

# **ADVISORY MEMORANDUM – The Importance of Planning for Possible Incapacity**

August 2005

## **I. Introduction**

In March 2005, the public legal battle over the fate of a profoundly disabled Florida woman, Terri Schiavo, ignited a worldwide controversy about the existence and precise parameters of the right to die. The contentious and prolonged struggles between the Schindlers and Michael Schiavo over what Terry *would have wanted* in her situation could have been avoided had Terry planned for the unexpected event of her incapacity and documented her wishes.

In light of this recent controversy, Morrissey, Hawkins & Lynch wishes to take this opportunity to emphasize to our clients the importance of planning for the unpredictable. Thinking about the possibility of becoming incapacitated, and planning for such a contingency, is undoubtedly unpleasant. However, the unpredictable nature of such a tragedy is precisely why one must plan now for what may happen in the future. Providing binding guidance to one's family, friends and physicians in the form of a *living will* and a *health care proxy* will ensure that one's wishes are carried out in the event of incapacity. The tragedy of an incapacitating injury or illness is compounded when loved ones are faced with uncertainty over what their relative or friend would want them to do. Executing the proper documents can provide you and your loved ones with much-needed peace of mind.

## **II. What is a Living Will**

A living will, sometimes called an advanced medical directive, is an instrument that allows the declarant to determine what will be done in a medical situation in which the declarant can no longer participate in his or her health care decisions and is either not expected to regain consciousness or, if consciousness is regained, will live a life of negligible quality. The declarant sets forth his or her wishes regarding whether life-saving procedures should be continued or withheld where such procedures would merely prolong the dying process and are not necessary for comfort or pain alleviation. A living will is an extremely adaptable document. It can be tailored to each individual's own wishes concerning life-sustaining treatment options and can be amended or revoked at any time.

As of the date of this publication, Massachusetts does not have a living will statute. Nonetheless, Massachusetts case law has recognized that the signing of a living will is strong evidence of the incapacitated person's intentions and will be given significant weight in any disputed situation.

### **III. What is a Health Care Proxy**

A health care proxy is an instrument that designates a person, referred to as the health care agent, to make medical decisions for the principal should the principal lack capacity to make such decisions at a time when a decision is needed. A health care proxy gives medical providers the ability to obtain consent to treatment where the patient can no longer provide consent due to incapacity. Unlike a living will, a health care proxy serves to identify the person you trust to make decisions for you. The document does not set forth specific actions and procedures you would want taken. Although, specific directions are sometimes included in health care proxies, rapid advances in medicine and the uncertainty as to the circumstances under which the proxy will come into effect caution against such specificity. Instead of providing guidance to the agent, it may serve to bind them in a situation not anticipated by the principal where the directions are contrary to what the principal would want.

The person named in a health care proxy has full access to the principal's medical records and authority to make all health care decisions on their behalf, including decisions concerning life-saving treatment. Thus, it is important that the health care agent fully understand the principal's wishes and attitude concerning medical treatment and be someone who can be trusted with confidential health care information. The agent's authority begins as soon as the principal lacks the capacity to make or communicate health care decisions. A health care agent is under a duty to make the health care decision the principal would make if able. A health care proxy, like a living will, can be amended or revoked at any time.

Massachusetts General Laws Chapter 201D authorizes health care proxies and sets forth the requirements for validity. A durable power of attorney does not meet these requirements and should not be relied on as a substitute for a health care proxy.

Where a health care proxy has not been executed and a disagreement arises as to the proper course of treatment, the only option may be to go to court and have a guardian appointed. The guardianship process can be expensive, lengthy and contentious. For these reasons, the

Massachusetts Health Care Proxy is supported by many organizations, including the Massachusetts Council of Churches, Massachusetts Medical Society, Massachusetts Bar Association, Massachusetts Catholic Conference, Massachusetts Association of Older Americans, American Association of Retired Persons, and the Massachusetts Executive Office of Elder Affairs.

#### **IV. The Right to Refuse Life-Sustaining Medical Treatment**

The Supreme Court of the United States has recognized that there is a fundamental, constitutionally-protected right to control one's own medical treatment. The enactment of living will and advanced directive statutes by state legislatures arose from the Supreme Court's decision in *Cruzan v. Commissioner, Missouri Department of Health*. In that case, the Court held that a competent person has a constitutionally-protected liberty interest in refusing unwanted medical treatment, including the right to refuse life-saving treatment. The Court further decided that a state may require that an incompetent person's wishes as to the withdrawal of life-sustaining treatment be proven by clear and convincing evidence.

Similarly, under Massachusetts law, a competent person can refuse medical treatment even where such treatment is necessary to save his or her life. Thus, a person's intentions, as set forth in a living will, are expressions of the declarant's constitutional right to refuse life-sustaining treatment and constitute strong evidence of that person's desires. Also, since a health care agent stands in the shoes of the principal and health care proxies are executed when the principal is competent, a health care agent is likewise allowed to make decisions about end of life treatment, including the decision to refuse such treatment.

#### **V. Conclusion**

It is recommended that clients execute both a living will and health care proxy, since the instruments serve different but complementary purposes. A living will allows the client to set forth his or her intentions regarding life sustaining procedures and provide specific directions. However, living wills only apply where the individual is permanently unconscious or in a terminal condition. Health care proxies cover decisions regarding day-to-day care, as well as treatment and placement options, where the client is incapacitated but not necessarily terminal or unconscious.

By executing a living will and health care proxy, you will find security and peace of mind, knowing that your wishes will be heeded in the event of an unexpected tragedy. The documents will also provide assurance to those concerned with your medical care that your intentions are being carried out. The legal battle and public controversy that embroiled the Schiavos and Schindlers following the incapacity of their loved one was painful and costly for all involved. It is our hope, and indeed our responsibility to ensure, that our clients have the documents in place to speak for them if they cannot, so that the tragedy of an incapacitating injury or illness is not exacerbated by uncertainty and resistance.