# LEGAL GUIDE TO DO NOT RESUSCITATE (DNR) ORDERS

## Prepared by Mental Health Legal Advisors Committee
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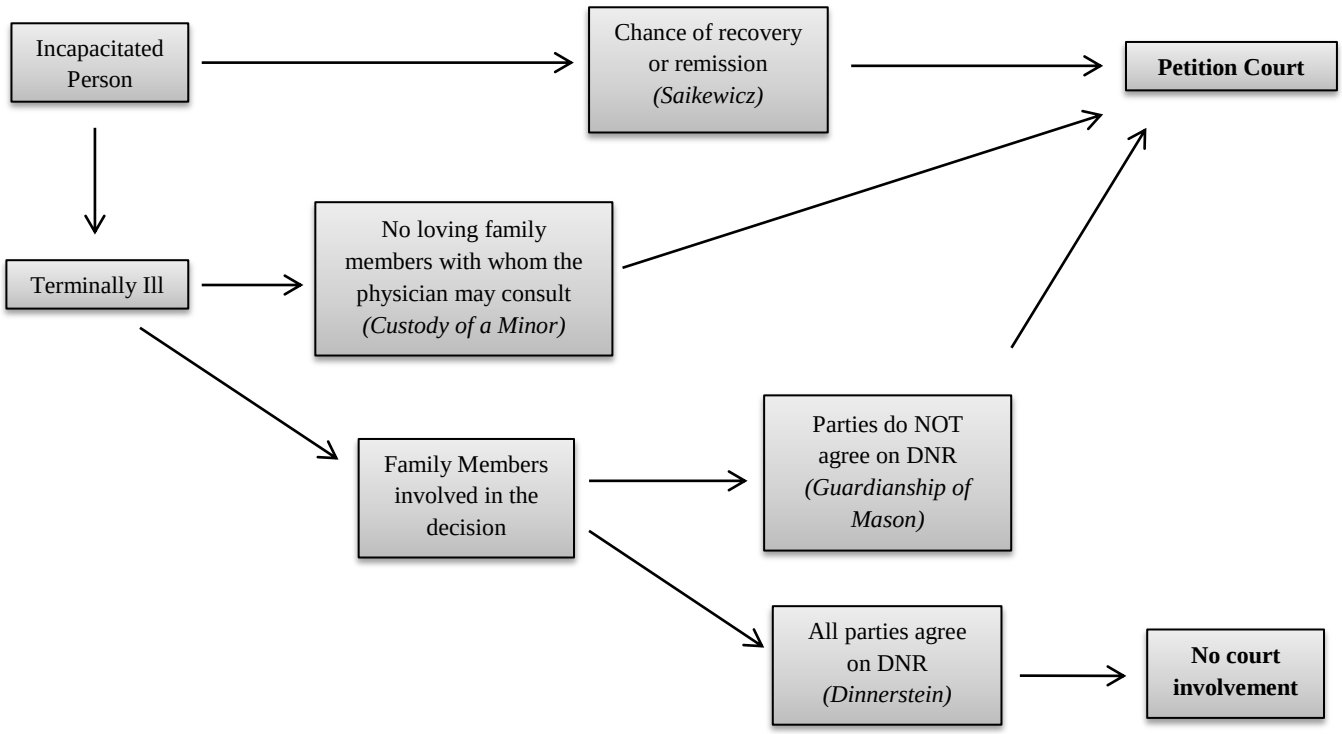
Generally, Do Not Resuscitate (DNR) Orders may be instituted without any involvement of the Court. However, there are some limited situations in which a party may be required to obtain court approval prior to instituting an order. These situations usually arise when a patient lacks the capacity to give informed consent. The question then becomes, who has the power to sign a DNR? The answer will depend on a variety of factors, including the severity of the patient's condition, the likelihood of recovery or remission, and the availability of family members (or lack thereof).



**Relevant Case Law**

| CASE/HOLDING | FACTS & PROCEDURE | REASONING |
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| **Superintendent of Belchertown State School v. Saikewicz,** 373 Mass. 728 (1977)<br><br>*(1) Competent person has the right to refuse medical treatment as long as his interest outweighs countervailing state interests*<br>*(2) Incompetent individual has the same right to refuse treatment as a competent individual*<br>*(3) Probate Court must use substituted judgment standard to determine whether an individual, if competent, would decide to refuse medical treatment*<br>*(4) Probate court made proper decision under substituted judgment to withhold treatment* | Saikewicz was a 67-year-old severely developmentally disabled resident of Belchertown State School suffering from leukemia. Probate Court granted petition of school to appoint GAL. GAL submitted report, concluding that although chemotherapy was a treatment for his condition, it would cause Saikewicz more harm than good.<br><br>Probate Court determined it was in Saikewicz's best interest to refuse treatment because of his age, the probable negative side effects, low chance of producing remission, immediate suffering treatment would cause, and the quality of life possible even with remission. | **A. Incompetent individual has same right to refuse treatment as competent individual**<br>- "Evidence that most people choose to accept the rigors of chemotherapy has no direct bearing on the likely choice Joseph Saikewicz would have made. Unlike most people, Saikewicz had no capacity to understand his present situation or prognosis." (750)<br><br>**B. Probate Court must use the substituted judgment standard to determine whether an incompetent individual, if competent, would decide to refuse medical treatment.**<br>- Test:<br>- "…decision in cases such as this should be that which would be made by the incompetent person, if that person were competent, but taking into account the present and future incompetency of the individual as one of the factors which would necessarily enter into the decision-making process of the competent person." (752-3)<br>- Expert witnesses may testify:<br>- "Probate judge may, at any step in these proceedings, avail himself or herself of the additional advice or knowledge of any person or group" such as ethics committees, physicians, medical experts. (757-8)<br>- The ultimate decision rests with the Court:<br>- Court rejected the approach of "entrusting the decision whether to continue artificial life support to the patient's guardian, family, attending doctors, and hospital 'ethics committee'" (758) because the "ultimate decision-making responsibility" lay with the court.<br>- "Such decisions of life and death seem to us to require the process of detached but passionate investigation and decision that forms the ideal on which the judicial branch of government was created." (759)<br><br>**C. If under the substituted judgment determination the incompetent person would decide to refuse treatment, the Probate Court must balance the person's individual interest against any countervailing state interests.**<br>- "State has a claimed interest in: (1) the preservation of life; (2) the protection of the interests of innocent third parties; (3) |

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| | | the prevention of suicide; and (4) maintaining the ethical integrity of the medical profession." (741)<br>1. Preservation of Life<br>- "The interest of the State in prolonging a life must be reconciled with the interest of an individual to reject the traumatic cost of that prolongation."<br>- The "failure to allow a competent human being the right of choice" offends constitutional right to privacy (742)<br>2. Protecting third parties<br>- "…particularly minor children, from the emotional and financial damage which may occur as a result of the decision of a competent adult to refuse life-saving or life-prolonging treatment." (742)<br>- This factor was not relevant to the case, but may be relevant in other circumstances. (743)<br>3. Protecting against suicide<br>- Not an issue when there is a "competent, rational decision to refuse treatment when death is inevitable and the treatment offers no hope of cure or preservation of life." (FN 11)<br>4. Ethics of medical profession<br>- "the prevailing medical practice seems to be to recognize that the dying are more often in need of comfort than treatment." (743) |
| **Matter of Dinnerstein**, 6 Mass.App.Ct. 466 (1978)<br><br>Saikewicz *does not require court approval for a DNR where the incompetent patient is terminally ill and the physicians and family agree on the DNR* | Shirley Dinnerstein was a 67-year-old patient with Alzheimer's disease confined to a hospital bed after suffering a stroke. She was paralyzed on her left side, and in a vegetative state, immobile, unable to swallow without choking, and for the most part "appear[ed] unaware of her environment" (468). She also had other medical problems, including a life-threatening coronary artery disease. Court described it as a hopeless condition, but noted that it was difficult to predict when she would die, but probably within the year from cardiac or | - *Saikewicz* requires court order when there is a "reasonable expectation" of "effecting a permanent or temporary cure of or relief from the illness or condition being treated." (472)<br>- "'Prolongation of life,' as used in the Saikewicz case, does not mean a mere suspension of the act of dying, but contemplates, at the very least, a remission of symptoms enabling a return towards a normal functioning, integrated existence." (472-3)<br>- "This case does not…present the type of significant treatment choice or election which, in light of sound medical advice, is to be made by the patient, if competent to do so. The latter is the type of lay decision which the court in the Saikewicz case had in mind when it required judicial approval of a negative decision…by the physician in attendance and by the family or guardian of a patient unable to make the choice for himself." (744-5)<br>- "[This case] presents a question peculiarly within the competence of the medical profession of what measures are appropriate to ease the imminent passing of an irreversibly, terminally ill patient in light of the patient's history and condition and the wishes of her family." (475) |

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| | respiratory arrest or stroke. Doctor and family petitioned the Court to institute a "no code," and GAL disagreed. | |
| **Matter of Spring**, 380 Mass. 629 (1980)<br><br>*Probate Court properly applied substituted judgment standard to determine the ward would not, if competent, consent to further treatment; however, the court improperly delegated the decision of whether to administer further treatment to the physician and family* | Incompetent man in his late 70s suffering from end stage kidney disease and senility (both permanent and irreversible) was undergoing hemodialysis, which did not improve his condition and only kept him from dying. He suffered unpleasant side effects and resisted transportation and needles. Family petitioned court to remove treatment, and believed, if competent, he would refuse treatment. | - Reaffirms principles of *Saikewicz* and affirms result of *Dinnerstein*.<br>- "…a competent person has a general right of competent person to refuse medical treatment in appropriate circumstances, to be determined by balancing the individual interest against countervailing State interests, particularly the State interest in the preservation of life." In striking that balance, account is to be taken of the prognosis and the magnitude of the proposed invasion." (634)<br>- "The decision should be that which would be made by the incompetent person, if he were competent, taking into account his actual interests and preferences and also his present and future incompetency." (634)<br>- Factors to take into account when determining whether to petition the Probate Court for treatment decisions:<br>- " Among them are at least the following: the extent of the impairment of the patient's mental faculties, whether the patient is in the custody of a state institution, the prognosis without the proposed treatment, the prognosis with the proposed treatment, the complexity, risk and novelty of the proposed treatment, its possible side effects, the patient's level of understanding and probable reaction, the urgency of decision, the consent of the patient, spouse, or guardian, the good faith of those who participate in the decision, the clarity of professional opinion as to what is good medical practice, the interests of third persons, and the administrative requirements of any institution involved." (637)<br>- Powers of a guardian to make a substituted judgment determination:<br>- "[W]e seem to have no binding precedent … as to the extent of the authority of a guardian in the absence of an explicit grant by the court. There is responsible opinion, however, that a duly appointed guardian of the person may give effective consent for the ward to undergo whatever medical treatment the guardian believes will be in the ward's best interest. Under the 'substituted judgment' doctrine of the *Saikewicz* case, however, the guardian, like the court, must seek to identify and effectuate the actual values and preferences of the ward." (638)<br>- Clarifying the role of the court vs. hospital personnel in |

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| | | making decisions<br>- "We in no way disapprove the practice of committee review of decisions by members of a hospital staff. But private medical decisions must be made responsibly, subject to judicial scrutiny if good faith or due care is brought into question in subsequent litigation… When a court is properly presented with the legal question, whether treatment may be withheld, it must decide that question and not delegate it to some private question or group." (639) |
| **Matter of Guardianship of Roe**,<br>383 Mass. 415 (1981)<br><br>*Absent an emergency, guardian must seek court approval to force administer antipsychotic medication when non-institutionalized, incompetent patient refuses medication (417)* | Father of person with mental illness whose judgment was seriously impaired instituted guardianship proceedings and sought the authority to force-administer anti-psychotic drugs. | **Substituted Judgment Analysis**<br>- Reaffirmed *Matter of Spring*'s factors in determining whether there must be a court order for an incompetent patient (435)<br>- Factors for substituted judgment determination (not exclusive, may not exist in every case):<br>- "(1) the ward's expressed preferences regarding treatment; (2) his religious beliefs; (3) the impact upon the ward's family; (4) the probability of adverse side effects; (5) the consequences if treatment is refused; and (6) the prognosis with treatment." (444) |
| **Custody of a Minor**,<br>385 Mass. 697 (1982)<br><br>*Absent a loving family with whom physicians may consult regarding a DNR, the physicians or ward's guardian must petition the court to make a substituted judgment determination* | Infant suffering from cyanotic heart disease had no hope of surviving for more than a year, with or without treatment. Because heroic lifesaving efforts would result in substantial pain and brain damage, physicians asked DSS and the infant's GAL to sign a "no-code" order, but both parties refused, and the medical facility petitioned the Juvenile Court to decide whether a "no-code" order was appropriate. | **The Court must make a substituted judgment determination for an incompetent person where there are no family members to consult.**<br>- While this case is similar to *Dinnerstein* because it involves a terminally ill patient, it is controlled by *Saikewicz* because there is no loving family with whom physicians may consult. Therefore, the Court must make a substituted judgment determination before a "no-code" order can be instituted. (708-10)<br>- "Absent a loving family with whom physicians may consult regarding the entry of a 'no code' order, this issue is best resolved by requiring a judicial determination in accordance with the substituted judgment doctrine enunciated in *Saikewicz*." (710) |

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| **Care and Protection of Beth**, 412 Mass. 188 (1992)<br><br>*Instituted DNR for young child in irreversible coma under substituted judgment determination, where child was in legal custody of DSS and parents and physician agreed on DNR* | A 5 ½-year-old child was injured in a car accident and as a result was in an irreversible coma. DSS had legal custody of the child and the child's mother. Her physician testified that she would never regain consciousness and there was no potential for her condition to be reversed. Mother and DSS petitioned the court to determine under substituted judgment what her treatment should be. | - "…as in *Custody of a Minor*, 'the child was already within the jurisdiction of the court before the question whether a 'no code' order should be made arose.'" (194)<br>- "…the minor is incompetent by virtue of both her age and irreversible coma. Further, both parents still also minors, and the mother and child were in the legal custody of DSS." (193-4) |
| **In re Guardianship of Mason**,<br>41 Mass.App.Ct. 298 (1996)<br><br>*Judicial substituted judgment determination for DNR was appropriate where patient's son objected to DNR and was a health care agent under signed health care proxies* | 77-year-old patient with numerous serious medical conditions was appointed a temporary guardian when her son's guardianship over her expired. The son (Joseph) objected to someone besides himself being appointed guardian, and objected when the temporary guardian petitioned the court for a DNR. | **While most no code orders do not require judicial oversight, this was a special situation warranting it**<br>- "…it is a situation complicated by the fact that the "no code" order was obtained over the objection of Joseph who holds health care proxies of questionable validity. We think that '[i]n these circumstances, a judicial 'no code' determination is appropriate.'" (305) |

**Regulations**

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| **Department of Youth Services**<br>• 109 CMR 11.03<br>• 109 CMR 11.12 | **109 CMR 11.03: <u>Definitions</u>**<br>"<u>Extraordinary Medical Treatment</u> shall include no-code orders, sterilization, electroconvulsive treatment, withholding or providing life-prolonging treatment (as defined in 109 CMR 11.00), and any other treatment determined to be extraordinary by using the following analysis:<br>Recognizing that it is impossible to itemize every extraordinary medical treatment, the Department shall utilize the following factors to determine whether a medical treatment is extraordinary:<br>Complexity, risk and novelty of the proposed treatment: The more complex the treatment, the greater the risk of death or serious complications, the more |

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| | experimental the procedure, the greater the need to determine that the treatment is extraordinary, and to obtain parental consent or to seek judicial approval prior to authorizing treatment."<br>109 Mass. Code Regs. 11.03.<br><br>**109 CMR 11.12: "No Code" Orders**<br>"(1) 'No code' means a medical order regarding a terminally ill patient directing a hospital and its staff not to use heroic medical efforts in the event of cardiac or respiratory failure. Heroic medical efforts include invasive and traumatic life-saving techniques such as intracardial medication, intracardial massage and electric shock treatment. 'No code' orders include 'do not resuscitate' orders or orders stated in different language attempting to accomplish substantially the same result as a 'no code' order.<br>(2) No Consent by Department. Department staff shall not consent to the entry of a 'no code' order for any client.<br>(3) Consent by Parent. With respect to a client, the right to consent or to refuse to consent to the entry of a 'no code' order shall remain with the client's parents, unless otherwise limited by court order."<br>109 Mass. Code Regs. 11.12. |
| **Department of Children and Families**<br>• 110 CMR 2.00<br>• 110 CMR 11.12 | **110 CMR 2.00: Glossary**<br>"Extraordinary Medical Treatment shall include no-code orders, sterilization, electroconvulsive treatment, antipsychotic medication, withholding or providing life-prolonging treatment (as defined in this Glossary), and any other treatment determined to be extraordinary by using the following analysis:<br>Recognizing that it is impossible to itemize every extraordinary medical treatment, the Department shall utilize the following factors to determine whether a medical treatment is extraordinary:<br>(a) Complexity, risk and novelty of the proposed treatment... (b) Possible side effects... (c) Intrusiveness of proposed treatment... (d) Prognosis with and without treatment... (e) Clarity of professional opinion... (f) Presence or absence of an emergency... (g) Prior judicial involvement... (h) Conflicting Interests…"<br>110 Mass. Code Regs. 2.00.<br><br>**110 CMR 11.12: "No Code" Orders**<br>"(1) 'No code' order means a medical order regarding a terminally ill patient directing a hospital and its staff not to use heroic medical efforts in the event of cardiac or respiratory failure. Heroic medical efforts include invasive and traumatic life-saving techniques such as intracardial medication, intracardial massage and electric shock treatment. No code orders include 'do not resuscitate' orders or orders stated in different language attempting to accomplish substantially the same result as a 'no code' order. See Custody of a Minor, 385 Mass. 697, 434 N.E.2d 601 (1982).<br>(2) No Consent by Department. Department staff shall not consent to the entry of a 'no code' order for any ward or child in its care or custody. See Custody of a Minor, 434 N.E.2d 601 (1982).<br>(3) Consent by Parents.<br>(a) With respect to a child who is in the care of the Department, the right |

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| | to consent or to refuse to consent to the entry of a ‘no code’ order shall remain with the child's parents, unless otherwise limited by court order. If the Department has reason to believe that the parents are guilty of medical neglect by their consent to a ‘no code’ order, the Department shall seek custody through a court proceeding which alleges medical neglect.<br>(b) With respect to a child who is a ward of the Department or is in Department custody, when a medical provider seeks the Department's consent to the entry of a ‘no code’ order, the Department shall not consent unless it seeks and receives prior judicial approval for the entry of a ‘no code’ order, even if the child's biological parents have consented to the entry of such order. See Custody of a Minor, 434 N.E.2d 601, 608 (1982). When seeking prior judicial approval, the Department shall file a Motion for Appointment of a Guardian ad Litem to investigate whether such order should enter.”<br>110 Mass. Code Regs. 11.12. |