May 26, 2005

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Dear Marty:

You have requested advice concerning the delegation of surrogate decision making authority. Specifically, the question is as follows: May an individual who has priority decision making status under the Health Care Decisions Act decline to exercise this authority and instead designate another individual from a lower priority class to serve as surrogate? For the reasons stated below, I conclude as follows: A surrogate who would be entitled to priority under the Act may make himself or herself unavailable by declining to exercise decision making authority but may not designate a successor. That role is assigned by law, not by the preferences of the presumptive surrogate.

The following hypothetical case illustrates the issue: Mr. Smith, a hospitalized patient, has been certified to be incapable of making informed health care decisions personally. Mr. Smith had not named a health care agent in an advance directive. Consequently, in accordance with §5-605 of the Health-General Article, Maryland Code, health care decisions on his behalf are to be made by a surrogate. Mr. Smith's wife would ordinarily serve in that role. §5-605(a)(2)(ii). However, she tells the hospital that, owing to her own poor health, she does not feel up to the task and prefers that her daughter assume the responsibility. The daughter is one of three adult children, all of whom are available to participate in decision making. Does the daughter become the sole surrogate by virtue of her mother's designation?

The surrogate provision, §5-605, is a legal default mechanism. The preferred decision maker for an incapacitated patient is a health care agent previously appointed by the patient. In the absence of a health care agent, "individuals or groups, in the specified order of priority, may make decisions about health care" for an incapacitated patient. The statute continues: "Individuals in a particular class may be consulted to make a decision only if all individuals in the next higher class are unavailable." The classes are: a guardian of the person for the patient, if one has been appointed; next, the patient's spouse; next, the patient's adult children, as a group; next, the patient's parents; next, the patient's siblings, as a group; and finally, a friend or other relative of the patient who attests, by affidavit, to regular contact with the patient. §5-605(a)(2).

The law fixes this priority order. It is not subject to alteration at the discretion of the patient's family members. Nor may someone in a class be involuntarily deprived of authority that the surrogate is willing and able to exercise.

One of the statutory grounds for unavailability is that a surrogate is "unwilling to make decisions concerning health care for the individual." §5-605(a)(1)(v). If family members arrive at a consensus that one of their number should be the surrogate, they can achieve this result by voluntarily stepping back from decision making and so render all but the consensus choice "unavailable." *All* in the same or a higher priority class must have deferred to the chosen surrogate.

So, to pursue the earlier example, Mr. Smith's wife became unavailable once she indicated her unwillingness to make decisions. Under the statutory priority list, the patient's adult children each had an equal entitlement to serve as a surrogate. The daughter could not be given an exclusive role by designation of her mother. Rather, she could assume that role only if both her mother and her two siblings agreed to the arrangement. Then, if the three of them rendered themselves "unavailable" through their unwillingness to serve as surrogates, the daughter could do so alone.

I hope that this letter of advice, although not to be cited as an opinion of the Attorney General, is fully responsive to your inquiry. Please let me know if I may be of further assistance.

Very truly yours,

Jack Schwartz
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Director, Health Policy Development