Advance Health Care Directives: Drafting & Dispute Resolution Strategies

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MSBA Health Section
November 22, 2019

1

Purpose

2

Goal concordant care

3

Get Tx you want

Avoid Tx you don't want

4

BUT

5

6

4

7

1. AD not completed

8

PewResearchCenter
NUMBERS, FACTS AND TRENDS SHAPING THE WORLD

NOV. 21, 2013

Views on End-of-Life Medical Treatments

Growing Minority of Americans Say Doctors Should Do Everything Possible to Keep Patients Alive

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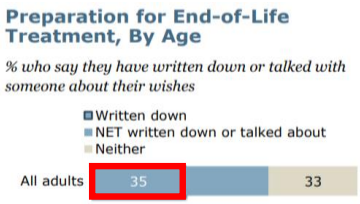

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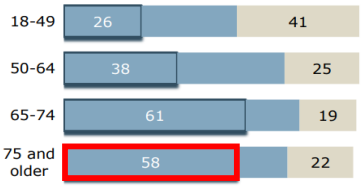

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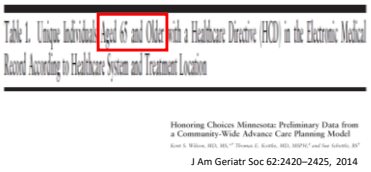
Table 1. Unique Individuals Aged 65 and Older with a Healthcare Directive (HCD) in the Electronic Medical Record According to Healthcare System and Treatment Location

Honoring Choices Minnesota: Preliminary Data from a Community-Wide Advance Care Planning Model

J Am Geriatr Soc 62:2420–2425, 2014

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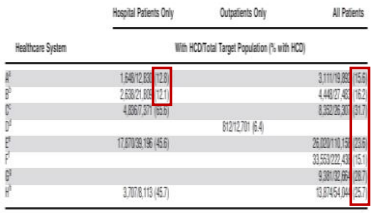

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2. AD not found

14

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

U.S. Department of Health and Human Services
Assistant Secretary for Planning and Evaluation
Office of Disability, Aging and Long-Term Care Policy

15

Fail to make & distribute **copies**

- Primary agent
- Alternate agents
- Family members
- PCP
- Attorney
- Clergy
- Online registry

16

Complete
≠
Have

17

Upshot

18

Advance directives are **preferred**

19

Your decision maker is someone **you** chose

20

BUT

21

Not completed

Not available

22

80%

23

Patient cannot speak for herself

24

No AD

25

No agent

26

Still need a SDM

27

2nd choice – after agent

28

Not chosen by patient

29

Chosen off **a list**

30

Almost all states have a statutory **sequence**

31

Agent
Spouse
Adult child
Adult sibling
Parent . . . . .

32

More relatives

33

ND list is **longer** than most

9 categories deep

34

23-12-13. Persons authorized to provide informed consent to health care for incapacitated persons - Priority.

1. Informed consent for health care for a minor patient or a patient who is determined by a physician to be an incapacitated person, as defined in subsection 2 of section 30.1-26-01, and unable to consent may be obtained from a person authorized to consent on behalf of the patient. Persons in the following classes and in the following order of priority may provide informed consent to health care on behalf of the patient:
   a. The individual, if any, to whom the patient has given a durable power of attorney that encompasses the authority to make health care decisions, unless a court of competent jurisdiction specifically authorizes a guardian to make medical decisions for the incapacitated person;
   b. The appointed guardian or custodian of the patient, if any;
   c. The patient's spouse who has maintained significant contacts with the incapacitated person;
   d. Children of the patient who are at least eighteen years of age and who have maintained significant contacts with the incapacitated person;
   e. Parents of the patient, including a stepparent who has maintained significant contacts with the incapacitated person;
   f. Adult brothers and sisters of the patient who have maintained significant contacts with the incapacitated person;

35

g. Grandparents of the patient who have maintained significant contacts with the incapacitated person;
h. Grandchildren of the patient who are at least eighteen years of age and who have maintained significant contacts with the incapacitated person; or
i. A close relative or friend of the patient who is at least eighteen years of age and who has maintained significant contacts with the incapacitated person.

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Problem 1

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Statutory sequence does **not match** your preference

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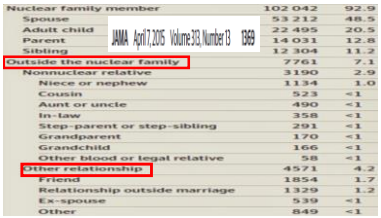

Nuclear family member	102 042	92.9
Spouse	53 212	48.5
Adult child	22 495	20.5
Parent	14 031	12.8
Sibling	12 304	11.2
Outside the nuclear family	7761	7.1
Nonnuclear relative	3190	2.9
Niece or nephew	1134	1.0
Cousin	523	<1
Aunt or uncle	490	<1
In-law	358	<1
Step-parent or step-sibling	291	<1
Grandparent	170	<1
Grandchild	166	<1
Other blood or legal relative	58	<1
Other relationship	4571	4.2
Friend	1854	1.7
Relationship outside marriage	1329	1.2
Ex-spouse	539	<1
Other	849	<1

JAMA April 7, 2015 Volume 313, Number 13 1369

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Problem 2

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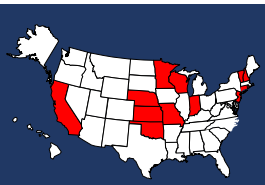
41

No list

42



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BUT

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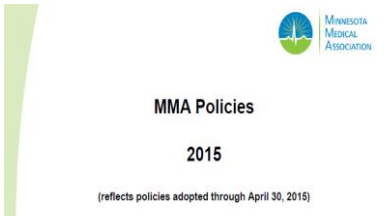
Custom & practice

45



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240.22 Decisions to Forego Life-Sustaining Treatment for Patients Lacking Decision-Making Capacity

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"**Without** an advance directive that designates a proxy . . ."

48

"**patient's family** should become the surrogate . . ."

49

"family"

50

"persons with whom the patient is **closely associated**."

51

"In the case when there is **no one** closely associated with the patient . . ."

52

"but there are persons who both **care about** the patient and have **some relevant knowledge**"

53

"may be appropriate surrogates"

54

Making Treatment Decisions for Incapacitated Older Adults Without Advance Directives

AGS Ethics 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

55

Judicially endorsed

56

CASE TYPE INDICATOR: CIVIL - OTHER

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT
PROBATE DIVISION
FILE NUMBER: C7-94-1717

RE: James D. Butcher and Patricia A. Butcher, individually and as parents and natural guardians of James D. Butcher, II,
Plaintiffs,
vs.
Thomas Fashingbauer, in his official capacity as Director, Ramsey County Community Human Services Department, and Ramsey County Community Human Services Department,
Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

57

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,

is consistent with the standard of medical and ethical practice in the State of Minnesota.

58

BUT

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Some providers **refuse** to recognize family

61

Using default list creates risk

Wrong SDM

62

Right SDM but the

3. Wrong decision

63

> 60%
accuracy

64

More
aggressive
treatment

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Agent	Advance directive
GO	STOP

66

Code of Medical Ethics
of the American Medical Association

"surrogate's decision . . .
almost always accepted"

AMA

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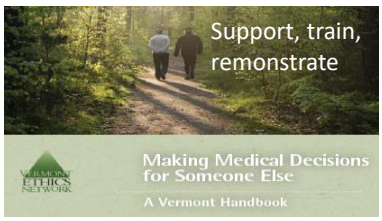

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Minn. Stat. 145C.07(3)

71

Health care agent must "act in the **best interests** … considering … principal's **personal values** to the extent known"

72

Clinicians should **not** follow "bad" surrogates

73

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Advanced dementia

End stage kidney disease

Chronic respiratory failure

76

80 ambulance calls

Treated at almost every hospital in Twin Cities

77

78

aggressive treatment is **unethical & painful**

CMO

79

80

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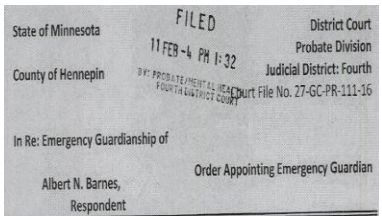

State of Minnesota
County of Hennepin
FILED
11 FEB -4 PM 1:32
BY: PROBATE/MENTAL HEALTH
FOURTH DISTRICT COURT
District Court
Probate Division
Judicial District: Fourth
Court File No. 27-GC-PR-111-16
In Re: Emergency Guardianship of
Albert N. Barnes,
Respondent
Order Appointing Emergency Guardian

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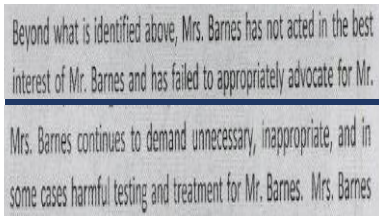

Beyond what is identified above, Mrs. Barnes has not acted in the best interest of Mr. Barnes and has failed to appropriately advocate for Mr.

Mrs. Barnes continues to demand unnecessary, inappropriate, and in some cases harmful testing and treatment for Mr. Barnes. Mrs. Barnes

83

Right SDM but the

3. Right decision

84

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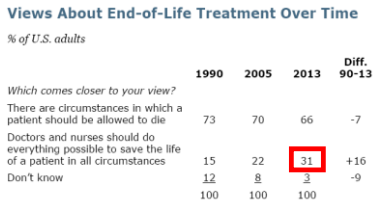

Views About End-of-Life Treatment Over Time

% of U.S. adults

	1990	2005	2013	Diff. 90-13
Which comes closer to your view?				
There are circumstances in which a patient should be allowed to die	73	70	66	-7
Doctors and nurses should do everything possible to save the life of a patient in all circumstances	15	22	31	+16
Don't know	12	8	3	-9
	100	100	100	

86

Medical Futility

87

Clinician	Surrogate
CMO	LSMT

88

Surrogate will **not** consent to CMO recommendation

89

BUT

unlike Lana Barnes

90

Aggressive treatment plan **consistent** with patient wishes

91

Table 4. Recommended Steps for Resolution of Conflict Regarding Potentially Inappropriate Treatments

1. Before initiation of and throughout the formal conflict-resolution procedure, clinicians should enlist expert consultation to aid in achieving a negotiated agreement.
2. Surrogate(s) should be given clear notification in writing regarding the initiation of the formal conflict-resolution procedure and the steps and timeline to be expected in this process.
3. Clinicians should obtain a second medical opinion to verify the prognosis and the judgment that the requested treatment is inappropriate.
4. There should be case review by an interdisciplinary institutional committee.
5. If the committee agrees with the clinicians, then clinicians should offer the option to seek a willing provider at another institution and should facilitate this process.
6. If the committee agrees with the clinicians and no willing provider can be found, surrogate(s) should be informed of their right to seek case review by an independent appeals body.
7a. If the committee or appellate body agrees with the patient or surrogate's request for life-prolonging treatment, clinicians should provide these treatments or transfer the patient to a willing provider.
7b. If the committee agrees with the clinicians' judgment, no willing provider can be found, and the surrogate does not seek independent appeal or the appeal affirms the clinicians' position, clinicians may withhold or withdraw the contested treatments and should provide high-quality palliative care.

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Minn. Stat. 145C.15(b)

94

"provider … unwilling to provide directed health care … may **transfer** the principal"

95

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

96

Treat 'til transfer

97

Addressed **only** to **agents** named in AD

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