

SURROGATE DECISION MAKING
DON Bootcamp

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**PATIENT SELF
DETERMINATION ACT**

OBRA (i.e. Federal Law)

Requires facilities to inform residents/legal representatives of the State laws regarding advance directives

Document provision of this information

Must be reviewed annually

STATE LAWS

Michigan does not have a living will statute. (48 states recognize living wills.)

Michigan is 1 of only 3 states that authorize the appointment of a health care agent only.

Michigan does not have a "default surrogate consent" statue. (37 states do.)



The Following Documents Are Not Advance Directives:

- Living Will
- Treatment Preference Sheet
- These documents may be used as clear and convincing evidence in a court of law.
- Can be used in combination with other legal authority to determine Resident wishes

WHO CAN MAKE HEALTH CARE DECISIONS?



PROPOSED REGULATORY REFORMS FOR LONG TERM CARE FACILITIES
42 CFR § 483.10(A)(3)

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Clarify the resident's right to designate a representative, the resident representative's limitation to those rights delegated by the resident, and the resident's retention of those rights not delegated, including the right to revoke delegation.

Makes clear that a court-appointed representative or legal surrogate has the right to make decisions for residents in the event of incompetency and includes same-sex spouses if the marriage is valid in the "jurisdiction in which it was celebrated."

Intended to ensure the facilities do not afford more decision making authority to a resident representative than is intended by the resident or permitted under applicable law.

Emphasized person-centered care and the role of the resident to be actively involved in the care planning process.

THE FOLLOWING TITLES DO NOT AUTOMATICALLY CONVEY AUTHORITY:



- Resident/Patient Representative
- Responsible Party
- Husband
- Wife
- Mother
- Father
- Surrogate
- Friend
- Son
- Daughter
- Advocate
- Power of Attorney
- Durable Power of Attorney
- Guardian

LOOK FOR LEGAL AUTHORITY
[DOCUMENTATION]

RESIDENT



KEY QUESTION:
Is the Resident competent?

RESIDENT

If the Resident is competent, no one else has authority to make health care decisions for that Resident.

RESIDENT

Typically, this is conclusion by MD

Look to Physician Documentation

MDS/RAPS

Mental Status Exams

Work with admission sources to get documentation prior to admission re: documentation of competence.

Make sure copies of all documents are maintained in the chart.

Assess annually and with any change in mental status; positive or negative.

RESIDENT

While the resident is competent:

If the Resident is competent, offer him/her the opportunity to complete a Durable Power of Attorney for Health Care.

Suggest a Living Will as additional evidence of the Resident's wishes.

DURABLE POWER OF ATTORNEY FOR HEALTH CARE

DURABLE POWER OF ATTORNEY FOR HEALTH CARE

Defined as a "patient advocate" whose authority to make health care decisions is created by execution of relevant paperwork by competent resident.

DURABLE POWER OF ATTORNEY FOR HEALTH CARE - MICHIGAN

Patient advocate authority is not triggered until it has been determined by 2 physicians or a physician and licensed psychologist that the patient is unable to participate in medical treatment decisions.

Make sure appropriate documentation is in place.

Needs to be reviewed at least annually.

Paperwork must designate a patient advocate (18 years of age or older).

Must be in writing, signed and witnessed by 2 witnesses.

Cannot be witnessed by immediate family, presumptive heir, insurance representative, facility staff, patient advocate or physician.

May designate a successor or advocate.

DURABLE POWER OF ATTORNEY FOR HEALTH CARE

Look for scope of authority, as set forth in signed paperwork; financial only versus health care decisions.

Don't confuse with Power of Attorney.

Don't confuse with Durable Power of Attorney.

DURABLE POWER OF ATTORNEY FOR HEALTH CARE - MICHIGAN

Before a patient advocate designation is implemented, a copy of the designation must be given to the proposed patient advocate (and successor advocate).

Before acting as a patient advocate, the advocate must sign an "acceptance" of the designation.

Paperwork may include a statement of the patient's desires on care, custody, and medical treatment. (Can limit scope.)

Advocate can only make decisions that the Resident could have exercised on their own behalf.

Advocate cannot delegate duties.

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DURABLE POWER OF ATTORNEY FOR HEALTH CARE - MICHIGAN

If upon review it is determined that a resident has regained the capacity to participate in medical decisions, the designation of the patient becomes *ineffective*.

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DURABLE POWER OF ATTORNEY FOR HEALTH CARE - MICHIGAN

The patient may revoke his/her designation at any time.

A patient advocate may revoke his/her acceptance at any time.

Disputes regarding a patient's ability to participate in medical decisions shall be resolved by petition to the court in the county in which the patient resides.

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DURABLE POWER OF ATTORNEY FOR HEALTH CARE - MICHIGAN

A patient advocate may make a decision to withhold or withdraw treatment that would allow a patient to die **only if the patient has expressed in a clear and convincing manner tht the patient advocate is authorized to make such decision, and that the patient acknowledges that such a decision could or would allow the patient's death.**

GUARDIAN

GUARDIAN

Individual whose authority is created by petition to *probate court*.

The probate court may appoint a guardian if it finds by clear and convincing evidence **both** that the individual for whom a guardian is sought is an **incapacitated individual** and that the **appointment is necessary** as a means of providing continuing care and supervision of the incapacitated individual.



Often the result of a failure to obtain DPOA for Health Care:

- No DPOA whatsoever; or
- DPOA attempted but resident has become incompetent already;
- DPOA challenged as executed when resident was incompetent.

GUARDIAN

The petition shall contain specific facts about the individual's condition and specific examples of the individual's recent conduct that demonstrate the need for a guardian's appointment.

Be prepared with documentation from the record and possible witnesses to testify at the hearing.

The court will appoint a guardian ad litem prior to the hearing.

The purpose of the GAL is to preserve the rights of the individual alleged to be incapacitated.

The GAL will make recommendations to the court regarding the specific powers of the guardian and the limitations on those powers.



A Guardian must be nominated

- Chosen by will
- Durable Power of Attorney
- Spouse
- Adult Child
- Parent
- Relative with whom the incapacitated individual lived for 6 months prior to petition
- Guardian service

GUARDIAN

Prior to hearing, written notice must be served personally on the incapacitated individual.

Prior to the hearing, notice must be served according to court rules on any other interested parties; spouse, parents, children, current guardian, patient advocate or closest relative.

If there is anyone known, serve them.

All will require proof of service.

GUARDIAN

A patient advocate designated by a Durable Power of Attorney for Health Care that was properly executed and invoked prior to a petition for guardianship will take precedence in health care decisions.

GUARDIAN



Petitions can be made to:

- Appoint a guardian
- Remove a guardian
- Change a guardian
- Limit a guardian
- Have an emergency hearing

GUARDIAN

If a guardian or patient advocate is not acting in the incapacitated individual's best interests, you can move to have the guardian removed or changed, or have a guardian appointed to replace the patient advocate.

Make sure documentation is available or witnesses are prepared to testify.

A guardian cannot make medical decisions to withhold or withdraw treatment that may hasten the incapacitated individual's death unless there is clear and convincing evidence authorizing such decisions prior to the individual's incapacitation.

EXCEPT a guardian may be authorized to request a DNR order.

A guardian cannot delegate authority to a third party or designate a patient advocate.

GUARDIAN

Every Probate Court and every judge has different procedures.

Call the judge's clerk at the court to ensure you are following the proper procedure.

Guardianship/Probate Court forms are available on the web.

CURRENT DNR LAWS
[UPDATED 2014]

MICHIGAN DO-NOT RESUSCITATE PROCEDURE ACT CHANGES

MICHIGAN DO-NOT RESUSCITATE PROCEDURE ACT CHANGES

Revises the definition of "DNR" to eliminate references to settings outside of a nursing home or outside of a mental health facility (owned or operated by the Department of Community Health).

Allows a guardian with the power to execute a do-not-resuscitate order under Section 5314 of the Estates and Protected Individuals Code (EPIC) to execute a DNR order on behalf of ward.

Establishes a process by which a guardian may execute a do-not-resuscitate order that is substantially similar to that in place for a person to execute a DNR order on his or her own behalf or for a patient advocate to do so.

Revises information required to be included in a DNR order to, among other things, require the signature of the guardian or patient advocate authorizing that, in the event the declarant's heart and breathing stops, no person shall attempt to resuscitate the declarant that he or she understands the full import of the order and takes responsibility for its execution, and that the order remains in effect until it is revoked as provided by law.

MICHIGAN DO-NOT RESUSCITATE PROCEDURE ACT CHANGES

Expands a provision allowing any interested person to petition the probate court for a review of a do-not-resuscitate order if he or she has reason to believe it was executed contrary to the declarant's wishes; the provision applies to DNR orders executed by a guardian that are contrary to a ward's best interests. In addition, the law requires the court to issue an injunction to void the order and prohibit complying with it if the court found that the order has been executed contrary to the declarant's wishes or a ward's best interests.

Allows a guardian (in addition to the declarant or patient advocate) to revoke a DNR order, requires all revocations to be in writing, requires actual notice of the revocation to be by delivering the written revocation to the declarant's attending physician (or a delegate), and also to the administrator of a facility (or that person's designee) if the declarant is a patient or resident of that facility.

Instead of destroying a revoked order, requires the declarant, patient advocate, guardian, or attending physician to write "void" on all pages of the order and remove the declarant's do-not-resuscitate identification bracelet (if applicable).

Requires, if the declarant is a patient or resident of a facility, the administrator or a designee who receives an actual notice of a revocation to immediately make the revocation part of the patient's or resident's permanent medical record.

ESTATES AND PROTECTED INDIVIDUALS CODE (EPIC)

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ESTATES AND PROTECTED INDIVIDUALS CODE

Changes regarding Guardian and DNRs

A guardian may not execute a do-not-resuscitate order without visiting the ward within 14 days of executing the DNR order and, if meaningful communication were possible, consulting with the ward about executing an order.

The guardian must consult directly with the ward's attending physician as to specific medical indications that warrant a DNR order. This must be repeated annually if a DNR order had been executed on the ward's behalf in order to consult with the ward or the attending physician in order to reaffirm the order.

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ESTATES AND PROTECTED INDIVIDUALS CODE

The annual report to the court required under a guardianship has to include whether the guardian has executed, reaffirmed, or revoked a DNR order on behalf of the ward during the past year.

When a guardianship petition is filed on the basis of incapacity, a guardian ad litem (GAL) is appointed for the individual who is the subject of the petition, if that individual does not already have legal counsel. The law requires the GAL to explain to the individual that the right to request limits on a guardian's powers includes a limitation on the guardian's power to execute a DNR.

The GAL will also have to inform the individual that if a guardian were appointed, the guardian may have the power to execute a DNR order on his or her behalf, and, if meaningful communication is possible, the GAL will have to determine if the individual objects to having a DNR order executed on his or her behalf. A GAL will have to notify the court if the individual objected to having a DNR order executed.

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ADULT FOSTER CARE
FACILITY CHANGES



House Bill 4383 amended the Adult Foster Care Facility Licensing Act (MCL 400.704) to revise the reference to the Michigan Do-Not-Resuscitate Procedure Act contained in the definition of the term "do-not-resuscitate order."

MCL 400.66h

The Social Welfare Act

Pertains to Medicaid residents only.

MCL. 400.66h

... If the person for whom surgical or medical treatment is recommended is not of sound mind, or is not in a condition to make decisions for himself, the written consent of such person's nearest relative, or legally appointed guardian, or person standing in loco parentis, shall be secured before such medical or surgical treatment is given...

MCL 400.66h

Does not necessarily grant authority

Creates a duty for providers to obtain consent.

SURROGATE

"Patient surrogate" means the parent or legal guardian of a patient who is a minor or a member of the immediate family, the next of kin, or the legal guardian of a patient who has a condition other than minority that prevents the patient from giving consent to medical treatment.



MCL 333.5655(b) That the patient, or the patient's patient surrogate or patient advocate, acting on behalf of the patient, has the right to make an informed decision regarding receiving, continuing, discontinuing, and refusing medical treatment for the patient's reduced life expectancy due to advanced illness.

"Advanced illness", except as otherwise provided in this subdivision, means a medical or surgical condition with significant functional impairment that is not reversible by curative therapies and that is anticipated to progress toward death despite attempts at curative therapies or modulation, the time course of which may or may not be determinable through reasonable medical prognostication. For purposes of section 5655(b) only, "advanced illness" has the same general meaning as "terminal illness" has in the medical community.

M.C.L. 333.5660

The Michigan Dignified Death Act DOES NOT "Create a presumption about the desire of a patient who has reduced life expectancy due to advanced illness to receive or refuse medical treatment, regardless of the ability of the patient to participate in medical treatment decisions."

Case Law suggests that a surrogate may still require clear and convincing evidence.

MI-POST

<p>An optional, one-page, two-sided medical order with a person's wishes for care in a crisis.</p>	<p>A part of the advance care planning process that includes choices about Cardiopulmonary Resuscitation (CPR), critical care, and other wanted care.</p>	<p>A form that guides care only if the person cannot tell others what to do at that time.</p>	<p>A completed form is signed by the patient/patient representative and the physician, nurse practitioner, or physician's assistant that gives medical advice and suggestions.</p>	<p>A patient representative may fill out a MI-POST for the person if they are not able to make healthcare choices due to illness or injury.</p>
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QUESTIONS?
