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Guest Article

'Schiavo' Case Serves As Reminder Of Need For Proper Planning

By Jeffrey A. Baskies

On Sept. 23, the Florida Supreme Court struck down "Terri's Law" in a 7-0 decision. Terri's Law was passed by the Florida Legislature in response to Governor Jeb Bush's request to allow a woman - Terri Schiavo - to remain on life support. The case hinged on fundamental issues of separation of powers which belong in a first year constitutional law text. But the meaning of the case is much greater.

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Every time I read about this tragic case, I realize that this story is a perfect reminder to all clients of the importance of proper estate planning.

We have all met potential clients who ask, "I know why rich folks need estate planning, but why do I?" Or we have met potential clients who may have wondered aloud why they should pay our fees instead of using an on-line or prepackaged estate planning service.

Well, the next time I meet clients who ask either question, I know what I will do. I'll give them the name of Terri Schiavo. And I'll invite them to go online and learn how awful a situation can get when there isn't proper estate planning.

Now, I don't mean that as a knock on Terri Schiavo or her family for not having an estate plan in place. When Terri collapsed in 1990 she was a young woman of 26 or 27 years of age. She was married and had no children. Many potential clients in that same situation haven't done any estate planning. They don't have much money, they have all assets jointly held with a spouse and/or with a beneficiary designation to the spouse and they don't see a need to spend money to create an estate plan.

However, the *Schiavo* case highlights how amazingly hard a family can fight after the death or disability of a loved one, particularly when the issues of money and life support are involved. I will cite to this family and tell my clients that unless they create a proper estate plan, then they run the risk that something will happen to one or both of them and the survivor or their family will

be fighting with their in-laws, their children, their siblings, etc.

I used to just tell clients that I'd seen too many cases where post-death, families fought over dollars, cents, family pets, burial, pots and pans. Most clients could relate to a personal experience they had which motivated them to continue the planning. But now the *Schiavo* case will be my example.

I'll tell clients to read about just how awfully wrong and twisted one's fate can be in the absence of estate planning. And while the *Schiavo* case is really about issues of living wills, it is also a reminder of how important all planning can be. When family and money mix in a fight over one's dying (whether in the context of a living will or a last will), the consequences can be unbelievable.

The History Of The Case

In February 1990, Terri Schiavo collapsed at home when her heart stopped temporarily. The incident cut off oxygen to her brain, and she has been in a "comatose" state since. Doctors believe the incident occurred due to a potassium imbalance.

Terri's husband, Michael became her legal guardian, and sued doctors for allegedly misdiagnosing her condition. In November 1992, a jury awarded over \$1 million - about \$700,000 for Terri's care and about \$300,000 for Michael's damages.

In July 1993, after the malpractice case was resolved, Terri's parents, Bob and Mary Schindler - apparently concerned about Michael's motivation - filed an action to remove him as guardian. That case was dismissed; however, it marked the beginning of what now is an 11+ year fight over control of Terri's care.

In May 1998, Michael filed his first request to remove Terri's feeding tube. The Schindlers objected and fought to keep the tube in place.

After almost two years, Florida circuit court judge George Greer ruled in February 2000 that the feeding tube could be removed.

The fighting between Michael and the Schindlers continued, and it wasn't until April 24, 2001 that the tube was in fact removed. However, two days later, another Florida circuit court judge, Frank Quesada, ordered the tube be reinserted.

In September 2001, the 2nd District Court of Appeal heard arguments from Michael and the Schindlers on the removal of the feeding tube. They heard arguments citing seven doctors for the Schindlers arguing that Terri had brain function and might recover somewhat in the future. They also heard arguments citing to treating physicians testifying on Michael's behalf that Terri was brain dead with no hope of recovery.

In October 2001, the court of appeal ordered the feeding tube to remain in and appointed a panel of five doctors to examine Terri and determine if there might be any reasonable hope of recovery.

The examining committee concluded that there was none. In November 2002, after hearing more arguments and reviewing and considering the report of the committee, Judge Greer again ruled that there was no reasonable hope of recovery for Terri and ordered that Michael could have the feeding tube removed.

The Schindlers appealed and the 2nd District Court of Appeal again heard the case. And in June 2003, in a very lengthy and surprisingly open and narrative opinion, the court stated that all reasonable efforts had been made to treat Terri and that after 10+ years on a feeding tube without any appreciable signs of brain functions, her recovery was not reasonably foreseeable.

The court examined the process, noted all the hearings, the mediation, the various doctor's reports, and concluded that the process had been fair and the trial judge's conclusion was supported by the evidence. The court again upheld the order allowing the feeding tube to be removed.

Several additional appeals were made, including appeals to federal court. All found the process to be conclusive and reasonable. The Schindlers then appealed to the public, the media and the governor to step in and "save" Terri. A public campaign to keep her on life support was very effective, but ultimately did not change the court rulings.

Finally, on Oct. 15, 2003, doctors removed Terri Schiavo's feeding tube.

Governor Jeb Bush, responding to the cries of the Schindler family, vowed to fight to protect Terri. On Oct. 21, 2003, he pushed the Florida Senate and House to pass a bill - labeled "Terri's Law" - allowing him to intervene to force doctors to replace the feeding tube.

After the passage of Terri's Law, the trial court was again asked to consider Terri's fate. An independent guardian was appointed and asked to investigate. Like the examining committee a year or so before, in December 2003, the guardian filed a report indicating there was no reasonable hope for Terri's recovery.

In the meantime, Michael's attorneys filed a suit alleging Terri's Law was unconstitutional. In May 2004, trial judge Douglas Baird ruled in his favor. In June the Florida Supreme Court agreed to hear the case, and oral arguments were heard in late August.

Then, as noted above, on Sept. 23, 2004, the Florida Supreme Court agreed that the law was indeed unconstitutional. The opinion stated that the legislature and the governor had improperly intruded on the power and sovereignty of the courts.

The Ultimate Issue And How To Avoid It

In this case, the ultimate issue was whether Terri would have preferred to remain on life supporting treatments (a feeding tube) even if there was no medically recognized hope of recovery. The real problem was that she never expressed her intentions in such a situation in writing.

As we all know, a simple living will form has been a basic of estate planning now for decades. After the Nancy Cruzan case made national headlines, a federal law in her name was passed requiring all hospitals to offer free living wills to patients.

If Terri Schiavo only had such a document, this case may not have been so contentious. But she did not. And thus the ultimate issue of how her care should be administered had to be decided not by her but by a court. And all a court could do was examine her medical state and then any evidence as to what her preference would have been.

Under Florida law (as in all states, I believe) virtually any evidence as to intent can be admitted to determine this issue. Thus, Michael was able to argue that Terri told him she would never want to live in a vegetative state. With the lack of any countervailing evidence, the court ultimately accepted Michael's testimony.

But what an awful way to have one's fate decided. Can your clients bear the thought of having a 10+ year legal battle between their family members? Can they tolerate the idea that their end of life decisions might be made not by them, and not even by their loved ones, but by a judge they never met?

The answer is: of course not. So after looking at the *Schiavo* case, any clients in their right mind will recognize that there may be issues they need to consider in the realm of estate planning.

And as I said above, if issues of living and dying can lead to such headache and heartache, imagine how ugly it gets when money is involved. In the *Schiavo* case, the money from the malpractice suit - how it would be managed and who would get it upon her death - further exacerbated the fighting.

Thus, the moral of the story for clients is that not only end of life issues - living wills - but also issues surrounding the passing of wealth are best dealt with directly and in writing. The better the plan and the clearer the intentions, the less likely there will be problems.

That's why this case serves as the ultimate reminder of why every adult should consider estate planning, and why doing it yourself risks unimagined trouble.

Questions or comments can be directed to the editor at: sbocamazo@lawyersweekly.com

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