

_____, 2006

Re: Health Care Directives

To Our Clients and Friends:

The personal issues and protracted litigation that have engaged the family of Terri Schiavo, the courts and Congress demonstrate the critical importance of a properly executed Health Care Power of Attorney. All of this litigation probably would have been avoided if Terri Schiavo had expressed her preferences in a written advance directive, or Health Care Power of Attorney.

We cannot emphasize enough the value of such a document. If you are ever unable to express your wishes, an up-to-date Health Care Power of Attorney may avoid tragedy in your family.

In Minnesota, living wills are now known as health care directives. They are broader than the old living will forms, which applied only when a patient was terminally ill.

What is it? A document that takes effect when you cannot speak with health care professionals. It allows you to name one or more people to act for you on medical decisions and to say what care you want or do not want in situations.

Will it guarantee you get what you want? Health care officials may challenge your directive if you ask for care they consider medically inappropriate. Providers try to resolve differences with families rather than go to court.

What's most important? Many doctors and medical ethicists say it is more important to name an agent than it is to spell out precise care.

Directives from other states: Unlike many other states, Minnesota law requires that any advance directive to be recognized by health care providers in Minnesota. It can be a note that you write and have witnessed by two people other than the person you name as an agent. Or it can be a printed form available from doctors.

If you already have a Health Care Power of Attorney, please make sure that you and your family know where it is. Make sure that in it you have indicated your preferences regarding life-sustaining treatment. File a copy with your primary care physician or clinic.

We believe that all of our clients will want to do everything they can to avoid, for themselves and their families, a Schiavo-like dispute. If you have not executed a Health Care Power, please contact us to have one prepared. Feel free to call us with questions you may have regarding the issues raised by Health Care Powers of Attorney or questions regarding other advance directives, such as Living Wills and DNR orders, or financial powers of attorney.

Very truly yours,

Lommen, Nelson, Cole & Stageberg, P.A.

LIVING WILLS: QUESTIONS AND ANSWERS

This memo attempts to answer basic questions relating to a Health Care and Living Will Declaration. This memo will answer general questions about living wills and then discuss each section in greater detail.

GENERAL QUESTIONS

1. Must I have a lawyer prepare my health care declaration?

No, but there are some situations in which it would be advisable to do so. For Example, if you do not have a family member who is willing or able to act as your proxy; if you decide to name someone other than a family member to serve as your proxy; or if you anticipate disagreement among members of your family even after talking about your wishes with them. Your lawyer will act as your advocate when you are no longer able to speak for yourself.

2. Must I complete all the blanks?

No, you do not. The law says, however, that if you do not state your wishes in #6 about artificially administered sustenance (nutrition and hydration), or say that you want your proxy to decide for you, any decisions related to artificially administered sustenance will be made according to reasonable medical practice.

QUESTIONS ABOUT SPECIFIC INSTRUCTIONS

#2.01. What does "circumstances under which the declaration applies" mean?

A declaration doesn't actually apply until the declarant (person making the declaration) has a terminal condition and can't make health care decisions for her/himself. Terminal condition is defined in the law as one that is incurable or irreversible and for which the administration of medical treatment will serve only to prolong the dying process. You can further limit the applicable time when it becomes effective, if you wish, by stating, "I do not want my declaration to become effective until it is expected that I will die within a short period of time." Instruction #1 is also a place for general statement about terminal care, such as, "I want care and treatment that will make it possible to remain active for as long as possible" or "I don't want care that only delays inevitable death." One person write, "I want my family and my doctor and nurses to remember that I am the same person as I was before I became terminally ill." Another said, "I do not want treatment given only to make my family, doctor, and nurses feel better."

#2.02. What is "appropriate health care" and how can I possibly know all the ways it will help me?

You can't - no one can. Furthermore, everyone is entitled to appropriate care when they place themselves in the care of a physician, hospital, or nursing home. In fact, this law defines reasonable medical practice to include "the continuation of appropriate care to maintain the patient's comfort, hygiene and human dignity." Nevertheless, some may want to say, "I want to be kept comfortable,

to be treated with dignity."

You might want to include the idea of time-limited treatment trials, and say, "I want treatment to the extent necessary to find out if it might have some benefit, but if, after a certain period of time, there is no benefit or if it is a burden to me, I want it stopped." This is a place to say whether or not you want your doctor to consider hospice care as an option.

You need not and aren't expected to list every conceivable type of care and whether you might want it or not. Medical judgment will also determine appropriateness and the benefit/burden of a particular form of care or treatment. There are no trivial or wrong answers. The purposes of a declaration is to assist those who must make decisions for you.

#2.02 & 4. Both #2 and #4 ask about care and treatment that is wanted, but #4 specifically refers to life-sustaining treatment. What does this mean and what is the difference between the two questions?

Declarations are not only for refusing treatment, but can be used to say that you want to receive maximum treatment, both within the limits of reasonable medical practice. A person could combine #2 and #4 and write under #2 "See #4." (See #3 for discussion of life-sustaining treatment.)

#2.03 & 5. Both #3 and #5 are about treatment one does not want, but what is the difference between treatment and life-sustaining treatment?

These two instructions can be addressed together, because almost any treatment at some point in terminal illness becomes merely life-sustaining. It's most important to make sure your doctor and family understand your intentions and your feelings about treatment, rather than making a list of specific treatments that you want or don't want. If you don't want treatment that will neither cure nor reverse a terminal condition but merely prolong your dying, say so in #3. Terms such as "heroic" or "extraordinary" should not be used because they are vague. You may, of course, list specific treatment such as a respirator, renal dialysis, chemotherapy, or aggressive antibiotic therapy, but no one can be expected to think of every possible kind of treatment that may be involved in a terminal illness.

It's a good idea to say whether or not you want cardiopulmonary resuscitation (CPR). This is because at some time your heart will stop beating and you will stop breathing. In all hospitals and most nursing homes, every effort will be made to resuscitate you, that is, to start your heart beat and breathing. It will be attempted unless your doctor has written a Do-Not Resuscitate (DNR) order on your medical record. Talk with your doctor about the risks and benefits of CPR for persons with a terminal condition. If you decide that you do not want it, writing "I don't want CPR" in your declaration is not enough; your doctor has to write it as a medical order. This should be done as part of an overall plan for your care. Also, in an emergency situation, the paramedics may start CPR. So talk with your doctor about alternatives to 911 in case of emergency.

Note that brain death is an exception to the above description of cardiopulmonary death so you may wish to discuss brain death with your doctor. For the related issue of tissue donation, see #7.

#2.04. See #2 above.

#2.05. See #3 above.

#2.06. The law states that everyone must declare his/her wishes about artificially administered sustenance or state that he/she wishes his/her proxy to make such decision. If you do not so state, the declaration is enforceable as to all other preferences or instructions, but decisions to administer, withhold, or withdraw nutrition and hydration will be made according to reasonable medical practice:

(a) What is "artificially administered sustenance"?

Special nutrients and fluids that are given by tube if a person can't take them by mouth. Intravenous feedings (IV's) may be used for a short time but the usual means of longer term administration is through nasogastric (NG) tubes put into the stomach through the nose or through tubes put directly into the stomach or small intestine by surgery (gastrostomy, jejunostomy).

(b) What is reasonable medical practice related to artificially administered sustenance?

It usually means that doctors will consider the benefits and harm to the person from tube feeding and the person's wishes. It should mean that the doctor will obtain the person's or family's consent before inserting a feeding tube, but this isn't always done, especially if the person is being transferred from a hospital to a nursing home. Also, some doctor's personal beliefs and some hospital and nursing home policies do not allow them to withdraw a feeding tube once it's been placed. So it's advisable to state your wishes about receiving or not receiving artificial sustenance when in a terminal condition.

(c) It says on the form that if I reject artificially administered sustenance, then I may die of dehydration or malnutrition rather than from my illness or injury. What does this mean?

This is not medically accurate, because death is caused by the terminal condition, not the rejection of artificially administered sustenance. Remember that a declaration goes into effect only when someone has terminal condition, which means an illness or injury that is incurable or irreversible and for which medical treatment will only prolong the dying process. When tube feeding is the treatment involved, it means that the person is not able to eat because of the terminal illness, and is perhaps unconscious.

d) Will I be starved to death if I say that I don't want artificial sustenance?

No. Not only does this law require food and water to be given to a patient who is able to eat or drink, but the standards of care for hospitals and nursing homes require that appropriate nutrition and hydration always be provided.

(e) Would death without artificial sustenance be painful?

Pain is related to the underlying terminal condition, not the presence or absence of a feeding tube.

Doctors and nurses are obligated to provide medication and other care to relieve pain and keep one comfortable. If tube feeding is necessary for comfort, it would be painful. It also can cause more pain and discomfort and would not be given.

We suggest you discuss the physiology of dying with your doctor or with nurses or chaplains who have cared for dying persons. You should ask about hospice care, where tube feeding is rarely done unless necessary for comfort. Artificially administered nutrition and hydration is a medical treatment because it requires medical judgment as to the risks and benefits to each individual patient.

#2.07. Questions and Answers:

- (a) What does "thoughts relevant to my instructions mean" and why should I give my religious beliefs and other personal values?

This is to help those who must make decisions for you when you are no longer able to do so. Any thoughts or beliefs you have about life and death will help them understand your intentions and carry out your instructions. Your thoughts will be especially helpful when family members must consent to withhold or withdraw life-sustaining treatment. You may wish to state your beliefs about life after death, and about things that are especially important to you in life such as being active, being in charge, communicating with loved ones, attending one more family celebration, etc.

- (b) It says that I can state preferences about location of my care. Can I say that I always want to be cared for at home, or that I never want to go to a nursing home?

You may say anything--there are no right or wrong answers. At the same time, you should think about the effect on family and other loved ones of such a statement, should they be unable to care for you at home. Might this add to their sorrow and guilt? Also, other laws, such as the Vulnerable Adult Protection Act, may make it impossible for a person to stay at home if there is a risk of harm to self or others.

Another locational consideration is hospitalization for treatment such as intravenous antibiotics, surgery, or other treatments that usually are not given at home or even in a nursing home. For example, if you did not want to die in a hospital, you could say "I don't want to be moved to the hospital for treatment unless it's necessary for my comfort.

- (c) I want to donate my organs. Can I put that in my declaration?

Yes, and #7 is an appropriate place, but you should also fill out an organ donor card because another law governs organ and tissue donation. It requires family consent, so stating your wishes in your declaration will help your family when they are asked for consent. If you want to donate solid organs such as heart, lungs, kidneys, liver, or pancreas, you would have to be on a respirator until brain death is determined and the organs removed. Therefore, if you want to donate your organs but don't want to be kept on a respirator, you should qualify the latter instruction by saying "only for a short while for organ donation purposes." Also, organs are rarely accepted from a person who is over 65 years of age. Donations of cornea, skin, and other tissue do not require that the body be kept on a respirator and the age limit is higher. Corneas can be used regardless of donor's age.

(d) Should I designate a proxy, and if so, who and how many?

Yes, because it's helpful in many ways: It tells your doctor, nurses, hospital, and nursing home whom you have chosen to make health care decisions for you. It should be helpful to your family, as well. Choosing a proxy requires thinking about who you believe will best be able to represent you and carry out your wishes when you have a terminal condition and cannot speak for yourself. This means that it should be someone whom you expect to be around when you have a terminal condition. It also means the person(s) must respect your wishes and be willing and able to carry them out. Some family members cannot bring themselves to consent to removing a respirator, withholding or withdrawing a feeding tube, or agreeing to a Do-Not-Resuscitate order.

Only you can decide who or how many proxies you want, but be sure to discuss it with potential proxies in advance to be sure they agree to serve. If you want two or more people to share the proxy responsibility, be sure to say so in your declaration. Otherwise it will be assumed that the first named person will be spokesperson. Although the law does not require it, it is a good idea to have your proxies sign or initial the form so that every one knows that they have agreed to serve.

AFTER WRITING THE DECLARATION

1. Sign the declaration in the presence of two witnesses or a notary public. Neither of the witnesses nor the notary can be named as proxy nor can they be persons who would benefit from your estate.
2. Make a number of copies of the declaration after it's signed and witnessed. Give copies to your proxy, other family members, your doctor, your lawyer, and if you wish, to your priest or minister. Make sure to bring a copy with you if you go into a hospital or nursing home. Keep a list of those to whom you've given copies and keep the original devaluation at home. Review it periodically and make any changes that you wish. Be sure to tell your doctor about the changes, and let all those who received copies of the original declaration know about the changes.
3. If you want to revoke your declaration in total, be sure to let your doctor and nurses know that you have revoked it. Your declarations can be revoked or changed at any time, but only by you.
4. When you bring a copy of your declaration to a health care provider, such as a doctor, hospital, nursing home, or home health nurse, each is required to put it in your medical record. As a rule, there is no one unified medical record that will follow you from your doctor's office to hospital to nursing home or home care. Therefore, you should bring a copy of your declaration with you each time you consult a new doctor or enter a hospital or nursing home. After that, it's a good idea to ask much of the responsibility upon the individual preparing the declaration, as it should, because it is a recognition of the right to self determination in matters related to health care. It at any time, your health care providers are not willing to comply with your declaration, they must tell you so. Then it's your responsibility to decide whether or not to change doctors, hospitals, or nursing homes. If they do not tell you that they are unwilling to comply with your declaration and you become terminally ill and can't make a decision to transfer, the doctor or other health care provider is then responsible to take all reasonable steps to transfer you to someone who will comply with your declaration.

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