

## ADVISING THE ELDERLY CLIENT:

*Advance Care Planning,  
End of Life Decisions:*

### WHAT CAN GO WRONG?

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### It's the Lawyer's Fault!

- "I don't care what that piece of paper says, Daddy didn't tell me he wanted me to kill him!"
- "Mother couldn't have put that in her POA, it's against our religion!"
- "He couldn't have agreed to that, his English isn't good enough!"
- "She wasn't capable when she signed that!"

## It's the Lawyer's Fault!

- Did you make your client promise to advise her Attorneys for Personal Care what's in the document, have an "end of life" chat?
- Did you ask about religious/cultural beliefs?
- Did you bring the "no heroic measures" provision to your client's attention?
- How was the client's English?
- Did you direct your mind to client's capacity?

## It's the Lawyer's Fault!

Did you docket everything and make adequate notes so that when subpoenaed to testify in a decade you'll know what you said to the client?

## TIPS

- Is the client's English good enough?
- Have client put initials beside the "No Heroic Measures" provision?
- Docket that you discussed it with the client.
- Make your client promise to talk to the Attorneys about end of life wishes!
- Chart capacity observations.

## TIP

- Video record your interviews, save the video on disc in the file

## IT'S THE CLIENT'S FAULT

- For appointing Attorneys who can't agree on the time of day...
- For not reading the damn thing!
  - Yes, you mailed/emailed a draft
  - Yes, you asked if they'd read it
- For not telling the Attorneys what's in it.
  - Yes, they promised they would
- For changing his mind...
  - And not following up [later verbal wishes trump prior written wishes: *HCCA s. 5*]

## IT'S THE PHYSICIAN'S FAULT:

- For not asking if there is a POA
- For not reading it
- For not explaining the principles of substitute consent to the Attorneys
- For not being aware of the principles of substitute consent....
- For not obtaining lawful substitute consent
- For not challenging the SDMs...



## IT'S THE PHYSICIAN'S FAULT:

### "Lawful" Substitute Consent:

- Make and chart a finding of incapacity;
  - Including explanation of risks and benefits of treatment;
- To the extent appropriate, advise patient of the finding, its consequences and of the right to challenge it;
- Identify the correct SDM;
- Explain the risks and benefits of treatment:
  - In a meaningful way
- Get consent that accords to the principles of substitute consent...
  - HCCA s. 10(1)(b): "SDM has given consent in accordance with this Act."

## IT'S THE PHYSICIAN'S FAULT:

### The Principles of Substitute Consent:

#### HCCA s. 21

- Decisions must respect prior capable wishes applicable to the circumstances.
- If no such wishes or if they are impossible to follow, then in accordance with patient's "best interests."
- BEST INTERESTS consider:
  - Respect for impossible/incapable wishes;
  - Values and beliefs
  - Best "medical" interests
  - Any other relevant factor

## IT'S THE PHYSICIAN'S FAULT:

- Physicians have the right *[if not the obligation]* to challenge an SDM whose consent does not accord to the principles for substitute consent.
- "Form G" Application to the Consent and Capacity Board.
- How often do you think physicians engage the legal system to advance a patient's treatment interests?

## IT'S THE HOSPITAL'S FAULT

- How do you get admitted to hospital for
  - Brain surgery
  - Dementia
  - Anything!
- And no one inquired after
  - a POA, [or even identified the SDMs!]
  - your end of life wishes, values and beliefs...

*PHYSICIAN ASSISTED DEATH*  
*PHYSICIAN ASSISTED DEATH*  
*PHYSICIAN ASSISTED DEATH*

### *PHYSICIAN ASSISTED DEATH*

What Can Go Wrong?

- Might be legal in Canada on February 7<sup>th</sup> 2016
  - Or not...
  - Or delayed...
- Might be legislation in place when PAD becomes legal
  - Or not...
- Might be guidelines from CPSO, CMA
  - Or not...

## The *Carter* Guidelines:

What Could Possibly Go Wrong?

- “Competent adult”
  - Capable children?
  - Does this obviate a provision in a POAc?
- clearly consents to the termination of life;
- has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition.

Thank You

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