

## ELDER LAW

BY DANIEL G. FISH

*The 'Schivo' Case: An Object Lesson for the Health Care Proxy*

**T**HIS IS THE most important column I have written. It is directed at all readers, not just to the elder law bar. This is an opportunity to ensure that your autonomy is respected, that the medical decisions that would be made if you were incapacitated are the decisions you would want made yourself. Acting now could avoid unnecessary litigation.

The form is printed in full later within this same article (on the "jump" page, or p. 5). Cut it out and sign it now.

In February 1990, in Florida, Terri Schivo suffered a cardiac incident and was placed on life support. Her husband, as her guardian, sought permission to remove the life-support equipment in 1998. He was opposed by her parents. According to a brief in the current litigation, actions include: a one-week trial, a seven-day evidentiary hearing in an action to vacate the judgment, 13 applications for appellate review and three federal court actions. And this litigation is far from over.

The spectacle of six years of litigation over medical decision-making for Terri Schivo underscores the need for all adults to have advance directives. Her plight could have been avoided if she had simply signed a Health Care Proxy. The object lesson from the *Schivo* case is the importance of our clients and ourselves taking a few minutes to fill out a Health Care Proxy.

The Health Care Proxy is the most important document an attorney can prepare for a client. It is more important than a Last Will and Testament, a Living Will, a Power of Attorney or a Trust Agreement.

### Who May Sign a Health Care Proxy?

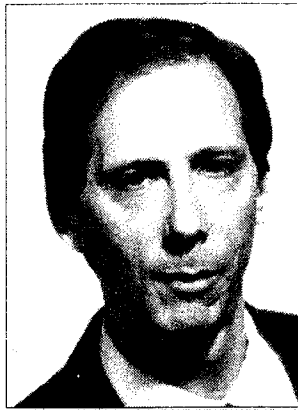
Any competent "adult" may sign a Health Care Proxy and name an agent to make medical decisions in the event of incapacity. "Adult" is defined as a person 18 years of age or older, who is the parent of a child, or is married.

### Artificial Nutrition and Hydration

The agent may make all medical decisions for the principal with the exception of artificial nutrition and hydration. The agent may not make decisions in this area, unless the principal expressly authorizes the agent to act in that area.

The principal may give detailed instructions to the agent or the principal may simply make a general delegation. The advice given by most elder law attorneys is in favor of the general delegation. If the principal decides to opt for the specific instructions, there is the risk that the principal may not have anticipated the exact sequences of medical events. That could lead to a situation where the Health Care Proxy is not honored. The possibility of advances in medical treatment also argues for the general delegation.

Of course, the principal must discuss his or her wishes with the agent so that the agent can make the best attempt to make the same decision that the prin-



cipal would have made.

### Only One Agent Can Act at Any Time, But Alternates Are Permitted.

Public Health Law only permits the principal to name one agent to make medical decisions. The principal may not name more than one agent to serve at one time; however, the principal may name alternate or successor agents seriatim. If the originally named agent is unable or unwilling to serve, the next alternate may act. Prohibited from acting as agent are: (1) an operator, administrator or employee of a hospital for a patient or applicant for admission; (2) a physician for patient in a psychiatric facility; (3) a physician in other settings

may be named but may not act as principal's attending physician; (4) an unrelated person may not be agent for more than 10 principals.

### Execution

Only two witnesses are required. No notarization is required. This makes the execution of the Health Care Proxy a simple matter. The agent may not act as a witness.

After the Health Care Proxy is signed and witnessed, it should become a part of the principal's medical record. The Health Care Proxy should be given to the agent. Wallet-size copies of the Health Care Proxy are available, useful in the event the principal were involved in an emergency event. The Health Care Proxy is not useful if it is locked in a safe deposit box. Medical emergencies occur over the weekend so a Health Care Proxy is not useful if it is kept in an attorney's office.

### Trigger Event

The agent named in a Health Care Proxy is not empowered to act until a trigger event has occurred. The principal's attending physician must make a finding that the principal lacks the capacity to make medical decisions. The finding must be in writing and placed in the medical record. Two physicians must concur if the medical decision is to withdraw or withhold life-sustaining treatment. The principal must be notified of the decision. If the principal objects, his or her decision shall prevail unless a court finds otherwise.

**Difference Between Health Care Proxy and Living Will.** The Living Will is an advance medical directive that permits a patient who is terminally ill, with no hope of recovery, for which heroic measures are considered. The Living Will works well for the cancer patient. Such patients typically retain mental capacity until shortly (six months) before demise. Cancer is such a well-studied illness that the interventions likely to be considered are well-known and can be discussed with the patient.

This is not true for most elder law clients. The time period after signing a Health Care Proxy and the need for the agent to act is much longer for them. This results in greater unreliability.

Most importantly, the Living Will does not name a live human being to implement the medical decisions; it is

*The 'Schiavo' Case: An Object Lesson for the Health Care Proxy*

simply an expression of the patient's wishes. The patient must rely upon a lifeless piece of paper rather than the Health Care Proxy, which appoints a live human being who can ask questions, research medical issues or request a second opinion.

**Revocation**

A competent adult may revoke a Health Care Proxy. Revocation may be orally, in writing or by executing a subsequent Health Care Proxy. If a principal names a spouse as agent, divorce or legal separation automatically revokes the authority (unless the principal specifies otherwise).<sup>1</sup>

**Organ Donation**

In 2000, §2981 was amended to allow for the inclusion of optional language in the Health Care Proxy in regard to the principal's instructions about organ donation. The amendment states that a failure to give such instructions in the Health Care Proxy is not to be construed to imply a wish not to donate; no action is to be considered as a neutral matter.

**Access to Medical Records**

In the current HIPPA climate, the question of access to medical records is a major issue. Public Health Law §2982(3) makes the right of the agent to medical information clear. "Notwithstanding any law to the contrary, the agent shall have the right to receive medical information and medical and clinical records necessary to make informed decisions regarding the principal's health." Despite this plain language, there may be practical reasons for the

HEALTH CARE PROXY

I, \_\_\_\_\_  
(Name of Principal)

appoint \_\_\_\_\_  
(Name, Address and Telephone Number of Agent)

as my health care agent to make any and all health care decisions for me, including decisions about artificial nutrition and hydration.

\_\_\_\_\_  
(Signature of Principal and Date)

I declare that the person who signed this document is personally known to me appears to be of sound mind and acting willingly and free from duress.

_____ Witness	_____ Date
_____ Witness	_____ Date

inclusion of language in the Health Care Proxy expressly authorizing the agent to receive medical information under HIPPA.

**Health Care Proxy Executed in Another State.** Health care proxies validly executed in other states or jurisdictions are recognized in New York (Public Health Law §2990).

**Immunity for Providers and Agents.** Health care providers and agents are protected from civil and criminal liability for actions taken in good faith.<sup>2</sup>

**Conclusion**

The Health Care Proxy is appropriate for most, but not all, adults.

There must be an agent that the principal has confidence in. If there is no responsible person that the principal has trust in, then the Health Care Proxy is not appropriate and a court-appointed guardian may be required. In fact, no health care facility can require a Health Care Proxy as a condition of admission.

(1) See *In re: University Hospital of the State University of New York, Upstate Medical University*, 754 NYS2d 153 (Sup. Ct. Onondaga Co., 2002)

(2) See *DeCintio v. Lawrence Hospital*, 753 NYS2d (AD 1st Dept., 2002)

FREEDMAN AND FISH, LLP

**Daniel G. Fish**  
Attorney at Law

521 Fifth Avenue, New York, New York 10175

Telephone: 212.953.1172 • Fax: 212.953.5323

E-mail: [dfish@fandflaw.com](mailto:dfish@fandflaw.com)