

Checklist #2 Adult Patients Without Medical Decision-Making Capacity Who Have a Health Care Proxy (Any Setting)

A health care agent may make medical decisions on behalf of a patient, after two physicians/nurse practitioners/physician assistants concur that the patient lacks medical decision-making capacity. Health care agents are generally authorized to make decisions as if they were the patient. However, sometimes the patient's health care proxy limits the authority of the health care agent.

Health care agents are required to make decisions according to the patient's wishes, including the patient's religious and moral beliefs. If the patient's wishes are not reasonably known and cannot with reasonable diligence be ascertained, the health care agent may make decisions according to the patient's best interests, except a decision to withhold or withdraw artificial nutrition or hydration. Health care agents are authorized to make a decision to withhold or withdraw artificial nutrition or hydration only if they know the patient's wishes regarding the administration of artificial nutrition and hydration.

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

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.
- ____ 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.

(If there is no health care proxy, and patient chooses not to complete one or lacks capacity to do so, go to Step 8 and select the appropriate checklist. If there is a health care proxy, proceed to Step 4.)

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 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, nurse practitioner or physician assistant's opinion regarding the cause and nature of the patient's incapacity as well as its extent and probable duration. The determination is documented in the patient's medical record.

(B) Assessment for Mental Illness or Developmental Disability and Concurring Physician/Nurse Practitioner/Physician Assistant Determination Check (i), (ii) or (iii) 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 or a developmental disability; and

___ A concurring physician, nurse practitioner, or physician assistant confirmed that the patient lacks 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 concurring physician, nurse practitioner, or physician assistant confirmed that the patient lacks medical decision-making capacity. Such determination is also included in the patient's medical record.

___ One of the two practitioners who determined that the patient lacks medical decision-making capacity is a physician who is a qualified psychiatrist. The determination by the qualified psychiatrist is documented in the medical record.

___ (iii) The attending physician, nurse practitioner, or physician assistant has determined that the lack of medical decision-making capacity **is due** to a developmental disability **and Check both:**

___ A concurring physician, nurse practitioner, physician assistant, or clinical psychologist confirmed that the patient lacks medical decision-making capacity. Such determination is also included in the patient's medical record.

___ The concurring physician, nurse practitioner, physician assistant or clinical psychologist is employed by a Developmental Disabilities Regional Office (DDRO), or has been employed for a minimum of two years to render care and service in a facility operated or licensed by the Office for People With Developmental Disabilities, or has specialized training and two years' experience treating persons with developmental disabilities or has three years' experience treating persons with developmental disabilities. The determination by the concurring physician, nurse practitioner, physician assistant or clinical psychologist 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, orally and in writing (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 such notice.

Step 6: Identify the decision-maker:

___ The health care agent is the decision-maker.

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

- ___ Hospital (see Glossary for definition, includes hospice, regardless of setting)
- ___ Nursing Home (see Glossary for definition)
- ___ Community (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 # 2 (for adults without medical decision-making capacity who have a health care proxy). 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 https://www.health.ny.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: Discuss goals for care with the health care agent. ___

Step 10: Health care agent has given informed consent.

- ___
 - Health care agent has been fully informed about the patient's medical condition and the risks, benefits, burdens, and alternatives of possible life-sustaining treatment.
 - Health care agent has consented to the withholding, withdrawal or delivery of certain life-sustaining treatment, for which medical orders are written.
 - If health care agent is consenting to withholding or withdrawing artificial nutrition or hydration, health care agent knows the patient's wishes regarding the administration of artificial nutrition and hydration (this may be presumed if the health care proxy states that the health care agent knows the patient's wishes regarding the administration of artificial nutrition and hydration).

Step 11: Witness requirements are met. Check one:

Two witnesses are always recommended. The physician, nurse practitioner, or physician assistant who signs the orders may be a witness. To document that the attending physician, nurse practitioner, or physician assistant has witnessed the consent, the attending physician, nurse practitioner, or physician assistant just needs to sign the order and print his/her name as a witness. Witness signatures are not required – printing the witnesses' names is sufficient.

___ Health care agent has consented in writing.

___ Patient is in a hospital or nursing home, the health care agent consented verbally, and two witnesses 18 years of age or older, at least one of whom is a health or social services practitioner affiliated with the hospital or nursing home, have witnessed the consent.

___ Patient is in the community, health care agent has consented verbally, and the attending physician, nurse practitioner, or physician assistant has witnessed the consent.

___ Patient resides in an OPWDD-operated or certified residential facility, execution of health care proxy complied with special regulatory requirements.
More information at <https://opwdd.ny.gov/providers/health-care-decisions>

Step 12: Physician, nurse practitioner, or physician assistant signature

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

Step 13: Notify director of correctional facility.

___ For adult patients who are inmates in, or are transferred from a correctional facility, the attending physician, nurse practitioner, or physician assistant 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.