

**Navigating Guardianship and Its
Alternatives
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Topics of Today's Talk:

- Legal and ethical requirements for informed consent for adults and minors
- Less restrictive alternatives to guardianship
 - Advance Health Care Directive
 - Advance Directive for Mental Health
 - Surrogate Decision Makers
 - Power of Attorney
- When guardianship of the person or property is appropriate

Informed Consent

All adults (and some minors under certain circumstances) have the right to informed consent in making decisions about their health care unless they have been determined to be incapable of making an informed decision.

Ethical Considerations in Health Care Decision Making

- Preserving Individual Autonomy (self-determination)
- Beneficence
- Nonmaleficence
- Veracity

How can we preserve and promote autonomy and also protect individuals with disabilities?

General Rule for Informed Consent

Informed consent must be obtained directly from the individual prior to the provision of health care.

The responsibility for obtaining informed consent rests on the health care practitioner who is providing the health care.

Elements of Informed Consent

The Health Care Provider must explain:

- The diagnosis
- The proposed treatment
- Alternative treatments, including no treatment
- Material risks of the proposed treatments, including the risks of no treatment

Health Care Provider/Patient Relationship

Informed consent is a very personal process through which health care providers and their patients communicate about their most fundamental values in order to determine what is best for the individual's health.

Health Care Provider/Patient Relationship

There is no "right" choice for every individual. The most important thing that health care providers can do to ensure adequate informed consent is to maintain an open dialogue with their patients and then, respect their choices.

Exception to General Rule: Emergency Treatment

In an emergency, treatment can be provided without first obtaining informed consent. Maryland law provides that: "A health care provider may treat a patient who is incapable of making an informed decision, without consent, if:

1. The treatment is of an emergency medical nature;
(Section 5-607 of the Health General Article of the Maryland Annotated Code)

Exception to General Rule: Emergency Treatment

2. A person who is authorized to give the consent is not available immediately; and
3. The attending physician determines that there is a substantial risk of death or immediate and serious harm to the patient; and with a reasonable degree of medical certainty, the life or health of the patient would be affected adversely by delaying treatment to obtain consent.

(Section 5-607 of the Health General Article of the Maryland Annotated Code)

**General Rule for Informed
Consent: Minors**

Informed consent for health care must be obtained from parents or guardians, with some exceptions.

**Exception to the General Rule:
Minors (part 1)**

A minor under 18 "has the same capacity as an adult to consent to medical or dental treatment if the minor:

1. Is married;
2. Is the parent of a child; or
3. (i) Is living separate and apart from the minor's parent, parents, or guardian, whether with or without consent of the minor's parent, parents, or guardian; and
(ii) is self-supporting, regardless of the source of the minor's income."

(Section 20-102(a) of the Health General Article of the Maryland Annotated Code)

**Exception to the General Rule:
Minors (part 2)**

A minor has the same capacity as an adult to consent to treatments related to:

- drug abuse or alcoholism (does not include capacity to refuse treatment in an inpatient treatment program to which parent has consented)
- venereal disease • pregnancy
- contraception • alleged rape or sexual offense
- medical examination in a detention center
- emergency or psychological treatment (if the minor's health would be affected adversely by delaying treatment to obtain the consent of parent or guardian)

(Section 20-102(b),(c) of the Health General Article of the Maryland Annotated Code)

Informed Consent for Special Education

"Consent" in the special education context means a parent:

- Has been fully informed of all information relevant to the activity for which consent is sought, in the parent's native language or other mode of communication;
- Understands and agrees in writing to the carrying out of an activity, which is described in writing, for which the parent's consent is sought
- Understands that consent is voluntary and may be revoked at any time.

COMAR 13A.05.01.03(12)

Informed Consent for Education

When parental consent is required:

- For a child to be initially assessed for special education
- Before any subsequent evaluations related to special education
- Before implementation of special education services
- Before an agency representative is invited to an IEP meeting to discuss transition services
- To excuse an essential IEP team member's attendance at a meeting

COMAR 13A.05.01.13

Informed Consent for Education

When consent is not needed or can be legally challenged by the school system:

- Before reviewing existing data about a student
- Before administering a test that is given to all students
- Before a reevaluation assessment if the school requested consent and the parent failed to respond.
- **NOTE:** If a parent refuses to consent to assessments, a school system may pursue the assessment through mediation or due process.

COMAR 13A.05.01.13

Informed Consent for Special Education

If a parent revokes consent:

- The revocation is not retroactive and does not negate earlier actions after consent was given
- If the parent revokes consent for special education services after the child is provided special education, the school is not required to amend the student's education records to remove any references to the child's receipt of special education

COMAR 13A.05.01.03(12)

Informed Consent for Education: Parental Consent

A child's parents are the child's "natural guardians" and are "jointly and severally responsible for the child's support, care, nurture, welfare, and education."

(Section 5-203 of the Family Law Article of the Maryland Annotated Code)

Informed Consent for Education: Divorced or Separated Parents

"Unless otherwise ordered by a court, access to medical, dental, and educational records concerning the child may not be denied to a parent because the parent does not have physical custody of the child."

(Section 9-104 of the Family Law Article of the Maryland Annotated Code)

Informed Consent for Special Education

Parental consent is required even if the student is 18 years old **unless** the student has not been adjudged incompetent and:

- The parents are **unavailable or unknown**; or
- The parents **have not, cannot, and will not participate in special education decision making**; or
- The child lives outside the parents' home and is not in custody of a public agency

(Section 8-412.1 of the Education Article of the Maryland Annotated Code)

When Is Someone "Competent"?

"Competent individual means a person who is at least 18 years of age ... and who has not been determined to be incapable of making an informed decision."

Health Gen. §5-601(f)

When is Someone "Incapable of Making an Informed Decision"?

A patient is "**incapable of making an informed decision**" about the provision, withholding or withdrawal of a specific medical treatment or course of treatment if she is:

- "unable to understand the nature, extent or probable consequences of the proposed treatment or course of treatment,

Health Gen. §5-601(m)

When is Someone “Incapable of Making an Informed Decision”?

–unable to make a rational evaluation of the burdens, risks, and benefits of the treatment or course of treatment, or

–is unable to communicate a decision.”

Health Gen. §5-601(m)

Assessing Capacity

- Ask: Capacity to make what decision?
- Does the individual have an understanding of the consequences of her decisions?
- What do her doctors, social workers and/or psychologists say about her decision making capacity?
- Are decisions consistent with past stated wishes?

What Incapacity ISN’T

- Old Age
- Eccentricity
- Poverty
- Refusal of Care
- Disagreement with health care provider’s recommendation

Method of Communication

A person who is otherwise a “competent individual” but who communicates through some method other than speech cannot be considered “incapable of making an informed decision.”

Health Gen. §5-601(m)(2)

“Bad Decisions”

“Bad” or inconvenient decisions do not automatically equate to incapacity.

Competent individuals are free to make unpopular or “bad” decisions.

When in Doubt about Capacity...

Get a second opinion!

Examples:

- Older adult with dementia
- Younger adult with Autism spectrum disorder
- Individual with an intellectual disability

Third Party Decision-Making; When A Patient Lacks Capacity

For individuals who lack capacity, informed consent can be obtained from a

- Health Care Agent
- Health Care Surrogate
- Guardian

Advance Health Care Directive

A written expression of a person's future health care wishes.

Allows the person signing it to choose a health care "agent" who can make decisions relating to when health care is provided, and when it is withheld or withdrawn.

Health Gen. § 5-602

Advance Health Care Directive

Allows the person signing it to state preferences for health care and treatment in general or specific situations, including:

- terminal condition
- persistent vegetative state
- end-stage condition

Health Gen. § 5-603

Oral Advance Health Care Directive

An oral advance directive is effective if:

- It is made in the presence of an attending physician, physician assistant or nurse practitioner and one witness and
- The patient's wishes are documented in the individual's medical record, and the record is signed and dated by the health care provider and the witness.

Health Gen. § 5-602(d)

Advance Health Care Directives

For a health care directive to go into effect, 2 physicians – at least one of whom has examined the patient within the preceding 2 hours – must certify in writing that the patient is incapable of making an informed decision regarding treatment.

(Section 5-606(a) of the Health General Article of the Maryland Annotated Code)

Advance Health Care Directives

- The physicians' certifications must be based on personal examination of the patient.
- If the patient is unconscious or unable to communicate by any means, only one physician's certificate is required.

Health Gen. §§ 5-602(a),(e), 5-606(a)

A Health Care Agent's Powers

Advance directives may give agents the power to:

- Request and review medical records
- Authorize admission to a hospital
- Authorize discharge from a hospital
- Decide what steps should be taken in sustaining the patient on life support

Advance Mental Health Directive

Like an Advance Health Care Directive, an Advance Directive for Mental Health Services allows an individual to decide, ahead of time, what mental health services they want if and when they become incapable of providing informed consent.

Health Gen. § 5-602.1

Advance Mental Health Directive

An Advance Directive for Mental Health Services should name an "agent" that the person wants to speak for his or her interests.

Health Gen. § 5-602.1

Advance Mental Health Directive

Can include preferences of:

- Particular mental health professionals to offer treatment
- Particular facilities
- Particular treatment programs
- Medications the patient wants or does not want

Health Gen. § 5-602.1

Practical Tips for Advance Health Care Directives

- **Don't leave your health care directives in the drawer!**
- **Give copies to your agents, your health care providers, your family members.**
- **Have an open and candid conversation with your agents about your wishes.**
- **Review your directives on a regular basis.**

Health Surrogates

The Maryland Health Care Decisions Act allows certain people to make health care decisions for family members or close friends even when there is no Advance Health Care Directive.

Health Gen. § 5-605

Health Surrogates

The law looks for surrogates in this order:

- 1) The patient's guardian
- 2) The patient's spouse or domestic partner;
- 3) An adult child;
- 4) A parent;
- 5) An adult sibling
- 6) A friend or other relative subject to certain requirements

Health Gen. § 5-605(a)(2)

Health Surrogates

A friend can become a health surrogate if she:

“Is a competent individual; and

Presents an affidavit to the attending physician stating:

- That the person is a relative or close friend of the patient; and
- Specific 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.”

Health Gen. § 5-605(a)(3)

Health Surrogates

Before a health surrogate can be appointed, 2 physician certifications that the patient lacks capacity are required (the same as for an advance directive).

Health Gen. § 5-606

A Health Surrogate's Duties

A surrogate must make decisions that, in their experience with the patient, best represent the patient's wishes.

That may include their knowledge of the patient's religious or moral beliefs and the patient's expressed preferences with regard to withholding or providing treatment.

Health Gen. § 5-605(c)

A Health Surrogate's Duties

"The decision of a surrogate regarding whether life-sustaining procedures should be provided, withheld or withdrawn, in whole or in part, **shall not** be "based on the patient's preexisting, long term mental or physical disability or a patient's economic disadvantage."

Health Gen. § 5-605(c)(3)

Limits on a Health Surrogate's Authority

A surrogate **cannot authorize** "sterilization" or "treatment for a mental disorder"

Health Gen. § 5-605(d)

"A health care provider may not withhold or withdraw life-sustaining procedures on the basis of an advance directive where no agent has been appointed or on the basis of the authorization of a surrogate" without special certifications.

Health Gen. § 5-606(b)

Limits on a Health Surrogate's Authority

If no agent appointed via an Advance Directive exists, a health care provider can withhold or withdraw life-sustaining procedures only if:

"The patient's attending physician and a second physician have certified that the patient is in a terminal condition or has an end-stage condition; or

Two physicians, one of whom is a neurologist, neurosurgeon, or other physician who has special expertise in the evaluation of cognitive functioning, certify that the patient is in a persistent vegetative state."

Health Gen. § 5-606(b)

Challenges for Health Surrogates

- Legal authority to act is not always observed without "paperwork."
- Surrogates of a particular class all have equal say; all adult children or siblings of patient must agree

Power of Attorney: Financial and Property Matters

Through a power of attorney, an individual can choose a person they trust as their agent to manage their property and financial affairs. That person is known as their "agent".

Can also designate who they would want to be appointed their guardian if one should be needed.

Power of Attorney

- Agent has authority to act for business and property matters that are specified in the document such as:
 - Accessing bank accounts and safe deposit boxes, taking out loans, buying real estate, and entering into contracts
- A power of attorney grants to the person only the powers defined in the document.

Guardianship

Maryland law allows courts to appoint a guardian of the person and/or the property for an adult with a disability
(Sections 13-705 and 13-201 of Health General Article of Maryland Annotated Code)

When to Appoint a Guardian of the Person

If a person:

1) “lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person”

Due to:

2) “any mental disability (or) disease(.)”

Health Gen § 13-705(b)

When to Appoint a Guardian of the Person

In addition, the court must find that there are no "less restrictive" means of ensuring that person's health and safety.

Health Gen § 13-705(b)

When to Appoint a Guardian of the Property

If a person:

- 1) "is unable to manage his property and affairs effectively" due to:
- 2) "any mental disability (or) disease" and
- 3) "has or may be entitled to property or benefits which require proper management"

Health Gen § 13-201(c)

Appointing a Guardian: The Petition

"Interested persons" can file a request -- a "petition" - with the court, asking that they be appointed the guardians of an individual with a disability.

Health General § 13-705,
Rule § 10-201 of the Maryland Rules of Court

Appointing a Guardian: The Petition

“Interested person” means the guardian, the heirs of the minor or disabled person, any governmental agency paying benefits to the minor or disabled person, or any person or agency eligible to serve as guardian of the disabled person.

Appointing A Guardian: Certifications

The petition must be accompanied by 2 certificates from the legally required health care professionals, stating that the person requires a guardian.

Health General § 13-705(c),
Rules 10-202 & 10-301(d) of
Maryland Rules of Court

Appointing A Guardian: Certifications

The certificates must be from:

- 2 physicians, OR
- 1 physician AND
- 1 psychologist or certified clinical social worker.

Health General § 13-705(c)(2),
Rule 10-202(a) of the
Maryland Rules of Court



**Appointing A Guardian:
Certifications**

In 2017, the Maryland court system developed forms for each type of certifying professional to use – with different forms for physicians, psychologists and social workers. These forms are required to accompany guardianship petitions as of January 2018.

Rule 10-202(a)(2) of the
Maryland Rules of Court

**Appointing A Guardian:
Certifications**

At least one of the certifying professionals must have evaluated or examined the person within 21 days before the filing of the petition.

Health General § 13-705(c)(3),
Rule 10-202(a) of Maryland Rules of Court

**Appointing A Guardian:
Appointment of Attorney**

After receiving the petition, the court will appoint an attorney to represent the interests of the adult with a disability.

Health General § 13-705(d),
Rule 10-106 of Maryland Rules of Court

Appointing A Guardian: Court Hearing

- The hearing on a petition for guardianship may be held as a jury trial.
- The attorney for the alleged disabled person can waive the right to a jury trial.
- The hearing should be closed and confidential, unless a court decides to hold an open hearing “for good cause shown.”

Health General § 13-705(e)
Rule 10-205 of Maryland Rules of Court

Appointing A Guardian: Court Decision

The court or a jury will review the petition, the certificates, and the court-appointed attorney’s answer to the petition.

Then a judge or a jury will decide whether the person with a disability needs a guardian.

Health General § 13-705(e)
Rule 10-205 of Maryland Rules of Court



Guardianship: Appointment of Attorney

Maryland courts modified the rules governing the guardianship process in 2017. As of January 1, 2018, a court may also appoint an attorney to represent a disabled person after a guardian has been appointed, “ if the court finds that such appointment or continuation is in the best interest of the ... disabled person.”

Rule 10-106(d)(4) of Maryland Rules of Court

Guardianship: Appointment of Attorney

The revised rules governing that went into effect on January 1, 2018, also set out training requirements for court-appointed attorneys for disabled persons. They also set out training requirements for people who have been appointed to act as guardians.

Rules 10-106, 10-205.1, 10-304.1 of Maryland
Rules of Court

Limit on Guardianship Hearing: Inpatient Mental Health Treatment

An adjudication of a disability for purposes of appointing a guardian of a person may not be the basis for commitment of the disabled person to a mental institution.

Health General § 13-706

What Guardianship Means

Depending on the powers given to the guardian in the Guardianship Order, the guardian:

May make decisions about:

- A place to live
- Financial transactions
- Health care

Health General § 13-708(d)

What Guardianship Means

“Appointment of a guardian of the person is not evidence of incompetency of the disabled person; and does not modify any civil right of the disabled person unless the court orders, including any civil service ranking, appointment, and rights relating to licensure, permit, privilege, or benefit under any law.”

Health General § 13-706

What Guardianship Means

Even if someone has had a guardian appointed, they will still be able to vote in elections unless “a court has specifically found that the individual cannot communicate, with or without accommodations, a desire to participate in the voting process.”

Elections § 3-102

Case Study

- Mary Jones, now 18, has been an active member of her community.
- She has just graduated from high school and frequently acted in school plays.
- She had an individualized education program (IEP) during her time in school based on her intellectual disability.

Case Study

- Mary's parents are concerned about her ability to make health care decisions. They wonder whether they should ask a court to appoint them as her guardians.
- Her doctor says that she needs a guardian because she has Down Syndrome.
- She still lives with her parents while she goes to a special program for students with disabilities at the community college.

Case Study

- Does Mary have capacity?
- What else do you need to know?
- Does she need a guardian?
- Ethical considerations?
- Possible solutions or next steps?

Case Study

- Simply because Mary has Down Syndrome does not mean that she can not make decisions. When in doubt, get a second opinion from a mental health professional who has expertise in evaluating individuals with developmental disabilities.
- If she is willing, Mary could execute a power of attorney and/or an advance health care directive, which could make appointing a guardian of the property and person unnecessary.

Case Study

- Lisa Adams is a 21 year-old senior at a local university. She does well academically and has been on the school's dance team since her freshman year.
- Lisa was diagnosed with bipolar disorder during her senior year in high school. She has generally been stable with medication but has occasional setbacks that make it hard for her to study and work consistently.

Case Study

- Lisa and her parents would like to plan for the future so that Lisa will have the support she needs going forward, especially after her parents have passed away.

Case Study

- Although Lisa has a serious emotional disability, she will most likely not need to have a guardian appointed on her behalf.
- Most individuals with emotional disabilities are capable of making an informed decision about who they would like to make health care decisions and financial decisions on their behalf should they lose their decision making capacity.

Case Study

- Specifically, Lisa may benefit from executing an advance health care directive.
- She may also want to execute an advance directive for mental health services in which she can designate an agent to make mental health care decisions for her, and can designate her preferred mental health providers and preferred medications.

Case Study

- She can give her parents power of attorney for financial and property transactions.
- Her parents can be appointed her representative payees for any government benefits she may receive.
- Her parents could also establish a special needs trust on her behalf.

Case Study

- It should be noted that guardians do not have the authority to commit the person with a disability to a psychiatric facility without an involuntary commitment proceeding.

Helpful Forms

A sample Advance Health Care Directive is available at <http://dhmh.maryland.gov/yourrights/docs/advdirform.pdf>

A Sample Advance Mental Health Directive is available at <http://dhmh.maryland.gov/mha/Documents/Advance%20Directive%20for%20Mental%20Health%20Treatment%20july%202008.pdf>

Helpful Forms

Many guardianship forms are available at <http://mdcourts.gov/family/formsindex.html>

Guardianship Handbook

A handbook co-edited by Ellen Callegary, *Guardianship and Its Alternatives: A Handbook on Maryland Law*, is available at <http://www.callegarylaws.com>

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