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NEW LIVING WILL FOR HEALTH CARE

By: Matt W. Zeigler, Esq.

As our population grows older, and we live longer, the rights and personal dignity of our employees and their family members who become infirm due to accident, illness, or simple maturity has been unclear. Now, Michigan has adopted a statute which settles the rights of Michigan residents to receive or refuse medical treatment.

On December 19, 1990, Governor Blanchard signed a law giving individuals (the "Patient") the binding right to grant to other persons ("the Patient Advocate") the power to decide to provide or to withdraw specific life extending care, custody, or medical treatment. The statute establishes safeguards to insure that the Patient's rights are clearly communicated, impartially executed and only implemented if the two medical opinions confirm that the disabled Patient is unable to participate in medical treatment decisions.

Safeguards

Before the new Patient Advocate authority (the "Designation") is effective, both the Patient's attending physician and another physician or licensed psychologist are required to make a written determination of the Patient's inability to participate in medical treatment decisions. Once made, the determination must be filed in the Patient's medical record. This determination must be reviewed annually.

A further safeguard prevents certain interested parties from serving as witnesses to the signing of the Designation of a Patient Advocate. The following persons cannot serve as a witness: spouse, parent, child, grandchild, sibling, a person presumed to be an heir, or likely to benefit under the will of the Patient. Other persons who are not suitable witnesses include the Patient Advocate, or an employee of the hospital or health care facility where the Patient resides.

At the time the Patient signs the Designation, witnesses must affirm that the Patient appears to be of sound mind and appears to be free from duress, fraud or undue influence.

The statute provides for a quick dispute resolution mechanism. The parties to a dispute are to file a petition in the probate court where the Patient resides or is located. The probate court will appoint a guardian ad litem to represent the interests of the Patient and conduct a hearing within 7 days and make its decision "as soon as possible" after the hearing. Such an immediate hearing could be conducted to determine the capacity of the Patient to participate in medical decisions which could cause the Designation to become effective.

Further, the probate court is to determine the intent of the Patient when there is a dispute regarding whether the Designation has been revoked by the Patient. Finally, if a dispute arises as to whether a Patient Advocate is acting consistently with the Patient's best interests, the probate court is the forum to make that decision.

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The Patient may include in the Designation a statement on the extent of his/her desire for care, custody and medical treatment. This new statute allows the Patient Advocate to make a decision to withhold or withdraw such medical treatment. This authority can be exercised if the Patient has expressed his/her intent in a "clear and convincing manner" and the Patient acknowledges that the exercise of such a decision "could or would allow the patient's death".

The Designation could include the power to cover specific types of medical treatment, such as the use of mechanical long-term artificial breathing apparatus. Or the powers delegated could be general in nature, such as prohibiting the use of any extraordinary and artificial life preserving medical measures or artificial nutritional support.

Implementation

The Designation is to be made a part of the medical records of both the Patient's attending physician and the facility where the Patient is located. In addition, copies of the Designation, before the power is used, are to be given to Patient Advocate and the successor Patient Advocate, if any, both of whom are required to sign an acceptance of the duties outlined in the Designation.

The standard of care that the Patient Advocate owes to the Patient is the highest standard of duty in law: the fiduciary duty. Moreover, the Patient Advocate is to act only in the best interests of the Patient.

Limitations

The Designations of a Patient Advocate are not effective during the pregnancy of a Patient, and after the recovery of a Patient who is again able to participate in medical decisions.

Further, Designations are revoked following the resignation of the Patient Advocate, upon a probate court order dissolving the Designation, or by the making of a subsequent Designation revoking prior Designations. If the Patient Advocate is the spouse, then the Designation is revoked upon the divorce, the legal separation of the couple, or the annulment of the marriage.

Prior Living Wills

The statute maintained the validity of living wills which have been executed prior to December 19, 1990. However, all of the safeguards discussed above are required to be a part of an old living will, except: (1) the requirements of filing the Designation in the Patient's medical record of his/her attending physician and with the medical facility where the Patient is located and (2) the requirement that the witnesses be totally disinterested.

Conclusion

So, this new statute provides for the implementation of a Patient's wishes with respect to new modern medical procedures that can artificially extend the quantity, but not the quality of life. As long as certain safeguards are in place, current and some prior "living" wills are valid. Professional advisors can best inform you, your employees and their family members of appropriate plans for future health care decisions.