

MAKING YOUR OWN CHOICES

Richard A. Courtney, Certified Elder Law Attorney

Anyone who has read the newspaper or seen the television news during the last few years has observed – and probably reacted to – the tragic story of Terry Schiavo. She is the young Florida woman who was in a “persistent vegetative state” for over a decade after her heart stopped during a medical procedure. Her husband and her parents engaged in an on-going legal battle to determine whether she should be allowed to continue in this condition or be allowed to die quietly. The reason for this controversy is that she had no written statement of her own choices about such a situation – a situation that has occurred countless times throughout the country, including in Mississippi. This does not have to be so.

Planning for Incapacity

Planning for incapacity is as important, if not more so, than preparing a will or trust for distribution of assets at death. The reason is that, statistically, an adult person is five times more likely to become disabled than to die within any future 5, 10 or 15 year period. Mississippi has enacted the Uniform Health Care Decisions Act, which permits you to sign an “Advance Health Care Directive” dealing with medical and health care decisions. (This law replaced the old “living will” law that dealt only with terminal illness and life-support.) This health care directive allows you to control and direct decisions about your health care after you become disabled by selecting the most appropriate person to handle such decisions and by giving directions based on your personal values and choices. This document, prescribed under Mississippi law, allows you to designate one or more other persons as your agent to make medical and health-care treatment decisions for you if you later become incapacitated and unable to make such decisions. In the Advance Health Care Directive, you can state personal decisions about keeping or removing life-support or other treatments in the event of terminal illness and other choices concerning medical treatment based on your own personal values.

In April 2003, the federal Health Insurance Portability and Accountability Act (HIPAA) implemented stringent privacy regulations governing the release of personal medical information by all types of health care providers. As a result of these regulations and the penalties they impose for improper release of such personal medical information, many doctors, hospitals and other health care providers are reluctant to release health care information without strict compliance with HIPAA. Therefore, it is wise to include specific language in your Advance Health Care Directive that identifies your designated agent as your “personal representative” who is entitled to request and receive your personal medical information for HIPAA purposes.

The Advance Health Care Directive is more than just a form to sign. We can furnish guidelines to help you in selecting an appropriate agent, as well as guidelines for the agent to help him/her understand how to carry out such role in the event you become unable to make health care decisions for yourself.

Avoiding Court-Ordered Decision-making

Where there is no Advance Health Care Directive authorizing someone to act on your behalf if you become incapacitated, a court may have to appoint a conservator to handle your medical affairs and decision-making. This could result in a court dispute similar to the one involving Terry Schiavo's family. While talking to a group of social workers at a south Mississippi hospital, I was asked about the following situation. An incapacitated gentleman had entered the hospital with a chronic health problem, and his son presented them with a power of attorney naming him to act as agent for his father. The hospital was preparing to discharge the father to a nursing home in keeping with the instructions of the son (acting under the power of attorney). I walked the gentleman's daughter from out-of-state with an order from a Chancery Court appointing her as conservator over her father, and she began giving the hospital instructions that contradicted those which the son felt his father would want carried out. The social worker's question to me: "Who trumps who – the conservator or the agent under the power of attorney the father signed?" The unfortunate answer, under our state law, is that the court-appointed conservator/daughter has authority that takes priority over the son as agent under the father's power of attorney. This is not what the father wanted, but he did not make his intentions known in a sufficient written directive. If the father had executed an advance health care directive naming his son to make health-care decisions for him and stating that the son should be the conservator if one was required, the court would be required by law to honor his directive and, if a conservator was sought to be appointed, the court would have appointed the son as conservator.

The Advance Health Care Directive is a basic and essential part of any complete estate plan. Without it, families can be torn apart trying to decide what they think is best for an incapacitated child, spouse or parent. With a directive, however, the maker's personal desires and values for his/her own circumstances can be communicated and the most appropriate person can be selected to carry out his/her wishes in the event of such circumstances. Make your own choices with an Advance Health Care Directive, and give your family peace of mind by doing so.