Michigan Laws Clarify Guardian Authority to Consent to Do Not Resuscitate Orders

November 14, 2013

For many years, Michigan guardians and some courts held differing opinions about whether a guardian could consent to a Do Not Resuscitate (DNR) order for their wards. The Michigan Legislature recently put the debate to rest by amending the Do Not Resuscitate Procedure Act and the Estates and Protected Individuals Code. The new laws make it clear that guardians have the authority to consent to DNR Orders for their wards (e.g. the incapacitated person for whom the guardian is responsible), provided certain prerequisites exist. These amendments were signed by Governor Snyder on November 5, 2013, and will take effect on February 5, 2014.

Outside of a Hospital

In addition to a specific grant of authority, the new laws provide a specific form for guardians to use to consent to DNR Orders for wards who are located anywhere outside of a hospital. This includes a nursing home, home for the aged, adult foster care facility, assisted living, hospice residence or the ward's private residence. Importantly, this is the first time this form is available for nursing home residents, and should now be the only DNR authorization and order form that is used in that setting.

Three prerequisites must be in place before a guardian may sign a DNR Order for a ward located outside of a hospital:

- The Court must have granted the guardian the baseline authority to consent to a DNR Order, although the court does not need to become involved in each individual decision. The court will now routinely consider whether or not to give a guardian this authority in every guardianship petition that is filed. Additionally, the guardian-ad-litem who investigates each guardianship petition for the court will now routinely discuss the issue with the alleged incapacitated individual and make a report to the court.
- The guardian must visit the ward within 14 days before signing a DNR Order, and must attempt to discuss the proposed Order with the ward if meaningful communication is possible.
- The guardian must personally discuss the medical indications for the DNR Order with the ward's attending physician.

The guardian is to use the "best interest" standard to decide whether to sign a consent to a DNR Order, as informed by the medical opinion of the attending physician and what the guardian can glean about the ward's wishes. The guardian must give a copy of the DNR Order to the attending physician and to the administrator of any facility where the ward resides. If the ward lives in a private residence, the guardian must ensure that it is available in the home. The guardian may apply a Do Not Resuscitate Identification Bracelet to the ward's wrist. The DNR Order is effective for a year, at which time the guardian must reconsider it after again visiting the ward and talking with the attending physician. The guardian may revoke the DNR Order at any time by voiding the original order and notifying the attending physician and the administrator of any facility where the ward resides. Any interested person who questions whether the DNR Order was properly executed may petition the court for a judicial assessment of its validity.

This clear-cut process will make it much easier for nursing homes to comply with recent Centers for Medicare & Medicaid Services (CMS) directives about the use of CPR in nursing homes. Under the revised Do Not Resuscitate Procedure Act and the new CMS requirements, when a nurse, EMT, respiratory therapist or physician comes upon a nursing home resident who has no pulse or respirations, CPR must be initiated unless:

- the nursing home has actual knowledge of a facially valid DNR Order as described above; or
- the resident displays obvious signs of clinical death, as described in the American Heart Association's CPR guidelines.

In the absence of a DNR Order as described above, CMS' new directive requires that the nursing home commence CPR and call 911. CMS requires this even if the nursing home believes that CPR will be futile because of the length of time that the resident has been without a heartbeat or respirations.

In a hospital

The amendment to the Estates and Protected Individuals Code specifically states, "The power of a guardian to execute a do-not-resuscitate order … does not affect or limit the power of a guardian to consent to a physician's order to withhold resuscitative measures in a hospital." In short, whether or not a court has granted the guardian the authority to execute a DNR Order, the guardian can agree to a physician order to withhold resuscitation in a hospital. Michigan law specifically limits the term "Do Not Resuscitate Order" to a DNR Order written and signed pursuant to the Do Not Resuscitate Procedure Act, which by its terms applies only outside of a hospital. DNR Orders in hospitals are not subject to that Act or any of its procedural or other formalities.

This is the clearest expression of guardian DNR authority that has ever existed in Michigan statutes. It confirms the position taken by the Michigan Supreme Court and Court of Appeals in two judicial opinions from the 1990's—*In re* Martin and *In re* Rosebush.

The guardian community, courts, and health care providers now have definitive information on how to handle a critical component of end-of-life care. In particular, nursing homes and hospitals should evaluate their policies and procedures to comport with the amendments, and CMS' CPR requirements for nursing homes.

If you have any questions or require assistance regarding this matter, please contact Dykema attorneys Joanne Lax (248-203-0816 or jlax@dykema.com) or Kathleen Reed (231-348-8134 or kreed@dykema.com).

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