Legal Issues
Advance Care Planning
Advance Directives

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Advance Health Care Directives

- Two types:
  - Instructive Directive
  - Proxy Directive

- Provides information to health care professionals if a patient is:
  - Unable to express their wishes
  - Unable to make decisions
The Instructive Directive

- Referred to as “living will”
- Documents health care preferences
  - Wishes regarding life-sustaining treatments
- Outlines how health care decisions should be made on patient’s behalf
- Helpful to both the proxy and health professionals
The Instructive Directive

Criteria:
- Patient and proxy must be of the age of majority
- Patient must be capable of giving consent to medical treatment

To be valid, the authorization must be:
- In writing
- Signed by the person giving it
- Witnessed by a person who is not the proxy or the spouse of the proxy
The Proxy Directive

- Known as durable power of attorney for health care
- Proxy is the “substitute decision maker”
  - A person entrusted with responsibility to speak for another individual when they are unable to speak for themselves
- Can incorporate the instructive directive
Reminders

- Advance Care Directive must be available when crisis occurs
  - Not locked away in safety deposit box
- Directive must be reflective of the individual’s current health situation
- Must reflect future unknowns (e.g. heart attack)
- Documents must be reviewed and updated
Goals of Advance Directives

- Role for both the physician and the lawyer
- Goal is to develop a document that is:
  - Individualized to the particular patient’s preferences
  - Reflective of their goals and values
Personal Directives Act
If, I am in the advanced (end) stages of an illness and in the dying process, I wish to have no life prolonging treatment, such as cardiopulmonary resuscitation (CPR), ventilation, blood transfusion surgery or tube feeding. I will accept treatment with antibiotics however, if it is administered with the intention of alleviating pain. I do wish to have pain medication and other measures, excluding intravenous or subcutaneous hydration, to keep me comfortable, even if they hasten my death.
Some unique features

Instructions about statutory decision-makers:

- If for some unforeseen reason my delegate and alternative are unavailable, I am herein instructing that the following relatives are not to be consulted regarding any and all healthcare and personal decisions: *Not Applicable*
Consultation

- Consultation when delegate making decisions
- My delegate may consult with my family physician and other family members if my delegate determines that such consultation is advisable or necessary.
Purpose of the Act

- Help individuals prepare for the onset of incapacity to make personal care decisions (nutrition, hydration, shelter, clothing, hygiene, comfort, recreation, support services, healthcare, placement).

- Help individuals who have not prepared for incapacity regarding personal care decisions by providing a mechanism for the appointment of a statutory decision maker who can make decisions related to long term care placement, health care decisions and home care support services.
What does the Act allow for?

- Appoint someone (delegate) to make personal care decisions for the maker
- Set out instructions or general principles about what or how personal care decisions should be made
- Hierarchy of statutory substitute decision makers for (1) health care (2) placement in continuing care home and (3) home care services
Jurisdictional Context

- Nova Scotia’s approach is aligned with other Canadian provincial jurisdictions

- Nova Scotia’s model is informed by a number of provincial programs that have been in existence for a number of years such as Ontario and the Yukon
Personal Directive – As a Document

- Any individual capable to make the decision in the personal directive— including mature minors can make a personal directive.
- It must be signed, dated and witnessed.
- A personal directive is considered a legal document if it meets the above noted criteria.
- A personal directive takes effect when the person who created the personal directive, becomes incapacitated.
- A personal directive will not assure the maker access to services that are above and beyond the established program parameters.
  - E.g. will not allow placement “fast tracking” based on facility preference.
Planning for Your Future

- A Personal Directive is just one of many planning mechanisms a person may use to ensure their wishes and values related to end of life decisions are captured and communicated.

- Other mechanisms may include:
  - Directives made in other jurisdictions are valid
    - (section 24)
  - Authorizations made under the *Medical Consent Act* prior to Nov 1, 2009
  - Enduring Power of Attorney/Power of Attorney
  - Wills
Capacity

- For all Planning Mechanisms, Capacity is assumed unless otherwise proven and is a requirement to support the validity of the planning document.

- Section 2(a): “capacity”, with respect to the *Personal Directives Act*, means the ability to understand the information that is relevant to the making of a personal care decision and the ability to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

- Definition fits with national and international movement; (eg. UK Mental Capacity Act)

For Health Purposes

- When there is a question of or disagreement related to an individual's capacity, physician’s opinion must be sought – section 10, 11 and 13 *PDA* – *form in regulations*.

- Health Care professionals will continue to assess client’s ability to give informed consent to service – as part of professional guidelines and scope of practice.
Named Delegates

- Can make personal care decisions
  - e.g.;
    - Nutrition
    - hydration
    - shelter
    - clothing
    - hygiene,
    - comfort,
    - Recreation
    - support services
    - healthcare
    - placement

- Must abide by instructions outlined in personal directive, or if values or wishes are unknown, decisions should be made in the “best interests” of the person represented

- Who are they?
  - Individual who created the personal directive can identify anyone they wish
  - e.g.
    - family member
    - neighbour
Appointed Statutory Decision Makers

- Can make decisions in relation to 3 areas:
  - health care
  - placement in continuing care home
  - home care services
- Must make decisions based on knowledge of or believed wishes of the person based on values and/or oral instructions; if they do not know the wishes, they base decision on the ‘best interests’ of the person
- Who are they?
  - Nearest relative (hierarchy)
  - Public Trustee
Protections and Limitations

Key protections:
- Termination/revocation
- Offences
- Court powers (similar to issues of guardianship now)
- Liability protection
- Good Faith Clause

Limitations
- A personal directive does not permit an illegal act
- An appointed substitute decision maker or delegate must comply with the requirements set out in the *Personal Directives Act* with respect to their role and responsibilities
  - Section 15 (4) of the Act
Benefits

- Fill long-standing gaps in legislation to address informed consent issues for placement and ‘home care services’ and health care outside of hospital.
- Allow for Nova Scotians to be legally clear about their wishes related to their care and personal decisions once they no longer have the capacity to do so.
- Provide clarity to health care workers in working with delegates/ substitute decision makers (families).
Challenges

- Developing and sharing a Personal Directive to ensure that their wishes and values related to their decisions are captured and communicated.

- Ensuring that health care professionals understand both the development process associated with creating a document (a Plan) as well as the law.
Cognitive Impairment

- Talking specifically about dementia
- The presence of dementia does not mean an inability to complete a Personal Directive
  - It means there is more burden on the lawyer receiving instructions (stats all over the map)
  - informed consent
  - Communication! Communication!
Capacity to make a Personal Directive

- Decisional capacity includes at least four components:
  - understanding information relevant to the decision
  - appreciating the information (applying the information to one’s own situation)
  - using the information in reasoning
  - and expressing a consistent choice
Can capacity be improved?

- Usually not, but understanding can
  - Communication can!
  - Supporting the efforts of “speak up”
Reminders

1. Everyone is assumed to be competent
   – Unless they have been declared incompetent by a court – then their attorney/delegate or guardian should be the decision-maker

2. Ask Questions-re-ask questions
   – (make a note of the questions and answers when documenting the consent process)
Need More Information?

- Information related to the *Personal Directives Act* and developing a Personal Directive are available online at:
  
Questions?