J. JOSEPH CURRAN, JR.
Attorney General

DONNA HILL STATON
Deputy Attorneys General

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL

(410) 576-7036
TELECOPIER NO.

(410) 576-6327
WRITER'S DIRECT DIAL NO.

July 8, 2004

Howard K. Sollins, Esquire
Ober, Kaler, Grimes & Shriver
120 East Baltimore Street
Baltimore, Maryland 21202-1643

Dear ~~Mr.~~ Howard Sollins:

You have requested my advice about the scope of a restriction on surrogate authority, in the context of certain emergency department evaluations. The provision of the Health Care Decisions Act in question is § 5-605(d)(2),[1] which states as follows: "A surrogate may not authorize ... treatment for a mental disorder."

You present the following situation: A nursing home resident is exhibiting unexpected and apparently serious problems in behavior, mood, cognition, or the like. These symptoms might be caused by a mental disorder, but this diagnosis has not been established, and other possible causes (a somatic disorder or an adverse reaction to medication, for example) would need to be considered as well.[2] The facility believes that an evaluation in a hospital emergency department is medically necessary. If the resident has been certified to be incapable of making informed medical decisions and had not designated a health care agent in a written or oral advance directive, the facility would seek the consent of the resident's surrogate for the emergency department evaluation. In my view, the surrogate may give consent.

---

[1] All citations in this letter are to the Health-General Article of the Maryland Code.

[2] Neuropsychiatric symptoms are a common adverse drug event in a nursing home population. J.H. Gurwitz, T. S. Field, J. Avorn et al. *Incidence and Preventability of Adverse Drug Events in Nursing Homes*. 109 Am. J. Med. 166 (2000).

A surrogate is generally authorized to "make decisions about health care" for an incapacitated patient. 5-605(a)(2). Hence, unless the restriction in § 5-605(d)(2) applies, a surrogate may consent to the emergency department evaluation.

The central purpose of the restriction is clear: to disallow the surrogate process as a means of circumventing the procedures for involuntary admissions to mental health facilities contained in Title 10 of the Health-General Article, the Mental Hygiene Law. The scope of the restriction is not self-evident in other situations, because neither of the key terms – "treatment" or "mental disorder" – is defined in the Health Care Decisions Act.

The term "treatment" is used throughout the Act, however, in its conventional sense: "medical or surgical management of a patient." *Stedman's Medical Dictionary* (27th ed. 2000). The definition of "treatment" in the Mental Hygiene Law is substantially similar, in a more particular context: "any professional care or attention that is given in a facility ... to improve or prevent the worsening of a mental disorder." § 10-101(i).[3] The emergency department evaluation posited in your question precedes, and does not yet involve, treatment of a patient's mental disorder. If the very purpose of the evaluation is differential diagnosis, the surrogate's authorization for the evaluation cannot reasonably be deemed to "authorize ... treatment for a mental disorder." Of course, if the evaluation reveals that the set of symptoms probably derives from an underlying mental disorder for which treatment is warranted, as distinct from a somatic disorder or an adverse drug reaction, the surrogate would not have authority under the Act to consent to that follow-up care.

The evaluation described in your question also differs from the emergency psychiatric evaluations described under the Mental Hygiene Law. A petition for emergency evaluation under that law requires the petitioner to have "reason to believe that the individual has a mental disorder and that there is clear and imminent danger of the individual's doing bodily harm to the individual or another." § 10-101(i). As posited in your question, however, the medical situation and presenting symptoms do not afford "reason to believe that the individual has a mental disorder," but rather reason to assess a range of possible causes, of which a mental disorder is only one. Accordingly, recognizing the surrogate's authority in this situation is not inconsistent with the separate procedures for emergency psychiatric evaluations.

---

[3] For purposes of the Mental Hygiene Law, the term "mental disorder" means "a behavioral or emotional illness that results from a psychiatric or neurological disorder." § 10-101(f)(1).

I hope that this letter, 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