

## 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 a legally binding document regardless of what it is called.) A health care agent also may be appointed by an oral, witnessed statement to a physician. This is just as valid as a written advance directive.

A health care agent may be a family member or someone else. The agent has the 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 allows a person to set out directions on medical treatment in advance. It is to be followed when the person has a terminal illness, is in a persistent vegetative state, or in the end-stage of a serious illness and can no longer speak for themselves. A living will does not appoint an agent. However, 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 health care decisions. This person (or sometimes more than one) is called a **surrogate decision maker**, or **surrogate** for short.

Unless the court already has named a guardian to make health care decisions (see below), the patient’s spouse has the first right to be a surrogate and make these decisions on the person’s behalf. If there is no spouse, the patient’s domestic partner would make these decisions. If there is a spouse or domestic partner who is unavailable or unwilling to

make decisions, then an adult child of the patient (or children, if more than one is available) can decide. If there is no adult child, then a parent, followed by an adult sibling can decide. If none of these relatives is available, a friend or more distant relative may make decisions. In this case, the friend or relative needs to sign a statement about his or her regular contact with the patient and familiarity with the patient's health and personal beliefs.

Pending divorce, a spouse may not make decisions for the patient if the spouse and the patient have entered into a separation agreement or one of them has filed for divorce, unless the patient later decides to appoint their spouse as their health care agent. A person also may not make decisions for the patient if the 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***, or ***guardian*** for short, to make health care and other decisions for individuals. Guardianship might be necessary to get consent for a specific medical procedure, for ongoing medical care, or for placing a person in a safe living environment. Guardians usually need specific court approval to withhold or withdraw life-sustaining procedures.

### **WHAT IS THE AUTHORITY OF A HEALTH CARE PROXY?**

A ***health care agent's*** authority depends on what the person's advance directive says. A health care agent's duties begin when the individual loses the ability to make health care decisions on their own (or, rarely, when the person wants to let the agent decide even though they still could). This is determined by a process outlined in the advance directive. If no process is identified, two physicians should certify that the person is incapable of making decisions concerning their own health care. (If the person is unconscious or unable to communicate by any means, the certification of 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:

- 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 the same, except that a surrogate may not make a decision about sterilization or treatment for a mental disorder. Also, if a decision is against the use of life-sustaining procedures, the patient's doctor must certify that the patient is in one of three situations set out in the law: terminal condition, end-stage condition, or persistent vegetative state. For a terminal condition or an end-stage condition, a second doctor or nurse practitioner must also certify that the patient is in one of those conditions. For a persistent vegetative state, a second doctor with specialized expertise (a neurologist or neurosurgeon as examples) must also certify that the patient is in a persistent vegetative state. 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 on 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 to seek court approval for medical procedures that involve a substantial risk to the person's life, including a decision to withhold or withdraw life-sustaining procedures. A guardian must file an annual report with the court about how the patient is doing, whether the patient's condition has changed, and whether any changes in the court order are necessary.

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  
February 24, 2023