

YOUR LIFE, YOUR FINAL SAY



BEWARE OF LIVING TRUST SCARE TACTICS YOUR LIFE, YOUR FINAL SAY

By now, most of America is familiar with the tragic events of Terri Schiavo's life. No matter how you may feel about the moral and political issues that have arisen, most Americans would agree that they would not want their families to suffer through the 15-year ordeal that Terri and her family endured. Fortunately, there are means within easy reach of any American to plan for end-of-life medical decisions.

Born to Mary and Robert Schindler on December 3, 1963, Theresa Marie Schindler had a typical, happy childhood. The Pennsylvania native enjoyed spending time with her two siblings, listening to music and drawing sketches. In November 1984, at just under 21 years of age, Terri married Michael Schiavo. By age 26, Terri was employed and living in Florida with her husband.

Sadly, it was at this age that Terri's life took a devastating turn. In February 1990, Terri suffered a heart attack that deprived her brain of oxygen for five minutes, damaging it severely. She slipped into what doctors call a "persistent vegetative state," in which she lost the brain functions that control judgment and reason. She could not communicate and her only movements were minor reflexes. Terri could not even survive without the assistance of a feeding tube.

For many years, Terri's husband and parents requested that Terri be kept alive by the artificial feeding tube, hoping that she would recuperate to some degree. However, by 1998 Terri still showed no signs of improvement. Michael Schiavo decided to request removal of the feeding tube, explaining that Terri would not want to continue being kept alive for years and years in this condition. Her parents disagreed, clinging to the hope that one day their daughter would recover, even minimally.

The ensuing legal battle over Terri's right to die engulfed not only their family, but the state of Florida and the entire nation. For seven agonizing years both parties struggled to convince the courts that they knew best what Terri would have wanted. State courts consistently ruled in favor of Michael Schiavo, but the Schindlers appealed again, and again, and again.

While such cases are normally the province of state courts, Congress enacted special legislation to allow the case to be brought before federal courts. In fact, the President flew back to Washington to sign the legislation. However, the federal courts refused to reverse the state court's order.

LEGAL OPTIONS THAT CAN PREVENT FAMILY TURMOIL

Terri Schiavo was only 26 years old when she fell ill. Her case has focused public attention on the fact that the elderly are not the only ones who can become incapacitated and have to face life and death medical decisions. Taking advantage of your legal options now can facilitate a less

painful process for your loved ones in the future. Knowing the legal precedents behind the Schiavo case will help you understand the importance of your decisions.

In 1983, Nancy Cruzan was involved in a car accident that left her in a persistent vegetative state. She was only 25 years old. After it became clear that Nancy had no chance of recovery, her parents requested removal of the artificial feeding and hydration tubes that were keeping her alive. However, the Missouri Supreme Court ruled that “clear and convincing evidence” of Nancy’s wishes was necessary to do so.

The Nancy Cruzan case came before the United States Supreme Court in 1990. The federal court upheld the state court ruling that clear and convincing evidence was necessary before the tubes could be removed. In addition, it sided with the state court in saying that such evidence had not yet been presented. However, later that year, Nancy’s parents were able to provide sufficient evidence of her desire not to remain on artificial feeding tubes to satisfy the Missouri courts. The tubes were removed and Nancy passed away in 1990.

Since that landmark Supreme Court ruling, Americans have had the legal right to make their own decisions about what kind of medical treatments or procedures, if any, they choose to have if death is imminent or if they are permanently unconscious and beyond hope of recovery. Every state since then has passed laws guaranteeing and defining how to exercise those rights. Indeed, the law of Florida gave Terri Schiavo the right to make a Living Will which would have expressed her wishes to her family, and made court intervention optional.

Unfortunately, Terri did not sign a Living Will or Health Care Power of Attorney/Proxy before she took ill. That's why the Florida courts were forced to get involved in her personal affairs. Ultimately, that's what led to the unprecedented act of Congress to make a statute about Terri.

The most important lesson from Terri's case is that every adult should make a proper legal document expressing his or her wishes about end-of-life medical care. The remainder of this report will discuss the basic legal documents to do this, and how you and your loved ones can protect yourselves.

HEALTHCARE POWER OF ATTORNEY

The Healthcare Power of Attorney (HCPOA), or healthcare proxy, is the primary method for ensuring your wishes regarding your healthcare are carried out. Just as you would want a reliable individual to manage your finances if you are incapable, you need someone you trust to make decisions about your medical care when you cannot make such decisions for yourself due to your mental or physical condition. The HCPOA does just that. And, it is effective immediately upon your incapacity. Your family does not have to wait for a court proceeding to move forward with important medical decisions. Your agent can make decisions from the moment you become

unable to do so. Also, if the person who is your first choice cannot carry out your wishes, then you can name alternate choices.

Although you have the right to determine exactly which powers you want your chosen agent to have (or not have), those powers could include:

- *The right to refuse or consent to medical treatments*
- *The right to access medical records*
- *The right to withdraw life sustaining treatments*

In many states your spouse can make medical decisions for you, but this is not always the case. If you are unmarried but have a life partner, that person has no legal right to make decisions for you. By creating a HCPOA, you ensure that your loved ones will not have to face additional trauma in the event you become incapacitated in some way. You may also help to avoid conflict within your family about what is the best decision.

LIVING WILL

You should supplement your HCPOA with a Living Will, also called a Healthcare Directive or Directive to Physicians. The Living Will is similar to a letter of intent. It provides doctors with specific instructions about your preferences with regard to certain procedures or treatments if you meet certain criteria with respect to your medical condition. This will vary from state to state but generally speaking your Living Will declaration applies if death would be imminent but for artificial, life-sustaining measures, or if you are irreversibly and permanently unconscious with no hope of recovery of brain functioning.

Since approximately 75% of people die in a hospital or nursing home setting* and doctors are required by law to save a patient's life through whatever means necessary, you should consider a legal means through which your wishes can be known. Your Living Will serves as a guide to your wishes. Your healthcare agent's job is to be there to enforce those wishes and make decisions regarding issues not covered in your Living Will. However, the extent of your agent's decision-making ability can vary according to the laws for your state and the written instructions you leave behind.

PLANNING EARLY IS CRUCIAL

It is fairly easy to set up both a HCPOA and a Living Will. The documents can be prepared by an attorney, who understands the laws and issues involved and can customize a plan according to your wishes. You can also find information and resources through local senior centers, clinics and organizations that provide support to those dealing with chronic or terminal illness. Some agencies offer seminars on healthcare options and how to complete your legal documents.

When you take the time to complete this process of planning, you have the greatest chance that your wishes will be enforced. In the case of Terri Schiavo, the clear, unequivocal expression of her wishes would have spared her family years of bitterness, strife, and public disharmony. While Terri's tragic end may have been impossible to avoid, her family would most likely have been at peace if they had known the decision to remove the feeding tube was her choice. If only Terri's voice could have been heard, her family could have remained united in the face of their common tragedy.

With appropriate planning, you can ensure that your family isn't faced with making difficult decisions when they are already facing a traumatic situation. It is always difficult to admit to our own mortality and face the inevitable. Yet, by addressing the issue and discussing it, we alleviate potential crises and show our loved ones how much they mean to us. The most important step you can take in creating any plan is to discuss your intentions with those who will be affected by it before the plan is needed.

However, it is essential to remember that even if you have an estate plan or other end-of-life legal documents in place, if they have not been updated recently, changes in the law or your own views could prevent them from carrying out your intended wishes. Also, a Living Will is only one of several legal documents that you need for an effective and complete estate plan. A qualified estate planning attorney who knows your personal circumstances and wishes is in the best position to help you decide what is best for you.

ESTATE PLAN REVIEW IS ESSENTIAL

If you answer "no" to any of the following questions, it is time to consult a qualified estate planning attorney:

- *Do you already have an estate plan in place?*
- *Does your plan account for end-of-life healthcare decisions?*
- *Have you reviewed your estate plan in the last year?*

You may have taken all the necessary precautions when you set up your plan, but if your circumstances have changed since your estate plan was created, it may need to be updated. An annual review of your estate plan is essential for guaranteeing that it continues to accomplish your goals in the manner you intended. Listed below are just a few of the non-financial changes that might require adjustment to your estate planning documents.

CHANGE IN FAMILY CIRCUMSTANCES

The birth or death of a family member often has significant impacts on the estate plan, as well as on us personally. Changes are usually appropriate upon marriage or divorce. If you become

incapacitated, you probably would not want your ex-spouse making your healthcare decisions! Family relationships often develop or deteriorate over time. Those whom you had once considered to be prudent and level-headed may have proven themselves to be otherwise. Others who had been young and immature may have grown into the mantle of adulthood and proven themselves to be responsible, caring people.

CHANGES IN HEALTH

Changes to your estate plan may also be appropriate due to significant changes in the health of you or a loved one. For example, if you are unmarried you may have initially chosen to have a parent act as your agent. However, as that parent ages, it may become more appropriate for a sibling or other close relative to take over this responsibility.

CHANGE IN RESIDENCE

In our legal system, many laws vary from state to state. For example, states differ significantly in how documents such as Living Wills and HCPOAs are worded and how those documents are applied once you become incapacitated. While one state is unlikely to disregard a Living Will or HCPOA from another state, it may take more time and effort to see that your wishes are carried out than it would otherwise. Since the point of creating these documents is to make a difficult and traumatic situation easier for your loved ones, it is best to make sure that they are in accordance with your state's regulations.

CHANGE IN GOALS / DESIRES

Although there are many valid external reasons for revisiting your estate plan, perhaps the most important reason for doing so is a change in your own goals or desires. Your values can change over time; for instance, your views on end-of-life care could be affected by witnessing the effects of tragic circumstances on a loved one.

Once you have made your decisions, or if you need assistance in evaluating your options, a qualified estate planning attorney can guide you through the legal process. Only attorneys that focus their practices on estate planning have the resources and requisite experience to provide you with the advice and expertise you need to make certain that your wishes will be carried out. Call our office today for an appointment so that our staff can help you accomplish your goals. Let your voice be heard—it's your life, make sure you have the final say!

ABOUT THE ACADEMY

This report reflects the opinion of the American Academy of Estate Planning Attorneys. It is based on our understanding of national trends and procedures, and is intended only as a simple overview of the basic estate planning issues. We

recommend you do not base your own estate planning on the contents of this Academy Report alone. Review your estate planning goals with a qualified estate planning attorney.



The Academy is a national organization dedicated to promoting excellence in estate planning by providing its exclusive Membership of attorneys with up-to-date research on estate and tax planning, educational materials, and other important resources to empower them to provide superior estate planning services.

The Academy expects Members to have at least 36 hours of legal education each year specifically in estate, tax, probate and/or elder law subjects. To ensure this goal is met, the Academy provides over 40 hours of continuing legal education each year. The Academy has also been recognized as a consumer legal source by *Money Magazine*, *Consumer Reports Money Adviser* and Suze Orman in her book, *9 Steps to Financial Freedom*.

ADDITIONAL REPORTS

Request any reports of interest to you or your family. Simply call our office or visit our website.

- A Child With Special Needs, Needs Special Planning
- Aid & Attendance: Special Care Pensions Wartime Veterans
- Are Your Bank Accounts Safe? FDIC Insurance Can Cover You – With the Right Planning
- Asset Protection: Reducing Risk, Promoting Peace of Mind
- Beware of Living Trust Scare Tactics
- Charity Begins at Home: The Charitable Remainder Trust
- Creating a Lasting Legacy: The Best Things in Life Aren't Things
- Dangers of Do-It-Yourself Wills and Living Trusts
- Estate Planning Basics For Families with Young Children
- Estate Planning with Individual Retirement Accounts (IRAs)
- Family Farm: The Next Generation
- Family Wealth Trust: Calculating the Benefits
- Fifteen Common Reasons to Do Estate Planning
- Finding the Right Estate Planning Firm
- Funeral Planning: Options for You and Your Family
- Getting the Most Out of Your Life Insurance: The Irrevocable Life Insurance Trust
- Grandparents' Guide to Second Generation Planning
- Keeping Up With the Ever Changing Estate Tax
- Living Trusts: Calculating the Benefits
- Paying for Nursing Home care: A Guide to Medicaid Planning
- Peace Of Mind: Planning For All Of Life's Contingencies
- Planning It Right The Second Time Around
- Probate: A Process, Not a Problem
- Probate: An Executor's Role and Responsibilities
- Protecting Your Assets with the Family Limited Partnership
- Protecting Your Assets with the Limited Liability Company
- Set the Stage for Medicaid Eligibility
- Should You Trust Your Estate Plan – Estate Plan Reviews Ensure Protection for Your Family and Assets
- Special Valuation Benefits for Farms and Other Business Real Property
- The Impact of Divorce on Your Estate Plan
- The Nightmare of Living Probate
- The Trouble with Joint Tenancy
- To My Dog Lucky I Leave \$10,000
- Trust Administration: Prior Planning Prevents Problems
- What Every Senior Should Know About Probate
- Where There's a Will, There's Probate
- Your Life, Your Final Say