

LEAVE YOUR AFFAIRS IN ORDER: ENDURING AND MEDICAL POWERS OF ATTORNEY, ENDURING GUARDIANSHIP AND ANTICIPATORY DIRECTIONS

Introduction

Many readers will have followed the debate last year relating to Terri Schiavo and the tug-of-war between her husband and her parents over whether she should be kept alive following a heart attack in 1990 (during which she suffered severe brain damage). Terri, who was described by doctors as being in “a persistent vegetative state with no hope of recovery”, became the centre-piece in a national right-to-die battle in the U.S.A. following a dispute between those closest to her. After years of litigation, Terri finally died on 31 March last year after doctors removed the feeding tube that had sustained her for more than a decade. The tube was removed in accordance with her husband's request and insistence that his wife would not have wanted to live in her condition. This view was not shared by her parents who sought unsuccessfully to take guardianship of their daughter from her husband.

The Schiavo case raises a multitude of religious, ethical, legal and other issues about which opinion is extremely divided; however, regardless of your opinion in relation to the right to live or die in such circumstances, few would argue that the litigation, media frenzy and family dispute in the Schiavo case would not have been upsetting to Terri Schiavo had she been aware of them. Many people would also take the view that Terri Schiavo's own wishes in those circumstances ought to be respected. Unfortunately, however, Terri's wishes were not known for certain because they had never been clearly or appropriately documented before her brain damage occurred.

The Schiavo case highlights the need for people to consider their wishes should they become incapacitated through illnesses, injury or age related effects and to leave clear instructions and appropriate mechanisms in place for their families to facilitate those wishes. These wishes and mechanisms should be documented appropriately and should form a part of one's personal estate planning together with, among other things, one's will.

What Are Your Options in South Australia?

Here in South Australia, a range of appointments and directions can be made to reflect one's wishes upon incapacity and to make life substantially easier and less traumatic for one's loved ones in circumstances such as Terri Schiavo's. These include the following:

- 1. Enduring Power of Attorney.** In general terms, a **power of attorney** is a brief but formal document that allows for a grantee of the power to 'step into the shoes' of the grantor and act for the grantor. Powers of attorney are created in South Australia under the *Powers of Attorney and Agency Act 1984*. Powers of attorney are well-suited for circumstances where the grantee is taking care of the financial, legal or property affairs of the grantor. In such circumstances, most third parties such as banks or purchasers will need to sight the power of attorney before acting on the instructions of, or dealing with, the grantee. A **general power of attorney** is effective immediately but ceases to be legally effective in the event of the grantor's loss of legal capacity (e.g. prolonged coma). However, an **enduring power of attorney** remains effective in the event of the donor's loss of legal capacity. A power of attorney may be unlimited or it may contain conditions that restrict the grantee's powers. These are all at the discretion of the grantor. A **combined general and enduring power of attorney** in favour of a trusted person can be a most effective instrument in that it allows the grantee to act on behalf of the grantor in appropriate matters should the grantor be, for example, overseas or out of contact, and also 'endures' and is effective should the grantee ever need to make financial decisions on behalf of a grantor that is suffering a legal incapacity.
- 2. Medical Power of Attorney.** Under the *Consent to Medical and Palliative Care Act 1995*, a person may appoint a **medical agent** under a **medical power of attorney**. A medical power of attorney authorises the agent to make decisions about the medical treatment of the grantor if the grantor is incapable of making decisions on his or her own behalf. However, a medical power of attorney does not authorize the agent to refuse the natural provision or natural administration of food and water or the administration of drugs to relieve pain or distress or medical treatment that would result in the grantor regaining the capacity to make decisions about his or her own medical treatment unless the grantor is in the terminal phase of a terminal illness. The *Consent to Medical and Palliative Care Act 1995* expressly states that the Act does not authorize a person to assist the suicide of another person. A medical power of attorney may be unlimited or it may contain conditions that restrict the grantee's powers at the grantor's discretion.

3. **Enduring Guardianship.** Under the *Guardianship and Administration Act 1993*, a person may appoint an **enduring guardian**. An enduring guardian is authorized to exercise the powers at law or in equity of a guardian of a person if the grantor becomes mentally incapacitated. These powers have not been defined by the law but are considered to be extremely wide. The guardian is also authorized in such circumstances to consent or refuse consent to the medical or dental treatment of the grantor unless the grantor has a medical agent available and willing to act in the matter. The powers of an enduring guardian may be limited in the instrument at the grantor's discretion. A person cannot appoint his or her medical doctor or other medically responsible person as an enduring guardian.
4. **Anticipatory Direction.** Under the *Consent to Medical and Palliative Care Act 1995*, a person may give a direction about the medical treatment that the person wants or does not want if he or she is at some future time in the terminal phase of a terminal illness or in a persistent vegetative state or incapable of making decisions about medical treatment when the question of administering the treatment arises. Sometimes this direction is referred to as a **living will**. Unless there is reason to suppose that this direction has been revoked subsequently, a person that has given such a direction is taken to have consented to medical treatment that is in accordance with the wishes of that person as expressed in the direction or to have refused medical treatment that is contrary to those expressed wishes.

We usually recommend that people appoint a general and enduring attorney and a medical agent or an enduring guardian as part of their estate planning arrangements. In contrast to a will, these arrangements take effect **before** the death of a person. Where people feel strongly about it and also wish to take responsibility for the decision, we suggest that they make an anticipatory direction of their wishes should they in the future suffer a terminal illness or be incapable of making medical decisions.

Readers should note that the documentation required to effect the arrangements described above requires a particular legal form and legal formalities in order to be effective. Accordingly it is strongly recommended that they be prepared by a lawyer with experience in this area who can also provide advice and direction in connection with the arrangements.

In Terri Schiavo's case, had she put into place a combination of the above legal arrangements, her loved ones would have been spared the tug-of-war over her wishes and there would have been no doubt about what those wishes were.

If you have any queries in relation to the above, or would like to discuss these types of documents and arrangements, please contact **Andrew Baggio** on **8232 8889** or at **andrew@baggiolegal.com.au**.

About Us

Baggiolegal is a boutique law firm, specialising in commercial, taxation and private client law. **We understand** our client's objectives and provide clear and independent advice. Service is paramount to us. **We deliver** technically sound, timely and commercially oriented solutions. **We know** and understand the South Australian landscape, but our international perspective is unique in Adelaide. Our people have excelled in the legal profession in private practice and industry all over the world. **We apply** international best practice to our local client's needs. **We work** with our clients. **We listen** to our clients. We are approachable, accessible and personable.

These materials are for general information purposes only and do not constitute legal advice.

Before acting on any of our views expressed in this publication, careful consideration of the case specific facts should be undertaken by a qualified lawyer.