Health Care Decision-Making For a Resident In a Nursing Home

Policy Statement of the Michigan State Long Term Care Ombudsman Program

January, 2013

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Introduction

The law has long been clear that an adult who is able to give informed consent to medical treatment – who understands her or his condition, treatment options, intended effects and possible side effect of these choices – has sole right and authority to make those decisions.

Residency in a nursing home does not affect this right.

The law concerning who has authority to make medical decisions if an adult lacks the ability to do so has evolved over the years through new laws and court decisions.

The process has been episodic, non-comprehensive, and incomplete. The state of the law today can be compared to a jigsaw puzzle with some pieces missing and other pieces not fitting well with one another.

The situation is understandably confusing to long-term care residents, to family members, to health care providers, to long-term care ombudsman and to state officials charged with overseeing the quality of nursing home care.

For a number of years, surveyors cited nursing homes if every resident did not have either an advance directive or a guardian. However, this was a misinterpretation of the law, with adverse consequences for residents and for nursing homes.

Nursing home staff can be under the misimpression that a patient advocate has authority immediately upon the signing of an advance directive, or that a guardianship preempts almost all rights of a resident.

Historically, some nursing homes have pushed for guardianship for the convenience of the nursing home rather than the needs of the residents.

It is the aim of this Statement to clarify this broad area of the law, which we term surrogate decision-making.

It must be noted the Centers for Medicare and Medicaid Services published changes to surveyor guidance for F-tag 155 (advance directives)

and F-tag 309 (quality of care – review of resident at or approaching end of life), effective November 30, 2012.

These changes **do not** alter state law regarding who can make health decisions for an individual who becomes unable to make them her or himself. Indeed, the new language underscores the importance of properly recognizing those who are so empowered.

The sole focus of these materials is health care decision-making. There are different laws and different mechanisms for decision–making concerning an individual's property and financial affairs.

The Policy Statement is in three parts: Advance Directives, Family Decision-Making, and Guardianship. Information on voluntary and involuntary psychiatric hospitalization is beyond the scope of this paper.

For ease of reading, the information is presented in a question-and-answer format. Citations are to Michigan law (MCL); federal statute (42 USC) or federal regulation (42CFR).

The statement is directed toward nursing home administrators, social workers, directors of nursing, and admissions personnel; and to nursing home surveyors in the Bureau of Health Systems, Michigan Department of Licensing and Regulation.

The Michigan State Long Term Care Ombudsman Program has developed other materials on surrogate decision-making for residents of long term care facilities and their families.

These publications include the booklet, ***Advance Directives: Planning for Medical Care in the Event of Loss of Decision-Making Ability***. The booklet, which has questions-and-answers, and fill-in-the-blank forms, is Appendix A to this paper, and has been accessible on-line.

In addition to English, the booklet is available in Spanish, Arabic, Chinese, Korean, German and Italian.

These materials or others can be used by nursing homes to help fulfill federally mandated responsibilities to educate staff; to provide community education; and to assist willing residents to complete an advance directive.

In reviewing the particulars of the law, it is important to keep in mind the grand purpose of this statutory and regularly scheme concerning

surrogate decision-making: to honor the wishes, values and dignity of the individual.

It is also important to recognize there can be an unfortunate chasm between the law as it is written, and the law as it is practiced.

If upon reading this policy paper, you have further questions, please contact the State Long Term Care Ombudsman Program at (517) 373-3697 or gellerb@michigan.gov.

Finally, I thank Sarah Slocum, Michigan State Long Term Care Ombudsman, for her unflagging advocacy and support.

B.G.

Part 1

Advance Directives

What is an advance directive?

An advance directive is a signed and witnessed document in which an individual voluntarily provides input or direction concerning future medical care decisions in the event the individual become unable to participate in these decisions.

Are there different types of advance directives?

Yes. But to avoid unnecessary confusion, this statement focuses on the most prevalent type of advance directive, a "durable power of attorney for health care." This type of document is also known as a "health care proxy," or a "patient advocate designation."

What is a durable power of attorney for health care?

A durable power of attorney for health care is a document whereby an individual voluntarily chooses another person to make medical decisions for her or him, during any time she or he "unable to participate in medical treatment decisions." MCL 700.5506 *et seq*.

What is a nursing home's obligation concerning advance directives for a new resident?

Under the Federal Patient Self-Determination Act, a nursing home which participates in Medicare or Medicaid must give written information to a new resident about the resident's right under Michigan law to make

decisions about her or his medical care, and the right to sign an advance directive. 42 USC 1395cc(f)(1)((A)(i); 42 USC 1396a(w)(1)(A)(i); 42CFR 489.102(a)(1); 42 CFR 483.10(b)(8).

What if an incoming resident does not have the capacity to understand this information?

The nursing home has an obligation to give the information to family or a surrogate for the resident empowered under state law to receive information about a nursing home's policies and procedures. 42 CFR 489.102(c).

Must a nursing home help a resident toward having an advance directive?

Yes. A nursing home has a responsibility "to offer assistance if a resident wishes to execute one or more directive(s)." CMS Surveyor Guidance to F Tag 155, p. 4.

During a periodic survey, surveyors must interview staff to determine "how staff help the resident or legal representative document treatment choices and formulate an advance directive." CMS Surveyor Guidance Investigative Protocol for 42 CFR 483.10(B)(4) and (8).

Can a nursing home provide educational materials about advance directives to an applicant or resident?

Yes.

What about making fill-in-the-blanks forms available?

A nursing home should instruct a resident about options for completing an advance directive, including how to obtain fill-in-the-blanks forms.

If a nursing home makes available fill-in-the-blank forms, the home should ensure residents are aware there is no standard form for a durable power of attorney for health care, and that the resident has other options.

Can a nursing home require an applicant or a resident to have an advance directive?

No. It is an individual's a choice whether to have an advance directive. A nursing home cannot condition admission or continued stay on a resident having or not having an advance directive. 42 USC 1395cc(f)(1)(C); 42 USC 1996a(w)(1)(C); 42 CFR 489.102(a)(3).

This is echoed in state law. MCL 700.5512(2)

How does a nursing home know if an incoming resident already has an advance directive?

The nursing home must determine whether an incoming resident has an advance directive. The nursing home should ask the resident, or if the resident is unable to understand, should ask family or other surrogate.

What is the obligation of the nursing home if an incoming resident already has an advance directive?

The nursing home has an obligation to make an advance directive a prominent part of the resident's medical record. 42 USC 1395cc(f)(1)(B); 42 USC 1396a(w)(1)(B). 42 CFR 489.102(a)(2).

This is true for a new resident or a long-term resident.

Can a nursing home require an incoming resident to complete a new advance directive?

No. A nursing home cannot require a resident to replace an advance directive with one written on the nursing home's own form. The nursing home must make the existing advance directive part of the resident's medical record. Any corporate policy to the contrary is invalid.

Is there a statewide site where a durable power of health care can be filed?

Yes. Through legislation passed in 2012, The Michigan Department of Community Health is contracting with Gift of Life of Michigan, an organ donation agency, to establish a statewide registry for durable powers of attorney for health care. MCL 333.10301.

Participation is voluntary on the part of the individual, and it is free. Nursing homes will have electronic access to this information at no cost.

When will the registry be in operation?

The registry, known as *Peace of Mind*, will be open to registrants by mid-2013, and to providers in 2014.

Can an individual also include in a durable power of attorney for health care wishes concerning future medical treatment?

Yes, an individual has a choice whether to include general wishes, specific wishes or no wishes at all. MCL 700.5507(1).

Who is able to have a durable power of attorney?

An individual must be 18 years old or older, and of "sound mind." MCL 700.5506. In this context, sound mind means the individual realizes he is giving another person authority to make health care decisions if she or he cannot, and she or he knowingly chooses this person.

Is there a standard form for a durable power of attorney for health care?

No. There are a number of forms available from different organizations. An individual can instead have a lawyer draft the document. A hand-written document can be valid if properly signed and witnessed.

What are the requirements of a valid durable power of attorney for healthcare?

The document must be signed by the individual, and witnessed by two persons. Nursing home staff members are prohibited from serving as a witness for a resident. MCL 700.5506(4).

Does the document have to be notarized?

No. There is neither a requirement nor suggestion in the law that the document be notarized.

What is the person designated in a durable power of attorney for health care called?

The person is called a "patient advocate." MCL 700.5506(2).

Can an individual choose more than one patient advocate to serve at the same time?

No. Under this statute, an individual can only choose one person to serve at any one time.

Can an individual name a second person to serve if the first person cannot?

Yes. An individual can appoint one person as patient advocate, and a second person to serve as patient advocate **if** the first person does not accept, is incapacitated, resigns or is removed. MCL 700.5507(2).

The second person is commonly known as a "successor patient advocate."

A patient advocate or successor patient advocate does not have power to delegate her of his powers to someone not named in the document.

What if an individual does choose two or more patient advocates to serve at the same time?

The document is not invalid. You may request the designated patient advocates inform you who will serve as the primary contact person.

Does a patient advocate have authority to make decisions immediately upon the individual signing the durable power of attorney?

No. This is misconception as serious as it is popular.

Upon signing a durable power of attorney for health care, the individual retains the right to make medical care decisions for herself or himself just as before.

One criteria for compliance with 42 CFR 483.10(b)(4) and (8) is if the facility has "documented when the resident is determined not to have decision-making capacity and **therefore** decision-making is transferred to the health care agent or legal representative." CMS Surveyors Guidance. (emphasis added)

Can an individual give a patient advocate immediate access to medical records?

Yes. Indeed, the document might explicitly reference HIPAA, and serve as a release under that statute.

What must occur before a patient advocate has authority to act for the individual?

First, the patient advocate must be given a copy of the document. Second, the patient advocate must sign an "acceptance," a document whereby the person agrees to properly undertake her or his duties. MCL 700.5507(3).

Is there standard language for the acceptance?

The general language of the acceptance is set forth in law. MCL 700.5507(4).

When does the patient advocate have to sign the acceptance?

The patient advocate can sign the acceptance when the individual signs the durable power of attorney for health care, or at any time thereafter.

What else must occur before a patient advocate has authority to act?

A patient advocate only has authority to act when the individual is "unable to participate in medical treatment … decisions." MCL 700.5508(1).

Who determines whether the individual has become unable to participate in medical treatment decisions?

The individual's attending physician and a second physician or licensed psychologist make that determination. MCL 700.5508(1).

Must the attending physician and the other physician or psychologist examine the individual before making the determination?

Yes. MCL 700.5508(1). They need not conduct the examination at the same time as one another.

What must the physicians or psychologist do upon making their determination?

The physicians or psychologist must put their determination in writing, make the writing part of the resident's medical record, and review the determination at least once a year. MCL 700.5508(1).

How is a durable power of attorney described after the physicians or physician and psychologist have made their determination?

If the individual is deemed unable to participate in medical treatment decisions, a popular expression is that the durable power of attorney for health care has been "triggered."

Is there a standard form for the physicians or psychologist to use?

No. It is up to the nursing home to develop a form for this purpose.

Are the two physicians or physician and psychologist determining the individual is incompetent?

No. Only a court, after notice and a hearing, can determine an individual is "incapacitated" in a legal sense. MCL 700.1105(a); MCL 700.5306(1)

What powers can an individual give her or his patient advocate?

An individual can give a patent advocate the power to make any care, custody and medical decisions the individual herself or himself could make.

Can an individual give a patient advocate power to withhold or withdraw life-sustaining care?

Yes. To do so, the individual must explicitly state in the document that she or he is giving the patient advocate that power. MCL 700.5509(1)(e).

What treatments could a patient advocate withhold or withdraw if given this authority?

Examples include resuscitation, antibiotics, respirator care and tube feeding. A patient advocate could also opt for hospice care. MCL 5509(1)(f).

Can a patient advocate determine which relatives can visit a resident or talk with a resident by telephone?

No. A resident has the right to speak on the telephone and to have visitors of his or her choice.

What is the duty of the patient advocate?

A patient advocate has a duty to take reasonable steps to follow the desires and instructions of the individual, whether expressed in the document or orally in the past. MCL 700.5509(b).

What if the first patient advocate cannot be found?

The health care provider can call upon the successor patient advocate.

What happens if an individual regains the ability to participate in medical treatment decisions?

If an individual regains the ability to participate in medical treatment decisions, the authority of the patient advocate is suspended for as long as the individual remains able to participate. MCL 700. 5509(2).

Who determines an individual has regained the ability to participate in medical treatment decisions?

The law is silent on this issue. One might assume the attending physician can make this determination.

What happens if the individual again loses the ability to participate in medical treatment decisions?

The determination an individual has once again become unable to participate in medical treatment must be made by two physicians or a physician and psychologist. MCL 700.5509(2)

Is there any time limit after which a durable power of attorney is not valid?

No. The only exception is if the document, itself, states a time limit.

How often must the physicians or physician and psychologist review their determination?

If the individual has been determined to be unable to participate in treatment decisions, the attending physician and second physician or psychologist are to review the determination at least once a year. MCL 700.5508(1).

Can an individual revoke a durable power of attorney for health care?

Yes.

Does a revocation need to be in writing?

No.

Can an individual revoke a designation even after two physicians have determined that she or he is unable to participate in treatment decisions?

Yes.

The law reads, "… even if the individual is unable to participate in medical treatment decisions, a patient may revoke a patient advocate designation at any time and in any manner by which he or she is able to communicate an intent to revoke" it. MCL 700.5510

Can an individual partially revoke a durable power of attorney for health care?

In effect, yes. Even if an individual is unable to participate in medical treatment decisions, she or he can express a desire to receive specific life-extending procedures, and those wishes are binding on the patient advocate. MCL 700.5511(1)

What is a nursing home's obligation if a resident revokes a durable power of attorney for health care?

If a nursing home administrator or staff member witnesses a revocation that is not in writing, that person must describe the circumstances in writing, and sign it. MCL 700.5510(1)(d).

The nursing home or physician must then note the revocation in the resident's medical records and bedside chart, and attempt to contact the patient advocate. MCL 700.5501(1)(d).

Can a resident sign a new durable power of attorney after revoking one?

Yes, if the resident is of "sound mind."

An individual might be unable to participate in treatment decisions, but still be able to understand giving another person authority to make those decisions.

What if a resident has more than one document?

The most recent, validly signed document should be followed if there is any inconsistently between the two documents. MCL 700.5510(1)(e).

Does a patient advocate have any authority after the death of the individual?

Yes, but only to the extent the durable power of attorney for health care empowers the patient advocate to make an organ or body donation. MCL 700.5510(1)(d).

What if dispute arises concerning a durable power of attorney for health care?

The following disputes can be resolved through petition to the probate court:

1) Whether or not an individual is able to participate in medical treatment decisions. MCL 700.5508(2).

2) Whether or not an individual has revoked a durable power of attorney for health care. MCL 700.5510(1)(d)

3) Whether or not the patient advocate is acting consistent with the individual's wishes and otherwise consistent with the individual's best interests. MCL 700.5511(5).

Does a nursing home have an obligation to honor a durable power of attorney for health care?

Yes.

If a durable power of attorney for health care is properly signed and witnessed, if a proper determination has been made the resident is unable to participate in medical treatment decisions, if the patient advocate is acting in the resident's best interest, and if the directions of the patient advocate are within sound medical practice, a nursing home is obligated to follow those directions. MCL 700.5511(3).

How will a surveyor evaluate compliance with this obligation?

When a surveyor does a record review, he or she must determine "whether any treatments or interventions have been ordered (e.g., unplanned hospitalizations or placement of a feeding tube) that are inconsistent with the resident's documented acceptance or refusal of treatment or with any advance directive." CMS Guidance to Surveyors.

To comply with 42 CFR 483.10(b)(4) and (8), the facility must have "monitored the care and services given to the resident to ensure they are consistent with the resident's documented choices and goals." CMS Guidance to Surveyors.

Can a nursing home or a physician be successfully sued for following the instructions of a patient advocate?

If a health care provider reasonably believes the patient advocate has authority to make a decision, the health care provider has the same liability as if the individual had made the decision herself or himself. MCL 700.5511(2).

What else does law require of nursing homes?

A nursing home has an obligation to provide for "education of staff and the community on issues concerning advance directives." 42 USC 1395cc(f)(1)(E); 42 USC 1396a(w)(1)(E).

Can the State Long Term Ombudsman Program assist nursing homes in training nursing home staff?

Yes. The SLTCOP will consider requests to provide written materials, to participate in in-service training, and to address larger groups at conferences.

Are there advance directives other than a durable power of attorney for health care?

Yes. One type is a "living will." In a living will, an individual states her or his wishes for care if terminally ill and not able to participate in treatment decisions.

Although 47 states have laws making living wills legally binding, Michigan does not have such a law.

Can an individual still have a living will?

Yes. The document can provide good evidence of the wishes of an individual. This may be particularly important for an individual who has outlived closed friends and relatives, and has no one to appoint as a patient advocate.

What is an "advance directive for mental health care?"

An individual can sign a durable power of attorney for health care that is limited to mental health treatment decisions. There are provisions in the law that are different for this type of advance directive.

What these differences?

In an advance directive for mental health care, the determination of inability to participate in mental health decisions must be made by a physician and a mental health professional. MCL 700.5515(2). The individual can choose the physician or mental health professional, or both.

The individual can provide for a 30-day "cooling-off" period, whereby the patient advocate retains authority to make decisions for 30 days after a revocation. MCL 700.5515(d).

A mental health professional need not comply with a provision of the document if the life of the individual or another person is in danger. MCL 700.5511(4)(e).

Are there other differences?

An individual may wish to be quite specific in her or his mental health advance directive. She or he might specify the hospital to which she or he wants to go, indicate a choice of treating psychiatrist, and list effective medications and dosage.

Can an individual include wishes for mental health care within a more general durable power of attorney for health care?

Yes, if the individual so chooses.

Can individual have both a mental health advance directive and a general durable power of attorney for health care?

Yes. The individual can choose one person to be patient advocate for mental health issues and a different person to be patient advocate for all other medical decisions.

Where can someone obtain further information?

A booklet entitled, ***Advance Directive For Mental Health Care***, with questions-and-answers and a fill-in-the-blanks forms is available online in English, Spanish and Arabic:

https://www.michigan.gov/mdch/0,4612,7-132-2941_4868_41752---,00.html

What is a "do-not-resuscitation declaration?"

An individual can sign a standard form stating that if breathing and heartbeat stop, she or he wants no efforts made at resuscitation.

This document is intended for individuals living at home or assisted living. It is **not** applicable to individuals while in a nursing home or hospital.

Is a do-not-resuscitate declaration the same as a "do-not-resuscitate order?"

No. A do-not-resuscitate order is a notation in the medical chart of a nursing home resident or hospital patient.

The notation is made by a physician at the request of a resident, a hospital patient, a patient advocate (if the patient advocate has been given authority to withhold life-sustaining treatment), or other person with legal authority.

Part 2

Family Decision-Making

What is a general family consent law?

A general family consent law provides that if an individual is not able to participate in a medical treatment decisions, and does not have a patient advocate or guardian, a family member can make the decision for the individual.

Which family member can make the decision?

A general family consent statute sets forth a priority for family members; first, the spouse; second an adult child or children; third, parents; fourth, siblings.

Does Michigan have a general family consent statute?

No, Michigan, is not among the states that have such a law.

Has a general family consent statute been considered by the Michigan legislature?

Yes. The first time was in 1992, House Bill 5553, introduced by Rep. Perry Bullard and 20 co-sponsors.

A revised version was introduced in 1997 as Senate Bill 671. Senator Chris Dingell and five co-sponsors introduced the bill. Neither bill became law.

Will a general family consent statute be re-considered by the Michigan legislature?

It is possible a bill will be introduced at some point in the future. Nursing homes and other health care providers would have opportunity to comment on the bill as it was being considered in the legislative process.

Are there any laws in Michigan that empower family members to make medical treatment decisions?

Not all providers and advocates agree on an answer to that question. The position of the State Long Term Care Ombudsman Program is there are two relevant laws.

What is the first law?

The Michigan Social Welfare Act provides, in part,

> 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 (The entire section of the law is Appendix B.)

How is this law relevant?

Michigan's Medicaid provisions are set forth in the Social Welfare Act. The provision cited above thus applies to nursing home residents and others enrolled in Medicaid, we believe.

Which family member has priority under this statute?

The term "nearest relative" is not defined.

Does the power to consent to treatment for a resident mean a family member can refuse treatment?

Certainly, the family member has the right to withhold consent.

If the nursing home believes the family member is not acting in the best interests of the resident, the nursing home can petition the probate court for appointment of a guardian.

How does the nursing home determine an individual is not of sound mind or not in a condition to make decisions?

The statute provides no guidance.

A mini-mental exam is wholly inadequate. And the test is not whether the resident agrees with the physician or family.

What, then is best?

The best approach may be to rely on the opinion of the attending physician and one other physician or psychologist, who would document their determination in the resident's medical record. This parallels the determination under a durable power of attorney for health care.

It is critically important that a nursing home not turn to a family member if the resident is still able to participate in the treatment decision.

What is the second law?

The Michigan Dignified Death Act, MCL 333.5652 *et seq*., sets forth certain responsibilities for a physician who diagnoses an individual as terminally ill.

When did the law go into effect?

The law went into effect in1997. The entire Act is Appendix C.

What is a major responsibility of the physician under the law?

If the physician is recommending treatment, the physician must provide information to the patient on the recommended course of treatment and alternatives to that treatment. MCL 333.5654.

What other information must the physician provide?

If the physician is recommending treatment, the physician must provide information to the patient that she or he has the right to -

- Make "an informed decision regarding receiving, continuing, discontinuing, and refusing medical treatment"
- Choose palliative care, including hospice care
- Choose "adequate and appropriate pain and symptom management."

MCL 333.5655.

What if the patient is unable to give consent?

The law provides that the same information described above be provided to the patient's *patient advocate* or the *patient surrogate.*

What is a patient advocate*?*

A patient advocate is a person appointed by an individual to make medical decisions if the individual cannot participate. The appointment is made through a *durable power of attorney for health care.* MCL 700.5506 *et seq.*

How does this law define patient surrogate?

For an adult, a "patient surrogate means … a member of the immediate family, the next of kin, or the legal guardian. MCL 333.5653(g).

Can an immediate family member or next of kin can make decisions to consent to, refuse authorization for, or withdraw medical treatment?

There is certainly implication in this law that if an individual is terminally ill and unable to give informed consent, and does not have a guardian or patient advocate, that a family member can make those decisions.

Is that how the law is interpreted by the Michigan Department of Community Health*?*

Yes. A brochure entitled, *Michigan Dignified Death Act*, published by the Michigan Department of Community Health in July, 2003, states -

> If you do not name an advocate, your doctor may let a patient surrogate make decisions for you. A court can also name a surrogate. A surrogate may be member of your immediate family or next of kin."

How does a nursing home determine an individual is unable to give informed consent?

As with the Social Welfare Act provision, the best course is likely to have that decision made by the attending physician and one other physician or psychologist, who would put their determination in the resident's medical record.

Which family members have priority?

The law does not address this. One can presume immediately family members have priority over other relatives.

If the spouse and children of the resident agree on a course of treatment, priority is not an issue.

What if immediate family members disagree?

If there is conflict that cannot be resolved informally, the nursing home has two options.

Each county has a community dispute resolution center. At minimal cost, family members can agree to *mediation*. The mediator has no power to make decisions, only to help family members in conflict explore whether agreement can be reached.

If all else fails, the nursing home has the option of going to probate court and petitioning for guardianship.

What if the resident is not terminally ill and not enrolled in Medicaid?

In such case, there is no statutory authority for a nursing home to rely on a family member to make decisions for a resident who cannot participate in that decision.

Can a nursing home still turn to a family member to make decisions?

There are customs whereby a family member authorizes treatment in circumstances when an individual cannot make decisions for herself or himself. These customs are likely followed very often in outpatient, nursing home and hospital settings.

How can a nursing home determine if it can rely on a family member to authorize treatment*?*

This is an issue of risk-management, best addressed by counsel for the nursing home.

What are the risks?

The risks are potential lawsuits from other family members, and citations from the Michigan Department of Licensing and Regulatory Affairs. The risk of lawsuit is minimal if immediate family members agree on a course of treatment

Part 3

Guardianship

Is there one guardianship system for all adults?

No. Provisions in the Estates and Individuals Code apply to all adults except adults with an alleged developmental disability. MCL 700.5301 *et seq.*

Provisions in the Mental Health Code apply only to adults with an alleged developmental disability. MCL 330.1600, *et seq.* The definition of "developmental disability" is Appendix C.

Are the provisions of the two laws the same?

No. Although both types of guardianship are handled by the probate court, there are significant differences in procedure and terminology.

What are some of the differences?

A proceeding under the Mental Health Code requires a psychosocial evaluation known as a "612 report." All respondents have a lawyer appointed to represent them. A partial guardianship lasts for a maximum of 5 years unless a new proceeding is initiated.

Information in this policy statement focuses on guardianships brought under the Estates and Individuals Code.

What is a *guardian*?

A guardian is a person or company appointed by a probate court to make decisions for an individual if there is clear and convincing evidence the individual is unable to make informed decisions about her or his care, **and** that guardianship is necessary. MCL 700.5306(1).

What is an *informed decision*?

The term is not defined in the law. Generally, if an individual understands the choices she or he can make, and understands the risks of each choice, she or is making an informed decision.

Prior to 1989, the law referred to an inability to make "responsible decisions." The term was changed in the law because guardianship is **not** appropriate merely because family or health care provider believe an individual is not making the best or safest decision.

How many adults in Michigan have a guardian?

According to statistics published by the State Court Administrative Office, 53,882 adults had a guardian at the end of 2011. It is not known how many of these individuals reside in nursing homes.

What is the difference between a guardian and a *conservator*?

A conservator is a person appointed by a probate court for an individual who cannot manage his or her money or property effectively. MCL 700.5401(3).

An individual can have a guardian, or a conservator or both. The guardian and conservator can be the same person, or different persons, depending on circumstances.

Can a court give a guardian power to handle an individual's money if a conservator is not appointed?

Yes. MCL 700.5314(d)(ii).

If an individual has a durable power of attorney for health care, is guardianship necessary?

Rarely. If a patient advocat*e* under a durable power of attorney for health care is performing her or his duties, a court **cannot** give a guardian power to make medical treatment decisions. MCL 700.5306(2).

What if a court appoints a guardian because the court is unaware a durable power of attorney for health care exists?

In such circumstances, the patient advocate and not the guardian has authority to make medical decisions. MCL 700.5306(5).

Does every resident who does not have a patient advocate need a guardian?

No. This is a long-standing and common misunderstanding.

A nursing home should never be cited because a resident who is able to participate in medical decisions has neither a patient advocate nor a guardian.

Who can apply for guardianship?

Anyone interested in the welfare of the individual can petition for guardianship, if the petitioner believes guardianship is appropriate. MCL 700.5303(1).

What happens upon a petition for guardian being filed with the court?

Court staff set a date for a court hearing. MCL 700.5303(3). The time between petition and hearing can be two weeks or more, depending on the court's caseload.

Can a judge appoint a guardian before a court hearing is held and the respondent receives?

<u>No</u>, never.

What else happens upon a petition being filed?

Court staff will send a *guardian ad litem* to the nursing home to talk with the resident before the hearing date. MCL 700.5303(3). Under the Mental Health Code, the court immediately appoints a lawyer for the respondent.

Does the guardian ad litem have any power to make decisions for the resident?

<u>No</u>.

What will the guardian ad litem talk to the resident about?

The guardian ad litem will explain guardianship, rights the individual has in the process, and ask if the resident objects to guardianship or to the individual seeking guardianship. MCL 700.5305.

Must the guardian ad litem provide written material to the resident?

Yes. Under a law passed in 2012, the guardian ad litem, must hand the respondent written information explaining the rights the individual has. MCL 5306a(2). The type of information the guardian ad litem must convey is shown in the pamphlet, ***Your Rights in the Guardianship Process***, Appendix E.

A guardian has long had the obligation to orally explain these rights to the respondent. MCL 700.5305.

What does the guardian ad litem do after speaking with the resident?

The guardian ad litem will likely talk with the petitioner, may review the medical record, and may talk with staff.

What then?

If the individual does not object to guardianship or to the individual seeking appointment as guardian, and does not request limits on the guardian's powers, the guardian ad litem will provide information and make recommendations to the judge.

The guardian ad litem will advise the judge whether there are alternatives to guardianship, whether guardianship is appropriate, what powers the guardian should have, who should serve as guardian, and whether mediation should be considered. MCL 700.5305(e).

What if the resident does not want a guardian?

If he individual does not want a guardian, objects to the person nominated as guardian, wants limits on the guardian's powers, or requests a lawyer, the guardian ad litem reports this to the judge.

In any of these circumstances, the judge is obligated to appoint a lawyer to represent the individual. MCL 700.5305(3), (4). At that point, the role of the guardian ad litem ends. MCL 700.5305(5).

Does the individual have the right to attend the court hearing?

Yes. MCL 5304(4).

The guardian ad litem should ask if the resident wants to be at the hearing, and if so, determine what accommodations the individual might need. These could include a wheelchair, an assistive listening devise or an interpreter.

Does a nursing home have an obligation to transport a resident to court?

Yes. If the resident is enrolled in Medicaid and wishes to attend the hearing but has no transportation, the nursing home has an obligation to arrange transport:

> Where needed services are not covered by the Medicaid State plan, nursing facilities are still required to attempt to obtain these services. For example, if a resident requires transportation services that are not covered under a Medicaid state plan, the facility is required to arrange these services. This could be achieved, for example, through obtaining volunteer assistance.
>
> The type of conditions to which the facility should respond with social services by staff or referral include, among several others:
>
> • ***Presence of legal or financial problems***
>
> State Operations Manual, Appendix PP: Guidance to Surveyors for Long Term Care Section Facilities, Interpretive Guidelines to 42 CFR 483.15(g)(1) (emphasis added)

If the judge determines the individual meets the standards for appointment of a guardian, who has priority to serve?

Assuming the individual does not already have a guardian appointed in another state, first priority is a person chosen or nominated by the individual, if that person is suitable and willing to serve. MCLA 700.5313(2). This has long been the law, but was underscored in legislation passed in 2012.

What if the individual does not choose or has not nominated a person to serve?

Second priority is a family member suitable and willing to serve. MCL 700.5313(3). Family disagreement about who should serve can be referred to mediation.

In what circumstances can a court appoint a professional guardian?

Only if the individual does not make a viable choice and there are no family members willing and able to serve is the judge permitted to appoint a professional guardian. MCL 700.5106(2).

Are professional guardians licensed, certified or registered?

No. There is no regulation of professional guardians. There have been very serious issues with a number of professional guardians, some of whom are responsible for hundreds of individuals.

What role can a nursing home play concerning the appointment of professional guardians?

A nursing home should never nominate a professional guardian to serve unless the home checks that the person, partnership or agency has an unsullied reputation and can well handle the duties of a guardian.

Can a judge appoint more than one person as guardian?

Yes. The persons appointed are known as *co-guardians*.

Can each guardian make a decision independently?

The *letters of guardianship* issued by the court will ideally indicate whether the co-guardians must act together or can act independently.

Do all guardians have the same powers?

No. The law requires the judge to limit the powers of a guardian to the demonstrated needs of the individual. MCL 700.5306(2). The applicable section in the Mental Health Code mirrors EPIC. MCL 330.1602(1).

The law now requires a judge to specify the powers of a guardian in the court *order*, which will be echoed in the letters of guardianship. MCL 700.5314.

If a resident has a guardian, should a nursing home keep a copy of the letters of guardianship in the medical file?

Yes.

The letters of guardianship should show what powers the court has granted to the guardian. For example, a *limited guardian* might not have the power to make some medical treatment decisions.

Does an individual maintain some rights under guardianship?

Yes. An individual does not cease to be "his or her own person" because of guardianship.

Unless the letters of guardianship are to the contrary, a resident retains the right to have visitors of her or his choice, to use the telephone privately, to practice her or his religion, and to enjoy other rights set forth in federal and state law.

Many of those rights can be found at 42 USC sec. 1395i-3(c); 42 USC sec. 1396r(c); and MCL 333.20201.

What about an individual with a guardian under the Mental Health Code?

Under the Mental Health, Code an individual with a partial guardian "retains all legal and civil rights" except those the court specifically grants to the partial guardian or designates as legal disabilities. MCL 330.1620(2).

What are some general responsibilities of a guardian?

A guardian is required to visit the individual at least every three months, and, if communication is possible, to talk with the individual before making major decisions. MCL 700.5314.

A guardian is required to make decisions in the individual's best interests, and to arrange appropriate medical and social services to restore the individual to the best possible physical and mental well-being. MCL 700.5314.

The provision in the Mental Health Code is MCL 330.1602.

Are there other general responsibilities?

Yes. A guardian has the responsibility to see that rights of the resident to dignity and good care are respected by a nursing home. Federal law provides guardians have the right to assert the rights of residents. 42 USC sec, 1395i-3(c)(1)(C); 42 USC sec.1396r(c)(1)(C).

A guardian can call the **Long Term Care Ombudsman Program** to assist her or him in effecting this goal. The toll-free telephone number is **1-(866) 485-9393.**

What are a guardian's general responsibilities to the probate court?

A guardian also has a duty to report to the court once a year concerning the condition of the individual, and to account to the court for any money in the guardian's control. MCL 700.5314(e).

The guardian also has a responsibility to inform the court of a change in her or his residence, and a change in the individual's residence. MCL 700.5314(a).

Is there a time limit on guardianship?

Under the Estates and Individuals Code, there is no time limit unless a termination date is included in the court order.

Under the Mental Health Code, a *partial guardianship* can last no more than 5 years. At that point a new petition for guardianship must be brought, if appropriate. MCL 330.1626.

Can a nursing home pay a guardian to have an individual reside in its nursing home?

No. Such payments constitute a felony, punishable by 4 years in prison, a $30,000 fine, or both. MCL 333.21792(1).

Can a nursing home request a guardian sign a nursing home admissions contract?

Yes. Under the Estates and Individuals Code, if the guardian has authority to determine where an individual lives, she or he can sign the admissions contract. MCL 700.5314(a), (d)(ii).

In signing the contract, to what is the guardian agreeing?

The guardian is agreeing to use the individual's funds the guardian controls to pay the nursing home bill.

The guardian is not agreeing to be a guarantor using her or his own funds. Requiring that would violate both state and federal law:

> With respect to admissions practices, a nursing home must … (ii) not require a third party guarantee of payment to the facility as a condition of admission (or expedited admission) to, or continued stay in the facility. 42 USC sec.1396r(c)(5)(A).

Does a guardian under the Mental Health Code have the same power to sign an admissions contract?

No. A guardian for an individual with a developmental disability must request explicit court authority in order to put the individual in a facility. MCL 330.1623.

Can a guardian complete and sign an application for Medicaid?

Yes. Form DHS -1171, page S.

A guardian has a responsibility to submit an application for a resident who is, or will soon be, eligible for Medicaid.

Can a guardian move a resident to another nursing home?

Yes, if the guardian has authority to determine where the individual resides. The guardian should consider the trauma such a transfer could cause the individual.

Does the nursing home have any obligation if the guardian decides to move the resident?

Yes.

> A nursing home must provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility. 42 USC sec. 1396r(c)(2)(C)

Does a guardian have access to the resident's medical records?

Yes, if the guardian's powers include authority to make medical decisions.

Can a nursing home give a professional guardian access to the records of residents who do not have a guardian?

No. This is a serious violation of a resident's rights under federal and state law. 42CFR Parts 160 and 164; 42 USC 1396r(c)(1)(A)(iii); MCL 333.20175(1); MCL 333.20201(2)(b).

Does a guardian have authority to prevent relatives from visiting a resident?

No, except if a court order explicitly excludes someone. Otherwise,

> A nursing home must … permit immediate access to a resident, subject to the resident's right to deny or withdraw consent at any time, by immediate family or other relatives of the resident. 42 USC Sec. 1396r(c)(3)(B).

Can a guardian with powers over medical treatment choose an attending physician and specialists for a resident?

Yes.

What is the general scope of a guardian's authority over medical decisions?

Generally, a guardian "may give consent or approval that is necessary to enable the ward to receive medical or professional care, counsel, treatment, or service." MCL 700.5314(c).

This includes physical examinations, wound care, medications, surgery, dental care, eye care, physical therapy, occupational therapy and speech therapy among other treatments.

Are there exceptions?

Yes. For instance, a guardian cannot authorize electroconvulsive treatment (ECT) unless the guardian has explicit authority from the court to do so, and two psychiatrists deem it appropriate. MCL 330.1717.

Can a guardian authorize psychotropic medication for a resident?

Yes.

It is critical the guardian consult with the physician prescribing the medication about the dose, the intended effects and side effects of any medication. The guardian can refuse a suggested medication.

The more information the guardian has, the better. For instance, recent reports have discussed the danger of psychotropic medication intended to treat schizophrenia being prescribed for dementia.

Can a guardian approve inpatient mental health treatment?

A full guardian has the power to admit the resident as a *formal voluntary patient* if the resident "assents." MCL 330.1415. This term is not

defined in Michigan law. At the very least it means a guardian cannot admit an individual as a voluntary patient if the individual expresses an objection.

If the individual does object, the guardian must seek a *commitment order* from the probate court. MCL 330.1423 *et seq.*

What if an individual has neither a guardian nor a patient advocate?

Despite any "behaviors" exhibited by a resident, a nursing home can not arrange for in-patient psychiatric treatment without authority from the resident, a legal representative of the resident, or a commitment proceeding.

Does a guardian have the right to authorize a do-not-resuscitate order in a resident's chart?

Judges differ in their view on whether a guardian has this power. The same is true for the power to withhold or withdraw any life-sustaining treatment, such as respirator, tube feeding, or antibiotics; and the power to authorize hospice care.

There are judges who make a forceful argument a guardian has these powers under the Michigan Dignified Death Act, if the resident is terminally ill.

Does it matter whether the guardian is a family member or a professional guardian?

To some judges, family members have greater discretion in making end-of-life decisions.

What if the nursing home or the guardian is unsure of the guardian's powers?

A guardian has the right to return to court to seek specific authority from the judge to make a particular decision. A nursing home can request a guardian do so.

Who provides information during the annual assessment of the resident?

Residents should be the primary source of information for resident assessment items. Should the resident not be able to participate in the assessment, the resident's family, significant other, and guardian or legally authorized representative should be consulted.

Center for Medicare and Medicaid Services, *RAI Version 3.0 Manual*, page 3-4.

Does this apply to Section Q, "Participation in Assessment and Goal-Setting?"

Yes.

Residents should be asked about inviting family members, significant others, and/or guardian/legally authorized representative to participate, and if they desire that they be involved in the assessment process. *Ibid*, page Q-1.

Having a guardian "should not create a presumption that the resident is not able to comprehend and communicate their wishes." *Ibid*, page Q-5.

What if an individual answers question Q-0500 in the affirmative?

If an individual answers "yes" to the question, "Do you want to talk to someone about the possibility of leaving the facility and returning to live and receive services in the community?" the nursing home should start the process toward referral to a waiver agent.

Can a guardian prevent the referral?

CMS has answered that question informally:

A referral to the local contact agency should be made if the resident wishes, even if they have a legal guardian, durable power of attorney for health care or a legally authorized representative, in accordance with state law.

MDS 3.0 Section Q Implementation Questions and Answers, from Informing LTC Choice Conference and E-mails, September 22, 2010

Can a guardian prevent a resident from moving to the community?

If the guardian has power to determine where the individual lives, the guardian will need to approve a transition to the community.

What information does a guardian need to evaluate the feasibility of a resident moving from the nursing home?

A guardian should be fully informed of programs available to eligible individuals, such as home and community based waiver services, home help services, and aid and attendance benefits through the Veterans Administration.

Where can a guardian obtain this information?

A guardian can contact the local Area Agency on Aging, a local waiver agent, the county office of the Department of Human Services, and the Veterans Administration.

Is there further information available about the duties of a guardian to the individual and to the court?

Yes. The publication, ***Handbook for Guardians of Adults, 10th edition, 2012*** is available online.

www.berriencounty.org/uploaded/trialcourt/guardians_handbook.pdf

If the nursing home believes a guardian is not performing his or her duties, what can be done?

If a guardian doesn't visit the resident, or return telephone calls from the nursing home, or pay the patient pay amount each month; if the guardian unduly restricts the rights of the resident or otherwise doesn't act in the resident's best interest, the nursing home can petition the probate court and request a new guardian be appointed.

The nursing home has this right whether the guardian is a family member or a professional.

What court form would a nursing home use?

The court form is called a *Petition for Modification / Termination of a Guardianship.* The form should be available from the probate court.

What if the nursing home believes a guardian is abusing or exploiting a resident?

The nursing home should immediately call **Adult Protective Services**, at **1-(855) 444-3911** and report the suspected activity. The nursing home should also file a report with the Bureau of Health Systems, and consider petitioning the probate court for appointment of a new guardian.

Does a resident have the right to request the court modify or terminate the guardianship?

Yes. The resident can always petition the court or write the judge a letter. Neither the guardian nor the nursing home can interfere in any way with this request. MCL 700.5310(2).

Are there any court fees if the resident asks for a modification or termination of a guardianship?

No.

Why might a resident request action from the probate court?

The individual might have needed a guardian because of a stroke or closed head injury. She or he may have recovered sufficiently to want to make her or his own decisions.

Why else might a resident request action from the probate court?

The individual might be unhappy with decisions of the guardian and want a different guardian or further limits on the guardian's powers.

For instance, if the resident wishes to move to the community but the guardian objects, the resident can go to court to request a modification of the guardianship.

Can a resident hire a lawyer to represent her or him in this process?

Yes. An individual always has the right to hire a lawyer in seeking to modify or terminate a guardianship.

If the individual seeks a modification or termination but does not have a lawyer, the court must appoint a lawyer for her or him.

What happens upon the court receiving a petition or letter?

The court will schedule a hearing and follow a process similar to that for an initial petition for guardianship. The individual has all the same rights in the process. MCL 700.5310(3), (4). Many of these rights are et forth in ***Your Rights in the Guardianship Process***, Appendix E.

How does a guardian get paid?

If a resident is enrolled in Medicaid, the guardian can charge a maximum of $60.00 per month. This amount is deducted from the resident's patient pay amount, and Medicaid pays the nursing home the additional $60.00. Bridges Eligibility Manual (BEM) 546, Post-Eligibility Patient Pay Amounts, p. 7.

Can a guardian use a resident's personal needs funds to pay her or himself?

No.

What if a resident is not enrolled in Medicaid?

The guardian can fix her or his fees, which are subject to approval each year by the probate court. Michigan Court Rules 5.313(F).

When do the powers of a guardian end?

The powers of a guardian generally end upon the death of the resident. MCL 700.5308.

What if a nursing home has questions about guardianship?

A nursing home can telephone the probate court.

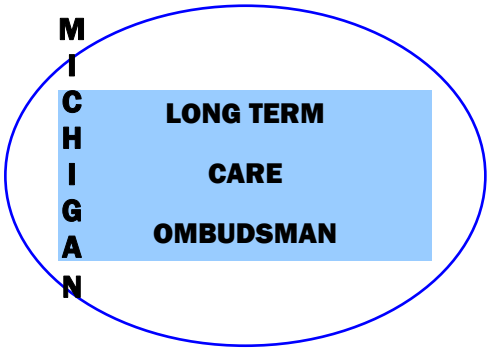
If court staff are unable to answer a question, they may be able to refer the caller to an agency that can answer it.

APPENDIX A

Advance Directives

Planning for Medical Care in the Event of

Loss of Decision-Making Ability



Bradley Geller

Michigan State Long Term Care
Ombudsman Program
1-866-485-9393

Advance Directives

Planning for Medical Care in the Event of
Loss of Decision-Making Ability

- Durable Power of Attorney for Health Care
- Living Will
- Do-Not-Resuscitate Declaration
- Declaration of Anatomical Gift

Foreword

We all value the right to make decisions for ourselves. Whether we term this autonomy, liberty or independence, it is central to our concept of dignity.

One important area in which we exercise independence is in choosing the medical treatment we receive. Few would deny a competent adult has the right to consent to or refuse particular medical treatments or medically related services.

Unfortunately, due to illness or injury, we may not remain able to participate in treatment decisions. Such disability may be temporary or permanent.

No one likes to consider the possibility of becoming unable to make decisions. It is easy to put off thinking about that happening, and what treatment we would like in those circumstances.

As difficult as it is to confront these issues, by doing so we can help ensure our wishes are honored in the future.

Once you determine your wishes, the process of planning is relatively simple and inexpensive or free. This pamphlet contains information on advance directives to assist you. The fill-in-the-blanks forms at the end of the pamphlet are but one option should you choose to proceed.

Questions and Answers About Advance Directives

A. Introduction

What is an *advance directive*?

An advance directive is a written document in which you specify what type of medical care you want in the future, or who you want to make decisions for you, should you lose the ability to make decisions for yourself.

Why is there a need for advance directives?

Years ago, most individuals died in their own homes. Today, there is greater chance of dying in a hospital or nursing home.

Expanding technology has increased the treatment choices we face, and improved public health has increased life expectancy. Decisions may have to be made concerning our care at a time we can no longer communicate our wishes.

What are the advantages of having an advance directive?

We each have our own values, wishes and goals. Having an advance directive provides you some assurance your personal wishes concerning medical and mental treatment will be honored at a time when you are not able to express them. Having an advance directive may also prevent the need for a guardianship imposed through the probate court.

Must I have an advance directive?

No. The decision to have an advance directive is purely voluntary. No family member, hospital or insurance company can force you to have one, or dictate what the document should say if you decide to write one. A hospital or nursing home or hospice organization cannot deny you service because you do or don't have an advance directive.

Are there different types of advance directives?

Yes. Three types are a durable power of attorney for health care, a living will, and a do-not-resuscitate declaration.

There is also a declaration of anatomical gift, to take effect when you die.

Can I have more than one type of advance directive?

Yes. You may choose to have any number of advance directives, or to have none at all.

B. Durable Power of Attorney For Health Care

What is a *durable power of attorney for health care*?

A durable power of attorney for health care, also known as a health care proxy or a patient advocate designation, is a document in which you appoint another individual to make medical treatment and related personal care decisions for you.

You can, in addition, choose to give your patient advocate power to make decisions concerning mental health care you may need.

Finally, you can empower your patient advocate to donate specific organs or your entire body upon your death.

Is a durable power of attorney for health care legally binding?

Yes.

Who is eligible to have a durable power of attorney for health care?

You must be at least 18 years old, and you must understand you are giving another person power to make certain decisions for you should you become unable to make them.

What is the person to whom I give decision-making power called?

That person is known as your *patient advocate*.

When can the patient advocate act in my behalf?

Your patient advocate can make decisions for you only when you become unable to participate in medical treatment decisions yourself. Until that time, you make your own decisions directly.

If you choose to give your patient advocate power to make decisions about mental health treatment, your patient advocate can only act if you cannot give informed consent to mental health treatment.

How might I become unable to participate in medical or mental health decisions?

You might have a temporary loss of ability to make or communicate decisions if, for example, you had a stroke or were knocked unconscious in a car accident. You might suffer permanent loss through a degenerative condition, such as dementia.

You might become unable to make mental health decisions if a condition such as severe depression or schizophrenia affected your mood or thought process.

Who determines I am no longer able to participate in these decisions?

The doctor responsible for your care and one other doctor or psychologist who examines you will make that determination in the case of medical decisions.

After examining you, a doctor and a mental health professional (physician, psychologist, registered nurse or masters-level social worker) must each make the determination in respect to mental health treatment. You may in the document choose the doctor and mental health professional you wish to make this determination.

What if my religious beliefs prohibit an examination by a doctor?

You should state in your durable power of attorney document your religious beliefs prohibit an examination by a doctor, and how you want it determined you are unable to participate in health care decisions.

What powers can I give a patient advocate?

You can give a patient advocate power to make those personal care decisions you normally make for yourself. For example, you can give your patient advocate power to consent to or refuse medical treatment for you; arrange for mental health treatment, home health care or adult day care; or admit you to a hospital, nursing home or home for the aged.

You can also authorize your patient advocate to make a gift of your organs or body, to be effective upon your death.

Will my patient advocate have power to handle my financial affairs?

You can give your patient advocate power to arrange for medical and personal care services, and to pay for those services using your funds. Your patient advocate will not have general power to handle all your property and finances.

If you wish another person to handle all your property and financial affairs should you become incapacitated, you could seek a lawyer's help to draft a *durable power of attorney for finances* or a *living trust*.

Can I give my patient advocate the right to withhold or withdraw treatment that would allow me to die?

Yes, but you must express in a clear and convincing manner the patient advocate is authorized to make such decisions, and you must acknowledge these decisions could or would allow your death.

Can I authorize my patient advocate to decide to withhold or withdraw food and water administered through tubes?

Yes. If you want to give you patient advocate this authority, describe in the document the specific circumstances in which he or she can act - terminal illness, and permanent unconsciousness, for example.

Do I have the right in the document to express other wishes?

Yes. You might, for example express your wishes concerning other types of care you want during terminal illness. You could also express a desire not to be placed in a. nursing home and a desire to die at home. Your patient advocate has a duty to try to follow your wishes.

What are my options about mental health care?

First, you have a choice whether or not to give your patient advocate any powers concerning mental health care.

If you choose to give your patient advocate powers concerning mental health care, you should specify clearly which powers he or she can exercise. Some powers to consider are outpatient treatment, hospitalization, administration of psychotropic medication, and electro-convulsive therapy (ECT).

You can also provide greater detail - what hospital you prefer and what medications you want or don't want, for instance.

What are my options concerning organ donation?

You can choose whether or not to give your patient advocate this power.

If you wish your patient advocate to have this power, you can specify which organs you want donated, or whether your whole body is to be donated. You can specify where or to whom you wish your organs donated.

You can also complete the separate form in this booklet, *Declaration of Anatomical Gift*. If you state your wishes both in the durable power of attorney and in the declaration of anatomical gift, make sure your wishes are the same in both documents.

Is it important to express my specific wishes in an advance directive?

Your wishes cannot be followed if no one is aware of them. It can also be a burden for your advocate to make a decision for you without guidance. If you have specific desires, make these clear to your patient advocate in talking to him or her. Also consider including these wishes in the document.

What is the duty of my patient advocate?

Your patient advocate has a duty to take reasonable steps to follow your desires and instructions, oral and written, expressed while you were able to participate.

Are there exceptions?

A mental health professional can refuse to honor your wishes concerning a specific mental health treatment, location or professional, if there is a psychiatric emergency endangering your life or the life of another person.

What if I don't express any specific wishes concerning medical treatment?

Your patient advocate must then make decisions about medical care in what he or she sees as your best interest.

Will a hospital or nursing home allow my patient advocate to review my records?

Yes. A patient has the right to inspect and copy his or her hospital or nursing home records. Your patient advocate has the same right you have, once you are unable to participate in treatment decisions.

The form in this pamphlet allows a patient advocate to have access to your medical records at any time after you appoint him or her.

Whom can I appoint as patient advocate?

Any person age 18 or older is eligible; you can appoint your spouse, an adult child, a friend or other individual. You should choose someone you trust, who can handle the responsibility, and who is willing to serve.

It is a good idea to speak with the individual you propose to name as patient advocate before you complete and sign the document.

Can I appoint a second person to serve as patient advocate in case the first person is unable to serve?

Yes. It is a good idea to do so. There is no provision in law to allow more than one person to serve at the same time.

What must I do to have a valid durable power of attorney for health care?

The declaration must be in writing, signed by you, and witnessed by two adults.

There are restrictions on who can be a witness. You need witnesses who are not family members, not your doctor or proposed patient advocate, not an employee of a health facility or program where you are a patient or client.

What does a patient advocate need to do before acting in my behalf?

Before the patient advocate can act, he or she must sign an *acceptance.* This can be done at the time you complete the document or at a later time. The general language of the acceptance is set forth in law.

Is there a required form for the document?

No. You may choose to use the sample form in this pamphlet. There are a number of organizations that provide different, free forms.

Make sure in completing any document you type or print clearly.

Must I use a fill-in-the-blanks form?

No. You may write out your own document or have a lawyer draft a document for you. Using the form in this pamphlet is one option you have.

Once I sign a durable power of attorney, may I change my mind?

Yes. You may want to name a different patient advocate or alter the expression of your wishes. So long as you are of sound mind, you can sign a new document and then destroy the old one.

Regardless of your physical or mental condition, you can revoke or cancel the durable power of attorney by indicating in any way the document does not reflect your current wishes. Also, any spoken wish to have a specific life-extending treatment provided must be honored by a patient advocate, even if the wish contradicts a written directive.

Are there different rules for mental health treatment?

Yes. You can choose to waive your right to immediately revoke the durable power of attorney insofar as mental health treatment. In such case, your revocation is effective 30 days after you communicate your intent.

Can my patient advocate refuse to act in my behalf?

Yes. A patient advocate can revoke his or her Acceptance at any time. If so, your named successor would become patient advocate.

What if there is a dispute when my patient advocate is making decisions for me?

If an interested person disputes whether the patient advocate is acting in your best interests, or has the authority to act in your behalf, the interested person may petition the local probate court to resolve the dispute.

What if I regain the ability to participate in medical or mental health decisions?

The powers of your patient advocate are suspended during the time you are able to participate in decisions.

What if I have no one to appoint as a patient advocate?

You can still complete a living will or a do-not-resuscitate declaration, or both.

C. Living Will

What is a *living will*?

A living will is a written document in which you inform doctors, family members and others what type of medical care you wish to receive should you become terminally ill or permanently unconscious.

When will a living will take effect?

A living will only takes effect after a doctor diagnoses you as terminally ill or permanently unconscious and determines you are unable to make or communicate decisions about your care.

How is a living will different from a durable power of attorney for health care?

Although there can be overlap, the focus of a durable power is on *who* makes the decision; the focus of a living will is on *what* the decision should be.

A living will is limited to care during terminal illness or permanent unconsciousness, while a patient advocate may also have authority in circumstances of temporary disability.

A durable power of attorney for health care may be more flexible because your patient advocate can respond to unexpected circumstances, but a living will might be honored without the presence of a third person making the actual decision.

What might a living will say?

You might express your wishes in general terms - "Do whatever is necessary for my comfort, but nothing further." Or, "I authorize all measures be taken to prolong my life."

You might instead state whether or not you wish specific medical interventions, such as a respirator, cardiopulmonary resuscitation (CPR), surgery, antibiotic medication, and blood transfusions. You could authorize experimental or non-traditional treatment.

Whichever approach you choose, you should express your wishes concerning food and water administered through tubes.

Is a living will legally binding on health care providers?

Although 47 states have statutes giving living wills legal force, Michigan has not passed such a law. However, based on a Michigan court decision, there is an argument living wills are binding in this state. No one, however, can provide absolute assurance your wishes will be honored.

Is it worth having a living will?

Yes. It is particularly important to have a living will if you don't have a durable power of attorney for health care. Your wishes cannot be honored if they are not known.

Can I have both a durable power of attorney for health care and a living will?

Yes. Your patient advocate can read your living will as an expression of your wishes. The living will might also be valuable if your patient advocate were unavailable when a decision needed to be made.

If you have both documents, make sure your wishes expressed in the documents are consistent.

What are the requirements for a living will?

Since there is no state law, there are no formal requirements. But it is strongly recommended the document be entitled, "Living Will;" be dated; signed by you; and signed by two witnesses who are not family members.

D. Do-Not-Resuscitate Declaration

What is a *do-not-resuscitate declaration*?

A do-not-resuscitate declaration (DNR declaration) is a written document in which you express your wish that if your breathing and heartbeat cease, you do not want anyone to attempt to resuscitate you.

For whom might such a document be particularly useful?

A hospice patient who is home to die as peacefully as possible might wish to sign a DNR declaration.

Must I be terminally ill before signing a DNR declaration?

No. For example, you may be in good health but still not want to be resuscitated should your heart and lungs fail.

Are such documents legally binding?

Yes. A Michigan law provides these documents are valid in settings *other* than hospitals or nursing homes.

Are there standard forms for a DNR declaration?

Yes. One form provides spaces for your doctor to sign, for you to sign, and for two witnesses to sign.

There is an alternate form for individuals who have religious beliefs against using doctors. Both forms are included in this booklet.

Can my patient advocate sign the form instead of me?

If your patient advocate has authority to act, he or she can sign the form instead of you.

Is it necessary to have a DNR declaration if I have a durable power of attorney or living will?

Perhaps. A durable power of attorney for health care and a living will only take effect when you are unable to participate in treatment decisions. If you are competent until the moment your heart and breathing stop, these documents will never take effect.

What else can be done to prevent unwanted resuscitation?

Ask your relatives in advance not to call 9-1-1 or the police if your breathing should stop. If you are under the care of a registered nurse, she or he has the authority to pronounce death.

What about when I am in a nursing home or hospital?

These facilities can set their own policies about resuscitation. Upon admission or afterward, you should express your wishes on this issue and ask that these wishes be reflected on your medical chart.

E. General Information

In general, what should I do before completing an advance directive?

Take your time; these are difficult decisions. Think about what treatment you would like under various circumstances in the future. Consider whom you might choose as your patient advocate, and make sure that person is willing to serve.

Discuss the issue with family members. Talk with your minister, rabbi, priest or other spiritual leader if you feel it would be helpful.

Should I also talk with my doctor?

Yes! Bring the subject up with your doctor. Have a discussion about the benefits and burdens of various types of treatment. Express at least your general wishes and make sure the doctor is comfortable with carrying them out.

Are there issues to which I should give particular attention?

Yes. Many people have strong feelings about the administration of food and water. If you become unable to swallow, food and water can be supplied by a tube down your throat, a tube surgically placed into your stomach, or intravenously. Consider in what circumstances, if any, you wish such procedures withheld or withdrawn.

What should I do with an advance directive after it is signed?

Give the original durable power of attorney for health care to your patient advocate (or at least make sure she or he knows where it is). Give a photostatic copy to your doctor and keep a copy yourself. Let people know whom you have chosen as your patient advocate.

Is there a statewide registry of advance directives?

Yes. Individuals have the right to voluntarily have their advance directive on a registry, to which health providers will have access. There is no cost. The registry is operated by Gift of Life Michigan.

What about a living will?

Keep the original of a living will. Give a copy to family members who are close to you, a friend and your doctor. Keep a list of these people.

Your doctor should make the documents part of your medical record. If you enter a hospital or nursing home, try to see to it the facility has a copy.

What about a do-not-resuscitate declaration?

Always keep the order with you at home, and in plain sight. Give a copy to family members who might be with you at your death.

After I sign one or more advance directives, should I continue to discuss the issue of my care?

Yes. Sit down with the person you have chosen as patient advocate. The clearer picture he or she has of your wishes, the better. If some time has passed since you signed the document, discuss the issue again.

It is almost always a good idea for you to make relatives and friends aware of your desires.

When I should review an advance directive?

Since medical technology is constantly changing, and since there may be changes in your outlook, it would be wise to review your advance

directives once a year. Upon review, you can decide to keep the document, write a new one, or have no advance directive at all.

If you decide to keep the advance directive, you can put your initials and the date on the bottom.

What should I do if I write a new advance directive?

Whether you choose a different person to be your patient advocate or alter your wishes for care, try to get back copies of the old document and destroy them. Distribute copies of the new document.

What are the responsibilities of health care facilities?

Hospitals, nursing homes, hospice organizations and home health agencies receiving federal funds have an obligation to inform incoming patients of their rights to consent to or refuse treatment, including the right to have advance directives.

A health care facility cannot force you to sign an advance directive, or refuse to care for you if you have signed one.

If given an advance directive, the hospital or nursing home must make it part of your medical record.

Will the hospital or nursing home honor my advance directive?

If the facility has no reason to question the document's authenticity, has evidence you are no longer able to participate in treatment decisions, and believes a patient advocate is acting consistent with your wishes, the facility would likely comply.

Be aware even though you have an advance directive, there is no absolute assurance your wishes will be honored.

What if I decide not to have an advance directive?

Decisions would still have to be made for you should you become unable to make them. Sometimes, a doctor or hospital will accept a spouse or child as an informal decision-maker. In some situations, a family member has authority by law. At other times a guardianship proceeding will have to be initiated in probate court.

DURABLE POWER OF ATTORNEY FOR HEALTH CARE

I, _____, am of sound mind and I

(Print or type your full name)

voluntarily make this designation.

APPOINTMENT OF PATIENT ADVOCATE

I designate _____, my _____

(Insert name of patient advocate) (Spouse, child, friend …)

living at _____

_____

(Address and telephone number of patient advocate)

as my patient advocate. If my first choice cannot serve, I designate

_____, my _____,

(Name of successor patient advocate) (Spouse, child, friend ...)

living at _____

_____

(Address and telephone number of successor patient advocate)

to serve as my patient advocate.

My patient advocate or successor patient advocate must sign an acceptance before he or she can act. I have discussed this appointment with the individuals I have designated as patient advocate and successor patient advocate.

GENERAL POWERS

My patient advocate or successor patient advocate shall have power to make care, custody and medical treatment decisions for me if my attending physician and another physician or licensed psychologist determine I am unable to participate in medical treatment decisions.

In making decisions, my patient advocate shall try to follow my previously expressed wishes, whether I have stated them orally, in a living will, or in this designation.

My patient advocate has authority to consent to or refuse treatment on my behalf, to arrange medical and personal services for me, including admission to a hospital or nursing care facility, and to pay for such services with my funds.

My patient advocate shall have access to any of my medical records to which I have a right, immediately upon signing an Acceptance. This shall serve as a release under the Health Insurance Portability and Accountability Act.

Immediately upon signing an Acceptance, my patient advocate shall have access to my birth certificate and other legal documents needed to apply for Medicare, Medicaid, and other government programs.

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POWER REGARDING LIFE-SUSTAINING TREATMENT

(OPTIONAL)

I expressly authorize my patient advocate to make decisions to withhold or withdraw treatment which would allow me to die, and I acknowledge such decisions could or would allow my death. My patient advocate can sign a do-not-resuscitate declaration for me. My patient advocate can refuse food and water administered to me through tubes.

_____

(Sign your name if you wish to give your patient advocate this authority)

POWER REGARDING MENTAL HEALTH TREATMENT

(OPTIONAL)

I expressly authorize my patient advocate to make decisions concerning the following treatments if a physician and a mental health professional determine I cannot give informed consent for mental health care:

(check one or more consistent with your wishes)

❑ outpatient therapy

❑ my admission as a formal voluntary patient to a hospital to receive inpatient mental health services. I have the right to give three days notice of my intent to leave the hospital.

❑ my admission to a hospital to receive inpatient mental health services

❑ psychotropic medication

❑ electro-convulsive therapy (ECT)

❑ I give up my right to have a revocation effective immediately. If I revoke my designation, the revocation is effective 30 days from the date I communicate my intent to revoke. Even if I choose this option, I still have the right to give three days notice of my intent to leave a hospital if I am a formal voluntary patient.

_____

(Sign your name if you wish to give your patient advocate this authority

POWER REGARDING ORGAN DONATION

(OPTIONAL)

I expressly authorize my patient advocate to make a gift of the following

(check any that reflect your wishes)

❑ any needed organs or body parts for the purposes of transplantation, therapy, medical research or education

❑ only the following listed organs or body parts for the purposes of transplantation, therapy, medical research or education: _____

❑ my entire body for anatomical study

❑ (optional) I wish my gift to go to -

_____

(Insert name of doctor, hospital, school, organ bank or individual)

The gift is effective upon my death. Unlike other powers I give to my patient advocate, this power remains after my death.

_____

(Sign your name if you wish to give your patient advocate this authority)

STATEMENT OF WISHES

My patient advocate has authority to make decisions in a wide variety of circumstances. In this document, I can express general wishes regarding conditions such as terminal illness, permanent unconsciousness, or other disability; specify particular types of treatment I do or not want in such circumstances; or I may state no wishes at all. If you have chosen to give your patient advocate power concerning mental health treatment, you can also include specific wishes about mental health treatment such as a preferred mental health professional, hospital or medication.

A. My wishes are as follows (you may attach more sheets of paper):

_____

_____

_____

_____

_____

_____

_____

_____

or

B. I choose not to express any wishes in this document. This choice shall not be interpreted as limiting the power of my patient advocate to make any particular decision in any particular circumstance.

I may change my mind at any time by communicating in any manner that this designation does not reflect my wishes or that I do not want my patient advocate to have authority to make decisions for me.

It is my intent no one involved in my care shall be liable for honoring my wishes as expressed in this designation or for following the directions of my patient advocate.

Photocopies of this document can be relied upon as though they were originals.

SIGNATURE

I sign this document voluntarily, and I understand its purpose.

Dated: _____

Signed: _____

(Your signature)

_____

_____

(Your address and telephone number)

STATEMENT REGARDING WITNESSES

I have chosen two adult witnesses who are not named in my will; who are not my spouse, parent, child, grandchild, brother or sister; who are not my physician or my patient advocate; who are not an employee of my life or health insurance company, an employee of a home for the aged where I reside, an employee of community mental health program providing me services or an employee at the health care facility where I am now.

STATEMENT AND SIGNATURE OF WITNESSES

We sign below as witnesses. This declaration was signed in our presence. The declarant appears to be of sound mind, and to be making this designation voluntarily, without duress, fraud or undue influence.

_____ _____

(Print name) (Signature of witness)

_____

(Address)

_____ _____

(Print name) (Signature of witness)

_____

(Address)

ACCEPTANCE BY PATIENT ADVOCATE

(1) This designation shall not become effective unless the patient is unable to participate in decisions regarding the patient's medical or mental health, as applicable. If this patient advocate designation includes the authority to make an anatomical gift as described in section 5506, the authority remains exercisable after the patient's death.

(2) A patient advocate shall not exercise powers concerning the patient's care, custody and medical or mental health treatment that the patient, if the patient were able to participate in the decision, could not have exercised in his or her own behalf.

(3) This designation cannot be used to make a medical treatment decision to withhold or withdraw treatment from a patient who is pregnant that would result in the pregnant patient's death.

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

(5) A patient advocate shall not receive compensation for the performance of his or her authority, rights, and responsibilities, but a patient advocate may be reimbursed for actual and necessary expenses incurred in the performance of his or her authority, rights, and responsibilities.

(6) A patient advocate shall act in accordance with the standards of care applicable to fiduciaries when acting for the patient and shall act consistent with the patient's best interests. The known desires of the patient expressed or evidenced while the patient is able to participate in medical or mental heath treatment decisions are presumed to be in the patient's best interests.

(7) A patient may revoke his or her designation at any time or in any manner sufficient to communicate an intent to revoke.

(8) A patient may waive his or her right to revoke the patient advocate designation as to the power to make mental health treatment decisions, and if such waiver is made, his or her ability to revoke as to certain treatment will be delayed for 30 days after the patient communicates his or her intent to revoke.

(9) A patient advocate may revoke his or her acceptance to the designation at any time and in any manner sufficient to communicate an intent to revoke.

(10) A patient admitted to a health facility or agency has the rights enumerated in Section 20201 of the Public Health Code, Act No. 368 of the Public Acts of 1978, Being Section 333.20201 of the Michigan Compiled Laws.

I, _____, understand the above

(Name of patient advocate)

conditions and I accept the designation as patient advocate or successor

patient advocate for _____, who signed a

(Name of patient)

durable power of attorney for health care on the following date:

_____.

Dated: _____

Signed: _____
(Signature of patient advocate or successor patient advocate)

Living Will

I, _____ am of sound mind, and I voluntarily make this declaration.

If I become terminally ill or permanently unconscious as determined by my doctor and at least one other doctor, and if I am unable to participate in decisions regarding my medical care, I intend this declaration to be honored as the expression of my legal right to authorize or refuse medical treatment.

My desires concerning medical treatment are -

_____

_____

_____

_____

_____

_____

_____

(attach additional sheets if wish)

My family, the medical facility, and any doctors, nurses and other medical personnel involved in my care shall have no civil or criminal liability for following my wishes as expressed in this declaration.

I may change my mind at any time by communicating in any manner that this declaration does not reflect my wishes.

Photostatic copies of this document, after it is signed and witnessed, shall have the same legal force as the original document.

I sign this document after careful consideration. I understand its meaning and I accept its consequences.

Dated: _____ Signed: _____

(Your signature)

_____

(Your address)

STATEMENT OF WITNESSES

We sign below as witnesses. This declaration was signed in our presence. The declarant appears to be of sound mind, and to be making this designation voluntarily, without duress, fraud or undue influence.

_____ _____

(Print Name) (Signature of Witness)

_____

(Address)

_____ _____

(Print Name) (Signature of Witness)

_____

(Address)

DO-NOT-RESUSCITATE DECLARATION

I have discussed my health status with my physician, _____. I request that in the event my heart and breathing should stop, no person shall attempt to resuscitate me.

This order is effective until it is revoked by me.

Being of sound mind, I voluntarily execute this order, and I understand its full import.

_____ _____

(Declarant's signature) (Date)

_____

(Type or print declarant's full name)

_____ _____

(Signature of person who signed for declarant, if applicable) (Date)

_____

(Type or print full name)

_____ _____

(Physician's signature) (Date)

_____

(Type or print physician's full name)

ATTESTATION OF WITNESSES

The individual who has executed this order appears to be of sound mind, and under no duress, fraud, or undue influence. Upon executing this order, the individual has (has not) received an identification bracelet.

_____ _____

(Witness signature) (Date)

_____

(Type or print witness's name)

_____ _____

(Witness signature) (Date)

_____

(Type or print witness's name)

THIS FORM WAS PREPARED PURSUANT TO, AND IN COMPLIANCE WITH, THE MICHIGAN DO-NOT-RESUSCITATE PROCEDURE ACT

DO-NOT-RESUSCITATE DECLARATION

I request that in the event my heart and breathing should stop, no person shall attempt to resuscitate me.

This order is effective until it is revoked by me.

Being of sound mind, I voluntarily execute this order, and I understand its full import.

_____ _____

(Declarant's signature) (Date)

_____

(Type or print declarant's full name)

_____ _____

(Signature of person who signed for declarant, if applicable) (Date)

_____

(Type or print full name)

ATTESTATION OF WITNESSES

The individual who has executed this order appears to be of sound mind, and under no duress, fraud, or undue influence. Upon executing this order, the individual has (has not) received an identification bracelet.

_____ _____

(Witness signature) (Date)

_____

(Type or print witness's name)

_____ _____

(Witness signature) (Date)

_____

(Type or print witness's name)

THIS FORM WAS PREPARED PURSUANT TO, AND IN COMPLIANCE WITH, THE MICHIGAN DO-NOT-RESUSCITATE PROCEDURE ACT

Declaration of Anatomical Gift

I, _____, am of sound mind, and I voluntarily make this declaration. In the hope I may help others, I make the following anatomical gift to take effect upon my death: (You may check any one box, or both boxes A and C)

❑ A. Any needed organs or body parts for the purposes of transplantation, therapy, medical research or education.

❑ B. Only the following listed organs or body parts for the purposes of transplantation, therapy, medical research or education: _____, _____, _____.

❑ C. My entire body for anatomical study.

Dated: _____ Signed: _____

(Your Signature)

_____

(Address)

OPTIONAL

I wish my gift to go to _____.

(Insert name of doctor, hospital, school, organ bank or individual)

I wish to have my body at my funeral: yes ☐ no ☐

STATEMENT OF WITNESSES

This declaration was signed in our presence by the declarant or at his or her direction. We sign below as witnesses in the presence of the declarant.

_____ _____

(Print Name) (Signature of Witness)

_____

(Address)

_____ _____

(Print Name) (Signature of Witness)

_____

(Address)

Appendix B

Social Welfare Act (excerpt)

400.66h Hospitalization; consent to surgical operation, medical treatment; first aid.

Nothing in this act shall be construed as empowering any physician or surgeon, or any officer or representative of the state or county departments of social welfare, in carrying out the provisions of this act, to compel any person, either child or adult, to undergo a surgical operation, or to accept any form of medical treatment contrary to the wishes of said person. 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. This provision is not intended to prevent temporary first aid from being given in case of an accident or sudden acute illness where the consent of those concerned cannot be immediately obtained.

1957, Public Act 286 (emphasis added)

Appendix C

Michigan Dignified Death Act

333.5651 Short title of part.

This part shall be known and may be cited as the "Michigan dignified death act".

333.5652 Legislative findings; Michigan dignified death act.

(1) The legislature finds all of the following:
(a) That patients face a unique set of circumstances and decisions once they have been diagnosed as having a reduced life expectancy due to advanced illness.
(b) That published studies indicate that patients with reduced life expectancy due to advanced illnesses fear that in end-of-life situations they could receive unwanted aggressive medical treatment.
(c) That patients with reduced life expectancy due to advanced illnesses are often unaware of their legal rights, particularly with regard to controlling end-of-life decisions.
(d) That the free flow of information among health care providers, patients, and patients' families can give patients and their families a sense of control over their lives, ease the stress involved in coping with a reduced life expectancy due to advanced illness, and provide needed guidance to all involved in determining the appropriate variety and degree of medical intervention to be used.
(e) That health care providers should be encouraged to initiate discussions with their patients regarding advance medical directives during initial consultations, annual examinations, and hospitalizations, at diagnosis of a chronic illness, and when a patient transfers from 1 health care setting to another.

(2) In affirmation of the tradition in this state recognizing the integrity of patients and their desire for a humane and dignified death, the Michigan legislature enacts the “Michigan dignified death act”. In doing so, the legislature recognizes that a well-considered body of common law exists detailing the relationship between health care providers and their patients. This act is not intended to abrogate any part of that common law. This act is intended to increase awareness of the right of a patient who has a reduced life expectancy due to advanced illness to make decisions to receive, continue, discontinue, or refuse medical treatment. It is hoped that by doing so, the legislature will encourage better communication between patients with reduced life expectancy due to advanced illnesses and health care providers to ensure that the patient's final days are meaningful and dignified.

333.5653 Definitions.

(1) As used in this part:
(a) "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.
(b) "Health facility" means a health facility or agency licensed under article 17.
(c) "Hospice" means that term as defined in section 20106.
(d) "Medical treatment" means a treatment including, but not limited to, palliative care treatment, or a procedure, medication, surgery, a diagnostic test, or a hospice plan of care that may be ordered, provided, or withheld or withdrawn by a health professional or a health facility under generally accepted standards of medical practice and that is not prohibited by law.
(e) "Patient" means an individual who is under the care of a physician.
(f) "Patient advocate" means that term as described and used in sections 5506 to 5515 of the estates and protected individuals code, 1998 PA 386, MCL 700.5506 to 700.5515.
(g) "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.
(h) "Physician" means that term as defined in section 17001 or 17501.
(2) Article 1 contains general definitions and principles of construction applicable to all articles in this code.

333.5654 Recommended medical treatment for advanced illness; duty of physician to inform orally; limitation or modification of disclosed information.

(1) A physician who has diagnosed a patient as having a reduced life expectancy due to an advanced illness and is recommending medical treatment for the patient shall do all of the following:
(a) Orally inform the patient, the patient's patient surrogate, or, if the patient has designated a patient advocate and is unable to participate in medical treatment decisions, the patient advocate acting on behalf of the patient in accordance with sections 5506 to 5515 of the estates and protected individuals code, 1998 PA 386, MCL 700.5506 to 700.5515, about the recommended medical treatment and about alternatives to the recommended medical treatment.
(b) Orally inform the patient, patient surrogate, or patient advocate about the advantages, disadvantages, and risks of the recommended medical treatment and of each alternative medical treatment described in subdivision (a) and about the procedures involved.
(2) A physician's duty to inform a patient, patient surrogate, or patient advocate under subsection (1) does not require the disclosure of information beyond that required by the applicable standard of practice.
(3) Subsection (1) does not limit or modify the information required to be disclosed under sections 5133(2) and 17013(1).

333.5655 Recommended medical treatment for advanced illness; duty of physician to inform orally and in writing; requirements.

In addition to the requirements of section 5654, a physician who has diagnosed a patient as having a reduced life expectancy due to an advanced illness and is recommending medical treatment for the patient shall, both orally and in writing, inform the patient, the patient's patient surrogate, or,

if the patient has designated a patient advocate and is unable to participate in medical treatment decisions, the patient advocate, of all of the following:
(a) If the patient has not designated a patient advocate, that the patient has the option of designating a patient advocate to make medical treatment decisions for the patient in the event the patient is not able to participate in his or her medical treatment decisions because of his or her medical condition.
(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.
(c) That the patient, or the patient's patient surrogate or patient advocate, acting on behalf of the patient, may choose palliative care treatment including, but not limited to, hospice care and pain management.
(d) That the patient or the patient's surrogate or patient advocate acting on behalf of the patient may choose adequate and appropriate pain and symptom management as a basic and essential element of medical treatment.

333.5656 Updated standardized written summary; development; publication; contents; availability to physicians.

(1) By July 1, 2002, the department of community health shall develop and publish an updated standardized, written summary that contains all of the information required under section 5655.
(2) The department shall develop the updated standardized, written summary in consultation with appropriate professional and other organizations. The department shall draft the summary in nontechnical terms that a patient, patient surrogate, or patient advocate can easily understand.
(3) The department shall make the updated standardized, written summary described in subsection (1) available to physicians through the Michigan board of medicine and the Michigan board of osteopathic medicine and surgery created in article 15. The Michigan board of medicine and the Michigan board of osteopathic medicine and surgery shall notify in writing each physician subject to this part of the requirements of this part and the availability of the updated standardized, written summary within 10 days after the updated standardized, written summary is published.

333.5657 Availability of form to patient, patient surrogate, or patient advocate; compliance with MCL 333.5656; placement of signed form in patient's medical record; signed form as bar to civil or administrative action.

(1) If a physician gives a copy of the standardized, written summary developed and published before July 1, 2002 or a copy of the updated standardized, written summary made available under section 5656 to a patient with reduced life expectancy due to advanced illness, to the patient's patient surrogate, or to the patient advocate, the physician is in full compliance with the requirements of section 5655.
(2) A physician may make available to a patient with reduced life expectancy due to advanced illness, to the patient's patient surrogate, or to the patient advocate a form indicating that the patient, patient surrogate, or patient advocate has been given a copy of the standardized, written summary developed and published under section 5656 before July 1, 2002 or a copy of the updated standardized, written summary developed and published under section 5656 on or after July 1, 2002 and received the oral information required under section 5654. If a physician makes such a form available to a patient, to the patient's patient surrogate, or to the patient advocate, the physician shall request that the patient, patient's patient surrogate, or patient advocate sign the form and shall place a copy of the signed form in the patient's medical record.
(3) A patient, a patient's patient surrogate, or a patient advocate who signs a form under subsection (2) is barred from subsequently bringing a civil or administrative action against the physician for providing the information orally and in writing under section 5655 based on failure to obtain informed consent.

333.5658 Prescription of controlled substance; immunity from administrative and civil liability.

….

333.5659 Life insurer, health insurer, or health care payment or benefits plan; prohibited acts.
…..

333.5660 Scope of part; limitation.

This part does not do the following:
(a) Impair or supersede a legal right a parent, patient, patient advocate, legal guardian, or other individual may have to consent to or refuse medical treatment on behalf of another.
(b) 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.
(c) Limit the ability of a court making a determination about a decision of a patient who has reduced life expectancy due to advanced illness to take into consideration all of the following state interests:
(i) The preservation of life.
(ii) The prevention of suicide.
(iii) The protection of innocent third parties.
(iv) The preservation of the integrity of the medical profession.
(d) Condone, authorize, or approve suicide, assisted suicide, mercy killing, or euthanasia.
□

333.5661 Fraud resulting in death of patient; violation as felony; penalty.

(1) An individual shall not, by fraud, cause or attempt to cause a patient, patient surrogate, or patient advocate to make a medical treatment decision that results in the death of the patient with the intent to benefit financially from the outcome of the medical treatment decision. As used in this subsection, "fraud" means a false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, that deceives and is intended to deceive another so that he or she acts upon it to his or her legal injury.
(2) An individual who violates subsection (1) is guilty of a felony, punishable by imprisonment for not more than 4 years or a fine of not more than $2,000.00, or both.

1996, Public Act 594, as amended (emphasis added)

Appendix D

Mental Health Code (Excerpt)

MCL sec. 330.1100a

(21) "Developmental disability" means either of the following:

(a) If applied to an individual older than 5 years of age, a severe, chronic condition that meets all of the following requirements:

(i) Is attributable to a mental or physical impairment or a combination of mental and physical impairments.

(ii) Is manifested before the individual is 22 years old.

(iii) Is likely to continue indefinitely.

(iv) Results in substantial functional limitations in 3 or more of the following areas of major life activity:

(A) Self-care.

(B) Receptive and expressive language.

(C) Learning.

(D) Mobility.

(E) Self-direction.

(F) Capacity for independent living.

(G) Economic self-sufficiency.

(v) Reflects the individual's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services that are of lifelong or extended duration and are individually planned and coordinated.

Appendix E

YOUR RIGHTS IN THE GUARDIANSHIP PROCESS

INFORMATION PRESENTED BY THE MICHIGAN STATE

LONG TERM CARE OMBUDSMAN PROGRAM

Introduction

Why am I receiving this pamphlet?

You are being provided this information because someone has asked the probate court to appoint a guardian for you, or because you already have a guardian.

You have a number of rights to help ensure you only have a guardian if you need one.

What is a guardian?

A guardian is a person or company appointed by a probate court to make decisions for you if there is convincing evidence you are unable to make informed decisions for yourself.

A guardian can only be appointed if necessary to provide for your care.

What decisions can a guardian make for me?

A judge can give a guardian power to decide where you live, to make medical treatment decisions for you, to arrange services and to decide how your money is spent.

Do I lose rights if a guardian is appointed?

Yes. For instance, if a guardian is given power to decide where you live, you lose the right to make that decision for yourself.

Do all guardians have the same powers?

No. For example, a judge could grant a guardian power to make medical decisions for you, but not the power to decide where you live or to handle your money.

What are some responsibilities of a guardian if one is appointed for me?

Your guardian is required to visit you at least every three months, and to talk with you before making major decisions.

Your guardian is required to make decisions in your best interests, and to arrange appropriate medical, housing and social services so you can regain as much self-care as is possible.

The Guardianship Petition

How is a guardian appointed?

The first step is that someone interested in your welfare files a petition in probate court.

At the same time you are receiving this pamphlet, you are being given a copy of the petition.

What is the purpose of the petition?

The petition sets forth information why the petitioner believes you need a guardian.

What happens upon a petition for guardianship being filed with the court?

Court staff set a date for a court hearing. The hearing may be very soon or a few weeks away.

The judge cannot appoint a guardian for you without a hearing.

The Guardian Ad Litem

What else happens upon a petition being filed?

Court staff will send a person to your home to talk with you before the hearing date. This person, known as a guardian ad litem, is the person who handed you this pamphlet.

The guardian ad litem has no power to make decisions for you, only to collect information.

What will the guardian ad litem talk to me about?

The guardian ad litem will explain guardianship and your rights in the process.

If you do not object to guardianship, the guardian ad litem will provide information to the judge whether guardianship is appropriate and about who should serve as guardian.

Your Rights

Can I choose the person to be my guardian?

Yes, you have this right. Tell the guardian ad litem of your choice.

Do I have the right to attend the court hearing?

Yes, you always have the right to be at the hearing.

Tell the guardian ad litem if you want to attend the court hearing. Tell the guardian ad litem if you need transportation to get to the hearing, and if you need any help such as a wheelchair, a special hearing device or an interpreter in the courtroom.

What if I have signed a durable power of attorney for health care in the past?

Make sure you make the guardian ad litem aware of the document. Give him or a copy of the document if you have one.

If I do not want a guardian, what do I do?

It is very important you tell the guardian ad litem if you do not want a guardian, or if you do not want a particular person to serve as guardian, or if you want the guardian's powers limited in any way.

What will the guardian ad litem do then?

By law, the guardian ad litem must report your wishes to the court, and court staff must appoint a lawyer to represent you. This will not cost you any money.

Hiring a Lawyer

Can I hire my own lawyer instead of having the court appoint a lawyer?

Yes. You also always have the right to hire a lawyer.

What is the role of my lawyer?

Whether the lawyer is court appointed or chosen by you, your lawyer must strongly argue for your wishes, regardless of what anyone else thinks is best for you.

Do I have the right to get a professional evaluation of my ability to make decisions?

Yes. You can choose a doctor, psychologist, nurse or social worker to do the evaluation. If you cannot afford the cost of the evaluation, the court will pay for it.

The Court Hearing

What is the purpose of the court hearing?

The person who filed the petition must present evidence and prove that you cannot make informed decisions for yourself, and that guardianship is necessary to meet your needs.

What if I disagree with the evidence presented?

You or your lawyer have a right to dispute any evidence presented, and you or your lawyer has a right to present witnesses and other evidence on your behalf.

If you have asked for a professional evaluation, you can decide whether to present the results to the judge.

Who decides whether I need a guardian?

The judge will usually make the decision whether there is clear and convincing evidence you cannot make informed decisions over one or more areas of your life. The judge will also determine whether guardianship is necessary to meet your needs.

If you have exercised your right to have a jury trial, the jury will decide those questions.

Who decides what powers the guardian will have?

The judge or jury will also determine what powers the guardian will have, based on your needs.

What if the judge or jury decides I need a guardian, but I disagree?

You have a right to appeal the decision to the Circuit Court.

How do I know what powers my guardian has?

The court order signed by the judge, and the letters of guardianship given to the guardian, must show the powers the guardian has.

You can ask court staff or the guardian for a copy of the letters of guardianship.

After a Guardian is Appointed

If I have a guardian, do I lose all my rights?

No. For example, generally you maintain the right to speak your mind, to practice your religion and to see family and friends of your choice.

If a guardian is given authority to make medical treatment decisions for me, are there limits in the types of decisions the guardian can make?

Yes. For instance, a guardian does not have authority to hospitalize you for mental health treatment unless you assent.

A guardian can only authorize electroconvulsive therapy (ECT) if your guardian is given that authority and two psychiatrists agree it is appropriate.

Can a guardian have a do-not-resuscitate order put in my nursing home chart or hospital chart?

The law does not adequately address the powers of a guardian concerning end-of-life care.

Judges disagree whether a guardian has the power to agree to a DNR order, or to withhold or withdraw treatment that is keeping you alive.

How can I know whether my guardian has such power?

It is best to ask the judge to specify in the court order and letters of guardianship whether the guardian has this power, and in what circumstances.

If I object to a guardian's decisions, what can I do?

You can write a letter to the probate judge, or you can file a petition with the court. There is no cost. You can ask the judge to -

- End the guardianship, or
- Limit the guardian's powers, or
- Name another person as guardian.

Can I hire a lawyer to represent me?

Yes. You do not lose that right just because you have a guardian.

If you do not hire a lawyer, request the judge appoint one for you. The judge is required to do so.

Will there be another court hearing?

Yes. You have all the same rights you had during the first hearing.

What if I have questions about guardianship?

You can telephone the probate court.

Court staff can provide information such as rights you have under the law, the name of your guardian ad litem or lawyer, and the date of your court hearing.

What if court staff are unable to answer my questions?

If staff are unable to answer a question, they may be able to refer you to a person or agency that can answer it.

What is the name and phone number of the probate court?

Bradley Geller currently serves as an assistant state long term care ombudsman in Michigan. He began a career in law and aging in 1974.

In developing a legal services project for older adults in a three county area in 1978, he represented individuals facing guardianship. He wrote a client-oriented pamphlet on guardianship, which became a chapter in his 1982 book, *Changes and Choices Legal Rights of Older Adults*. State legislators have distributed more than 500,000 copies to constituents.

As counsel to the Michigan House Judiciary Committee, he drafted the Michigan Guardianship Reform Act of 1988 and designed project Joshua, detailing changes in court forms, court rules and jury instructions. He participated in drafting statues creating the durable power of attorney for health care, the do-not-resuscitate procedures act, and the Michigan Statutory Will, while creating a legislative agenda for older adults.

As counsel to the Washtenaw County Probate County for ten years, he managed the adult guardianship and conservator system, and initiated Project Dignity. The project's goals were the promotion of alternatives to full guardianship; the education of guardians, conservators and guardians ad litem; the use of mediation; and the creation of a volunteer guardianship program.

He has participated on the Michigan Probate Rules Committee, the Probate Forms Committee and the Michigan Law Revision Commission. He envisioned and was a member of the Michigan Supreme Court Task Force on Guardianship and Conservatorship.

Throughout the years, he has pursued legislative, investigative and educational efforts to improve the structure and functioning of the guardianship system.