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JUNE 2005

UPDATE ON THE LAW

LIVING WILLS: THE LESSON FROM THE SCHIAVO CASE

By JEFFREY W. POMPEO, ESQ.

The landmark case of Karen Ann Quinlan, the New Jersey woman in a persistent vegetative state for many years in the 1970s and 1980s, recognized our right to refuse or remove extraordinary means of life support, such as a respirator, when faced with an incurable disease or terminal illness. Because of this case, we have the right to "die with dignity".

The lesson from the case of Terri Schiavo, the Florida woman in a vegetative state for many years in the 1990s and 2000s, is that our intentions concerning the level of medical care we want when faced with an incurable disease or terminal illness should be in writing. Unfortunately, Terri Schiavo did not have a living will. The result was a bitter and protracted legal battle between her husband, who believed she would not want a feeding tube, and her parents, who believed she would.

WHAT IS A LIVING WILL?

A living will, also known as an "Advanced Directive for Health Care", is a simple legal document, usually 2-3 pages in length, which expresses an individual's intent with respect to the level of health care to be provided during their "last illness". The typical living will indicates that the individual does not want life sustaining treatment, such as a feeding tube or respirator, or does want such treatment (or something in between these two choices).

Under New Jersey law, life sustaining treatment may be withheld or withdrawn from a patient after it is determined that the patient lacks the capacity to make a particular health care decision and: (1) the life sustaining treatment is experimental and not a proven therapy or is likely to either be ineffective in prolonging life or merely prolong an imminent dying process; (2) the patient is permanently unconscious or in a terminal condition, as determined by the patient's attending physician and confirmed by a second qualified physician; or (3) the patient has a serious irreversible illness or condition and the likely risk and burdens associated with the life sustaining treatment to be withheld or withdrawn outweigh the likely benefits to the patient or

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imposition of life sustaining treatment on an unwilling patient would be inhumane.

Under these limited circumstances, a living will provides guidance to the patient's family, physicians and lawyer with respect to the level of medical care to be provided.

A living will may be revoked orally or in writing at any time or by signing a subsequent one.

HEALTH CARE REPRESENTATIVE

A living will is also an opportunity to name an individual as "health care representative". This is the person who will act as spokesperson in dealing with doctors and hospitals. It is also the person who will make sure that the patient's wishes, as expressed in their living will, are carried out.

It is important to name alternate health care representatives, in the event the first person named is not alive or not able or willing to serve.

A health care representative can be a spouse, family member, friend, religious person, spiritual advisor or other individual.

WHO SHOULD PREPARE

Clients of mine often show me forms they received from their church or local stationery store in which they fill in blank spaces to express their intent concerning the level of medical care they desire during their last illness. Some of these forms are well written, enforceable and effective; others are not. The ones that are not are usually vague or incomplete. While there is no requirement in New Jersey that an attorney prepare a living will, as opposed to preparing it yourself using a form, the benefit of knowing it is done correctly far outweighs the cost. A New Jersey attorney who drafts living wills on a regular basis will be familiar with the "New Jersey Advance Directives for Health Care Act."

In most cases, living wills are prepared when wills and powers of attorney are prepared.

CONCLUSION

A living will is not only a document for the elderly. It is one that people of all ages should have. The lesson of the Schiavo case is to put your intentions concerning the level of medical care you want during your last illness in writing while you are healthy and able to make intelligent and well informed decisions.



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