

End of Life Planning and Decision-making



PRESENTED BY



Courtney Elder Law Associates

Elder Law • Special Needs Planning • Estate Planning

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THOUGHTS ABOUT DEATH

“I’m not worried about dying, I just don’t want to be there when it happens.”

- Woody Allen

A Good Death does Honor to a Whole
Life

– Petrarch (1304-1374)



THOUGHTS ABOUT DEATH

Financial advisor's mother:

“Am I going to run out of money?”

“Why am I still here? I'm ready to go.”

-More afraid of running out of money than dying



VALUE OF LIFE



- “Unalienable Right bestowed by Creator
 - Declaration of Independence

- Constitutional Right to life, liberty, property
 - Fourteenth Amendment
 - Body, personal medical information is your property


- Common Law
 - Edward Coke: Common Law Protection for Liberty

THINGS WE DON'T LIKE

- CHANGE
 - CONFLICT
 - LOSS OF CONTROL
- 

HOW WE DIE IN AMERICA

In era of modern medicine:

- We live longer, with chronic illness
 - Few complete cures for illness
 - Death can be just as readily prolonged as life
 - Most deaths are “negotiated”
 - Most deaths are in institutions
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HOW WE DIE IN AMERICA

3/3/18 Kaiser Health article

Maxine Stanich, age 87, CHF & chronic lung disease – said DNR, wanted natural death – 2008 ER visit, defibrillator implanted – later ER doctor said shock would knock her down, deactivated defibrillator, ordered hospice care

- 1:3 Medicare pts have operation in last year
- 50% more time in hospital, 2x days in ICU
- 70% with limited life expectancy & non-fatal skin cancers elect surgery (2013 study)

Maxine had 90th birthday in 2010 w family

LEGAL END OF “LIFE”

Death: Irreversible cessation of

- Circulatory & respiratory function, **or**
- All brain functions, including brain stem

Life: Continuation of either

- Circulatory & respiratory function, or
- Some brain or brain stem functions
 - Mississippi Uniform Determination of Death Law
 - MCA § 41-36-1, -3

COMA

Deep state of unconsciousness

- Unable to move or respond to environment
- Result from illness or brain injury
- May improve into “vegetative state”
- Characteristics:
 - No eye-opening
 - Cannot follow instructions
 - No speech or communication
 - No purposeful movement
- Generally requires hospitalization, rarely last >1 mo.

PERSISTENT VEGETATIVE STATE

Awake but unaware

- Irreversible loss of all neocortical functions (sensory perception, motor commands, spatial reasoning, conscious thought, language)
- Brain stem functions intact (cardio, respiratory)
- Characteristics:
 - Eyes-open unconsciousness
 - Sleep-wake cycles; may moan, cry, smile, startle at noise
 - No speech, communication, purposeful movement
 - No physical or psychological suffering
- Can last years, live at home, require full care


MINIMALLY CONSCIOUS

Slow recovery of consciousness stage

- Reduced level of self-awareness, environment
- Inconsistent, limited ability to communicate, respond
- Characteristics:
 - May speak some, gesture, follow simple instructions
 - May cry, smile, laugh, reach for and hold objects
 - Sustained eye focus on people or things
 - Difficult to distinguish from PVS at times
- Require extensive care similar to PVS

WHAT IS A “DECISION”

HEALTH CARE DECISION (MCA § 41-41-203(h))

- Select and discharge providers & institutions
 - Approve or disapprove diagnostic tests, surgical procedures, medications, DNR orders
 - Directions to provide, withhold or withdraw artificial nutrition/hydration “and all other forms of health care”
 - May include consent to admit to mental health facility, but **not** involuntary commitment, abortion
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WHO DECIDES?



- **INDIVIDUAL** - MCA § 41-41-203
 - **Emancipated Minor** - MCA § 41-41-203(e)
- **AGENT** - MCA § 41-41-203(c) – **priority over Guardian** if no Court order
- **GUARDIAN** - MCA § 41-41-203(f) – **no Court order** req'd
- **SURROGATE** - MCA § 41-41-203(s)


- Any of these may petition a **COURT** to “enjoin or direct a health care decision” - MCA § 41-41-229

WHO DECIDES?

Individual With “Capacity”

- Medical context – Diagnosis
- Legal context – Functional (but relies on medical)
- “Lucid moment” or “Lucid interval”
 - In re Estate of Byrd, 749 So.2d 1214 (Miss. 1999)

Capacity to:

- Make health care decision
 - Give or revoke HC directive
 - Designate or disqualify a surrogate
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CAPACITY

Statutory definition MCA § 41-41-203(d)

- Ability to understand the significant benefits, risks and alternatives to proposed health care and to make and communicate a health care decision

Who determines MCA § 41-41-205(6)

- **Primary Physician** – “Unless otherwise specified” in written AHCD
- Clinical assessment may be necessary


Presumption of Capacity MCA § 41-41-223

FOUR INCAPACITY SITUATIONS

1. Never had capacity
2. Were once competent but are now unable to make decision
3. Disabled but competent and conscious and able to make decision
4. Conscious incompetent or minimally conscious patient
 - Most challenging for providers and courts

FOUR INCAPACITY SITUATIONS

For categories 1, 2 and 4, process is:

- Determine whether patient incapacitated
 - If so, identify appropriate decision-maker (guardian, agent, surrogate, court)
 - Decision-maker to determine wishes of patient, and
 - Make the health-care decision
- 


PRIMARY PHYSICIAN

Bankston v. CLC of Biloxi, LLC (2016)

Jack B. fell, injured head/spine; UMMC, had emergency trach; transferred to Forrest Gen.; Kahler, MD was primary physician; discharged to CLC nursing home; fell from bed & died. Wife sued NH. NH pled arbitration agreemt in admission agreemt. Wife said she lacked authority to sign as his “healthcare surrogate”. Court held: No evidence Jack’s primary physician declared him incapacitated, so wife had no authority to decide. Dr.’s notes re TBI, acute delirium ≠ incapacity determination.

INFORMED CONSENT

Physician must:

- Explain patient's diagnosis
 - Explain proposed procedure
 - Warn of material risks & dangers associated with procedure
 - Explain prognosis if procedure not done
 - Alternative treatments, if any
- 

REFUSAL OF TREATMENT

Patient may refuse or request removal of life-prolonging treatment

- *Cruzan*, liberty interest in 14th Amendment
 - But balance countervailing state interests
- *Quinlan*, privacy right inherent in Constitution
 - 22 yo, TBI, permanent comatose, father was guardian

Death resulting is not suicide or homicide, does not impair annuity or insurance policy

- MCA § 41-41-227(2)

DECISION-MAKING - AGENT

Older Types (pre-September 1998)

- “Living Will” – no life support if terminal illness;
- Durable Power of Attorney for Healthcare

Newer Type (since 1998)

- Advance Healthcare Directive (AHCD) – POA; immediate or “springing”; organ donation (optional)

Download at www.ElderLawMS.com Forms page



REVOCACTION OF DIRECTIVE

Maker can revoke:

- Designation of Agent - **only** by signed writing or by personally informing supervising HC provider
 - MCA §41-41-207(1)
- Any other part – at **any time** and in **any manner** that communicates intent to revoke
 - MCA §41-41-207(2)
- Later directive revokes earlier “to extent of conflict”
 - MCA §41-41-207(5)

WHEN DIRECTIVE EFFECTIVE

Agent may only decide:

- when maker's primary or consulting physician determines maker unable to make decision . .
- “Unless otherwise specified in [the directive]”
- Authority terminates when maker “has recovered capacity”
 - MCA §41-41-205(5)

MEDICAL INFORMATION

HIPAA Authorization (April 2005)

- “Covered entity” must disclose Personal Health Information (PHI) to individual on request (Privacy Rule (45 CFR §164.502(a)))
- Covered entity must treat “personal representative” same as individual if designated by “written authorization” (§164.502(g))
- §164.508(c) states requirements for written authorization
 - Should be drafted by knowledgeable attorney
- Allows access by another to medical information

HEALTHCARE SURROGATE

- **Healthcare Surrogate** – if NO written authorization
 - Spouse, if not legally separated
 - Adult child
 - Parent
 - Sibling
 - A person who cares and is willing to make decisions
- Provider can require written evidence of authority
 - MCA §41-41-211(10)
- No liability for refusal to honor decision
 - MCA §41-41-219

DECISION-MAKING STANDARD

Agent must make decisions:


- In accordance with principal's instruction and
- Other wishes to extent known to the agent
 - “Substituted judgment”

OR,


- In accordance with principal's “**best interest**”
 - MCA §41-41-205(7)

SUBSTITUTED JUDGMENT

Five factors to consider:

- Patient's expressed preferences
 - Patient's religious convictions & relation to treatment decisions
 - Impact on patient's family
 - Probability of adverse side effects
 - Prognosis with and without treatment
- 


SURROGATE PROBLEMS

1. Surrogates must consider principal's prior statements, actions, instructions, personal values, character, goals, beliefs, attitudes, lifestyle
 2. "Clear and convincing evidence" standard - different sources, reliability, consistency of statements, specificity, context of statements, to whom made, how often, have views changed over time, consistent with behavior?
 3. Wrong surrogate – judgment, values may differ; no discussion with provider
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SURROGATE PROBLEMS

4. Confusion, interference among surrogates – conflict or deference to one surrogate
5. Difficulty separating surrogate interest from principal's interest – longstanding “family values”
 - We told Mom we would never put her in a NH
6. Self-interest of surrogate – anger, dislike toward patient; guilt, fear of responsibility for death; financial interests

SURROGATE PROBLEMS

7. Feeding, hydration – food, water are symbols of caring, provide comfort & nutritional status; moral & religious concerns about stopping
 8. Withholding vs. Withdrawing treatment – NO difference in law or medical ethics, but withdrawing FEELS like killing emotionally
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DECISION-MAKING STYLES

- Instantaneous – made on intuition
- Not making a decision:
 - Waiting for situation to improve on its own
 - Hoping another option will arise
 - Someone else may decide
- Unable to decide due to lack of knowledge
- Unable to decide due to fear (of unknown, expense, assuming responsibility for decision, loss of normalcy)

PROVIDER RESPONSIBILITIES

Assisting and Registering Patient Wishes


- Patient Self-Determination Act, 42 USC 1396a(w)
 - All Medicare/Medicaid providers (NH, hospital, HHA, hospice)
 - Inform patient of their policies re HC decisions
 - Assist patient to do directive if desired

PROVIDER RESPONSIBILITIES

Assisting and Registering Patient Wishes

- Mississippi Uniform Health Care Decisions Act, MCA 41-41-215(2)-(3)
 - Supervising provider must record and file patient's directive / revocation / surrogate designation
 - Primary doctor must record loss or recovery of capacity, other condition affecting decisions

Communicate with Patient

- Mississippi Uniform Health Care Decisions Act, MCA 41-41-215(1)
 - Supervising provider must communicate to patient in advance a decision and who made it
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PROVIDER COMPLIANCE

Must comply with individual's instruction or authorized agent/surrogate's decision

- MS Uniform HC Decisions Act, MCA 41-41-215(4)

May decline to comply if:

- Contrary to policy based on “reasons of conscience”
- Requires ineffective care or contrary to generally accepted medical standards
 - MS Uniform HC Decisions Act, MCA 41-41-215(5)-(6); 41-41-227(4)
 - “Medical futility”

REFUSAL TO COMPLY

If provider refuses to comply with individual's instruction or authorized agent/surrogate's decision, shall:

- Promptly inform patient or agent
- Provided continuing care until transfer
- Immediately make reasonable efforts to assist with transfer to complying facility
 - MS Uniform HC Decisions Act, MCA 41-41-215(7)


PROVIDER PROTECTION

No civil, criminal or professional liability if provider acts in good faith and within generally accepted health care standards to:

- Comply with HC decision to w/hold or w/draw care
- Decline to comply if believes no authority
- Comply with advance directive and assume was valid when made and not revoked
 - MS Uniform HC Decisions Act, MCA 41-41-219(1)

PHYSICIAN ORDER FOR SUSTAINING TREATMENT (POST)

MCA §41-41-301 ff.

- State-prescribed medical order form for persons with advanced illness
 - Specifically targeted to patients, families, and health care professionals
 - Must be completed by patient/guardian ***and*** physician
 - Does not replace advanced directive
- 

PHYSICIAN ORDER FOR SUSTAINING TREATMENT (POST)

- States when CPR / antibiotics / IVs / tubes desired
- Provides for (if condition deteriorates):
 - **Full Sustaining Treatment**
 - **Limited Interventions** (no intubation or ventilator)
 - **Comfort Measures** (relief of pain)

THANK YOU



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