

Is Your “Health Care Plan” in Order?

End-of-Life Planning in Light of the Terri Schiavo Case

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Many go to great lengths to ensure that their “financial plan” or “estate plan” at death is in order. However, it is less common for individuals to adequately plan for the health care decisions and issues which are almost certain to come – such as the continuation or removal of life-support and who is to make one’s health care decisions if incapacity occurs. These critical issues were brought into public focus in the well-known Terri Schiavo saga.

THE TERRI SCHIAVO STORY

In early 1990, Teresa “Terri” Schiavo collapsed in her St. Petersburg apartment. Mrs. Schiavo’s husband, Michael, called 911 and paramedics found her unresponsive. Upon arrival at the hospital, Terri was placed on a ventilator. However, the long passage of time without sufficient oxygen led to a “persistent vegetative state” diagnosis.

At the time of her collapse, Terri had no health care legal documentation in place, and thus a tumultuous and highly publicized legal battle ensued between Terri’s parents and Michael to decide Terri’s fate.

All tolled, more than a decade passed and hundreds of thousands of dollars were spent for the various actions in Florida and Federal courts. Ultimately, the case was turned over to the Florida courts, and in 2005 Terri was disconnected from her feeding tube.

Unfortunately, the years of squabbling and legal turmoil within the Schiavo family could have been averted if Terri had executed the necessary legal documentation.

THE LIVING WILL “SOLUTION”

Under Florida statute 765.302, an adult (age 18 or over) may execute a “Living Will.” In the Living Will the person may direct either that life-support be continued or that it be removed – once the person meets the statutory medical criteria for life-support removal.

Importantly, Florida statute 765.303 provides the proposed format for a Living Will – and a Living Will executed in compliance with Florida law is deemed to be “clear and convincing evidence” of the patient’s health care wishes for all judicial and medical purposes. Therefore, one’s directives in the Living Will are to be carried out by medical personnel regardless of any contentions among various family members.

OOPS – NO LIVING WILL

If one has not executed appropriate health care documentation, the decision to continue or to remove



life-support is held by his or her statutorily-designated “proxy.” The general statutory sequence for the proxy appointment is first the spouse, then one’s adult children, then one’s parents, then one’s siblings, and finally a “close friend” (as determined in an affidavit from the “close friend”).

However, the statutory proxy (even if it is the spouse) may not have life-support removed unless it is shown by “clear and convincing evidence” – a very high evidentiary standard – that removal would have been the patient’s desire. Consequently, if there is any substantial evidence that the patient desired life-support, then life-support may not be removed.

Further, if there is no evidence regarding the patient’s life-support desire, then life-support may only be removed if removal is deemed to be in the patient’s “best interest.” Unfortunately, Florida statutes do not define what one’s “best interest” is – leaving open the possibility of another Schiavo-like quagmire.

As seen in the Schiavo case, when a person has not indicated his or her wishes in a Living Will, significant family disturbances can occur in proving to the medical system, or the Court, the patient’s “desire” and “best interest.”

DON’T FORGET A “HEALTH CARE SURROGATE” DESIGNATION

A well-crafted health care plan will combine the Living Will with a Health Care Surrogate designation. In this designation the patient identifies the person (or sequence of persons) who will serve as surrogate, in lieu of the statutory proxy, if the patient becomes incapacitated. The surrogate holds legal authority to act on behalf of the patient in all health care matters – but must follow any specific instructions in the Living Will.

It is critical that one execute a Health Care Surrogate designation so that the hand-picked surrogate will be positioned to make health care decisions if incapacity

occurs. Importantly, the surrogate designation will circumvent the appointment of the statutory “proxy” (as discussed previously) – who may be a person ill-suited or not desired for this role – such as an estranged adult child.

WHEN TO UPDATE THE HEALTH CARE PLAN

It is advisable that the Living Will and Health Care Surrogate designation documents be reviewed whenever there has been a significant change in one’s circumstances, such as the development of a serious illness or a move to another jurisdiction.

And even without any significant change of circumstances, a good rule of thumb is to “re-sign” the health care plan every 5 years. Although health care documents technically remain valid indefinitely, Florida law authorizes these documents to be verbally revoked by the patient. Therefore, if an “old” Living Will or Health Care Surrogate designation is presented to a medical facility, the question may arise as to whether the patient had verbally revoked the document – and the potential for a Terri Schiavo situation raises its head.

HEALTH CARE PLANNING IS NOT JUST FOR SENIORS

Although health care planning is arguably more urgent for seniors, it should be recalled that Terri Schiavo was only 26 years old when her ordeal began. Therefore, younger folks should be urged – most likely by their parents or grandparents – to take the short period of time required to implement their own health care plan.

INTERNET AND OFFICE SUPPLY SHOP HEALTH CARE DOCUMENTS

The protective value of a well-crafted health care plan can be enormous to one’s family – particularly at a very difficult time. Therefore, it is advisable to retain a qualified attorney to prepare health care documentation that is precisely tailored to one’s wishes and Florida law. Although well-intentioned health organizations, websites and office supply shops often offer “fill in the blank” health care documents, prudence suggests that any short-cut to this important matter be avoided.

The comments expressed herein are intended for general informational purposes only and should not be relied upon as legal advice. Please consult legal counsel to obtain specific advice for your situation.



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