

PLANNING FOR MEDICAL DECISIONS

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Every human being of adult years and sound mind has a right to determine what shall be done with his own body...@
Justice Cardozo

The single fastest growing demographic group in the US is those 85 and above. As the baby boomers and their parents reach their elder years, issues of medical decision making are becoming imperative. But it is not just the aging elderly who need to plan for incapacity. The conflicts in the Florida family of Terri Schiavo are a ready example of why every client should plan for incapacity. Terri Schiavo had a heart attack at age 26 which rendered her totally incapacitated. For 13 years, her family has incurred huge emotional and financial costs to maintain her life. For the last several years, large legal fees have been paid (and the Florida legislature has spent considerable time) to try and conclude what choices she would have made.

The debate over the withdrawal of life support has been a long and costly legal and political conflict:¹

- X By the early 1960s, medicine had advanced to the stage that permanently unconscious clients could be kept alive even with little brain activity. As a result, debates began to occur about a patient's right to die.@
- X In 1976 California became the first state to approve living wills. By 1992 all fifty states had adopted similar legislation.
- X In 1976 the New Jersey Supreme Court rendered In Re Quinlan². The court decided that a heart/lung machine could be withdrawn from Karen Ann Quinlan, but required that intravenous fluids and nourishment must continue, even though Miss Quinlan had no brain activity. Although doctors had expected her to die after being taken off the heart/lung machine, she continued to breathe. She lived almost 10 more years on intravenous fluids and nourishment.
- X In Cruzan v. Director, Missouri Dept. of Health,³ the U.S. Supreme Court ruled that to be taken off life support (including intravenous nourishment and fluids), the incapacitated patient must have declared such a desire before becoming incapacitated. The decision was returned to the Missouri courts which found that Nancy Cruzan had made sufficient verbal declaration to permit withdrawal of nourishment under guidelines of the Supreme Court decision. Eight years after the accident which rendered her permanently unconscious and without significant brain activity, Nancy Cruzan died.

¹ See: Peter G. Filene, In the Arms of Others: A Cultural History of the Right to Die in America, Chicago: Dee 1998; Alan Meisel and Kathy L. Cerminara, The Right to Die, The Law of End-of-Life Decision Making, (Aspen 2003).

² 355 A2d647 (N.J.), cert denied, 429 U.S. 922 (1976).

³ Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 289 (1990).

- X In 1991 Congress passed The Patient Self-Determination Act⁴ which requires health care providers (e.g., hospitals, nursing homes, hospice programs, home health care agencies and HMOs) receiving Medicaid and Medicare payments to ascertain the intent of patients about advance directives for health care and provide patients educational materials about their rights under state law.
- X In 1994 an Oregon referendum⁵ resulted in the adoption of a new statute⁶ which permitted physician assisted suicide in certain circumstances. The implementation of the act was enjoined by the US District Court in Lee v. State of Oregon.⁷ The injunction was lifted by the Ninth Circuit Court of Appeals.⁸ The plaintiff=s appeal to the US Supreme Court was denied.
- X In Compassion in Dying v. State of Washington,⁹ the Ninth Circuit Court of Appeals overturned a Washington statute which made physician assisted suicide a criminal act. The Ninth Circuit found a due process constitutional right to physician assisted suicides. One month later, in Quill v. Vacco,¹⁰ the Second Circuit Court of Appeals struck down a New York statute which prohibited physician assisted suicide. The Second Circuit ruled that the law violated the equal protection provisions of the US Constitution.
- X On June 26, 1997, the U.S. Supreme Court overturned both Circuit Court decisions in Washington v. Glucksberg¹¹ and Vacco v. Quill.¹² The US Supreme Court left it up to the states to determine whether to prohibit physician assisted suicide. The Court could find no constitutional right for terminally ill patients to obtain a physician=s assistance in ending their lives. The battle over physician assisted suicides has continued around the country.¹³ Like 38 other states, Georgia provides that it is a criminal act to assist in any suicide.¹⁴

⁴ Public Law 101-508; 42 U.S.C. 1395cc(a).

⁵ The referendum passed 51% to 49%.

⁶ The Oregon Death with Dignity Act, Oregon Statutes section 127.800 et. seq.

⁷ 819 F. Supp 1429 (D Or 1995).

⁸ Lee v. Oregon, 107 F3d 1382 (9th Cir. 1997).

⁹ 79 F3d 790 (9th Cir. 1996)

¹⁰ 80 F3d 716 (2nd Cir 1996)

¹¹ 521 U.S. 702 (1997).

¹² 521 U.S. 793 (1997).

¹³ c.f., Sampson v. State of Alaska, 31 P.3d 88 (Alaska 2001) and Oregon v Ashcroft, 192 F. Supp.2d 1077(D.Or. 2002), appealed to the Ninth Circuit Court of Appeals in No. 02-35587 (9th Circuit).

¹⁴ O.C.G.A. section 16-5-5.

- X In April 1998, President Clinton signed into law The Assisted Suicide Funding Restrictions Act of 1997¹⁵ which prevents the federal governments from reimbursing costs associated with physician assisted suicide. The bill also provided for the funding of programs to reduce the rate of suicide by persons with disabilities or terminal or chronic illnesses.
- X Over the last few years, America has watched the parents and husband of Terri Schiavo battle over who has the right to decide whether to withdraw life support from a patient who doctors say is in a persistent vegetable state. The Florida legislature adopted an act¹⁶ to allow the Governor to intervene. Mrs Schiavo has been on a feeding tube for 13 years. On May 6, 2004, a Pinellas Circuit Court judge ruled that the new Florida law adopted for Terri Schiavo was unconstitutional. The battle over her life will probably continue.
- X In a talk on March 20, 2004, the Pope indicated that patients in persistent vegetative states should be feed and hydrated. The pope indicated that such treatment is Amorally obligatory@ and that the withdrawal of feeding tubes constitutes Aeuthanasia by omission.@¹⁷ The Pope=s remarks have created new concerns about the proper treatment of incapacitated patients.¹⁸

Fact
 Two-thirds of Americans want to live to the age of 100. Sixty two percent expect to live to be at least eighty years of age.
Source: CNN, June 13, 2001

The legal, medical and moral controversies over euthanasia and the right to die will continue. As attorneys we have a duty to assure that our clients are fully informed about the choices they are entitled to make and the implications of those choices. This article will discuss some of those choices.

The nuiances of medical decision making vary widely from state to state. The remainder of this article will discuss some of the general rules governing medical decision making. The article will reference the Uniform Health Care Decisions Act which was adopted by the National Conference of Commissioners on Uniform State Laws in 1993 (the “Act”).¹⁹ The Act provides that it applies to both adults and emancipated minors.²⁰

¹⁵ 42 USC 14401.

¹⁶ The Florida Starvation and Dehydration of Persons with Disabilities Prevention Act, Florida statute section 765.701 et. seq.

¹⁷ ACatholic Hospitals Grapple with Pope=s Remarks,@ The Assocaited Press, April 15, 2004 at 3:56.

¹⁸ More information on the Catholic Church=s position can be found at the United States Conference of Catholic Bishops website at www.usccb.org

¹⁹ A copy of the act can be found at: <http://www.law.upenn.edu/bll/ulc/fnact99/1990s/uhcda93.htm>

²⁰ Act section 2(a).

Making Medical Decisions

Most people would prefer to decide who will make medical decisions for them and, in some cases, restrict the manner that the decisions can be made. Failure to establish a legal structure by which the decisions can be made breeds both additional costs and the potential for family turmoil. For example, a 1992 study in the Archives of Internal Medicine reported that having a living will or medical power of attorney saved almost \$65,000 per patient in the final stay in the hospital.²¹ The average cost from 1990 through 1992 of persons without medical directives was \$95,305 versus \$30,478 for those who had medical directives. Since 1992 medical care costs have increased at a significant rate. Among the client considerations are the following:

Living Wills. A living will is a declaration not to provide life-sustaining treatment if there is no significant hope of recovery. It is only operative when its maker can no longer make medical decisions.

Although Nancy Cruzan decision permits verbal declarations, clients are well advised to sign written documents which are consistent with the state statutes in their state of residence. Failure to sign a proper living will may result in family conflicts over the clients declared intentions (e.g., the Schiavo case in Florida) and necessitate court cases to discern what the client=s intentions.

The Act provides that living wills can be oral or written.²² Every state has adopted legislation allowing individuals to state their intent not to receive advanced medical treatment or life sustaining treatment in certain situations. The Act provides a statutory form which is a combined living will and health care power of attorney.

While most statutes specifically provide that the exact form of the statutory form does not have to be followed, the document must be executed with the required formalities to be enforceable under state law. This usually requires the signature of two witnesses and may require other signatures if the signer is in a medical or nursing care facility.

The Act's form provides the following language: "I do not want my life to be prolonged if (i) I have an incurable and irreversible condition that will result in my death within a relatively short time, (ii) I become unconscious and, to a reasonable degree of medical certainty, I will not regain consciousness, or (iii) the likely risks and burdens of treatment would outweigh the expected benefits." The uniform form permits the signer to separately declare whether he or she wants to

²¹ See: C.V. Chambers, J.J. Diamond, R.L. Perkel and L.A. Lasch, ARelationship of Advance Directives to Hospital Charges in a Medicare Population,@ Archives of Internal Medical, March 1994, Volume 154. See also: P.A. Singer and F.H. Lowy, ARationing, Patient Preferences and Cost of Care at the End of Life,@ Archives of Internal Medical, March 1992.

²² Act section 2(a).

receive nourishment and hydration. One flaw in the form may be that it does not contemplate a signer wanting either nourishment or hydration, but not both.

Under some states laws²³, Living Wills had a limited life or may not have dealt specifically with the withdrawal of nourishment and hydration. Therefore, persons have older living wills should discuss with their estate planning advisors whether their living wills are still enforceable. While the prior document may provide evidence of the client's desires not to be kept artificially alive, the failure to deal specifically with withdrawal of nourishment and hydration could result in the decision to maintain these body resources.

Do only elderly clients need to consider Living Wills? No. Remember, Nancy Cruzan, Karen Ann Quinlan and Terri Schiavo were all in their late 20s or early 30s when they became incapacitated.

Fact

In the 1950s roughly half of all Americans died in their homes. Today, 85% of Americans die in a health care setting.
Source: MedicineNet.com

Durable Power of Attorney for Healthcare. A living will is simply a declaration not to use life-sustaining measures. A health care power of attorney (also called a medical power of attorney) is designed to give someone the power to make medical decisions upon incapacity, including the withdrawal of life support. The document can name successor power holders and guardians.

Although living wills and powers of attorney both deal with life-sustaining issues, we generally recommend signing both documents. Having a medical power of attorney generally assures that the family, not the doctors have the final say in treatment. But if it is clear that life cannot be sustained, the power holder can step away and allow the living will to take effect. *AThis is his decision, not mine@* makes it much easier psychologically for the power holder.

Most states have adopted statutes which provide a statutory form for medical powers of attorney. The Act contains the statutory form of a Georgia Durable Power of Attorney for Healthcare. The statute²⁴ provides that the exact form of the uniform statutory form does not have to be followed in order for the document to be enforceable and provides that the language can be combined with any other form of a Power of Attorney, such as a General Power of Attorney governing property decisions. To be enforceable, the document must be executed in compliance the statutory formalities (e.g., in front of two witnesses who are at least 18 years of age and who are unrelated to the person signing the living will).

²³ For example, Georgia living wills (O.C.G.A. Section 31-32-6) initially had a seven year life.

²⁴ Act, section 4.

The Act²⁵ provide that the person holding a Healthcare Power of Attorney has priority decision making over any guardian over the person who may have been appointed. The statute²⁶ also provides that the Healthcare Power of Attorney can even extend beyond the principal=s death if Anecessary to permit anatomical gifts, autopsy or disposition of remains.@

Unless the Power of Attorney expressly provides otherwise, if marriage occurs after signing the document, the marriage is an automatic revocation of the designation of any person to serve as power holder other than the principal=s spouse.²⁷ Effectively, Powers of Attorney completed before marriage which do not name the new spouse as power holder are revoked at the time of the marriage, unless drafted in contemplation of the marriage.

The Georgia statutes provide that if a marriage is dissolved or annulled, the dissolution revokes the principal=s former spouse as the principal=s agent to make healthcare decisions. Thus, it is important to name one or more successors to a spouse (i.e., in case a divorce occurs).

Georgia²⁸ provides that a healthcare provider or other person who acts in good faith in reliance upon the direction of the decision of the person named in the Power of Attorney is protected and released from liability. The statute also limits the liability of agents who act in good faith.

Who should be the power holder? Married clients usually name a spouse. However, if the marriage has not been in existence long, some people will name another family member. We generally advice clients not to name emotional individuals or children under age 30 as power holders (i.e., they may not be able to emotionally handle the required decision making). Having someone who has medical training can be a plus.

It is especially important that unmarried individuals appoint power holders to minimize the risk of fights over who should act as guardian. But as the Schiavo conflict demonstrates, questions can even be made about a spouse=s right to make medical decisions.

Can more than one person be named as power holder? The statute does not recognize multiple power holders. The statute²⁹ provides that the power is delegated to Aa trusted agent.@ Therefore, it is generally advisable to appoint one power holder at a time. It is also generally advisable to name one or more successors behind the originally appointed power holder (e.g., both the agent and principal are involved in the same accident).

²⁵ Act section 6(b).

²⁶ O.C.G.A. Section 31-36-4

²⁷ O.C.G.A. Section 31-36-6(b).

²⁸ O.C.G.A. Section 31-36-8

²⁹ O.C.G.A. Section 31-36-2(a)

Should only elderly clients consider Medical Powers of Attorney? No. Remember, Nancy Cruzan, Karen Ann Quinlan and Terri Schiavo were all in their late 20s or early 30s when they became incapacitated.

Medical Directives. Many clients are concerned about how the holder of a power of attorney will exercise his or her discretionary authority. If the client is concerned about specific decisions the agent may make, review using a "medical directive." Copies of the directive can be obtained at www.Medicaldirective.org. A similar form is available at www.help4srs.com

Personal Notes. It is also important for clients to leave information for their family on the types of decisions they want to be made if they become incapacitated. For example, *I want to be kept at home as long as possible.* Clients may want to consider executing ethical wills³⁰ in which they discuss their thoughts on receiving life sustaining treatment and other philosophical perspectives.

Books On Medical Decision Making

- * Living Wills Made E-Z: Includes Power of Attorney for Healthcare (Made Ez Products, 2001)
- * William Molloy, Let Me Decide: The Health and Personal Care Directive That Speaks for You When You Can't, (Biblio Distribution 2003)
- * David Kuhl, What Dying People Want (Public Affairs 2003)
- * David Kessler, The Needs of the Dying, (Quill 2000)
- * Alan Meisel and Kathy L. Cerminara, The Right to Die (Aspen Publishers 2003).
- * Alan D. Lieberson, Advance Medical Directives (West 2004)

Letting the State Direct the Process

If a client fails to leave directions on how he or she want decisions to be made, the decisions may be made in accordance with applicable state statutes. Among the processes are:

Temporary Healthcare Placement. Georgia³¹ provides a process by which certain designated persons have the authority to approve the placement of an individual in a healthcare facility. The act

³⁰ Barry K. Baines, The Ethical Will: Reviving a Biblical Tradition and Applying it to Retirement Planning, @ Journal of Retirement Planning, June 1999. This article provides practical advice in writing an ethical will. See also: Kathleen M. Rehl, Help Your Clients Preserve Values, Tell Stories and Share the Voice of Their Hearts Through Ethical Wills, @ J. Prac.Est.Plan., July 2003; Josephine Turner, Estate Planning: Ethical Wills, @ found at http://edis.ifas.ufl.edu/BODY_FY536; Robert Flashman, Melissa Flashman, Libby Noble and Sam Quick, Ethical Wills: Passing on Treasures of the Heart, @ found at www.ces.ncsu.edu/depts/fcs/pub/1998/wills.html

³¹ O.C.G.A. Section 31-36A-1

requires a certification that the physician believes the adult cannot consent for himself or herself and that it would be in the person=s best interest to transfer to or be admitted to an alternative facility, including, but not limited to: nursing facilities, personal care homes, rehabilitation facilities and home and community-based programs.

Guardian Over the Person. If a client does not sign a medial power of attorney or living will, it may be necessary to have a guardian appointed to make medical decisions.³² Guardians do not generally have the same authority the client has to require remove intravenous nourishment and hydration. Virtually every decision requires court approval. As the Terri Schiavo fights demonstrate, the decision can create tremendous emotional and legal costs.

Websites on Aging and Critical Care Issues

- X www.critical-conditions.org
- X www.abanet.org/aging/toolkit/
- X www.ama-assn.org/public/booklets/livgwill.htm
- X www.help4srs.com
- X www.mag.org/content
- X www.nolo.com
- X www.Medicaldirective.org.
- X www.caregiver.org

Anatomical Gifts

In many cases the body of the decedent can provide benefits to others (e.g., cornea transplants). Power holders under Medical Powers of Attorney have the authority to make anatomical gifts.³³ If a client wants parts of his or her body be made available, consider attaching such a statement to the Medical Power of Attorney. In many states (including Georgia) residents can make anatomical gifts by making such a declaration on their driver=s license.

Most states also have an Anatomical Gift statute. The Georgia statutes³⁴ provide a priority list of persons who have the right to make anatomical gifts of parts of a deceased relative=s body. It provides that if persons having the same priority of decision making disagree, that the gift cannot be made. However, if a person with a higher priority makes the decision, persons down the list cannot stop the gift. For example, a person having a Medical Power of Attorney has priority over a spouse who has priority over children.

³² O.C.G.A. Section 29-5-1

³³ O.C.G.A. Section 31-36-4

³⁴ O.C.G.A. Section 44-5-140 et. seq.

Internet Resources for the Elderly

- X www.aoa.gov - the federal government=s Agency on Aging
- X www.eldercare.gov - a website of the Agency on Aging
- X www.medicare.gov - the national website for Medicare
- X www.cms.gov - The government=s center for both Medicare and Medicaid advice
- X www.socialsecurity.gov - the Social Security website
- X www.aarp.org - American Association of Retired Persons website
- X www.caremanager.org - a helpful website on care giver resources
- X www.nia.nih.gov - providing information on gerontology

The Ethics and Morals Surrounding Medical Directives

The issues surrounding medical incapacity and the withdrawal of life support involve more than legal and medical decision making. There are ethical, moral and religious issues which must also be addressed by both the person signing a medical directive and those who will be called upon to implement the document. As lawyers we should help the client address the personal questions which may occur in both executing and implementing these documents.

Articles Discussing the Moral, Ethical and Religious Issues of Medical Directives

- * Rabbi Yitchok Breitowitz, AThe Right to Die: A Halachic Approach,@ found at www.us-israel.org/jsource/Judaism/right_to_die.html
- * A Discussion of the topic and how different cultures deal with the issue can be found at www.ethics.acusd.edu/applied/euthanasia/

Incapacity planning involves more than planning for medical decision making upon incapacity. Clients should also consider having documents in place to assure that decisions with regard to your property, businesses and income are handled by people you have selected. They should consider drafting durable general powers of attorney, and if death or incapacity are an imminent issue, consider using a living trust.

Author: John J. Scroggin, J.D., LL.M., AEP is a graduate of the University of Florida and is a frequent speaker and author. Mr. Scroggin has written more than 290 published articles and outlines and 3 books. To be added to his free blast email list on estate and income tax planning, contact Gayle@scrogginlaw.com.