

The Lesson Of The Schiavo Case - Prepare A Living Will

February 10, 2014 | by Gary Botwinick

I recently attended a program where Bill Walton, the former NBA star and current NBA broadcaster, was the guest speaker. Mr. Walton, as a player for the UCLA Bruins, won the national collegiate basketball title in 1972 and 1973 under legendary coach John Wooden. Mr. Walton spent much of the night singing the praises of Coach Wooden. There was one quote of Coach Wooden's that Mr. Walton referred to several times that evening. "Failing to prepare is preparing to fail."

We have all followed the very disturbing case of Terri Schiavo and issues surrounding the case. As I sat listening to Bill Walton, I thought about how apropos that quote was to Terri Schiavo's plight. There is a very powerful lesson from the case; one that many people seem to overlook. Coach Wooden's words of wisdom apply off the court as well as on the court.

Michael Schiavo and Terri Schiavo's parents were locked in a decade-long battle over the comatose Ms. Schiavo's fate because she failed to execute a living will. Because Ms. Schiavo did not have a living will, a court was required to determine what her wishes were. Mr. Schiavo testified, along with others, that Terri had expressed her wishes that she not be kept alive in her current state. However, because there was no written evidence of Terri's wishes, the dispute continued for many years. Because Ms. Schiavo did not have a living will, her plight and the plight of her family became a "three-ring circus": the Courts ruled, the Federal and State Legislatures acted, and the Governor of Florida and the President involved themselves in a situation that is so intimately a family decision. Meanwhile, all this was played out in the public eye through the press and media. The best way to avoid this situation is to prepare. The best way to prepare is to execute a living will.

The following is important information on living wills that you should consider.

Below are some questions I am often asked, and answers to help you understand the subject.

Q. What is a "living will"?

A. A "living will" is the term often used to refer to an "advance directive." An advance directive is an instrument that expresses your desires as to the form of treatment you do, or do not wish to receive in the event you are in one of a number of circumstances; e.g. if you are in a permanent vegetative state, terminally ill, or permanently unconscious. The document might say that you do not wish to receive artificial means of life support such as mechanical and artificial respiration, and cardiopulmonary resuscitation. The advance directive should also specify whether or not you wish to receive artificial nutrition (e.g. a feeding tube) or artificial hydration (e.g. intravenous fluids). The document should be tailored to meet your needs. However, since it is impossible to foresee all that might befall you, it is important to also execute a Health Care Proxy.

Q. What is a "health care proxy"?

A. A "health care proxy" is a document that permits you to appoint someone to make health care decisions for you in the event that you are incapacitated and unable to make decisions for yourself. The person whom is given this decision-making power is called the "health care agent." It is important that you appoint someone who is familiar with your wishes and has the ability to carry out your wishes. Often a family member is the person best suited to make this decision. However, this document allows you to designate the person to make that decision - not a Court. It is important that you also designate a successor health care agent in the event that the original designee is unable to act.

Q. I executed an advance directive/health care proxy five years ago. Should I consider updating it?

A. Yes. Generally, it is a good idea to review these documents from time to time to ensure that they still memorialize your wishes. Additionally, any documents executed prior to 2004 should be

reviewed in light of recent regulations regarding health information privacy under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). Unfortunately, some hospitals and doctors have been reluctant to disclose confidential patient information to health care agents, even when it is necessary for the agent to have this information to carry out the patient's wishes.

Q. Can I prepare my own living will using forms available from the hospital and/or the internet and should I?

A. While you can prepare your own living will, I would not recommend it. Generally the legal fees associated with the preparation of a living will are modest. Each state has its own unique laws that must be considered in the preparation of the document. Moreover, this document should not be a "one-size-fits-all" document, which is exactly what you will find on the internet. You will undoubtedly have individual concerns and desires that should be addressed. Careful drafting can ensure that your wishes are carried out.

Q. When I am considering preparing a living will or health care proxy, are there other issues I should consider?

A. Yes. This is a great time to consider preparing or updating your Last Will and Testament and Powers of Attorney. While these issues are often emotionally difficult to face, it will be easier for your family if your affairs are in order. Remember Coach Wooden's wisdom.

If you wish to discuss the preparation of a living will/health care proxy with our office, or any other estate planning needs, please contact Gary R. Botwinick, Esq., at (973) 627-7300 to make an appointment.

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