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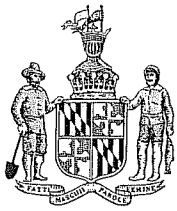

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OFFICE OF THE ATTORNEY GENERAL

June 10, 2008

Nancy Pineles, Esquire
Managing Attorney Developmental Disabilities
Maryland Disability Law Center
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Dear Ms. Pineles:

You have requested my advice on an issue of statutory construction related to the surrogate decision making provision in the Health Care Decisions Act, § 5-605 of the Health-General Article, Maryland Code. For the reasons stated below, I conclude that, if certain facts about a relationship are specified in an affidavit, an employee of a service provider may qualify as a surrogate for an individual with a developmental disability.

I

Background and Questions

A licensed agency that provides services to an individual with a developmental disability does so pursuant to a consensus-driven individual plan ("IP"). COMAR 10.22.05. An IP covers a wide range of services, both medical and non-medical. COMAR 10.05.02. Those involved in the development of an IP are called the IP Team; the IP Team includes employees of the licensee. COMAR 10.22.01.01B(55).

Although the existence of a developmental disability in itself does not equate with incapacity for various kinds of decision making, the disability of some individuals is sufficiently severe that they do not have the capacity to consent to medical or dental treatment or to make an advance directive appointing health care agents. Some individuals receiving the services of an IP Team are not under guardianship and have no family members available to serve as surrogate decision makers.

Under HG § 5-605(a)(2)(vi), if no one in a higher priority class is available, a patient's "friend" may serve as a surrogate decision maker. A person asserting the status of a "friend" must present an affidavit to the patient's attending physician stating "that the person is a ... close friend of the patient" and specifying "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." The terms "friend" and "close friend" are not defined.

Your questions are as follows:

1. Can a "friend" include a member of an IP Team?

2. If an IP Team member provides services to an individual but does not provide medical or dental care, would the disqualification provisions for health care agents under [HG] § 5-602(b)(1) prevent the IP Team member from serving as a medical decision maker for medical or dental care?

3. If a member of an IP Team is disqualified from serving as an health care agent under [HG] § 5-602(b)(1), could he or she serve as a surrogate decision maker pursuant to § 5-602(b)(3)(i)?

II

Discussion

One hallmark of the Health Care Decisions Act is that, in several areas, it omits detailed statutory specification and so leaves important determinations to the reasoned judgment of clinicians. One example is in the definition of "terminal condition," in which the term "imminent" is undefined.[1] Because the occurrence of a patient's terminal condition is evidenced by a physician certification to that effect, the lack of statutory definition means that the physicians have discretion to decide that a patient is close enough to death to meet this criterion. Other examples include the Act's omission of procedures for capacity assessment; omission of a definition of "ethically inappropriate" treatment, which a physician

[1] A patient is in a terminal condition if, among other criteria, the condition "makes death imminent." HG § 5-601(q).

is not required to render, § 5-611(a); and use of the broad and undefined phrase "generally accepted standards of patient care" as a criterion for certain protective steps by a health care provider, § 5-612(a).

So it is with the issue of who counts as a friend for surrogate decision-making. The Act's failure to define "friend" or "close friend" creates ambiguity about the scope of these terms. A leading commentator recognized this point soon after the Act became law: "Although this provision will undoubtedly be useful in a number of situations where close family members are not available, there are no standards for determining whether the close friend is 'close enough.' This determination is, in effect, left to the health care provider and the institution." Diane E. Hoffmann, *The Maryland Health Care Decisions Act: Achieving the Right Balance?*, 53 Md. L.Rev. 1064, 1119 (1994).

In other words, the Act leaves it to the attending physician (in practice, those health care professionals acting on the physician's behalf) to distinguish between insufficient and sufficient affidavits.[2] In my view, a physician would act reasonably in accepting an affidavit, and thereby according surrogate status to a "friend," if the affidavit describes a relationship of considerable duration involving activities that, in ordinary experience, promote a personal bond between two people. These include being present during meals, sharing holidays and other events, and assisting with various needs.[3] An IP Team member might well be able to attest that such bonds of friendship have developed over time. If so, the IP Team member may act as a surrogate.

You also asked about the effect of a disqualification provision regarding health care agents. Under § 5-602(b)(2), a competent individual is generally free to select whomever he or she wants as a health care agent. However, certain "disqualified persons" may not serve as health care agents. § 5-602(b)(3). The disqualification applies to an "owner, operator, or employee of a health care facility from which the [individual] is receiving health care" or the first-degree relative of such an owner, operator, or employee. § 5-602(b)(1).[4] Assuming for the sake of this discussion that an IP Team member would be a "disqualified person,"

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[2] Of course, that the specific assertions about regular contact with the patient must be made in affidavit form, and therefore under penalties of perjury, is itself a protective measure beyond reliance on physician discretion.

[3] These factors, not intended as an exhaustive list, are drawn from a judicial discipline case that sought to give content to the phrase "close familial relationship." *In re Horgos,* 682 A.2d 447 (Pa. Ct. Jud. Discipline 1996).

[4] The term "health care facility" is not defined for purposes of §5-602.

nevertheless the disqualification itself has an exception: A disqualified person may serve as a health care agent if the person "would qualify as a surrogate decision maker under § 5-605(a) of this subtitle." § 5-602(b)(3)(i).[5] This exception, then, simply reverts the question back to the one already addressed – whether an IP Team member may qualify to be a surrogate as a "friend." For the reasons already stated, I conclude that, under appropriate circumstances as specified in an affidavit, an IP Team member may so qualify.

This response is a construction of the Health Care Decisions Act, not an exploration of potential ethical issues. Conflict of interest and related issues are to be taken seriously and should be addressed in the policies of the licensee employing the IP Team. If a licensee considers it unwise as a matter of policy for IP Team members to serve as surrogates, the practice may be prohibited by policy.[6] Nor does this letter address the potential impact of the statute or regulations governing a licensee under the Health Occupations Article.

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

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[5] A second exception, not relevant here, is that a disqualified person may serve as a health care agent if the advance directive is made "before the date on which the [individual] receives, or contracted to receive health care from the facility."

[6] The situation is analogous to the question of who may witness the signing of a written advance directive. If an individual with capacity is in a health care or residential facility and wishes to make an advance directive, nothing in the Health Care Decisions Act precludes the staff member of the facility from witnessing the advance directive. *See* § 5-602(c). Some facilities, however, have policies precluding staff members from serving as witnesses.