Larry D. Weiss, M.D., J.D. ©2013
lweiss@smail.umaryland.edu

THE RIGHT TO DIE
AND CONSENT AT THE END OF LIFE

Disclaimer: This information does not constitute legal advice, is general in nature, and because individual circumstances differ it should not be interpreted as legal advice. The speaker provides this information only for Continuing Medical Education purposes.

I. CASE LAW

A. In re Quinlan, 355 A.2d 647 (NJ 1976). Karen Ann Quinlan, a 21 year old woman, became apneic after consuming alcohol and pills. She remained deeply comatose, her life sustained by a ventilator and feeding tube. She had "no reasonable hope of recovery." Her doctors and the hospital refused to comply with her father's decision to end life supports.

The court held (1) Karen's father may assert her right of privacy on her behalf. (2) This would not constitute a homicide, as she would die from "existing natural causes," and her death would occur through the exercise of a constitutional right. (3) Her father, as her legal guardian, may transfer her care to other physicians. If they feel she has no reasonable chance of recovery, they may consult with an ethics committee and withdraw the "present life support system."

Karen's father directed discontinuation of the ventilator, but continuation of the tube feedings. She died nine years later.

B. Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261 (1990). Nancy Beth Cruzan, a 23 year old woman, suffered a hypoxic encephalopathy after a motor vehicle accident. The paramedics found her apneic, face-down in a muddy ditch. She never regained consciousness. Several years later, her parents requested termination of her feedings. The physicians and hospital refused. Missouri law requires clear and convincing evidence of the patient's preference before a surrogate decision-maker may order the termination of life support for a patient with a terminal and irreversible condition.

The Court held Missouri's law was constitutional. The Cruzans did not meet their burden of proof. The state has an overriding responsibility to protect human life.

In addition to its holding, the Court made other important statements:

- Patients have a right to refuse treatment based on the common-law right to informed consent.
- A competent person has a liberty interest to refuse medical care.
- A state does not have to accept the "substituted judgment" of close family members in the absence of substantial proof that their views

reflect the patient's views. However, the Court did appear to accept the standing of surrogate decision makers.

C. Vacco v. Quill, 521 U.S. 793 (1997). Several physicians and their terminally ill patients sued the New York Attorney General to overturn the state law prohibiting assistance of suicide. They claimed the law violated the Equal Protection Clause of the U.S. Constitution, as it unfairly accorded different treatment to competent terminally ill patients who wish to take a lethal overdose, compared to those who wish to remove life-support systems.

The Court held that New York's law prohibiting assisted suicide does not violate the Equal Protection Clause. The law does not treat people differently. All competent patients may refuse unwanted life-saving medical, but no one is permitted to assist a suicide. The law is rationally related to a legitimate state interest.

D. Washington v. Glucksburg, 521 U.S. 702 (1997). A very similar fact pattern as in Vacco, but here the respondents evoked the Due Process Clause, claiming the Washington state law banning assisted suicide violated fundamental rights of terminally ill patients, without the due process of law. The Court disagreed, holding that the Washington law did not violate due process, as suicide is anot a fundamental right. No such right existed in our nation's history, legal traditions, or practices, therefore any such claimed right is not fundamental. The Washington law is rationally related to legitimate government interests.

E. Gonzales v. Oregon, 546 U.S. 243 (2006). The U.S. Attorney General filed suit for a judgment declaring Oregon's Death With Dignity law in violation of the federal Controlled Substances Act. The AG claimed the use of controlled substances for the assistance of suicide violated the Act. The Court disagreed, stating the Act does not prohibit physicians from prescribing regulated drugs for use in physician-assisted suicides allowed under a state law permitting such procedures.

II. SURROGATE DECISION-MAKING (Md. Code HG § 5-605)

A. Competent adults may provide their own consent..

B. The statute provides a clear ranking order of those who may provide consent for an incompetent patient. The health care practitioner may proceed to the next class when no one from a higher-ranking class is reasonably available.

1. health care agent (as designated in advanced directive)
2. guardian
3. Spouse

4. adult child
5. parent
6. adult sibling
7. friend or other relative who meets the following criteria:

C. Standards for Surrogates Md. Code HG §5-605(c). Basically states that surrogates should consider all relevant factors, act reasonably, and in accordance with the patient's known wishes.

D. Dispute Among Surrogates
1. Attending physician shall refer the case to the institution's patient care advisory committee, and may act in accordance with the committee's recommendation, or
2. transfer the patient (if the physician does not want to comply with the committee's recommendation).

II. CONSENT AT THE END OF LIFE (Md. Code HG §§5-601 et seq.)

A. Advance Directive
1. General Rule: Any competent individual may execute an advance directive regarding (1) provision of health care, and (2) withholding or withdrawal of health care.
2. Written instrument: dated, signed, and subscribed by two witnesses
3. Oral directive: has the same effect if made in the presence of the attending physician and one witness, and if then documented in the patient's medical records.
4. Directive only effective when the patient lacks capacity. This must be documented by the patient's attending physician and one other physician; or by only one physician when the patient is unconscious.
5. When properly notified, the physician has the responsibility to make the advance directive a part of the patient's medical record.
6. Revocation: A competent individual may revoke an advance directive at any time, either in writing or orally.
7. Certification of incapacity: by attending physician and one other physician. If unconscious, only one physician required.
8. Terminal or irreversible condition: Life-sustaining treatment may not be withheld based on an advance directive (where no agent has been appointed) or the authorization of a surrogate, unless (1) the patient's attending physician and one other physician certify that the patient has a terminal or irreversible condition, or (2) two physicians, one of whom is a neurologist, neurosurgeon, or one with special expertise in cognitive functioning, certifies that the patient is in a persistent vegetative state.

9. Liability: Health care providers who in good faith follow appropriate advance directives are not subject to criminal prosecution or civil liability. Md. Code HG § 5-609

B. EMS "Do Not Resuscitate" Orders Md. Code HG §5-608
   1. EMS personnel must follow protocols established by MIEMSS and the Maryland Board of Physicians.
   2. DNR orders may be superceded by a competent patient who expresses a desire to be resuscitated.
   3. An online medic command physician or a physician at the scene may provide oral DNR orders to EMS personnel.

C. Maryland Medical Orders for Life-Sustaining Treatment (2011)
   1. The form is valid in "all health care facilities and programs" throughout Maryland. "Programs" presumably includes EMS systems.
   2. Physicians or nurse practitioners may complete the forms.
   3. A copy of the original form must be given to the patient or "authorized decision maker" within 48 hours if a patient is discharged or transferred.
   4. Practitioners must "certify" they completed the form "as a result of a discussion with and the informed consent of" the patient, the appropriate surrogate, or the decisions are consistent with an advance directive.
   5. Section 1 must be completed (CPR or no CPR with or without orior intubation).
   6. Sections 2-9 are optional.

D. Medical Futility Md. Code HG §5-611
   1. Nothing requires a physician to provide unethical or ineffective treatment.
   2. A patient's attending physician may withdraw or withhold medically ineffective life-sustaining treatment. A second physician must also certify the futility of such treatment, and inform the family or surrogate of the decision. When in the emergency department, and only one physician is available, the certification of the second physician is not required.
   3. Mercy Killing: The statute does not permit any affirmative or deliberate act to end a life. The statute only relates to the natural process of dying. Health care providers shall make every effort to provide patients with food and water by mouth.

E. Court Orders Md. Code HG §5-612
   1. A health care provider who disagrees with a directive, shall seek a court order.
   2. The patient or surrogate may likewise seek a court order.

F. Penalties Md. Code HG §5-610
   1. willful defacement of a declaration
   2. forgery of a declaration
   3. misrepresentation/falsification of the wishes of the patient

G. Duty of Physicians (summary)
   1. Document the presence of a terminal and irreversible condition
   2. If unable to comply with an appropriately completed declaration, transfer the patient to the care of another physician.
   3. What happens to physicians who ignore a declaration and treat a patient? Not directly addressed by the legislation, but probably has liability for treating the patient without consent.

THE RIGHT TO DIE

AND CONSENT AT THE END OF LIFE

Larry D. Weiss, M.D. J.D.
Professor of Emergency Medicine
Univ. of Maryland School of Medicine

OBJECTIVES

Participants will understand . . .

- physician-assisted suicide
- Maryland law
- end of life consent
  - advance directives
  - surrogate decision-making
  - medical futility

CASE LAW

- In re Quinlan (NJ SCt. 1975)
- Cruzan v. Director (US SCt. 1990)
- Vacco v. Quill (US SCt. 1997)
- Washington v. Glucksburg (US 1997)
- Gonzales v. Oregon (US SCt. 2006)

IN RE QUINLAN

355 A.2D 647 (NJ 1976)

- facts
  - apnea after alcohol + drugs
  - persistent vegetative state
  - guardian demanded removal

IN RE QUINLAN

355 A.2D 647 (NJ 1976)

- holdings
  - guardian may assert pt's "privacy interests"
  - not a homicide, but death from natural causes
  - father may transfer care

CRUZAN v. DIRECTOR

497 U.S. 261 (1990)

- facts
  - apnea after MVC
  - persistent vegetative state
  - guardian demanded removal

CRUZAN v. DIRECTOR

497 U.S. 261 (1990)

- holding: Mo. law const.
- dicta:
  - liberty interest in refusing med. care
  - state does not have to accept "substituted judgment"

VACCO v. QUILL

521 U.S. 793 (1997)

- facts: assisted suicide prohibition in NY
- holding:
  - not an equal protection violation
  - the statute did not treat pts differently

WASHINGTON v. GLUCKSBURG

521 U.S. 702 (1997)

- facts: assisted suicide prohibition in Washington
- holding:
  - not a due process violation
  - suicide not a fundamental right

GONZALES v. OREGON

546 U.S. 243 (2006)

- facts:
  - case filed by AG John Ashcroft
  - challenged Oregon law, violation of CSA
- holding:
  - not a violation of CSA

CONSENT

Surrogate Decision-Making

- general rule
- ranking order

CONSENT

Dispute Among Surrogates

- pt care advisory comm.
- transfer
- (court order)

END OF LIFE

Md. Code HG §§5-601 et seq.

- general rule
- written or oral

END OF LIFE

Md. Code HG §§5-601 et seq.

- when effective
- medical record
- revocation

END OF LIFE

Md. Code HG §§5-601 et seq.

- certify incapacity
- term/irrev, or veg.state
- liability

EMS DNR ORDER

Md. Code HG §5-608

- protocol (MIEMSS, MBP)
- incompetent patient
- oral order
  - medic command
  - MD at scene

MOLST (2011)

- valid throughout state
- MD, NP or PA
  - must complete § 1
- requires patient consent
- copy to pt within 48 hours

FUTILITY

Md. Code HG §5-611

- ineffective treatment
- attending MD + MD
- inform family
- mercy killing

END OF LIFE

Petitioning a Court: Md. Code HG §5-612

- MD disagrees with adv. directive
  - pt. care advisory committee
  - seek court order
- pt/surrogate has same rights

DUTIES

Summary

- document
- follow directives
- transfer
- appeal

QUESTIONS?

Maryland Medical Orders for Life-Sustaining Treatment (MOLST)

Patient's Last Name, First, Middle Initial	Date of Birth	☐ Male ☐ Female

This form includes medical orders for Emergency Medical Services (EMS) and other medical personnel regarding cardiopulmonary resuscitation and other life-sustaining treatment options for a specific patient. It is valid in all health care facilities and programs throughout Maryland. This order form shall be kept with other active medical orders in the patient's medical record. The physician or nurse practitioner must accurately and legibly complete the form and then sign and date it. The physician or nurse practitioner shall select only 1 choice in Section 1 and only 1 choice in any of the other Sections that apply to this patient. If any of Sections 2-9 do not apply, leave them blank. A copy or the original of every completed MOLST form must be given to the patient or authorized decision maker within 48 hours of completion of the form or sooner if the patient is discharged or transferred.

CERTIFICATION FOR THE BASIS OF THESE ORDERS: Mark any and all that apply.

I hereby certify that these orders are entered as a result of a discussion with and the informed consent of:

_____ the patient; or
_____ the patient's health care agent as named in the patient's advance directive; or
_____ the patient's guardian of the person as per the authority granted by a court order; or
_____ the patient's surrogate as per the authority granted by the Heath Care Decisions Act; or
_____ if the patient is a minor, the patient's legal guardian or another legally authorized adult.

Or, I hereby certify that these orders are based on:

_____ instructions in the patient's advance directive; or
_____ other legal authority in accordance with all provisions of the Health Care Decisions Act. All supporting documentation must be contained in the patient's medical records.

_____ Mark this line if the patient or authorized decision maker declines to discuss or is unable to make a decision about these treatments. **The patient's or authorized decision maker's participation in the preparation of the MOLST form is always voluntary.** If the patient or authorized decision maker has not limited care, except as otherwise provided by law, CPR will be attempted and other treatments will be given.

CPR (RESUSCITATION) STATUS: EMS providers must follow the *Maryland Medical Protocols for EMS Providers*.

_____ **Attempt CPR:** If cardiac and/or pulmonary arrest occurs, attempt cardiopulmonary resuscitation (CPR). This will include any and all medical efforts that are indicated during arrest, including artificial ventilation and efforts to restore and/or stabilize cardiopulmonary function.

[If the patient or authorized decision maker does not or cannot make any selection regarding CPR status, mark this option. Exceptions: If a valid advance directive declines CPR, CPR is medically ineffective, or there is some other legal basis for not attempting CPR, mark one of the "No CPR" options below.]

1 **No CPR, Option A, Comprehensive Efforts to Prevent Arrest:** Prior to arrest, administer all medications needed to stabilize the patient. If cardiac and/or pulmonary arrest occurs, do not attempt resuscitation (No CPR). Allow death to occur naturally.

_____ **Option A-1, Intubate:** Comprehensive efforts may include intubation and artificial ventilation.

_____ **Option A-2, Do Not Intubate (DNI):** Comprehensive efforts may include limited ventilatory support by CPAP or BiPAP, but do not intubate.

_____ **No CPR, Option B, Palliative and Supportive Care:** Prior to arrest, provide passive oxygen for comfort and control any external bleeding. Prior to arrest, provide medications for pain relief as needed, but no other medications. Do not intubate or use CPAP or BiPAP. If cardiac and/or pulmonary arrest occurs, do not attempt resuscitation (No CPR). Allow death to occur naturally.

PHYSICIAN'S OR NURSE PRACTITIONER'S SIGNATURE (Signature and date are required to validate order)

Practitioner's Signature	Print Practitioner's Name	
Maryland License #	Phone Number	Date

Patient's Last Name, First, Middle Initial	Date of Birth	Page 2 of 2 ☐ Male ☐ Female

Orders in Sections 2-9 below do not apply to EMS providers and are for situations other than cardiopulmonary arrest. Only complete applicable items in Sections 2 through 8, and only select one choice per applicable Section.

2 ARTIFICIAL VENTILATION

2a. _____ May use intubation and artificial ventilation indefinitely, if medically indicated.

2b. _____ May use intubation and artificial ventilation as a limited therapeutic trial.
Time limit_____

2c. _____ May use only CPAP or BiPAP for artificial ventilation, as medically indicated.
Time limit_____

2d. _____ Do not use any artificial ventilation (no intubation, CPAP or BiPAP).

3 BLOOD TRANSFUSION

3a. _____ May give any blood product (whole blood, packed red blood cells, plasma or platelets) that is medically indicated.

3b. _____ Do not give any blood products.

4 HOSPITAL TRANSFER

4a. _____ Transfer to hospital for any situation requiring hospital-level care.

4b. _____ Transfer to hospital for severe pain or severe symptoms that cannot be controlled otherwise.

4c. _____ Do not transfer to hospital, but treat with options available outside the hospital.

5 MEDICAL WORKUP

5a. _____ May perform any medical tests indicated to diagnose and/or treat a medical condition.

5b. _____ Only perform limited medical tests necessary for symptomatic treatment or comfort.

5c. _____ Do not perform any medical tests for diagnosis or treatment.

6 ANTIBIOTICS

6a. _____ May use antibiotics (oral, intravenous or intramuscular) as medically indicated.

6b. _____ May use oral antibiotics when medically indicated, but do not give intravenous or intramuscular antibiotics.

6c. _____ May use oral antibiotics only when indicated for symptom relief or comfort.

6d. _____ Do not treat with antibiotics.

7 ARTIFICIALLY ADMINISTERED FLUIDS AND NUTRITION

7a. _____ May give artificially administered fluids and nutrition, even indefinitely, if medically indicated.

7b. _____ May give artificially administered fluids and nutrition, if medically indicated, as a trial.
Time limit_____

7c. _____ May give fluids for artificial hydration as a therapeutic trial, but do not give artificially administered nutrition.
Time limit_____

7d. _____ Do not provide artificially administered fluids or nutrition.

8 DIALYSIS

8a. _____ May give chronic dialysis for end-stage kidney disease if medically indicated.

8b. _____ May give dialysis for a limited period.
Time limit_____

8c. _____ Do not provide acute or chronic dialysis.

9 OTHER ORDERS _____

_____

_____

_____

_____

PHYSICIAN'S OR NURSE PRACTITIONER'S SIGNATURE (Signature and date are required to validate order)

Practitioner's Signature	Print Practitioner's Name	
Maryland License #	Phone Number	Date

INSTRUCTIONS

Completing the Form: The physician or nurse practitioner shall select only 1 choice in Section 1 and only 1 choice in any of the other Sections that apply to this patient. If any of Sections 2-9 do not apply, leave them blank. Use Section 9 to document any other orders related to life-sustaining treatments. The order form is not valid until a physician or nurse practitioner signs and dates it. Each page that contains orders must be signed and dated. A copy or the original of every completed MOLST form must be given to a competent patient or authorized decision maker within 48 hours of completion of the form or sooner if the patient is discharged or transferred.

Selecting CPR (Resuscitation) Status: EMS Option A-1 – Intubate, Option A-2 – Do Not Intubate, and Option B include a set of medical interventions. You cannot alter the set of interventions associated with any of these options and cannot override or alter the interventions with orders in Section 9.

No-CPR Option A: Comprehensive Efforts to Prevent Cardiac and/or Respiratory Arrest / DNR if Arrest – No CPR. This choice may be made either with or without intubation as a treatment option. Prior to arrest, all interventions allowed under *The Maryland Medical Protocols for EMS Providers.* Depending on the choice, intubation may or may not be utilized to try to prevent arrest. Otherwise, CPAP or BiPAP will be the only devices used for ventilatory assistance. In all cases, comfort measures will also be provided. No CPR if arrest occurs.

No-CPR Option B: Supportive Care Prior to Cardiac and/or Respiratory Arrest. DNR if Arrest Occurs – No CPR. Prior to arrest, interventions may include opening the airway by non-invasive means, providing passive oxygen, controlling external bleeding, positioning and other comfort measures, splinting, pain medications by orders obtained from a physician (e.g., by phone or electronically), and transport as appropriate. No CPR if arrest occurs.

The DNR A-1, DNR A-2 (DNI) and DNR B options will be authorized by this original order form, a copy or a fax of this form, or a bracelet or necklace with the DNR emblem. EMS providers or medical personnel who see these orders are to provide care in accordance with these orders and the applicable *Maryland Medical Protocols for EMS Providers*. Unless a subsequent order relating to resuscitation has been issued or unless the health care provider reasonably believes a DNR order has been revoked, every health care provider, facility, and program shall provide, withhold, or withdraw treatment according to these orders in case of a patient's impending cardiac or respiratory arrest.

Location of Form: The original or a copy of this form shall accompany patients when transferred or discharged from a facility or program. Health care facilities and programs shall maintain this order form (or a copy of it) with other active medical orders or in a section designated for MOLST and related documents in the patient's active medical record. At the patient's home, this form should be kept in a safe and readily available place and retrieved for responding EMS and health care providers before their arrival. The original, a copy, and a faxed MOLST form are all valid orders. There is no expiration date for the MOLST or EMS DNR orders in Maryland.

Reviewing the Form: These medical orders are based on this individual's current medical condition and wishes. Patients, their authorized decision makers and attending physicians or nurse practitioners shall review and update, if appropriate, the MOLST orders **annually and whenever the patient is transferred between health care facilities or programs, is discharged, has a substantial change in health status, loses capacity to make health care decisions, or changes his or her wishes.**

Updating the Form: The MOLST form shall be voided and a new MOLST form prepared when there is a change to any of the orders. If modified, the physician or nurse practitioner shall void the old form and complete, sign, and date a new MOLST form.

Voiding the Form: To void this medical order form, the physician or nurse practitioner shall draw a diagonal line through the sheet, write "VOID" in large letters across the page, and sign and date below the line. A nurse may take a verbal order from a physician or nurse practitioner to void the MOLST order form. Keep the voided order form in the patient's active or archived medical record.

Revoking the Form's DNR Order: In an emergency situation involving EMS providers, the DNR order in Section 1 may be revoked at any time by a competent patient's request for resuscitation made directly to responding EMS providers.

Bracelets and Necklaces: If desired, complete the paper form at the bottom of this page, cut out the bracelet portion below, and place it in a protective cover to wear around the wrist or neck or pinned to clothing. If a metal bracelet or necklace is desired, contact Medic Alert at 1-800-432-5378. Medic Alert requires a copy of this order along with an application to process the request.

How to Obtain This Form: Call 410-706-4367 or go to marylandmolst.org

Use of an EMS DNR bracelet is OPTIONAL and at the discretion of the patient or authorized decision maker. Print legibly, have physician or NP sign, cut off strip, fold, and insert in bracelet or necklace.

☐ DNR A-1 Intubate ☐ DNR A-2 Do Not Intubate ☐ DNR B

Pt. Name _____ DOB _____

Phys./NP Name _____ Date _____

Phys./NP Signature _____ Phone _____