Advance Directives in Fifty Points

2023

One important area in which we exercise independence is in choosing the medical and mental health care treatment we receive. A competent adult has the right to consent to or refuse particular health care treatments or healthcare related services.

Unfortunately, due to illness or injury, we may not remain able to participate in our treatment decisions. This disability may be temporary or permanent. With a small amount of advance planning, an individual can help ensure that their health care wishes are honored in the future even if the individual is unable to communicate those wishes at the time.

This booklet provides information related to advance directives (*Durable Power of Attorney for Health Care* and *Do-Not-Resuscitate Orders*) and general information about Guardianships. If you have questions related to this information, you should contact your supervisor or the SCCMHA Compliance Officer.

1. An advance directive is a written document in which an individual specifies what type of health care they want in the future, or who they want to make decisions for them when or if they lose the ability to make those decisions for themselves. An advance directive provides a person with some assurance that their personal wishes concerning medical or mental health treatment will be honored at a time when they are unable to express them. Having an advance directive may also prevent the need for a guardianship imposed through the probate court.

2. The decision to have an advance directive is absolutely voluntary. No family member, healthcare provider or insurance company can force an individual to have an advance directive, or dictate what the advance directive should say if an individual decides to write one.

3. There are three types of advance directives: 1) Durable Power of Attorney for Health Care; 2) Living Will; 3) Do-Not-Resuscitate Order.

I Durable Power of Attorney for Health Care

4. A Durable Power of Attorney for Health Care (may also be known as a health care proxy, a patient advocate designation or a DPA for health care) is a written document in which an individual appoints another individual to make health care treatment decisions for them when they are no longer able to make the decisions for themselves.

5. An individual who is named in a patient advocate designation to exercise powers concerning care, custody, and medical or mental health treatment decisions is known as a patient advocate and an individual who makes a patient advocate designation is known as a patient.

6. The patient advocate only makes decisions for the patient when that patient is unable to participate in health care decisions for themselves (for example – the patient may be unable to make health care decisions due to a stroke, they have become unconscious due to a car accident, or due to severe depression or schizophrenia). Until that time, the patient keeps the power to make their own healthcare decisions.

7. The determination that an individual is no longer able to participate in making their health care choices is made by two people: the doctor responsible for the patient's care and one other doctor or psychologist.

8. A properly prepared (valid) Durable Power of Attorney for health care is legally binding in Michigan.

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

10. There is no specific form that must be used to create a valid DPA for health care – although a number of organizations provide free forms that may be used.

11. The amount of decision-making authority that the patient gives to the patient advocate is up to the patient. The patient may give the patient advocate the power to make the personal care decisions that the patient normally makes for themselves. This may include the power to consent to or refuse health care treatment, to arrange for mental health treatment, home health care or to admit the patient to a hospital, nursing home or home for the aged.

12. The patient advocate may also be given the power to arrange for medical and personal care services and to pay for those services using the patient's funds. The patient advocate

may be given the right to withhold or withdraw treatment that would allow the patient to die – **but** – that power must be expressed in a clear and convincing manner in the document. The patient can also give the patient advocate the authority to sign a Do-NotResuscitate Order (see the section III dealing with DNRs).

13. The patient advocate will **not** have general power to handle all the patient's property and finances however. That would require a lawyer's assistance to draft a *durable power of attorney for finances* or a living trust.

14. The patient may also give the patient advocate the power to make decisions concerning organ donation – the patient may specify which organs to be donated and to whom.

15. A patient's specific healthcare wishes cannot be followed if the patient has not been clear about what those wishes are. Although it is not a requirement for the patient to place very specific instructions in their DPA, the patient advocate will be more effective if clear guidance is provided in the document. Once a DPA for health care has been created, it is important that a copy of it be provided to health care providers and that it is placed in the patient's health care records. The patient advocate then has a duty to take reasonable steps to follow the patient's desires and instructions which were expressed while the patient was able to participate.

16. A patient has the right to voluntarily have their durable power of attorney for health care placed on a statewide registry, operated by *Gift of Life Michigan*, under contract from Michigan Department of Community Health. Health care providers will then have immediate access to the patient's information. The registry is free to the patient and to the health care providers.

17. A valid durable power of attorney for health care has three requirements: (1) it must be in writing; (2) it must be signed by the patient; and (3) it must be witnessed by two adults (the witnesses cannot be family members, the patient's doctor or an employee of the health facility where the patient is receiving their services).

II **Living Will**

18. A living will is a written document in which a patient informs doctors, family members and others what type of medical care they may wish to receive if the patient becomes terminally ill or permanently unconscious.

19. A living will only takes effect after a doctor has diagnosed the patient as terminally ill or permanently unconscious and has determined that the patient is unable to make or communicate the decisions about their care.

20. The focus of a DPA for health care is on **who** makes the health care decision, while the focus of a living will is on **what** the health care decision should be. The DPA for health care may be more flexible than a Living Will because the patient advocate can respond to unexpected circumstances.

21. The vast majority of states have passed laws which give living wills legal force. Michigan **has not** passed such a law. While a living will may be honored in Michigan, there is no absolute assurance that a patient's wishes will be honored by a living will.

III Do-Not-Resuscitate order

22. A do-not-resuscitate order (DNR Order) is a written document in which an individual (declarant) expresses their wish that if their breathing and heartbeat ceases, they do not want anyone to attempt to resuscitate them. Examples of individuals who may wish to prepare a DNR include a hospice patient who is home to die as peacefully as possible or a nursing home resident who has deteriorating health conditions.

23. Michigan law provides that a DNR order is valid in settings other than hospitals. Hospitals set their own policies about resuscitation.

24. Like the other form of advance directive in Michigan (DPA for health care), the DNR Order is voluntary and can be revoked by the patient at any time.

25. Unlike the DPA for health care, **Michigan provides a standard form for a DNR**. The form requires signatures from the declarant's attending physician, the declarant, and two witnesses who are 18 years of age or older (at least 1 of whom is not the declarant's spouse, parent, child, grandchild, sibling or presumptive heir). There is also an alternate form available for individuals who have religious beliefs against using doctors.

26. An individual who is 18 years of age or older and of sound mind may execute a do-notresuscitate order on their own behalf.

27. A patient advocate of an individual who is 18 years of age or older may execute a do-notresuscitate order on behalf of that individual.

28. If the patient has a guardian, a court may grant the guardian power to sign a DNR order. The guardian's paperwork from the court should be examined carefully to assure that the guardian has the necessary power to create a DNR order.

29. At any time after an DNR order is signed and witnessed, the declarant, the declarant's patient advocate, the guardian, the attending physician or delegatee, may apply a **Donot-resuscitate identification bracelet** to the declarant's wrist.

30. A Do-not-resuscitate identification bracelet is an identification bracelet that meets the requirements of the Michigan Do-not-resuscitate procedure act and that is worn by a declarant while a do-not-resuscitate order is in effect.

31. An individual shall not apply a do-not-resuscitate identification bracelet to another individual unless he or she knows that the patient is a do-not-resuscitate declarant. An individual who wrongly puts a DNR identification bracelet on an individual may be punished by up to two years imprisonment and/or a fine of not more than $1,000.

32. The fact that a declarant has a do-not-resuscitate order does not create a presumption concerning their intent to consent to or refuse medical treatment in circumstances other than the cessation of both spontaneous circulation and respiration. In other words, the DNR order only applies if the individual's breathing or heart stops. Other acts of first aid should be provided as usual.

IV **Guardian Information**

To more fully understand the powers of a patient advocate, it is important to understand how that role differs from a Guardian. There are several different types of guardians with distinct powers – it is important to understand not only how guardians differ from patient advocates – but how guardians differ from each other. When there is a question related to a guardian's authority, it is important to examine the Court's order of appointment. The next several points relate to the role of a Guardian.

33. **Important distinction between Patient Advocate and Guardian**: The individual consumer (patient) appoints the patient advocate. Guardians are generally appointed by the Court (with some exceptions related to minors).

34. When a court appoints a guardian, the court shall design the guardianship to encourage the development of maximum self-reliance and independence in the individual. If the court is aware that an individual has executed a patient advocate designation, the court shall not grant a guardian any of the same powers (for example, the power or duty of making medical or mental health treatment decisions) that are held by the patient advocate.

35. A person may become a minor's guardian by **parental appointment** or **court appointment**. The guardianship status continues until it has been terminated.

36. If the court determines that some form of guardianship is necessary, partial guardianship is the preferred form of guardianship for an individual with a developmentally disability.

37. **Guardian ad litem** (GAL) definition: A guardian ad litem is a guardian appointed by a court to protect the interests of a minor or incompetent in a particular legal matter. Typically, the court may appoint either a lawyer or a court appointed special advocate volunteer to serve as guardian ad litem in juvenile matters, family court matters, probate matters, and domestic relations matters. The guardian ad litem is not expected to make diagnostic or therapeutic recommendations but is expected to provide an information base from which to draw resources. As authorized by law the guardian ad litem may present evidence and ensure that, where appropriate, witnesses are called and examined, including, but not limited to, foster parents and psychiatric, psychological, medical, or other expert witnesses.

38. **Partial guardian definition:** A partial guardian is a guardian who has only those powers set forth in the order of appointment and the letters of guardianship. The partial guardian possesses less than all of the legal rights and powers of a plenary guardian. The partial guardian has special powers that are clearly specified and conferred by a court order. In a case of partial guardianship, the ward continues to possess some legal control over themselves.

39. If the court finds by clear and convincing evidence that an individual is developmentally disabled or incapacitated and lacks the capacity to do some, but not all, of the tasks

necessary to care for himself or herself or their estate, the court may appoint a partial, or limited, guardian to provide guardianship services to the individual – but the court may not appoint a plenary, or full, guardian. The court order shall define the powers and duties of the partial guardian.

40. An individual with a developmental disability for whom a partial guardian has been appointed retains all legal and civil rights except those that have by court order been designated as legal disabilities or that have been specifically granted to the partial guardian by the court.

41. A partial guardian shall not be appointed for a term greater than 5 years.

42. **Plenary guardian definition:** Plenary guardianship is a guardianship in which the court gives the guardian the power to exercise all legal rights and duties on behalf of a ward, after the court makes a finding of incapacity.

43. If the court finds by clear and convincing evidence that an individual is developmentally disabled, or incapacitated, and is totally without capacity to care for himself or herself or their estate, the court shall specify that finding of fact in any order and may appoint a plenary, or full, guardian of the person or of the estate or both for the individual.

44. **Standby guardian definition**: A standby guardian is an individual designated by the court whose appointment shall become effective without further proceedings immediately upon the death, incapacity, or resignation of the initially appointed guardian. The powers and duties of the standby guardian shall be the same as those of the initially guardian. In an emergency situation and in the absence and unavailability of the initially appointed guardian, the standby guardian may temporarily assume the powers and duties of the initially appointed guardian.

45. **Testamentary guardian:** A person appointed by a surviving parent to assume legal guardianship of a minor following the death the parent is called a testamentary guardian. In Michigan, the surviving parent of a minor with a developmental disability for whom a guardian has not been appointed may, by will, appoint a testamentary guardian. The testamentary appointment becomes affective immediately upon the death of the parent and shall terminate when the minor attains 18 years of age, or the guardian is dismissed by the court.

46. **Delegation of powers by parent or guardian**: By a properly executed power of attorney, a parent or guardian of a minor or a guardian of a legally incapacitated individual may delegate to another person, for a period not exceeding 180 days, any of the parent's or guardian's powers regarding care, custody, or property of the minor child or ward, except the power to consent to marriage or adoption of a minor ward or to release of a minor ward for adoption. (**DO NOT** confuse the power of attorney under this section with the durable power of attorney for health care.)

47. SCCMHA consumers must be informed about their right to create an advance directive; however, the consumer's creation of an advance directive is voluntary.

48. If an SCCMHA consumer creates an advance directive, a copy of the advance directive should be placed into the consumer's SCCMHA records.

49. If an SCCMHA consumer has a guardian, the consumer's SCCMHA record must have accurate information about the type of guardian involved – the SCCMHA clinician needs to assume the responsibility to update the SCCMHA record.

50. When or if you have any questions related to advance directives, contact the SCCMHA Compliance Officer at 797-3539.