

Checklist #3: Adult Hospital 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)

Under the Family Health Care Decisions Act, a surrogate selected from the surrogate list can make any kind of medical decision in a hospital or nursing home, after the attending physician and another health or social services practitioner at the facility concur that the patient lacks capacity. For decisions to withhold or withdraw life-sustaining treatment, specific clinical criteria must be satisfied. Sometimes, the facility's ethics review committee must agree.

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. **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 lines under (A) and (B) (if a required item cannot be checked because the patient has capacity, use Checklist #1 for patients with capacity):**

(A) Attending Physician Determination **Check both:**

___ The attending physician has determined in writing to a reasonable degree of medical certainty that the patient lacks capacity to understand and appreciate the nature and consequences of *DNR and Life-Sustaining Treatment* orders, including the 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 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 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 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 and that a surrogate will make medical decisions on his/her behalf 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 and that a surrogate will make decisions on his/her behalf has not been given to the patient because there is no indication of the patient's ability to comprehend the information.

Step 6: Identify and notify the appropriate Public Health Law surrogate. *Check both:*

___ The attending physician has identified a person **from the class highest in priority** who is reasonably available, willing, and competent to serve as a surrogate decision-maker. Such person may designate any other person on the list to be surrogate, provided no one in a class higher in priority than the person designated objects. ***Check one:***

- ___ 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 actively involved close friend, age 18 or older

___ The attending physician has notified at least one person on the surrogate list who is highest in order of priority, and who is reasonably available, that he/she will make medical decisions because the patient has been determined to lack medical decision-making capacity.

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

___ Hospital (see Glossary for definition)

___ Nursing Home (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 # 3 (for adult hospital or nursing home patients without medical decision-making capacity who do not have a health care proxy, and whose decision-maker is a Public Health Law surrogate). If this is the appropriate checklist, proceed to Step 9 below. If this is the wrong 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 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 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 MOLST form is being completed in the community

Step 9: Discuss goals for care with the Public Health Law surrogate. ___

Step 10: Surrogate has given informed consent. *Check all:*

- ___ Surrogate has been fully informed about the patient's medical condition and the risks, benefits, burdens and alternatives of possible life-sustaining treatment.
- ___ Surrogate has consented to the withholding, withdrawal or delivery of certain life-sustaining treatment, for which medical orders are written.
- ___ Surrogate's 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. The surrogate's assessment is based on the patient's wishes and best interests, not the surrogate's, and includes consideration of:
 - the dignity and uniqueness of every person;
 - the possibility and extent of preserving the patient's life;
 - the preservation, improvement or restoration of the patient's health or functioning;
 - the relief of the patient's suffering; and
 - any medical condition and such other concerns and values as a reasonable person in the patient's circumstances would wish to consider.

Step 11: If the decision is to withhold or withdraw life sustaining treatment, the surrogate's decision complies with the following clinical standards, as determined by the physician, with independent physician concurrence and, where applicable, by an ethics review committee. *Check (i) and/or (ii) and (iii) and any applicable lines underneath:*

- ___ (i) Treatment would be an extraordinary burden to the patient, **and** an attending physician determines, with the independent concurrence of another physician, that, to a reasonable degree of medical certainty and in accord with accepted medical standards,
 - the patient has an illness or injury which can be expected to cause death within six months, whether or not treatment is provided; **or**
 - 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 with the independent concurrence of another physician to a reasonable degree of medical certainty and in accordance with accepted medical standards.

- **Special requirements for declining artificial nutrition and hydration in a hospital over the attending physician’s objection, and for certain life sustaining treatments in a nursing home, based on “irreversible or incurable condition” (clinical standard (ii) above)** *Note – These requirements do not apply to a decision for a patient in hospice or to a decision to withhold or withdraw life-sustaining treatment under clinical standard (i) above (death is expected within 6 months with or without treatment, or patient is permanently unconscious):*
 - In a hospital (other than a hospice), when the medical order involves the withdrawal or withholding of nutrition or hydration provided by means of medical treatment, and the attending physician objects to the order, the ethics review committee (including a physician who is not directly responsible for the patient’s care) or an appropriate court has determined that the medical order meets the patient-centered and clinical standards.
 - In a nursing home, for MOLST orders other than a DNR order, the ethics review committee, (including at least one physician who is not directly responsible for the patient's care) or an appropriate court has determined that the orders meet the patient-centered and clinical standards described above.
- (iii) The concurring physician’s determination is documented in the medical record.

Step I2: Witness requirements are met. *Check one:*

Two witnesses are always recommended. The physician who signs the orders may be a witness. To document that the attending physician witnessed the consent, the attending physician signs the order and prints his/her name as a witness. Witness signatures are not required -- printing the witnesses' names is sufficient.

- The surrogate consented in writing.
- The surrogate consented verbally, and the attending physician witnessed the consent.

Step I3: If the surrogate is a close friend, verify the age and relationship with the patient.

- The surrogate is 18 or older and has signed a statement that he or she is a close friend of the patient, or a relative of the patient (other than a spouse, adult child, parent, brother or sister), who has maintained such regular contact with the patient as to be familiar with the patient's activities, health, and religious or moral beliefs. A copy of the signed statement is in the medical record.

Step I4: Physician signature

- The attending physician signed the MOLST form.

Step I5: 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 has notified the director of the facility and MHLS of the determination that the resident lacks medical decision-making capacity and that the resident has MOLST orders.

Step I6: Notify director of correctional facility.

- For adult patients who are inmates in, or are transferred from, a correctional facility, the attending physician has notified the director of the correctional facility of the determination that the inmate lacks medical decision-making capacity and that the inmate has MOLST orders.