

Advance Directives “Living Wills”

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With thanks to
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1

Objectives

- ◎ Understand the basic requirements of a valid:
 - Living will
 - Durable power of attorney
 - Mental health advance directive
- ◎ Understand the situations where each written instrument applies, and the benefits of each.

2

Why are advance directives so important?

- ◎ Technology can prolong physical existence without improving actual quality of life.
- ◎ Possibility that the life of a person in a persistent vegetative state can continue for years.
- ◎ The cost of long term and catastrophic health care can use up the assets of an incapacitated person
- ◎ Ethics concept of “futility”

3

Emotional cost as well...

- ◎ Without written guidance as to the incapacitated person’s wishes, family members are likely to agonize and even argue about what the incapacitated person would have wanted.

4

Terri Schiavo case (Florida)

- Suffered severe brain damage in 1990 at age 27 after sustaining a cardiac arrest precipitated by a K⁺ imbalance.
- Despite injury, Schiavo appeared to have periods of wakefulness and could breathe on her own.
- Her parents videotaped her while awake to demonstrate that not only could she experience thought and emotion, but had the possibility of recovery.

5

Terri Schiavo Case (cont'd)

- Maintained for several years in LTC with constant nursing care and with a feeding and hydration tube
- May 1998, husband and legal guardian (Michael) began a long battle to obtain a court order from a Florida trial court which would permit caretakers to withdraw life-sustaining treatment.

6

Terri Schiavo: Why the dispute over care (guardianship)?

- No written advance directive, her intentions had to be determined by a trial judge, based on testimony and evidence submitted by her husband and opposed by her parents.
- MS submitted testimony demonstrating that Terri was in a “persistent vegetative state”; he also testified that his wife stated on several occasions that she would have not have wanted her life prolonged artificially.
- Parents disputed PVS

7

Legal battle in trial court...

- Judge ruled on evidence, issued court order permitting discontinuation of treatment.
- After repeated rehearings, appeals, even a law signed by Gov. Jeb Bush (then overturned by the Florida Supreme Court), the Florida trial court in March 2005 issued a ruling authorizing removal of her feeding tube.

8

Final Days, March 2005

- ◎ US Congress intervened to pass a law allowing the case to be heard in federal court
- ◎ US District Court and 11th Circuit Appeals Court ruled in support of Florida trial court
- ◎ Supreme Court declined certiorari.
- ◎ Schiavo died 3/31/05.

9

Autopsy commentary

- ◎ Subsequent autopsy revealed “marked global anoxic-ischemic encephalopathy resulting in massive cerebral atrophy....The lack of oxygen caused extensive brain damage, killing so many nerve cells that Ms. Schiavo's brain had wasted away to about half its normal weight. The damage had also blinded her, by destroying the vision centers in the occipital lobes of her brain.” (Autopsy by Dr. Jon R. Thogmartin, Florida Medical Examiner).

10

Segue to Washington's Natural Death Act

- ◎ Problems in Shiavo case?

11

What is Washington law regarding advance directives?

- ◎ Natural Death Act, RCW 70.122 et seq., allows “any adult person” to execute a document directing the withholding or withdrawal of “life sustaining treatment”. (1992)
- ◎ “Life sustaining treatment” is any medical or surgical intervention that uses mechanical or other artificial means to sustain, restore, or replace a vital function, which when applied to a “qualified patient”, serves only to prolong the process of dying. This includes artificially provided nutrition or hydration; excludes pain interventions (RCW 70.122.020(5))

12

What is a “qualified patient”?

- ⦿ Adult person who is diagnosed in writing to have a terminal condition by the patient’s attending physician , who has personally examined the patient; or,
- ⦿ Adult person who is diagnosed in writing to have a permanent unconscious condition in accordance with accepted medical standards by two physicians, (one of who is attending physician), both of whom have personally examined the patient.

13

What is considered to be a “terminal condition”?

- ⦿ An incurable or irreversible condition caused by injury, disease, or illness, that, within reasonable medical judgment, will cause death within a reasonable period of time in accordance with accepted medical standards,
and
- ⦿ Where the application of life-sustaining treatment serves only to prolong the process of dying. (RCW 70.122.020)

14

Checklist for a valid health care directive (RCW 70.122.030)

- ⦿ Must be in writing.
- ⦿ Must be signed by declarant in the presence of two witnesses:
- ⦿ Witnesses cannot be related to declarant by blood or marriage and cannot be entitled to any portion of the declarant’s estate.
- ⦿ Witnesses cannot be attending MD or an employee of the attending MD or a health facility in which the declarant is a patient.
- ⦿ Witnesses cannot have a claim against declarant’s estate upon his/her death.

15

Types of treatments which may be described in health care directive:

- ⦿ Accept/refuse
 - artificially provided hydration/nutrition;
 - pain medication at doses to relieve pain (if such medication may increase risk of death)
 - “DNR”/”No Code” order placed in/on chart.
- ⦿ May list any other “life sustaining/heroic measures” that are permitted by patient; e.g. intubation, ventilation, etc.

16

Medical record (RCW 70.122.030)

- ◉ Directive or copy of directive shall be made part of the patient's medical record retained by the attending physician.
- ◉ Copy of directive shall be forwarded (by MD) to the custodian of records for the health care facility when the withholding or withdrawal of life support is contemplated.

17

Revocation of health care directive (RCW 70.122.040)

- ◉ Can be revoked by the qualified patient at any time, regardless of whether qualified patient has been declared incompetent:
- ◉ By canceling, defacing, obliterating, burning, tearing, or otherwise destroying it or instructing someone else to do so (physical destruction).
- ◉ By written revocation (signed, dated) or by verbal expression.

18

Revocation (cont'd):

- ◉ If written or verbal expression, shall become effective only upon communication to the attending MD by the declarant or by a person acting in his/her behalf.
- ◉ Attending MD shall record in pt's medical record date, time and place of revocation and date, time, and place (if different) of when MD was notified of revocation.

19

What Natural Death Act does not allow..

- ◉ RCW 70.122.100 (as amended in Initiative 1000) specifically states:
 - “Nothing in this chapter shall be construed to condone, authorize, or approve mercy killing or ~~physician-assisted suicide, or to permit an affirmative or deliberate act or omission to end life other than to permit the natural process of dying~~, lethal injection, or active euthanasia.”

20

Health Care Durable Power of Attorney

21

Health care durable power of attorney (RCW 11.94.043, .046)

22

- ◉ Basically an extension of the concept of a general power of attorney
- ◉ “Durable” power because attorney-in-fact can act during incapacity of principal
- ◉ Can be any trusted adult friend/family member
- ◉ Cannot be principal’s MD, MD’s employees, or owners, administrators, or employees of health care facility where principal resides or receives care (unless spouse, adult child, brother/sister)

Powers that can be given to “attorney-in-fact”

23

- ◉ access medical records and other personal info
- ◉ employ and discharge health care personnel
- ◉ give, withhold, or withdraw informed consent for medical treatment
- ◉ exercise and protect rights of principal

Powers that can be given to “attorney- in-fact” (cont’d)

24

- ◉ grant releases
- ◉ authorize pain relief
- ◉ companionship and visitation: to be equivalent to a family member in this respect

Mental health advance directives

25

Mental health advance directives RCW 71.32

- ⦿ Allows individuals with periodic major mental health issues to effectively approve/disapprove of specific mental health treatments even at time of incapacity before acute psychiatric illness occurs.

26

Mental health advance directives RCW 71.32 (cont'd)

- ⦿ Important tool because durable power of attorney cannot be used for most acute mental health situations.
- ⦿ WA, attorney-in-fact cannot consent to therapy involving
 - convulsions;
 - psychosurgery; or
 - psychiatric or mental health procedures that are intrusive on person's bodily integrity, freedom of movement, or the rights set forth in the involuntary commitment statute (RCW 71.05.217)

27

Mental health advance directives: requirements

- ⦿ Must be in writing
- ⦿ Must be dated and signed by the principal or surrogate in principal's presence (incapacity)
- ⦿ Must designate whether it can be revoked during periods of incapacity or not
- ⦿ Must be witnessed by two individuals who can attest that they know principal; were present during signing; can attest that principal did not appear incapacitated

28

Commitment proceedings may still be required in some cases..

- ◉ Note that advance directive **CANNOT** be used as authority for inpatient admission for more than 14 days in a 21 day period

29

Mental health advance directive can be revoked by the following actions:

- ◉ By written statement of principal or at the principal's direction in principal's presence;
- ◉ Expressly or by inconsistency, by a subsequent directive;
- ◉ By court order.
- ◉ Note that mental health advance directive can be revoked during incapacity only if originally written to permit revocation during incapacity.

30

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- ◉ questions

31

Summary

- ◉ What is:
 - Living will
 - Durable power of attorney
 - Mental health advance directive

32