

Planning and Communicating Health Care Decisions and Surrogate Decision-Making

As we live longer, we face an increased likelihood of physical or mental disability. In our [last article](#), we focused on financial management planning alternatives for persons confronted with potential health crises and incapacity. While financial management is important to assure the resources to carry through life and to pass on to loved ones, planning for nonfinancial issues may have even greater personal impact. Whatever your resources, they may be ineffective if you don't properly plan and designate future caretakers who will make the types of personal and health decisions you want made. In this article, we address how personal health care decisions can be legally and effectively communicated.

Advance Directives for Health Care

Under common law, absent a public interest otherwise, we each have a right to determine who can touch our body or not touch our body at any given time. For the purposes of deciding among health care alternatives, Maryland law provides that “[a]ny competent individual may, at any time, make a written or electronic advance directive regarding the provision of health care to that individual, or the withholding or withdrawal of health care from that individual. Notwithstanding any other provision of law, in the absence of [such] a validly executed or witnessed advance directive, any authentic expression made by an individual while competent of the individual's wishes regarding health care for the individual shall be considered.” Note however that, for your wishes to be considered when you can no longer communicate, they should be spelled out in writing so that they can be read by health care providers without involvement of a court, or, if court involvement becomes necessary, so that the court has proof upon which to make a decision.

As Justice William Brennan noted in his dissent in the Supreme Court's landmark 1990 *Cruzan* decision, “Medical technology has effectively created a twilight zone of suspended animation where death commences while life, in some form, continues. Some patients, however, want no part of a life sustained only by medical technology. Instead, they prefer a plan of medical treatment that allows nature to take its course and permits them to die with dignity.” If you wish to limit or eliminate artificial measures to prolong your life, you will want to execute a type of advance directive called a **“Living Will Declaration”**. In effect, a [Living Will](#) Declaration is an advance directive that, in certain defined situations, health care should be withheld or withdrawn. Maryland law facilitates such communication by defining common instances for such decisions in the event that you suffer a “persistent vegetative state”, “end-stage condition”, or “terminal condition” so that health care providers have a common understanding as to what these terms mean. While you may wish to specify other situations where

you don't want your life prolonged by artificial measures (such as if you become a paraplegic) or you may wish to modify the Maryland definitions (such as to define the word "imminent" in the State's definition of "terminal condition"), these definitions become a good starting point for expressing your intent about end-of-life treatment in a manner that others will understand.

In addition to living will declarations, Maryland and other states now require health care facilities to maintain a "**Medical Order for Life-Sustaining Treatment**" (commonly known as a "MOLST") as a part of a patient's medical records. A MOLST is a written medical order signed by a physician, physician's assistant, or nurse practitioner concerning the use of life-sustaining procedures, use of medical tests, patient transfers from a hospital to a nonhospital setting, and other appropriate treatment matters across various health care settings. By law, the MOLST is supposed to be consistent with the patient's known decisions and advance directives (and the decisions of his or her health care agent or surrogate decision maker) so it is important that you provide copies of all of your advance directives for care to your health care facility upon entry. It is generally a good idea to review and prepare a MOLST form ahead of time to go over the decisions to be made at the health care facility's MOLST interview. (You can download one of these forms from our website at <http://thewrightfirm.net/forms/>.) My experience is that if a competent patient has completed a reasonably contemporaneous MOLST worksheet, that will be the basis of the one ultimately entered at the health care facility. Such a completed written MOLST worksheet is itself also an effective written advance directive regarding your wishes about your health care or the withholding of health care.

Advance Directives for Surrogate Health Care Decision-Making

Since it is virtually impossible to anticipate all the potential health care decisions that might need to be made were one to become incapacitated, it is important to designate a surrogate to make those decisions in the manner that you would want them to be made. In this regard, Maryland law authorizes "[a]ny competent individual . . . , at any time, [to] make a written or electronic advance directive appointing an agent to make health care decisions for the individual under the circumstances stated in the advance directive." When making an advance directive to appoint a health care surrogate, be sure to designate alternative agents to act in this capacity in case one designated surrogate is unable or unwilling to act. Both primary and alternative health care agents may be appointed to act together as co-agents, individually by themselves, or consecutively in a line of succession.

Unless otherwise provided in the document, an advance directive by law only becomes effective when the declarant's attending physician and a second physician certify in writing that the patient is incapable of making an informed decision. "Incapable of making an informed decision" means the inability of an adult patient to make an informed decision about "the provision, withholding, or withdrawal of a specific medical treatment or course of treatment because the patient is unable to understand the nature, extent, or probable consequences of the proposed treatment or course of treatment, is 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.” Know therefore that, in naming a health care agent, you are not giving up the right to make your own decisions. You retain that authority until two doctors determine that you can no longer make informed decisions for yourself or unless you designate other circumstances as to when you want your nomination to become effective. Should you choose to do so, you may designate persons (such as family members) other than physicians to decide when the designation takes effect.

If you fail to designate who you want to make health care decisions for you when you can no longer make informed decisions and the need for a surrogate arises, Maryland law provides a priority list for who is entitled to be your decision-maker in this order: your guardian, if one has been appointed; your spouse or domestic partner; an adult child; your parent; your adult brother or sister; or another friend or relative who demonstrates specific facts and circumstances that show regular contact and familiarity with your activities, health, and personal beliefs. Individuals in one particular class may be consulted to make a decision only if all individuals in the next higher priority are unavailable. Since the first priority class is a guardian appointed by a court, it is generally always better to name who you want to serve in an advance directive rather than to leave such a court appointment to chance.

HIPAA Authorizations for Release of Protected Health Information

In 1996, Congress passed a law entitled the [Health Insurance Portability and Accountability Act](#) (“HIPAA”) that limits the use, disclosure, or release of a patient’s “individually identifiable health information”. While the main purpose of HIPAA was to help consumers maintain health insurance coverage as they changed locations and jobs, Congress was concerned that in doing so, it was increasing the likelihood for inadvertent disclosures of private health information as people moved around. Congress decided that such disclosures could only be avoided if harsh penalties were imposed on health care providers who released individually identifiable health information without explicit patient authority. HIPAA’s success and the resulting provider reluctance to release health information to persons other than their actual patient make it important that, in addition to declaring who you want to be your surrogate decision-makers, you authorize them to obtain individually identifiable health information about you. A written Authorization for Release of Protected Health Information (or “HIPAA Waiver”) is a means to make sure that your designated surrogate can obtain the information necessary to make meaningful decisions. Very often, the designated surrogate will need to get health care information about you from many different sources, not all of whom know your particular current circumstances. A HIPAA Waiver is a proactive approach to making sure such health care information will be available to your health care agent from sources who otherwise fear being hit with a large fine for disclosure. In addition, you may wish to allow family members to have individually identifiable health information about you to provide them with information about inherited health conditions. Therefore, make sure that your HIPAA Waiver names both your designated health care agents and such family members and that the HIPAA Waiver survives your death.

The common thread here is that federal and Maryland law provide for and encourage you to plan and communicate your wishes in advance about how your personal health care decisions should be made if you are incapable of doing so at a later time. We encourage you to think about and make these decisions now rather than to risk never addressing them. As you can see, there are many tools available to document your wishes in writing so you can make sure they are available and understood when the need arises. As always, I will be happy to discuss your future health care wishes with you and how available legal documents can insure that your expectations will be carried out.