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Dear Howard:

You have asked for my advice concerning the following issue: Suppose a guardian of the person has been empowered by court order to decide about the use of life-sustaining medical treatments without need for additional, specific court approval. The guardian later seeks to authorize such treatments to be withheld or withdrawn. Do the decision-making criteria and limitations that are generally applicable to surrogates under the Health Care Decisions Act apply to this guardian? In particular, does the Act allow a health care provider to carry out the guardian's decision even if the patient does not satisfy the criteria for terminal condition, end-stage condition, or persistent vegetative state?

In my view, the decision-making criteria and limitations generally applicable to surrogates under the Health Care Decisions Act do apply. If the patient is in none of the three specified conditions, a health care provider should not carry out the withholding or withdrawal of life-sustaining treatments unless the guardian presents documentation that the court, having been apprised of the specific circumstances, has approved the guardian's decision.

I

Guardian as Surrogate: Background

This issue involves an interpretation of provisions in both the guardianship law, Title 13, Subtitle 7 of the Estates and Trusts ("ET") Article, and the Health Care Decisions Act, Title 5, Subtitle 6 of the Health-General ("HG") Article. Under ET § 13-708(c), the general rule is that, even if a guardian has been appointed with broad authority to make health care decisions for the disabled person, nevertheless the court must specifically authorize a guardian's consent to a medical procedure that involves a substantial risk to the life of the

patient or, conversely, a guardian's consent to the withholding or withdrawal of a life-sustaining procedure. *See Mack v. Mack*, 329 Md. 188, 205-206 (1993). As you point out, a health care provider should ask for documentation of the court's authorization before acting on the guardian's decision. Having obtained that, the health care provider need do no more to establish the legal basis for the guardian's decision.[1]

An exception to the general requirement for specific court approval of a guardian's request to withhold or withdraw a life-sustaining procedure applies to guardians who are otherwise within any of the classes of individuals designated as surrogate decision makers under the Health Care Decisions Act. If the guardian qualifies as a surrogate under HG § 5-605(a)(2) and is determined by the court to be familiar with the disabled person's beliefs, values, and medical situation, the court may authorize the guardian to make this kind of decision without further court review. ET § 13-708(c)(2)(ii). Language to this effect would be included in the order appointing the guardian and describing his or her powers. (For brevity's sake, I shall henceforth refer to such a guardian as "specially empowered.")[2]

Suppose, then, that a specially empowered guardian directs the withholding or withdrawal of a life-sustaining procedure. May a health care provider simply carry out the guardian's decision without more, or are other steps necessary for the health care provider to gain the immunity afforded by the Health Care Decisions Act?[3]

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[1] The court's approval of a guardian's request to withhold or withdraw a life-sustaining procedure would require clear and convincing evidence supporting a substituted judgment or best interest basis for the request. ET §§ 13-711 through 13-713. These provisions do not specify any particular diagnosis or prognosis as a prerequisite to the court's approval. However, medical evidence about the patient's condition would be at the heart of the court's inquiry, and it seems unlikely that sufficient evidence could be amassed to support such a ruling were the patient not very seriously ill. In any event, a health care provider presented with documentation of court approval of a guardian's treatment-specific decision making need not obtain physician certifications under HG § 5-606, for the findings in the judicial process will have supplanted the need for certifications in the health care facility.

[2] Originally, appointment as guardian with this advance authorization was limited to the patient's spouse, adult children, parent, or adult siblings (that is, all of the surrogate classes except "friend or other relative"). Chapter 372, Laws of Maryland 1993. Then, one subset of "other relatives" was added – adult grandchildren. Chapter 450, Laws of Maryland 1996. Finally, this provision was amended to cover all classes of surrogates. Chapter 189, Laws of Maryland 2001.

[3] As pointed out in a prior letter of advice, with rare exceptions the Health Care Decisions Act does not set out penalties for violations of its requirements. Those who fail to comply are denied the immunity granted to those who do. HG § 5-609. Whether the actions or omissions that constitute the failure to comply result in liability depends on the application of other law. Letter of advice to

(continued...)

II

Specially Empowered Guardian: Health Care Decisions Act Limitations

A guardian is a surrogate – indeed, the surrogate with the highest priority. HG § 5-605(a)(2)(i). Consequently, unless something in the guardianship law trumps a provision of the Health Care Decisions Act that is generally applicable to surrogates, the same rules apply when a guardian is the surrogate as when anyone else on the surrogacy list serves in that role. *See* 78 *Opinions of the Attorney General* 208, 216-218 (1993).

The guardianship law provision allowing a court to specially empower a guardian is explicitly linked to the individual's status as a surrogate. Therefore, it is to be assumed that the General Assembly was aware of the relevant provisions applicable to surrogate decision making. *See generally, e.g., Doe v. Maryland Board of Social Work Examiners*, 384 Md. 161, 177 (2004); *Pete v. State*, 384 Md. 47, 65 (2004). Had the General Assembly intended to free specially empowered guardians of the need to comply with the surrogate decision-making provisions of the Health Care Decisions Act, it would not have linked the guardianship law provision ever more tightly to the pertinent section of the Act.[4]

Consequently, a specially empowered guardian should make a decision based on surrogate criteria: "the wishes of the patient" or, if these wishes are "unknown or unclear, on the patient's best interest." HG § 5-605(c)(1) and (2). A specially empowered guardian may not base a decision on the patient's "preexisting, long-term mental or physical disability" or "economic disadvantage." HG § 5-605(c)(3). Furthermore, a specially empowered guardian's decision, like that of other surrogates, is subject to HG § 5-606(b): "A health care provider may not withhold or withdraw life-sustaining procedures . . . on the basis of the authorization of a surrogate unless" the attending and a consulting physician have certified that the patient is in a terminal or end-stage condition or a persistent vegetative state.

This construction is consistent not only with the wording and underlying purposes of the Health Care Decisions Act but also with the role of the guardianship court. The court is presumed to be aware that the statutory designation of the guardian as surrogate invokes provisions in the Act aimed at protecting patients, namely the qualifying condition requirement in HG § 5-606(b) as well as the decision-making criteria in HG § 5-605(c). Especially given the court's ultimate responsibility for the protection of the disabled person, *Kircherer v. Kircherer*, 285 Md. 114, 118 (1979), a court order specially empowering a guardian cannot be understood to give the guardian carte blanche over the forgoing of life-sustaining treatments.

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[3] (...continued)
Evan G. DeRenzo from Jack Schwartz (May 29, 2002), available at the following link: http://www.oag.state.md.us/Healthpol/status.pdf

[4] The legislative history of the guardianship provision is summarized in note 2 above.

III

Conclusion

If a specially empowered guardian seeks to have a life-sustaining procedure withheld or withdrawn, the health care provider should first ascertain whether a certification under HG 5-606(b) has been made or appropriately could be. If so, the guardian's decision should be carried out. If not, the guardian should be asked to provide documentation from the court that confirms the guardian's authority to forgo the life-sustaining procedure under these circumstances.

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