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Integrating Health Care Planning Into the Estate Plan

Roger A. McEowen
Iowa State University

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Robert P. Achenbach, Jr.
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Dr. Neil E. Harl, Esq.

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Integrating Health Care Planning Into the Estate Plan

-by Roger A. McEowen[*]

Overview

The events surrounding the withdrawal of a feeding tube from brain-damaged Terri Schiavo have highlighted the importance of health care planning. The lack of evidence concerning Schiavo's intent with respect to the continuation or withdrawal of life-sustaining nutrition and hydration, complicated by the fact that she left no signed document or any clear previous oral statement, created a long and arduous legal battle among family members. Aside from the important policy implications of the Schiavo case, the case illustrates that health care planning in the event of incompetency should be a part of every estate plan.[1]

Legal Issues Concerning the Medical Treatment of Incompetents

Under common law, the mere touching of another person without consent and without legal justification constitutes a battery.[2] As such, informed consent is generally required for medical treatment, and a physician performing a medical procedure without the patient's consent commits a battery for which the physician may be held liable for resulting damages.[3] But, what if the patient is not competent to either consent to or refuse treatment? Advancements in medical technology have made possible the continuation of life beyond the point where natural forces would result in death, resulting in an increase in cases involving incompetent persons and the right to refuse life-sustaining treatment.

Key court opinions. In 1975, 21-year old Karen Ann Quinlan suffered severe brain damage and lapsed into a coma after mixing alcohol with valium at a party. Karen's father sought judicial approval to disconnect her respirator and the New Jersey Supreme Court granted the relief, holding that Karen had a constitutional right of privacy to terminate treatment.[4] However, the court reasoned that the privacy right had to be balanced against asserted state interests.[5] The court noted that the state's interest weakens and the right to privacy strengthens as the degree of bodily invasion increases and the prognosis dims.[6] The court also concluded that the only practical way to prevent the loss of Karen's privacy right due to her incompetence was to allow her guardian and family to decide whether she would exercise it under the circumstances.[7] After *Quinlan*,[8] most courts based a right to refuse treatment either solely on the common-law right to informed consent or on both the common law right and a constitutional privacy right.[9]

In early 1983, 25-year old Nancy Cruzan lost control of her vehicle. The car overturned and Nancy was discovered lying face down in a ditch without detectable respiratory or cardiac function. Paramedics were able to restore her breathing and heartbeat at the accident site, and she was transported to a hospital in an unconscious state. She remained in a coma for about three weeks and then progressed to an unconscious state in which she was able

* Associate Professor of Agricultural Law, Department of Agricultural Education and Studies, Iowa State University, Ames, Iowa. Member of the Nebraska and Kansas Bars.

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to orally ingest some nutrition. To ease feeding and aid recovery, surgeons implanted a gastrostomy feeding and hydration tube with her husband's consent. Nancy's brain-damaged condition was diagnosed as a "persistent vegetative state" – she was neither dead nor terminally ill. Medical experts testified that she could live another thirty years with nutrition and hydration, but her parents subsequently requested the hospital staff to remove the feeding tube. The staff refused to do so without court approval. The trial court authorized the removal of Nancy's feeding tube, but the Missouri Supreme Court reversed on the basis that the Missouri Living Will statute[10] indicated a strong state policy favoring the preservation of life.[11] Because Nancy did not leave a written document comporting with the Living Will statute, her parents (as Nancy's co-guardians) could not make the decision to remove Nancy's feeding tube without clear and convincing evidence that the removal would have comported with Nancy's desires. The court held that such evidence was not present.[12] The U.S. Supreme Court affirmed, holding that a state may apply a clear and convincing evidence standard in proceedings where a guardian seeks to disconnect nutrition and hydration of a person diagnosed to be in a persistent vegetative state.[13] Ultimately, Nancy's parents were able to prove her desire not to live in a "persistent vegetative state" and Nancy died shortly after her feeding tube was removed.

In 1990, 26-year old Terri Schiavo collapsed in her home when her heart temporarily stopped, cutting off oxygen to her brain and leaving her severely brain damaged. In late 1992, Terri's husband won a medical malpractice lawsuit on the basis that doctors failed to diagnose the chemical imbalance that caused the heart attack.[14] In 1993, Terri's parents petitioned a court to have Terri's husband removed as Terri's guardian for conflict of interest reasons.[15] The request was denied in 2001. Terri was not diagnosed as either terminally ill or brain-dead.[16] A diagnosis that she was in a persistent vegetative state was later disputed by neurologists that concluded Terri was in a "minimally conscious state,"[17] a neurological diagnostic criteria first defined in 2002.[18] In 1998, Terri's husband petitioned a state trial court to have Terri's feeding tube removed on the basis that Terri told him that she did not want life sustaining intervention in the event of her incapacity. In 2000, a Florida trial court judge (serving as the surrogate decisionmaker) ruled that the feeding tube could be removed, and the tube was subsequently removed in April of 2001 after the Florida Court of Appeals upheld the trial judge's order.[19] Two days later, a federal court issued a stay resulting in the reinsertion of the feeding tube.[20] Later in 2001, the appellate court indefinitely delayed the removal of Terri's feeding tube pending the examination of Terri by five physicians (two selected by Terri's parents, two selected by Terri's husband and one selected by the trial court).[21] A month later, following an evidentiary hearing, the trial court judge again ordered the feeding tube removed. In late 2003, following additional legal filings, the feeding tube was removed for a second time, and six days later the Florida legislature approved legislation authorizing the Governor to issue a one-time stay and order reinsertion of Terri's feeding tube.[22] The Governor exercised this power and ordered the feeding tube to be reinserted. The provision, however, was later ruled unconstitutional.[23] On March 18, 2005, Terri's feeding tube was removed. Within hours, the Congress passed legislation, which the President signed into law, granting jurisdiction for de novo review of the case in the federal judiciary.[24] The trial court refused to grant temporary injunctive relief,[25] the appellate court affirmed,[26] and the Supreme Court refused to hear the case.[27] Terri died on March 31, 2005.

Implications of the cases. While *Cruzan*[28] established the constitutionally protected right to refuse medical treatment, it did not establish a federal standard as to how that right may be exercised, and it permitted the states to establish procedures limiting the methods of exercising such rights if the patient is incompetent.[29] More importantly perhaps, persons who were previously competent but fail to express their desires in writing concerning life-sustaining medical treatment in the event of a subsequent incompetency, subject their guardians to legal proceedings (which may be contested and prolonged) where the guardian bears the burden of proof to establish the incompetent's intent.[30] Certainly, all three cases illustrate the importance of executing a written document comporting with applicable state law clearly expressing one's intent with respect to artificial life support.

Documenting health care desires. Durable Powers of Attorney for Health Care (DPAHC) and Living Wills are the two primary devices for establishing personal wishes with respect to medical care. Most states have Living Will statutes, and all states have Durable Power of Attorney statutes that have been amended in recent years to include durable powers for health care decisions.

Under the typical statutory provision, an adult may make a written declaration (i.e., a Living Will) of the desire not to have life-sustaining procedures induced upon a diagnosis of a terminal condition coupled with the inability to participate in the decision-making process regarding treatment, and where the use of life-sustaining procedures would merely prolong the dying process.[31] Practitioners should familiarize themselves with the statutory requirements for execution and witnessing of the declaration, and advise clients concerning the effectiveness of the declaration and the procedure for revoking the declaration.[32]

Alternatively, one may sign a DPAHC. A DPAHC is a signed, witnessed and notarized document that allows the person (as the principal) to designate an agent to make health care decisions on the person's behalf in the event the person is unable to do so.[33]

While much of the recent media attention surrounding the *Schiavo* case has focused on the need for a Living Will, the DPAHC clearly is the best and most flexible instrument to express one's wishes regarding artificial life-sustaining medical treatment. The DPAHC can address a full range of medical problems, while most Living Will statutes apply only to patients who are terminally ill. Likewise, while a DPAHC may involve termination of treatment, it can also provide for aggressive care.[34] A DPAHC may also serve the dual function of delegating a broad range of medical decision-making powers to an agent while simultaneously allowing the principal to exercise the constitutional right recognized in *Cruzan*.[35]

Conclusion

Clearly, the most important lesson of *Schiavo* (and the *Quinlan* and *Cruzan* cases that preceded it) is that one's desires concerning

life-sustaining medical treatment in the event of incompetency be reduced to writing and became part of the overall estate plan.

FOOTNOTES

[1] While federal law requires medical facilities to inform all patients, prior to admission, of the right to sign a living will or health care power of attorney (42 U.S.C. § 1395cc(f)), most persons can benefit from legal counsel explaining the differences between the two documents.

[2] See W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on Law of Torts § 9, pp. 39-42 (5th ed. 1984).

[3] *See, e.g.*, Schloendorff v. Society of New York Hospital, 211 N.Y. 125, 129-130, 105 N.E. 92, 93 (1914).

[4] *In re* Quinlan, 70 N.J. 10 at 38-42, 355 A.2d 647 at 662-664 (1976), *cert. denied sub nom.*, Garger v. New Jersey, 429 U.S. 922 (1976). While life support was removed in 1976, Karen lived until 1985, but never came out of her coma.

[5] The state interests include the preservation of life, the protection of the interests of innocent third parties, the prevention of suicide, and the maintenance of the ethical integrity of the medical profession.

[6] *In re* Quinlan, 70 N.J. 10 at 41, 355 A.2d 647 at 664.

[7] *Id.*

[8] *In re* Quinlan, 70 N.J. 10 at 38-42, 355 A.2d 647, 662-664 (1976), *cert. denied sub nom.*, Garger v. New Jersey, 429 U.S. 922 (1976).

[9] See L. Tribe, *American Constitutional Law* §15-11, p. 1365 (2d ed. 1988).

[10] Mo. Rev. Stat. §459.010 *et seq.* (1986).

[11] Cruzan v. Harmon, 760 S.W.2d 408 (Mo. 1989).

[12] *Id.*

[13] Cruzan *et ux.* v. Director, Missouri Department of Health, *et al.*, 497 U.S. 261 (1990). Specifically, the Court concluded that the procedural safeguards established by Missouri requiring that an incompetent person's intent to have life-sustaining medical treatment withheld or withdrawn need only be honored if there is clear and convincing evidence of that intent, did not violate the Due Process Clause of the Constitution.

[14] The court awarded approximately $1 million in damages to Terri's husband - $300,000 for loss of consortium and $700,000 for Terri's guardianship and care.

[15] After winning the malpractice award, Terri's husband claimed that Terri had previously stated that she did not want to be kept alive by artificial means. Such a claim was not made during the malpractice trial. Also, in 1995, Terri's husband began living with another woman with whom he fathered two children.

[16] Terri breathed on her own unaided by a ventilator. Her only dependency, like that of Cruzan, was on a feeding tube.

[17] See affidavits of neurologists Beatrice C. Engstrand, M.D., Mar. 3, 2005; Jacob Green, M.D., Feb. 22, 2005; and Lawrence Huntoon, M.D., Mar. 3, 2005, that were filed in the *Schiavo* litigation.

[18] Researchers are only beginning to test this criteria against that of "persistent vegetative state" with patients. See J.T. Giacina, *et al*., "The minimally conscious state: Definition and diagnostic criteria," *Neurology*, February 2002; 58: 349-353; Melanie Boly, *et al*., "Auditory Processing in Severely Brain Injured Patients," *Archives of Neurology*, February 2004, 61: 233-238.

[19] *In re* Schiavo, 780 So. 2d 176 (Fla. Ct. App. 2001).

[20] Schindler v. Florida, No. 8:01-cv-784-T-26EAJ (M.D. Fla. 2001).

[21] *In re* Schiavo, 800 So. 2d 640 (Fla. Ct. App. 2001).

[22] House Bill 35-E, enacted as 2003 Fla. Laws Ch. 418, and known popularly as "Terri's Law."

[23] Bush, *et al*. v. Schiavo, 885 So. 2d 321 (Fla. Sup. Ct. 2004), *aff'g*, 871 So. 2d 1012 (Fla. Ct. App. 2004), *cert. denied*, 125 S. Ct. 1086 (2005).

[24] Pub. L. No. 109-3, "An Act for the Relief of the Parents of Theresa Marie Schiavo," signed into law on Mar. 21, 2005.

[25] Schiavo, *ex rel*. Schindler v. Schiavo, No. 8:05-CV-530-T-27TBM (M.D. Fla. Mar. 22, 2005).

[26] Schiavo *ex rel*. Schindler v. Schiavo, No. 05-11556 (11th Cir. Mar. 23, 2005), *reh'g denied*, 404 F.3d 1270 (11th Cir. 2005).

[27] Schiavo, *ex. rel*. v. Schiavo, 125 S. Ct. 1722 (2005).

[28] 497 U.S. 261 (1990).

[29] The *Cruzan* opinion makes it impossible for an individual who has never been competent to meet a standard of proof as high as that imposed by Missouri and other states. While not every state requires the same standard of proof, it may not be possible to move an incompetent individual from a state with a higher standard of proof to a state with a lower standard of proof. *See, e.g., In re* Busalacchi, No. 59582, 1991 Mo. App. LEXIS 315 (Mo. Ct. App. Mar. 5, 1991)(guardian statutorily required to act in best interest of ward such that movement of ward to another state must have a reasonable basis other than a desire to avoid state law; state granted injunctive relief and case remanded for evidentiary hearing). However, the law on this point is not entirely clear, and it may be possible to accomplish removal to a different jurisdiction via a clause in a Durable Health Care Power of Attorney authorizing such removal.

[30] The requisite proof is a function of state law and varies among jurisdictions. Under Florida law, for example, the guardian must establish the ward's intent, *at the time removal from life-sustaining medical procedures is requested*, by clear and convincing evidence. See *In re* Schiavo v. Schiavo, 780 So. 2d 176 at 180 (Fla. Ct. App. 2001).

[31] *See, e.g.*, the Kansas "Natural Death Act," Kan. Stat. Ann. §65-28,101, et seq. (2003). Under the Kansas provision, "life sustaining procedures" are defined as any medical procedure or intervention which, when applied to a qualified patient, would only prolong the dying process and where, in the judgment of the attending physician, death will occur whether or not such procedure or intervention is utilized. Kan. Stat. Ann. § 65-28,102(c). A "qualified patient" is defined as a patient who has executed a declaration and has been diagnosed and certified in writing to be afflicted with a terminal condition by two physicians who have personally examined the patient, one of whom is the attending physician. *Id.* § 65-28,102(d). The Kansas Supreme Court has held that such a declaration is not considered suicide for insurance

or other purposes. Hawes v. Kansas Farm Bureau, 238 Kan. 404 (1985).

[32] A model statutory form is typically provided for the declaration. *See, e.g.*, Kan. Stat. Ann. § 65-28,103. Also, under the common statutory provision, if the declarant is competent, the declarant's express desires, if in conflict with the declaration, control. See, e.g., Kan. Stat. Ann. § 65-28, 106. That is an important point to clarify for clients.

[33] Counsel should carefully study the state law requirements that must be satisfied to trigger the agent's authority to act under the DPAHC, and whether the agent has the authority to invalidate a previously existing declaration (Living Will) of the client. In the usual situation, the agent will not have the power to revoke a previously existing declaration. That could result in the DPAHC being inconsistent with the declaration. In that event, counsel should consider advising the client to revoke the declaration.

[34] Thus, a DPAHC is a philosophically neutral document that lets the principal decide appropriate medical treatment based on the principal's own value system. Importantly, language in a DPAHC could be included that would trigger the agent's authority to act on a medical finding that the principal's death is imminent and that the continuation of artificial means of life support (with nutrition and hydration specifically not defined as artificial life support) would only prolong the principal's inevitable death.

[35] 497 U.S. 261 (1990).

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr

ANIMALS

CATTLE. The plaintiff owned an irrigated corn field which adjoined the defendant's land. The properties were separated by a "lawful fence" and a one-wire electric fence; however, the defendant's cattle broke through the fence and spread out over the irrigated field which had immature corn growing on it at the time. Although the defendant agreed to pay for the damage to the crop, a fertilizer tank and the loss of fertilizer, the parties disagreed as to the measure of damages. The plaintiff argued that the damages were calculated by comparing the yield of the non-damaged crops and the yield of the damaged area. The plaintiff harvested the areas separately and measured the difference in yield to support its damage claim. The trial court allowed the plaintiff damages only for the cost of rent of a pasture for one day because it found that the plaintiff failed to prove the loss of value of the crop on the day the damage occurred, not later when the crop was harvested. The appellate court held that the proper measure of damages was the difference in yield reduced by any reduced costs. Because the plaintiff continued to irrigate, fertilize and harvest the entire field, the costs were not reduced by the damage; therefore, the damages were equal to the loss of yield in the damaged field. **Harsh v. Cure Feeders, LLC, 2005 Colo. App. LEXIS 842 (Colo. Ct. App. 2005)**.

FEDERAL AGRICULTURAL PROGRAMS

CROP INSURANCE. The plaintiffs were Texas, Georgia, Alabama, Florida, and South Carolina peanut farmers who insured their 20 01-2002 peanut crops under Multiple Peril Crop Insurance ("MPCI") policies. The plaintiffs' crops suffered weather-related damage in 2002 and the plaintiffs filed insurance claims for the losses. The loss claims were allowed using the non-quota peanut per-pound coverage rate of $0.1775 as provided under the 2002 Farm Security and Rural Investment Act, *Pub. L. No. 107-171, 116 Stat. 182 (2002)*. The 2002 removed the distinction between quota and non-quota peanuts and set the rate at $0.1775 per pound. The plaintiffs sued in the Court of Federal Claims for breach of contract in that the insurance policies were formed when the coverage rate for quota peanuts was $0.31 per pound. The court dismissed the case for lack of jurisdiction and refused to transfer the case to the Federal District Court. The plaintiffs argued that the Court of Federal Claims had jurisdiction under the Tucker Act, 28 U.S.C. § 1491(a)(1), because the suit did not name the FCIC as a defendant. The court rejected this argument because the FCIC was the true defendant in this case because the crop insurance policies are between the FCIC and the plaintiffs. However, the court held that the case should have been transferred to the Federal District Court because the failure to transfer caused the loss of the claims due to a statute of limitations and because the transfer would not prejudice any party or unduly burden the courts. **Texas Peanut Farmers v. United States, 2005 U.S. App. LEXIS 9881 (Fed. Cir. 2005)**.

IRRADIATION OF FRUITS AND VEGETABLES. The APHIS has issued proposed regulations to revise the approved doses for irradiation treatment of imported fruits and vegetables. This proposed regulations establish a new minimum generic dose of irradiation for most arthropod plant pests, establish a new minimum generic dose for the fruit fly family, reduce the minimum dose of irradiation for some specific fruit fly species, and add nine pests to the list of pests for which irradiation is an approved treatment. In addition, the proposed regulations provide for the irradiation of fruits and vegetables moved interstate from