

POLST versus PO-PND

This story illustrates a critical difference between the combination of the Advance Directive to Permit Natural Dying-with-the Physician's Orders to Permit Natural Dying, and the Physician's Order for Life-Sustaining Treatment: Only patients who are competent can sign an AD-PND/PO-PND. Furthermore, their signature must be witnessed by qualified persons. In contrast, patients may have a POLST even if they never, while competent, had seen or discussed this form. This story illustrates the significant difference this can make:

“The Sooner Mother Dies, The Better”

Martha is an 87-year-old widow. She suffers from moderate dementia and resides in a skilled nursing facility. While she requires manual assistance to eat and to drink, she seems eager to accept food and she even smiles when given a favorite food. While she will occasionally join in sing-alongs, she spends most of her time just staring into space. She also has a serious medical problem. Sometimes her heart beats so irregularly that she would die unless she receives a brief electrical shock to get back into normal rhythm.

Martha's twin daughters, Annette and Nannette, are 48 and her only offspring. One day, they agree: "Mom's quality of life is so low... What a waste of money! Martha can't enjoy life anymore. And this facility costs us \$60,000 a year, plus another \$20,000 for extra care and treatment." (By "cost us," they mean, "drains our future inheritance.") They sit in silence for a moment and then almost in unison say, "The sooner mother dies, the better." The problem is, how can they accomplish that?

In strict confidence they frankly explain their concerns to an attorney. They show him Martha's Living Will. After he reviews the form, he concludes, "Worthless. Listen to this vague wording: 'No heroics if my condition is hopeless.' Nothing is specifically defined. You just have to wait for her to die. You can't create a new Living Will now because it is too complex for her mental abilities to fill out. And you can't create a Proxy Directive that designates one of you as the proxy and the other as the witness since both of you are heirs to her estate. The law will allow only one of you to meet the requirement of two qualified witnesses. Furthermore, since your mother is a resident of a skilled nursing facility, you have an even greater obstacle to overcome: State law requires an extra witness—an Ombudsman—to help make sure her signing is voluntary and willful, and that she was fully informed about all her options, even if you bypass the witnessing requirement by requesting a notary to acknowledge her signature."

The sisters give up. Then a few days later, Annette recalls the physician whom she dated a few years ago. She hadn't seen him in a while, but after their romance ended, they promised to remain "friends." For awhile, they did see each other. She calls Dan and explains in an empathic tone of voice, "Martha has deteriorated a lot since you last saw her. You know she wouldn't want to be hooked up to machines indefinitely, but the attorney said her Living Will was so badly written, it was worthless. The truth is, Mom has her 'good' days when she seems lucid, and her 'bad' days when she is disorientated and confused. But she almost always knows us by name and that we are her daughters. And Dan, she has no one else she can trust. Could you do her a favor? Could you come over and sign some orders that is, on one of her 'good' days? And, you know, if you want, we can also have dinner after, and..."

Dr. Dan agrees. In the privacy of Martha's room, he points to Annette and asks Martha who she is. Then he asks Martha if she wants Annette to make her medical decisions. He repeats the questions for Nannette. Each time, Martha identifies her daughter and repeats Dan's words, "Yes, I want her to make medical decisions for me." Note: There are four people in the room, but none is an independent witness or an Ombudsman to oversee Dr. Dan as he completes and signs a Physician Orders for Life-Sustaining Treatment (POLST). Dan reads the statement about his signature, "My signature below indicates to the best of my knowledge that these orders are consistent with the person's medical condition and preferences." A brief thought flashes through his mind: he has never asked Martha what her wishes are. But then he thinks there is no reason to, since she is well right now and has just clearly designated two proxies.

Dan passes the form to Nannette. She signs without reading the statement that applies to her signature: "By signing this form, the legally recognized decisionmaker acknowledges that this request regarding resuscitative measures is consistent with the known desires of, and with the best interest of, the individual who is the subject of the form."

Meanwhile Nannette has been holding her breath. She looks at her mother who as usual seems "out of it." She sighs and thinks, *Problem solved!* The stage is now set.

So, the next time Martha has a problem with heart rhythm, or if she contracts pneumonia or a urinary tract infection, or needs a feeding tube, Annette or Nannette can use "her" POLST to refuse all life-sustaining medical treatment so Martha will die sooner. Mission accomplished!

Note: In some states, like California, there would have been no need to ask the patient to designate her decisionmakers by pointing since, as her closest relatives, they are already her "legally **recognized** decisionmakers." The requirements for a physician to sign the immediately actionable orders in a POLST, that can determine life-or-death, are much less strict than for a patient to create a valid Advance Directive in which she legally **designates** whom she wants to make her medical decisions in the future. (Note the difference between these two key words: **recognized** versus **designated** decisionmakers.)

Strategy to prevent this kind of abuse: Actually, the solution already exists in California's Healthcare Decisions Act and in similar statutes in many other States: to be legally valid, Advance Directives must be signed and witnessed. In contrast, for POLSTs in many states, "Family members may be able to speak on behalf of a loved one. A health care professional can complete the POLST Paradigm form based on family members' understanding of their loved one's wishes."* The problem is, the patient for whom a POLST is completed may never have seen the form that will seal his/her fate while s/he was still competent. Why did California's POLST law specifically state that POLSTs are NOT Advance Directives? -- Perhaps to bypass the extra requirement for witnessing by Ombudsmen. These volunteers are in short supply, have a high turnover rate, and are often hard to find. All these problems will get worse as funding for their training decreases. Their numbers are decreasing dramatically. But while laws make the completion of POLSTs quite efficient, they do so at the risk of opening a door to potential abuse.

Several States (again, including California) recognize that residents of skilled nursing facilities are more vulnerable to elder abuse and deserve extra protection by requiring an Ombudsman to serve as an additional objective witness. But its new POLST law goes in the opposite direction: it requires no witnesses at all. Some States (including Pennsylvania, which uses Oregon's 2004 POLST) have forms where the patient's OR the surrogate's signature is optional. In parts of Wisconsin, the POLST form does

not even have a place for a patient's or surrogate's signature.* How long will the signature be valid? In some States, patients may designate surrogates as temporary decision makers, yet these physicians' orders may last as long as the patient is alive.

Conclusion: The qualification of witnesses provides one layer of protection for a vulnerable person who engages in Advance Care Planning that involves the creation of a Proxy Directive or Living Will. The requirement that Ombudsmen provide oversight to help prevent abuse provides another. Yet neither is required for a POLST to become effective. The consequence could be devastating: it could lead to an affront to the sanctity of life and the duty of the State to protect its most vulnerable citizens from the worst kind of abuse: loss of life.

***Footnotes:**

Another FAQ on the national POLST website adds: "Some state laws have limitations on the power of a patient's chosen decision-maker so check with your health care professional," and another defines "a health care professional" as "usually a physician, nurse practitioner, physician assistant or social worker." From FAQs about the POLST Paradigm, retrieved on 11-29-08, from <http://www.ohsu.edu/ethics/polst/patients-families/faqs.htm>.

Oregon's POLST explains, "If you are unable to make your own health care decisions, the orders should reflect your preferences as best understood by your surrogate."

In some institutions (skilled nursing facilities), Admissions Coordinators, who have no clinical degree or training, are asked to inform patients about POLSTs, and the physician signs the form later. (Discussion at "Putting POLST Into Action," Sacramento, 3-30-09.

Signatures are optional in Pennsylvania: retrieved on 4-6-09, from <http://www.ohsu.edu/polst/programs/forms/pa.pdf>.

No Signatures are required in Wisconsin: <http://www.ohsu.edu/polst/programs/forms/wi.pdf> or in North Carolina: "A MOST form (Medical Orders for Scope of Treatment) is a medical order and does not require the use of witnesses or notarization" http://www.ncmedsoc.org/pages/public_health_info/most_faq.html

MOSTs can be completed at a distance: "If the patient is no longer able to make and communicate decisions, and the patient representative is not physically available at the location where the patient is, then the health care professional may prepare the form in consultation with the patient representative by telephone, electronic, or other means." Retrieved on 4-6-09 from http://www.ncmedsoc.org/pages/public_health_info/most_faq.html#exceptions