

The Importance Of Living Wills. Do You Have A Plan? *Continued*

In a recent controversy in Florida concerning a brain-damaged patient, years have passed as both the state legislature and court system have stepped in to settle the debate between the patient's husband and her parents regarding what was the most appropriate course of action.

This difficult debate has centered around whether the complicated life-support equipment keeping the patient alive should or should not be disconnected. The Florida affair could have been handled quite differently if the patient had previously signed and executed a document stating the sort of medical treatment she would desire if her health ended up in such a state.

This sort of declaration, commonly referred to as a living will, is available to individuals in North Carolina in the form of a Declaration of Desire For a Natural Death. The Declaration allows you to express your health care wishes, which relieves your family members who would possibly agonize over such momentous decisions. Another useful document which works hand in hand with the Declaration is a Health Care Power of Attorney. With this document you can authorize who you want to make your health care decisions if you become unable to make them for yourself.

Recent developments in North Carolina now give you the ability to

register your original Declaration and Health Care Power of Attorney in an online state-run database. Registering with the database allows you to pass along your login and password to those close to you who might need access to these documents at a later time.

A third document known as a durable General Power of Attorney allows you to designate who you would like to handle your financial affairs if you become unable to do so for yourself. Our estate planning attorneys can assist you with these documents which will protect your integrity and your assets. Please contact Pat Levy or Cory Rayborn for further information.

In Brief is published quarterly by Wyatt Early Harris Wheeler LLP. The purpose of this newsletter is to provide general information about legal developments. As the information presented is not a comprehensive treatment of the subject matters covered, readers are encouraged to seek specific legal advice before taking any action.



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The Government Wants To Take Your Land. What Are Your Options?

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Scott Wyatt

Chances are good that you know a neighbor, family member or friend whose property has been taken by the Department of Transportation or some other government entity. Generally, when property is condemned (which has nothing to do with whether the property is safe or dangerous), the government agency offers the owner what it considers the fair market value. If the owner doesn't accept the offer, the government is forced to deposit the offered amount with the Clerk of Superior Court, and then to file a lawsuit to secure title to the property it intends to take. After the suit is filed, the landowner has a period of time to file a response, and may request that a jury determine the just compensation for the land.

In handling these government-taking cases, the landowner's first step should be to ask an attorney to help gain the full, fair market value for the property. A competent, qualified attorney can greatly facilitate a satisfactory settlement. But in the event negotiations fail, an attorney should increase the prospects of success in a trial before a jury.

In a recent well-publicized case, a Durham hotel property owner said no to a Department of Transportation offer of \$560,000, and allowed a jury to decide the value of the property. The jury awarded \$2.3 million for the State's road widening project that came within 25 feet of the hotel. In a related case, a Durham jury awarded \$1 million to a diner near the hotel, after the DOT offered property owners \$207,000.

In our experience, landowners with qualified attorneys usually receive amounts well in excess of what normally is offered by the DOT, or other government entities that take land. However, we advise that each case is different and must be valued on its own.

We frequently represent landowners in these types of cases and will gladly answer any questions you may have about this procedure.



Registering Your Trademark. Should You Consider The Benefits?

Chris Kroger, General Business, ckroger@wehwlaw.com



Chris Kroger

Frequently we receive inquiries about trademarks, trade names, and copyrights. We refer to these as intellectual property, and frequently clients ask whether they should register a trademark or trade name. At the outset, you may want to ask yourself: "Do I have a trademark to protect?"

What is a trademark and how does it differ from a service mark and a trade name?

A **trademark** is a word, phrase, symbol or design, or a combination of words, phrases, symbols or designs, that identifies and distinguishes the source of the goods of one party from those of others. Examples of trademarks

SUIT FILED AGAINST ESPN OVER EARNHARDT SYMBOL; COMPANY: STYLIZED NO. 3 TRADEMARK WAS VIOLATED

Headline in the *Winston Salem Journal*, March 19, 2005

include Polo (clothing) or Jeep (automobiles).

A **service mark** is the same as a trademark, except that it identifies and distinguishes the source of a service rather than a product. Examples include McDonalds (food service) and Hilton (hotel services).

A **trade name** is a corporate or other name which identifies a business as opposed to products or services.

If you want to use a trademark or service mark, it's important to ensure that you're not infringing on the mark of another company. Our firm regularly conducts trademark searches to determine whether a proposed mark is already in use. If the search shows no conflicting marks, we strongly recommend that clients take the extra step of registering the mark with the United States Patent and Trademark Office (USPTO).

Clients often ask, "Why should I register my trademark?" Consider the following benefits:

- constructive notice to the public of claim of ownership of the mark;
- a legal presumption of ownership of the mark and the exclusive right to use the mark nationwide on or in connection with the goods and/or services listed in the registration;
- the ability to bring an action concerning the mark in federal court;
- the use of the U.S. registration as a basis to obtain registration in foreign countries; and
- the ability to file the U.S. registration with the U.S. Customs Service, to prevent importation of infringing foreign goods.

The USPTO determines the right to register a mark, and the registration is based on either actual use of the mark or intent to use it in the future.

Please let us know if we can assist in evaluating, searching and registering your trademark or service mark.



The Importance Of Living Wills. Do You Have A Plan?

Cory Rayborn, Estate Planning, crayborn@wehwlaw.com

Reprint of 2004 In Brief Article

More than a year ago, Cory Rayborn, an attorney in our Estate Planning Group, wrote an In Brief article which was prompted by litigation connected with the Schiavo case in Florida. In view of the

publicity surrounding Ms. Schiavo's case and the renewed interest in living wills, we have reprinted Mr. Rayborn's article in this issue.

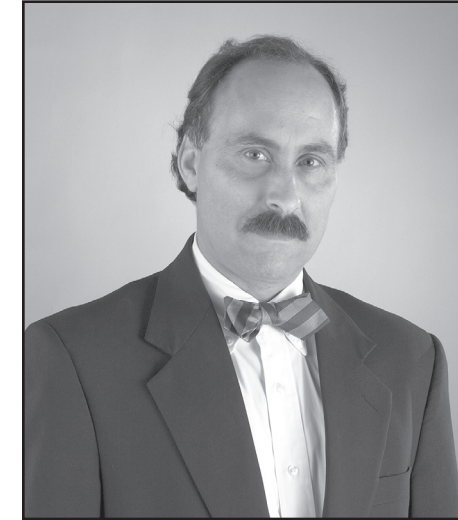
Dealing with illness and death is never easy, but these issues become much more complicated when

you have never made a definitive statement regarding your medical care and you become terminally ill or lapse into a persistent vegetative state.

(continued on back cover)

The Telephone Consumer Protection Act. Are You In Violation?

Stanley Hammer, Litigation, shammer@wehwlaw.com



Stanley Hammer

"It shall be unlawful for any person within the United States to use any telephone, facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine"

Telephone Consumer Protection Act

Do you receive junk faxes? More importantly, have you contemplated using faxes to advertise products or services to customers? Under the Telephone Consumer Protection Act (TCPA) passed by Congress in 1991, senders of unauthorized faxes are liable to the recipient for \$500 per fax, or \$1500 in the case of an intentional violation.

What is an unauthorized fax? In general, faxed ads may not be sent to persons with whom the sender does not have an "established business relationship." On June 30, 2005, new FCC rules take effect and require that a sender have prior "express permission" (from the recipient) to send a fax soliciting business. Under the new FCC rules, fax advertisers must secure the following from their intended recipients:

- Written authorization;
- Recipient's signature;
- Specific fax numbers to which the ads are to be sent.

Several businesses have been stung by class actions brought under the TCPA. Hooters of Augusta was the object of an \$11.9 million dollar class action based on unauthorized faxes sent to thousands of recipients. The Dallas Cowboys football team settled a TCPA class action based upon its use of a fax blasting service. The bowling alley chain AMF settled a similar suit.

In the past we have represented clients involved in TCPA suits. We don't want to see our clients having to defend these actions — especially a class action suit. Please be careful to protect yourself from liability exposure which results from the use of fax advertising.



Firm News

Kim Gallimore Certified As Board Specialist



The North Carolina State Bar's Board of Legal Specialization recently announced that Kim has been certified as a specialist in real property law for business, commercial, industrial and residential matters. This designation is bestowed on those lawyers who have demonstrated special knowledge, skill and proficiency in real estate law.

Bill Wheeler Completes Service As President of High Point Bar Association



Bill recently completed his term as President of the High Point Bar Association. This year the Association enjoyed hearing from a number of judges, government leaders and bar officials at their monthly meetings. In addition, the Association hosted a continuing legal education event on professionalism with North Carolina Supreme Court Chief Justice I. Beverly Lake.

Doyle Early Serves as Chair of the Family Law Section of the North Carolina Bar Association



As the 2004-2005 Chair of the Family Law Section, Doyle has been involved in working with other family law attorneys throughout the state on various legislative issues and continuing education programs.

