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Schiavo case breathes life into living wills

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Terri Schiavo died this week, but her legacy will live on. The attention she drew to the topic of living wills means thousands will be motivated to take steps to prevent the kind of legal and media circus that surrounded her bizarre case.

The controversy swirling around the long-comatose Florida woman could have been avoided had Ms. Schiavo explicitly specified her wishes in writing.

Such a document is termed a "living will," although the term is a misnomer. It's a confusing one, which should itself be put out of its misery, says estate planner Sandra Foster, author of *You Can't Take it With You*. "It's not really about living, nor is it a will."

Traditional wills are prepared while the subjects are still living, but don't kick in until they die. The idea is to inform the world of the deceased's plans for the distribution of property.

By contrast, the term "living will" came into being to clarify in advance the medical wishes of someone like Ms. Schiavo, who was unable to articulate her wishes but was technically still alive.

A living will specifies your wishes for personal care and medical treatment should you become similarly incapacitated. This may include your wish not to be resuscitated or to avoid "heroic" life support measures. Or it may do the opposite and ask to keep you alive no matter what.

Thus, a living will "deals with your dying, not your living," says Sandy Cardy, vice-president tax and estate planning for Mackenzie Financial Corp. It "directs how you would like to die or not die. It's an advanced health

care directive that indicates your wishes for health care or medical intervention when you're unable to speak for yourself."

A living will may contain directions about withdrawing or refusing treatment. However, instructions directing euthanasia aren't enforceable, Ms. Cardy says.

The problem with Ms. Schiavo was she was unable to speak for herself and had never specified her wishes in writing. After all, she was only 26 in 1990 when she suffered a heart attack, creating permanent brain damage. She was kept alive eight years before her husband asked to withdraw her feeding tube.

In the absence of a living will, a legal fight ensued with Terri's parents, who wanted to keep her alive despite her "persistent vegetative state." Her husband, Michael, claimed she had told him (alas, only verbally) that she did not wish heroic measures to prolong her life. Her parents denied she had ever expressed this.

Even a simple written statement might have avoided this heartache. A hand-written signed statement can suffice, although it would be better to be witnessed. "Anything's better than nothing," Cardy says.

In the wake of the final publicity blitz over Ms. Schiavo's death, you can be sure many people are scrambling to do just that.

The Web site www.advisor.ca has created a package for financial advisors deluged by client requests for information on this topic. It contains useful links to sites about dying with dignity and sites specifying applicable laws in each Canadian province.

Most Canadian provinces have legislation regarding heroic measures, and the living will is

key to these laws. As an advance expression of your wishes, living wills are legal in most Canadian provinces or soon will be. Different terms are used, however. They may be called health care directives, advance directives (detailed treatment-specific documents for doctors), representation agreements or personal directives.

A big first step is the living will or "instructional advance directive." A second is to appoint in advance someone as your legal decision maker. Formalities vary by province. In Ontario, the proxy directive is called the Power of Attorney for Personal Care. In British Columbia it's a Representation Agreement, in Quebec it's a Mandate and in Alberta, a Personal Directive.

These complement the Power of Attorney for Property and may cost a few hundred dollars for a lawyer to prepare.

The POA PC deals with broader issues than the specific health care issues a living will focuses on. APOA PC specifies where you want to live, what to eat or wear, clothing, cleanliness and safety. It's also used to designate the person you want to make decisions if you're unable to do so. As with a POA for property you're giving them authority, but instead of dealing with your property you're empowering them to make life or death decisions on your behalf.

The living will can be part of the POA for Personal Care or a separate document, but Ms. Cardy recommends creating a stand-alone living will separate from the POA PC. "It's important that a living will be drafted as precisely as possible."

She says the Canadian Medical Association has endorsed living wills and most doctors rely on

them heavily.

You should create at least one of these to gain control over your future health care and relieve loved ones from the burden of making difficult decisions.

"The main issue is who has the right to make these decisions," says Jamie Golombek, vice-president of tax and estate planning for AIM Trimark Investments.

In the absence of living wills, laws vary in specifying the hierarchy of people who can decide your fate.

Barry Corbin of Corbin Estates Law says each Canadian province has different but similar legislation bearing on this problem. In Ontario, the Health Care Consent Act of 1996 sets out the pecking order of who can make decisions on behalf of the incapacitated or terminally ill patient.

In the absence of a proxy directive, a spouse or partner becomes the decision maker by default. After that comes a child or a parent, then siblings or other relatives.

Not all of these will necessarily have your best interests at heart — particularly if big money and inheritances are involved. You want to appoint someone who will best stand by your wishes so they can "trump" other possible decision makers, Mr. Corbin says.

You should consult both a doctor and a lawyer to draft these directives. Once completed, copies should be given to your proxy, doctor and lawyer. Family members are then legally bound to follow these wishes. If one attempts to misrepresent your wishes with respect to treatment, they can be fined \$10,000 in Ontario.

The earlier you deal with these issues, the better. Terri Schiavo showed disaster can strike even at a young age.

GLOSSARY:**A Living Will or Instructional Advance Directive**

An advance expression of your instruction or wishes about the health care you want or don't want when you are not able to decide on your own.

In most provinces these instructions are binding on your legal substitute decision maker.

A Proxy Directive

A written document made by a capable adult that appoints someone as your health care substitute decision maker. This is known as a Power of Attorney for Personal Care (Ontario), Representation Agreement (BC), Personal Directive (Alberta), or Mandate (Quebec). There are very specific rules in each province on how to make this legally effective.

An Enduring Power of Attorney of Property

This legal instrument made by a capable adult appoints another person to manage an adult's property if they become mentally incapable. It does not apply to health care decisions.

Guardian

A court appointed individual who has authority to make legal decisions for an adult who is not mentally capable.

A Will

Legal instrument that takes effect after death. It mainly deals with the disposition of your property.

Source: Public Guardian and Trustee of British Columbia