

Checklist #4: Adult Hospital, Hospice or Nursing Home Patients Without Medical Decision-Making Capacity Who Do Not Have a Health Care Proxy and For Whom No Surrogate From the Surrogate List Is Available

Under the Family Health Care Decisions Act, a patient who lacks capacity and who does not have a health care agent or surrogate may be enrolled in hospice with a plan of care that includes orders regarding the provision or withdrawal/withholding of life-sustaining treatment, if two physicians, nurse practitioners, or physician assistants and an Ethic Review Committee agree that the patient meets certain criteria (which are the same criteria that would apply to a decision by a surrogate under Checklist 3).

This checklist may also be used for a life-sustaining treatment decision for a patient who is already enrolled in hospice.

If the patient is not enrolled in Hospice, life-sustaining treatment may be withheld from a patient in a hospital or nursing home who does not have a health care proxy or a surrogate, only if a court makes the decision or two physicians, nurse practitioners, or physician assistants authorized by the facility concur that the patient would die imminently, even if the patient received the treatment, and that provision of the treatment would violate accepted medical standards.

Complete each step and check the appropriate lines as indicated.

Step 1: Assess health status and prognosis. ____

Step 2: Check all advance directives known to have been completed.

____ Health Care Proxy ____ Living Will ____ Organ Donation ____ Documentation of Oral Advance Directive

(If there is a health care proxy and the health care agent can make the decision, stop filling out this checklist. Use Checklist #2 for adults with a health care proxy.)

Step 3: If there is no health care proxy, assess capacity to complete a health care proxy.

A patient who lacks the capacity to consent to medical orders for life-sustaining treatment may still have the capacity to choose a health care agent and complete a health care proxy. Any patient with that capacity should be counseled to complete a health care proxy if he/she has not already completed one.

Document the result of patient counseling, if applicable. **Check one:**

- ____ Patient retains the capacity to choose a health care agent and completes a health care proxy. (If the patient completes a health care proxy, use Checklist #2 for adults with a health care proxy).
- ____ Patient retains the capacity to choose a health care agent but chooses not to complete a health care proxy.
- ____ Patient lacks capacity to choose a health care agent.

Step 4: Determine the patient's medical decision-making capacity. Check appropriate line(s) under (A) and (B) (if a required item cannot be checked because the patient has capacity, use Checklist #1 for adults with medical decision-making capacity.):

(A) Attending Physician/Nurse Practitioner/Physician Assistant Determination

Check both:

- ____ The attending physician, nurse practitioner, or physician assistant has determined in writing to a reasonable degree of medical certainty that the patient lacks the ability to understand and appreciate the nature and consequences of DNR and Life-

Sustaining Treatment orders, including benefits and burdens of and alternatives to such orders, and to reach an informed decision regarding the orders.

- ___ The determination contains the attending physician's/nurse practitioner's/physician assistant's assessment of the cause and extent of the patient's incapacity and the likelihood that the patient will regain medical decision-making capacity. The determination is documented in the patient's medical record.

(B) Assessment for Mental Illness and Concurring Determination Check (i) or (ii) and all line(s) underneath:

- ___ (i) The attending physician, nurse practitioner, or physician assistant has determined that the patient's lack of medical decision-making capacity is **not due** to mental illness; and

- ___ A health or social services practitioner employed by, or formally affiliated with, the facility has independently determined that the patient lacks medical decision-making capacity. The concurring determination includes an assessment of the cause and extent of the patient's incapacity and the likelihood that the patient will regain medical decision-making capacity. Such determination is also included in the patient's medical record.

- ___ (ii) The attending physician, nurse practitioner, or physician assistant has determined that the lack of medical decision-making capacity **is due** to mental illness (this does not include dementia) and **Check both:**

- ___ A health or social services practitioner employed by, or formally affiliated with, the facility has independently determined that the patient lacks medical decision-making capacity. The concurring determination includes an assessment of the cause and extent of the patient's incapacity and the likelihood that the patient will regain medical decision-making capacity. Such determination is also included in the patient's medical record.

- ___ Either the attending physician or the health or social services practitioner who determined that the patient lacks medical decision-making capacity is a qualified psychiatrist. The determination by the qualified psychiatrist is documented in the medical record.

Step 5: Notify the Patient. Check one:

- ___ Notice of the determination that the patient lacks medical decision-making capacity has been given to the patient (the patient may be able to comprehend such notice).

- ___ Notice of the determination that the patient lacks medical decision-making capacity has not been given to the patient, because there is no indication of the patient's ability to comprehend the information

Step 6: Determine that there is no Public Health Law Surrogate. Check both:

- ___ The attending physician, nurse practitioner, or physician assistant, or someone acting on behalf of the attending physician, nurse practitioner, or physician assistant or the hospital or nursing home, made diligent efforts to contact a surrogate from the list below:

- a. Patient's guardian authorized to decide about health care pursuant to Mental Hygiene Law Article 81
- b. Patient's spouse, if not legally separated from the patient, or the domestic partner

- c. Patient's son or daughter, age 18 or older
- d. Patient's parent
- e. Patient's brother or sister, age 18 or older
- f. Patient's close friend, age 18 or older

___ No surrogate was reasonably available, willing and competent to make medical decisions for the patient.

Step 7: Document where the MOLST form is being completed. Check one:

- ___ Hospital (see Glossary for definition)
- ___ Nursing Home (see Glossary for definition)
- ___ Hospice (i.e. for a patient already enrolled in hospice) (see Glossary for definition)

Step 8: Be sure you have selected the appropriate legal requirements checklist, based on who makes the decision and the setting. Check one:

This is Checklist #4 for adult hospital or nursing home patients without medical decision-making capacity who do not have a health care proxy and for whom no surrogate from the surrogate list is available. If this is the appropriate checklist, proceed to Step 9 below. If this is the wrong checklist, stop filling out this checklist; find and complete the correct checklist. All checklists can be found on the Department of Health's website at http://www.nyhealth.gov/professionals/patients/patient_rights/molst/.

- ___ Checklist #1 - Adult patients with medical decision-making capacity (any setting)
- ___ Checklist #2 - Adult patients without medical decision-making capacity who have a health care proxy (any setting)
- ___ Checklist #3 - Adult hospital, hospice or nursing home patients without medical decision-making capacity who do not have a health care proxy, and decision-maker is Public Health Law Surrogate (surrogate selected from the surrogate list)
- ___ Checklist #4 - Adult hospital, hospice or nursing home patients without medical decision-making capacity who do not have a health care proxy and for whom no surrogate from the surrogate list is available
- ___ Checklist #5 - Adult patients without medical decision-making capacity who do not have a health care proxy and do not have a developmental disability, and the MOLST form is being completed in the community
- ___ Checklist #6 - OPWDD Checklist – Adult patients with a developmental disability who do not have medical decision-making capacity and do not have a health care proxy

Step 9: Identify patient goals for care based on patient's wishes, if known, or patient's best interests ___

Step 10: Consult with staff directly responsible for the patient's care ___

Step 11: Decision complies with the following patient-centered standards as determined by the physician, nurse practitioner, or physician assistant with independent physician, nurse practitioner, or physician assistant concurrence:

- ___ Decision is patient-centered, in accordance with the patient's wishes, including the patient's religious and moral beliefs; or if the patient's wishes are not reasonably known

and cannot with reasonable diligence be ascertained, in accordance with the patient's best interests. This assessment is based on the patient's wishes and best interests, not the decision-maker's, and includes consideration of:

- o the dignity and uniqueness of every person;
- o the possibility and extent of preserving the patient's life;
- o the preservation, improvement or restoration of the patient's health or functioning;
- o the relief of the patient's suffering; and
- o any medical condition and such other concerns and values as a reasonable person in the patient's circumstances would wish to consider.

Step 12: Decision complies with the following clinical standards as determined by the physician, nurse practitioner, or physician assistant with independent physician, nurse practitioner, or physician assistant concurrence. Check (i) and/or (ii):

- ___ (i) Treatment would be an extraordinary burden to the patient, **and** an attending physician/nurse practitioner/physician assistant determines, with the independent concurrence of another physician/nurse practitioner/physician assistant, that, to a reasonable degree of medical certainty and in accord with accepted medical standards,
 - o the patient has an illness or injury which can be expected to cause death within six months, whether or not treatment is provided; **or**
 - o the patient is permanently unconscious.
- ___ (ii) The provision of treatment would involve such pain, suffering or other burden that it would reasonably be deemed inhumane or extraordinarily burdensome under the circumstances; **and** the patient has an irreversible or incurable condition, as determined by an attending physician/nurse practitioner/physician assistant with the independent concurrence of another physician/nurse practitioner/physician assistant to a reasonable degree of medical certainty and in accordance with accepted medical standards.

Step 13: Ethics Review Committee:

___ An Ethics Review Committee, composed as described below, reviewed the decision, and determined that it was consistent with the standards in Steps 11 and 12:

- At least five members who have demonstrated an interest in or commitment to patient's rights or to the medical, public health, or social needs of those who are ill.
- At least three Ethics Review Committee members must be health or social services practitioners, at least one of whom must be a registered nurse and one of whom must be a physician, nurse practitioner or physician assistant.
- At least one member must be a person without any governance, employment or contractual relationship with the hospital.
- In a residential health care facility the facility must offer the residents' council the opportunity to appoint up to two persons to the Ethics Review Committee, none of whom may be a resident of or a family member of a resident of such facility, and both of whom shall be persons who have expertise in or a demonstrated commitment to patient rights or to the care and treatment of the elderly or nursing home residents through professional or community activities, other than activities performed as a health care provider

Step 14: Documentation of Concurrence and Ethics Review Committee:

___ The concurring physician/nurse practitioner/physician assistant's determination is documented in the medical record.

___ The Ethics Review Committee determination is documented in the medical record.

Step 15: Physician/nurse practitioner/physician assistant signature

___ The attending physician/nurse practitioner/physician assistant has signed the MOLST form.

Step 16: Notify director of mental hygiene facility and Mental Hygiene Legal Services (MHLS).

___ For patients who are residents in, or are transferred from, a mental hygiene facility, the attending physician/nurse practitioner/physician assistant has notified the director of the facility and MHLS of the determination that the resident lacks medical decision-making capacity and, that there is no surrogate or health care proxy and that the resident has MOLST orders.

Step 17: Notify director of correctional facility.

___ For adult patients who are inmates in, or are transferred from, a correctional facility, the attending physician/nurse practitioner/physician assistant has notified the director of the correctional facility of the determination that the inmate lacks medical decision-making capacity, that there is no surrogate or health care proxy and that the inmate has MOLST orders.