End of Life – Legal Issues
Health Care

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End of Life Decision-making –
Does person have capacity?

• Presumption of capacity - sufficient capacity
  1. Understand their medical conditions and treatment options
  2. Weigh the risks/benefits
  3. Appreciate likely consequences of decision
  4. Communicate decision

End of Life Legal Standard of Proof –
"Clear and convincing evidence" - legal standard of proof
- Lies between
  • "preponderance of the evidence," and
  • "beyond a reasonable doubt"
- Requires
  • firm belief or conviction
  • factfinder - a clear conviction, without hesitancy, of the truth
- Nancy Cruzan - persistent vegetative state –
  • Supreme Court – required "clear and convincing evidence" of wishes

Clear and Convincing Evidence - Conservatorship of Wendland (California): Minimally Conscious
Robert - permanently physically and mentally disabled after accident/drinking
• After 16 months in a coma - severe cognitive impairment, unable to "swallow, control his bowels or bladder, communicate verbally"
• Able to react to simple commands - much repetitive coaching
• Robert's wife/children believed he was unable to recognize them
• Two years later - Robert's physicians reported Robert no reasonable chance of improvement
• Wife and children requested Robert's physicians remove the feeding tube and allow Robert to die
• Wife recalls Robert saying: "I would never want to live like that"; "I wouldn't want my children to see me like that" when she had to decide whether to turn off a respirator sustaining the life of her father, who was near death
• No Advance Directive

Minimally Conscious State (MCS)
In Re Martin (Michigan), Conservatorship of Wendland (California)
• Pre-injury statements - insufficient under "clear and convincing standard" -
  • did not want to "live like a vegetable" or "be kept alive by tubes"
• Patient must predict with precision
  • nature of condition
  • intervention(s) to be discontinued
In Re Baby F - Oklahoma Supreme Court -
• "clear and convincing" standard before authorizing DNR for child in custody of DHS
• Cited Cruzan case - "clear and convincing" standard
Scenarios

Person has no documents and no capacity to execute documents

Hierarchy of Decision-making

Person has documents or has capacity to execute documents

Legal Documents-
- Advance Directive for Health Care
- Durable Power of Attorney for Healthcare
- Do Not Resuscitate
- POLST

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Case: Hierarchy of Surrogacy Decision-making
- 38-year-old woman has diagnosis of metastatic cancer of unknown primary
- On ventilator and clearly in terminal condition with probably less than few weeks to live
- Has no advance directive
- Domestic partner says she knows patient would want to terminate all life support/select palliative care
- Sister, who lives in Florida, arrives and notifies doctor that doctor needs to do “all that can be done” including keeping sister on ventilator/no DNR- knows this is what she would want

What result?

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Hierarchy of Surrogacy Decision-making

46 states + DC have statutory “hierarchies”- (e.g.) in order of priority
Oklahoma – HB1894 passed in May, 2017, effective November 1, 2017
1. Appointed Guardian
2. Proxy
3. DPOA
4. Spouse
5. Children > 18 yrs
6. Parents
7. Adult siblings
8. Other adult relatives in order of kinship
9. Close friends of patient - maintained regular contact with the patient sufficient to be familiar with patient’s personal values

Disagree - majority may make decision
- Health care provider or member may petition court-
  - health care decision violates Advance Directive standard
  - standard – “known intentions of person”
- Individual cannot serve
  - Involved in abuse, neglect, or exploitation

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Oklahoma Laws related to End of Life
1. Hydration and Nutrition for Incompetent Patients Act
2. Oklahoma Advanced Directive Act
3. Uniform Durable Power of Attorney Act (with Health Care Powers only)
4. Oklahoma Do-Not-Resuscitate Act
5. Non-discrimination in Treatment Act
6. Medical Treatment Laws Information Act
7. Physician Orders for Life-Sustaining Treatment Act (POLST)

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Hierarchy of Surrogacy Decision-making - Problems
- Higher ranking surrogates not involved in patient’s life
- No willing or identifiable family
- Family disagreements
- Review of 16 studies - surrogates predicted patients goals 1/3 of time
- Even when patients thought surrogates and physicians knew wishes- accuracy 59%-88%
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**Case - Artificial Nutrition and Hydration**

- Susan, 58-year-old, unmarried, woman suffers a severe stroke, unconscious
- Placed on feeding tube
- Physicians indicate cannot do anything more, no chance of recovery, move her to a nursing home
- After months of watching her suffer in unconscious state, daughter and son request nursing home remove feeding tube
- No Advance Directive
- Nursing home refuses

### Oklahoma Advance Directive Act, 63 OS §3101.1 et. seq.

- **Revised in 2006 - AG found AD unconstitutional without “End Stage Condition” option**
- **Living Will — Options with Each Condition**
  - Do not want life sustaining treatment/do want nutrition & hydration
  - Do not want life sustaining treatment/do not want nutrition & hydration (nothing)
  - Do want life sustaining treatment/do want nutrition & hydration (everything)
  - No distinction legally/ethically — withdrawing/withholding

### Specific Instructions

- I authorize my health care proxy to have access to any information governed by HIPAA.
- I want sufficient pain medication to control my pain even if it results in my ultimate death
- I want/do not want antibiotics
dialysis
blood transfusions medically implanted devices
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Oklahoma Advance Directive Act, 63 OS §3101.1 et. seq.

Appointment of Health Care Proxy - 2 physicians certify incapacity
- Appoint Health care proxy and alternate
- Should be same as DPOA
- Make healthcare decisions
- Decisions - only as in Living Will

Witnesses > 18, not related and cannot inherit
- Two signatory witnesses

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Oklahoma Advance Directive Act, 63 OS §3101.1 et. seq.

Anatomical Gifts -- upon cessation of cardiac functions or brain death
- Transplantation Therapy
- Entire body/body organs
- Advancement of science, research, education
  - Anatomical Donation Program
  - Body Donor Program – Tulsa

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Case - Advance Directive

48 year-old man with severe disability properly executes
Advance Directive - wants no life sustaining treatment nor nutrition and hydration
- Names his wife as a health care proxy
- As disability increases, he expresses on numerous occasions to family that disability is too much/does not want live
- Very vocal about his desire not to live in his condition
- Taken to the hospital- physician determines that she can stabilize the patient if she starts dialysis and perhaps save his life
- Wife refuses to allow dialysis
- What should the doctor do?
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**Uniform Durable Power of Attorney Act, 58 OS § 1071 et. seq.**

Additional Guidance – Goals, Fears, etc.

**Effectiveness**
- Effective - upon signing
- Springing: certification that person is no longer capable of making decisions
- Witnessed: persons > 18, not related by blood or marriage to principal or attorney-in-fact
- Notarization

**Case - Durable Power of Attorney**

Lucy executes Durable Power of Attorney granting her father, John, power for medical decisions, effective immediately.

Lucy dies two weeks later.

Hospital admits Susan, 17 year-old daughter of Lucy, to hospital one week later.

John submits Durable Power of Attorney as authority that he can sign consent to medical treatment of Susan, stating that Lucy granted him the powers under Durable Power of Attorney.

Should hospital accept Durable Power of Attorney as authority to consent to medical treatment of Susan?

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**Oklahoma Do Not Resuscitate Act 63 OS§ 3131.1 et. seq.**

"Cardiopulmonary resuscitation" means those measures used to restore or support cardiac or respiratory function in the event of a cardiac or respiratory arrest.

**DNR Consent Form** - chest compressions, artificial ventilation, intubations, defibrillation, or emergency cardiac medications.

**Case - Do Not Resuscitate**

- EMSA responds to call for an 82 year-old man who suffered cardiac arrest.
- Son meets the EMSA workers in father's apartment - instructs them not to perform CPR.
- States he has talked to father - is absolutely sure that father does not want resuscitation.
- Angrily insists and demands they do nothing.

What should the EMSA workers do?

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**Presumption – presumed to consent to cardiopulmonary resuscitation in event of cardiac or respiratory arrest**

DNR –
- Attending physician of incapacitated person
  - without representative
  - knows by “clear and convincing evidence”
  - sufficient to constitute informed consent (Certification of Physician)
- "In reasonable medical judgment of physician . . . would not prevent imminent death" of patient
  - noted in medical records

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**Consensus of attorneys in health care, surrogate cannot sign form**

Some question if surrogate can make person DNR under Hierarchy law.
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URLs for Documents

• Advance Directive
  http://www.okdhs.org/OKDHS%20Publication%20Library/87-07W.pdf
• DNR
• Durable Power of Attorney

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Nondiscrimination in Treatment Act 63 OS §3090.1 et. seq.
Health care providers shall not deny life preserving care to elderly, disabled, or terminally ill –
• lower value than younger, nondisabled, or not terminally ill
• disagreement with how patient/representative values trade-off
  – between extending length of patient’s life and risk of disability

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Medical Treatment Laws Information Act 63OS §3160 et. seq.
Requires State Board of Medical Licensure and Supervision to prepare brochure/ disclosure statement
1. Hydration and Nutrition for Incompetent Patients Act
2. Non-discrimination in Treatment Act
3. Oklahoma Advanced Directive Act
4. Oklahoma Do-Not-Resuscitate Act
5. Assisted Suicide Prevention Act

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Oklahoma Physician Orders for Life-Sustaining Treatment (POLST) 63 OS §3105.2 et. seq.
POLSST -based on current medical condition- reviewed if substantial change/annually
• Any section not completed indicates full treatment
• Resuscitation
  • CPR/no CPR
• Medical interventions
  • Full treatment/Limited Interventions/Comfort Measures
• Antibiotics- Preserve life /trial period/ initially use
• Assisted Nutrition/hydration
• Oral fluids and nutrition/spoon feeding
• TPN- Long-term/trial period/initially none
• Tube Feeding -Long-term/trial period/initially none
• IV Fluids -Long-term /trial period/initially none
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Oklahoma Physician Orders for Life-Sustaining Treatment (POLST) 63 OS §3105.2 et. seq.

• Information given to patient or representative
  – POLST is voluntary/preferences for POLST- AD,DPOA
  – Must give Information for Patients and Their Families - Your Medical Treatment Rights Under Oklahoma Law
  – Advance Directive recommended
  – Affirms that lives are of equal dignity regardless of age or disability