Lessons From the Terry Schiavo Case: Sign a Patient Advocate Designation
Lauretta K. Murphy, 616.831.1733, murphyl@millerjohnson.com

Terri Schiavo never wrote down her end-of-life wishes or who would make medical treatment decisions for her if she could not do it herself. The battle over how her life would end has inspired many people to put their own choices in writing. Some people may mistakenly believe they don’t need to sign an advance directive because their spouse or adult children could make end-of-life decisions for them. As evidenced by the Schiavo case, neither spouses nor parents have an automatic right to make those decisions. Without a written document, the family must apply for the appointment of a guardian who has decision-making authority under the supervision of the court. There is also a misconception that advance directives are only for people who are sick or elderly. Terri Schiavo was in her twenties when she became ill. The names Karen Ann Quinlan, Nancy Cruzan and Michael Martin are familiar to us because their situations were similar to Terri Schiavo’s.

Living wills, patient advocate designations, and medical powers of attorney are all forms of advance directives. An advance directive allows you to state your wishes regarding your future medical treatment in the event you are unable to make your own decisions at that time. Michigan does not have a living will law. Instead, Michigan law allows you to designate a patient advocate. Your patient advocate will make decisions for you if you cannot do that yourself. You can instruct your patient advocate about what medical interventions you do or don’t want if you become incapacitated. You can provide specific instructions stating that you would want all possible medical treatments, or you can tell your patient advocate to reject tube feeding, ventilators, or other life sustaining medical treatment. You can require your patient advocate to get a second opinion or to wait for some period of time before making a decision to suspend life-sustaining medical treatment.

Michigan’s patient advocate law is broader, and therefore more useful, than a living will. A living will deals only with life-sustaining medical treatment. Michigan’s law allows a patient advocate to make decisions about care, custody, and medical treatment. This is particularly helpful for people who suffer from long-term chronic

(see TERRI SCHIAVO on page 2)
illnesses. The patient advocate can’t act unless two doctors or a doctor and a psychologist determine that you can’t participate in your own medical decision making. Your patient advocate may make a decision to withhold or withdraw treatment, which would allow you to die, only if you have specifically authorized that in writing.

You may name any adult as your patient advocate. We generally recommend against naming several people to act together. Disputes will be difficult or impossible to resolve, since nobody has the final decision-making power. The person you choose should be someone who understands your wishes and is willing to advocate on your behalf to make sure your wishes are followed.

Signing an advance directive is only the first step. The next step is to discuss your wishes with your doctor, your patient advocate, and your other family members – particularly those who are likely to disagree with you or your patient advocate. Family members who disagree with your wishes or your choice of patient advocate are less likely to object if they know that what you have decided truly reflects your wishes.

You should continue to communicate with your loved ones about your values and your wishes. Medical treatments and your own health status may change over time. The more information you give your patient advocate, the better he or she can advocate for what you would want under the circumstances at hand.

The patient advocate designation form is not complicated, but the emotional and family issues are often very complex. A Miller Johnson estate-planning attorney can help you navigate these difficult matters and ensure that your values and wishes are followed. Please contact one of our estate planning attorneys for questions or assistance.

Miller Johnson in the News

- JEFFREY S. AMMON was a session moderator at a seminar for the Institute for Professionals in Taxation. It was held in Taylor, MI in April 2005. He will also present “Business Law Legislative Update” in June at the Business Law Institute in Mt. Pleasant.

- FRANK E. BERRODIN spoke on health savings accounts to the Institute of Management Accountants in March.

- ROBERT D. BROWER was interviewed by WOOD TV 8 on the need for legal documentation of one’s wishes for end of life care. The broadcast aired on March 21 and 22.

- CAROLINE M. DELLENBUSCH was elected to the Board of Directors of the Alzheimer’s Association, North/West Michigan Chapter.

- CAROLINE M. DELLENBUSCH was interviewed by the Grand Rapids Press and quoted in the article “Case Shows Need for Will.” The article ran on the front page on Tuesday, March 22.

- DWIGHT K. HAMILTON was elected to the Board of Directors of the Grand Rapids Chamber of Commerce.

- CAROL J. KARR spoke on “Estate Planning for Farmers” to the Ridge Economic Agricultural partners in January and “Life Stories: Giving with Passion and Purpose” for the Ryerson Library, American Cancer Society and Gerontology Network in April. She is scheduled to speak on Estate Planning to the Butterworth Hospital Junior Guild and at St. Thomas Church – both in May – and for Edward Jones in June.

- ILEANA MCALARY spoke on the topic of Immigration Law at a Free Legal Clinic introduced through the Mexican Consulate in Detroit. It was sponsored by Lazo Cultural newspaper.

- MICHAEL J. TAYLOR appeared on “Take Five” on WZZM TV 13 on March 23. He spoke about durable power of attorney and designating patient advocates.
As a design-build contractor, wouldn’t you be happy to have an owner waive its right to seek consequential damages against you, especially since you’re responsible for design as well as construction? That’s what a design-builder in Mississippi thought, until it learned a very expensive lesson about consequential damage waivers.

You may think the consequential damage waiver is no problem, since you may recall that the 1997 version of the AIA standard construction contracts contain a mutual waiver of consequential damages. You’re right about that, but only half right. The mutual waiver is found only in the AIA owner/general contractor form, not the AIA owner/design-build form.

An easy fix, you think: just add to your design-build contract a clause that waives the owner’s rights to consequential damages. That move proved disastrous, however, for the Mississippi design-build contractor. After the project had been completed, the owner sued the design-builder because the completed facility did not perform up to expectations. The design-builder defended by pointing to its clause in the contract, which stated: “in no event shall [design-builder] be liable for any compensatory or consequential damage in connection with the installation, use, or failure” of the facility.

This clause looks good for the builder, doesn’t it? In spite of this waiver, however, the court ruled in favor of the owner and required the design-builder to pay substantial consequential damages.

How could this be? Because waivers of consequential damages are not as simple as they appear to be, that’s how. The court determined that the waiver clause did protect the contractor against damages for faulty construction and installation, but not for faulty design. Since the owner’s claim was based on faulty design, the waiver didn’t apply and the owner could exercise its full remedies against the design-builder.

Was the court’s interpretation really consistent with the intent of the parties? Did the design-builder really intend to protect itself only from claims relating to construction and installation, but leave itself wide open for design claims? Did the owner believe that this language didn’t apply to design claims? Should design-builders merely shrug off this decision as one where a court bent over backwards to help out an owner?

The answer to all these questions is no. Design-builders should take one simple lesson from this case: an ounce of contract language prevention is worth a pound of litigation cure. Design-builders should recognize that waivers of consequential damages are much more difficult to negotiate in design-build contracts than in traditional owner/contractor construction contracts, especially when they’re dealing with well counseled owners. If design-builders are able to negotiate a consequential damages waiver, they should make sure it says what they intend it to mean. That’s the job of the design-builder’s legal counsel, who should have experience in the construction industry and construction contracts.

If you have questions about this article, or would just like to swap stories about design-build experiences, feel free to contact Jeffrey S. Ammon.
Have a question about a specific legal area? If so, please contact one of the following members of the Miller Johnson Business Section. We would welcome the opportunity to assist you.

**BUSINESS SECTION CHAIR**  
John M. Sommerdyke  
sommerdykej@millerjohnson.com

**BUSINESS SECTION VICE CHAIR**  
Thomas P. Sarb  
sarbt@millerjohnson.com

**CORPORATE AND CORPORATE FINANCE**  
Jeffrey G. York  
yorkjg@millerjohnson.com

**CREDITORS'/DEBTORS' RIGHTS**  
Thomas P. Sarb  
sarbt@millerjohnson.com

**EMPLOYEE BENEFITS**  
James C. Bruinsma  
bruinsmaj@millerjohnson.com

**ENVIRONMENTAL**  
Alan C. Schwartz  
schwartza@millerjohnson.com

**ESTATE PLANNING AND PROBATE**  
Carol J. Karr  
karrc@millerjohnson.com

**FAMILY PRACTICE**  
W. Jack Keiser  
keiserj@millerjohnson.com

**INTELLECTUAL PROPERTY**  
Frank M. Scutch III  
scutchf@millerjohnson.com

**MERGERS AND ACQUISITIONS**  
Jeffrey G. York  
yorkjg@millerjohnson.com

**REAL ESTATE**  
Robert W. Scott  
scottm@millerjohnson.com

**TAXATION**  
Mark E. Rizik  
rizikm@millerjohnson.com

Any of the above lawyers can also put you immediately in contact with firm attorneys who practice in the areas of Banking, Construction, Economic Development, Environmental Law, Government Relations, Health Care, Health Professionals, Immigration, and Small Business.

This newsletter is a periodic publication of Miller, Johnson, Snell & Cummiskey, P.L.C., and should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult your lawyer concerning your own situation and any specific legal questions you may have. For further information about these contents, please contact us.

© 2005 Miller, Johnson, Snell & Cummiskey, P.L.C. All rights reserved. Priority Read is a federally registered service mark of Miller, Johnson, Snell & Cummiskey, P.L.C.