

# Office of the Attorney General

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## SUMMARY OF MARYLAND HEALTH CARE DECISIONS ACT

### I. Informed Consent

The Health Care Decisions Act does not affect the doctrine of informed consent, which applies to treatment issues in the current clinical context. A patient with capacity has the right to decide these issues, including whether life-sustaining procedures should be used, whatever condition he or she is in.

### II. Definition of Medical Conditions Specified in the Act

***Terminal Condition:*** An incurable condition that makes death “imminent.” The term “imminent” is not defined, so the determination is left to reasonable medical judgment.

***Persistent Vegetative State:*** An irreversible loss of consciousness, despite reflexive nerve and muscle activity.

***End-Stage Condition:*** An advanced, progressive, irreversible condition caused by injury, disease, or illness: (1) that has caused severe and permanent deterioration indicated by incompetency and complete physical dependency; and (2) for which, to a reasonable degree of medical certainty, treatment of the irreversible condition would be medically ineffective.

### III. Advance Directives

The Act allows an adult (or an emancipated minor) who has decision-making capacity to deal with future health care issues by any of the following three methods:

*written instructions* authorizing the provision, withholding, or withdrawal of health care, sometimes called a decisional directive or living will;

*a written appointment of an agent* to make health care decisions for the patient, sometimes called a proxy directive or durable power of attorney for health care; and

- *an oral statement to a physician* leaving instructions or appointing an agent.

***Legal Requirements:*** To meet the Act’s requirements, a *written advance directive* must be witnessed by two witnesses; neither witness may be the person’s health care agent, and at least one witness must have no financial interest in the person’s death. It need not be notarized. An *oral advance directive* must be made to a physician with one witness present, documented in the patient’s medical record, and signed and dated by the physician and the witness. If a health care agent is named, the health care agent may

not be an employee, owner, or operator of a health care facility where the patient is being treated, unless the agent would also qualify as a surrogate.

**Forms:** Individuals may prepare documents worded as they choose. The Act includes two **optional** forms: (1) a more traditional *living will form*, allowing individuals to state whether they want life-sustaining procedures provided, withheld, or withdrawn if they are in either a terminal condition or a persistent vegetative state; and (2) a broader *advance directive form*, allowing individuals to appoint a health care agent, leave instructions for any type of medical care, or both. Using the statutory advance directive form, individuals may specify whether or not they want life-sustaining procedures if they are in a terminal condition, persistent vegetative state, or end-stage condition. Both forms allow individuals to make specific decisions regarding the provision, withholding, or withdrawal of artificial nutrition and hydration. Both forms also allow an individual to direct that all available medical treatment be given in accordance with accepted health care standards.

**Implementing Instructions:** If an advance directive does not name a health care agent but does instruct that life-sustaining procedures be withheld or withdrawn in the event of a terminal or end-stage condition or persistent vegetative state, the advance directive may be implemented only if the patient's attending physician and a consulting physician certify, to a reasonable degree of medical certainty, that the patient is in one of these three conditions.

**Authority of Agent:** A health care agent's authority is defined by the individual creating the advance directive. Unless the advance directive provides otherwise, a health care agent has authority to decide about life-sustaining procedures and, unlike a surrogate decision maker, may decide to forgo life-sustaining procedures even if the patient has not been certified to be in one of the Act's three specified conditions. Unless the advance directive provides otherwise, an agent is to make a decision that is consistent with the patient's wishes or, if those wishes are unknown or unclear, that is in the patient's best interests. If the individual has given unambiguous instructions about life-sustaining procedures in the same or another legally valid advance directive, the agent is obliged to carry out those instructions.

**Pregnancy:** Both forms have space for a woman to say whether pregnancy would have any effect on her decision about life-sustaining procedures.

**Organ Donation:** Both forms may be used to donate organs or tissue.

#### **IV. Surrogate Decision Making**

If a patient has not picked a health care agent and is no longer able to make health care decisions personally, a surrogate may do so. Surrogates are listed in priority order; individuals in a particular class may be consulted only if all individuals in the next higher class are unavailable: (1) a guardian of the person, if one has been appointed; (2) the patient's spouse; (3) an adult child of the patient; (4) a parent of the patient; (5) an adult brother or sister of the patient; or (6) a friend or other relative of the patient who describes, in an affidavit, enough regular contact with the patient so as to make the surrogate familiar with the patient's activities, health, and personal beliefs.

**Disputes Among Surrogates of Same Class:** A health care provider must refer these disputes to a patient care advisory committee (often called an “ethics committee”). The patient’s physician may follow the recommendation of the committee without risking liability for suits based on lack of consent or authorization.

**Standards for Surrogates:** A surrogate is to make a decision that is consistent with the patient’s wishes or, if those wishes are unknown or unclear, that is in the patient’s best interests. The Act includes factors for the surrogate to consider in determining the patient’s wishes. It also includes a definition of “best interest.”

**Surrogates and Life-Sustaining Treatment:** The Act authorizes a surrogate to consent to the withholding or withdrawal of life-sustaining procedures if the patient’s attending physician and a consulting physician certify, to a reasonable degree of medical certainty, that the patient has a terminal or end-stage condition or is in a persistent vegetative state. A surrogate may not consider a patient’s pre-existing, long-term mental or physical disability in making a decision to withhold or withdraw life-sustaining procedures. A surrogate who is a guardian usually must obtain the court’s permission to authorize the withholding or withdrawal of life-sustaining procedures.

## **V. Patient’s Plan of Care Form**

Effective October 1, 2005, long-term care facilities are to offer each new resident (or in case of incapacity, whoever is making health care decisions for the resident) the opportunity to state preferences about currently relevant end-of-life issues on a Patient’s Plan of Care form. Use of the form is optional in other health care facilities. The form is neither a new advance directive nor a physician’s order, but rather documentation of a care planning discussion. More information about the Patient’s Plan of Care form is available on the Attorney General’s web site.

## **VI. Patient Safeguards**

A health care provider who believes that an instruction to withhold or withdraw life-sustaining procedures from a patient is inconsistent with generally accepted standards of patient care must bring the matter to a facility’s patient care advisory committee or file a petition in court.

Family members and qualified surrogates may file suit to enjoin allegedly unlawful actions. These cases are to be given expedited consideration by the courts.

A person loses immunity for decisions involving life-sustaining procedures if the person did not comply with the Act in good faith.

Mercy killing, euthanasia, and assisted suicide are *not* authorized under any circumstances. Criminal penalties are provided for destruction, concealment, or forgery of an advance directive document.

## **VII. Medically Ineffective Treatment and Transfers**

**Physicians’ Authority:** A physician need not provide treatment that the physician believes to be medically ineffective or ethically inappropriate. Medically ineffective treatment is defined as treatment

that, as certified by the attending and consulting physicians to a reasonable degree of medical certainty, will neither prevent or reduce the deterioration of the health of an individual nor prevent the impending death of an individual.

**Transfers:** If a health care provider intends not to comply with the instruction of a surrogate or agent, the provider must inform the person giving the instruction of that decision and inform the person that he or she may request a transfer to another health care provider. Pending the transfer, a health care provider must comply with a request for treatment made by a competent patient, surrogate, or agent if failure to comply would result in the death of the patient.

### **VIII. Outpatient DNR Orders**

The Maryland Institute for Emergency Medical Services Systems has developed a palliative care protocol for use by emergency services personnel and makes a special form available for physicians to record outpatient DNR orders. Only this specific order form, a copy of it, or an approved bracelet will be acknowledged by emergency services personnel. Other health care professionals may withhold or withdraw treatment when they see an EMS/DNR order or bracelet.

### **IX. Legal Immunity**

Health care providers who take actions based on the Act are immune from claims that the actions were unauthorized. Health care agents and surrogates who follow the Act when they authorize the withholding or withdrawal of life-sustaining procedures are immune from liability.

### **X. Additional Information**

The text of the Health Care Decisions Act, additional explanatory material about it, advance directive forms and related materials, the Patient's Plan of Care form and related regulations and explanatory guides, and numerous legal opinions and advice letters may be found on the Attorney General's web site. The home page is: [www.oag.state.md.us](http://www.oag.state.md.us). From there, click on "Health Policy."

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