

## Naming of patient advocate can have far-reaching effects

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Almost every doctor, nurse and staff member will treat a patient whose mental capacity to make his or her own medical decisions is impaired.

When this occurs, questions often arise about whether the patient is legally incompetent and who should make the patient's medical decisions.

These scenarios may lead to life-altering decisions that can harm family relationships and cause unnecessary patient stress.

### Legal issues with competency

Michigan's Estates and Protected Individuals Code (EPIC), Public Act 386 of 1998, provides the legal framework for resolving disputes about patient competency. When a patient's mental capacity is suspect, EPIC requires the attending physician as well as another physician (or licensed psychologist) to examine the patient and make a written determination about whether the patient is able to participate in his or her own medical decisions.

Written findings must be included in the patient's medical chart. If both physicians conclude that the patient is incompetent, the question then becomes who, if anyone has the legal authority to step in and control the patient's course of treatment.

Most health care professionals know that a "Patient Advocate" form is a tool commonly used to designate a surrogate decision maker in the event of a patient's incapacity. EPIC provides strict requirements for executing a legally enforceable patient advocate designation.

Patient advocate designations often are made with standardized forms which, for the most part, are valid under EPIC. In order to be valid, a patient advocate designation must be signed by a mentally competent patient in the presence of two witnesses. These witnesses cannot be the patient's relative or an employee of a treating health facility.

If the patient advocate designation appears to be proper and there is no dispute that the patient cannot make his or her medical decisions, medical treaters must follow the directions of the patient advocate.

However, if family, friends or the patient disputes the patient's competency or patient advocate designation does not appear to be valid (for example, because a witness improperly dated the form), a probate judge must decide about who, if anyone, should act for the patient. This is when problems can arise.

The probate court process is different from other legal proceedings because most people that appear in probate court do so in pro per, which means that they are not represented by an attorney.

When a dispute arises about whether a patient is competent or who should act for the patient, a petition must be filed in the probate court in the county where the patient is located. EPIC does not restrict physicians or other medical staff from filing a petition, but it is usually filed by a person desiring to have authority to act for the patient.

If a patient has executed a Patient Advocate form, the probate court must hold a hearing within seven days and make a finding of whether the patient is competent within another seven days after the hearing.

If a patient advocate form was not executed or is determined by a judge to be invalid, a petition for guardianship must be filed. A common misperception is that only immediate family may file a petition for guardianship. But EPIC provides that any person interested in the patient's welfare may file a petition. This includes any family, friends and health care providers.

EPIC designates the priority of interested persons who may act as a guardian. A person designated by the patient, including through a durable power of attorney, has first priority. Spouses have second priority, followed by parents and then other relatives with whom the patient has lived with for more than six months.

Only when these people are unwilling or unsuitable to serve may a court appoint a professional guardian. A professional guardian is often an attorney who operates a guardian company and has no familiarity with the patient or the family.

A key question the probate judge must determine in a guardianship proceeding is whether a person with priority is "suitable." EPIC does not define or provide guidance on what factors make a person unsuitable.

Probate judges have wide discretion to make determinations of suitability based on hearsay, speculation and other indiscriminate factors. A treating physician's opinion may be considered. Very few Michigan Court of Appeals cases exist which address the proper determinations for finding suitability, most likely because most petitioners are in pro per and lack the financial ability to appeal probate court rulings.

Hearings on guardianship proceedings usually last five to 10 minutes and judges commonly rely on a court-appointed "guardian ad litem" who makes a recommendation to the court.

### **Case study**

A recent guardianship proceeding occurred where problems unfortunately arose. In this case, a patient became incompetent. He had previously executed a patient advocate form designating his wife, but there was a discrepancy with a witness signature.

The matter came to probate court when the wife filed a petition for guardianship. Once the petition was filed, a guardian ad litem was appointed and recommended the appointment of a professional guardian even though the patient's wife and sister were willing to serve as the guardian.

Unfortunately, the probate judge followed this recommendation and appointed a professional guardian before making any determination of whether the patient's wife or other family members were "suitable" to serve as guardian.

The professional guardian then banned all visitation by the family and removed the patient from the care of his long-term treating physician. As could be expected, this led to chaos. Another family member subsequently filed a petition to be named as guardian, but the judge refused to change his original ruling. The patient's family has not been allowed to visit in several months and the patient's long-term physician has not been able to provide treatment.

### **Advice**

This case is an example of what can go wrong when a patient's competency is at issue. Doctors, nurses and staff should understand that their opinion about the suitability of a patient's family members or friends to act as a decision maker can carry a lot of weight in a court.

Don't shy away from becoming involved if a court proceeding is necessary. Your recommended course of treatment may very well be altered by decisions made in probate court.

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