

LEAVE YOUR AFFAIRS IN ORDER: ENDURING POWERS OF ATTORNEY AND ADVANCE CARE DIRECTIVES

Introduction

Many readers will have followed the debate in 2005 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 2005 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** takes effect and 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. Advance Care Directive.** The *Advance Care Directives Act 2013* commenced operation on 1 July 2014. Under this Act, a person may make an **Advance Care Directive** which effectively combines all powers a grantor could have given to a person under a Medical Power of Attorney, Enduring Power of Guardianship or Anticipatory Direction made prior to 1 July 2014. Any valid Medical Power of Attorney, Enduring Power of Guardianship or Anticipatory Direction made prior to 1 July 2014 remains valid and binding, until that grantor executes an Advance Care Directive to supersede such document.

More importantly, an Advance Care Directive is broader in scope than a Medical Power of Attorney, Enduring Power of Guardianship or Anticipatory Direction, as it also allows the grantor to clearly document their values, wishes and instructions with respect to their future living arrangements and other personal matters (excluding legal and financial affairs).

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Under an Advance Care Directive, a grantor may:

- (a) authorise a person, known as a **substitute decision maker** 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, an Advance Care Directive does not authorize the substitute decision maker 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. An Advance Care Directive may be unlimited or it may contain conditions that restrict the substitute decision maker's powers at the grantor's discretion.

A substitute decision maker is also authorized to exercise the powers at law or in equity of a guardian of a person if the grantor becomes mentally incapacitated (and is deemed to have impaired decision-making capacity). These powers have not been defined by the law but are considered to be extremely wide.

- (b) give a direction in a binding provision about the medical treatment that the grantor 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. Unless there is reason to suppose that this direction has been revoked subsequently, a grantor that has given such a direction is taken to have consented to medical treatment that is in accordance with the wishes of that grantor as expressed in the direction or to have refused medical treatment that is contrary to those expressed wishes.

If a grantor has not made a valid Advance Care Directive, and does not have a valid Medical Power of Attorney or Enduring Power of Guardianship or Anticipatory Direction, the *Consent to Medical Treatment and Palliative Care Act 1995* prescribes that a "Person Responsible" (being a person close to that grantor as defined in the Act) will be able to make health care decisions on that grantor's behalf if the grantor has impaired decision making capacity.

We usually recommend that people appoint an enduring attorney and a substitute decision maker under an Advance Care Directive 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 also specify in their Advance Care Directive 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 **8132 5000** or at **andrew@baggiolegal.com.au**.

About Us

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