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Getting Old: Planning for Disability

Let's face it. We are all getting older. Life gives all those under the age of 30 a psychological "immunity" to any worry about that fact of life. Everyone else should eventually deal with the possibility of not being as able and healthy as they were in their halcyon days of youth.

In 2001, when I first wrote about the legal issues from a disability, I cited the case of Christopher Reeve, the actor who played Superman. He was in his 40's when he was thrown from a horse and suffered a spinal cord injury that left him a quadriplegic. It could have been worse, since he was left with his mental faculties. Because of his powerful will to live, he overcame the many limitations of life in a wheelchair and became a spokesman and hero for disabled persons everywhere until his death in 2006.

In 2005 it was Terri Schiavo. She was a woman in her 20's living in Florida, when due to an injury or illness (that remains fairly vague for me), she allegedly lapsed into a "persistent vegetative state." There was a medical malpractice lawsuit which produced a recovery of at least a million dollars with which to provide for her care.

Not too long after the malpractice case was concluded. A dispute arose between her husband and her parents over whether she wished to be kept alive in this condition and who would decide her fate. Her husband won the lawsuit and she was starved to death when the artificial nutrition and all sources of hydration were both terminated.

The Terri Schiavo case is at one end of the spectrum. At the other end of the spectrum are the people I see in my practice who are on the other side of 70 years of age and who face the possibility of an illness, or just old age, destroying their ability to manage their personal affairs.

The first concern for anyone should be providing for the control of their medical care in the event of an incapacitating illness or injury. If Terri Schiavo had executed a Living Will, there would have been less room for argument because that instrument would clearly state her wishes.

A lesser known legal device, called a Healthcare Power of Attorney, contains a person's stated preferences and empowers another person, such as a spouse, adult offspring or close relative to carry out those preferences.

The "Healthcare POA" is important in the case of a person in a coma or at the end-stages of a terminal illness for two reasons: first, he or she considered (in advance) different scenarios and decided upon his or her preferences; second, it kept the power to implement those preferences "in the family." A Living Will just conveys certain absolute preferences from the patient to his or her doctor, who must then in turn certify that certain medical conclusions are true before life-sustaining treatment can be discontinued. Before making that certification some doctors might feel a need to defer to the wishes of the patient's family, resulting in a "Schiavo-type" controversy.

The other big issue, present in many geriatric cases, is how that person's financial affairs are to be managed in the event of a disability. When no estate planning documents have been executed, a conservator of the property who is appointed by a probate court judge may be the only solution. The

disadvantages of that procedure include increased costs, more paperwork and less flexibility. The advantages are court supervision and regular reports from the guardian which can be scrutinized by others concerned in the well-being of the “ward.”

People who prepare estate planning documents usually execute a financial power of attorney wherein they designate a spouse, close friend, adult son or daughter for the role of attorney-in-fact to act in their place. Even with a power of attorney, most people should contact their bank, mutual fund, stock broker and retirement plan administrators to verify that the authority of that attorney-in-fact will be recognized. They may have to sign and submit additional forms required by the entity.

An older person with a large investment portfolio (e.g. \$250,000 to \$500,000) or significant real estate holdings might consider establishing a revocable trust to hold those investments. The advantage here is the ability to designate a successor trustee so that the original owner is hand-picking the person (including a corporate trustee if necessary) to succeed the owner as trustee and thus the “investment manager” of those assets.

Another advantage is the immediate availability of the assets after death for the trust’s beneficiaries. In contrast, if those investments pass through a probate estate the executor may need to delay full distribution for six to nine months pending resolution of any taxes or debts payable by the estate. Early partial distributions from an estate are normally permissible.

Planning for Medicaid eligibility is a hot topic in some circles. First, it is worth remembering that Medicaid (in this context) is a welfare program for the poor to defray the cost of extended care in a nursing home. Second, there are laws and regulations designed to delay eligibility to those who intentionally impoverish themselves so as to receive Medicaid benefits. Trust me those rules are complicated.

A person who is concerned about these issues might consider buying an extended care insurance policy. If it is too late for that, consulting an attorney with a practice devoted to Medicaid planning might be appropriate. The ironic thing is that some people who are concerned about Medicaid eligibility have sufficient assets and income to cover the cost of extended care.

In all cases, it is only with hindsight that we learn exactly when such legal planning was necessary. The only sure thing is that more peace of mind is obtained when adequate precautions are taken against the legal problems arising from a disabling illness or injury.

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Patrick J. Gibbs practices law in Roswell, Georgia with a concentration on Wills, Trusts and Estates. This article is intended to be educational. Legal advice should be obtained as to individual needs before taking any action.