating to definitions), including decisions involving health care necessary to preserve life if the incapacitated person were to be in an end-stage medical condition or be permanently unconscious, and any limitation of those powers.

* * *

STATUTORY RECOMMENDATIONS

Title 20 of the Pennsylvania Consolidated Statutes (the Probate, Estates and Fiduciaries Code) is amended as follows:

§ 5511. Petition and hearing; independent evaluation.

* * *

(e) Petition contents.--

(1) The petition, which shall be in plain language, shall include the name, age, residence and post office address of the alleged incapacitated person, the names and addresses of the spouse, parents and presumptive adult heirs of the alleged incapacitated person, the name and address of the person or institution providing residential services to the alleged incapacitated person, the names and addresses of other service providers, the name and address of the person or entity whom petitioner asks to be appointed guardian, an averment that the proposed guardian has no interest adverse to the alleged incapacitated person, the reasons why guardianship is sought, a description of the functional limitations and physical and mental condition of the alleged incapacitated person, the steps taken to find less restrictive alternatives, the specific areas of incapacity over which it is requested that the guardian be assigned powers and the qualifications of the proposed guardian.

(2) If a limited or plenary guardian of the estate is sought, the petition shall also include the gross value of the estate and net income from all sources to the extent known.

(3) A petition that is filed for the appointment of a guardian of the person on or after (in preparing this act for printing in the Laws of Pennsylvania and the Pennsylvania Consolidated Statutes, the Legislative Reference Bureau shall insert here, in lieu of this statement, the effective date of this section) shall state whether it is proposed that the guardian of the person shall have the power to make health care decisions and, if so, whether the guardian shall have all the powers of a health care representative to make health care decisions as defined under section 5422 (relating to definitions), including decisions involving health care necessary to preserve life if the incapacitated person were to be in an end-stage medical condition or be permanently unconscious, and any limitation of those powers.

* * *

§ 5521. Provisions concerning powers, duties and liabilities.

* * *

(d.1) Health care decisions.--

(1) Subject to the following, a guardian of the person shall have the same authority to make health care decisions on behalf of the incapacitated person as a health care representative under section 5461(c) (relating to decisions by health care representative), and a health care decision by the guardian of the person shall be effective without court approval as with a health care representative under section 5461(j):

(i) Any limitations and conditions set forth in the order of appointment.

(ii) The same health care decision-making process as prescribed in section 5456(c) (relating to authority of health care agent).

(iii) The same limitations under sections 5429 (relating to pregnancy) and 5462(c) (relating to duties of attending physician and health care provider), including the requirement that health care necessary to preserve life be given to an individual who has neither an end-stage medical condition nor is permanently unconscious.

(iv) Subsection (d).

(v) Subsection (f).

(vi) Any other provision regarding health care representatives as set forth in Chapter 54 (relating to health care), except section 5461(d) regarding who may act as health care representative.

(2) To the extent practicable, a guardian of the person shall consult with close family members of the incapacitated person in making a health care decision, particularly one involving end-of-life decision-making.

(3) A petition that is filed for the appointment of a guardian of the person under section 5511 (relating to petition and hearing; independent evaluation) on or after (in preparing this act for printing in the Laws of Pennsylvania and the Pennsylvania Consolidated Statutes, the Legislative Reference Bureau shall insert here, in lieu of this statement, the effective date of this section) shall state whether it is proposed that the guardian of the person shall have the power to make health care decisions and, if so, whether the guardian shall have all the powers of a health care representative to make health care decisions as defined in section 5422 (relating to definitions),

including decisions involving health care necessary to preserve life if the incapacitated person were to be in an end-stage medical condition or be permanently unconscious, and any limitation of those powers.

(4) Notice of a petition or hearing under section 5511 shall contain the information under paragraph (3).

(5) An order of appointment of a guardian of the person that is issued on or after (in preparing this act for printing in the Laws of Pennsylvania and the Pennsylvania Consolidated Statutes, the Legislative Reference Bureau shall insert here, in lieu of this statement, the effective date of this section) shall specify whether the guardian of the person shall have the power to make health care decisions and, if so, whether the guardian shall have all the powers of a health care representative to make health care decisions as defined in section 5422, including decisions involving health care necessary to preserve life if the incapacitated person were to be in an end-stage medical condition or be permanently unconscious, and any limitation of those powers.

(6) A guardian of the person appointed before (in preparing this act for printing in the Laws of Pennsylvania and the Pennsylvania Consolidated Statutes, the Legislative Reference Bureau shall insert here, in lieu of this statement, the effective date of this section) shall have the same powers as a health care representative unless:

(i) a prior court order has limited the power of the guardian of the person to make health care decisions; or

(ii) a health care representative is available and assumes authority to act by agreement between the health care representative and the guardian of the person,

in which case the guardian of the person shall thereafter have no health care decision-making powers.

* * *

Comment

Subsection (d.1) clarifies and coordinates the exercise of health care decision-making powers of a guardian consistent with the provisions of the Health Care Agents and Representatives Act (20 Pa.C.S. §§ 5451-5465) and *In re D.L.H.*, 2 A.3d 505 (Pa. 2010). Neither a guardian nor a health care representative can refuse or withdraw health care necessary to preserve life for a person who is not in an end-stage medical condition nor permanently unconscious. Only a competent patient or a duly authorized health care agent can do that. At the same time, this subsection clarifies that unless limited or conditioned in the order appointing the guardian, the powers of the guardian of the person allow most health care decisions to be made without a prior court order, including the withdrawal of life-sustaining treatment for a person who is in an end-stage medical condition or permanently unconscious, provided that the protective decision-making process required by § 5456 is followed. This rule is consistent with the Supreme Court decision of *In re Fiori*, 673 A.2d 905 (Pa. 1996), which confirmed the power in a close family member to withdraw life-sustaining care without a prior order of court from a patient in a persistent vegetative state where there was no disagreement among the parties in interest, including the physicians, the family members, the guardian and the medical facility. Subsection (d.1) is not intended to undermine the importance of those close family members in this decision-making process. In such cases, it is particularly important that the guardian consult with those close family members, especially where the health care decision involves end-of-life decision-making.

With respect to a guardianship petition and order of appointment filed or issued on or after the effective date of subsection (d.1), the issue of whether the guardian of the person should have the same health care decision-making powers as a health care representative should be addressed in the petition, notice and order of appointment. The court has the discretion to appoint the guardian of the person without the power to make health care decisions, in which case a health care representative may assume that role.

With respect to a guardianship petition and order of appointment filed or issued before the effective date of subsection (d.1), the

guardian of the person is intended to have all the powers of a health care representative, except where the court order limits those powers or where a health care representative has assumed authority to act by agreement with the guardian of the person. This concept is intended to introduce flexibility where a third party or agency is appointed as the guardian of the person and a health care representative (who is a family member or close friend) is available to act as a health care decision-maker. In such a case, if the health care representative and the guardian of the person agree, the health care representative may act without further court action. This agreement is not intended as a veto power in the guardian of the person. Rather, it reflects the policy of allowing decisions to be made without court action as in *Fiori* wherever there is no dispute among the parties in interest, which must include the guardian of the person and the proposed health care representative. If there is disagreement as to who should make the health care decisions, the matter must then be brought before the court. The agreement is not required to be in writing, but some written evidence of the agreement signed by the guardian of the person would be helpful to reflect the proper health care decision-maker in the patient's medical records.

The special limitations relating to pregnancy in § 5429 continue to apply, and the present requirement of a prior court order is preserved for certain intrusive and irreversible treatment, such as abortion, sterilization, electroconvulsive therapy or experimental medical treatment. Inpatient psychiatric admissions continue to be governed separately under the Mental Health and Mental Retardation Act of 1966 (50 P.S. §§ 4101-4704).

§ 5601. General provisions.

* * *

(b) Execution.--A power of attorney shall be dated, and it shall be signed [and dated] by the principal by signature or mark, or by another individual on behalf of and at the direction of the principal if the principal is unable to sign but specifically directs another individual to sign the power of attorney. [If the power of attorney is executed by mark or by another individual, then it] The power of attorney shall be witnessed by two individuals, each of whom is 18 years of age or older. A witness shall not be an agent

appointed in the power of attorney or the individual who signed the power of attorney on behalf of and at the direction of the principal.

(b.1) Acknowledgment and affidavits.--

(1) In addition to the requirements under subsection (b):

(i) A power of attorney shall be acknowledged by the principal as provided in this subsection.

(ii) The witnesses to a power of attorney shall provide affidavits as provided in this subsection. A witness may not be the individual who takes the principal's acknowledgment. A separate affidavit may be used for each witness whose affidavit is not taken at the same time as the principal's acknowledgment.

(2) The acknowledgment of the principal and the affidavits of the witnesses shall be:

(i) Made before:

(A) an officer authorized to administer oaths under the laws of this Commonwealth or under the laws of the state where execution occurs; or

(B) an attorney at law and certified to such an officer as provided in paragraph (3).

(ii) Evidenced by the officer's certificate, under official seal.

(iii) Attached or annexed to the power of attorney.

(iv) In substantially the same form and content as follows:

Acknowledgment by Principal

Commonwealth of Pennsylvania (or State of ____________)

County of ____________

The principal whose name is signed to the attached or foregoing instrument, having been duly qualified according to law, did hereby acknowledge that he or she signed the instrument as a power of attorney willingly and as a free and voluntary act for the purposes therein expressed.

Sworn to or affirmed and acknowledged before me by ____________________________, the principal, this ______ day of _____________, 20____.

____

(Signature of officer or attorney)

(Seal and official capacity of officer or state of admission of attorney and Supreme Court Identification No. _______)

Affidavit by Witnesses

Commonwealth of Pennsylvania (or State of ____________)

County of ____________

We (or I) _______________ and _______________, the witness(es) whose name(s) are (is) signed to the attached or foregoing instrument, being duly qualified according to law, do depose and say that we were (I was) present and saw the principal sign the instrument as a power of attorney willingly and as a free and voluntary act for the purposes therein expressed, that we (or I) signed the power of attorney as witness(es) in the hearing and sight of the principal, and that to the best of our (my)

knowledge the principal was at that time 18 or more years of age, of sound mind and under no constraint or undue influence.

Sworn to or affirmed and subscribed before me by ________________

and ________________, witness(es), this ______ day of ______________, 20____.

____

Witness

____

Witness

____

____

(Signature of officer or attorney)

(Seal and official capacity of officer or state of admission of attorney and Supreme Court Identification No. _______)

(3) The acknowledgment of the principal and the affidavit of a witness required by this subsection may be made before a member of the bar of the Supreme Court of Pennsylvania or of the highest court of the state in which execution of the power of attorney occurs who certifies to an officer authorized to administer oaths that the acknowledgment and affidavits were made before that member of the bar. In such case, in addition to the acknowledgment and affidavits required by this subsection, the attorney's certification shall be evidenced by the officer before whom it was made substantially as follows:

Commonwealth of Pennsylvania (or State of ____________)

County of ____________

On this, the ________________ day of _______________, 20____, before me _________________, the undersigned officer, personally appeared ________________, known to me or satisfactorily proven to be a member of the bar of the highest court of (Pennsylvania or the state in which execution of the power of attorney took place), and certified that he or she was personally present when the foregoing acknowledgment and affidavits were made by the principal and witnesses.

In witness whereof, I hereunto set my hand and official seal.

____

(Signature, seal and official capacity of officer)

* * *

(e.1) Limitation on applicability in commercial transaction.--

(1) Subsections (b), (b.1), (c), (d) and (e) do not apply to a power or a power of attorney contained in an instrument used in a commercial transaction which simply authorizes an agency relationship. This paragraph includes the following:

(i) A power given to or for the benefit of a creditor in connection with a loan or other credit transaction.

(ii) A power exclusively granted to facilitate transfer of stock, bonds and other assets.

(iii) A power contained in the governing document for a corporation, partnership or limited liability company or other legal entity by which a director, partner or member authorizes others to do other things on behalf of the entity.

(iv) A warrant of attorney conferring authority to confess judgment.

(v) A power given to a dealer as defined by the act of December 22, 1983 (P.L.306, No.84), known as the Board of Vehicles Act, when using the power in conjunction with a sale, purchase or transfer of a vehicle as authorized by 75 Pa.C.S. § 1119 (relating to application for certificate of title by agent).

(2) Powers and powers of attorney exempted by this subsection need not be dated.

(e.2) Limitation on applicability in health care power of attorney.--Subsections (b), (b.1), (c) and (d) do not apply to a power of attorney which exclusively provides for health care decision making.

* * *

Comment

Two witnesses are now required for powers of attorney under Chapter 56, not just for a principal whose power of attorney is executed by mark or by another individual at the principal's direction. This execution requirement is the same as that under Chapter 54, which concerns health care powers of attorney. However, an agent appointed under a Chapter 56 power of attorney may not be a witness, whereas that limitation is not present for a health care power of attorney under Chapter 54. A notary may not act as one of the required witnesses.

An acknowledgment is now required for the principal, and affidavits are now required for the witnesses, similar to a self-proving affidavit for a will, in order to heighten the formality required and the responsibility of the witnesses for execution in the situation of the invalidity of the power of attorney. Unlike a self-proving affidavit, the principal does not need to sign the acknowledgment under subsection

(b.1) since the principal will have already signed the power of attorney at the end as well as the required notice at the beginning of the power of attorney. The acknowledgment and affidavits should serve as additional protection for the principal who is bearing this risk of loss.

Under 42 Pa.C.S. § 327, certification by an attorney must be in accordance with section 7(5) of the Uniform Acknowledgment Act and include the attorney's Supreme Court identification number.

Section 5608(b) imposes upon the principal the risk of loss vis-à-vis a third party as to a forged power of attorney or an invalid power of attorney due to the principal's incapacity or where procured through undue influence.

§ 5602. Form of power of attorney.

* * *

(c) Filing of power of attorney.--An originally executed [copy of the] power of attorney may be filed with the clerk of the orphans' court division of the court of common pleas in the county in which the principal resides, and if it is acknowledged, it may be recorded in the office for the recording of deeds of the county of the principal's residence and of each county in which real property to be affected by an exercise of the power is located. The clerk of the orphans' court division or any office for the recording of deeds with whom the power has been filed, may, upon request, issue certified copies of the power of attorney. Each such certified copy shall have the same validity and the same force and effect as if it were the original, and it may be filed of record in any other office of this Commonwealth (including, without limitation, the clerk of the orphans' court division or the office for the recording of deeds) as if it were the original.

(d) Copy of power of attorney.--Except for the purpose of filing under subsection (c), a photocopy or electronically transmitted copy of an originally executed power of attorney has the same effect as the original.

§ 5608. Liability.

(a) Third party liability.--

(1) Any person who is given instructions by a person claiming to be an agent [in accordance with the terms of a] acting under a document appearing to be a valid power of attorney shall comply with the instructions if the action requested is authorized under the terms of the document.

(2) Any person who without reasonable cause fails to comply with those instructions shall be subject to civil liability for any damages resulting from noncompliance.

(3) Reasonable cause under this subsection shall include, but not be limited to, [a] any of the following:

(i) A reasonable good faith belief that:

(A) the document presented is void, invalid or terminated;

(B) the agent's apparent authority is void, invalid or terminated; or

(C) the agent is exceeding or improperly exercising the agent's apparent authority.

(ii) A good faith report having been made by the [third party] person to whom instructions have been given by the agent to the local protective services agency regarding abuse, neglect, exploitation or abandonment pursuant to section 302 of

the act of November 6, 1987 (P.L.381, No.79), known as the Older Adults Protective Services Act, or section 302 of the act of October 7, 2010 (P.L.484, No.70), known as the Adult Protective Services Act.

(b) Third party immunity.--Any person who reasonably acts in good faith reliance on a document appearing to be a valid power of attorney shall incur no liability as a result of acting in accordance with the instructions of the person claiming to be an agent.

Comment

The amendment of this section reverses the Supreme Court's decision in *Vine v. Commonwealth*, 9 A.3d 1150 (Pa. 2010) to provide, as originally intended, full immunity for third parties who rely in good faith on a power of attorney and to maintain the continued widespread acceptance by third parties of powers of attorney. This immunity is intended to apply even in the case of a power of attorney that is forged, signed by an incapacitated person or the product of undue influence, provided that the third party reasonably relies upon it in good faith. This amendment retroactively applies to existing powers of attorney.

TRANSITIONAL LANGUAGE

APPLICABILITY

(1) The amendment or addition of 20 Pa.C.S. § 5601(b) and (b.1) shall only apply to powers of attorney executed on or after the effective date of this act.

(2) The amendment of § 5608 shall apply to:

(i) A power of attorney executed before, on or after the effective date of this act.

(ii) An action, by a third party or person to whom instructions have been given by an agent, occurring before, on or after the effective date of this act.

EFFECTIVE DATES

(1) The following provisions shall take effect immediately:

(i) The amendment or addition of 20 Pa.C.S. § 5602(c) and (d).

(ii) The amendment of 20 Pa.C.S. § 5608.

(2) The following provisions shall take effect in 60 days:

(i) The amendment of 20 Pa.C.S. § 5511(e).

(ii) The addition of 20 Pa.C.S. § 5521(d.1).

(3) The amendment or addition of 20 Pa.C.S. § 5601(b), (b.1), (e.1) and (e.2) shall take effect in six months.

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§ 5422. 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:

"Advance health care directive." A health care power of attorney, living will or a written combination of a health care power of attorney and living will.

"Attending physician." The physician who has primary responsibility for the health care of a principal or patient.

"Bracelet." An out-of-hospital do-not-resuscitate bracelet as defined under section 5483 (relating to definitions).

"Cardiopulmonary resuscitation." Any of the following procedures:

(1) Cardiac compression.

(2) Invasive airway technique.

(3) Artificial ventilation.

(4) Defibrillation.

(5) Any other procedure related to those set forth in paragraphs (1) through (4).

"Competent." A condition in which an individual, when provided appropriate medical information, communication supports and technical assistance, is documented by a health care provider to do all of the following:

(1) Understand the potential material benefits, risks and alternatives involved in a specific proposed health care decision.

(2) Make that health care decision on his own behalf.

(3) Communicate that health care decision to any other person.

This term is intended to permit individuals to be found competent to make some health care decisions, but incompetent to make others.

"DNR." Do not resuscitate.

"Emergency medical services provider." As defined under section 5483 (relating to definitions).

"End-stage medical condition." An incurable and irreversible medical condition in an advanced state caused by injury, disease or physical illness that will, in the opinion of the attending physician to a reasonable degree of medical certainty, result in death, despite the introduction or continuation of medical treatment. Except as specifically set forth in an advance health care directive, the term is not intended to preclude treatment of a disease, illness or physical, mental, cognitive or intellectual condition, even if incurable and irreversible and regardless of severity, if both of the following apply:

(1) The patient would benefit from the medical treatment, including palliative care.

(2) Such treatment would not merely prolong the process of dying.

"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 an advance health care directive.

"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.

"Health care representative." An individual authorized under section 5461 (relating to decisions by health care representative) to make health care decisions for a principal.

"Incompetent." A condition in which an individual, despite being provided appropriate medical information, communication supports and technical assistance, is documented by a health care provider to be:

(1) unable to understand the potential material benefits, risks and alternatives involved in a specific proposed health care decision;

(2) unable to make that health care decision on his own behalf; or

(3) unable to communicate that health care decision to any other person.

The term is intended to permit individuals to be found incompetent to make some health care decisions, but competent to make others.

"Invasive airway technique." Any advanced airway technique, including endotracheal intubation.

"Life-sustaining treatment." Any medical procedure or intervention that, when administered to a patient or principal who has an end-stage medical condition or is permanently unconscious, will serve only to prolong the process of dying or maintain the individual in a state of permanent unconsciousness. In the case of an individual with an advance health care directive or order, the term includes nutrition and hydration administered by gastric tube or intravenously or any other artificial or invasive means if the advance health care directive or order so specifically provides.

"Living will." A writing made in accordance with this chapter that expresses a principal's wishes and instructions for health care and health care directions when the principal is determined to be incompetent and has an end-stage medical condition or is permanently unconscious.

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

"Necklace." An out-of-hospital do-not-resuscitate necklace as defined under section 5483 (relating to definitions).

"Order." An out-of-hospital do-not-resuscitate order as defined under section 5483 (relating to definitions).

"Patient." An out-of-hospital do-not-resuscitate patient as defined under section 5483 (relating to definitions).

"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 executes an advance health care directive, designates an individual to act or disqualifies an individual from acting as a health care representative or an individual for whom a health care representative acts in accordance with this chapter.

"Reasonably available." Readily able to be contacted without undue effort and willing and able to act in a timely manner considering the urgency of the individual's health care needs.

§ 5423. Legislative findings and intent.

(a) Intent.--This chapter provides a statutory means for competent adults to control their health care through instructions written in advance or by health care agents or health care representatives and requested orders. Nothing in this chapter is intended to:

(1) affect or supersede the holdings of In re Fiori 543 Pa. 592, 673 A.2d 905 (1996);

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

(3) 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 an advance health care directive to consent to the use or withholding of life-sustaining treatment in the event of an end-stage medical condition or in the event the individual is permanently unconscious.

(c) Findings in general.--The General Assembly finds that:

(1) Individuals have a qualified right to make decisions relating to their own health care.

(2) 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.

(3) Modern medical technological procedures make possible the prolongation of human life beyond natural limits.

(4) The application of some procedures to an individual suffering a difficult and uncomfortable process of dying may cause loss of dignity and secure only continuation of a precarious and burdensome prolongation of life.

(5) It is in the best interest of individuals under the care of health care providers if health care providers initiate discussions with them regarding living wills and health care powers of attorney during initial consultations, annual examinations, at diagnosis of a chronic illness or when an individual under their care transfers from

one health care setting to another so that the individuals under their care may make known their wishes to receive, continue, discontinue or refuse medical treatment in the event that they are diagnosed with an end-stage medical condition or become permanently unconscious.

(6) Health care providers should initiate such discussions, including discussion of out-of-hospital do-not-resuscitate orders, with individuals under their care at the time of determination of an end-stage medical condition and should document such discussion in the individual's medical record.

§ 5429. Pregnancy.

(a) Living wills and health care decisions.--Notwithstanding the existence of a living will, a health care decision by a health care representative or 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 an end-stage medical condition or who is permanently unconscious unless, to a reasonable degree of medical certainty as certified on the pregnant woman's medical record by the pregnant woman's attending physician and an obstetrician who has examined the pregnant woman, life-sustaining treatment, nutrition and hydration:

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

(2) will be physically harmful to the pregnant woman; or

(3) will cause pain to the pregnant woman that cannot be alleviated by medication.

(b) Rule for orders.--Notwithstanding the existence of an order or direction to the contrary, life-sustaining treatment, cardiopulmonary resuscitation, nutrition and hydration shall be provided to a pregnant patient unless, to a reasonable degree of medical certainty as certified on the pregnant patient's medical record by the attending physician and an obstetrician who has examined the pregnant patient, life-sustaining treatment, nutrition and hydration:

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

(2) will be physically harmful to the pregnant patient; or

(3) would cause pain to the pregnant patient that cannot be alleviated by medication.

(c) 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.

(d) Payment of expenses by Commonwealth.--

(1) In the event that treatment, cardiopulmonary resuscitation, nutrition and hydration are provided to a pregnant woman, notwithstanding the existence of a living will, health care decision by a health care representative or health care agent, order or direction to the contrary, the Commonwealth shall pay all usual, customary and reasonable expenses directly, indirectly and actually incurred by the pregnant woman to whom such treatment, cardiopulmonary resuscitation, nutrition and hydration are provided.

(2) The Commonwealth shall have the right of subrogation against all moneys paid by any 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.

§ 5456. 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) and section 5460 (relating to relation of health care agent to court-appointed guardian and other agents), 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 5429 (relating to pregnancy), 5454 (relating to when health care power of attorney operative) and 5462(a) (relating to duties of attending physician and health care provider).

(c) Health care decisions.--

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

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

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

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

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

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

(A) The preservation of life.

(B) The relief from suffering.

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

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

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

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

(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.

§ 5460. 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 by a court, 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 appointment of a health care agent that the principal would

have if the principal were not incapacitated but may not revoke or amend other instructions in an advance health directive absent judicial authorization.

(b) Nomination of guardian of person.--In a health care power of attorney, a principal may nominate a guardian of the person for the principal for consideration by a court if incapacity proceedings for the principal's person are thereafter commenced. If a court determines that the appointment of a guardian is necessary, the court shall appoint a guardian 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 a 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.

§ 5461. Decisions by health care representative.

(a) General rule.--A health care representative may make a health care decision for an individual whose attending physician has determined that the individual is incompetent if:

(1) the individual is at least 18 years of age, has graduated from high school, has married or is an emancipated minor;

(2) (i) the individual does not have a health care power of attorney; or

(ii) the individual's health care agent is not reasonably available or has indicated an unwillingness to act and no alternate health care agent is reasonably available; and

(3) a guardian of the person to make health care decisions has not been appointed for the individual.

(b) Application.--This section applies to decisions regarding treatment, care, goods or services that a caretaker is obligated to provide to a care-dependent person who has an end- stage medical condition or is permanently unconscious as permitted under 18 Pa.C.S. § 2713(e)(5) (relating to neglect of care-dependent person).

(c) Extent of authority of health care representative.--Except as set forth in section 5462(c)(1) (relating to duties of attending physician and health care provider), the authority and the decision-making process of a health care representative shall be the same as provided for a health care agent in section 5456 (relating to authority of health care agent) and 5460(c) (relating to relation of health care agent to court-appointed guardian and other agents).

(d) Who may act as health care representative.--

(1) 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 health care representative. In the absence of a designation or if no designee is reasonably available, any member of the following classes, in descending order of priority, who is reasonably available may act as health care representative:

(i) The spouse, unless an action for divorce is pending, and the adult children of the principal who are not the children of the spouse.

(ii) An adult child.

(iii) A parent.

(iv) An adult brother or sister.

(v) An adult grandchild.

(vi) An adult who has knowledge of the principal's preferences and values, including, but not limited to, religious and moral beliefs, to assess how the principal would make health care decisions.

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

(3) An individual with a higher priority who is willing to act as a health care representative may assume the authority to act notwithstanding the fact that another individual has previously assumed that authority.

(e) Disqualification.--An individual of sound mind may disqualify one or more individuals from acting as health care representative in the same manner as specified under subsection (d) 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. Upon the petition of any member of the classes set forth in subsection (d), the court may disqualify for cause shown an individual otherwise eligible to serve as a health care representative.

(f) 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 provider in which the principal receives care.

(g) Decision of health care representative.--

(1) If more than one member of a class assumes authority to act as a health care representative, the members 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.

(2) If the members of the class of health care representatives are evenly divided concerning the health care decision and the attending physician or health care provider is so informed, an individual having a lower priority may not act as a health care representative. So long as the class remains evenly divided, no decision shall be deemed made until such time as the parties resolve their disagreement. Notwithstanding such disagreement, nothing in this subsection shall be construed to preclude the administration of health care treatment in accordance with accepted standards of medical practice.

(h) Duty of health care representative.--Promptly 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 (d) who can be readily contacted.

(i) Countermand of health care decision.--

(1) A principal of sound mind may countermand any health care decision made by the principal's health care representative at any time and in any manner by personally informing the attending physician or health care provider.

(2) Regardless of the principal's mental or physical capacity, a principal may countermand a health care decision made by the principal's health care representative that would withhold or withdraw life-sustaining treatment at any time and in any manner by personally informing the attending physician.

(3) The attending physician or health care provider shall make reasonable efforts to promptly inform the health care representative of a countermand exercised under this section.

(4) A countermand exercised under this section shall not affect the authority of the health care representative to make other health care decisions.

(j) Court approval unnecessary.--A health care decision made by a health care representative for a principal shall be 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.

§ 5462. Duties of attending physician and health care provider.

(a) Duty to certify end-stage medical condition.--Promptly after a determination that a principal has an end-stage medical condition or is permanently unconscious, the attending physician shall certify in writing that the principal has an end-stage medical condition or is permanently unconscious.

(b) Communication of health care decision.--Whenever possible before implementing a health care decision made by a health care representative or 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 and health care representative.--

(1) Health care necessary to preserve life shall be provided to an individual who has neither an end-stage medical condition nor is permanently unconscious, except if the individual is competent and objects to such care or a health care agent objects on behalf of the principal if authorized to do so by the health care power of attorney or living will. In every other case, 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 or health care representative to the same extent as if the decision had been made by the principal.

(2) 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) 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 medical record of the principal.

(2) An 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.--An attending physician who determines that a principal is incompetent or has become competent 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.

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