

## **Finding Meaning from the Tragedy that was the Schiavo Case**

No matter how we felt about the Schiavo case, everyone can recognize and sympathize for the personally tragedy behind the case. Terri was a mere 26 years old when her life was shattered on February 25, 1990. Before that day, she was a normal young woman, newly married and with hopes of starting a family. It is not really surprising that Terri had not taken the time to memorialize her wishes in writing. Very few young, healthy people do so, even after cases like this fill the news. In fact, only one-third of baby boomers have executed a living will. One AARP study found that almost 75% of people did not think they needed such a document, probably because they have expressed their wishes to their partners (which 74% of respondents had). Clearly, the simple lesson from this case is that this is not enough.

One of the ironic things about this case is that it occurred despite the best efforts of the Florida legislature. In thirteen states, there is no provision in the law for guardians or family members to make health care decisions, and the statutes in another six states would not apply in this case because they either prohibit refusals of nutrition and hydration or only apply when there is a consensus. New York allows family members to request DNRs but they cannot effect other treatment decisions or refusals. Florida is not such a state. Florida has a well-drafted and thoughtful statute which allows spouses and guardians to make treatment decisions. However, family members retain the right to legally contest surrogate decisions without advanced directives. In New Jersey, we faced this issue early with Quinlan case. In 1976 the New Jersey Supreme Court found that Karen Quinlan's independent right of self-determination overcame the claimed interests of the state in the preservation of life. The court allowed Karen's father to become appointed guardian and act on her behalf. However, even here, agreement among family members and consultation with the hospital's Ethics Committee were preconditions to removing life support. There is no doubt that the best and clearest way to ensure your wishes will be respected is to execute advanced directives.

Advance directives (living wills, powers of attorneys, and health care proxies) are legal documents that express an individual's wishes with regard to medical decisions. You may designate an agent who then has legal authority to make any health care decisions on your behalf. You may limit an agent's authority or provide specific direction to your agent through advanced directives as well.

The format and form of advance directives vary by state. It is wise to consult an attorney to address the legal nuances, personal preferences, and state differences. However, completing a pre-prepared form or online template is probably better than nothing. What is essential is for you to appoint a trusted person to speak for you when you are unable to speak for yourself. Once that person is appointed, it is vital that you explain your wishes. When drafting a living will, health care power of attorney or health care proxy,

the following should be considered:

- Who will serve as your Agent for Health Care? It is important to appoint one individual, and an alternate, who will be willing and able to respect your wishes.
- Are there certain medical treatments or pain control measures you want or don't want?
- How do you feel about artificial nutrition and hydration?
- Do you have any particular directions regarding specific health care facilities, religious preferences, disposition of your body, donation of bodily parts for transplant or research, etc?
- Considering various levels of impairment, what directions will you provide related to end-of life decisions specifically regarding
  - if you can no longer eat, drink or breathe on your own
  - if you cannot function independent of machines
  - if you are confined to bed
  - if you are in severe pain
  - if you have no cognitive ability

While you cannot and would not want to address every possible scenario in an advanced directive, it is useful to discuss any specific wishes and strongly held beliefs with your designated agents.

One of the most frustrating parts of being an elder lawyer is seeing people struggle with crises that could have easily been avoided. People make choices more often than not by not acting. We see this in cases like Schiavo, as well as in much more common scenarios played out in elder law offices daily across the country. So often people come into my office at a moment of crisis and the assistance and options which I can offer are limited by their failure to plan and communicate.—whether it is having to bring a guardianship action because no family member has a power-of-attorney or losing some protection of assets options because the family waited too long. The Schiavo case hopefully will serve as a wake-up call. Don't miss this opportunity to take a proactive approach to your life and health care. Communicate with your loved ones and plan for your future by executing planning documents, including advanced directives.