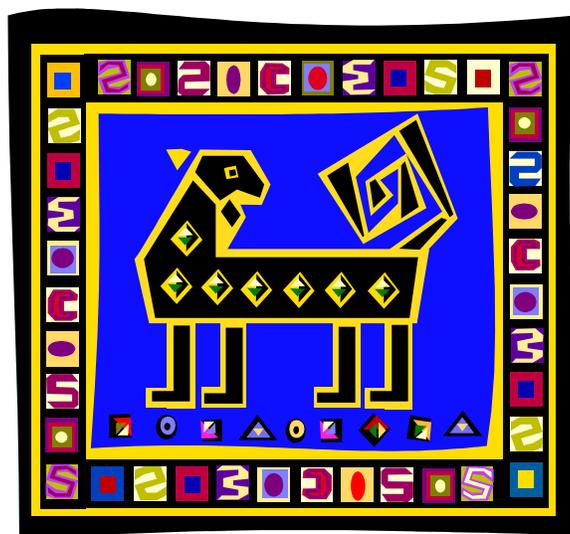


Health Care Decision-Making For a Resident In a Nursing Home



(Clip Art Image of Cat)

A Toolkit Presented by the
Michigan State Long Term Care Ombudsman Program

April, 2013

by Bradley Geller, J.D.

About the Author

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 of the book 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 statutes 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.

Mr. Geller 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.

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

Table of Contents

Introduction	5
Advance Directives	9
Family Involvement in Decision-Making	31
Guardianship	39
Appendices	
A. Index of Fact Sheets	65
B. Advance Directives Booklet	67
C. Fact Sheet: Your Rights in A Nursing Home	109
D. Social Welfare Act Excerpt	115
E. Michigan Dignified Death Act	117
F. Mental Health Code Excerpt	123
G. Rights in the Guardianship Process	125
H. Petition to Terminate/Modify Guardianship	135

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 effects 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. The law provides it is a resident's choice whether to sign an advance directive. Guardianship is only appropriate if a resident is unable to make informed choices about his or her care, and guardianship is necessary.

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.

It is one aim of these materials to clarify this broad area of the law, which we term surrogate decision-making. As we pursue clarification, we acknowledge **the law is still unsettled in some important respects**. We have endeavored to point these areas out in the document.

A second aim is to provide resources to nursing homes they can use to help fulfill federally mandated responsibilities to educate staff; to provide community education; and to assist willing residents to complete an advance directive.

It must be noted the Centers for Medicare and Medicaid Services recently 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),

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 subject 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 text is in three parts: Advance Directives, Family Involvement 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 (42 CFR). A compendium of statutes, regulations and rules, *Federal and State Regulation of Nursing Homes*, has been prepared by the State Long Term Care Ombudsman Program, and is available in electronic form.

These materials are directed toward nursing home administrators, social workers, directors of nursing, and admissions personnel; and to nursing home surveyors in the Bureau of Health Care Services, Michigan Department of Licensing and Regulatory Affairs.

The text may also be useful to adult foster care homes, homes for the aged, community mental health staff, adult services workers, probate courts, advocates, and lawyers unfamiliar with this area of law.

In reviewing the particulars of the law, it is important to keep in mind the grand purpose of this statutory and regulatory 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.

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.

The Program has written or edited over 50 *Fact Sheets* on issues relevant to residents and recipients of long term care services. A number of these *Fact Sheets* address issues of resident rights surrounding advance directives and guardianship. An index of these *Fact Sheets* is Appendix A.

Other 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 B to this paper, and is accessible on-line at www.michigan.gov/osa.

In addition to English, the booklet is available in Spanish, Arabic, Chinese, Korean, German and Italian. The Elder Law and Disability Rights Section of the State Bar of Michigan has been instrumental in increasing access to advance directives.

This paper is solely the work of the State Long Term Care Ombudsman Program, and neither the Michigan Department of Community Health nor the Michigan Office of Services to the Aging is responsible for its content.

If upon reading this 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

13. 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, and/or appoints a surrogate decision-maker, in the event the individual becomes unable to participate in these decisions.

2. Are there different types of advance directives?

Yes. 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.”

3. 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 “exercise powers concerning care, custody, and medical or mental health treatment” for her or him, during any time she or he is “unable to participate in medical treatment decisions.” MCL 700.5506 *et seq.*

4. When was the law passed providing for legally binding durable powers of attorney for health care in Michigan?

The law was passed in December 1990, after 14 years of effort by State Representative David Hollister.

5. 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).

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

If an adult individual is incapacitated at the time of admission or at the start of care and is unable to receive information (due to the incapacitating conditions or a mental disorder) or articulate whether or not he or she has executed an advance directive, then the provider may give advance directive information to the individual’s family or surrogate in the same manner that it issues other materials about policies and procedures to the family of the incapacitated individual or to a surrogate or other concerned persons in accordance with State law. The provider is not relieved of its obligation to provide this information to the individual once he or she is no longer incapacitated or unable to receive such information. Follow-up procedures must be in place to provide the information to the individual directly at the appropriate time.

42 CFR 489.102(e).

7. 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 helps 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).

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

Yes.

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

A nursing home can inform 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 residents have other options, including consulting a lawyer.

10. 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 or not having an advance directive. 42 USC 1395cc(f)(1)©; 42 USC 1996a(w)(1)©; 42 CFR 489.102(a)(3); MCL 700.5512(2)

11. 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.

12. 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.

13. Can a nursing home require an incoming resident to replace an advance directive with a new advance directive?

No.

A health care provider shall not require a patient advocate designation to be executed as a condition of providing, withholding, or withdrawing care, custody, or medical or mental health treatment. MCL 700.5512(2).

14. 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.

15. What is the registry named?

The registry is named Peace of Mind.

16. How can a resident obtain further information about the registry?

If a resident has access to the internet, she or he can go to www.mipeaceofmind.org.

A resident can also call, toll, free, 1-800-482-4881.

17. How can an individual register her or his durable power of attorney for health care?

Registration is available electronically or by mailing the advance directive to Peace of Mind, 3861 Research Park Drive, Ann Arbor, MI 48108. A cover sheet will be available to include with the mailing.

18. When will nursing homes and other health providers have electronic access to the registry?

Health care providers will have access in 2014.

19. 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).

20. 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.

21. 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, though there is a risk of completing the document incorrectly.

22. What are the execution 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 among those prohibited from serving as a witness for a resident.

A patient advocate designation under this section must be executed in the presence of and signed by 2 witnesses. A witness under this section shall not be the patient’s spouse, parent, child, grandchild, sibling, presumptive heir, known devisee at the time of the witnessing, physician, or patient

advocate or an employee of a life or health insurance provider for the patient, of a health facility that is treating the patient, or of a home for the aged ... where the patient resides, or of a community mental health services program or hospital that is providing mental health services to the patient. A witness shall not sign the patient advocate designation unless the patient appears to be of sound mind and under no duress, fraud, or undue influence. MCL 700.5506(4).

23. Does the document have to be notarized?

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

24. 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).

25. Does an individual appoint one person to serve as patient advocate?

Under the statute as it is designed, an individual chooses one person to serve as patient advocate at any one time. The relevant section of the statute reads,

An individual 18 years old or older who is of sound mind at the time a patient advocate designation is made may designate in writing another individual who is 18 years of age to exercise powers concerning care, custody and medical or mental health treatment decisions for the individual making the patient advocate designation. MCL 700.5506(1).

26. How do others approach this issue?

Appointment of one person as patient advocate is presented in the booklet distributed by state legislators beginning in 1991, and distributed today as part of the legislative publication, *Peace of Mind*. The same approach was used in a 1991 booklet jointly published by the Michigan State Medical Society, the

Michigan Osteopathic Association, the Michigan Health and Hospital Association and the State Bar of Michigan.

Some lawyers argue an individual can appoint joint patient advocates.

27. Can an individual name a second person to serve if the first person later cannot serve or be located?

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

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

28. Can a patient advocate delegate her or his powers to another person not named in the document?

A patient advocate or successor patient advocate does not have power to delegate her or his powers without prior authorization from the individual.

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

No. This is a misconception as serious as it is popular. The law provides

–

... the authority under a patient advocate designation is exercisable by a patient advocate only when the patient is unable to participate in medical treatment or, as applicable, mental health decisions. MCL 700.5508(1).

30. Will a nursing home be evaluated on this standard?

Yes. One criterion for compliance with 42 CFR 483.10(b)(4) and (8) is if the nursing 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, Appendix PP to State Operations Manual, Revisions to F Tag 155, Transmittals dated September 27, 2012 and March 18, 2013, p. 13. (emphasis added)

31. What rights does an individual retain immediately upon signing a durable power of attorney for health care?

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

32. 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.

33. 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).

34. Is there standard language for the acceptance?

The general language of the acceptance is set forth in law. “The acceptance of a designation as a patient advocate must include substantially all the following statements.” The statements are set forth MCL 700.5507(4), and are included in Appendix B.

35. 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 a later time.

The statute provides, “Before acting as a patient advocate, the proposed patient advocate must sign an acceptance of the patient advocate designation.” MCL 700.5507(3).

36. 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).

37. 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).

38. 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.

39. What must the physicians or the physician and 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).

40. 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, popular expressions are that the durable power of attorney for health care has been “triggered,” or “activated.”

41. 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.

42. 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).

43. What is the duty of a 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).

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

The patient may authorize the patient advocate to make 1 or more powers concerning the patient’s care, custody, medical treatment, mental health treatment, the making of an anatomical gift ... the patient could have exercised on his or her own behalf. MCL 700.5507(1)

45. 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, or sign a statement in the document, that she or he is giving the patient advocate that power. MCL 700.5509(1)(e).

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

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

47. Can a patient advocate determine which relatives can visit or speak with a resident?

No. The rights of a resident to speak on the telephone and to have visitors of his or her choice are well established in federal and state law.

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©(3)(B).

See also, MCL 333.21763.

48. What are the sources of residents' rights?

Both federal and state law establish rights of nursing home residents. Many of these rights can be found at 42 USC sec. 1395i-3©; 42 USC sec. 1396r©; and MCL 333.20201.

These rights are discussed in a State Long Term Care Ombudsman Program Fact Sheet found at Appendix C.

49. 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).

50. 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.

51. 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)

52. 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.

53. 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).

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

Yes. MCL 700.5510(d)

55. Does a revocation need to be in writing?

No. The law explicitly allows a revocation that is not in writing. MCL 700.5510(d).

56. 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

57. 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)

58. 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).

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

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

The individual must understand she or he giving another person authority to make medical treatment decisions, and know whom she or he is designating as patient advocate.

60. 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).

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

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).

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

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

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

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

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).

63. 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).

64. 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 Surveyors Guidance, Appendix PP to State Operations Manual, Revisions to F Tag 155, Transmittals dated September 27, 2012 and March 18, 2013, p. 12.

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." *Ibid*, p.14

65. 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).

66. 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).

A nursing home must-

Provide for community education regarding issues concerning advance directives that may include material required in paragraph (a)(1) of this section, either directly or in concert with other providers and organizations. Separate community education materials may be developed and used, at the discretion of providers. The same written materials do not have to be provided in all settings, but the material should define what constitutes an advance directive, emphasizing that an advance directive is designed to enhance an incapacitated individual's control over medical treatment, and describe applicable State law concerning advance directives. A provider must be able to document its community education efforts. 42 CFR 489.102(6).

67. May a nursing home use the materials in this Toolkit?

Yes. Nursing homes may use materials in this Toolkit toward fulfilling these obligations, if they wish.

68. 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.

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

Yes. There are several types of advance directive. One type is a “living will.”

70. What is a living will?

In a living will, an individual states her or his wishes for medical care in the future, in the event she or he becomes terminally ill and not able to participate in treatment decisions.

An individual does not appoint a patient advocate in a living will.

71. Does Michigan have a living will statute?

No. Although 47 states have statutes making living wills legally binding, Michigan does not have such a law.

72. Have efforts been made to pass a living will law in Michigan?

Yes. The first effort was HB 4176, introduced by State Representative Perry Bullard in 1987. The bill was named the “Michigan Medical Self-Determination Act,” a title coined by Daniel Sharp and drafter Bradley Geller to avoid confusion between a living will and a last will and testament.

The phrase morphed into the “Patient Self-Determination Act,” a federal law sponsored by Michigan Congressman Sander Levin, codified at 42 USC 1395cc(f); 42 USC 1396a(w).

73. 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.

74. Are there relevant court cases?

The Michigan Supreme Court has suggested individuals may have a common law right to have a living will honored:

Among the factors identified as important in defining clear and convincing evidence, ... the predominant factor is “a prior directive in which the patient addresses the situations in which the patient would prefer that medical intervention cease.” Cantor, *Legal Frontiers of Death and Dying*, ch.3, p 64. Optimally, the prior directive would be expressed in a living will, patient advocate designation, or durable power of attorney. While a written directive would provide the most concrete evidence of the patient’s decisions, and we strongly urge all persons to create such a directive, we do not preclude consideration of oral statements, made under the proper circumstances.

In re Martin, 450 Mich 204, 227 (1995).

75. What is an “advance directive for mental health care?”

This is a third type of advance directive.

An individual can sign an advance directive limited to mental health treatment decisions, including inpatient hospitalization.

76. How are a durable power of attorney for health care and a mental health advance directive similar?

Each document provides for the appointment of a patient advocate to act when an individual is unable to participate in treatment decisions

77. What is one difference between the two types of documents?

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).

In the document, the individual can choose the physician or mental health professional, or both.

78. Are there other differences?

Yes.

In an advance directive for mental health care, 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).

79. How specific can an individual be in a mental health advance directive?

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

80. 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.

81. 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.

82. Is there further information available about mental health advance directives?

One source is the booklet, *Advance Directive For Mental Health Care*, with questions-and-answers and a fill-in-the-blanks form, written by Bradley Geller under the auspices of Irene Kaziezko, then Bureau Director, Community Mental Health Services, Michigan Department of Community Health.

83. Where can one obtain this booklet?

The booklet is available on-line in English, Spanish and Arabic at –
https://www.michigan.gov/mdch/0,4612,7-132-2941_4868_41752---,00.html

84. Is there a fourth type of advance directive?

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

85. What is this form called?

The form is known as a “do-not-resuscitate order.”

86. Does Michigan have a law making this document binding?

Yes. The law was passed in 1996, as Public Act No. 193, and amended in 2004, as Public Act No. 552.

87. How did the law come about?

A bill entitled, “Michigan Do-Not-Resuscitate Procedure Act” was introduced by State Representative Perry Bullard in 1989. The bill was prompted by concerns expressed by EMS agencies that their staff had a legal duty to attempt resuscitation in an individual’s home, even if clear the individual did not want it.

No state had a law on this subject at the time. The bill, drafted by Bradley Geller, was based on the Hennepin County Protocol, in use in Minneapolis, Minnesota.

88. In what settings is the document applicable?

This document is intended for individuals living at home or assisted living. It is currently not applicable to individuals while in a nursing home or hospital, although pending legislation would remove the restriction on nursing home settings.

89. Are there standard forms?

Yes, unlike other types of advance directives, the law provides standard forms. One form is for individuals who have a physician. A second form is for individuals, such as Christian Scientists, who do not utilize physicians.

Both forms are included in the advance directives booklet, Appendix B.

90. Is it helpful to have a DNR order if an individual already has a durable power of attorney or living will?

Yes, if the individual does not want resuscitation attempted.

A durable power of attorney for health care and a living will only take effect when an individual is unable to participate in treatment decisions. If an individual is competent until the moment the heart and breathing stop, these documents will have never taken effect.

91. Can a patient advocate sign a do-not-resuscitate form instead of the individual?

Yes, if the patient advocate has authority, he or she can sign the form instead of the individual. The law states –

A patient advocate of an individual who is 18 years of age or older may execute a do-not-resuscitate order on behalf of that individual. MCL 333.1053

This is confirmed by the Senate Fiscal Agency Analysis of SB 452 (S-1), dated February 12, 1996, at page 2.

92. What happens if an individual has a do-not-resuscitate declaration?

If EMS personnel arrive and view a do-not-resuscitation order, personnel will check for signs of breathing and heartbeat. If there are no signs, no CPR efforts will be attempted.

An individual has an option of wearing a DNR bracelet.

93. Is there another type of do-not-resuscitate order?

Yes. A do-not-resuscitate order in a hospital or nursing home setting is a notation in the medical chart of a patient.

The notation is made by a physician at the request of the hospital patient, a patient advocate (if the patient advocate has been given authority to withhold life-sustaining treatment), or other person with legal authority. A physician has no authority to make this decision on her or his own.

Part 2

Family Involvement in Decision-Making

94. 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.

95. 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.

96. Does Michigan have a general family consent statute?

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

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

Yes. The first time was in 1992, House Bill 5553, known as the "Medical Treatment Decisions Act." The bill was introduced by State Representative Perry Bullard and 20 co-sponsors.

A revised version was introduced in 1997 as Senate Bill 67, by Senator Chris Dingell and five co-sponsors. Neither bill became law.

98. Is there more information about the bill as introduced?

Yes. For a discussion of the proposed law, see Geller, B., “*Medical Treatment Decisions: Back to the Future?*” Michigan Bar Journal, Volume 72, No.1:28, January, 1993.

99. Are there any laws in Michigan that involve family members in the medical treatment decision process?

The position of the State Long Term Care Ombudsman Program is there are two relevant laws. Not all lawyers agree with the following commentary:

Many states, Michigan included, also have consent laws that allow next of kin to make limited decisions in limited circumstances. (In a footnote to this statement, the author cites MCL 333.5651 *et seq.* and MCL 400.66h.)

Brigman, C. “*The Accidental Patient Advocate.*” Michigan Probate and Estate Planning Journal 28:8, Summer, 2009.

100. 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 text of this section of the law is Appendix D. The Social Welfare Act included provisions applicable to hospitals and provisions applicable to county medical care facilities. These facilities were nursing homes primarily for older persons. They were explicitly authorized to provide medical

treatment and minor surgery. See 1954 PA No. 125, which added MCL 400.58a.

101. When was the law passed?

Section 400.66h of the Social Welfare Act was passed as part of 1957 P.A. No. 286. Two other provisions of the 1957 law affected funding of county medical care facilities.

102. How might this law be 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, the State Long Term Care Ombudsman Program believes.

The law is only applicable if the individual cannot participate in the decision, does not have a patient advocate and does not have a guardian with power to make the decision.

103. Which family member has priority under this statute?

The term "nearest relative" is not defined.

104. What if a nursing home believes a family member is not acting in the best interests of the resident?

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.

105. How does a nursing home determine an individual is not in a condition to make a decision?

The statute provides no guidance.

A “mini-mental exam” is not adequate. A mere diagnosis, such as closed head injury or dementia, or a label such as “mentally ill,” is also not sufficient. And the test is not whether the resident agrees with the physician or family on a course of treatment.

106. What, then, is best?

One approach is 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.

107. Where could a nursing home go wrong?

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

108. 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.

109. When did the law go into effect?

The law was passed as P.A. 1996, No. 594, and went into effect March 31, 1997. The Act was subsequently amended in 2000, 2001 and 2004. The entire Act, as amended, is Appendix E.

110. 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.

111. What other information must the physician provide?

... 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:

...

(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.

© 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.

MCL 333.5655.

112. What if the patient is unable to give consent to medical treatment?

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

113. What is a patient advocate?

A patient advocate is the 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, as discussed in Part 1. MCL 700.5506 *et seq.*

114. How does this law define patient surrogate?

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

MCL 333.5653(g)

115. Does the statute give family the right to make decisions in addition to receiving information from the physician about treatment options?

Lawyers disagree on the answer to this question.

116. How does the Michigan Department of Community Health describe the law?

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

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.

117. 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 be involved in the decision-making process for a resident who cannot participate in that decision.

118. Might a spouse have a common law right to authorize or refuse treatment for her or his spouse?

An attorney has opined –

Michigan law can likely be interpreted to support the right of an incapacitated patient's spouse to make decisions on the patient's behalf, as several Michigan cases have held that a spouse may have authority to act for the other spouse even in the absence of court authorization. (citations omitted)

Trainer, T. "An Update on Medical Decision-Making at the End of Life." Michigan Bar Journal, Volume 72, No.1:34, 37, January, 1993.

This article was written before *In re Martin*, 450 Mich 204 (1995). In that case, the Michigan Supreme Court held that a spouse who was guardian could not withdraw life-sustaining treatment from her husband who was not terminally ill, absent clear and convincing evidence of her husband's wishes for the particular circumstances in which he found himself.

119. What about customs?

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 often in outpatient, nursing home and hospital settings.

Part 3

Guardianship

120. 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 F.

121. Is there a choice of which system to use?

No. If an individual is alleged to have a developmental disability, a probate court must use provisions of the Mental Health Code. *In re Neal*, 230 Mich App 723 (1998); lv den, 459 Mich 890.

122. 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.

123. 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 these materials focuses on guardianships brought under the Estates and Individuals Code.

124. 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 both that the individual is unable to make informed decisions about her or his care, **and** that guardianship is necessary. MCL 700.5306(1).

125. 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.

126. Is guardianship appropriate merely because an individual has one or more physical disabilities?

No. An individual with physical incapacity as severe as quadriplegia can have mental capacity to make informed decisions.

127. 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.

128. How many of these adults live in a nursing home or in another licensed long term care setting?

The Michigan Long Term Care Ombudsman is not aware of any data on this question.

129. Have there been efforts to reduce unnecessary guardianships?

Yes. This was one of the goals of the Michigan Guardianship Reform Act, 1988 Public Act 398, sponsored by State Representative Perry Bullard. For a discussion of that law, see Geller, B. *The Long and Winding Road: Guardianship Reform in Michigan*, Elder Law Journal, Volume 1:No. 2, 1983.

See also, *Michigan Guardianship Reform Act Handbook*, written by Bradley Geller and first published by the Michigan House of Representatives in 1990. The volume was a procedural manual for lawyers and judges, setting forth changes in the law, with consequent amendments to court rules, court forms and jury instructions.

130. Has the Judiciary considered the issue?

Yes. The Michigan Supreme Court convened a task force in February, 1997.

Early on, the Task Force identified four sub-goals as integral to achieving the main goal of improving the guardianship and conservatorship system in Michigan:

(1) Reduction in the use of guardianships and conservatorships

....

Michigan Supreme Court Task Force on Guardianships and Conservatorships Final Report, page 2. For the 11 unanimous recommendations of the Task Force, see pages 6-8

<http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/Reports/gdntaskrpt.pdf>

131. Was there mention of nursing homes in the Task Force Report?

Yes.

Part of the reason why hospitals and nursing homes might unduly suggest or require the appointment of a guardian or conservator may be a perception on these institutions' part that the 1987 federal Nursing Home

Reform Amendments (NHRA) force them to do so. This perception may be encouraged by the explanation of the 1990 regulations implementing the NHRA included in a 1991 letter from the Bureau of Health Systems ... Ibid, page 6, footnote 33

132. Has there been call to effect the Supreme Court Task Force recommendations?

Yes.

Implement Recommendations of the 1998 Michigan Task Force on Guardianship and Conservatorships.

...

Not all the recommendations of this report have been implemented. Some of the recommendations of this 1998 Task Force involve how to reduce unnecessary petitions for guardians and conservatorships, other recommendations address how to reduce unnecessary appointments of guardians and conservators

The Governor's Task Force on Elder Abuse, Final Report, August, 2006, Recommendation 2-4, p. 14-15.

www.michigan.gov/documents/miseniors/GovTaskForce_186155_7.pdf

133. Did the Governors Task Force on Elder Abuse lead to guardianship legislation?

Yes. For a description of the latest changes in guardianship law, see Wood, Erica. *State Adult Guardianship Legislation: Directions of Reform, 2012*, American Bar Association Commission on Law and Aging.

www.americanbar.org/groups/law_aging.html

134. 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.

135. 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).

136. Is there a source for further information about the role of a conservator?

Yes. One can read the publication, *Handbook for Conservators of Adults*, 7th edition, 2012 by Bradley Geller. Contact gellerb@michigan.gov for an electronic copy.

The initial edition was supported by a grant from the Michigan Bar Foundation.

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

Rarely. If a patient advocate under a durable power of attorney for health care is performing her or his duties and the document was executed properly, a court cannot give a guardian power to make decisions delegated in the durable power of attorney.

If the court is aware that an individual has executed a patient advocate designation, the court **shall not** grant a guardian the same powers that are held by the patient advocate. MCL 700.5306(2). (emphasis added)

138. 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.

If an individual executed a patient advocate designation under section 5506 before the time the court determines that he or she became a legally incapacitated individual, a guardian does not have and shall not exercise the power or duty of making medical or mental health decisions that the patient advocate is designated to make.

MCL 700.5306(5).

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

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

The decision to have a patient advocate is voluntary, MCL 700.5506(3), and a guardian is only appropriate if an individual is incapacitated and guardianship is necessary, MCL 700.5306(1)

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.

140. Who can apply for guardianship?

An individual her or himself, or anyone interested in the welfare of the individual can petition for guardianship, if the petitioner believes guardianship is appropriate. MCL 700.5303(1).

141. Can a nursing home petition for guardianship for a resident?

Yes. But,

A nursing home employee may request the appointment of a guardian for an individual applicant or patient only if the nursing home employee reasonably believes that the individual meets the legal requirements for the appointment of a guardian. MCL 333.21766(10)

This provision was initially included in House Bill 5085, introduced by State

Representative Perry Bullard in 1991. It was drafted by the author in response to a Washtenaw County nursing home bringing over 70 guardianship petitions in the same day, a petition for every resident in the home.

142. What must happen before a person files a petition for guardianship?

The probate court must give a potential petitioner written information on alternatives to appointment of a full guardian. MCL 700.5303(2).

143. 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.

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

No, never.

145. 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, unless the resident already has a lawyer. MCL 700.5303(3).

Under the Mental Health Code, the court will immediately appoint a lawyer for the respondent.

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

No. The roles of the guardian ad litem are to provide information and to investigate.

147. 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.

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

The type of information the guardian ad litem must convey is shown in the pamphlet, *Your Rights in the Guardianship Process*, Appendix H.

149. What else must the guardian ad litem do?

Among other duties, the guardian ad litem must consider alternatives to guardianship, determine if mediation is appropriate, and gauge whether the individual has sufficient resources to merit consideration of conservatorship.

The guardian ad litem might call the petitioner and family members, review the medical record, and talk with staff.

150. What does the guardian ad litem do after completing her or his investigation?

In most courts, the guardian ad litem will make a written report to the court before the hearing.

151. What will be included in the report?

The contents of the report differ according to the findings of the guardian ad litem.

152. What if the resident does not want a guardian?

If the 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 only this to the judge.

In these circumstances, the judge is obligated to appoint a lawyer to represent the individual. MCL 700.5305(3), (4).

153. What happens to the guardian ad litem if a lawyer is appointed?

At that point, the role of the guardian ad litem ends, and she or he no longer participates in the process. MCL 700.5305(5).

154. How is the report different if the individual does not object to guardianship?

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 report will include findings and recommendations to the judge.

155. What subjects will the report cover?

In the report, 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 if there is a family dispute MCL 700.5305(e).

156. Is there more information available about the roles of a guardian ad litem and appointed counsel?

Yes. You can obtain the publication, *Manual for Guardians Ad Litem and Appointed Counsel in Adult Guardianship and Conservatorship Proceedings*, 6th edition, 2012, by Bradley Geller.

Contact gellerb@michigan.gov for an electronic copy.

157. Can a resident hire a lawyer of his or her choice, if the lawyer is willing?

Yes. MCL 700.5306a(1)(d).

158. 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 device or an interpreter.

159. What is the court's obligation if the resident wishes to attend the hearing?

If the individual wishes to be present at the hearing, all practical steps shall be taken to ensure his or her presence, including, if necessary, moving the hearing site. MCL 700.5304(4).

160. 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)

161. 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 by the individual now, or nominated by the individual in the past, 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 recently. 2012 Public Act No. 545.

162. 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 by the judge. Michigan Court Rule 5.143.

163. 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 suitable and willing to serve is the judge permitted to appoint a professional guardian. MCL 700.5106(2). The court also must find the appointment of a professional guardian is in the individual's best interests. MCL 700.5106((2)(a).

164. Are professional guardians licensed, certified or registered?

No. For the more than 300 professional guardians in Michigan, there are no education, training or other qualifications required.

165. Have there been serious issues with some professional guardians?

Yes, both in Michigan and in others states. One issue has been financial exploitation. See, e.g., *Report of John Chase, Jr. on Guardian, Inc of Wayne County*, January,1999. Guardian, Inc. of Wayne County had been appointed guardian for more than 600 individuals.

166. Is there a limit to the number of individuals for whom a professional guardian is responsible?

No. Some professional guardians are responsible for 200 or 300 individuals. The law does state –

A professional guardian ...shall ensure that there are a sufficient number of employees assigned to the care of wards for the purpose of performing the necessary duties associated with ensuring that proper and appropriate care is provided. MCL 700.5106(6).

167. How did this requirement come about?

Several provisions of the law related to professional guardians were added by 2000 Public Act No. 46. The bill as introduced, SB 863, provided for specific staffing requirements and other measures in response to the Chase Report. Details are available at the legislature's website, www.michigan.gov.

168. Have issues other than financial exploitation been raised?

Yes. Other issues include lack of individualized decisions and placing the convenience of the guardian over the welfare of the individual.

169. Can a nursing home give a professional guardian access to medical 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©(1)(A)(iii); MCL 333.20175(1); MCL 333.20201(2)(b).

170. Can a nursing home or a staff person of a nursing home serve as guardian for a resident?

No. MCL 333.21767

171. 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).

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

If a nursing home is petitioning for guardianship, and nominating a professional guardian as appropriate, the home should be sure the person, partnership or agency has an unsullied reputation and can well handle the duties of a guardian.

173. Can a judge appoint more than one person as guardian?

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

174. Can each guardian make a decision independently?

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

175. Do all guardians have the same powers?

No.

The court shall grant a guardian only those powers and only for that period of time as is necessary to provide for the demonstrated need of the incapacitated person. The court shall design the guardianship to encourage the development of maximum self-reliance and independence of the individual. MCL 700.5306(2).

The applicable section in the Mental Health Code mirrors EPIC. MCL 330.1602(1).

176. What is a guardian with fewer than all powers that can be granted called?

The person is called a *limited guardian*. MCL 700.5306(3). Under the Mental Health Code, the person is called a “partial guardian.”

177. How does a nursing home know whether an individual is a full guardian or a limited guardian?

The nursing home should ask for the person’s letters of guardianship, and keep a copy on file. The letters of guardianship will reflect the court *order*, in which the judge will set forth the powers of the guardian, or set forth limits on the guardian’s powers.

178. Does an individual maintain some rights under guardianship?

Yes. First, a guardian only has powers to the extent granted by the court. For example, a limited guardian might not have the power to make some medical treatment decisions, or have the power to determine where the individual lives.

179. 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).

180. What about a resident’s right to have visitors?

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

Federal law provides,

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©(3)(B).

See also, MCL 333.21763.

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 many of the other rights set forth in federal and state law.

181. What are some general responsibilities of a guardian?

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.

182. 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©(1)©; 42 USC sec.1396r©(1)©.

183. Can a guardian call the State Long Term Care Ombudsman Program to assist in having a resident's rights respected?

Yes. The toll-free telephone number is **1-(866) 485-9393.**

184. Must a guardian remain in contact with the individual?

Yes. A guardian is required to visit the individual at least every three months.

In addition,

Whenever meaningful communication is possible, a legally incapacitated individual's guardian **shall** consult with the legally incapacitated individual before making a major decision affecting the legally incapacitated individual. MCL 700.5314. (emphasis added)

185. 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).

186. Does a nursing home have access to a guardian's annual report?

Yes. The report is a public record, and the nursing home can obtain it from the probate court.

187. Is there court oversight of guardianships in addition to the court reviewing the annual report?

Yes. The court must appoint a person to visit the individual under guardianship, determine whether the guardian is performing her or his duties, and recommend to the court whether there should be any change in the guardianship. Michigan Court Rule 5.408.

188. How often must a court do this?

Periodic review must occur one year after the guardian is appointed, and every three years thereafter. MCL 700.5309.

189. 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.

190. 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).

191. 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©(5)(A).

See also, MCL 333.21765a. This state prohibition was initiated in House Bill 5085, introduced by State Representative Perry Bullard in 1991.

192. 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.

193. 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, to prevent an involuntary transfer for non-payment of the nursing home bill.

194. Does a guardian have the responsibility to pay the resident's patient pay amount?

Yes, if the guardian has control of the individual's income.

195. 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 determine whether it is generally in the best interests of the resident to move. The convenience of the guardian should never be an overriding factor.

196. 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©(2)©

The obligation of nursing homes to reduce transfer trauma was established as settlement of a federal lawsuit, *Barton v. Califano* (E.D. Mich) in 1979. The settlement was negotiated by Susan Hartman and Bradley Geller, attorneys with Legal Services of Southeastern Michigan.

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

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

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

Yes.

199. 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.

200. Are there exceptions to the general scope of authority?

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.

201. 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.

202. 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.*

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

Despite “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.

204. 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. Pending legislation may resolve this issue.

205. What about the power to withhold other life-sustaining treatment?

Judges also differ about the authority of a guardian to withhold or withdraw other life-sustaining treatment, such as respirator, tube feeding, or antibiotics; and the power to authorize hospice care.

One factor is whether the individual is terminally ill; another factor is if there is clear and convincing evidence of the individual's wishes. See *In re Martin*, cited earlier.

206. 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 without having to return to court.

207. 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, or can itself, petition the court.

208. Who provides information during the nursing home's 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.

209. 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 [the residents] desire that they [other individuals] 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.

210. 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.

211. 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

212. 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.

A guardian must consult with resident before making this decision, and must consider her or his duty to obtain services to restore the individual to the degree of self-care possible.

213. 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.

214. 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, respectively.

215. 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, written by Bradley Geller, is available online.

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

216. 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 interests, the nursing home can petition the probate court and request a new guardian be appointed. MCL 700.5310(2).

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

217. What court form would a nursing home use?

The court form is called a *Petition to Terminate/Modify Guardianship*, PC 675. The form is Appendix H.

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

Nursing home are mandatory reporters and 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.

219. What if the adult services worker believes the program has no role in nursing homes?

If the county adult services worker at the Michigan Department of Human Services is not responsive, the administrator should call the state manager of adult services in Lansing.

220. 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).

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

No. MCL 600.880b(3).

222. 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.

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

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.

The individual might be unhappy with other decisions of the guardian and want a different guardian or further limits on the guardian's powers. Or the guardian may never be visiting, or never asking for input from the individual when required by law.

224. 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 contest, modify or terminate a guardianship. MCL 700.5310(4); MCL 700.5306a(1)(d).

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

225. 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 set forth in *Your Rights in the Guardianship Process*, Appendix G.

226. 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.

227. 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).

228. When do the powers of a guardian end?

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

229. What if a nursing home has questions about guardianship?

A nursing home can telephone the probate court, though the court is not permitted to provide legal advice.

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

MICHIGAN LONG TERM CARE OMBUDSMAN PROGRAM INDEX OF FACT SHEETS

Surrogate Decision-Making

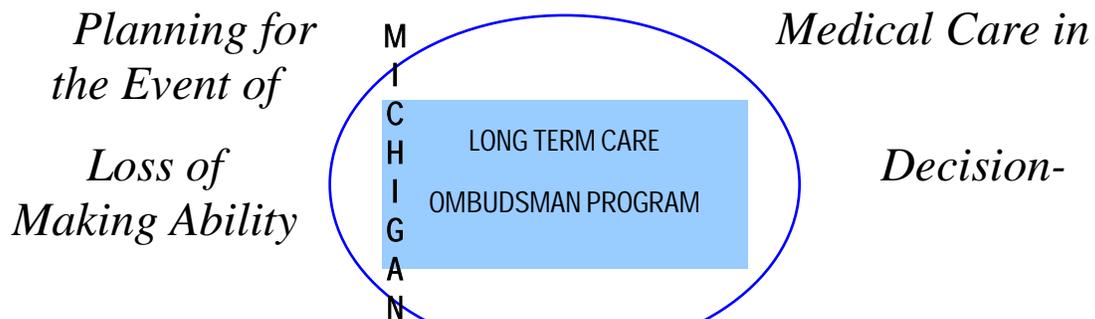
1. Advance Directives
2. Federal Patient Self-Determination Act
3. Do-Not-Resuscitate Orders
4. Roles in Making Decisions for Another Adult
5. Alternatives to Contemporaneous Decision-Making
6. Surrogate Decision-Making: Citations to Statutes
7. Revocation of an Advance Directive
8. When Faced with Guardianship
9. Your Rights in the Guardianship Process
10. Guardianship and Nursing Home Residency:
What Rights Does a Resident Retain?
11. Modifying a Guardianship

12. Mediation in Care-Giving Disputes

13. Community Dispute Resolution Programs

APPENDIX B

Advance Directives



(Logo of Michigan Long Term Care Ombudsman Program)

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 Order
- 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 attempt to follow any desires, instructions or guidelines you have spoken about or written in the past.

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 Order

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

A do-not-resuscitate order (DNR order) 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 order?

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 order?

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 order 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 order?

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, clients or residents 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

(Print or type your full name)

sound mind and I 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.

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)

- 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)

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 health 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 you 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 ORDER

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 ORDER

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

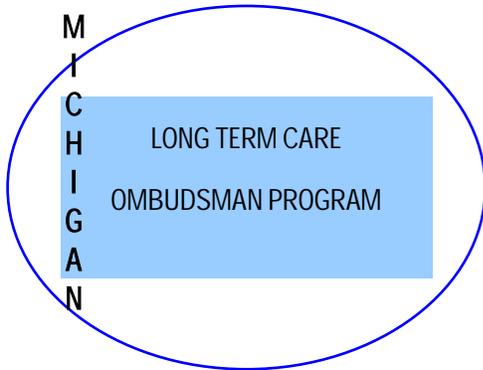
I wish my gift to go to

_____.

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

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

Appendix C



Fact Sheet

Your Rights as a Resident in a Nursing Home

Federal and State Laws Protect Your Rights

Your rights as a resident of a nursing facility are guaranteed by the federal 1987 Nursing Home Reform Law, and my state law. The federal law requires nursing homes to “**promote and protect the rights of each resident**” and places a strong emphasis on individual dignity and self-determination. Nursing homes must meet federal residents’ rights in state law or regulation for nursing homes. A person living in a nursing home maintains the rights he or she had before becoming a resident of the facility.

All nursing homes are required “to provide services and activities to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident in accordance with written plan of care that is prepared with the participation of the resident, the resident’s family, or legal representative.

Your Rights to Dignity & Respect

You have a right to -

- Reasonable accommodations of individual needs and preferences
- Appropriate and timely medical and personal care based on your needs and preferences
- Be protected from any kind of abuse, harsh treatment, neglect
- Be free from any kind of restraint (physical or chemical) used for convenience or discipline and not used to treat medical symptoms
- Adequate management of pain
- Live in a clean place
- Have meals that meet your needs and preferences
- Be listened to carefully and spoken to respectfully
- Have your own possessions and clothing as space permits
- Have your private space and belongings respected
- Receive notice before your room or your roommate is changed
- Share a room with your spouse if you both agree

- To return to the nursing home following a hospital stay

Your Rights to Self-Determination

You have a right to -

- Participate in choices about food, activities, health care and other services based on needs, interests and the care plan
- Choose your physician
- Refuse treatment, including medication, dietary restrictions and experimental research
- Choose to do work for the nursing home or choose not to do work for the nursing home
- Be paid at the prevailing rate if you choose to work
- Associate with people you choose inside and outside the nursing home
- Participate in social, religious and other community activities
- Organize and participate in resident and family groups
- Have immediate visits by your personal physician, relatives, friends, ombudsman program and others providing health, social, legal or other services

- Exercise your rights granted as a citizen or resident of the United States, such as the right to vote

Your Rights to Privacy & Information

You have a right to -

- Have information about you kept private
- Privacy during personal care, medical treatment and visits with family, friends and groups
- Send and receive mail unopened
- Use the phone privately without being overheard
- Privacy during visits with your spouse
- Be informed in language you understand of your health status, care and treatment and cost and any changes to the above
- Be fully informed of your care plan before it begins
- Access to all of your records within 24 hours after requesting them (excluding holidays and weekends) and have a copy of all or part of your records at a reasonable cost
- Give permission to family, friends or ombudsman to inspect records
- Information from nursing home on how to get help to pay for your care

- Information about your rights
- Examine results of the most r recent survey conducted by state or federal licensing agents and plans of correction for licensing violations
- Written notice of all available services and their costs
- Receive a copy of the nursing home rules about resident care and conduct

Your Rights Regarding Your Finances

You have a right to -

- Manage your own finances
- Choose not to deposit your funds with the nursing home
- Choose to have the nursing home manage your funds
- If funds are managed by the nursing home, the home must:
 - Keep funds over \$50 in an interest bearing account
 - Keep your money separate from nursing home accounts
 - Keep and give you a written quarterly accounting of all transactions of your funds

Your Rights During a Nursing Home Transfer or Discharge

You have the right to:

- Remain in the facility unless –
 - It is not in your best interest
 - It is inappropriate for medical reasons
- To appeal the transfer or discharge
- Be safe during a transfer or discharge
- Receive 30 days notice which states -
 - When the transfer or discharge will happen
 - Where you will be transferred or discharged to
 - Information on your right to appeal
 - The name, address and phone number of the State Long Term Care Ombudsman

Your Right to File Complaint

You have a right to voice your concerns without discrimination, reprisal or threat of discharge and receive a prompt response. You can file a complaint using the nursing home complaint process. Call the Bureau of Health Systems (licensing) to file a complaint at: **1-800-882-6006**. In any case, you can call the Michigan Long Term Care Ombudsman Program for assistance at: **1-866-485-9393**.

Appendix D

Social Welfare Act (excerpt)

MCL 400.66h

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 No. 286

Appendix E

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 F

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 G

**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?

