



the *Sidebar*

STRATEGIES FOR KEEPING THE LAW ON YOUR SIDE

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By Constantine Intzeyannis, Esq.

THE UNFORTUNATE AND TRAGIC INCAPACITY OF TERRI SCHIAVO RESULTED IN AN IMMENSE LEGAL BATTLE DATING BACK TO 1993 BETWEEN HER HUSBAND AND HER PARENTS AS TO WHETHER SHE WOULD WANT TO BE KEPT ALIVE IN A VEGETATIVE STATE. IT HAS ALSO SHOWN EVERYONE THE IMPORTANCE OF PLANNING AHEAD IN THE EVENT OF SUCH A TRAGEDY.

THE HEART OF THE CONTROVERSY

On the morning of February 25, 1990, Terri Schiavo collapsed in her home in Florida, which resulted in brain damage from a lack of oxygen. Following her collapse, Terri Schiavo was in a persistent vegetative state. Her husband, Michael Schiavo, was subsequently appointed her legal guardian by a Florida court. Terri Schiavo's parents and family had battled with her husband and legal guardian, Michael Schiavo, over her fate since July 29, 1993. Her husband claimed that he and his wife had conversations about such an event and that she had indicated to him that she would not want to be kept alive in such circumstances. Her parents and family claimed otherwise, citing her religious beliefs and asserting that as a devout Roman Catholic she would never intentionally allow herself to die. This issue as to whether Terri Schiavo would want to live or die in her vegetative state was the heart of the controversy that made its way into the national spotlight.

PLANNING FOR INCAPACITY

An individual's right to make decisions regarding his or her own medical treatment, including the right to refuse life-sustaining treatment, is a constitutionally

protected right. In the Cruzan case, the United States Supreme Court held that although the right to refuse medical treatment is constitutionally protected — and is not abrogated simply because an individual becomes incompetent — a state may nonetheless require an incompetent patient's wish to withdraw medical treatment to be proven by clear and convincing evidence.

Subsequent to the Cruzan case, each state enacted laws allowing its citizens to designate health care agents and to make decisions, about future medical decisions such as the right to refuse medical care.

The legal documents that are utilized to delegate medical decision-making authority and to express intentions about future medical treatment are known as advance medical directives. In New York, there are two types of advance medical directives: the Health Care Proxy and the Living Will.

HEALTH CARE PROXY

Pursuant to New York's Public Health Law, an individual may execute a Health Care Proxy, which delegates the authority to make medical decisions to another adult, a "health care agent." The health care agent's authority extends to making any and all medical treatment decisions and is valid only during periods of temporary or permanent incapacity that impairs the decision-making ability of the individual delegating such authority. Once it has been determined that the individual is incapacitated within the definition established under New York's Public Health Law, the health care agent basically stands in the shoes of the individual who delegated such decision-making authority.

Moreover, a Health Care Proxy executed in another state will be considered valid in New York, assuming that it is not inconsistent with New York law. Conversely, most other states will honor a Health Care Proxy
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> “Success-ion” Planning for the Business Owner

By Joseph G. Milizio, Esq.

IT IS INTERESTING TO NOTE THE WORD “SUCCESS” IN SUCCESSION PLANNING; ALTHOUGH A BUSINESS OWNER MAY STRUGGLE TO ATTAIN SUCCESS THROUGHOUT HIS OR HER ENTIRE BUSINESS CAREER, ONCE IT IS OBTAINED IT IS OFTEN LOST IN THE SUCCESSION PLAN FOR THE BUSINESS. LET’S LOOK AT SOME FIGURES. THE AVERAGE FAMILY-OWNED BUSINESS LASTS 24 YEARS. AND ONLY 30 PERCENT OF THESE FAMILY-OWNED BUSINESSES SURVIVE THE SUCCESSION FROM THE FOUNDER TO THE NEXT GENERATION. BY CONTRAST, FAMILY MONARCHIES HAVE RULED ENTIRE COUNTRIES FOR THOUSANDS OF YEARS. HOW CAN ENTIRE COUNTRIES BE RUN FOR THIS LONG BY ONE LINE OF SUCCESSION AND YET THE AVERAGE BUSINESS CANNOT GET PAST ONE GENERATION?

CONCERNS FOR SUCCESSION PLANNING

In a monarchy, the oldest child becomes the heir to the throne without question. There are no choices or decisions to be made with respect to the succession plan. No one questions the choice or the successor’s abilities. On the other hand, a succession plan for a business is filled with choices and considerations. These choices depend upon the following: whether there are others who can successfully take over the business, such as key employees, co-owners or family members; the type of entity the business is being operated as, such as a corporation, partnership or sole proprietorship; the reason for the succession plan, such as retirement, death or family continuity; the type of business being operated, such as a service business, retail or wholesale entity

Obviously, just as your business is organized and operated differently from the business next door and, in all likelihood, differently from that of your competitors, no one succession plan is ideal for everyone. However, there are some often-used techniques that every business owner should be aware of when considering a succession plan. This article will focus on techniques that are available in an owners’ agreement.

THE OWNERS’ AGREEMENT

An agreement among owners can be set up as a shareholders’ agreement for a corporation, an operating agreement for a limited liability company or a partnership agreement for a partnership. It can provide for day-to-day business affairs, provide restrictions on transfers of

ownership interests and provide for the sale of an owner’s interest in the event of retirement, permanent disability or death. Moreover, an owners’ agreement can provide for the amicable sale of an owner’s interest should co-owners no longer be able to get along.

An owners’ agreement may be utilized to purchase the interest of an owner, while providing financial security for the owner and his family members. From the perspective of the business and the remaining owners, such an agreement ensures the remaining business owners continuity of operations and ownership, without unwanted family members. In addition, such an agreement will establish post-sale restrictions, such as confidentiality, nondisclosure and noncompete agreements, thereby preserving the integrity of the business.

Although an owners’ agreement must be crafted to meet the specific needs and situations of the business and its owners, there are three distinct types of buy/sell arrangements that are generally utilized by shareholders, limited liability company members and partners: cross purchase, redemption and “wait and see” agreements. Simply stated, a cross purchase provides that each of the owners is obligated to purchase a selling owner’s interest in the business, whereas a redemption agreement provides that the business itself acts as the purchaser. Both of these purchase approaches can be funded by insurance. However, complications may arise if the purchase terms do not clearly reflect the intentions of the parties. The “wait and see” approach allows the remaining business owners to make a determination at the time of the transaction whether to use a cross purchase, redemption or hybrid buy/sell arrangement. Each business must carefully consider each of these methods and determine — in light of the business and personal implications — which to utilize.

STATUTORY CONSIDERATIONS

New York law provides that both a corporation and a limited liability company continue their existence subsequent to the death of an owner. Conversely, the partnership laws provide that upon the death of a partner, a partnership is automatically dissolved, not only with respect to the deceased partner, but with respect to all of the partners. Unless there is an agreement to the contrary, the remaining partners must liquidate the partnership and wind up the business. Upon liquidation, all firm assets are sold and all

firm debts are paid. In this situation, the amount realized from liquidation usually represents only a small fraction of the actual value of the business. The alternative to liquidation is reorganization. In such an event, the surviving partners may either take the decedent's heirs into the new partnership or purchase the decedent's interest in the partnership. An agreement such as that outlined above is often utilized to plan in advance for this situation.

SOLE PROPRIETORSHIPS

Despite the myriad of potential problems resulting from the individual ownership of a business, there are businesses which still function as sole proprietorships. In these situations, there is often no one left to run the business after the incapacity or death of the owner. This often forces the business to cease operations, despite the fact that the business may be the sole source of income for the owner's family. In this situation, key employees are usually the best suited to continue the business, as they are currently involved with the business and the business is also their livelihood.

After the death of a business owner there is often a scramble between family members and key employees to attempt to ascertain the current status of various operational matters. It is during this period that a key employee, out of nothing more

than confusion about the future of the business and hence, his future as well, may decide to leave the employ of the business. This situation can be avoided by an owner having the forethought to enter into a buyout arrangement with these employees which takes effect either in stages or upon the happening of a specified event. Often, employee buyout arrangements are established as an employee benefit, such as a stock option plan.

WHAT ABOUT YOUR BUSINESS?

There are many potential variables to the successful succession plan, but the first step in formulating such a plan is to determine what will happen to your business should you become incapacitated, die or decide it is time to retire. Who will be the future owners of the business? What method or combination of methods will be used to transfer legal ownership to successors? Is active participation within the business required for ownership? Can key employees become owners? Are there existing agreements that require modification to assure a smooth succession? Many of these questions will be reviewed and discussed with your attorney when preparing for "succession." We are prepared to sit down with you to carefully develop an appropriate plan that meets your needs and the future needs of your business. ■

Schiavo continued from front page...

executed under New York law. However, as with New York, another state may similarly limit the authority of the health care agent if it violates the laws or public policy of that state. Furthermore, the Health Care Proxy can be revoked by the individual who executed it at any time while the individual is not incapacitated.

LIVING WILL

Although New York has no statutory authority with regard to the use of Living Wills, the New York Court of Appeals recommended the use of such a document in the *Matter of Westchester County Medical Center* case. In that case, the Court of Appeals refused to authorize the withholding of life-sustaining treatment from an elderly patient based solely on oral statements allegedly made prior to her incapacity. The court held that verbal statements are too general and do not offer adequate proof so as to outweigh New York's interest in

preserving the rights of individuals who are unable to make medical decisions for themselves. In New York, the Living Will is basically a written statement of an individual's desires and intentions concerning future medical treatment and/or resuscitation. While there is no standard legal form for a Living Will in New York, a written statement of an individual's desires concerning future medical treatment and/or resuscitation will be valid if it provides clear and convincing evidence of the individual's intentions.

Whatever your stance is on the *Terri Schiavo* case, one of the most important lessons that is learned from this controversy is that it could have been avoided if Terri Schiavo had clearly expressed her desires and intentions by executing a Health Care Proxy and Living Will. If you have any questions concerning this important subject, please feel free to contact the attorneys in our estate planning department. ■

> Side Briefs

Capell Vishnick LLP was the proud sponsor of its second annual dinner dance for the benefit of the Multiple Sclerosis Society, which took place on March 4th at Verdi's in Westbury. The event, which was planned and hosted by a committee of CV members, raised over \$35,000. All 250 attendees had a wonderful evening of dining and dancing and went home with great auction prizes.

Joseph G. Milizio was elected the 2005 Multiple Sclerosis Walk Chairperson for the Long Island MS Walk, which was held this year at Jones Beach and Belmont Park on Sunday, April 17th. As chair, Joe was involved in raising awareness for the event and anticipates that the Walk raised a total of one million dollars!

On Saturday, May 21, 2005, Capell Vishnick LLP sponsored the Long Island Multiple Sclerosis Society's Member Education Conference. It was held at the Huntington Hilton in Melville. Christopher J.L. Deziel, our managing partner, presented a workshop, along with a physician, on the legal and medical aspects of Health Care Proxies and Living Wills.

Baby Boom! Bernard Vishnick and his wife Sheri became grandparents! Ross Ian was born on November 16, 2004. Erik Ortmann, a litigation associate, and his wife Lisa welcomed Jack Ortmann into the world on September 12, 2004. Michael Humphrey, a trusts and estates associate, and his wife Tara are proud to announce that their son Ryan Michael Humphrey was born on Saturday, April 16, 2005.

Erik Ortmann spoke at a Contractor's Trade Association meeting on issues concerning mold and fire damage remediation/reconstruction and related liability/legal issues on May 19, 2005 at Westbury Manor.

Wedding Bells are ringing! Audrey Hurley, a litigation paralegal, and her fiancé Kevin will tie the knot on November 4, 2006. Erica Jackowitz, a litigation associate, said YES when Steven asked her to be his wife. A wedding date has been set for October 8, 2005. Best wishes to all of them!

Andrew A. Kimler and Joseph Trotti have agreed to undertake the revision of a portion of Matthew Bender's treatise, entitled "New York Civil Practice: Matrimonial Actions." They will be focusing on chapters entitled, "Property Distribution in Matrimonial Actions" and "Modifications of Judgments and Orders."

We are proud to announce that on May 2, 2005, Joseph Trotti and Theresa DeStasio celebrated 20 years of working together. Terry joined Joe's former office as an administrative assistant and quickly moved into the position of office manager. Joe joined Capell Vishnick in 2001 and, of course, brought Terry with him. Terry has made her mark in CV's Transactional and Real Estate departments as a skilled paralegal. Her energy has labeled her the whirlwind of the office; if you happen to be in her path, you risk being swept away.

Erik Ortmann has been named general counsel for the NYC/LI chapter of NARI (National Association of the Remodeling Industry). The chapter recently bestowed upon him the "President's Award" for "creative, innovative and continuous leadership promoting professionalism in the remodeling industry and to the management of NYC/LI NARI." ■



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