Legal Issues to Consider Throughout Your Family Member's Life

The Arc Montgomery County

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Making Plans to Care for Family Members

There are several questions you should be ready to answer:

•Where will he live? On his own, with supervision, or in a group home?

•What will she do during the day? Will she have a job and, if so, will she need training or supports to be successful?

•How can you protect your family member from exploitation?

Making Plans to Care for Family Members

Agencies that may help in getting services and supports for family members:

- Developmental Disabilities Administration
- Mental Hygiene Administration
- Division of Rehabilitative Services
- Core Service Agencies (local agencies responsible for providing mental health services at the county level)
- The Arc Montgomery County

Guardianship and Health Care Planning

- Informed Consent for Health Care
- Guardianships
- Durable Powers of Attorney
- Advance Health Care Directives
- Advance Directives for Mental Health Services

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.

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

Guardianship

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

Guardianship

Parents or other "interested persons" can file a request – a "petition" - with the court, asking that they be appointed the guardians of their child with a disability when he or she turns 18.

(Maryland Code, Estates and Trusts Article Section 13-705 and Maryland Rule 10-201).

When to Appoint a Guardian

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(.)"

(Maryland Code, Estates and Trusts Article Section 13-705(b)).

When to Appoint a Guardian

What are "decisions concerning his person"? May include decisions about:

- Health care
- Food

Shelter

(Maryland Code, Estates and Trusts Article Section 13-705(b)).

When to Appoint a Guardian

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

(Maryland Code, Estates and Trusts Article Section 13-705(b)).

Appointing A Guardian

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

(Maryland Code, Estates and Trusts Article Section 13-705(c) and Maryland Rule 10-202).

Appointing A Guardian

The certificates must be from:

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

(Maryland Code, Estates and Trusts Article Section 13-705(c)(2) and Maryland Rule 10-202(a)).

Appointing A Guardian

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

(Maryland Code, Estates and Trusts Article Section 13-705(c)(3) and Maryland Rule 10-202(a)).

Appointing A Guardian

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

(Maryland Code, Estates and Trusts Article Section 13-705(d) and Maryland Rule 10-106).

Appointing A Guardian

That attorney should meet with the person with a disability.

After the meeting, the attorney should either recommend that the court grant the petition, or explain why the person does not need a guardian.

Appointing A Guardian

If parents are requesting guardianship, they will likely have to pay for the court-appointed attorney.
(Maryland Rule 10-107(a)).

Appointing A Guardian

The hearing on a petition for guardianship may be held as a jury trial. However, the attorney for the "alleged disabled person" can waive the right to a jury trial.

The hearing should also be closed and confidential, unless a court decides to hold an open hearing "for good cause shown."
(Maryland Code, Estates and Trusts Article Section 13-705(e) and Maryland Rule 10-205).

Appointing A Guardian

The court or a jury will hear testimony, review the petition, the certificates, and the court-appointed attorney's recommendation.

Then a judge or a jury will decide whether the person with a disability needs a guardian.
(Maryland Code, Estates and Trusts Article Section 13-705(e) and Maryland Rule 10-205).

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

(Maryland Code, Estates and Trusts Article Section 13-708(d)

Appointment of Guardian

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.

(§13-706, Maryland Code, Estates and Trusts Article)

Alternatives to Guardianship

Before pursuing guardianship, it is important to look at the other ways that state law supports decision making for an individual with a disability.

Alternatives to Guardianship

- Power of Attorney
- Advance Healthcare Directive
- Advance Directive for Mental Health Services

Power of Attorney

A Power of Attorney agreement is provided for by state law
(Maryland Code, Estates and Trusts Article, § 17-101)

Power of Attorney

Power of Attorney documents are not restricted to adults with disabilities.

Anyone can have a Power of Attorney, making sure that they have appointed someone they trust to handle their affairs if they ever need it.

Power of Attorney

In a Power of Attorney document, the "principal" – the person signing the document – gives someone else power to make legal decisions.

The person who is named in the document to make those legal decisions is the "attorney in fact" or the "agent."

(Maryland Code, Estates and Trusts Article, § 17-101)

Durable Power of Attorney

Instead, most Power of Attorney documents say that the agent has power as soon as the principal signs the document and that it continues in force even after "subsequent incapacity or disability."

(Maryland Code, Estates and Trusts Article, § 17-105)

"Durable" Powers of Attorney

Under Maryland law, "when a principal designates another as an ... agent by a power of attorney in writing, it is a durable power of attorney unless otherwise provided by its terms."

(Maryland Code, Estates and Trusts Article, § 17-105(c))

What Power Does An Agent Have?

It can be as broad or as narrow as the person signing the Power of Attorney wants.

What Power Does An Agent Have?

Some Powers of Attorney may include:

- Collecting money for the principal
- Depositing checks for the principal
- Paying the principal's debts
- Opening the principal's mail
- Taking out loans for the principal

Statutory Form

State law includes two Power of Attorney forms. These forms are optional, not required.

(Maryland Code, Estates and Trusts Article, §§ 17-202 and 17-203)

Honoring a Power of Attorney

State law also provides that "A person may not require an additional or different form of power of attorney for any authority granted in a statutory form" and provides penalties if anyone refuses to honor the statutory form.
(Maryland Code, Estates and Trusts Article, § 17-104)

Advance Healthcare Directive

An Advance Healthcare Directive authorizes the person you choose to make health care decisions for you.
(Maryland Code, Health-General Article, § 5-602).

Advance Healthcare Directive

Like Powers of Attorney, Advance Healthcare Directives are not restricted to adults with disabilities.

Advance Healthcare Directive

A Directive allows the person signing it to choose a health care "agent." The agent is empowered to make decisions relating to when health care is provided, and when it is withheld or withdrawn.
(Maryland Code, Health-General Article, § 5-601).

Advance Healthcare Directives

Unlike a Power of Attorney, however, Advance Healthcare Directives only become effective when physicians certify that the patient is incapable of providing informed consent.
(Maryland Code, Health-General Article, § 5-602(e)).

Advance Healthcare Directives

For a healthcare 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.
(Maryland Code, Health-General Article, § 5-606(a)).

Advance Healthcare Directives

The physicians' certifications must be based on personal examination of the patient.

If the patient is unconscious, only one physician's certificate is required.

(Maryland Code, Health-General Article, § 5-606(a)).

When Is Someone "Competent"?

Maryland law defines a "competent individual" as a person:

- At least 18, who has not been determined to be incapable of making an informed decision,
- or Under 18 who has been determined to have the same capacity as an adult to consent to medical treatment, and who has not been determined to be incapable of making an informed decision

(Maryland Code, Health-General Article, § 5-601(f)).

Incapable of Making an Informed Decision

"The inability to make an informed decision about the provision, withholding, or withdrawal of a specific medical treatment or course of treatment."

(Maryland Code, Health-General Article, § 5-601(m)).

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."
(Maryland Code, Health-General Article, § 5-601(m)(2)).

What Power May A Health Care Agent Have?

Some directives may give agents the power to:

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

What Duties May A Health Care Agent Have?

Advance Healthcare Directives can – and should – be tailored to the patient's desires.

The appointed agent must comply with those desires, if they are in the Directive.
(Maryland Code, Health-General Article, § 5-605).

Advance Mental Health Directive

Like an Advance Healthcare Directive, an Advance Mental Health Directive is created by state law to let patients decide, ahead of time, what mental health services they want if and when they become incapable of providing informed consent.
(Maryland Code, Health-General Article, § 5-602.1).

Advance Mental Health Directive

A Mental Health Directive should name an "agent" that the person wants to speak for his or her interests.
(Maryland Code, Health-General Article, § 5-602.1).

Advance Mental Health Directive

A 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

(Maryland Code, Health-General Article, § 5-602.1(d)).

Health Surrogates

Even without a healthcare directive, state law allows certain people to make health care decisions for family members or close friends.
(Maryland Code, Health-General Article, § 5-605).

Health Surrogates

Before a health surrogate can be appointed, the same 2 physician certifications are required that are necessary for an advance directive.

Health Surrogates

The law looks for surrogates in this order:

1) A guardian for the patient;
2) Patient's spouse or domestic partner;
3) Patient's adult child;
4) Parent of the patient
5) Adult sibling of the patient

(Maryland Code, Health-General Article, § 5-605(a)(2)).

Health Surrogates

Finally, if no one else is available, a "health surrogate" could be a friend or other relative of the patient who meets certain requirements.
(Maryland Code, Health-General Article, § 5-605(a)(2)(vi)).

Health Surrogates

The law requires that person to:

a) Be competent, and
b) Present the doctor with an affidavit, showing he or she has maintained regular contact with the patient sufficient to be familiar with the patient's beliefs.

(Maryland Code, Health-General Article, § 5-605(a)(3)).

Health Surrogates

A surrogate is responsible for making decisions that, in their experience with the patient, best represent the patient's wishes.
(Maryland Code, Health-General Article, § 5-605(c)).

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