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January 15, 2003

Ms. Patricia Younger
Charles County Nursing and Rehabilitation Center
10200 La Plata Road
La Plata, Maryland 20646

Dear Ms. Younger:

I am writing in response to your recent e-mail message in which you requested my advice about surrogate decision making and DNR orders. You presented the question as follows:

“The State has informed our facility that Advance Directive wishes must be honored even if there is no physician’s order on file. For example, upon admission, if the staff are informed that the resident would not want CPR, the facility must honor that wish even without an order. The State has said the wish should be honored if a competent resident has signed, a health care agent, or a surrogate decision maker. The question is regarding a surrogate decision maker. Should the wish be honored without two physicians declaring end stage, persistent vegetative state or terminal or should we wait until the two physicians sign before honoring? Sometimes upon admission we are not yet sure if someone who holds themselves out as an appropriate surrogate IS actually an appropriate surrogate. It is therefore entirely possible to accept the wishes of a son who says no CPR, have the resident arrest, and later find out there is a wife who would not have agreed.”

This problem has several components to it: (1) recognizing someone as a surrogate; (2) if a recognized surrogate decides against the use of life-sustaining procedures, ascertaining and documenting that the resident is in one of the three qualifying conditions; and (3) issuing a DNR order to implement the surrogate's decision. I shall address these points one by one.

(1) The Health Care Decisions Act (HCDA) requires a health care provider to make a "reasonable inquiry" about the existence and availability of a surrogate. § 5-605(a).¹ Obviously, any health care provider must try to find out whether a patient has a spouse. To take your example, if a nursing home, after a reasonable inquiry, believes that a resident does not have a spouse (or that the spouse is incapacitated or otherwise unavailable), the nursing home may rely on an adult child as a surrogate. It does not matter whether later, quite unexpectedly, a spouse appears on the scene. Until that time, the facility's good-faith reliance on the child's decisions would be legally valid and would support the facility's assertion of the HCDA's immunity protection. § 5-609.

(2) As your inquiry rightly suggests, a surrogate's decision that CPR should not be attempted in the event of arrest is valid under the HCDA only if the resident meets the HCDA's criteria for any one of three qualifying conditions: terminal condition, end-stage condition, or persistent vegetative state. The resident's status is to be determined by the attending physician with the concurrence of a consulting physician. The qualifying status is to be "certified" by the two physicians. § 5-606(b).

Certification of condition requires an agreement by the two physicians, based on relevant clinical indications, that the resident is currently in one of the three conditions or that the resident would be in one of the conditions should the resident suffer a cardiopulmonary arrest. Once the physicians have reached that agreement, they should promptly embody it in writing. The preferred form of documentation would be a written certification signed by the physicians. However, a facility may use an interim form of documentation until the signed certification is completed. For example, if the resident's attending physician orally informs a nurse (or other health care professional) that the resident is one of the qualifying conditions, and the nurse confirms that this conclusion is shared by a consulting physician, the nurse's notes in the chart suffice as a written certification.

¹ The statutory citations in this letter are to the Health-General Article.

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(3) Once the resident is certified, as discussed above, a DNR order should be entered promptly. Even if the order is not yet on the chart, however, for the reasons explained in a July 28, 2000, advice letter available on our web site², once the resident has been certified, the surrogate's decision that CPR not be attempted should be honored.

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

² The letter may be found at this URL: <http://www.oag.state.md.us/Healthpol/CPR.pdf>