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NAVIGATING LEGAL ASPECTS OF SERIOUS ILLNESS AND END OF LIFE

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February 22, 2019

“Death is no longer something that just happens…

Rather it is a process, planned in advance and monitored and controlled by lawyers, doctors, family members, legislatures, government officials, and the person who is dying.

It is the concern, in short, of bio-politics.”

2 Estate Planning and Community Property Law Journal, 1, 29 (Fall 2009)

Topics to be discussed

1. Advance Directives
2. Powers of Attorney
3. MOST form
4. End-of-Life Options Act

Advance Directives / Powers of Attorney

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Living Will

Most widely used type of advance directive

Written statement that details patient's desires and wishes for medical treatment when no longer able to express informed consent or in a persistent vegetative state

Living Wills: "Colorado Medical Treatment Decision Act" (8/11/10)

- **Then was New & Improved:**

- **Terminal Condition OR PVS**
- **Decisional capacity replaces mental competency**
- **Unconscious/incompetent terms removed**
- **"lacks decisional capacity" is new criterion for accepting/rejecting treatment instead of 'mentally incompetent' or 'unconscious'**
- **NPs can now determine when "nourishment" intervention necessary for comfort/pain relief**
- **Artificial nutrition & hydration not limited to being the "only procedure being provided" (now MOST exists)**
- **MDPOA recognized for MD to discuss terminal condition before final determination on withholding/withdrawing life-sustaining treatment**

Other Advance Directives:

-Medical Durable Power of Attorney

-General Power of Attorney

-Organ Donation form

Medical Durable POA

Legal document authorizing agent to make health care decisions when person is *incapacitated*

OR immediately

Makes healthcare decisions

Can't pay bills though or sell real estate or property

Must act in patient's interests & preferences

Medical Durable Powers of Attorney: "Patient Autonomy Act" (1992)

- **Written MDPOA gives agent authority to act on behalf of patient if preconditions met.** **C.R.S. § 15-14-506(1)**
- **Agent must act on patient's wishes.** **C.R.S. § 15-14-506(2)**
- **Only effective upon decisional incapacity of patient.** **C.R.S. § 15-14-506(4)**

General POA

Conveys broad powers to a person or organization to act on your behalf

Handling financial and business transactions, operating business, making gifts, employing help

May include authority deciding admissions or placement

MOST or POLST

Medical Orders for Scope of Treatment
Physician Orders for Life Sustaining Treatment

(NEITHER REPLACE ADVANCE DIRECTIVES – ONLY A MEDICAL ORDER BY A PHYSICIAN)

Colorado Advance Directives Consortium

coloradoadvancedirectives.com/most-in-colorado

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MOST law in Colorado

- **Effort to reconcile prior advance directives when drafting MOST form**
- **If conflicting documents, one most recently executed prevails, areas not in conflict continue**
- **Authorized surrogate/MD/NP not revoke/alter previous adv dir for artificial nutrition/hydration if patient declaration under CO Med Treatment Decision Act**

Screening POAs – Ongoing Communication

- Who has authority to speak for resident if the resident is not capable of making health care decisions?
- Is POA acting in patient's best interests?

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What if provisions in multiple Advance Directives conflict?

- If multiple advance directive documents, conflicts are decided in favor of the most recently executed.
  - Provisions of prior advance directives that are not in conflict remain valid, unless explicitly revoked.
- Authorized health proxy / surrogate not permitted to revoke / alter previous advance directive for artificial nutrition / hydration if patient declaration under CO Med Treatment Decision Act (executed after 8.10.2010).

POTENTIAL SCENARIO

- Resident of NF is terminal and on hospice
- Resident dependent on cardiac pacemaker
- Resident has Living Will – DNR and no treatment that prolongs death
- Resident has 4 children - 1 is POA, another is alternate
- MD agrees pacemaker is treatment that is prolonging death
- POA refuses to discontinue pacemaker because would “hasten my mother's death”

How have prior cases impacted current End of Life Option law in Colorado?

- *Quinlan* (**1976**) PVS, father sought court order to take off respirator since no proof of Karen's own wishes: removal of life-sustaining device not criminal act by MD since patient would presumably die from "natural circumstances" but counter to prevailing medical practice of the time.

  (difference between unlawful taking of life vs. ending artificial life support systems)

Case Precedent (con't.)

- *Cruzan* (**1988**) PVS, parents sought court order to take adult daughter off life support but U.S. Supreme Court held Missouri had a legitimate state interest in protecting human life and personal choice thru heightened evidentiary requirements.

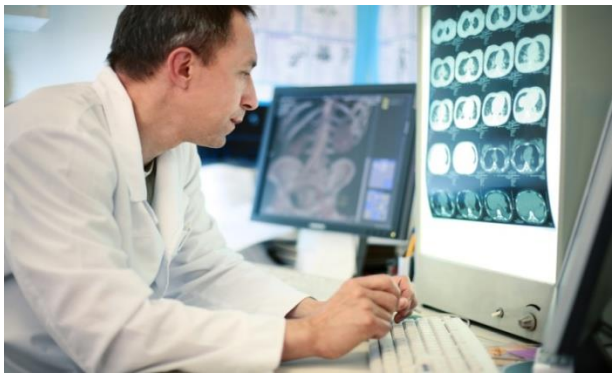
  (states can regulate end of life decisions, gradual progression to recognize patient rights:

  - right to refuse medical treatment;
  - privacy right protected by 14th Amendment)

Case Precedent (con't.)

- ***Shiavo*** **(1990) MI-no higher brain functioning, placed on tube feeding, parents filed suit to revoke spouse's guardianship because he wanted tube removed; all courts found clear & convincing evidence patient would not want to live in condition with no hope for recovery.**

  (FL passed law for Gov. Bush to reinsert tube but reversed by FL Sup. Ct. since law violated separation of powers)



Colorado End-of-Life Options Act

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What is the Colorado End-of-Life Options Act?

- Statute that permits individuals who have mental capacity and have been diagnosed with a terminal illness with a prognosis of 6 months or less to request from their attending physician medical prescription for aid-in-dying medication.
- General Requirements:
  - 2 oral requests (separated by at least 15 days) and a valid written request to attending physician;
  - Written request must be witnessed by 2 adult individuals; and
  - Attending physician must refer requestor to another consulting physician for confirmation of diagnosis, prognosis, mental capacity (may require evaluation by psychiatrist/psychologist), and voluntariness.

WHAT CHOICES DO FACILITIES HAVE?

1. **Do nothing** – physicians will be permitted to prescribe and residents will be permitted to take aid-in-dying medications.
2. **Choose to participate** – draft policies and procedures addressing physicians' ability to prescribe and residents' ability to consume aid-in-dying medication on premises of the facility.
3. **Opt-out of participation** – draft policies and procedures and issue written notice informing physicians and residents that facility will not participate in the End-of-Life Options Act and that residents expressing desire to participate will be discharged / transferred to accommodate their wishes.

Potential Scenario

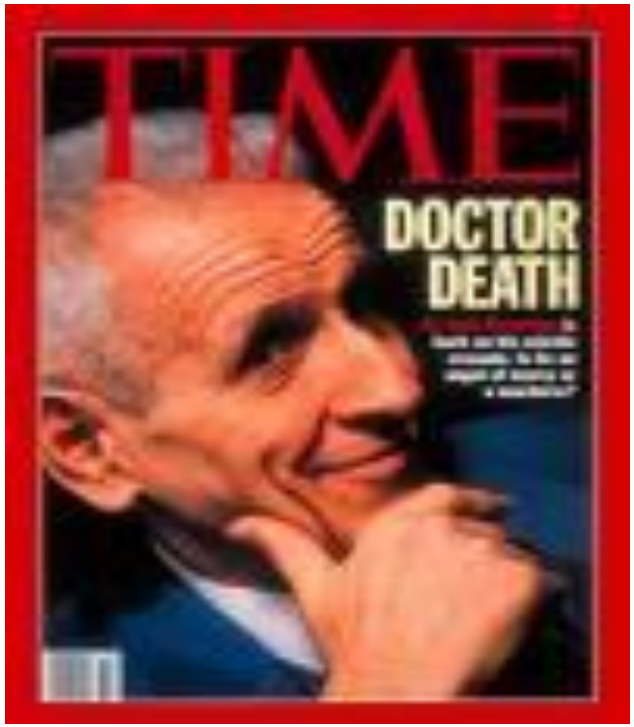
- SNF resident is terminally ill and receiving hospice care
- No indications of imminent death
- Family members suddenly visit resident in SNF
- Soon thereafter, family takes resident out of facility, possibly to family member's home
- Resident dies at family member's home
- Hospice aware of resident's death, SNF only learns of resident death after contacting hospice and family
- Circumstances of resident's death unknown to SNF

Criminal Statutes

A person commits the crime of manslaughter if intentionally causes or aids another person to commit suicide or recklessly causes the death of another person. C.R.S. §18-3-104

NOTE: 2010 CO Medical Treatment Act withholding/withdrawal of life-sustaining procedures is NOT suicide or homicide

Best Advice:
Avoid
BIO-POLITICAL
Pitfalls



and follow the LAW

QUESTIONS?

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