

Family Consent to End of Life Care in Michigan

First 10 minutes of content:

Who is watching you?

- State. State's legal interest in regulating end of life care.
- Patient. Patient's legal interest in receiving care according to the patient's wishes.

State's legal interest:

- Preserve life.
- Prevent suicide.
- Protect integrity of medical profession.

Patient's interest in receiving medical care according to the patient's wishes:

- Patient's possession and control of his or her own person.
- Patient free from restraint from other persons unless by clear and unquestionable authority of law.

Generally speaking, there is only one standard that applies: The Substituted Judgment Standard.

- First this standard considers the patient's prior expressions about medical treatment. The family member must consider the credibility of those expressions based on the specificity and the seriousness of the expression when it was made.
- If there is no credible evidence of the patient's wishes, then the family member must look at more general evidence to decide what the patient would prefer:
 - Patient's philosophical, religious, and moral views.
 - Patient's life goals.
 - Patient's values about the purpose of life and the way it should be lived.
 - Patient's attitudes toward sickness, medical procedures, suffering, and death.

The best interest standard (objective standard) is rarely applicable. In almost all cases, the patient has had the opportunity to form opinions and beliefs about the quality of life he or she wishes to live. Therefore, the surrogate should be making decisions based on the patient's wishes, and the objective standard is inapplicable.

Second 10 minutes of content

Which end of life situations most often require judicial intervention?

- An end of life decision must be made. (Death is unavoidably imminent; No medical treatment will cure the patient or prolong the patient's life; The physician and patient have a common interest in keeping the patient as comfortable as possible.)
- And, the patient does not have a patient advocate designation.
- And, this patient who lacks a patient advocate designation is incompetent (thus currently unable to execute a patient advocate designation).
- And, the family is not unanimous about the patient's wishes.

What is usually asked of the court?

- Permission to withdraw life support; however, the court needs clear and convincing evidence of the patient's wishes to withdraw the patient's life support.
- A guardian ad litem will investigate on behalf of the court.
- The family receives notice of the petition and hearing.
- The patient's procedural due process rights are triggered by the state's participation in this decision process.

Can a medical professional make an end of life decision for the patient?

- No, however well intended the medical professional may be, a medical professional cannot make an end of life decision for a patient.
- Michigan law provides an order of priority for the appointment of a surrogate decision maker.
- If a healthcare professional's ethics countermand the directions provided, then it is permissible to transfer the patient to a different healthcare facility.

Third 10 minutes of content

Best practices when dealing with unprepared patients who are facing end of life care decisions.

- Patients with poorly drafted advance directives.
- Patients with no legally authorized surrogate whatsoever.

The patient advocate needs clear and convincing evidence of the patient's wishes just as the court would need, if the court were carrying out the patient's wishes.

- The guiding principal is "credible evidence of the patient's wishes."
- A literal reading of a document occasionally leads to some irrational and wrong conclusions.

According to the Michigan Do-Not-Resuscitate Procedures Act, only a patient advocate designation or a court may authorize a patient advocate or a guardian to sign a do-not-resuscitate order on a patient's behalf.

Final 10 minutes of content

A family consent law in Michigan could protect both the state's and the patient's legal interests. Suggested possibilities:

- If there is no surrogate appointed by the court or by a patient advocate designation, then the statute provides an order of priority to name an adult with the authority to make end of life decisions on the patient's behalf. This surrogate can act only after the attending physician has determined that death is imminent and the patient can no longer provide informed consent.
- The state's interest in preserving life, preventing suicide and taking care of the integrity of the medical profession is protected. The surrogate cannot make a medical treatment decision for the patient that he or she could not make for himself (avoids suicide and homicide).
- The patient's interest in making his or her own medical decisions is protected. The patient can override the surrogate's decision AT ANY TIME. An incompetent patient can countermand any decision made by the family member surrogate. If a dispute arises, then any interested party can petition the court for review and appointment of a guardian. The family member surrogate must apply the substituted judgment standard for medical decisions (the patient's wishes) and apply the clear and convincing evidence standard.
- The patient's interest in timely health care is protected. An order of priority is provided thus providing a start to a process that is often impermissibly delayed. If a person will not waive priority and that person is incompetent, then the court must determine incompetency before the next person in line may serve. It would be no different in a guardianship proceeding, so either way we end up in the same place. The order of priority:
 - Spouse, unless legal separated or an action for divorce, annulment, legal separation, or for separate maintenance is pending.
 - An adult child.
 - A parent with legal custody who has authority to make healthcare decisions as provided in a judgment of divorce or applicable interim order.
 - An adult brother or sister.
 - A grandchild or grandparent.

- The medical community is protected. Any health care provider acting in accordance with the standards of care applicable to the provider's scope of practice shall not be liable for reliance upon representations made by an individual regarding his or her priority to act as the patient's health care representative under the family consent law.

Final 20 minutes of presentation: Review

1. Which actors have a legal interest in end of life care decisions?

Answer: The S _ _ T E and the P _ T _ _ _ T.

2. What are the State's three legal interests?

Answer:

Preserve L _ F E,

Prevent S _ _ C _ D E, and

Protect the integrity of the M _ D _ _ _ L P _ _ F _ S S _ _ N.

3. What are the patient's two legal interests?

Answer:

Possession and control of his or her own P _ _ S _ _ N, and

Freedom from restraint from other persons unless by C _ L _ R and

U _ Q U E S T _ _ _ A B L E authority of law.

4. The best interest standard will never apply to a family member making a decision under a family consent statute. What standard will apply?

Answer:

SUBSTITUTED Judgment Standard.

How does this standard ensure that the patient's wishes are honored?

All decisions are made based on the patient's prior expressions about medical treatment, if applicable.

If not applicable, then decisions are made based on the patient's:

- (1) Philosophical, moral and RELIGIOUS views,
- (2) LIFE goals,
- (3) Values about the purpose of LIFE and the way it should be LIVED, and
- (4) Attitudes toward sickness, medical procedures, suffering and DEATH.

5. Is it ever okay to disregard an expression of the patient's wishes?

Answer:

_____. It is never okay to disregard what the patient has said or done, but those statements and actions can be compared and weighed for specificity and seriousness of

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purpose. The surrogate must honor C _ _ _ _ B L E evidence of the patient's current wishes. There will always be competing evidence - but not all of it is C _ _ _ _ B L E and relevant as to what the patient would currently want.

6. Why doesn't the family consent law use a best interest standard?

Answer: The family consent law is based on the law of informed consent. It applies to formerly competent adults. These patients have had the opportunity to form opinions about the kind of medical care they do or do not want. The courts apply the best interest standard to that rare patient who never expressed such opinions, e.g. an infant child. The best interest standard is an O _ J E C T _ V E standard about whether receiving or refusing a medical treatment is in any patient's best interest under certain facts. Here, the decision comes down to relief from suffering, preservation or restoration of functioning, and quality and extent of sustained life.

7. Why do the courts, patient advocates, and family members need clear and convincing evidence of the patient's wishes in order to make an end of life decision?

Answer: Whether by court decision or under the color of a state law, a person cannot lose his life at the hands of another person without certain protections. The "clear and convincing evidence of the patient's wishes" standard does that. Every state has an

interest in preserving L __ E, preventing S _____ E, and protecting the integrity of the M _____ L P _____ N.

8. Do all guardians have the authority to make end of life decisions?

Answer: _____. Review the guardianship order and the guardian's letters of authority. The guardian's powers are limited by the court order and the letters of authority. Not all guardianships are the same. Some guardians have limited authority.

9. Why is an incompetent patient allowed to override an end of life decision of a patient advocate or family member?

Answer: By law, the right to determine one's own healthcare is a right that survives a person's incompetency. The "right to override" is a D __ Process consideration. The patient advocate or family member making the patient's end of life healthcare decision may or may not be honoring the patient's current wishes. At the very least, the patient has the right to notice and an opportunity to be heard by the court if any person is making a healthcare decision that will irreversibly end a patient's life on this earth, and the patient disagrees with that decision.

10. What is the point of a family consent law?

Answer: To provide an order of priority for naming a S _ R R _ G _ T E decision maker for an end of life patient who does not have a patient advocate or guardian. A family consent law cannot solve the problem of families in dispute. Only a guardianship proceeding can do that. It can, however, protect the medical profession when it accepts end of life decisions from families that are in agreement about the patient's wishes.