

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

Policy Statement of the Michigan State Long Term Care Ombudsman Program

By Bradley Geller

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 capacity, 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.

It is aim of this Statement to clarify this area of the law, which we term surrogate decision-making. The sole focus here 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 chapters: Advance Directives; Guardianship; and Family Decision-Making. For ease of reading, the information is presented in a question-and-answer format.

The statement is directed toward nursing home administrators, social workers, directors of nursing, and admissions personnel; and on 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.

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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 becomes 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 is “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).

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

No. It is an individual's choice whether to have an advance directive. A nursing home cannot condition admission or continued stay on a resident having an advance directive. 42 USC 1395cc(f)(1)(C); 42 USC 1996a(w)(1)(C) . This is echoed in state law. MCL 700.5512(2)

Can a nursing home provide forms for durable powers of attorney if a resident requests them?

Yes. In such case, residents should be made aware there is no standard form.

There is no legal requirement nursing homes make forms available.

What if an incoming resident already has an advance directive?

The nursing home should ask every incoming resident whether she or he 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). 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, Gift of Life of Michigan, an organ donation agency, will be authorized to establish a statewide registry for durable powers of attorney. MCL 333.10301. The registry should be up and running by the spring of 2013.

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.

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 are prohibited from serving as a witness for a resident. MCL 700.5506(4).

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, not under this statute. But 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.”

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

The document is still valid. You may request the designated patient advocates inform you who will serve as the primary contact person, if the document is silent on the issue.

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.

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

Yes. Indeed, the document might explicitly reference HIPPA, 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 patient 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 authority 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).

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 such time 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.

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 the 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 override the decision of a patient advocate without revoking the designation?

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).

In these circumstances, the patient advocate would continue to have authority over other health care decisions.

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 individual 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 inconsistency 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 in accord 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?

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).

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 State Long Term care Ombudsman Program will consider requests 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 close 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 an advance directive health that is limited to mental health treatment decisions. The individual appoints a patient advocate in similar fashion, but there are ways this type of advance directive differs from a durable power of attorney for health care.

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).

What is a “do-not-resuscitate 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, or a patient advocate (if the patient advocate has been given authority to withhold life-sustaining treatment).