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Advance Directives

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Although the heart-rending details of the Terri Schiavo “right to die” case may have receded from memory by now, hopefully the lessons learned from the horrendous experience of that family will not be forgotten soon.

As you may recall, Ms. Schiavo was severely brain-damaged at the age of 26 following a heart attack. She had not executed a living will or other advance directive expressing her wishes, and she had not executed a health care proxy, authorizing someone else to make health care decisions on her behalf. She remained in a persistent vegetative state for the next 15 years, being kept alive by means of a feeding tube, as her husband, her parents, the State of Florida and even the United States Congress all fought over what was best for her and what her wishes would have been, had she had the foresight to express them.

The Courts determined that Ms. Schiavo’s husband, Michael, as her next of kin, was the person who had the right to make those decisions on her behalf, and he ordered the removal of the feeding tube and the cessation of all other extraordinary measures. Terri Schiavo died on March 31, 2005, at the age of 41.

This article discusses the importance of financial and medical advance directives.

Powers of Attorney

A durable general power of attorney is a document by which an individual (the “principal”) appoints one or more other persons to be the “attorney-in-fact” to conduct financial transactions on behalf of the principal. The power of attorney is called “durable” because it continues to be effective even if the principal later becomes incompetent or disabled. The principal can appoint a single attorney-in-fact, multiple attorneys-in-fact who must all act jointly, or each of the multiple attorneys-in-fact can act alone.

Typical powers conferred on the attorney-in-fact include the powers to engage in real estate and securities transactions, banking and business transactions, insurance and retirement benefit transactions, to file tax returns and deal with tax authorities, to defend and pursue litigation and to make gifts.

Many states, including New York, Connecticut and California, have statutory short form durable general powers of attorney. These short form powers of attorney, authorized by statute, usually contain a series of boxes that the principal must initial that represent the types of powers described above. The statutes authorizing the short form powers of attorney go into great detail in describing the powers conferred. Although banks in New York often insist on using their own forms of powers of attorney, they have no right to so insist. Section 5-1504 of the New York General Obligations Law provides that no financial institution located in New York shall refuse to honor a properly executed statutory short form power of attorney.

Other states, including New Jersey, Massachusetts and Florida, do



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who's who

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Kill's Estate Planning & Tax Advisor. Ms. Herbst is admitted to practice in New York and New Jersey, and has broad experience in the areas of estate and tax planning and trust and estate administration. She is a member of numerous bar associations and the Financial Women's Association of New York.

Helpful Tip: Although most states provide that powers of attorney, health care proxies and living wills remain "good until cancelled," it is prudent to execute new advance directives at least every 10 years, in order to prevent a financial institution or health care provider from questioning them on the basis of staleness. Moreover, powers of attorney and health care proxies contain the addresses (and sometimes telephone numbers) of the principal and agents, which may have changed over the years.

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not have specific statutory short form powers of attorney, although all states recognize the concept of the power of attorney. In those states that do not have a short form power of attorney, a somewhat longer document is required, specifically enumerating the powers conferred on the attorney-in-fact.

Health Care Proxy

A health care proxy is a power of attorney for medical decisions. Unlike the durable general power of attorney, which can be effective immediately, the health care proxy becomes effective only if the principal becomes unable to make or articulate his or her own health care decisions. Terri Schiavo did not have a health care proxy in place.

Every state has a health care proxy statute. Unlike the durable general power of attorney, in which multiple agents can be named, there can be only one health care agent at a time, although an alternate can be named. This is to prevent the situation in which the two agents might disagree as to the best course of action for their principal, and which might then lead to exactly the sort of standoff that the health care proxy was designed to avoid.

The health care proxy is not intended to be used solely for "end of life" decisions. It can be used in far less dire circumstances, such as if the principal is seriously injured and unconscious, and unable to consent to life-saving surgery.

Living Will

A living will is an advance directive, in which the (future) patient sets forth his or wishes if the situation should arise in which the patient has an incurable or irreversible condition that is likely to cause death within a relatively short time, or if the patient should be permanently unconscious or in a permanent vegetative state (such as Ms. Schiavo was for 15 years). In those circumstances, the typical living will directs that the patient be allowed to die and not be subjected to or continue to be kept alive by medication, medical procedures, interventions or artificial means of any kind, but that medication be mercifully administered to alleviate suffering even though it may shorten the patient's remaining life.

Most states have statutes authorizing living wills. A few, such as New York, do not have statutes, but instead rely on decisions of their highest courts requiring clear and convincing evidence – such as that contained in the typical living will – in order to discontinue extraordinary measures.

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