Advisory
HEALTH CARE DEPARTMENT | SEPTEMBER 2006

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New Legal Road Map for Advance Directives—Practical Tips for Providers

Takes Effect on October 1 2006

For years, Connecticut's laws governing living wills and the authority to make health care decisions have been a patchwork of confusing and unnecessarily duplicative provisions. Proposals to simplify and strengthen our advance directives laws have been proposed by several groups, including the Law and Ethics Task Force of the Connecticut Coalition to Improve End of Life Care (which was co-chaired by Jeanette C. Schreiber of Wiggin and Dana). This past legislative session, the General Assembly enacted a comprehensive reform bill that takes important steps towards modernizing Connecticut's advance directives laws, bringing them up to national standards. The new law, Public Act No. 06-195, takes effect on October 1, 2006. Hospitals, long term care providers, home health care agencies, physicians and other health care providers in Connecticut should take the time now to understand the new law, revise policies and protocols relating to end-of-life decisions and train staff about the changes in the law and how they will affect patient care. This Advisory summarizes the pertinent provisions of the new law and recommends action steps that providers should take right away to address changes in the law.

Summary of Public Act No. 06-195: How Does It Change Current Law?

New "Health Care Representative" and Elimination of "Health Care Agent" and "Durable Power of Attorney for Health Care Decisions." The new law effectively combines the authority of the "health care agent" (whose authority under current law is limited to conveying the patient's wishes about withholding or withdrawal of life support) with the authority of the "attorney-in-fact" for health care decisions (who is authorized under current law, through the durable power of attorney for health care decisions, to make all health care decisions, except for decisions regarding withdrawal of life support), to create a new, unified proxy power called the "**health care representative**." An individual can appoint a health care representative while capable to make any and all health care decisions for that person once he or she becomes incapacitated.

Scope of Living Will. Current law limits the scope of what can be addressed in a living will to the withholding or withdrawal of various forms of life support. Public Act No. 06-195 changes the definition of "living will" to permit directives about any aspect of health care, including, but not limited to, the withholding or withdrawal of life support.

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Revocation. As under current law, a "living will" still can be revoked at any time and in any manner (including orally). However, under the new law, an appointment of a health care representative can be revoked only in a writing that is signed by two witnesses; both the appointment of a health care representative and the revocation of that appointment must be made a part of the individual's permanent medical record by the attending physician.

Impact on Conservators. Under the prior law, it was unclear how the appointment of a conservator by a Probate Court affected an individual's previously appointed proxies (health care agents, durable power of attorney, etc.). The new law clarifies these roles by expressly stating that if a conservator is appointed, the conservator must comply with a previously executed advance directive, and the conservator cannot revoke the ward's advance directive without permission of the probate court. The new law also provides that in most situations, the decision of a health care representative regarding treatment decisions will take precedence over the decision of a conservator.

Capacity of Health Care Representative. If there are any disputes about the capacity of a "health care representative" appointed to make decisions for a patient, or if a health care provider is concerned that the actions of a "health care representative" could interfere with treatment of a patient, the Probate Court can be petitioned to resolve such issues.

Durable Power of Attorney for Health Care Decisions. As discussed above, the new law eliminates the durable power of attorney for health care decisions, repealing the current durable power of attorney for health care decisions statute, Conn. Gen. Stat. § 1-54a. Starting October 1, 2006, it will no longer be an option to execute a durable power of attorney for health care decisions. The health care representative can exercise the authority previously exercised by someone appointed under a durable power of attorney for health care decisions. The new law does not repeal other forms of the power of attorney, and so it will still be possible and often useful to designate someone under a power of attorney to handle other matters, including financial decisions.

Validity of Advance Directives Executed Before October 1, 2006. Under the new law, previously executed advance directives such as a living will or the appointment of health care agent will remain valid after October 1, 2006. Patients who have already signed living wills or appointed health care agents will not be required to fill out new forms, and health care providers may continue to honor their advance directives. Although the new law does not explicitly state that a previously executed durable power of attorney for health care decisions will remain valid after October 1, 2006, we believe that a durable power of attorney for health care decisions executed prior to the new law's passage will still be considered valid, as it is likely the legislature intended that all types of advance directives executed before

October 1, 2006 would remain valid and enforceable after the new statute's effective date.

Health Care Representative's Request for Documentation of Incapacity. Under the new law, if an individual who has executed an appointment of a health care representative becomes incapacitated, and if the person who would be appointed health care representative requests it, the attending physician must disclose the determination of incapacity in writing to the health care representative.

Advance Directives from Other States or Countries. Under the new law, advance directives or health care instructions validly executed in other states or countries that are not contrary to Connecticut public policy are recognized and deemed valid in Connecticut. In determining whether such foreign documents are valid, providers can rely on a court decision from that state or country, an affidavit executed by the patient or by the person offering the health care proxy, or the provider's own "good faith legal analysis."

Aspects of Advance Directives that are Unchanged by Public Act No. 06-195

While the new law made substantial changes in how providers address end-of-life decisions, many important aspects of the current law will remain unchanged:

- The failure to execute an advance directive still creates no presumption regarding an individual's wishes with respect to end-of-life care. In planning end-of-life care for patients who have not executed an advance directive, health care providers should still consider the patient's wishes as expressed to family members or care givers or in non-legal documents.
- Comfort care and pain alleviation must be provided in all cases.
- Living wills and other advance directives, including the appointment of health care representative, still must be made part of the individual's medical record; The Joint Commission on Accreditation of Healthcare Organizations (JCAHO) also requires that providers maintain a copy of any such documents, or other evidence of advance directives, in the medical record. In addition, we recommend that health care providers continue to document all discussions with the patient, or with the patient's health care representative, conservator or next-of-kin about any aspect of the patient's health care.
- As with health care agents, the appointment of a spouse as health care representative is revoked automatically upon divorce, legal separation or annulment, unless otherwise specified by the individual.
- Current law provides immunity from civil and criminal liability to physicians and licensed medical facilities that withhold, remove or cause the removal of a life support system of an incapacitated patient if the decision is based on the attending physician's best medical judgment, the attending physician deems the patient to be in a

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terminal condition or permanently unconscious, and the attending physician has considered the patient's wishes. This important immunity provision remains in place. Although the scope of living wills is broadened to all health care decisions, and health care representatives have greater authority to make decisions, the immunity available for providers under the law remains limited to withholding or withdrawing life support.

- Physicians and other providers still have an express obligation to exercise medical judgment regarding patient care decisions (see discussion below).

Practical Effects and Recommended Actions Steps

Hospitals, long term care facilities, home health care agencies and other providers that deal with end-of-life issues will need to update their policies and forms and, in some cases, train staff on the new law. Below is a checklist of recommended items to address and tasks to complete:

Revised informational material for patients: Under the federal Patient Self-Determination Act, hospitals, nursing facilities, home health care agencies and hospices currently must provide written information to patients about an individual's right to make decisions regarding medical care and advance directives. Providers are required to update and disseminate amended information as soon as possible, but no later than 90 days after the effective date of any changes to state law. Providers in Connecticut usually have relied upon the Attorney General's Statement to meet this requirement; contacts in the Attorney General's office tell us that a revised version of this document will be available prior to October 1, 2006 (the effective date of the new law) on the Attorney General's web-site (www.ct.gov/ag). You should make sure that you obtain the Attorney General's Statement once it is available and begin distributing it on, or as soon as possible after, October 1, 2006.

Policy terminology: Review all end-of-life related policies (*e.g.,* policies on DNR orders, compliance with the Patient Self-Determination Act, withholding and withdrawal of life support, substitute decision-makers, etc.) to be sure these policies are consistent with the new law. As noted above, the person holding a "durable power of attorney for health care decisions" and the "health care agent" have been replaced with a "health care representative" who is empowered to make all health care-related decisions for someone who is incapable of making those decisions for him or herself. However, health care agents and health care durable powers of attorney executed prior to October 1, 2006 are still valid. You should make sure that policy glossaries include the new term "health care representative" on the list of substitute decision-makers who may be authorized to act on an incapable individual's behalf, and also be sure it is clear that in most cases, this individual's decisions take precedence over conservators, next-of-kin and others. Policies also should make the distinction between the authority of individuals given health care durable powers of attorney and

appointed health care agents (for documents executed prior to October 1, 2006) and the authority of health care representatives (for documents executed after October 1, 2006).

Revised forms: If your organization makes advance directives forms available to patients, you should obtain new forms that conform to the requirements of the new law. Public Act No. 06-195 includes two alternative model forms for appointing a health care representative: one form combines a living will, appointment of health care representative, designation of a conservator of the person and document of anatomical gift, and the other form is just for appointing a health care representative. The law also includes a model form for a living will. Note that the model forms set forth in the new statute include a notary statement, but notarization is *not* required by the statute. The "Five Wishes" document and other forms commonly downloaded from the Internet may *not* meet the requirements of current law, and it will require a case by case assessment to determine whether such documents are acceptable under Public Act No. 06-195.

Revocation of appointment of health care representative: As under current law, living wills can be revoked at any time and in any manner, without regard to the patient's mental or physical condition; such revocation must be recorded in the patient's medical record. An appointment of health care representative, however, can be revoked only in a writing signed by two witnesses. Such a written revocation also should be included in the patient's medical record. Public Act No. 06-195 does not address situations in which a patient whose competence is in question attempts to revoke the health care representative appointment. Read literally, the law seems to imply that a patient can revoke the appointment regardless of competence. Since the law still recognizes that health care providers must exercise medical judgment, however, it would be a reasonable interpretation of the law to allow providers to exercise their medical judgment in determining the validity of an incapacitated patient's attempted revocation. In any case, applicable policies should state that when a patient seeks to revoke a health care representative, details about the circumstances and the patient's condition should be documented in the patient's record.

New forms: As noted above, the attending physician must provide a written determination of incapacity on the request of an individual appointed health care representative. You should revise pertinent policies to include this requirement, and consider preparing a simple form to assist physicians in responding to such requests. Inform physicians about this new requirement, through medical staff meetings, memoranda, in-service trainings or otherwise.

Interaction with conservators/Probate Court: The new law expressly states that a conservator must comply with a previously executed advance directive, and in most situations, the decision of a health care representative will prevail over the decision of a conservator. If necessary, disputes about the actions of a health care representative can be brought to Probate Court for resolution. You should make sure that any policies indicating order of precedence for substitute decision-makers make this distinction clear and recommend that staff seek Probate Court guidance if they cannot resolve a dispute between conservator and health care representative.

Advance directives from other states: You should revise your policies and procedures to state that living wills and other advance directives valid in other states will be deemed valid in Connecticut, as long as they do not conflict with Connecticut law. If you have a substantial number of patients from outside Connecticut, consider downloading the official, state-sanctioned forms from border states such as New York or Rhode Island, and using those forms as a basis of comparison when out-of-state advance directives are presented. When there are any questions, you can consider accepting an affidavit from the patient or person presenting the advance directive document, or contacting legal counsel as necessary.

Training for staff, patients, and families. The changes to the law are significant. For this reason, your organization should provide in-service training or guidance for medical staff, nursing staff, patient service or care managers, admitting departments, social workers, clergy and other personnel involved in end-of-life decisions. The training or guidance should address the

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new terminology, documentation requirements, and some common questions that may arise. Some providers, such as long term care facilities, should consider educational programs for residents and their families.

Open Issues

While Public Act No. 06-195 resolved many ambiguities in the advance directives law, an important question remains. Health care representatives do have very broad decision-making power over all health care decisions. As a result, situations could arise in which a health care representative's ideas about appropriate medical care seem unreasonable to a health care provider. For example, a family member might insist that a resident not receive a particular medication or treatment contrary to a physician's order and medical judgment. The provider faces a dilemma because the health care representative has such broad powers. It is important to note that there is no statutory immunity for a provider who chooses to rely on the health care representative's instructions; immunity protection only extends to decisions relating to withholding and withdrawal of life support systems. In our view, the appointment of a health care representative does not abrogate a provider's obligation and authority to exercise medical judgment with respect to treatment decisions, as noted above, and providers should exercise caution in these situations. Attempt to work out any differences with the health care representative and if serious conflicts remain, bring the matter to the attention of the Probate Court.

Conclusion

Public Act No. 06-195 makes substantial improvements in Connecticut's laws on end-of-life decision-making, and hopefully it will bring some clarity to what has been a confusing area for providers and patients. Health care providers will need to revise policies and procedures and train staff on the new requirements. Moreover, there remain some open questions regarding how the new statute will be interpreted, and providers will have to make informed judgments about how to apply the new statute and answer patient questions once it takes effect on October 1, 2006. If you have any questions about your particular policies or forms, or about how the new statute will affect your organization, please feel free to contact any member of Wiggin and Dana's Health Care Department.