

Guardianship & Its Alternatives

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James Silver, Esq., Supervising Attorney, Adult Guardianship Program,
Maryland Legal Aid

jsilver@mdlaborg

Topics of Today's Talk

- Legal and ethical requirements for informed consent for adults
- Less restrictive alternatives to guardianship
 - Advance Health Care Directives
 - Surrogate Decision Makers
 - Powers of Attorney
 - Supported Decision Making
- When guardianship of the person or property is appropriate

Informed Consent

All adults (and some minors under certain circumstances) have the right to informed consent in making decisions about their health care unless they have been determined to be incapable of making an informed decision.

Elements of Informed Consent

The Health Care Provider must explain:

- The diagnosis
- The proposed treatment
- Alternative treatments, including no treatment
- Material risks of the proposed treatments, including the risk of no treatment

Provider/Patient Relationship

Informed consent is a personal process through which health care providers and patients communicate about their most fundamental values to determine what is best for the individual's health.

There is no “correct” choice for every person.

Ethical Considerations

- Preserving Individual Autonomy (self-determination)
- Beneficence (serve patient's interest)
- Nonmaleficence (do no harm)
- Veracity (truth telling)

General Rule for Informed Consent: Competent Adults

Informed consent must be obtained directly from the adults themselves prior to the provision of health care.

The responsibility for obtaining informed consent rests on the health care practitioner providing the health care.

Exception to the General Rule: Emergency Treatment

“A health care provider may treat a patient who is incapable of making an informed decision, without consent, if

- The treatment is of an emergency medical nature;
- A person who is authorized to give consent is not available immediately, and

Maryland Code, Health Gen. Article, §5-607

Exception to the General Rule: Emergency Treatment

- The attending physician determines that
 - There is a substantial risk of death or immediate and serious harm to the patient; and
 - With a reasonable degree of medical certainty, the life or health of the patient would be affected adversely by delaying treatment to obtain consent.”

Maryland Code, Health Gen. Article, §5-607

When Can a Minor Consent to Health Care?

“A minor has the same capacity as an adult to consent to medical treatment if, in the judgment of the attending physician, the life or health of the minor would be affected adversely by delaying treatment to obtain the consent of another individual.”

Maryland Code, Health Gen. Article, §20-102(b)

When Can a Minor Consent to Health Care?

A minor also has the right to consent to some specific health care treatments and has a general right to consent if the minor is married or is the parent of a child. The health care provider has responsibility of determining if the minor is competent.

Maryland Code, Health Gen. Article, §20-102

Who Is “Competent”?

“Competent individual means a person who is at least 18 years of age ... and who has not been determined to be incapable of making an informed decision.”

Maryland Code, Health Gen. Article, §5-601(f)

When Is Someone “Incapable of Making an Informed Decision”?

A patient is “**incapable of making an informed decision**” about the provision, withholding or withdrawal of a specific medical treatment or course of treatment if she is:

- “unable to understand the nature, extent, or probable consequences of the proposed treatment or course of treatment,”

Maryland Code, Health Gen. Article, §5-601(o)

When Is Someone “Incapable of Making an Informed Decision”?

- unable to make a rational evaluation of the burdens, risks, and benefits of the treatment or course of treatment, or
- is unable to communicate a decision.”

Maryland Code, Health Gen. Article, §5-601(o)

Assessing Capacity

- Ask: Capacity to make what decision?
- Does the individual have an understanding of the consequences of her decisions?
- What do the people who know her best say about her decision making capacity?
- Are decisions consistent with past stated wishes?

Assessing Capacity

Many factors can affect someone's capacity:

- “A minor's age,
- A temporary or permanent mental impairment,
- Addiction, and
- Physical or emotional trauma.”

Maryland Rules 19-301.0 (Comment 2), effective July 1, 2023

Assessing Capacity

“Diminished capacity can be situational in nature, varying in degree, or affect some but not all decisions.”

Maryland Rules 19-301.0 (Comment 2), effective July 1, 2023

What Incapacity ISN'T

- Old Age
- Eccentricity
- Poverty
- Refusal of Care
- Disagreement with a recommendation

What Incapacity ISN'T

People have a right to make bad decisions.

Method of Communication

A person who is otherwise a “competent individual” but who communicates through some method other than speech cannot be considered “incapable of making an informed decision.”

Maryland Code, Health Gen. Article, §5-601(o)(2)

When in Doubt about Capacity...

Get a second opinion!

Examples:

- Older adult with dementia
- Younger adult with Autism spectrum disorder
- Individual with an intellectual disability

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Third Party Decision-Making

For individuals who lack capacity, informed consent can be obtained from:

- Health Care Agent
- Health Care Surrogate
- Guardian

Advance Health Care Directive

A written expression of a person's future health care wishes.

Allows the person signing it to choose a health care “agent” who can make decisions relating to when health care is provided, and when it is withheld or withdrawn.

Maryland Code, Health Gen. Article, §5-602

Advance Health Care Directive

Allows the person signing it to state preferences for health care and treatment in general or specific situations, including:

- Terminal condition
- Persistent vegetative state
- End-stage condition

Maryland Code, Health Gen. Article, §5-603

Oral Advance Health Care Directive

An oral advance directive is effective if:

- It is made in the presence of an attending physician, physician assistant or nurse practitioner and one witness, and
- The patient's wishes are documented in the individual's medical record, and the record is signed and dated by the health care provider and the witness.

Maryland Code, Health Gen. Article, §5-602(d)

Advance Health Care Directive

For a health care directive to go into effect, 2 physicians – at least one of whom has examined the patient within the preceding 2 hours – must certify in writing that the patient is incapable of making an informed decision regarding treatment.

Maryland Code, Health Gen. Article, §5-606(a)

Advance Health Care Directive

- The physicians' certifications must be based on personal examination of the patient.
- If the patient is unconscious or unable to communicate by any means, only one physician's certificate is required.

Maryland Code, Health Gen. Article, §§ 5-602(a), (e) 5-606(a)

Health Care Agent's Powers

Advance directives may give agents the power to:

- Request and review medical records
- Authorize admission to a hospital
- Authorize discharge from a hospital
- Decide what steps should be taken in sustaining the patient on life support

Limits on Health Care Agent's Authority

An agent cannot “require a physician or physician assistant to prescribe or render medical treatment to a patient that the physician or physician assistant determines to be ethically inappropriate [or] ... medically ineffective.”

Maryland Code, Health Gen. Article, § 5-611

Advance Mental Health Directive

Like an Advance Health Care Directive, an Advance Directive for Mental Health Services allows an individual to decide, ahead of time, what mental health services they want if and when they become incapable of providing informed consent.

Maryland Code, Health Gen. Article, § 5-602.1

Advance Mental Health Directive

An Advance Directive for Mental Health names an “agent” that the person wants to speak for his or her interests.

It can include preferences of:

- Particular professionals
- Particular facilities or programs
- Medications the patient wants or does not want

Maryland Code, Health Gen. Article, § 5-602.1

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Maryland Code, Health Gen. Article, § 5-602.1

Practical Tips for Advance Health Directives

- Don't leave your health care directives in a drawer!**
- Give copies to your agents, your health care providers, your family members.**
- Have an open and candid conversation with your agents about your wishes.**
- Review you directives on a regular basis.**

Health Surrogates

The Maryland Health Care Decisions Act allows certain people to make health care decisions for family members or close friends even when there is no Advance Health Care Directive.

Maryland Code, Health Gen. Article, § 5-605

Health Surrogates

The law looks for surrogates in this order:

- 1) The patient's guardian;
- 2) The patient's spouse or domestic partner;
- 3) An adult child;
- 4) A parent;
- 5) An adult sibling;
- 6) A friend or relative subject to certain requirements.

Maryland Code, Health Gen. Article, § 5-605(a)(3)

Health Surrogates

A friend can become a health surrogate if she:

“Is a competent individual; and

Presents an affidavit to the attending physician stating:

- That the person is a relative or close friend of the patient; and
- Specific facts and circumstances demonstrating that the person has maintained regular contact with the patient sufficient to be familiar with the patient’s activities, health, and personal beliefs.”

Maryland Code, Health Gen. Article, § 5-605(a)(3)

Health Surrogates

Before a health surrogate can be appointed, 2 physician certifications that patient lacks capacity are required (the same as for an advance directive).

Maryland Code, Health Gen. Article, § 5-606

Health Surrogates

A surrogate must make decisions that, in their experience with the patient, best represent the patient's wishes.

That may include their knowledge of the patient's religious or moral beliefs and the patient's expressed preferences with regard to withholding or providing treatment.

Maryland Code, Health Gen. Article, § 5-605(c)

Health Surrogates

“The decision of a surrogate regarding whether life-sustaining procedures should be provided, withheld or withdrawn, in whole or in part, **shall not** be based on the patient’s preexisting, long term mental or physical disability or a patient’s economic disadvantage.”

Maryland Code, Health Gen. Article, § 5-605(c)(3)

Health Surrogates

A surrogate **cannot authorize** “sterilization” or “treatment for a mental disorder.”

Maryland Code, Health Gen. Article, § 5-605(d)

“A health care provider may not withhold or withdraw life-sustaining procedures on the basis of an advance directive where no agent has been appointed or on the basis fo the authorization of a surrogate” without special certifications.

Maryland Code, Health Gen. Article, § 5-606(b)

Health Surrogates

If no agent appointed via an Advance Directive exists, a health care provider can withhold or withdraw life-sustaining procedures only if:

“The patient’s attending physician and a second physician have certified that the patient is in a terminal condition or has an end-stage condition; or

Two physicians, one of whom is a neurologist, neurosurgeon, or other physician who has special expertise in the evaluation of cognitive functioning, certify that the patient is in a persistent vegetative state.”

Maryland Code, Health Gen. Article, § 5-606(b)

Supported Decision Making

In 2022, the Maryland General Assembly passed the Supported Decision Making Act, providing a new less restrictive alternative to guardianship.

Supported Decision Making

The purpose of the Supported Decision Making Act is “to assist adults by (1) obtaining support for the adult in making, communicating, or effectuating decisions that correspond to the will, preferences, and choices of the adult; and (2) preventing the need for the appointment of a substitute decision maker for the adult, including a guardian of the person or property.”

Maryland Code, Estates & Trusts Article, § 18-102(a)

Supported Decision Making

Supported decision-making allows a person to retain some decision-making authority without appointing a substitute decision-maker.

Supported Decision Making

Supported Decision Making formalizes a process that many adults, with and without disabilities, already use.

Informally, adults look to friends, family and trusted professionals to give them information about life decisions – for example, what kind of car to buy, or whether to undergo a medical procedure.

Supported Decision Making

The adult asks for advice, weighs the information he receives, and then makes a decision. Supported Decision Making recognizes the existence of these informal supported decision making arrangements as less restrictive alternatives to guardianship.

Supported Decision Making

The Supported Decision Making Act, now reflected in Maryland law, sets out a process by which an individual can formally identify “supporters” that she trusts to assist in making decisions in life. An adult can authorize supporters to get information from official sources, help the adult understand that information, and make a decision based on supporters’ input and the adult’s wishes.

Maryland Code, Estates & Trusts Article, § 18-104(c)

Power of Attorney

Through a power of attorney, an individual can choose a person they trust as their agent to manage their property and financial affairs. That person is known as their “agent.”

Can also designate who they would want to be appointed their guardian if one should be needed.

Maryland Code, Estates & Trusts Article, Title 17

Power of Attorney

Agent has authority to act for business and property matters that are specified in the document, such as:

- Accessing bank accounts and safe deposit boxes
- Taking out loans
- Buying real estate
- Entering into contracts

A power of attorney grants to the person only the powers defined in the document.

Appointing a Guardian

When to appoint a guardian of the person?

If a person:

- 1) “lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person”

Due to:

- 2) “any mental disability (or) disease[.]”

Maryland Code, Estates & Trusts Article, § 13-705(b)

Appointing a Guardian

In addition, the court must find that there are no “less restrictive” means of ensuring that person’s health and safety.

Maryland Code, Estates & Trusts Article, § 13-705(b)

Appointing a Guardian

When to appoint a guardian of property?

If a person:

- 1) “is unable to manage his property and affairs effectively” due to
- 2) “any mental disability (or) disease” and
- 3) “has or may be entitled to property or benefits which require proper management.”

Maryland Code, Estates & Trusts Article, § 13-201(c)

Petition to Appoint a Guardian

“Interested persons” can file a request – a petition – with the court, asking that they be appointed as guardians of an individual with a disability.

Maryland Code, Estates & Trusts Article, § 13-705

Petition to Appoint a Guardian

“Interested persons” means a guardian, the heirs of the disabled person, any governmental agency paying benefits to the disabled person, or any person or agency eligible to serve as guardian of the disabled person.

Maryland Code, Estates & Trusts Article, § 13-101(k)

Petition to Appoint a Guardian

The petition must be accompanied by 2 certificates from legally required health care professionals, stating that the person requires a guardian.

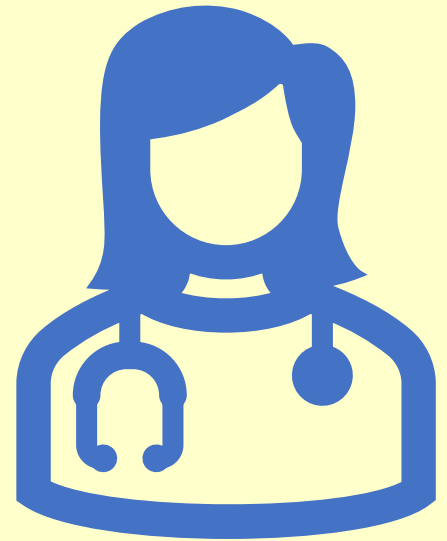
**Maryland Code, Estates & Trusts Article, § 13-705(c),
Md. Rules 10-202 & 10-301**

Petition to Appoint a Guardian

The certificates must be from:

- 2 physicians; OR
- 1 physician AND
- 1 psychologist, nurse practitioner or licensed certified clinical social worker.

Maryland Code, Estates & Trusts Article, §§ 13-705(c)(2), Md. Rule 10-202(a)



Petition to Appoint a Guardian

In 2017, the Maryland court system developed forms for each type of certifying professional to use, with different forms for physicians, psychologists, nurse practitioners and social workers. These forms are required to accompany guardianship petitions.

**Maryland Code, Estates & Trusts Article, § 13-705(c),
Md. Rules 10-202 & 10-301**

Petition to Appoint a Guardian

At least one of the certifying professionals must have evaluated or examined the person within 21 days before the filing of the petition.

**Maryland Code, Estates & Trusts Article, § 13-705(c)(3),
Md. Rules 10-202(a)**

Petition to Appoint a Guardian

After receiving the petition, the court will appoint an attorney to represent the interests of the adult with a disability

**Maryland Code, Estates & Trusts Article, § 13-705(d),
Md. Rules 10-106**

Petition to Appoint a Guardian

- A hearing on a petition for guardianship may be held as a jury trial.
- The attorney for the alleged disabled person can waive that right to a jury trial.
- The hearing should be closed and confidential unless a court decides to hold an open hearing “for good cause shown.”

**Maryland Code, Estates & Trusts Article, § 13-705,
Md. Rules 10-205**

Petition to Appoint a Guardian

A judge or a jury will review the petition, the certificates and the court-appointed attorney's answer to the petition, and any other evidence.

Then the judge or jury will decide whether the person with a disability needs a guardian, and who it should be.

**Maryland Code, Estates & Trusts Article, § 13-705(e),
Md. Rules 10-205**



Petition to Appoint a Guardian

The revised rules governing guardianships that went into effect in 2018 set out training requirements for people who have been appointed to act as guardians.

Md. Rules 10-205.1 & 10-304.1

Limits on Guardianship

An adjudication of a disability for purposes of appointing a guardian of a person may not be the basis for commitment of the disabled person to a mental institution.

Maryland Code, Estates & Trusts Article, § 13-706

Limits on Guardianship

“Appointment of a guardian of the person is not evidence of incompetency of the disabled person; and does not modify any civil right of the disabled person unless the court orders, including any civil service ranking, appointment, and rights relating to licensure, permit, privilege or benefit under any law.”

Maryland Code, Estates & Trusts Article, § 13-706

Disclaimer

These materials are provided for informational purposes only, and are not a substitute for individualized legal advice. Anyone seeking legal advice about a specific situation should seek the services of a competent attorney.