

Maryland's Health Care Decisions Act

Maryland MOLST Training Task Force
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Health Care Decisions Act

- The Health Care Decisions Act applies in all health care settings and in the community throughout Maryland
- It became effective on October 1, 1993

What is an advance directive?

- An advance directive is a written or electronic document or oral directive that:
 1. Appoints a health care agent to make health care decisions - and/or –
 2. States the patient's wishes about medical treatments when the patient no longer has capacity to make decisions (living will)

Is there another name for an advance directive?

- An advance directive has also been known as a durable medical power of attorney or a durable power of attorney for health care
- It is *not* a financial power of attorney

Who may make an advance directive?

- In Maryland, any competent individual may make a written, electronic, or oral advance directive

What are the legal requirements for a written advance directive?

- Signatures of patient and two witnesses with a date when signed
- Notary is not required, though a notary may be one of the two witnesses
- No required form (optional statutory form)
- Out-of-state advance directives are acceptable

How can an individual make an oral advance directive?

- An oral advance directive can be made in the presence of the attending physician or nurse practitioner plus one witness
- It must be documented in the individual's medical record
- It must be signed and dated by the physician or nurse practitioner that witnesses it

Can an advance directive include wishes about mental health?

- An advance directive may outline mental health services which may be provided to an individual in case of subsequent incapacity to make health care decisions
- May designate an agent to make decisions about mental health services

What preferences about mental health services may be included?

- May identify preferred mental health professionals, programs, and facilities
- May state preferred medications
- May give instructions about notifying third parties and release of mental health information to third parties

How can an advance directive be revoked?

- A competent individual may revoke an advance directive at any time by:
 1. Completing a new written or electronic advance directive
 2. Giving an oral statement to a health care practitioner
 3. Destroying all copies of the advance directive

What is in a living will?

- A living will contains a patient's wishes about future health care treatments.
- It is usually written "if, then":
 - If I lose capacity and I'm in (specified conditions),
 - Then use or do not use a specific medical intervention

When does a health care agent have authority?

- The advance directive determines when the health care agent has authority
 - “When I can no longer decide for myself”: The individual may decide whether one or two physicians must determine incapacity
 - “Right away”: When the document is signed, the agent has authority

How does an agent make decisions for the patient?

- The health care agent is to make decisions based on “wishes of the patient”
- If the patient’s wishes are “unknown or unclear,” then decisions are to be based on the “patient’s best interest”

Is there an exception to following a living will?

- In some instances, a living will may allow the health care agent to act in the patient's best interest, regardless of what wishes are stated in the living will
- Most living wills are not written this way

Can an ADM make or revoke an advance directive?

- An authorized decision maker cannot make or revoke a patient's advance directive



What is the best evidence of a patient's wishes?

- If the patient loses capacity, the advance directive is the best available evidence of the patient's wishes

**“Mom didn't understand
what she signed”**

<http://www.dhmh.state.md.us/ohcq/download/alerts/alert-v1-n1-sum2002.pdf>

Does the practitioner need to include the patient in decisions?

- If a patient lacks the capacity to make health care decisions, then a health care agent, guardian of the person, or surrogate makes decisions for the patient
- Even if there is another authorized decision maker, the patient should still be included in the health care decision making process as much as possible

Does a patient have the capacity to make health care decisions?

- A patient is presumed to have capacity until two physicians certify that the individual lacks the capacity to make health care decisions or a court has appointed a guardian of the person to make health care decisions
- Only one physician's certification is needed if the patient is unconscious or unable to communicate by any means

When a patient may lack capacity, what shall the practitioner do?

- The individual's capacity to make health care decisions should be evaluated
- If the individual lacks capacity, the attending physician and a second physician must certify in writing that a patient lacks the capacity to make health care decisions
 - One of the physicians must have examined the patient within two hours before making the certification

If the patient cannot make health care decisions, who does?



1. A designated health care agent
2. If no agent is designated or the agent is not available or is unwilling to act, a surrogate decision maker is used

Who is the appropriate surrogate decision maker?

If there is no health care agent, Maryland law specifies the type and order of the surrogate decision maker(s) as follows:

1. Guardian of the person
2. Spouse or domestic partner
3. Adult child
4. Parent
5. Adult brother or sister
6. Friend or other relative

How do you resolve disputes among equally ranked surrogates?

- All surrogates in a category have the same authority
- All surrogates of equal authority must agree on a decision regarding life-sustaining interventions
- A physician may not withhold or withdraw life-sustaining procedures if there is disagreement among persons in the same class

How do you resolve disputes among equally ranked surrogates?

- The issue is referred to the patient care advisory committee
- Hospitals and nursing homes are required to have a patient care advisory committee
- Attending physician has immunity for following the recommendations of the patient care advisory committee

How is the Patient Care Advisory Committee used?

- Patients, family members, guardians, or caregivers may request advice from the committee
- Committee must notify patients, family members, guardians, and health care agents of the right to discuss an issue
- Committee's advice is confidential and members not liable for good faith advice

Who is a domestic partner?

- Not related or married to the individual
- Gender irrelevant
- “In a relationship of mutual interdependence in which each contributes to the maintenance and support of the other”

Must domestic partners provide evidence of the relationship?

- Evidence about the relationship *may* be required
 - Affidavit
 - Financial documents
 - Health insurance coverage
- Spouses are not generally asked to produce a marriage license, so asking for evidence from a domestic partner is the exception rather than the rule

May a friend or other relative serve as surrogate decision maker?

- A friend or other relative must present an affidavit demonstrating regular contact with the patient and familiarity with the patient's activities, health, and beliefs
- This affidavit should be placed in the medical record

How was the correct surrogate decision maker identified?

- The process that has been used in determining the correct surrogate decision maker should be documented in the medical record
- When the patient is transferred to another care setting, contact information for the surrogate decision maker should be sent to the receiving facility or program

What information shall surrogate decision makers consider?

1. Current diagnosis and prognosis
2. Expressed preferences
3. Relevant religious and moral beliefs and personal values
4. Behavior, attitudes, and past conduct with respect to the treatment at issue
5. Reactions to the treatment at issue or similar treatments
6. Expressed concerns about the effect on the family or intimate friends if a treatment were provided, withheld, or withdrawn

What is not a basis for surrogates making health care decisions?

- An individual's preexisting, long-term mental or physical disability, or economic disadvantage should not be a basis for surrogates making health care decisions

Who is Mrs. Jones?



- Mrs. Jones is 87 years old and has had Alzheimer's disease for twelve years
- She lives in a nursing home
- Two physicians have certified that she lacks the capacity to make health care decisions
- Two physicians have certified that she has an end-stage condition

What does her advance directive say?

- The advance directive gives broad authority to the health care agent
- In the living will portion, she states that she does not want a feeding tube if she has an end-stage condition

What happens at the hospital?

- Mrs. Jones goes to the hospital for an infection
- She returns to the nursing home with a feeding tube
- Her health care agent insists on continued use of the feeding tube

Can this health care agent ignore the living will portion?

- No, this health care agent cannot ignore her living will
- A valid, clearly applicable living will controls the decision making unless the living will was explicitly stated to be guidance rather than to be binding

An advance directive
is clear, known evidence
of the patient's wishes

When can life-sustaining treatment be withdrawn if there is no agent?

- If no health care agent was appointed, then life-sustaining treatments may only be withdrawn when:
 1. Certification of incapacity by attending physician and second physician
 2. Certification of condition by attending physician and second physician which could include:
 - Terminal condition
 - End-stage condition
 - Persistent vegetative state
- Or, two physicians certify a treatment as medically ineffective for this patient

What is a terminal condition?

- A terminal condition is incurable
- There is no recovery despite life-sustaining procedures
- Death is imminent, as defined by a physician

What is an end-stage condition?

- An advanced, progressive and irreversible condition caused by injury, disease, or illness
- Severe and permanent deterioration indicated by incompetency and complete physical dependency
- Treatment of the irreversible condition would be medically ineffective

What is a persistent vegetative state?

- The individual has no awareness of self or surroundings
- Only reflex activity and low level conditioned responses
- Wait “medically appropriate period of time” for diagnosis
- One of two physicians who certify a persistent vegetative state must be a neurologist, neurosurgeon, or other physician who is an expert in cognitive functioning

What is medical ineffectiveness?

- A medically ineffective treatment is a medical procedure that will not prevent or reduce the deterioration of the patient's health or prevent impending death
- Physicians need not offer medically ineffective treatments

Advising Patients of Medical Ineffectiveness

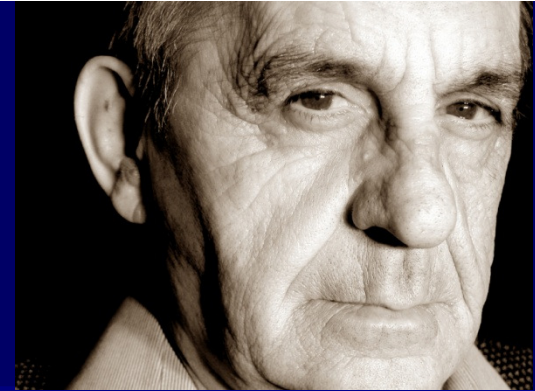
- If two physicians determine an intervention is medically ineffective, the patient or ADM must be informed of the decision
- The physician must make a reasonable effort to transfer the patient to another physician if the patient or ADM requests it
- Pending transfer, the physician must provide the requested treatment if failure to do so would likely result in the patient's death

What if the patient is in an ER and only one physician is available?

- In an Emergency Room, if only one physician is available, a second physician certification of medical ineffectiveness is not required



Who is Mr. Klein?



- Mr. Klein is 63 years old
- He has a court-appointed guardian of the person and property
- He lives in a nursing home

What happens to Mr. Klein in the hospital?

- Repeatedly hospitalized for multiple acute and chronic medical conditions
- During this hospital stay, CPR is certified as medically ineffective by two physicians
- A DNR order is written on discharge with no notice given to the guardian

What should the nursing home do about the DNR order?

- Honor the DNR order, but promptly...
 - Assess the resident's current condition
 - Consult with the guardian
 - Reaffirm the DNR order if CPR is still medically ineffective
 - If CPR is no longer medically ineffective, write a new order that he is a "full code"

When can a treatment be given without a patient's consent?

1. Treatment is a medical emergency
2. Authorized person to give consent is not immediately available
3. Attending physician determines
 - Substantial risk of death or immediate or serious harm
 - The life or health of patient would be affected

Are there any penalties for not complying with the HCDA?

- Noncompliance with the Health Care Decisions Act can result in deficiencies, fines and other remedies for facilities and programs
- Health care professionals may be referred to their licensing boards for noncompliance

Are there penalties for concealing an individual's advance directive?

- If any person conceals an individual's advance directive and causes life-sustaining procedures to be used or withdrawn in contradiction of the patient's expressed wishes, it is a misdemeanor with a fine up to \$10,000 and/or imprisonment of up to one year

Does following the HCDA protect the practitioner?

- A physician is not subject to criminal prosecution or civil liability or deemed to have engaged in unprofessional conduct by withholding or withdrawing health care in accordance with the Health Care Decisions Act

For More Information

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