

HEALTH INFORMATION AND DATA SHARING
Issue Brief

Maryland: Laws Regarding Minor Consent to Health Care

Introduction

Authority to consent to medical care directly impacts the health and wellness of minors. Familiarity with consent laws will enable medical professionals to better provide healthcare to patients under 18 years of age. The importance of minor consent laws can come up in many situations. A minor who is homeless may want access to medical care, despite not communicating with their parents. A grandparent who is caring for a child while a parent is incapacitated with a medical condition may want to take the child to a check-up. A minor with injuries may be in need of immediate treatment but their parents are inaccessible. These scenarios raise the question of what constitutes sufficient consent to treat a minor. Minor consent laws, as well as a medical provider's professional duties, help answer this question.

This brief reviews several aspects of Maryland law that are critical to the issue of consent to medical care, detailing the ways the law provides for minors to consent to their own care. It also addresses when someone other than a parent or guardian may consent to treatment for a minor. And finally, this brief addresses additional considerations in the laws surrounding minor consent, specifically emergency circumstances and liability concerns.

Consent for a Minor's Health Care

Minors Consenting to their Own Care

Minors are not presumed to be able to consent to their own medical treatment, therefore different laws must provide minors with the ability to consent on their own behalf.

There are two overarching legal circumstances where Maryland law allows minors to consent to their own care: (1) based on **the minor's living situation or status** and (2) based on **the specific type of treatment** sought.



First, minors in Maryland may consent to their own treatment if they are:

- (1) Married,
- (2) The parent of a child, or
- (3) Living separate and apart from their parents and are self-supporting.¹

This law does not define specifically what it means to live separate and apart from their parents and to be self-supporting. The legislative history behind this provision, however, indicates that it is meant to capture youth who are homeless or runaways, to allow them to consent to their own care.²

Second, a minor in Maryland may consent to specific types of treatments. Minors may consent to treatment or advice for substance misuse, sexually transmitted infections, contraception (not including sterilization), and pregnancy.³ Still, certain laws permitting consent to treatments have restrictions and rules. For instance, a minor must be 16 years of age or older to consent to consultation, diagnosis, and treatment of a mental or emotional disorder.⁴ Further, an unmarried minor generally may not terminate a pregnancy without notice to the minor's parent or guardian.⁵ However, the minor may consent on their own if the minor does not live with the parent or guardian and efforts to notify the parent or guardian are unsuccessful, or if the physician determines in their professional judgment that: (1) notice would result in physical or emotional abuse to the minor; (2) the minor is mature and capable of making such a decision; or (3) if parental notification is not in the minor's best interest.⁶

Informed Consent

Although Maryland law provides for circumstances in which a minor has capacity to consent to medical treatment, these provisions do not eliminate a medical professional's duty to obtain informed consent before proceeding with any medical treatment. Under the doctrine of informed consent in Maryland, medical professionals have the duty to (1) explain the proposed treatment to the patient and (2) warn of any material risks associated with the proposed treatment and with the decision not to undergo the proposed treatment.⁷ These explanations assist the patient in deciding whether they would like to proceed with the treatment or not. When determining whether an item should be disclosed, medical professionals consider whether that information would be material to the patient's decision-making process.⁸

However, incompetent individuals do not have the capacity to give informed consent. Maryland law specifically defines an incompetent individual as a person who is unable to make an informed decision regarding medical treatment because the patient is unable to understand the nature, extent, or probable consequences of the proposed treatment; make a rational evaluation of the burdens, risks, and benefits of the treatment; and/or communicate a decision.⁹ Notably, the statute makes clear that a competent individual who is able to communicate by means other than speech is not considered incompetent to make an informed decision.¹⁰ For example, a patient who is nonverbal but is able to communicate consent via American Sign Language is considered competent under the statute.

Aside from these statutory provisions, the determination of whether a minor can provide informed consent is a professional judgment based on what is known about the minor and the circumstances. The decision-making process on determining informed consent should be well documented in the provider's notes. The American Academy of Pediatrics and American Medical Association have both issued recommendations and opinions on how to ascertain consent in minors. Some factors they recommend considering are: age, cultural factors, and the type of treatment sought.¹¹



Foster Care

If a patient is a foster child, there are additional considerations when assessing who may consent to medical treatment of a minor. In Maryland, all foster children have a “health passport” that contains health-related information and a court order.¹² This court order should first be consulted when determining ability to consent to medical treatment. Generally, this court order authorizes the foster parent and the Department of Human Services (“DHS”) to consent to routine care on behalf of the child. It is possible for this court order to explicitly authorize the foster parents to consent to specific treatment; however, this is not often the case. When there is uncertainty, the best practice is to contact the DHS or have the foster parent contact the child’s social worker.

Generally, DHS encourages the birth parent or legal guardian to participate in the decision-making process for matters related to the child’s healthcare.¹³ In fact, some medical decision authority remains with the birth parent or legal guardian.¹⁴ These decisions include emergency care or surgeries, which the foster parent may not consent to. If the foster child requires care that DHS is not authorized to consent to and if DHS is unable to obtain consent from the appropriate individual, then DHS will likely petition the court for limited medical guardianship. A limited medical guardianship is an award of limited power of a guardian that may only be used to address medical decisions.¹⁵

Informal Kinship Care


Informal kinship care in Maryland is defined as a living arrangement in which a child not in the care, custody, or guardianship of DHS lives with a relative who provides for the care and custody of the child due to a serious family hardship.¹⁶ A relative providing informal kinship care for a child may consent to healthcare on behalf of that child if statutory conditions are met.¹⁷ There must be no other guardian for the child appointed by the court and the relative must verify the informal kinship care relationship through a sworn affidavit that is filed with DHS.¹⁸

The affidavit can be found at Md Health - General § 20-105 (Appendix A) and is made available at the offices of each county board of education and each local health department free of charge.¹⁹ It must include the name and birthday of the child; the name and address of the child’s parent or legal guardian; the name and address of the relative providing informal kinship care; the date the informal kinship relationship began; the hardship that led to the informal kinship care relationship and why; and the kinship relation to the child of the relative providing the care.²⁰ Local departments of social services have designated Kinship Navigators who are able to assist relative caregivers and connect them to local resources and services.²¹ DHS recommends contacting local departments of social services for more information.²²

Additional Considerations

In addition to the laws based on the identity of the patient, there are legal considerations that medical professionals should evaluate when responding to minors in need of or seeking treatment.

Medical professionals may generally provide care to patients unable to give informed consent in **emergency situations**. A medical professional may treat a patient unable to give consent if three circumstances are present: (1) the treatment is for an emergency; (2) a person who is authorized to consent to treatment is unavailable; and (3) the attending physician determines both that the patient is at substantial risk for death or immediate serious harm and the patient’s life or health is reasonably certain to be negatively affected by delaying the treatment.²³



Maryland law also provides an emergency exception specific to minors in need of treatment. Minors may consent to treatment if the attending physician determines that the minor’s life or health is reasonably certain to be negatively affected by delaying treatment to obtain parental consent.²⁴

In addition to emergency exceptions, Maryland provides certain **liability protections** to medical professionals when treating minor patients. Specifically, a licensed medical practitioner who treats a minor is not civilly or criminally liable solely for treating a minor who did not have the capacity to consent to care.²⁵ Medical professionals, just as when treating adult patients, may still be liable for other claims brought by minor patients.

Conclusion

Minor consent laws evoke two significant considerations: a parent’s right to make decisions for their child and a minor’s access to confidential treatment. Understanding the relevant minor consent laws is important for medical professionals to help promote patient health and well-being. Laws are ever-changing, so medical professionals should regularly educate themselves on who is able to consent and to what treatments.

SUPPORTERS



Robert Wood Johnson Foundation

Support for the Network provided by the Robert Wood Johnson Foundation. The views expressed in this document do not necessarily reflect the views of the Foundation.

This document was developed by Delaney Anderson, J.D. Candidate, and Edka Wong, J.D. Candidate, at the University of Maryland Francis King Carey School of Law, with guidance and review by Mathew Swinburne, J.D., Associate Director, Network for Public Health Law – Eastern Region at the University of Maryland Francis King Carey School of Law. The Network for Public Health Law provides information and technical assistance on issues related to public health. The legal information and assistance provided in this document does not constitute legal advice or legal representation. For legal advice, please consult specific legal counsel.

Updated: April 2021



APPENDIX A

Form of affidavit for informal kinship care found in MD Health Gen § 20-105(d)

Form of affidavit

(d) The affidavit shall be in the following form:

(1) I, the undersigned, am over eighteen (18) years of age and competent to testify to the facts and matters set forth herein.

(2) _____ (name of child), whose date of birth is _____, is living with me because of the following serious family hardship (check each that is applicable):

Death of father/mother/legal guardian

Serious illness of father/mother/legal guardian

Drug addiction of father/mother/legal guardian

Incarceration of father/mother/legal guardian

Abandonment by father/mother/legal guardian

Assignment of father/mother/legal guardian to active military duty

(3) The name and last known address of the child's parent(s) or legal guardian is:

(4) My kinship relation to the child is _____

(5) My address is:

Street Apt. No.

City State Zip Code


(6) I assumed informal kinship care of this child for 24 hours a day and 7 days a week on _____ (day/month/year).

(7) The name and address of the school that the child attends is:

(8) I solemnly affirm under the penalties of perjury that the contents of the foregoing are true to the best of my knowledge, information, and belief.

Signature of affiant

(Day/month/year)


¹ MD CODE, HEALTH-GENERAL § 20-102.

² S.B. 72, 432nd Session, [House Health and Government Operations hearing](#), (Md. 3/27/2012).

³ MD CODE, HEALTH-GENERAL § 20-102.

⁴ MD CODE, HEALTH-GENERAL § 20-102(d).

⁵ MD CODE, HEALTH-GENERAL § 20-103(a).

⁶ *Id.* at § 20-103(c).

⁷ *McQuitty v. Spangler*, 410 Md. 1, 21 (2009).

⁸ *Id.* at 1030.

⁹ MD. CODE, HEALTH-GENERAL § 5-601.

¹⁰ *Id.*

¹¹ AMA Council on Ethical and Judicial Affairs, *AMA Code of Medical Ethics' Opinion on Adolescent Care Opinion 5.055-Confidential Care for Minors*, 16(11) AMA J. OF ETHICS 901 (2014).

¹² Maryland Social Services Administration, Maryland Resource Parent Handguide 2016, https://dhs.maryland.gov/documents/Foster%20Care/ResourceParentHandGuide2016_web.pdf.

¹³ COMAR 07.02.11.08.

¹⁴ Maryland Social Services Administration, Maryland Resource Parent Handguide 2016, https://dhs.maryland.gov/documents/Foster%20Care/ResourceParentHandGuide2016_web.pdf.

¹⁵ MD CODE, FAMILY LAW § 5-301.

¹⁶ MD CODE, HEALTH-GENERAL § 20-105.

¹⁷ MD CODE, FAMILY LAW § 5-534 (noting that the provider of kinship care must be at least 21 years old and approved by the local department); see also MD Code, Health-General, § 20-105.

¹⁸ MD CODE, HEALTH-GENERAL § 20-105.

¹⁹ MD CODE, HEALTH-GENERAL § 20-105(e).

²⁰ MD CODE, HEALTH-GENERAL § 20-105.

²¹ Maryland Department of Human Services, *Kinship Care*, <https://dhs.maryland.gov/foster-care/kinship-care/>.

²² *Id.*

²³ MD CODE, HEALTH-GENERAL § 5-607.

²⁴ MD CODE, HEALTH-GENERAL § 20-102.

²⁵ MD CODE, HEALTH-GENERAL § 20-102(e).