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September 26, 2005

Gina D. Shaffer, Esquire  
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Dear Ms. Shaffer:

I am writing in response to your letter of September 16, 2005, in which you pose a question about the application of an advance directive to the use of antibiotics.

Your letter indicates that a patient's written directive expresses a decision against the use of life-sustaining procedures in the event of end-stage condition. The patient has been certified, in accordance with § 5-606 of the Health-General Article, Maryland Code, to be in end-stage condition. Consequently, the nursing home where the patient resides intends to give effect to the advance directive by, among other things, not administering antibiotics in the event of an infection. The patient's family, however, wants the resident to have antibiotics. (I assume that the family members are acting as surrogate decision makers, because your letter does not mention appointment of any health care agent in the advance directive.)

A "life-sustaining treatment," as defined in Health-General § 5-601(m), includes any treatment or intervention that uses "artificial means to sustain, restore, or supplant a spontaneous vital function" but that, even if used, does not afford a reasonable expectation of recovery. The use of antibiotics is a treatment or intervention to supplant, through the artificial means of a chemical compound, the functions of a person's immune system in combating infection. It is, therefore, a life-sustaining treatment, within the meaning of the Health Care Decisions Act, for a patient who has been certified to be in a terminal or end-stage condition or a persistent vegetative state. *See In re Albert S.*, 730 N.Y.S.2d 128, 129

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(N.Y. App. Div. 2001). That is why, for example, a question about the use of antibiotics appears on the new Patient's Plan of Care Form (Part F).

When a patient's advance directive rejects the use of life-sustaining treatments in a situation that has been certified to have occurred – here, end-stage condition – then the obligation of the facility is to honor the directive. Family members do not have the legal authority to countermand or curtail a clearly applicable, unambiguous instruction in an advance directive, because the surrogates' primary responsibility is to base their decisions “on the wishes of the patient,” which are here expressed in the advance directive. Health-General § 5-605(c)(1).

I hope 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