ALTERNATIVES TO GUARDIANSHIP FOR UNREPRESENTED HOSPITAL PATIENTS

Who are unrepresented hospital patients?

Unrepresented hospital patients are those who have been certified as lacking decision-making capacity and have no legally authorized relatives or friends who can make medical treatment decisions for them. National estimates suggest between 70,000 and 330,000 patients in the U.S. may be unrepresented. The numbers are expected to rise due to demographic shifts including aging and increasing rates of dementia.

WHY IS THIS A PROBLEM?

- Current Maryland law requires hospitals to apply to the courts for a guardian for these patients. This process can take weeks or months.
- Evidence shows that lack of a decision-maker causes patients to face risks of overtreatment, undertreatment, or treatment inconsistent with their preferences and values.
- Delaying common procedures such as tracheostomy or dialysis can lead to worsened clinical outcomes and prolonged suffering.
- Health care practitioners experience moral distress as they witness patients receiving inadequate care.
- Extended hospital stays reduce hospital efficiency and bed availability, including ICU access.
- Courts and advocates warn that guardianship is a rights-restrictive, costly and lengthy process.

PROPOSED SOLUTION

- **Create a hospital-based surrogate committee:** Amend the Maryland Health Care Decisions Act (HCDA) to authorize a "surrogate committee" to make medical treatment decisions for unrepresented patients.
- **Structured, balanced membership:** Committee must include four hospital members (physician, nurse, social worker or clergy, and ethics committee member) and three community members (patient advocate, former patient or caregiver, disability/aging advocate or person with lived experience).
- **Clear voting rule:** Any consent to provide, withhold, or withdraw treatment must include at least two hospital members and two community members voting in favor.
- **Scope limited to treatment decisions:** The committee cannot authorize discharge; its authority applies only while the patient is hospitalized.
- **Training, documentation, and reporting:** Members complete training; decisions are documented in the medical record; hospitals prepare annual report that includes how often committees were used and outcomes in each case.

GUIDING PRINCIPLES

- **Fairness:** Recognizes due process and patient rights; ensures diverse representation, objective decision-making, and uses less restrictive alternative to guardianship.
- **Efficiency:** Enables timely, medically appropriate decisions faster than guardianship allows.
- **Dignity and respect:** Honors patients known wishes if available, otherwise considers patients best interests and guards against discrimination.
- **Avoid harm:** Prevents delays that increase risks and ensures benefits outweigh burdens.

LEGAL FRAMEWORK: INCORPORATION INTO HEALTH CARE DECISIONS ACT

- **Capacity determination:** Attending physician plus a second clinician must certify incapacity for the specific decision.
- **Exhaust surrogate options:** Committee acts only after reasonable inquiry confirms no available health care agent or surrogate.
- **Decision standards:** Committee applies substituted judgment based on known preferences; if unknown, uses the statutory best interest standard (clinical effects, pain, dignity, life expectancy, prognosis, risks/benefits, and relevant beliefs/values).
- **Life-sustaining treatment limits:** Withholding/withdrawing life-sustaining procedures requires certification that the patient is terminally ill, in a persistent vegetative state, or has an end stage condition.
- **Good faith protections:** Health care practitioners and committee members acting in good faith under the statute are protected from civil/criminal liability related to consent or authorization.

This proposal was developed by a working group including representatives of the Maryland Healthcare Ethics Committee Network, Maryland hospitals and nursing homes, government agencies, as well as aging and disability rights advocates and experts. For more information contact: Diane Hoffmann, Director, Maryland Healthcare Ethics Committee Network, at diane.e.hoffmann@gmail.com or for a more detailed version of the proposal go to our website.