

# Who Can Make Health Care Decisions for Another

## *Defining health care proxies under Maryland law*

A health care proxy is the catchall word for anyone who makes medical decisions on behalf of a patient. Under Maryland law, there are three kinds of health care proxies.

- A health care agent
- A surrogate
- A guardian

## Health care agent

A health care agent is someone appointed by an individual to make health care decisions. Usually, the health care agent steps in after the individual has lost the ability to make these decisions personally.

Most health care agents are appointed through a written document called an advance directive. Sometimes people call this a durable power of attorney for health care, but it is legally binding regardless of the name. A health care agent may also be appointed by an oral witnessed statement to a physician.

A health care agent may be a family member or someone else. The agent has authority to see that doctors and other health care professionals give the type of care the person would want. The agent should advocate for the patient.

An advance directive appointing a health care agent is not the same as a living will. A living will sets out directions on medical treatment in advance and does not appoint an agent, although a living will may be combined with appointment of an agent through an advance directive.

## Surrogate decision maker

If no health care agent is available and the patient can no longer make health care decisions, Maryland law dictates which family member or friend can make those decisions. This person is called a surrogate decision maker, or surrogate.

Unless a court has already named a guardian, the patient's spouse has the first right to be a surrogate. If there is no spouse, the patient's domestic partner may decide. If there is no spouse or domestic partner available and willing to act, then an adult child may decide, followed by a parent, then an adult sibling. If none of these relatives is available, a friend or more distant relative may act after signing a statement about regular contact and familiarity with the patient's beliefs.

Pending divorce, a spouse may not make decisions if the spouse and patient have entered into a separation agreement or if one of them has filed for divorce, unless the patient later appoints the spouse as health care agent. A person also may not make decisions if that person is the subject of an interim, temporary, or final protective order and the patient is eligible for relief under the order.

## Guardian of the person

Sometimes a court names a guardian of the person to make health care and other decisions for individuals. Guardianship might be necessary for consent to a specific procedure, ongoing medical care, or placement in

a safe living environment. Guardians usually need specific court approval to withhold or withdraw life sustaining procedures.

## Authority of a health care proxy

A health care agent's authority depends on what the person's advance directive says. The agent's duties begin when the individual loses the ability to make health care decisions, or in rare cases when the person chooses to let the agent decide even though they still could. If no process is identified, two physicians should certify incapacity, unless the person is unconscious or unable to communicate, in which case a second physician is not required.

Most advance directives give the health care agent authority to make any and all decisions the patient would make if able. This includes the following.

- Receiving the same medical information the patient would receive
- Conferring with the medical team
- Reviewing medical records
- Asking questions and getting explanations
- Discussing treatment options
- Requesting consultations and second opinions
- Consenting to or refusing medical tests or treatments, including life sustaining treatment
- Authorizing a transfer to another doctor or institution, including another type of facility such as a hospital or skilled nursing home

A surrogate's authority is generally the same, except that a surrogate may not make a decision about sterilization or treatment for a mental disorder. Additional physician certifications are required when decisions involve life sustaining procedures. If surrogates at the same level disagree, a patient care advisory or ethics committee at a hospital or nursing home can help resolve the situation.

A guardian's duties depend on the court's order and Maryland law. A guardian often is responsible for making health care decisions generally and assuring that the person is living in a safe environment, but the court may limit this authority. A guardian may need court approval for procedures involving a substantial risk to life, including a decision to withhold or withdraw life sustaining procedures.

No matter how someone becomes a proxy, decisions about life sustaining treatment should not be influenced by whether the patient has had a long term disability or is low income.

Revised by Assistant Attorney General Paul Ballard on February 24, 2023.