



Lifelong Advocates for Marylanders with Developmental Disabilities ®

## MEDICAL DECISION MAKING WHAT HAPPENS WHEN YOU'RE GONE?

*The following article is in response to questions posed by parents: **What happens if there is no relative to make medical decisions for my son or daughter after I am gone?** Excerpts to address this question were taken from “[The Guardianship Handbook, A Guide to Adult Guardianship and Guardianship Alternatives in Maryland](#)”, published by the Law and Health Care Program, University of Maryland School of Law. A link to the Guide can be found on [www.bytheirsidē.org](http://www.bytheirsidē.org).*

Doctors and other health professionals generally must have a patient’s informed consent before giving medical treatment. Informed consent means that before a physician can treat a patient: (1) the doctor must explain the pros and cons and the alternatives to the treatment; (2) the patient must agree to be treated, unless the situation is an emergency; (3) the patient must understand the nature of the treatment, the dangers and the possible side effects; and (4) the patient must give consent freely, without pressure to do so.

If two doctors determine a person is incompetent or unable to understand the doctor’s explanation and make decisions for him or herself, the doctor must obtain informed consent from someone else. That person may be a guardian of the person appointed by a court. However, there are other alternatives for consenting to medical treatment. The **Maryland Health Care Decisions Act**, passed in 1993, provides two ways that someone else can consent to medical treatment for a person who is determined unable to provide consent.

### 1. ADVANCE DIRECTIVE

A person who is mentally competent can use an Advance Directive to appoint someone else (known as the “Agent”) to make health care decisions in the event that the person becomes unable to do so. An Advance Directive is sometimes called a **living will** or a **health care power of attorney**. In addition to appointing an Agent, it can give directions or guidelines about what choices should be made (for example, no resuscitation). The Advance Directive requires no court involvement but the person must be mentally competent at the time of signing the Advance Directive.

### 2. SURROGATE DECISION MAKING

If the person has not appointed an Agent, a surrogate decision maker can consent to medical care. A **surrogate** is a substitute, a person who makes a decision for the incompetent person. If there is a surrogate to make medical decisions, there may be no need for a guardian of the person.

The Maryland Health Care Decisions Act allows these persons to act as a Surrogate Decision Maker in the following order of priority:

- ◆ A guardian previously appointed by the court;
- ◆ A spouse;
- ◆ An adult child;
- ◆ A parent;
- ◆ An adult brother or sister; or
- ◆ A close friend or relative.

A surrogate from the last category (relative or close friend), must sign a statement confirming that the patient's wishes are well known to the surrogate. In the statement, the surrogate should state whether he or she is a relative or close friend of the patient, and give specific information showing that the surrogate is familiar with the patient's activities, health, and personal beliefs. The statement should include such facts as (1) how long he or she has known the patient; (2) how frequently they had contact; and (3) what he or she knows about the patient's beliefs and wishes. The statement is given to the doctor and is placed in the person's medical record. A new statement will be required for each new medical event.

Surrogate decision makers must follow certain guidelines and their decisions must be guided by what the person would have wanted. However, if a person's wishes are totally unknown or unclear, as in the case of someone who has had profound intellectual disability all of his or her life, the surrogate must then decide based on the person's **best interest**. In general, that means that the benefits of treating the person outweigh the burdens of doing so.

There are limitations on surrogates. A surrogate *may not* authorize sterilization or treatment for a mental disorder. In addition, the surrogate *may not* authorize treatment if the patient, even if incompetent, is actively refusing that treatment. An example is refusal of dental treatment. If any of these limitations occur, it would be necessary to ask a court to appoint a guardian to consent to treatment.

### **WHAT ABOUT EMERGENCIES?**

Maryland law allows doctors to give emergency medical treatment to a person deemed incompetent *without consent* if there is a substantial risk of death or immediate and serious bodily harm to the patient, and delay in treatment would be harmful to the patient.

When the situation is not an emergency but urgent, the law provides for the appointment of an **emergency guardian**. This is the case if treatment cannot be delayed for two to three months that it normally takes to appoint a guardian of the person. In some instances, the judge may confer with doctors on the telephone to expedite matters. The court order appointing a temporary guardian lasts for 144 hours or 6 days unless the petitioner asks to extend the order until a permanent guardian can be appointed.

### **WHAT IS A PUBLIC GUARDIAN?**

A public guardian is appointed if there is no family member or friend willing or able to provide surrogate decision making or serve as guardian. In a public guardianship, the director of the local Department of Social Services or the director of the local Agency on Aging is appointed to serve as guardian of the person. Public guardians may only serve as guardian of the person, not as guardian of the property.

In these cases, a staff person from the agency fills the role of the guardian, visiting the disabled person on occasion to determine that his or her needs are met. The public guardian can sign consent forms for medical care and other services. An Adult Public Guardianship Review Board is established in each county of Maryland and the City of Baltimore to review each of the public guardianships twice a year.

### **WHAT SHOULD I DO NOW?**

Now is the time to consider who will assist your son or daughter with future medical decisions. If he or she is able to understand and sign an Advance Directive, consider asking a relative or friend to be the Agent. Make sure the document is properly written and witnessed; legal advice is recommended. We suggest that a copy of the Advance Directive be filed with the service provider and family physician. If

an Advance Directive is not possible, consider someone to be the Surrogate Decision Maker. Talk with that person to determine if he or she is willing to serve. By Their Side is not able to serve as a Surrogate Decision Maker. Finally, your plans should be documented in your Letter of Intent and filed with your attorney and By Their Side so that the Personal Advocate will be aware of your decisions.

*(This article contains general information for educational purposes. Detail has often been sacrificed for the sake of brevity. It does not constitute legal advice. Families and individuals are strongly encouraged to consult with appropriate legal professionals to obtain a fuller explanation and to discuss their individual situations and options.)*