

Terri's Legacy

By Ellen G. Makofsky

The Terri Schiavo case has cast a long shadow on the health care proxy. New York law provides that a properly drafted and executed health care proxy allows the designated agent to make any health care decision that the incapacitated principal could make.¹ The agent may make a wide range of decisions: what hospital; what doctor; what type of treatment; how aggressive that treatment should be; and finally, end of life decision-making. The agent is required to act according to the principal's wishes. Where the wishes are unknown a best interest standard must be employed except where the decision to be made involves artificial nutrition and hydration. In cases involving tube feeding, the agent must know and act according to the principal's wishes. Where the above requirements are met the power of the designated agent is absolute in New York State.



There is no requirement within the health care proxy law that an individual's wishes be memorialized in writing. Health care decision-making has many nuances. It was contemplated in creating the health care proxy law that the agent, a trusted family member or friend would have a full and complete conversation with the principal so that the agent could really understand what the family member or friend wanted in a wide range of situations. The clear advantage of authorizing a health care agent to act is that the principal has a living, breathing person with a brain who can evaluate the particular situation in light of the principal's articulated wishes and the available medical technology and expertise.

The health care proxy law was enacted to provide an alternative to the living will, which is not recognized by statute and requires judicial intervention when the static words of the document do not meet the particular situation presented. It was never intended that the health care proxy stand side by side with the living will. After the health care proxy law came into being, the option of the living will remained for those who had no appropriate health care agent to appoint.

Terri Schiavo, a Florida resident, had no advance directive in place. Florida law allows a family mem-

ber to make surrogate health care decisions according to the incapacitated person's wishes when no individual was previously designated to make health care decisions. Terri's husband and parents each felt they knew what Terri would have wanted. When litigation failed to provide the decision Terri's parents were hoping for, they appealed to other branches of the government on both the state and federal levels. As a result the Florida legislature intervened, as did Florida's governor, and when this was unsuccessful, the Congress of the United States and the President became involved. This has set a dangerous precedent in undermining an individual's right to direct his or her own health care free of government intervention.

The health care proxy law works in New York. We cannot allow each branch of the government to weigh in on personal health care decisions made in good faith by a validly appointed health care agent. The legacy of Terri Schiavo should not be to weaken an individual's right to implement his or her own health care decisions but, rather, should be a wake-up call to all those who have neglected to execute a health care proxy.

Endnote

1. The statute requires that, at a minimum, the document identify the principal and agent and that the document indicate that the principal intends the agent to have the authority to make health care decisions on the principal's behalf. N.Y. Public Health Law § 2981(5). The health care proxy must be signed in the presence of two adult witnesses and the appointed health care agent may not serve as a witness. A statement from the witness that the principal appeared to execute the proxy willingly and free from duress must be incorporated into the health care proxy. N.Y. Public Health Law § 2981(2).

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