Documents (and Protection) Everyone At Every Age Should Have

Tragedy can strike at any age

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Now they can!

Terri Schiavo proved something every lawyer knew but most couldn't clearly illustrate. Now the problem is clear for all to see. While much of that case is viewed as involving highly emotional and spiritual "right to die" issues, the heart of the case revolved around what a twenty-seven year old woman, Terri Schiavo and her husband had not done; consider the need for advance directives. They were too young to need anything like that! Let their horrible experience be a lesson to you.

Terri Schiavo had a cardiac arrest in her St. Petersburg home in February, 1990. She "lived," but suffered severe brain damage due to lack of oxygen to her brain. She remained in a persistent vegetative state for the next 15 years during much of which the personal and legal battle raged around her. For years, her family and physicians attempted many ordinary and even extraordinary therapies and treatments, hoping to return her to consciousness, without success.

After eight years of failure and frustration, her husband, Michael, filed a petition with the Circuit Court in Pinellas County to remove her feeding tube to allow Terri to die. Her parents opposed that petition and argued that she was conscious and that this was murder. Based in part upon the testimony of her husband that she had indicated to him that she would not have wanted to live like that, the court determined that Schiavo would not have wanted to continue life-prolonging measures. Her feeding tube was removed under a Court order. It was then reinserted several days later as the case was appealed and as other lawsuits were filed. Years later, Terri Schiavo's feeding tube was again ordered removed. After more lawsuits and appeals through the federal court system, the original decision to remove the feeding tube was upheld and staff at the hospice where she had lived for years removed the feeding tube. Thirteen days later, on March 31, 2005, Schiavo died.

Setting aside the rights and wrongs of the many issues underlying this tragedy, are painful truths; 15 years of lying in a vegetative state, 7 years of litigation, having the U.S. Congress and the President of the United States try

to legislate to protect her, and becoming a national spectacle, was not necessary and could have been avoided. Terri was 27 when she suffered her cardiac arrest, and she was 41 when she died. More than a third of her life was spent in a persistent vegetative state. How could this have been avoided? With advance directives and other related documents.

What are Advance Directives?

You may be thinking about the natural decline at the end of your life as you age, or you may instead be thinking of an accident or a temporary medical or psychiatric condition. Regardless, there may be hours, days, months or, as in the case of Terri Schiavo, years, when you are unable to make your own medical decisions. These are the times when advance directives and the types of documents discussed below become so important.

The word "directives" is plural for a good reason; there are several different types of advance directives and related documents, each serving a different purpose, each working differently. In different states and areas they even have different names and often there are different legal requirements and technicalities in different states.

These are significant legal documents of life-extending or ending importance. You should not prepare any of these documents casually; they require understanding and careful attention. That is true even though any person 18 years of age or older can execute advance directives. Drafting a proper advance directive form may require guidance and assistance from a physician and an attorney. The Florida Supreme Court has approved forms for several advance directives. Even so, you may wish to speak with an experienced attorney to help with the drafting of any advance directives or similar document. Advance directives are commonly done at the same time as a part of an estate plan.

You may change or revoke any advance directive at any time, so long as you are legally competent. **To be effective, changes must be made and executed as required by the laws of your state; it typically is not as simple as just telling someone you have changed your mind.**

Advance directives are your way to inform your doctor and others, including your family, what kind of care and/or what treatments you would like to have (or would refuse) if you become unable to make medical decisions (for example, if you are in a coma). An accident or serious illness can happen suddenly, as it did for Terri Schiavo, and if you have properly executed advance directives, your wishes are much more likely to be followed. Well prepared advance directives may spare your loved ones the tragic stress of having to make hard decisions about your care or about withholding care while you are injured or sick.

The different advance directives and related documents discussed in this article (using the common Florida names) are:

Living Will
Health Care Surrogate Designation
Durable Power of Attorney
Do Not Resuscitate Order
Pre-need Guardian Designation
Anatomical Donations

A Living Will

A living will is one of the most common advance directives. It is a document that sets out the type of medical treatment or life-sustaining treatment you would want if you were seriously or terminally ill. You make the decisions yourself, it does not allow you to delegate decision-making to someone else. A living will allows you to clearly document your specific desires for receiving or withholding medical treatments at a time when you are terminally ill, have an end stage condition, or are in a persistent vegetative state. In most states, including Florida, a living will only goes into effect if you meet specific medical criteria and are unable to make decisions.

A living will can be general, very specific, or somewhere in between those two extremes. A common statement in a living will is to the effect that if you suffer an incurable, irreversible illness, disease, or condition and that your attending physician determines that the condition is terminal, you direct that life-sustaining measures that would serve only to prolong your dying be withheld or discontinued. If that is all that is said, you have a very general and non-specific living will.

But that leaves a great deal to the imagination and determining your desires in very specific circumstances may be difficult. More specific living wills may address your wishes in very specific circumstances including the following or more:

- Use of a feeding tube,
- Artificial (intravenous or IV) hydration,
- Use of medication or other treatments for relief of pain,
- Use of any or specific antibiotics,
- Cardiopulmonary resuscitation,
- Life-support equipment, including ventilators,
- A do not resuscitate (DNR) order.

With those specific examples, and many more are possible, you can see that a living will can get into fine detail as to what you do or do not want in terms of medical treatment if you are incapacitated.

But life can present strange and unanticipated challenges. You can't think of every possibility. So you may want someone to be ready to help make decisions when hard decisions must be made. That person is your health care surrogate.

Health Care Surrogate

Any competent adult in Florida has the right to designate a health care surrogate or surrogate decision maker, a person who can make health care decisions during any period of incapacity. The health care surrogate has the duty to consult with doctors and other health care providers and decides on the course of treatment provided or withheld. The surrogate makes health care decisions for you which are believed to be what you would have made under the circumstances. If there is no indication of what you would have chosen (such as a living will), the surrogate may consider what is believed to be your best interests in making decisions.

Know this, someone will be making the decisions when you can't! Florida law (F.S. §765.401) determines who will be your health care surrogate if you do not select one, if it is determined that you are unable to make medical decisions yourself, and there is no existing and available Medical Power of Attorney. That person is typically a relative or friend. If you do not have suitable relatives or friends, the appointed health care surrogate may be a person unknown to you.

Absent a living will or other expression of your wishes, the surrogate will make decisions based upon your perceived best interests. The health care surrogate has the same rights to request or refuse treatment that you would have if you were capable of making and communicating decisions. Complete trust for your health care surrogate is essential, your health care surrogate almost literally holds your life in his hands.

Power of Attorney

A Power of Attorney is a document that gives to another person the legal right and authority to make designated decisions. A general Power of Attorney terminates when the grantor becomes incapacitated. A Durable Power of Attorney remains in effect even when you are incapacitated or unable to make decisions. A Power of Attorney or Durable Power of Attorney can include far more than just medical decisions. Durable powers of attorney are useful for allowing family members to handle all aspects of life when a person is incapacitated, from operating a business to maintaining a household, all as expressed in the documents.

Alternatively, a Durable Power of Attorney can also be limited to medical decisions and as such it is another type of advance directive, like a Health Care Surrogate Designation. While a health care surrogate form typically grants the surrogate to make decisions without restrictions, a Medical Power of Attorney also expresses the same type of control as a living will, but it does so even when you are not terminal, end stage, or in a persistent vegetative state. For Powers of attorney signed in Florida after October, 2011, a Medical Power of Attorney is always active, not just in a period of incapacity, even if temporary. Previously, there had been something referred to as a springing Power of Attorney that became active when a person became incapacitated. That proved to be difficult to administer so springing powers of attorney are no longer permitted in Florida.

While a living will is limited to deathbed decisions and is used to declare your desire to not have life-prolonging measures be taken if there's no hope of recovery, a Medical Power of Attorney applies more often.

A Medical Power of Attorney is also referred to as a Durable Power of Attorney for health care or as a health care proxy. A Medical Power of Attorney becomes "active" whenever you are unconscious or otherwise unable to make medical decisions. It is often more desirable than a living will because of its application in times of incapacity that are not late in life. But one thing is certain, as with a health care surrogate designation, a Medical Power of Attorney requires a person you fully trust to make these decisions for you.

A Medical Power of Attorney is often combined with a Durable Power of Attorney that can cover virtually any aspect of life, financial, business and property. If you are, for example, in a coma, who will pay bills, respond to mail, handle your checking account, and many of the ordinary day-to-day activities we take for granted, as well as medical decisions?

Powers of Attorney in Florida are strictly governed by statute, chapter 709, Florida Statutes. What may have been valid before October 1, 2011, would not be valid if executed today; the requirements of the state law amended and effective in 2011 are very particular. Therefore, if you signed a Durable Power of Attorney in Florida before October 1, 2011, you should contact your attorney to consider having a new one executed.

Durable Powers of Attorney have peculiarities that require special attention:

- The right of the holder of a Power of Attorney cease at the death of the issuer.
- You must trust your general Power of Attorney completely because unless the document is specifically limited, that person has the power to access bank and financial accounts and records, buy and sell property and otherwise bind you legally.
- You must also be careful in selecting your Medical Power of Attorney. You may know the person, family or friend extremely well, but behavior can change under the kind of pressure faced while you are incapacitated. Your selected representative may make decisions that are very different from anything you expected. You will have to trust that the person who makes the decisions for you will sincerely act in your best interests.
- Finally, your Medical Power of Attorney also has the option to decline the responsibility, so that your alternate or another person may be thrust into an unexpected role.

A Do Not Resuscitate ("DNR") Order

A do not resuscitate order is another document some consider to be an advance directive, a very common one that arises during hospitalizations or serious medical illnesses. Typically a DNR is less specific and detailed than a Medical Power of Attorney. For example, a DNR commonly has an instruction not to administer cardiopulmonary resuscitation (CPR) if your heart stops or if you stop breathing. Without a DNR, doctors and nurses will typically try to help any

patient whose heart has stopped or who has stopped breathing. A DNR is the clearest way to tell your doctor that you don't want to be resuscitated. Your doctor will put the DNR in your medical chart. Doctors and hospitals in all states accept DNR orders although the form and content of DNRs can be very different from one medical facility to the next and from one state to the next.

Pre-Need Guardian Designations

You may state in advance that if you ever need a guardian, you desire it to be your spouse or your child or a specific friend. For example, if you become incapacitated in an accident, a guardian will be required to maintain a lawsuit and thereafter to manage your care. Florida law allows you to designate who you would like that person to be. You may also set out other desires you may have, although ultimately, court approval of those desires may be required.

Anatomical Donations

You may wish to donate, at death, all or part of your body. You may make an organ, tissue and eye donation to persons in need, or a donation of your body for training in the medical field. You can indicate your choice to be an organ donor by designating it on your driver's license, signing a uniform donor form, registering with the State of Florida at https://www.donatelifeflorida.org/register/, or by expressing your wish in a living will. Over 9 million people have registered in Florida alone.

That's a Lot. What Else Should I Know?

- The laws governing advance directives and these other documents are state laws and they vary from state to state. Florida's laws are different from other states. The written laws are interpreted by Courts, so a statute may actually work very differently than it reads.
- While technically you do not have to have a lawyer to fill out these documents, it is a good idea because they become legally valid as soon as they are properly executed.
- Because different states' laws are not the same, one state may not honor an advance directive even if valid in the state where it was executed. There is no easy solution to the problem this creates. The best solution is that if you are going to spend much time in another state, you may want to consider completing the advance directives for that state. If you move from one state to another, you need to determine if your old documents will be effective in your new home state.

- Advance directives do not expire unless they have their own built-in time limit. An advance directive typically remains in effect until amended or revoked.
- Generally, emergency medical personnel do not honor living wills or medical powers of attorney. Instead, they operate on an emergency basis

and do what is necessary to stabilize a person. Typically, only after medical personnel fully evaluate the person will advance directives be implemented.

- As life events happen, what was a good decision may change. You should review your advance directives periodically to see if they still do what you want. Changes should not be attempted without formally completing a new document.
- Proper documentation is of little value if no one knows it exists or if it cannot be found. It is critically important for family members and caregivers to know your preferences and to know where your advance directives are. A copy on your smart phone, in the hands of a close relative and in the handles of the person designated as your Medical Power of Attorney may save day or even years of uncertainty, indecision and suffering. These are important documents that should be included with your personal medical records.
- Ask your health care surrogate and alternate as well as your Power of Attorney if they will accept this responsibility. Discuss with them and put in writing how you would like decisions to be made. Give each a copy of the document.
- Make sure that your health care provider, attorney, and the significant persons in your life know that you have advance directives and where they are located. You also may want to give them a copy (but be cautious with your Power of Attorney), and on each copy note where the originals are kept.
- Set up a secure file where you can keep your advance directives (as well as other important paperwork such as your will, original documents that must be safely kept, and any final instructions). Commonly, such papers are kept in a safety deposit box or a fireproof safe. Wherever you keep those papers, make sure your family has information concerning the location of your safety deposit box and keys and the combination to your safe. Store that information on your smart phone as well, including copies of your advance directives.
- Keep a card or note in your purse or wallet that states that you have advance directives and where they are kept.
- If you change or revoke your advance directives, make sure your health care providers, attorney and family know what has happened and have the new documents or a record showing your revoked the old documents.

If you need further assistance or have questions, call The Idlewild Foundation, you may wish to go to the Advance Directives box under Resources/Legal Documents at the website of The Idlewild Foundation, www/idlewildfoundation.com or call (813) 264-8783 and we will guide you to affordable legal help.