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February 20, 2007

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Dear Howard:

I am writing in response to your letter of February 16, 2007, in which you asked about a nursing home's legal authority and obligations when a health care agent insists that a life-sustaining treatment be used, despite an unambiguous and clearly applicable instruction in the patient's advance directive that the treatment not be used. Must the treatment be provided indefinitely while the health care agent tries to arrange for a transfer of the patient to another facility? In my view, no.

I

Issue and Illustrative Case

You requested guidance on what you describe as "a recurring situation" involving nursing home residents with advance directives. The kind of advance directive at issue both appoints a health care agent with broad authority and gives treatment-specific directions. That is, the health care agent is generally authorized to make decisions concerning the resident's care, including the furnishing, withholding, or withdrawal of life-sustaining treatment; but the document also includes an express direction that, should the resident become terminally ill or be in a persistent vegetative state or end-stage condition, life-sustaining treatment not be used. Often the "living will" portion of the advance directive specifies that the treatments to be forgone under these circumstances include nutrition and hydration administered through a tube.

Sometimes, after a nursing home resident has been determined to lack decision-making capacity and to be in one of these three conditions, the health care agent nonetheless insists that tube feedings or other life-sustaining treatment be initiated or maintained. A nursing home may use its patient care advisory committees to review the advance directive and provide a setting in which the health care agent and the care team are able to discuss the matter. This process often proves effective in fostering agreement on a course of action consistent with the resident's expressed wishes. In some cases, however, despite the patient care advisory committee's reaffirmation that the resident's contrary direction in an advance directive is clear and unambiguous, the health care agent instructs that the treatment be provided. The following case illustrates the dilemma facing the nursing home:

Ms. X, 87 years old, has a valid advance directive in which she designated her son as her health care agent, effective upon her incapacity, with the usual array of broad powers. She also declared in the "living will" portion of the document her wish not to have any life-sustaining treatments, including a feeding tube, once in a terminal or end-stage condition or a persistent vegetative state. As a consequence of Alzheimer's disease, Ms. X has been certified by her attending and a second physician to be incapable of making her own health care decisions. The progressive dementia has worsened to the point that she has also been certified by these physicians to be in an end-stage condition. Because Ms. X had been able to eat with assistance, no issue about a feeding tube had arisen.

While hospitalized for treatment of an infection, however, Ms. X's oral intake dropped markedly, and a feeding tube was placed with the health care agent's consent. Ms. X is now back in the nursing home. Efforts to provide her with sufficient nutrition by mouth have failed. In light of what they recognize as a clear instruction in her advance directive, Ms. X's attending physician and others on the care team are concerned that continued use of the feeding tube is contrary to Ms. X's wishes. Ms. X's health care agent nevertheless insists that it be used. The attending physician requests a consultation with the facility's patient care advisory committee, which advises that the ethically proper course is to honor the patient's unambiguously expressed wishes and discontinue use of the feeding tube. The attending physician, medical director, and administrator all concur and inform the health care agent of their intention to discontinue use of the tube within a few days. The health care agent remains adamant. Although he is willing to look for another facility that might accept his mother, he demands that the nursing home continue use of the tube until he finds another place, no matter how long it takes.

II

Health Care Agent's Countermanding of Living Will

Ms. X's health care agent is not legally authorized to instruct that the feeding tube be used. The Health Care Decisions Act establishes "the wishes of the patient" as the primary basis for proxy decision making. § 5-605(c)(1) of the Health-General Article, Maryland Code. This requirement, although part of the section on surrogate decision making, is applicable to health care agents as well. § 5-602(h). Only if the patient's wishes are "unknown or unclear" may a health care agent or surrogate make his or her own assessment whether a particular treatment serves the patient's "best interest."

If a patient, like Ms. X, has an advance directive with language directly addressing the treatment in question under clinical circumstances that have now arisen, how could that *not* be conclusive evidence of "the wishes of the patient"?[1] After all, the sole purpose of making a living will is to communicate one's wishes after loss of capacity. Suppose the only advance directive Ms. X had done was a living will; surely the nursing home would not claim a prerogative to ignore the stated wishes. In my view, the fact that the patient also designated a health care agent in another part of the advance directive does not relieve a health care facility of its obligation to honor the patient's wishes. If a health care agent were free to countermand an otherwise binding statement in the patient's living will, then the health care agent would effectively have the power to revoke the living will at the very moment that it was meant to apply. But the Act does not grant a health care agent the power to revoke an advance directive. *See* § 5-604.[2]

To be sure, an individual is free to make an advance directive that gives primacy to the decision-making discretion of the health care agent – that, in effect, makes the living will a source of guidance, not an instruction. The new statutory advance directive, for example, contains language to accomplish this. § 5-603 (Part II, Paragraph G). Put another way, under such an advance directive "the wishes of the patient" are that the health care agent decide,

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[1] I am not here addressing the effect of "living will" language when the statutory requirements for the effectiveness of an advance directive have not been met. *See Wright v. Johns Hopkins Health System Corp.*, 353 Md. 568, 587 (1999). Nor am I addressing the effect of ambiguous or clinically inapplicable language or of an advance directive that grants a health care agent broad authority to make decisions concerning life-sustaining treatment but omits any treatment-oriented directions.

[2] *See also* letter to Anita Tarzian from Jack Schwartz (June 9, 2005), available at: http://www.oag.state.md.us/Healthpol/tarzian.pdf.

even if the decision is contrary to preferences expressed in the living will portion of the document. *See* § 5-602(h) ("*Unless otherwise provided in the patient's advance directive*, a patient's agent shall act in accordance with the provisions of § 5-605(c) ...").

Ms. X's advance directive, however, did not indicate that her stated wishes about the feeding tube were simply meant as guidance to her son, which he was free to accept or not. In the absence of such language, a health care agent is required by § 5-605(c)(1) to honor the wishes in the living will. Therefore, his insistence on continued use of the feeding tube, contrary to Ms. X's wishes, is invalid.

Ms. X's case involves the most common use of a living will – to decline life-sustaining treatments after certification of an end-stage or terminal condition or a persistent vegetative state. Exactly the same reasoning would apply, however, if a living will instructed that all medically reasonable interventions be used to extend life. A health care agent's instruction that, contrary to the living will, such an intervention not be used would be invalid. The living will should be followed, not the agent's contrary instruction.

III

Situation Pending Transfer

Must the nursing home continue to use the feeding tube pending transfer of Ms. X? If so, the health care agent has no incentive to move ahead with a transfer. Indeed, it might be impossible to find a nursing home that will accept Ms. X, since the condition for doing so is to dishonor her living will.

This aspect of the problem involves an interpretation of § 5-613(a)(3): "A health care provider that intends not to comply with an instruction of a health care agent or a surrogate shall ... [assist with a transfer of the patient and, pending the transfer], comply with an instruction of ... a health care agent or surrogate ... if a failure to comply with the instruction would likely result in the death of the [patient]."

Ms. X's health care agent has instructed that the feeding tube continue to be used. Given Ms. X's inability to take in enough nutrition orally, not using the feeding tube – that is, not complying with the health care agent's instruction – would likely result in her death, or perhaps more precisely would likely result in her dying sooner than if the tube continued

to be used.[3] But that is the very point of her living will: Ms. X *wanted* a natural death, even if it came sooner than death after use of a feeding tube or other medical interventions.[4]

A literal, blinkered reading of § 5-613(a)(3) would conclude that the nursing home is obliged to comply with the health care agent's instruction indefinitely, until the unlikely and maybe impossible transfer occurs. But such a reading ignores context and the overall objectives of the Act. The health care agent's instruction is invalid, because it breaches the health care agent's duty under § 5-605(c)(1). If all that a health care agent has to do to countermand the patient's clearly expressed wishes is request a transfer, the priority given to the patient's wishes by § 5-605(c)(1) will have been undermined. Hence, in my view, when § 5-613(a)(3) refers to an "instruction," it means one that is authorized elsewhere in the Act. It does not mean an instruction made without legal warrant.

This construction of § 5-613(a)(3) is limited to situations in which the patient's own unequivocal direction about care supports the intended action by the health care provider. Health care providers may not decline *valid* proxy requests for efficacious life-sustaining treatment pending transfer. Suppose, for example, that a patient is in a persistent vegetative state. Her nutritional status is sustained by a feeding tube. She has no advance directive. Her surrogate believes, based on the patient's values, that she would want the feeding tube to be used indefinitely and has so instructed under § 5-605(c)(1) . The patient's attending physician has concluded that continued use of the tube would achieve no benefit in terms of the patient's quality of life and so is deemed to be "ethically inappropriate." § 5-611(a). The physician informs the surrogate of an intention to discontinue use of the tube. Because discontinuation of the tube would result in the death of the patient, and the surrogate's instruction to use it is a valid exercise of authority under the Act, the tube must continue to be used pending transfer.

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[3] In other words, use of the feeding tube would not be "medically ineffective." *See* § 5-601(n).

[4] Many do not view use of a feeding tube as a medical intervention. The Act, however, includes "artificially administered nutrition and hydration" among the medical procedures, treatments, and interventions that are defined as "life-sustaining procedures" and that may be addressed in an advance directive. § 5-601(m). One who wishes to call for use of a feeding tube even if other interventions are declined may certainly do so, but Ms. X's living will specifically rejected use of artificially administered nutrition and hydration.

IV

Conclusion

In sum, the nursing home at which Ms. X is a resident should inform the health care agent of its intention to discontinue use of the feeding time on a given date in the near future. If the health care agent has arranged for a transfer of Ms. X by that date, the nursing home must cooperate fully in the transfer. If not, the nursing home should carry out Ms. X's wishes, as documented in the living will, on that date.[5]

I hope that this letter of advice is helpful in clarifying the legal background.

Very truly yours,

Jack Schwartz
Assistant Attorney General
Director, Health Policy Development

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[5] In my view, the nursing home and the health care professionals involved in discontinuing use of the feeding tube have the immunity from liability granted in § 5-609(a), because they are "withdrawing treatment under authorization obtained under [the Act]." Conversely, compliance with the invalid instruction of the health care agent may expose the nursing home to adverse regulatory attention.