Advance Health Care Directives: Drafting & Dispute Resolution Strategies

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MSBA Health Section
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Purpose

Goal concordant care

1. AD not completed

Get Tx you want

Avoid Tx you don’t want

BUT

Views on End-of-Life Medical Treatments
Growing Minority of Americans Say Doctors Should Do Everything Possible to Keep Patients Alive
2. AD not found

76% of physicians whose patients have ADs do not know they exist

Fail to make & distribute copies

Complete ≠ Have

Upshot
Advance directives are preferred

Your decision maker is someone you chose

BUT

Not completed
Not available

80%

Patient cannot speak for herself

No AD
No agent
Still need a SDM
Almost all states have a statutory sequence

Agent
Spouse
Adult child
Adult sibling
Parent . . . .

More relatives

2nd choice – after agent

Not chosen by patient

Chosen off a list

ND list is longer than most 9 categories deep
Problem 1

Statutory sequence does **not match** your preference

Problem 2

No list

**BUT**

Custom & practice
“Without an advance directive that designates a proxy . . .”

“patient's family should become the surrogate . . .”

“family”

“persons with whom the patient is closely associated.”

“In the case when there is no one closely associated with the patient . . .”

“but there are persons who both care about the patient and have some relevant knowledge”

“may be appropriate surrogates”
Making Treatment Decisions for Incapacitated Older Adults Without Advance Directives

AGENDA COMMITTEE

POSITION 2

It should not be assumed that the absence of traditional surrogates (next-of-kin) means the patient lacks an appropriate surrogate decision-maker. A nontraditional surrogate, such as a close friend, a live-in companion who is not married

3. Plaintiffs are appropriate surrogate decision makers for all health care decisions for their son, and they are not required to petition for or be appointed guardians or conservators in order to continue making all health care decisions for their son.

Some providers refuse to recognize family

Judicially endorsed

3. Wrong decision

Wrong SDM

Using default list creates risk
More aggressive treatment

Agent
Advance directive

GO STOP

> 60% accuracy

“surrogate’s decision . . . almost always accepted”

“act in the best interests . . . considering . . . principal’s personal values to the extent known”

Support, train, remonstrate

You’re Fired!

SDM steps into shoes of patient

Minn. Stat. 145C.07(3)
Clinicians should **not** follow “bad” surrogates

Agent: wife Lana

Al Barnes

Advanced dementia
End stage kidney disease
Chronic respiratory failure

80 ambulance calls
Treated at almost every hospital in Twin Cities

Aggressive treatment is *unethical* & painful
CMO

No consent
Beyond what is identified above, Mrs. Barnes has not acted in the best interest of Mr. Barnes and has failed to appropriately advocate for Mr. Barnes. Mrs. Barnes continues to demand unnecessary, inappropriate, and in some cases harmful testing and treatment for Mr. Barnes. Mrs. Barnes will not consent to CMO recommendation.

<table>
<thead>
<tr>
<th>Clinician</th>
<th>Surrogate</th>
</tr>
</thead>
<tbody>
<tr>
<td>CMO</td>
<td>LSMT</td>
</tr>
</tbody>
</table>

**Views About End-of-Life Treatment Over Time**

<table>
<thead>
<tr>
<th>% of U.S. adults</th>
<th>1990</th>
<th>2005</th>
<th>2013</th>
<th>Diff. 90-13</th>
</tr>
</thead>
<tbody>
<tr>
<td>Doctors and nurses should do everything possible to save the life of a patient in all circumstances</td>
<td>15</td>
<td>22</td>
<td>32</td>
<td>+16</td>
</tr>
<tr>
<td>Don’t know</td>
<td>100</td>
<td>100</td>
<td>100</td>
<td>0</td>
</tr>
</tbody>
</table>

**Medical Futility**

Right thing but the...
Aggressive treatment plan **consistent** with patient wishes.

Minn. Stat. 145C.15(b) says, "provider ... unwilling to provide directed health care ... may **transfer** the principal".

"but the provider shall take all reasonable steps to ensure ... directed health care **until** the principal ... is transferred".

Treat ‘til transfer. Addressed **only** to agents named in AD.