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Carl S. Jean-Baptiste, Jr., Esquire
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MedStar Health
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Dear Mr. Jean-Baptiste:

I am writing in response to your recent letter concerning the “medically ineffective treatment” provision in the Health Care Decisions Act. Your letter presents a situation in which a patient in the hospital has been certified to be incapable of making an informed decision, within the meaning of that term in § 5-601(l) of the Health-General Article; the patient has no health care agent, guardian, or other surrogate; and the treatment team, including the attending and a consulting physician, were of the strong opinion that a particular life-sustaining treatment would, under the clinical circumstances, be medically ineffective.

As you point out, § 5-611(b)(2)(i) requires that, if a life-sustaining procedure has been certified to be medically ineffective, the patient’s attending physician so inform “the patient or the patient’s agent or surrogate” The question is whether a life-sustaining procedure may be certified to be medically ineffective when the patient is incapacitated and there is no agent or surrogate to inform.¹

In my view, it may. There is no indication in the statutory text or legislative history that the physician’s independent prerogative to refrain from rendering medically ineffective

¹ For brevity’s sake, I shall henceforth refer to an agent or surrogate as a “proxy.”

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treatment exists only when a proxy is available.² The notification requirement in § 5-611(b)(2)(i) simply presupposes that a proxy has been involved in the incapacitated patient's care. The requirement reflects the Legislature's objective that one who has been making health care decisions for the patient be afforded the courtesy of learning, from the most authoritative source, that the particular procedure will not be offered. The proxy would need to understand how the physician's decision affects the overall plan of care for the patient. If no proxy has been available to make decisions, these considerations do not arise.

Consequently, I conclude that, in the absence of a proxy, the notification requirement in § 5-611(b)(2)(i) is immaterial. If the statutory criteria are deemed to be satisfied, the attending physician and a consulting physician may certify that a life-sustaining procedure is medically ineffective.

Very truly yours,

Jack Schwartz
Assistant Attorney General
Director, Health Policy Development

² With an exception not relevant here, "nothing in [the Act] may be construed to require a physician to prescribe or render medically ineffective treatment." § 5-611(b)(1).