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June 10, 2008

Howard L. Sollins, Esquire
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Dear Howard:

You have requested my advice about implementation of Senate Bill 566, "Health Care Facility Visitation and Medical Decisions – Domestic Partners." On May 22, 2008, the bill was signed into law as Chapter 590 of the Laws of Maryland 2008. The bill becomes effective on July 1, 2008.

One aspect of Senate Bill 566 amends the surrogate decision making provision of the Health Care Decisions Act, § 5-605 of the Health-General ("HG") Article, by assigning to a domestic partner the same high-priority status among surrogates as a spouse. That is, if a guardian of the person of a patient has not been appointed or is unavailable, decision making authority will be vested in "the patient's spouse *or domestic partner*." HG § 5-605(a)(2)(ii).[1] Prior to this amendment, an individual in an intimate but non-marital relationship with the patient had the lowest priority status, as a "friend." HG § 5-605(a)(2)(vi).

You asked about the extent to which Senate Bill 566 governs how a health care facility should document a domestic partnership. In my view, the legislation does not require any particular process or format for establishing an individual's status as a domestic partner. Rather, Senate Bill 566 identifies certain forms of evidence as sufficient to confirm someone

[1] Surrogate decision making arises only when the patient did not appoint a health care agent (or an appointed agent is unavailable) and has been determined by two physicians to be incapable of making an informed health care decision. HG § 5-605(a)(2). Neither this nor any other aspect of surrogate decision making, apart from the addition of domestic partners to HG § 5-605(a)(2)(ii), is affected by Senate Bill 566.

as a domestic partner, but the bill leaves to facility discretion when to request this evidence and how to document an individual's status as a surrogate based on a domestic partnership.

Under HG § 6-101(a), as enacted by Senate Bill 566, a domestic partnership has all of the following characteristics:

- It exists between two adults who are not related to each other. Gender is immaterial.
- Neither is married, in another domestic partnership, or in a civil union under the laws of a state that recognizes civil unions.
- Both "agree to be in a relationship of mutual interdependence in which each ... contributes to the maintenance and support of the other ... and the relationship, even if both ... are not required to contribute equally to the relationship."

The legislation then sets out concrete indications aimed at distinguishing a domestic partnership from a more casual involvement. Under HG § 6-101(b), "an individual who asserts a domestic partnership ... may be required to provide" both (1) "an affidavit signed under penalty of perjury by [the] two individuals stating that they have established a domestic partnership" and (2) documentary proof. The latter consists of any two documents showing:

1. joint liability for a mortgage, lease, or loan;
2. beneficiary status under a life insurance policy or retirement plan;
3. primary beneficiary status under a will;
4. status as an agent under a durable power of attorney for health care or financial matters;[2]
5. joint ownership of a motor vehicle;
6. joint asset or credit accounts;

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[2] Of course, if an individual is a health care agent under an advance directive (sometimes termed a durable power of attorney for health care), he or she is the decision maker by virtue of the document; the default mechanism of surrogate decision making would not be invoked.

7. a joint renter's or homeowner's insurance policy;

8. coverage under a health insurance policy;

9. joint responsibility for child care, such as school documents; or

10. a relationship or cohabitation contract.

Thus, a facility is authorized to adopt a policy under which purported domestic partners would be asked for proof of that relationship. Then, the individual claiming domestic partner status would be "required" to provide the affidavit and the documentary proof; failing to do so would deprive the individual of the priority status accorded to domestic partners. Because signing an affidavit requires awareness of the content and of the potential consequences for a false statement, ideally the two domestic partners will have already made the affidavit prior to the patient's loss of health care decision-making capacity.[3]

Although the affidavit and documentary proof "may be required," the legislation does not oblige a health care facility to ask for them. The term "may" connotes a permissive, discretionary function. *Spencer v. Board of Pharmacy*, 380 Md. 515, 532 (2004).[4] Whether or under what circumstances a health care facility will ask a purported domestic partner for proof is left to the facility's discretion. Senate Bill 566 allows facilities, if they wish, to adopt routine practices about domestic partners that parallel those already in place for spouses. In most facilities, as your letter indicates, documentary proof of marriage is never sought from someone who presents himself or herself as a patient's spouse, whose behavior fits the professional staff's sense of what is normally expected of a spouse, and whose status goes unchallenged by another would-be surrogate. The facility would record the individual's surrogate status in whatever way is customary in the facility, and issues of proof ordinarily would not arise. Under Senate Bill 566, a facility is free to adopt a similar practice with regard to an individual who presents himself or herself as a patient's domestic partner.

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[3] That an individual is incapable of making an informed decision about medical treatment does not necessarily imply, however, that the individual is incapable of attesting to facts about a domestic partnership.

[4] By contrast, a health care facility has no discretion whether to request an affidavit from an individual claiming surrogate status as a "friend or other relative" under HG § 5-605(a)(2)(vi). The individual may make decisions only if he or she submits an affidavit with certain specified content, and the attending physician "shall" incorporate the affidavit into the patient's medical records. HG § 5-605(a)(3) and (4).

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
Assistant Attorney General
Director, Health Policy Development