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## **Schiavo Case Triggers Avalanche Of Interest In Advance Directives**

Joe B. Whisler knows first-hand the agony a family goes through when a loved one hasn't left an advance directive for care and end of life decisions.

Several years ago, his mother-in-law, who had Alzheimer's disease, broke her hip and went into a persistent vegetative state. His wife and one of her siblings clashed over whether their mother should be put on life support.

"My wife and I both believed this wasn't the way she would have wanted to go out of this world, but she didn't have a health care directive," he said.

As a result, Whisler said, "She lingered for another two years, rolled up in a ball."

She died in 2002.

"It caused a real schism in my wife's family," he added. "And it's so preventable."

That's why Whisler has made it his mission as president of the Missouri Bar Association to get the word out to the public about the importance of advance directives - the umbrella term for living wills, health care proxies and health care powers of attorney.

The Missouri Bar Association's website- [www.mobar.org](http://www.mobar.org) - contains links that allow members of the public to download durable powers of attorney for health care and health care directive forms.

The response has been tremendous.

From 11 a.m., Tuesday, March 22, through 9 a.m. Monday, March 28, the site received 16,983 hits, according to Missouri Bar Association spokesman Gary Toohey.

The Terri Schiavo case in Florida has triggered an outpouring of interest by the public in advance directives, according to elder law and estate planning attorneys.

Schiavo was 26 years old when a heart stoppage caused severe brain damage 15 years ago. She died on March 31, following a prolonged legal battle between her husband and her parents about whether to remove her feeding tube.

She did not have a living will or health care proxy.

Estate planning and elder law attorneys say they have been flooded with calls from clients seeking to avoid the legal war waged by Schiavo's parents and her husband over her care.

"The phone has been ringing off the hook," said Bernard A. Krooks, an elder law attorney with Littman Krooks in Manhattan and White Plains, N.Y.

"People are becoming more and more aware how critical these documents are," he said.

"If there's any good that comes of the tragedy, certainly Ms. Schiavo's case is getting people's attention who don't want to have their families go through it, or go through it themselves," he said.

But many elder law and estate planning specialists express concern that the public may be downloading "living wills" off the Internet without understanding the legal implications of the forms.

"They pick up the forms; they don't get good counseling; they just do it on their own," said Kelly S. Davis, and elder law attorney in Cheyenne, Wyo. "They don't think of the consequences of their actions."

In addition, several elder law experts noted, members of the public may not be aware that the format and requirement of advance directives vary from state to state.

"I think they need to sit down and discuss it with someone. As an attorney, it's my job to put out what the ramifications are," Davis said.

### **'Passive, Wimpy Document'**

All 50 states have laws governing advance directives - legal documents that spell out an individual's wishes with regard to medical and end-of-life decisions. There are three types:

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- A living will states how an individual would like to be treated in the event he or she is unable to make decisions regarding the use of life-sustaining medical treatment.
- A health care proxy authorizes one or more individuals to communicate a person's wishes regarding end-of-life treatment. In some states, "proxy" is synonymous with health care power of attorney.
- A health care power of attorney not only authorizes and individual to communicate a person's medical instructions, but allots a host of other powers, including hiring and firing medical providers and consenting to a "DNR" (Do Not Resuscitate) order.

Davis said he typically drafts a health care power of attorney and supports it with a living will. (As of July 1, Wyoming will combine its living will and health care power of attorney forms into a single health care power of attorney form.)

"The living will [gives] the final instructions, and under the health care power of attorney I lock the attorney into following the wishes of the client," he explained.

The documents can go into specifics, such as whether a person who is comatose wants to be put on a ventilator or a feeding tube, given antibiotics or pain-killing narcotics, or resuscitated.

Douglas S. Delaney, an estate planning attorney in Bluffton, S.C., doesn't think much of the living will as a stand-alone document.

"The living will is a passive, wimpy document," he said. "I'm not a big fan of the living will at all. It doesn't give you an express appointment of an agent. Unless you have a living person there, you don't have a final arbiter."

Furthermore, the wording and legal direction of a living will are often "fuzzy," he said.

For example, the term "persistent vegetative state" can be interpreted in different ways, opening the door to legal wrangling.

Delaney instead recommends clients adopt a health care power of attorney, which gives a designated agent the authority to make specific decisions about how and when to remove life support, including artificial hydration and nutrition.

"An agent that can bang his fist on the table - that's what you ultimately want," he said.

While even a health care power of attorney doesn't preclude a legal fight, "it's such a heavy bat you swing as an agent, the courts are going to respect it," Delaney said.

Krooks agreed.

"In that document you literally appoint someone to make all health care decisions for you - including removal of nutrition and hydration," he said. "whereas [with] the living will ... there may be litigation over what is a 'persistent vegetative state.'

### **Better Than Nothing**

Still, attorneys agree, a living will is better than nothing. But according to a recent survey by the National Academy of Elder Law Attorneys, only a third of Americans aged 35 to 49 have one.

In an effort to boost those numbers, the academy is encouraging everyone over 18 to prepare advance directives.

In Missouri, volunteer lawyers are visiting senior centers, nursing homes and churches to hand out advance directive forms.

"the gold standard is obviously you go to an attorney and do a will and take care of all your end-of-life issues. You'll get a more tailored document," Whistler said.

But he noted, "The truth is very few people do that. So, We have written this to catch the people that don't go out to their attorney."

People can fill out the documents without a lawyer. Most states will consider the documents legal if they are witnessed by one or two people; some require the documents notarized.

Still, legal experts say the best approach is to hire an attorney who specializes in estate planning or elder law.

"Each state has different laws," Krooks said. "There will be additional items you can put in the document that you won't find in a boilerplate form on the internet."

In addition, he noted, forms, witnessing requirements and disclosure regulations vary from state to state. In particular, people who live or visit children in several states part of each year should check with an attorney to make sure they are following each state's rules.

Advance directives can even be customized according to a client's religious beliefs.

A "Catholic living will" for example, instructs physicians to take all possible measures to help save a pregnant woman's unborn child.

### **Industry Impact**

The federal government requires hospitals that receive Medicare funds to inform patients about state laws governing advance directives.

Amy Lee, a spokeswoman for the American Hospital Association, said some hospitals put the information on their websites; others include it in admission packets; and some have departments that help patients fill out the forms.

Scott Mager, a nursing home defense attorney in Fort Lauderdale, Fla., said most nursing homes encourage family member to include a living will in a patient's admission agreement.

There's no question, he added, that the few facilities that don't have a system in place will implement one, post- *Schiavo*.

Carol Meyer, a registered nurse and administrator of the Susanna Wesley Health Care Center in Hialeah, Fla., said that under Florida law having an advance directive is not a pre- requisite for admission to a nursing home.

But she said she gives families a booklet at the time of admission and explains, "It would behoove you when your mind is clear and not when your mother's health care is tenuous to think about how you want us to deal with this."

Still, getting families to agree about decisions involving the end of a loved one's life isn't easy.

"You always have to consider the resident's wishes, the family's wishes, especially if there are multiple siblings - that everyone is on the same page," she said.

Legal problems typically arise when family members clash over a loved one's care and no one has been given a health care power of attorney.

In Illinois, for example, once two physicians have certified a person is terminal and lacks the capacity to make a decision about life-withholding measures, the patient's doctors can ask the "top surrogate" (typically the spouse) to make medical decisions, said Laura Sakes, and attorney with the Illinois Office of State Guardian.

But if there's no clear surrogate and 11 brothers and sisters are arguing about what their mother would want, a hospital will probably end up petitioning the Office of State Guardian to appoint a legal guardian, she said.

### **Talk About It**

Whisler said that everyone should talk about their end-of-life wishes with their family before they become ill. That includes lawyers.

"I did that myself on Thanksgiving," Whisler said. "My daughter thought it was a little creepy."

But Whisler, 57, who is an insurance defense lawyer with Cooling & Herbers in Kansas City, Mo., thought it was important that his daughter, who is 26, understand exactly how he wants things handled.

Arthur D. Mouton, an estate planning lawyer in Lafayette, La., agreed that it's crucial to consider these issues in advance.

"I'm going to have DNR tattooed on my chest," he joked.

He said he includes Louisiana's living will document in every estate plan and offers it to all his clients. (Louisiana allows the appointment - in a living will -of a person to make decisions about removing life support.)

"I always recommend this path with the advice that the client take that person by the ears and tell them to 'read my lips,' and to give that person direct desires," he said.

Futher, said Mouton, "I'm telling people not only do you need to appoint someone, you need to specifically list: No feeding tube, or that my named agent has the right to prevent or withdraw a feeding tube."

"It doesn't take longer," Whisler said. "And it can save so much grief and hard feelings."