MASSACHUSETTS GENERAL HOSPITAL
PSYCHIATRY ACADEMY

Treatment Refusal/ Guardianship, Conservatorship, and Advance Directives

Ronald Schouten, MD, JD
Director, Forensic Psychiatry Fellowship Program
Saint Elizabeths Hospital
Washington, DC
Associate Professor of Psychiatry
Harvard Medical School

Disclosures

Neither I nor my spouse have a relevant financial relationship with a commercial interest to disclose.

The Right to Refuse Treatment

- All competent individuals have a right to make decisions about their own medical care, even though the decision may be at odds with the views of others, including the treating clinician(s)
- Who decides for those lacking decision-making capacity, i.e. incompetent (incapacitated) persons?
- Autonomy: right to be left alone and to bodily integrity
- Constitutional rights/common law/statutes all play a role

Current Practice

- General awareness and acceptance where
  - Patient has a psychotic illness
  - Patient is refusing treatment
- Continued resistance where patient is being treated with antipsychotics
  - For other illnesses
  - In low doses
  - In a non-psychiatric facility, such as nursing homes, medical/surgical units
  - Is consenting/assenting
- Wide acceptance of substituted judgment

Why the Resistance?

- The balance between duty to care for the patient and importance of autonomy
- Patients sit unmedicated waiting for legal proceedings
- Extended lengths of stay
- A decision from a different time
- Differing views of risks, especially with the newer antipsychotics
- Awareness and acceptance of the sliding scale approach to capacity assessment

Why the Resistance?

- One rule for every medicine and every situation ?
  - Prochlorperazine (Compazine)
  - Metoclopramide (Reglan)
  - Low dose antipsychotics for the sun downing or agitated demented patient
  - Cancer chemotherapy
- Why should antipsychotics be treated differently than other medications?

The Consequences

- Disrespect for the rule
- Incomplete compliance
- The underlying principles of autonomy and individual choice are lost

Who Decides for the Incapacitated Person? And how?

- Rights-driven model
  - Emphasizes protection of patient's right to autonomy
  - Minimal difference between rights of voluntary and involuntary patients
  - Patient's right to refuse even appropriate treatment is afforded protection through due process
  - States differ in how they apply this model (e.g., decision by guardian vs. judge)
- Treatment-driven model
  - Emphasizes protection of patient's right to adequate treatment during involuntary hospitalization
  - Limited right to refuse appropriate treatment
  - Primarily administrative, rather than judicial
  - Favored by federal courts

Involuntary Treatment: Differences Among States (adapted from Beinner, 2007)

- Involuntary treatment at time of admission (with clinical authorization): GA, MD, MI, MO, NJ, NC, PA, SC, TN, WV
- Administrative hearing required: DC, ME, NE, NV, NH
- Involuntary medication allowed upon judicial commitment: AL, AR, AZ, DE, KS, ID, IN, LA, MI, MT, WI, WI, WY, UT
- Allowed upon judicial commitment if need presented: MN, FL, IA, OK, RI, WA
- Allowed after separate hearing at time of commitment: AK, IL, TX
- Requires separate judicial hearing, usually after commitment hearing: CA, CO, HI, KY, MA, NY, ND, OH, OR, SD, VT, VA
- Requires a separate judicial order for a guardian: CT, NM

Rights Driven Model: Differences Among States

- Surrogate decision maker after a determination of incapacity
  - Guardian appointed by the court
  - Judge
- Decision making model
  - Best interests of the patient
  - Substituted judgment: What the incapacitated person would have decided if capable of making an informed choice

Two Rights Driven Models

- Adversarial (ex. Massachusetts)
  - Full legal proceedings
  - Judge decides
    - Issue of capacity (competence);
    - If incapacitated, whether the individual would accept the treatment if they had capacity;
    - Whether the treatment plan is appropriate
- Administrative (ex. District of Columbia)
  - Clinicians (non-treating) determine capacity
  - If incapacitated, atty-in-fact or substitute decisionmaker can consent (substituted judgment analysis)
  - In absence of those, can treat only after approval from administrative process
    - Single neutral person decides; due process rights
    - Patient can appeal to administrative body ("Medication Panel) consisting of non-treating psychiatrist, other licensed practitioner, consumer or consumer advocate

Clinical Aspects of Substituted Judgment

- Factors considered by the judge: Massachusetts as an example
  - The ward's expressed preferences regarding treatment
  - The ward's religious beliefs
  - The impact upon the ward's family
  - The probability of adverse side effects
  - The consequences if treatment is refused
  - The prognosis with treatment

Clinical Aspects of Substituted Judgment

- Shifting decisions and religious preferences
- Cross cultural issues
- The family member from out of town
- The family member/agent/guardian with “issues”
- Probability of adverse side effects

Clinical Aspects of Substituted Judgment

- Consequences if treatment is refused:
  - Controversy over the impact of delayed treatment
  - Controversy over neuroprotective vs. damaging effects of antipsychotics
  - Unknown long-term effects in children

Clinical Aspects of Substituted Judgment

- Prognosis with treatment
  - Generally better than without
  - Off-label uses of antipsychotics

The Newer Antipsychotics

- Highly effective
- Fewer side effects, but not side effect free
  - Metabolic syndrome
  - EKG changes
  - Orthostatic hypotension
  - Dyskinesias

Guardianships and Conservatorships

- Legal entity in which another person is given legal responsibility for an individual who has been deemed unable to fulfill some or all personal or financial responsibilities
- Terminology differs among jurisdictions
  - Guardianship/ Conservatorship of the person: decisions re treatment, living situation, other personal day-to-day matters
  - Guardianship/Conservatorship of the estate: decisions regarding finances
  - My have one without the other
  - Tailored to the individual/situation

Alternative Decision Making Tools

- Living wills
- Durable powers of attorney
- Health Care Proxy (HCP)
  - Uniform Probate Code; adopted in many states but may be modified
  - The Principal appoints the Agent to make decisions on his or her behalf in the event of incapacity
  - Agent can make “any and all” decisions that the Agent could have made prior to incapacity
    - Hospitalization
    - Antipsychotics
    - ECT

Potential Problems with HCPs

- Presumption of capacity to execute
- Presumption of capacity to revoke
- Principal can restrict choices of agent, e.g. no ECT, antipsychotics
- Solutions:
  - Presumptions are refutable
  - Original document can be used to establish Principal's preferences at time of execution