NAVIGATING VULNERABLE ADULTS IN TODAY'S HEALTHCARE SYSTEM

NEXT CHALLENGE. NEXT LEVEL.

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Framing the Issue: Vulnerable Adults in Today's Healthcare System

- We have a problem:
  - According to a U.S. News and World Report July 28, 2017 article, in 2016, there were an estimated 1.4 million elderly and disabled adults in South Carolina.
  - Some of society's most vulnerable experience unspeakable treatment both at the hands of family and at the hands of those who family members entrust their loved one's care.
  - Has this (or how many times has this) happened to you?
    - Elderly adult comes to the ED via EMS from home, the home of a relative, from an assisted living facility, from a nursing home, etc. with an apparent emergency medical condition and the elderly adult is not able to make healthcare decisions and no one (or no one who is capable / available / appropriate) is identified as a decision-maker.

Framing the Issue: Vulnerable Adults in Today's Healthcare System

- Impact on Hospitals/Healthcare Systems:
  - Potential civil liability for the hospital and health care providers for providing care (or not providing care) to an individual who is not able to make health care decisions for themselves;
    - Health care providers are understandably hesitant to provide care, in the absence of a clear emergency, without consent;
    - Potential for allegations of battery for providing care;
    - Potential for allegations of "wrongful life" for providing life-saving care in the absence of consent;
    - Potential for wrongful death allegations if life-saving treatment is not provided.

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- Impact on Hospitals/Healthcare Systems:
  - Financial impact related to patients without insurance or identified decision-makers:
    - Financial liability for hospital stay falls 100% on the hospital when the patient stay does not meet Medicare medical necessity requirements.
    - Results:
      - Overall increase in the cost of health care for everyone with insurance or the ability to pay due to cost-shifting;
      - Contributes to lack of transparency in the actual cost of health care.
    - Inability for the hospital Discharge Planners to develop and implement meaningful discharge plans or Social Services/Care Coordinators to find placement when there is no one to take financial responsibility or to make health care decisions.
    - Without having power of attorney for financial purposes, health care providers are not able to obtain information about potential assets/income and are not able to act on behalf of the patient to seek/apply for financial assistance.

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- Impact on Hospitals/Healthcare Systems:
  - Impact related to patients without identified decision-makers on staff:
    - Uncertainty in how to plan and provide care to individuals with no "legal" decision-maker/personal representative;
    - Frustration created by same uncertainty in providing care and the fear of potential liability for providing care without consent or not providing care;
    - Frustration experienced by the hospital Discharge Planners who cannot develop and implement meaningful discharge plans or Social Services/Care Coordinators to find placement when there is no one to take financial responsibility or to make health care decisions
    - Discontent of direct care givers who "signed up" for acute care.

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- Key definitions:
  - "Vulnerable Adult means a person eighteen years of age or older who has a physical or mental condition which substantially impairs the person from adequately providing for his or her own care or protection. This includes a person who is impaired in the ability to adequately provide for the person's own care or protection because of the infirmities of aging including, but not limited to, organic brain damage, advanced age, and physical, mental, or emotional dysfunction. A resident of a facility is a vulnerable adult." S.C. Code Ann. § 43-35-10(11).
  - The Adult Protection Act ("APA") is focused on protecting vulnerable adults from abuse, neglect and exploitation (improperly requiring engagement in an improper, unlawful or unreasonable activity or labor; unauthorized use of funds, assets, property, etc.; requiring the purchase of goods/services for the profit or advantage of another through undue influence, harassment, duress, force, coercion or swindling/overreaching/cheating/ or defrauding through cunning arts or devices that delude the vulnerable adult and cause him/her to lose money or property).

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- The APA requires physicians, nurses and many others to report an incident within 24 hours or next business day to the Vulnerable Adults Investigations Unit of SLED (DMH or DDSN facilities), the LTC Ombudsman Program (all other facilities – nursing care facilities; CRCF; any non DMH or DDSN psychiatric hospital) or to the Adult Protective Services Program of the DSS (all others).
- Even if no report is required, hospitals may be faced with the situation where no one is available to make health care decisions.

Who may consent to health care? General Consent Law

- The laws concerning consent are based in the doctrine that it "'is the patient's right to exercise control over his or her own body by deciding intelligently for himself or herself' whether or not to submit to the particular procedure." Hook v. Rothstein, 281 S.C. 541, 316 S.E.2d 690 (Ct. App. 1984) (quoting Sard v. Hardy, 281 Md. 432, 379 A.2d 1014, 1019 (1977)).
- In the seminal case of Hook, the SC Court of Appeals recognized the doctrine of implied consent. In Hook, the court stated that the information that must be provided by the physician to the patient to satisfy the rights of informed consent must be given to "a patient of sound mind, in the absence of any emergency which warrants immediate medical treatment." Harvey v. Strickland, 350 S.C. 303, 566 S.E.2d 529 (2002) (quoting Hook).
- Common law: Consent for health care is given by either the patient, the patient's guardian or health care is provided without consent in a bona fide emergency. Period.

Who may consent to health care?

- Adult Health Care Consent Act ("AHCCA").
- "The purpose of the Adult Heath Care Consent Act is to insure that the patient's wishes concerning her medical treatment are honored whenever possible, and that decision making by the surrogate is a last resort." Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 755 S.E.2d 450 (2014). "Adult Health Care Consent Act confers authority on a health care surrogate to consent on the patient's behalf to the provision or withholding of medical care and to make financial decisions obligating the patient to pay for the medical care provided." Thompson v. Pruitt Corp., 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016).
- The AHCCA is effective when the patient has been determined to be "unable to consent."
- Confusion between "unable to consent" v. incompetent.

Who may consent to health care: AHCCA

- "Unable to consent" means the patient is unable to appreciate the nature and implications of the patient's condition and proposed health care, to make a reasoned decision concerning the proposed health care, or to communicate that decision in an unambiguous manner.
- This term does not apply to minors, unless they are married or have been determined judicially to be emancipated.
- A patient's inability to **consent** must be certified by two licensed physicians, each of whom has examined the patient. In an emergency the patient's inability to **consent** may be certified by a health care professional responsible for the care of the patient if the health care professional states in writing in the patient's record that the delay occasioned by obtaining certification from two licensed physicians would be detrimental to the patient's health.
- A certifying physician or other health care professional shall give an opinion regarding the cause and nature of the inability to **consent**, its extent, and its probable duration. If a patient unable to **consent** is being admitted to hospice care pursuant to a physician certification of a terminal illness required by Medicare, that certification meets the certification requirements of this item. S.C. Code Ann. § 44-66-20(8).

Who may consent to health care: Order of Priority Under the AHCCA

- After a determination that an individual is "unable to consent":
- (1) a guardian appointed by the court pursuant to Article 5, Part 3 of the South Carolina Probate Code, if the decision is within the scope of the guardianship;
  - Clearing up confusion between "guardian" and "guardian ad litem".
  - Guardian: The individual/fiduciary who has custody of a minor or mentally incompetent adult as designated by a probate court judge to make decisions about the care of the person (ward). The term specifically excludes "guardian ad litem." S.C. Code Ann. § 62-1-201(18).
  - Guardian ad litem: In the context of a vulnerable adult subject of a report of abuse/neglect/exploitation, the individual who serves as a family court-appointed guardian ad litem pursuant to S.C. Code Ann. § 43-35-45 to advocate for the best interests of the vulnerable adult in proceedings within family court.

Who may consent to health care: Order of Priority Under the AHCCA

- (2) an attorney-in-fact appointed by the patient in a durable power of attorney executed pursuant to Section 62-8-101, if the decision is within the scope of his authority;
- (3) a person given priority to make health care decisions for the patient by another statutory provision;
- (4) a spouse of the patient unless the spouse and the patient are separated pursuant to one of the following:
  - entry of a pendente lite order in a divorce or separate maintenance action;
  - formal signing of a written property or marital settlement agreement; or
  - entry of a permanent order of separate maintenance and support or of a permanent order approving a property or marital settlement agreement between the parties;

Who may consent to health care?

- (5) an adult child of the patient, or if the patient has more than one adult child, a majority of the adult children who are reasonably available for consultation;
- (6) a parent of the patient;
- (7) an adult sibling of the patient, or if the patient has more than one adult sibling, a majority of the adult siblings who are reasonably available for consultation;
- (8) a grandparent of the patient, or if the patient has more than one grandparent, a majority of the grandparents who are reasonably available for consultation;
- (9) any other adult relative by blood or marriage who reasonably is believed by the health care professional to have a close personal relationship with the patient, or if the patient has more than one other adult relative, a majority of those other adult relatives who are reasonably available for consultation. S.C. Code Ann. § 44-66-30(A).

Who may consent to health care?

- Documentation of efforts to locate the individual in the priority order must be recorded in the medical record. S.C. Code Ann. § 44-66-30(B).
- Disagreements between individuals of equal priority may be petitioned to the probate court by any interested person. S.C. Code Ann. § 44-66-30(C).

Who may consent to health care?

- Priority must not be given to a person if a health care provider responsible for the care of a patient who is unable to consent:
  - Determines that the person is not reasonably available, is not willing to make health care decisions for the patient, or is unable to consent; S.C. Code Ann. § 44-66-30(D)
  - Has actual knowledge that, before becoming unable to consent, the patient did not want that person involved in decisions concerning his care; S.C. Code Ann. § 44-66-30(E) or
  - If, in the opinion of the certifying physicians, the patient's inability to consent is temporary, and the attending physician or other health care professional responsible for the care of the patient determines that the delay occasioned by postponing treatment until the patient regains the ability to consent will not result in significant detriment to the patient's health. S.C. Code Ann. § 44-66-30(F).

Consent to health care

- Decisions about health care shall be based upon the patient's wishes to the extent that the patient's wishes care be determined; If the patient's wishes cannot be determined, then the person in priority shall base decisions on the patient's best interest. S.C. Code Ann. § 44-66-30(G).
- Decision-making applies to consent and withholding of consent. S.C. Code Ann. § 44-66-30(H).
- Health care decisions on behalf of a patient who is unable to consent may be made by a person named in Section 44-66-30 if no person having higher priority under that section is available immediately, and in the reasonable medical judgment of the attending physician or other health care professional responsible for the care of the patient, the delay occasioned by attempting to locate a person having higher priority presents a substantial risk of death, serious permanent disfigurement, loss or impairment of the functioning of a bodily member or organ, or other serious threat to the health of the patient. S.C. Code Ann. § 44-66-40(B).

When may health care be provided without consent?

- Health care may be provided without consent to a patient who is unable to consent if no person authorized by Section 44-66-30 to make health care decisions for the patient is available immediately, and *in the reasonable medical judgment of the attending physician or other health care professional responsible for the care of the patient, the delay occasioned by attempting to locate an authorized person, or by continuing to attempt to locate an authorized person, presents a substantial risk of death, serious permanent disfigurement, or loss or impairment of the functioning of a bodily member or organ, or other serious threat to the health of the patient*. Health care for the relief of suffering may be provided without consent at any time that an authorized person is unavailable. S.C. Code Ann. § 44-66-40(A).

Who may consent to health care?

- Health care may be provided without consent to a patient who is unable to consent if no person authorized by Section 44-66-30 to make health care decisions for the patient is reasonably available and willing to make the decisions, and, in the reasonable medical judgment of the attending physician or other health care professional responsible for the care of the patient, the health care is necessary for the relief of suffering or restoration of bodily function or to preserve the life, health, or bodily integrity of the patient. S.C. Code Ann. § 44-66-50.

Who may consent to health care?

- A health care provider is not authorized to provide health care pursuant to an alternative decision-maker identified in the AHCCA if the health care provider has actual knowledge that the health care is contrary to the religious beliefs of the patient or the unambiguous and uncontradicted instructions expressed at the time when the patient was able to consent. S.C. Code Ann. § 44-66-60.

Liability Protections for Persons Acting Under the Adult Health Care Consent Act

- (A) A person who in good faith makes a health care decision as provided in Section 44-66-30 is not subject to civil or criminal liability on account of the substance of the decision.
- (B) A person who consents to health care as provided in Section 44-66-30 does not by virtue of that consent become liable for the costs of care provided to the patient.
- (C) A health care provider who in good faith relies on a health care decision made by a person authorized under Section 44-66-30 is not subject to civil or criminal liability or disciplinary penalty on account of his reliance on the decision.
- (D) A health care provider who in good faith provides health care pursuant to Sections 44-66-40 or 44-66-50 is not subject to civil or criminal liability or disciplinary penalty on account of the provision of care. However, this section does not affect a health care provider's liability arising from provision of care in a negligent manner. S.C. Code Ann. § 44-66-70.

Recommendations: Compliance with the AHCCA

- Document:
  - When a patient is “unable to consent.”
  - Efforts to locate persons in priority to make health care decisions and the person’s availability or lack of availability of willingness to act as a health care decision-maker;
  - Examination observations that support the appropriate standard necessary for any health care provided in the absence of consent:
    - The delay occasioned by attempting to locate an authorized person, or by continuing to attempt to locate an authorized person, presents a substantial risk of death, serious permanent disfigurement, or loss or impairment of the functioning of a bodily member or organ, or other serious threat to the health of the patient.

Recommendations

- Identify vulnerable adult patients who have no decision-maker as early as possible to (hopefully) minimize negative impacts;
- Involve all stakeholders in the discharge planning process as early as possible;
- Involve legal counsel to assist with searches for:
  - Relatives who may be available to make health care decisions and authorize the hospital to move forward with determining and filing for Medicaid eligibility;
  - Assets and income of the vulnerable adult.
- Involve Administration early on to consider petitioning the probate court for temporary guardianship (and potentially conservatorship) for the purpose of locating assets/income and filing an application for Medicaid;
- Consider entering into bed reservation agreements with community long term care providers to assist with placement.

Recommendations

- Support efforts to establish public guardianship and vulnerable adult programs in South Carolina;
- Support funding for guardianship programs.

Questions?

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