



End of Life - Legal Issues

Overview

No one knows when he may be impaired in such a way as to be unable to communicate his wishes with health care providers. Planning in advance for the possibility of being unable to convey medical care guidance to caregivers can save much heartache and even legal expenses for loved ones. One of the most well-known examples of this situation is that of Terri Schiavo. Terri died in March of 2005 of dehydration, thirteen days after her feeding tube was removed. After years of legal battles, a court made the determination that her husband had the right to have both food and fluid withheld from her, despite intervention by Terri's parents on her behalf.

In 2007, a similar situation in Arizona nearly ended in tragedy when Jesse Ramirez of Phoenix received extensive injuries from an auto accident. Just ten days after the accident, Jesse was moved from the hospital to a hospice. The tubes that provided him with food and water were removed at his wife's request, but contrary to state law. His sister and mother sought legal assistance from the Alliance Defense Fund, and a court ordered the restoration of food and water five days after it was removed. A week later, Jesse Ramirez awoke from his coma, and a few months later walked out of the hospital. Without legal intervention on his behalf, Mr. Ramirez would have been starved and dehydrated to death.

Communicating with Caregivers

In Arizona, there are three possibilities for communicating healthcare decisions:

1. **“Expressed Wishes”** – You have put your wishes put in writing. Generally, they will be followed.
2. **“Substituted Judgment”** – You don't have anything in writing. Decisions are made based on what your surrogate thinks you want.
3. **“Best Interests”** – Your values and wishes are not known. Decisions are made based on (a) relief from suffering; (b) whether function will be preserved/restored; and (c) the quality and extent of sustained life.

The “best interests” scenario is the least desirable way to have decisions about how one's medical care is administered (or withdrawn). It is entirely possible that caregivers will engage in a subjective assessment of “quality of life.” Treatment decisions should not be based on whether

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a disabled patient has a “meaningful life.” It is preferred to prepare to have your wishes expressed on your behalf either through “expressed wishes” or “substituted judgment.”

Power of Attorney

A healthcare power of attorney delegates the responsibility of making medical decisions to a spouse, adult child, or any other trusted individual named in the document. It provides one type of “substituted judgment.” The power of attorney can list any number of agents who can make decisions for you, in the order desired. If the first individual is unable to perform the role of agent, the next one on the list would be authorized to make decisions on your behalf. In order to have an enforceable healthcare power of attorney, it must be in writing, It must clearly state the intent to grant a specified adult that the power to make medical decisions. The document must be signed and dated. The signature must be witnessed by an adult or a notary public, and neither the notary nor a witness may:

- be the person designated to make decisions
- be directly involved in providing health care
- be entitled to any part of your estate

If a power of attorney document has not been executed, then a “surrogate” will make decisions on your behalf. A surrogate can be designated:

- by court order; or
- by being on "the list":
 - Spouse
 - Adult child
 - Parent
 - "Domestic partner"
 - Brother or sister
 - "Close friend"

A “close friend” is defined as "an adult who has exhibited special care and concern for the patient, who is familiar with the patient's health care views and desires and who is willing and able to become involved in the patient's health care and to act in the patient's “best interest.”

Living Will

The “expressed wishes” option is called a “living will.” A living will can specify exactly how medical treatment is to be given if a patient is unable to communicate with caregivers. Language must be very carefully considered when using a living will. Standard boilerplate language often uses phrases like “artificially administered” which courts will interpret as the administration of food and fluid along with high-tech and truly artificial means of supporting life.

Make certain that if you have a living will, the language used is unambiguous and not open to interpretation in a way that goes against your wishes. One particular area to be very careful in addressing in a living will is the provision of food and fluids. Arizona law refers to the provision of food and fluid as an “invasive procedure” that is “artificially administered,” but food and water is an essential element of basic care. When food and water is withheld there can only be

one outcome. If an incapacitated person is able to make use of hydrating fluids and nutrients, compassion requires that he not be starved or dehydrated to death.

Living Will or Power of Attorney?

Over the last 30 years, living wills have been heavily promoted as the “solution” to difficult medical decision-making scenarios. But living wills are far from being a perfect solution. They are always subject to certain limitations. As many circumstances as can be anticipated, there will always be possibilities which will be omitted. Often the standard, “boiler plate” language used in living wills is vague and fails to give clear direction to care givers. For example, phrases like “extraordinary” or “heroic” measures may fail to convey they exact treatment decision a patient desires. Additionally, living wills over-emphasize autonomy. As the President’s Council on Bioethics has recognized, “Living wills make autonomy and self-determination the primary values at a time of life when one is no longer autonomous or self-determining, and when what one needs is loyal and loving care.”

If, on the other hand, you designate a trusted individual in a healthcare power of attorney document, you can choose someone who would approach medical decisions from your point of view and with the same general philosophy of care.

When you share the same basic philosophy, or trust that they will honor yours, you can rely on their judgment to apply your general objectives to your specific situation. Being open and honest with your designated agent is instrumental in assuring that your wishes will be followed.

The Center for Arizona Policy recommends giving a trusted relative or friend the power to make health care decisions on your behalf (“substituted judgment”) in the event of incapacitation. We believe that the advantages of a healthcare power of attorney are a better way to accomplish the goals of a living will, but without the disadvantages that come with it.

Strengths/weaknesses of living wills

Strengths:	Weaknesses:
Can clarify patient's wishes.	Focus on autonomy. Deny dependence.
Encourage discussion between friends and loved ones.	Can not anticipate all medical conditions and communicate all wishes.
Conserve resources.	Rarely used. Not always transmitted to medical decision makers.
Avoid lawsuits.	May not accurately communicate the patient's real wishes.
More convenient for family and decision makers.	Prior wishes are not the same as present welfare.

Resources

“Life Care Planning Packet” - Office of Arizona Attorney General, www.azag.gov
 Arizona’s Advance Directive Registry – Office of Arizona Secretary of State, www.azsos.gov
 Taking Care – Presidents Council on Bioethics, www.bioethics.gov
 Meilander, Gilbert, Bioethics: A Primer for Christians, 2nd Ed. 2005, Eerdmans.
 Meilander, Gilbert, “I want to Burden My Loved Ones,” First Things, October 1991,
www.firstthings.com/article.php3?id_article=5755

*This material is a brief overview of a complex area of the law and should not be construed as legal advice relevant to a particular situation. Please consult an attorney for questions regarding your specific situation.

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