

Final Days, Finest Hours

What Lawyers & Doctors Can't Do at Life's End

Mark Handelman, B.A. LL.B. MHSc (bioethics)
Counsel, Whaley Estate Litigation
Barrister and Solicitor, *Health Law Matters*
m.handelman@sympatico.ca



Who Will “Pull Your Plug?”

And When?





LIFE'S END, A Definition?

- What is the legal definition of “death?”
- There isn't one!
- What is the medical definition of “death?”
 - Cessation of all brain activity, or
 - Cessation of cardiac function.
- The “dying process:”
 - Mental deterioration: loss of meaningful/significant interaction with one's environment;
 - Physical deterioration: irreversible breakdown of vital bodily functions;
 - Fully dependant for everything...



For how long do YOU wish to linger?

- How do you know that now—when you don't know what will afflict you?
- Did you factor in the medical advances we all expect between now and then?
- Do you believe in miracles? [Do your SDMs?]
- What about the cost?
- Who have you told--and what have you told them?
- What have you been told—and by whom?



What Can Possibly Go Wrong?

- “He is a fighter!”
 - Every game ends...
- “When God wants him, God will take him!”
 - Maybe God is trying and you’re in the way?
- “He never wanted to go to a nursing home!”
 - Who does?
- “I know that’s what he’d want, but how can I kill my own father?!”
- “His religious beliefs require that he suffer until God decides to take him.”
- “There’s nothing else we can do for your mother...”
- “I know that’s what it says but that isn’t what it means.”
- “He didn’t read it!!!”



You have specific views, religious or otherwise;

Your children have pitched battles about who gets the cottage on a holiday weekend;





Case Study: *Mr. Hassan Rasouli*

- Went to Sunnybrook for “routine” brain surgery to remove a tumor;
- Surgery successful but then acquired an infection—
- Leaving him with extremely limited brain function and completely dependant in ICU,
 - Initial diagnosis PVS then upgraded to MCS...
- Where he remains 4 years later, while his wife and doctors do battle through the Courts.



Case Study: *Mr. Hassan Rasouli*

WHAT'S MISSING from this story?

No evidence Mr. Rasouli:

- Had a POA for care—or had it suggested to him;
- Had discussions with his family about “what if...”
- Had discussions with his surgeon about “what if...”



Mr. Rasouli's

- LAWYERS can't do a POA now;
- DOCTORS can't cure him;
- And it's too late to ask him....
 - **Fortunately**, his family is certain they know enough about his values and beliefs to make unequivocal decisions to keep him alive.
 - **Unfortunately**, his treatment team disagrees that he should be kept alive.



Case Study: Mrs. I.A.

- Elderly widow with kidney failure and complications;
- No POA
- Two children:
 - A son who wants her life continued
 - A daughter who thinks she should be allowed to die
- Son not getting out of jail for another 3 months, wants to make amends.
- Daughter will settle for selling Mother's house, she needs the money...
- Now what?



Case Study: Mrs. I.A.

Mrs. I.A.'s

- Substitute decision-makers (“SDMs”) can’t agree;
- Lawyers can’t do a POA
- Doctors can’t discern her wishes...



Case Study: Mrs. I.A.

WHAT HAPPENED?

- Son and daughter fought it out in a Consent and Capacity Board Hearing.
- The Board concluded neither child could act in her best interests.
- Because there were no other relatives, the decision defaulted to Public Guardian and Trustee,
- But, to everyone's surprise, she recovered, read the Board's Judgment-----
- And did POAs and a Will!



Who Decides Whether Or Not YOU Can Decide For Yourself?

- Health practitioners proposing treatments are obliged to obtain informed consent
 - [also applies to admission to a care facility]
- Informed consent only comes from a capable person.
- Capable patients decide for themselves;
- Incapable patients have SDMs



“Capacity:”

- To make treatment decisions;
- To make admission to care facilities decisions;
- To do a Power of Attorney for Personal Care;
- To do a POA for Property;
- To manage your own personal care;
- To manage your own property.



Capacity, different definitions:

- You may have lost capacity to make your own treatment [or property] decisions but still retain capacity to make a Power of Attorney!



BUT:

Your Lawyer Can't

- Predict your illnesses or their course;
- Determine when you might lose capacity to make your own decisions;
- Predict what your SDMs will do.

Your Doctor Can't

- Necessarily cure you;
- Determine when you might lose capacity to make your own decisions;
- Predict what your SDMs will do.



AND:

Your Lawyer Probably Won't:

- Ask the probing questions required to ensure you pick the right Attorney;
- Make you promise to talk to your SDMs to ensure they understand your wishes, values and beliefs;
- Know about the Consent and Capacity Board process to resolve disputes...

Your Doctor Probably Won't:

- Ask the probing questions required to ensure you pick the right Attorney;
- Make you promise to talk to your SDMs to ensure they understand your wishes, values and beliefs;
- Initiate the Consent and Capacity Board process to resolve disputes....



Choosing the Wrong Decision-Maker(s)

- Your spouse
- is older than you—and already showing senility....
- Your children
- can't agree on the time of day...
- Your brother
- lives in a Tibetan Ashram and has taken a vow of silence...
- Your sister
- does not believe in modern medicine ...



Choosing the *Right* Decision-Maker(s)

- Someone who genuinely cares about your well-being!
- Will be capable, available and willing!
- Knows your wishes, values and beliefs
 - And will respect them!
- Will educate themselves about your condition(s) and prognosis;
- And, will advocate for you!



I have a POA, am I done?

NO! Not until you have:

- Had detailed discussions with your Attorney!
- They need to know your wishes, values and beliefs—
- And be empowered to respect and implement them!



Starting the Conversation:

- While watching the news;
- While watching a television drama;
- After visiting a friend in hospital;
- After a funeral...
- **Before** seeing a lawyer about wills and POAs!
- **Before or after** a checkup—even if you are healthy!



“Mother, if you can’t make your own decision, what should I do for you?”

“When there’s nobody home, you turn out the lights.”



Things You Should Never Say [unless you really, really mean them!]

- “I never want to go to a nursing home”
- “Do Everything!”
- “Don’t let me die!”



QUESTIONS?





Does it hurt when my lawyer touches you there?

