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ESTATE PLANNING

What Would Have Happened in New Jersey?

After *Schiavo*: A look at the law surrounding living wills

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The *Schiavo* case, which recently received significant public attention, has brought new awareness to the importance of executing a health care directive to ensure that a person's wishes will be honored if he is ever unable to make his own health care decisions. Although it is reasonable to conclude that New Jersey courts may have ruled the same way if Schiavo was a New Jersey resident and had not officially executed an advance directive, it is wise to advise clients to execute such a document to prevent a *Schiavo*-like court battle. Only after the New Jersey courts decided several cases involving a person's right to refuse life-sustaining treatment did the legislature enact a statute governing written advance directives for health care. In fact, the statute governing advance directives for health care is simply a response to common-sense case law which has existed for almost 30 years.

It should be noted at the outset that New Jersey's statute governing advance directives for health care recognizes that competent adults have a fundamental right, in collaboration with their health care providers, to make decisions about their health care. Implicit in this statute is the recognition that a patient has a personal right to make voluntary and informed decisions as to whether to accept, reject or choose among alternative courses of medical treatment. This is really an acknowledgment of great magnitude regarding a person's right to determine his own fate, and the statute repeatedly confirms that adults should have the ability, in advance, to express their wishes and have them honored. This right is not absolute, however, and is subject to certain societal interests — the most significant of which is the preservation of life.

New Jersey's Statute

N.J.S.A. 26:2H-58 is the operative provision that specifies what a person can enumerate in his or her advance directive. Generally speaking, the advance directive usually contains two components. First, the individual can state his treatment philosophy and objectives, and specify his wishes regarding the withholding or withdrawal of any form of health care, including life-sustaining treatment. This is generally referred to as the "instruction directive," and can be tailored to meet the individual needs of each client. The second component, called the "proxy directive," is the appointment of an individual to serve as one's health care representative if that person is no longer able to express his own desires regarding treatment. Implicit in this is the understanding that a person who is competent to make medical decisions always has the priority right to speak for himself.

While most individuals want to guarantee that they will not be indefinitely maintained in a vegetative or comatose state, a countervailing concern often expressed is that the health care directive not be utilized unless there is the clear certainty that the patient's life would cease but for the intervention of the life-support. N.J.S.A. 26:2H-67 attempts to address this issue by requiring that life-sustaining treatment only be withheld or withdrawn if a person is irreversibly ill, in a terminal condition or permanently unconscious as determined by the attending physician and confirmed by a second qualified physician. In other words, unless the patient has one of the conditions enumerated in the statute, life support cannot be removed and a person cannot direct that such intervention be withheld or withdrawn.

As a practical matter, the client's health care directive should be as specific as possible so that there can be no debate as to what type of treatment a person wants if he becomes unable to make his own health care decisions. There has been a case in New Jersey where, despite

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the fact that a person had expressed her desire not to receive any blood products in both writing and through verbal communication with her relatives and doctors, the court found that the patient may not have contemplated the need for a blood transfusion in her particular circumstances and authorized the appointment of a medical guardian to consent to the transfusion. This case demonstrates the necessity to have the client spell out, in no uncertain terms, her desires regarding medical treatment, and also shows the court's strong inclination, when there is doubt, to always rule "in favor of preserving life."

The state's desire to preserve life whenever possible is also expressed in other provisions of the New Jersey statute. While it is commonly thought that a hospital must abide by the wishes of a person as expressed in his or her health care directive, such is not the case. In fact, the New Jersey statute recognizes that a private, religiously affiliated health care institution may develop an internal policy in which it declines to participate in withholding or withdrawing specified measures to sustain life. These policies must be communicated to the patients and their families as soon as possible upon admission to the hospital. If the health care institution's policy conflicts with the legal rights of a patient to express his or her wishes regarding medical care, the hospital must attempt to resolve the conflict; if a compromise cannot be reached, the facility must take reasonable steps to transfer the patient to another health care institution.

Similarly, it is commonly thought that a physician and nurse must abide by a patient's wishes if those wishes are adequately expressed pursuant to the statute. Such is also not the case, as a physician or nurse is specifically permitted to decline to participate in the withholding or withdrawing of measures utilized to sustain life if such a measure conflicts with his personal and professional convictions. Again, in these circumstances, the physician or nurse must act in good faith and inform the patient and family accordingly. The hospital should then transfer the care of the patient to another physician or nurse who does not hold such beliefs.

Litigation in New Jersey

Hopefully, an incompetent patient will have an advance directive, and that directive will specify the circumstances of when he does or does not want treatment withheld or withdrawn. Not having such a document in effect, however, is not dispositive of the issue, as reflected in the *Schiavo* case. New Jersey has a history of case law, beginning with *In Re Quinlan*, 70 N.J. 10 (1976), that respects a person's right to have life support withheld or withdrawn if the patient so desires. In *Quinlan*, the court ruled that the patient had a constitutionally protected right of privacy which included her right to refuse extraordinary life-saving measures when she was in a persistent vegetative state. The court said the only practical way to prevent the destruction of the patient's fundamental right was to permit the guardian and family of the patient to render their best judgment as to what the patient would have wanted, as long as there was a sufficient showing to demonstrate the patient's wishes.

The *Quinlan* case was further reinforced in the subsequent *Conroy* and *Roche* decisions. In *Conroy*, even in the absence of a written statement or oral directive concerning a patient's wishes, the court held that life sustaining treatment could be withheld when it was clear that the patient would have refused the treatment under the circumstances involved. This intent, in the absence of a written statement or oral directive, could be deduced from a person's prior statements or consistent pattern of conduct. In the absence of adequate evidence, the court discussed two different "best interests" tests that could also be used to determine whether to withhold or withdraw life support. The "limited-objective test" allows life sustaining treatment to be withheld or withdrawn when there is some trustworthy evidence that the patient would have refused treatment and it is clear that the burdens of the patient's continued life with the treatment outweighs the benefits of that life for the patient. The "pure objective test" allows life sustaining treatment to be withheld or withdrawn when the effect of administering such treatment would be inhumane. *Roche* confirmed that these tests were applicable in certain circumstances even after the passage of the statute.

The *Schiavo* case highlighted the importance of encouraging clients to execute advance directives. New Jersey has codified a method that first and foremost protects an individual's right to dictate his or her own health care treatment. This right, however, is not absolute and the statute not only requires that a patient's condition be irreversible and permanent, but also gives rights to physicians, nurses and certain institutions who morally do not want to participate. Whether a client executes such a directive or not, it clearly is important to encourage clients to discuss their wishes with their health care providers and relatives to prevent a long court battle during the last stages of a person's life, which was so unfortunately evident in *Schiavo*. ■