

— END-OF-LIFE SERIES · PART 3

When the Family Can't Agree

Surrogate Decisions at the End of Life

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Mom is on a ventilator after a massive stroke. One daughter says she'd never want to live like this. The son wants a trach and a feeding tube. The other daughter is on speakerphone from out of state. There's no living will in the chart. Who decides?

That's the question in part three of our end-of-life series, and it's behind more litigation than people expect, some of it between families and hospitals and some of it inside families.

CAPACITY COMES FIRST

It starts with capacity. A patient who has capacity decides for themselves, even over the family's objections. Capacity is decision-specific and it can change from day to day with delirium or sedation. In a dispute, one of the first things we look for is whether anyone actually assessed it and wrote down how they reached that conclusion. "Patient lacks capacity" with nothing behind it is weak evidence.

WHO DECIDES

When the patient can't decide, there's a general order of authority: a court-appointed guardian, then the agent the patient named in a health care power of attorney, then the state's default surrogate list, which typically runs spouse, adult children, parents, then siblings. Most states have a statute like this, but they don't all say what happens when three adult children at the same level disagree. That silence is where a lot of disputes begin.

The surrogate's job is also widely misunderstood. They're meant to decide what the patient would have wanted, not what they want. That's why the patient's own words carry so much weight, even when they were never written down. A comment to a primary care doctor at an annual visit, or a remark after a sister was on a ventilator, can show up in old records and matter a great deal.

WHAT THE RECORD SHOULD SHOW

In these cases the record tells you most of what you need. Who did the hospital identify as the decision-maker, and is the reason documented? What do the family meeting notes say about who attended, what prognosis was given, and what options were offered? Was palliative care involved, was there an ethics consultation, and was a time-limited trial proposed with written goals? If the state has a specific dispute procedure, like the Texas Advance Directives Act, were the notice periods followed exactly?

Good family meeting notes are some of the most valuable evidence in these cases. Poor ones leave gaps nobody can fill later.

Episode 79 of Lexcura Clinical Insights covers all of this in detail. Next week, hospice, and what happens when the comfort that was promised doesn't arrive.

This newsletter is for education only and isn't medical or legal advice.

ABOUT LEXCURA CLINICAL INTELLIGENCE

Lexcura Clinical Intelligence provides integrated clinical and regulatory analysis for attorneys handling healthcare litigation. If you have a case that turns on what the medical record really shows, we'd welcome the conversation.

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