importance of legal planning

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86 year old Dean just lost his wife of 50 years, Eileen, to cancer. Eileen had been ill for quite some time and was unable to attend church with her husband for the last few years, one of her favorite things to do.

At Eileen’s funeral at the church, Dean was sitting with his daughter, Mary, and his son Ed. They were approached by a very fit woman in her mid 40’s named Olga. Olga expressed her condolences to all of the family members.

After the funeral, Olga began regularly attending church and all of the senior activities. She became fast friends with Dean and was observed sitting next to him often.

Mary noticed that in the months following her mother’s death, Dean and Olga were spending a lot of time together, and eventually Olga was spending a lot of time at Dean’s home.

hypothetical:

sex for signatures

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Mary noticed that in the months following her mother’s death, Dean and Olga were spending a lot of time together, and eventually Olga was spending a lot of time at Dean’s home.
Although Mary and Ed were concerned, their father seemed ok at first. But during the next few months, Dean became more withdrawn from family activities. He had stopped returning calls and sending birthday cards. At Thanksgiving, his grandkids wanted to visit and they were bluntly told that “we are spending Thanksgiving with Olga and her family.”

Right after Thanksgiving, Mary got a call from a lifelong family friend who happens to be her father’s accountant. He urged Mary to visit her father and indicated that substantial changes in ownership of his assets were being discussed.

Mary makes an appointment for her and her brother Ed to meet with an Elder Law Attorney to discuss their father’s situation.
The attorney, after listening to the story, expressed that in his experience, this was possibly a case of financial exploitation and said that it’s possible that Dean suffers from a bit of dementia. He notes that their father had not been intimate with his wife in 15 years and asks if he has been intimate with Olga.

Mary and Ed become upset and accuse the lawyer of insulting their deeply religious father. They leave the office.

Mary and Ed head to their father’s home after their meeting and notice a brand new BMW sitting in the driveway of his home.

They knock on the door, and after a few minutes, Olga answers the door visibly disheveled in a state of partial undress. Olga flashes a ring on her finger and tells them that they can’t come in right now, they are busy.

Mary and Ed head directly back to the attorney’s office, realizing he was right.
Who is a “Disabled Person”?  
755 ILCS 5/11a-2

The person in need of a guardian is the “Disabled Person” and must be 18 years or older and:

- Because of mental deterioration or physical incapacity, is not fully able to manage his person or estate,
- Because of mental illness or developmental disability is not fully able to manage his person or estate,
- Because of gambling, idleness, debauchery or excessive use of intoxicants or drugs, so spends/wastes his estate as to expose himself or his family to want or suffering; or
- Is diagnosed with fetal alcohol syndrome or fetal alcohol effects.

Determining the need for a guardian

If a person is capable of understanding the available options, and deciding what he or she wants, guardianship is not appropriate, even if the chosen course of action may be considered contrary to the person’s own best interests.
**TYPES OF GUARDIANSHIP**

**Guardian of the Person**
- Make medical decisions;
- Residential placement of the Ward with court approval;
- Ensures that the Ward receives proper professional services;
- Release of medical records and information;
- Limited powers with regard to mental health decisions (cannot admit a Ward to a mental facility).

**Guardian of the Estate**
- Make financial decisions;
- Entering into contracts;
- Take actions to benefit the estate for tax purposes;
- State Planning;
- File lawsuits;
- Sell real estate;
- Apply for government benefits especially to conserve estate assets;
 STEPS TO PETITION FOR TEMPORARY GUARDIANSHIP

1) Obtaining a Physician's Report (i.e., CCP-211)

• Perhaps the most challenging part of filing for Temporary Guardianship is getting the CCP-211, or Physician’s Report, completed in time. The Judge cannot approve a temporary guardian without an accompanying doctor’s evaluation.

The Role of Medical Professionals:

The determination of whether the person is disabled, to what extent a disability has any practical impact upon the decision-making capacity, particularly the need for guardianship, and the assessment of the least restrictive options for care and treatment, should be made by qualified medical and other specialists.
PHYSICIAN’S REPORT REQUIREMENTS:

- Does the report (Cook County Form CCP-211) include a diagnosis that the respondent suffers from one of the following that renders him or her partially or totally incapable of making personal or financial decisions?
  - Mental deterioration
  - Physical Incapacity
  - Mental Illness
  - Developmental Disability

Filing the Petition for Plenary and Temporary Guardianship Simultaneously.

- The Temporary Guardianship petition requires that you state why a temporary guardian is necessary. The explanation should focus on “the immediate welfare and protection of the alleged disabled person and/or his estate.”

3) After filing the Temporary Guardianship Petition, a Guardian Ad Litem must be appointed.
WHAT DIVIDES A FAMILY?

Mom or dad starts to need more help with day-to-day living:

<table>
<thead>
<tr>
<th>Money</th>
<th>Where is mom and dad’s money going?</th>
</tr>
</thead>
<tbody>
<tr>
<td>HE DID WHAT!?</td>
<td>Parent is making “irresponsible” decisions.</td>
</tr>
<tr>
<td>Conflicting Ideas</td>
<td>“Mom and Dad want this.” “No, Mom and Dad want that.”</td>
</tr>
<tr>
<td>What is money being spent on?</td>
<td></td>
</tr>
</tbody>
</table>

Who has the responsibility to care for mom and dad?

Does the rest of the family respect this siblings’ choices?

How do we avoid these conflicts?

What are the expectations for providing care?
**Estate Planning Basics**

- What documents you should have, update, or get
- Prevent future family disputes about decision-making
- Avoidance guardianship proceeding

**OVERVIEW**

**WHAT IS ESTATE PLANNING?**

- Distribution of Estate Assets upon Death
- Asset Protection
- Estate Tax Planning
- Advance Planning for Management of Financial Affairs in Case of Mental Incapacity
- Avoidance of Probate
- Advance Planning for Health Care Decision Making
ESTATE PLAN

Last Will and Testament

- Operative upon death
- Appoints Executor
- Directs payment of debts and last expenses
- Directs distribution of estate upon death
- Public document

Living Trust

- Operative during life and upon death
- Settlor transfers assets to a Trustee for the benefit of the Settlor during life and Settlor’s family after death
- Incapacity Planning – Successor trustee(s) can manage assets for the benefit of Settlor
- Provides for distribution of Trust assets to descendants upon death
- Private document
ADVANCED DIRECTIVES

The legal right to have an agent decision maker is based on the concept of someone “standing in the shoes” of the patient.

WHO IS MAKING THE DECISIONS?

- A competent adult patient makes their own medical decisions
- A patient is presumed to have decisional capacity without regard to advanced age
- Until a diagnosis is confirmed and the court appoints a guardian it is murky territory regarding those “HELPING” the senior with decision making
DURABLE POWERS OF ATTORNEY

Property

Healthcare

Competency to Sign

ESTATE PLANNING BASICS

POWERS OF ATTORNEY

Legal document granting authority:

✓ to another
✓ whom you trust
✓ to act for you
✓ in certain circumstances
✓ Your “legal clone”
NO LONGER HYPOTHETICAL

“Patient admitted to hospital and no one is designated as POA, so you download the POA form from the internet for the daughter”

“Two family members produce separate and different Power of Attorney documents”

“My mom has just been diagnosed with Alzheimer’s, what do we need to do first?”

POWER OF ATTORNEY FOR HEALTH CARE

- Appoints an agent to make health care decisions on your behalf if you become incapacitated.
- A Health Care Power of Attorney gives your agent general directives that must be followed but allows flexibility.
- Your agent can decide what you would have wanted done in each scenario.
- A Health Care Power of Attorney is also useful because it allows your doctor or the hospital to release all necessary medical information to whomever you choose as agent.
- Revocable regardless of mental capacity
HYPOTHETICAL

You arrive at work after the weekend and a new patient has been assigned to your case load after being admitted to the ER two days ago.

Stanley Older, 82 y/o male, suffered a serious fall down the stairs at the Chicago Symphony Center. He was at the concert with his long-time girlfriend Penny, 62 y/o female. Penny reports to you that she has been with Stanley for many years and his only concerned relatives are his two children, who both live in California.

Stanley’s injuries include a broken arm, broken nose, and most significantly, a closed head brain injury which has dramatically affected his cognitive abilities. Stanley doesn’t recall his fall or his girlfriend Penny. Penny asserts that she holds a power of attorney for health care, but cannot find the document “because it was signed so long ago.” She is certain that Stanley favors her as the decision maker over his children because he only sees them around the holidays.

HYPOTHETICAL CONTINUED

Stanley is incapable of understanding his brain injury and claims he is “just fine.” While generally pleasant, the staff asserts that Stanley has significant mood swings and is refusing treatment.

Stanley’s adult daughter is scheduled to arrive shortly and you have scheduled a care conference for your patient.

UPDATE: Stanley has suddenly developed a serious breathing problem and a trach was placed. He is now combative and completely uncooperative.
Who, if anyone, is empowered to act as Stanley’s decision maker?

When a patient lacks decisional capacity, medical decisions may be made by:

1. **First**: An agent under valid power of attorney for health care.

2. **Second**: A court-appointed guardian of the person.

3. **Third**: Another surrogate under the Health Care Surrogate Act.
HEALTH CARE SURROGATE ACT

The Process

- Presumption of capacity
- Determination of lack of decisional capacity
- Reasonable inquiry as to the availability of a healthcare agent
- Reasonable inquiry to identify possible surrogates

Where there is no agent, no living will or other applicable advance directives, medical decisions may be made by a surrogate decision maker. The Surrogate Decision Maker shall be one of the following:

- The “guardian” of the patient’s person;
- The patient’s spouse;
- Any adult son or daughter of the patient;
- Either parent of the patient;
- Any adult brother or sister of the patient;
- Any adult grandchild of the patient;
- A “close friend” of the patient;
- The guardian of the patient’s estate.
Can the girlfriend attend the conference?

Without a power of attorney for healthcare do we rely on the daughter as the surrogate decision maker?
Can Stanley’s son participate in the conference by phone and if he disagrees with his sister- who prevails?

What should you do about Stanley’s impaired status, i.e. should we seek the appointment of a guardian?
**DIMINISHED CAPACITY**

Health Care Professionals and Attorneys must constantly make assessments regarding a client’s capacity (assess cognition, not diagnosis).

- Some clients are obviously incapacitated, while others may suffer from varying degrees of incapacity.
- Capacity is not an “all or nothing” condition. A client may have greater capacity in some situations than others, it runs along a continuum and can vary according to time of day, the task presented, life stressors, medication and other pressures.

**A HEALTH CARE AGENT CAN:**

- Make decisions about treatments designed to keep you alive if you are near death or not likely to recover.
- Choose among options for where you receive care and who your health care providers are.
- Agree to donate your organs if you have not decided for yourself.
- Make decisions about what is done with your remains after you have died.
POWER OF ATTORNEY FOR PROPERTY

- Appoints an agent to manage your financial affairs upon incapacitation
  - Avoids guardianship and probate proceedings
  - Includes authority to manage real estate
  - Can change title on property

- Especially useful to manage assets that cannot be owned jointly:
  - Health Savings Accounts
  - IRA's
  - Retirement Plans
  - Property not put in trust
  - Revocable only with "contractual" capacity

THE LIVING WILL

- Signed by Competent Person
- "Terminal Condition"
  - "an incurable and irreversible condition which is such that death is imminent and the application of death delaying procedures serves only to prolong the dying process."
- Lack of capacity to make decision
INTERACTION OF ADVANCE DIRECTIVES

- Power of Attorney for Healthcare
- Living Will
- Mental Health Treatment Declaration
- Healthcare Surrogate Act

STATISTICS

The American Bar Association estimates 55% of adults in the United State die without a will or estate plan.
STATISTICS

Top Reason Given for Not Having a Will by Gender

39% Men Think Not Necessary
26% Women Think Too Costly

STATISTICS

Top Reasons Given for Not Having a Will

18% Not Necessary
16% Too Complicated to Deal With
14% Too Expensive
13% Believe spouse/children will receive all
6% Too Time Consuming
IN THE NEWS
AT LEAST 50 HOSPITAL EMPLOYEES FIRED FOR IMPROPERLY VIEWING SMOLLETT’S MEDICAL RECORDS

• In January, 2019 former Empire actor, Jessie Smollett arrived at Northwestern’s Emergency Department related to the alleged physical attack upon him.
• In March, 2019 a nurse from NMH told CBS News that she was one of the several healthcare workers fired for allegedly viewing Smollett’s records.
• Nurse claims, however, that she did not intentionally seek out Smollett’s record.

HOW PLAUSIBLE IS THE NURSE’S CLAIM?

- Improperly viewing any patient records—not just those of celebrities and high-profile patients—is grounds for termination for most HIPAA-covered entities.
- Hospital’s electronic health record (EHR) audit log could reveal the timing of when and how long certain pages or cases are viewed.
- If his name was scrolled past, PHI might have popped up that would probably trigger an audit log entry too.

“Insider” threats, or security risks posed by people who already have access to a provider’s system, are a recurring threat, according to the Office for Civil Rights.
HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT (HIPAA): WHAT IS IT?

- Statute which protects privacy of patients
- Dictates who can receive certain medical documents
- Establishes what penalties arise when a patient’s privacy is violated

QUESTIONS?

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