Group Legal Services Association

Solo, Small Firm, and General Practice Section

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Terri Schaivo Ten Years Later and Other End of Life Issues

Saturday, May 14

9:30 am – 10:30 am
Salon A-1

Presenter: Hamden Baskin III, BaskinFleece, Clearwater, FL

HAMDEN H. BASKIN III

Hamden was born in Clearwater, Florida, and is a third generation lawyer and is a Partner with BaskinFleece, Attorneys at Law, in Clearwater, Florida. Hamden attended Florida State University, where he obtained his Bachelors of Science degree in 1976, followed by his Master's Degree in Criminology in 1979. He attended Oklahoma City University Law School, and graduated with Honors, in 1983. He then served as a staff attorney to the Honorable Patricia Robinson, Oklahoma First District Court of Appeal for one and after then attended the University of Florida Law School, where he obtained his Master's Degree in Taxation in 1985. Hamden's practice areas are primarily in the area of trust, estate and fiduciary litigation, including Guardianship litigation, as well as estate planning and probate and trust administration.

In 2004 he became associated with the Terry Schiavo case, where he served as trial counsel to Michael Schiavo for several years, appearing on numerous local and national news and information shows, including CNN and Scarborough Country to name a few. Hamden is an AV rated attorney by Martindale-Hubbell, and is a member of the Litigation Counsel of America and a Florida designated "Super Lawyer". He served as a Special Master for the Sixth Judicial Circuit Court, hearing cases under Florida's Baker Act, was appointed Special Prosecutor by Circuit Judge Thomas E. Penick, Jr., to prosecute court-appointed guardians for criminal contempt. Hamden has extensive trial experience handling jury and non-jury trials, and has handled complex transactional corporate and commercial matters.

Hamden is admitted to the Oklahoma and Florida Bars, as well as the United States District Court, Middle District, U.S. Court of Appeals 10th Circuit, U.S. Tax Court and the U.S. Supreme Court. He is a frequent speaker at Law Seminars, Bar Association meetings, and numerous other groups. He served as Chairman of the Florida Bar Grievance Committee, and currently serves on the Florida Bar Unlicensed Practice of Law Committee. He is a member of the Board of Trustees for John Hopkins – All Children's Hospital, and is former Chairman of the Board, and a Current Trustee of Directions for Mental Health, Clearwater, Florida. Hamden is a member of the Rotary Club of Clearwater, and is a member of the Dean's Executive Council, for the Oklahoma City University Law School. Hamden is a Master with the Barney Masterson Inns of Court, and the Thomas E. Penick Inns of Court, and selected by the Judges of the 6th Judicial Circuit to receive the Richard T. Earle, Jr., Professionalism Award in 2013. He was designated one of Tampa Bay's Top Lawyers by Tampa Bay Magazine, and his firm BaskinFleece, Attorneys at Law, was named by U.S. News and World Report as one of the Best Law Firms in America. He has held numerous other voluntary positions throughout the community.

SCHIAVO 10 YEARS LATER AND OTHER END OF LIFE ISSUES

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The miracles of medical science are well-publicized and seemingly make it conceivable that someone living on the earth today, will live to be 150 years old. The proper handling of end of life issues will likely not become easier to manage, but no doubt, will be more prevalent and difficult to manage. The U.S. Supreme Court so noted this point sixteen years ago in its 1990 decision in *Cruzan*[1], referring to a footnote in the Missouri Supreme Court's decision, collecting 54 reported cases from 1976 through 1988.[2] The governance over end of life issues, within constitutional restraints, remains primarily with the state. Most every state has made its own laws dealing with the issue of removal of life-support of an individual who cannot make their wishes known, under conditions where it is nearly assured the individual will pass immediately. Thus, the stakes are high in the event of an error.

Theresa "Terri" Schiavo who passed away on March 31st, 2005 was an individual who could not speak for herself, was in a persistent vegetative state[3], kept alive by virtue of artificial life support. She had not executed a written living will.[4] After years of nearly Herculean efforts to reverse her vegetative condition, her husband, Michael Schiavo, determined Terri would not

[1] *Cruzan v. Mo. Dep't of Health,* 497 U.S. 261,(1990).
[2] See 760 S.W.2d, at 412, n.4.
[3] "Persistent vegetative state" means a permanent and irreversible condition of unconsciousness in which there is:
(a) The absence of voluntary action or cognitive behavior of any kind.
(b) An inability to communicate or interact purposefully with the environment. F.S. 765.101(15)
[4] "Living will" or "declaration" means:
(a) A witnessed document in writing, voluntarily executed by the principal in accordance with s. 765.302; or
(b) A witnessed oral statement made by the principal expressing the principal's instructions concerning life-prolonging procedures. F.S. 765.101(13)

wish to continue life under such condition were she able to speak for herself, hence, bringing full center the issue of her dependence on artificial life support to remain alive in a condition devoid of brain activity or of any personal quality of life. She simply laid in bed, hour after hour, with no discernable mentation. She was kept alive by tube feeding of both food and hydration.

Questions arose. Could Michael have the feeding tube removed without court order? Could he have it removed with a court order? Who would be the "interested persons" in making the decision? Who would be "interested persons" with standing to challenge the ruling of the trial court?

There were several important cases already decided to guide the litigants and the trial court. This paper details the state of the law leading up to the Schiavo case, as well as the current state of the law in the wake of the Schiavo decision. Did the Schiavo case ultimately "make" law, or just follow the existing law? What are the criticisms of the adjudication of Terri's case? Are those criticisms a legitimate inquiry for the court? What alternatives, such as the POLST movement, now exist that deal with end of life issues, post Schiavo?

In re Quinlan: **New Jersey, 1976**

The early New Jersey case of *In re Quinlan*,[5] decided in 1976, the court was required to address the threshold issue of termination of life support for individuals who could no longer speak for themselves. Karen Quinlan was a 22-year-old woman living in New Jersey who was in a permanent vegetative state and was utterly incompetent. Doctors had given Karen virtually no chance for recovery, although they believed she might survive in the same state without the respirator for some indeterminate time. She could not speak for herself and her quality of life was poor. She had no likelihood of recovering. Karen's father filed to be appointed her

[5] *In re Quinlan,* 70 *N.J.* 10, 18, 355 *A.*2d 647(1976)

Guardian, and sought the power to authorize discontinuance of extraordinary life support. Karen's Father was entitled to preference for the appointment as Guardian, much like he would be here in Florida, because he was her next of kin. The Father was appointed and the Trial Court appointed a Guardian *Ad Litem* to represent her interests. The Father then sought the Order to disconnect which was opposed by the doctors, the hospital, the Morris County Prosecutor, the State of New Jersey and the Guardian *ad litem*. The Trial Judge denied authorization to terminate life-support and the matter was appealed to the New Jersey Supreme Court. The Attorney General Cross-Appealed.

The issues involved on the one hand our rights to privacy and to have control over what happens to our body and our person, versus a policy of the State that every person is entitled to life. The court found the right of an incompetent[6], who was in a persistent vegetative state and whose vital processes were maintained by mechanical respirator, to decide whether to permit her non-cognitive, vegetative existence to terminate by natural forces was a valuable incident of her right to privacy and right would not be disregarded solely on basis that her condition prevented her conscious exercise of the choice.

The court somewhat broadly held, subject to stated qualifications, that a guardian and family could render their best judgment as to whether she would exercise this choice under the circumstances and if so, should the attending physicians[7] conclude that there was no reasonable possibility of the daughter emerging from her comatose condition to a cognitive, sapient state and that the life-support apparatus should be discontinued, physicians should consult with hospital ethics committee, and if the committee should agree with the physicians' prognosis, the

[6] "Incapacity" or "incompetent" means the patient is physically or mentally unable to communicate a willful and knowing health care decision. For the purposes of making an anatomical gift, the term also includes a patient who is deceased. F.S. 765.101(10)

[7] "Attending physician" means the physician who has primary responsibility for the treatment and care of the patient while the patient receives such treatment or care in a hospital. F.S. 765.101(2).

life-support system may be withdrawn and said action shall be without any criminal or civil liability on the part of any participant, whether Guardian, physician, hospital, or others.

While *Quinlan* addressed many issues, it left open many issues and perhaps ignored some. For example, what standard of proof would the court use in a contested case where concurrence of the Guardian and Family did not occur, particularly where the issue was whether the individual would have wanted to exercise this choice. In *Quinlan,* the trial court found that while Karen had made prior oral statements as to her distaste for continuance of life by extraordinary medical procedures under circumstances as eventually were presented in her case, her statements were made in the context of several conversations with regard to others in a terminal condition[8] and being subject to heroic measures. These statements were advanced as evidence of what she would want done in a contingency such as she was now faced. Karen was said to have firmly evinced her wish, in like circumstances, not to have her life prolonged by otherwise futile use of extraordinary means. The Trial Court, however, further found that such statements were remote and impersonal, and therefore lacked significant probative weight. The New Jersey Supreme Court agreed, but held, however, it was not a consequence to the Court's decision as to whether or not they were admissible hearsay.

Cruzan: Missouri, 1990

In *Cruzan v. Mo. Dep't of Health,* the underlying facts involved an individual, Nancy Cruzan, who was adjudicated incompetent after an automobile accident left her in a persistent vegetative state.[9] She was lying in a Missouri State hospital in a persistent vegetative state, where she had some motor reflexes but evinced no indications of significant cognitive function.

[8] Terminal condition" means a condition caused by injury, disease, or illness from which there is no reasonable medical probability of recovery and which, without treatment, can be expected to cause death. F.S. 765.101(22).
[9] *Cruzan v. Mo. Dep't of Health,* 497 U.S. 261,(1990).

The State of Missouri was bearing the cost of her care. The hospital employees refused, without Court approval, to honor the request of her parents to terminate her artificial nutrition and hydration, since it would result in death. The State (Probate) Court authorized the termination, finding that a person in Cruzan's condition has a fundamental right under State and Federal Constitutions to direct or refuse the withdrawal of life-prolonging procedures, and that her expression to a former housemate that she did not wish to continue life if sick or injured unless she could live at least halfway normally, suggested that she would not wish to continue on with her nutrition and hydration.

The Missouri State Supreme Court Reversed, and while recognizing the right of privacy, questioned a broad right of privacy that would support an unrestricted right to refuse treatment and expressed doubt that the Federal Constitution embodied such a right.[10] The Court then decided that the State Living Will Statute embodied a State policy strongly favoring the preservation of life, and that Cruzan's statements to her housemate were unreliable for the purpose of determining her intent.[11] It rejected the argument that her parents were entitled to order the termination of her medical treatment, concluding that no person can assume that choice for an incompetent in the absence of the formalities required by the Living Will Statute or clear and convincing evidence of the patient's wishes. Contrary to Quinlan, the issue of the quantum of proof as to ones desires was presented, and made a central issue in the case. The Missouri Supreme Court found a "clear and convincing" standard of proof required over a broad consensus as in Quinlan, and argued by Nancy Cruzan's parents.

[10] *Cruzan v. Harmon*, Mo. 760 S.W.2d 408,(1988)
[11] Mo.Rev.Stat. § 459.010 *et seq.* (1986),

The Order of the Missouri Supreme Court was appealed to the U.S. Supreme Court.[12] Justice Rehnquist held that (1) the United States Constitution did not forbid Missouri from requiring that clear and convincing evidence of an incompetent's wishes to the withdrawal of life-sustaining treatment, (2) the Missouri Supreme Court did not commit constitutional error in concluding that evidence adduced at trial did not amount to clear and convincing evidence of the patient's desire to cease hydration and nutrition, and (3) due process did not require the state to accept substituted judgment of close family members absent substantial proof that their views reflected those of the patient. It is important to note that Nancy Cruzan had not created a written Living Will however; there was testimony from a former housemate that Nancy expressed opinions that suggested she would not wish to continue on with her nutrition and hydration.

The Cruzan Court did establish the principal for proxy[13] decision making and confirmed the privacy rights of an incompetent person in a persistent vegetative state would include the right to refuse medical treatment. The Court, however, found that in light of the State's interest in preserving life, that a clear and convincing evidence standard was warranted when dealing with the question of what the patient would have wanted. It specifically found the State was not required to accept substituted judgment of close family members, as in Quinlan, as to withdrawal of life-sustaining medical treatment absent substantial proof that their views reflected the views of the patient.

The Court held the State could apply clear and convincing evidence in proceedings regarding the decision to discontinue nutrition and hydration of a person in a persistent vegetative state, as Missouri has a general interest in the protection and preservation of human

[12] *Cruzan v. Dir., Missouri Dep't of Health,* 497 U.S. 261,(1990)

[13] "Proxy" means a competent adult who has not been expressly designated to make health care decisions for a particular incapacitated individual, but who, nevertheless, is authorized pursuant to s. 765.401 to make health care decisions for such individual. F.S. 765.101(19).

life, as well as other, more particular interests, at stake. The choice between life and death is a deeply personal decision of obviously overwhelming finality, it stated that Missouri may legitimately seek to safeguard the personal element of this choice through imposition of heightened evidentiary requirements. The Court held the Due Process Clause protects the interest of life, as well as the interest in refusing life-sustaining medical treatment. Not all incompetent patients will have loved ones available to serve as surrogate decision makers.[14] And even where members are present, there will, of course, be some unfortunate circumstances where family members will not all act to protect the patient. The Court found the State was entitled to guard against such potential abuses in such situations and the State is entitled to consider that a judicial proceeding to make a determination regarding an incompetent's wishes may very well not be an adversarial one with the added guarantee of accurate fact finding that the adversary process brings with it. The Court said that a State may properly decline to make judgments about the quality of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally-protected interests of the individual. The more stringent the burden of proof a Party must bear, the more that Party bears the risk of an erroneous decision. It stated that Missouri may permissibly place an increased risk of the erroneous decision on those seeking to terminate an incompetent individual's life-sustaining treatment, recognizing that an erroneous decision not to terminate results in a maintenance of the status quo; the possibility of subsequent developments such as advancements in medical science, the discovery of new evidence regarding the patient's intent, changes in the law, or simply the unexpected death of the patient despite the administration of life-sustaining treatment, at least create the potential that a wrong decision will eventually be

[14] Surrogate" means any competent adult expressly designated by a principal to make health care decisions and to receive health information. F.S. 765.101(21).

corrected or its impact mitigated. An erroneous decision to withdraw life-sustaining treatment, however, is not susceptible of correction.

The most important lessons to take away from *Cruzan* are first, that the United States Constitution does not forbid States from requiring clear and convincing evidence of an incompetent's wishes for the withdrawal of life-sustaining treatment and second, that due process does not require acceptance of the judgment of close family members of the incapacitated patient, absent substantial proof that their views reflected those of the patient.

In re Guardianship of Browning: **Florida, 1990**

The last case of the end of life trilogy of cases prior to the Schiavo decision was the 1990 case *In re Guardianship of Browning*.[15] The Guardian of an incompetent patient petitioned to terminate the patient's artificial life-support and the trial court denied the petition and the Guardian appealed. The appellate court affirmed but certified the question to the Florida Supreme Court who held that the surrogate or proxy may exercise the constitutional rights of privacy for one who has become incapacitated and who, while competent, expressed his or her wishes orally or in writing. The key difference in *Browning*, from Quinlan and Cruzan, is that there was a valid Living Will created by the patient before becoming incapacitated, which expressed her desire not to be kept alive by artificial life support.

In November of 1986 Mrs. Browning suffered a stroke at the age of 86 which left her incapacitated from which there was virtually no chance of recovery. She was admitted to the hospital where her treating physician diagnosed a massive hemorrhage in her left parietal region of her brain, the portion that controls cognition. She was unable to swallow, so she was given a

[15] *In re Guardianship of Browning*, 568 So.2d 4 (Fla. 1990).

feeding tube directly into her stomach. She was discharged from the hospital and she remained bedridden and required total care. A Guardian was appointed, Doris Herbert, who was her only living relative.

During the course of her stay in the nursing home, Mrs. Browning was plagued with physical difficulties, including complications of the feeding tube becoming dislodged. She went on for two years, until the Guardian filed a Petition to terminate the feeding tube based on her Living Will. The Living Will stated that, "[i]f at any time I should have a terminal condition and if my attending physician has determined that there can be no recovery from such condition and that my death is imminent, I direct that life-prolonging procedures be withheld or withdrawn when the application of such procedures would serve only to prolong artificially the process of dying." She had also stipulated that nutrition and hydration provided by gastric tube not be administered. At the evidentiary hearing, the Guardian presented additional evidence of Mrs. Browning's wishes. The evidence reflected that predecessor Living Will, written in 1980, contained the same provisions for rejection of medical treatment at issue as the one before the Court. She had apparently executed the second one because one of the witnesses to the first one had died and she thought that might affect its validity.

Neighbors also testified that she expressed her wishes orally in regard to the Living Will several times. Mrs. Rose Kings, a close friend since 1965, witnessed Mrs. Browning execute the 1985 document. She testified that Mrs. Browning signed the declaration about two days after visiting patients in a nursing home and had said "Oh Lord, I hope this never happens to me…thank God I've got this taken care of. I can go in peace when my time comes." Mrs. Kings' Husband added that Mrs. Browning had a friend in the hospital on life-support and remarked that she "never want[ed] to be that way."

The Florida Supreme Court, having the benefit of Cruzan, said that recognizing that one has the inherent right to make choices about medical treatment, we can necessarily conclude that this right encompasses all medical choices. A competent individual has a constitutional right to refuse medical treatment regardless of his or her medical condition, and they cite Cruzan for that proposition. According to the Court, the issue apparently was a patient's right of self-determination and does not involve what is thought to be in the patient's best interest. The Court then went on to consider whether the right of privacy and self-determination is lost or diminished by virtue of physical or mental incapacity. They determined that it was not.

The Supreme Court found that Chapter 765 was not applicable to Mrs. Browning's situation but held that Mrs. Browning's fundamental right of self-determination controlled the case. The Court held the concept of privacy encompasses much more than the right to control the disclosure of information about oneself stating that "[p]rivacy" has been used interchangeably with the common understanding of the notion of "liberty," and both imply the fundamental right of self-determination subject only to the State's compelling and overriding interest. The Court then determined whether and if so, who, may exercise the incompetence's right to forego medical treatment. They found the issue was an extension of a similar issue presented in *John F. Kennedy Memorial Hospital, Inc. v. Bludworth*, dealing with a comatose patient.[16] The Court said that when a person is unable to personally or directly express his or her desires for healthcare because of physical or mental incapacity, the question is who will exercise this right and what parameters will limit him on the exercise of the right. Although the *Bludworth* Court dealt with a comatose patient and Mrs. Browning was not totally comatose, the Court failed to find any significant difference. The Court noted that the right involved is one of

[16] *John F. Kennedy Memorial Hospital, Inc. v. Bludworth*, 452 So. 2d 921 (Fla. 1984).

self-determination that cannot be qualified by the condition of the patient. In *Browning*, as in *Bludworth,* the patient was unable to personally or directly exercise the right to refuse medical treatment. In both *Bludworth* and *Browning*, the patients had executed Living Wills. The Browning Court therefore found that under *Bludworth* , the District Court properly found a constitutional right that because Mrs. Browning was unable to exercise her constitutional right of privacy by reason of her medical condition, her Guardian was authorized to exercise it for her. The Court stated, "[a]s in *Bludworth*, we do not limit the ability to exercise this right only to a legally appointed Guardian, but recognize that it may be exercised by proxies or surrogates such as close family members or friends." The Court emphasized that when such patient has left instructions regarding life-sustaining treatment, the surrogate must make the medical choice that the patient, if competent, would have made, and not one that the surrogate might make for himself or herself, or that the surrogate might think is in the patient's best interest.

The Court then addressed Mrs. Browning's Living Will. It stated that it was persuaded that when a patient has taken the time and trouble to make a Living Will, the surrogate need not obtain prior judicial approval prior to carrying out those wishes. This applies whether the patient has expressed his or her desires in a Living Will, through oral declarations, or by the written designation of a proxy to make all health care decisions in these circumstances.

The Court went on to state that a surrogate must take great care in exercising the patient's right of privacy, and must be able to support that decision with clear and convincing evidence. Before exercising the incompetent's right to forego treatment, the surrogate must satisfy the following conditions:

1. The surrogate must be satisfied that the patient executed any document knowingly, willingly, and without undue influence, and that the evidence of the patient's oral declarations is reliable;

2. The surrogate must be assured that the patient does not have a reasonable probability of recovering competency so that the right could be exercised directly by the patient; and

3. The surrogate must take care to assure that any limitations or conditions expressed either orally or in the written declaration have been carefully considered and satisfied.

The Court also addressed that when a proxy has been designated to make the decision without explicit instructions from the patient, the proxy must satisfy the following conditions:

1. The proxy must be satisfied that the patient executed the written designation of proxy knowingly, willingly, and without undue influence; and

2. The proxy must be assured that the patient does not have a reasonable probability of recovering competency so that the right could be exercised directly by the patient.

The guardian was then authorized to make the decision for Mrs. Browning in accordance with these specific procedures. To sum up the law, the first issue to consider in cases like this is whether or not the patient has expressed their desires in a Living Will or other advance directive. If such a document exists then a guardian, surrogate, or proxy can see to it the incapacitated patient's wishes are carried out by following the procedures discussed above. On the other hand if no advanced directive[17] or living will exists, a guardian, surrogate or proxy can still make

[17] "Advance directive" means a witnessed written document or oral statement in which instructions are given by a principal or in which the principal's desires are expressed concerning any aspect of the principal's health care or health information, and includes, but is not limited to, the designation of a health care surrogate, a living will, or an anatomical gift. F.S. 765.101(1).

decisions regarding life prolonging procedures[18] as long as they can bring forth clear and convincing evidence of how the patient would make those decisions for himself or herself.

Teresa Marie Schiavo

The case of Theresa Marie "Terri" Schiavo demonstrates the importance of advanced directives such as Living Wills.[19] Terri Schiavo was just 25 when her medical incident occurred and she had not executed a written Living Will at the time. This Florida case was post *Browning*, but as outlined in *Browning*, there would be no presumption that Terri's wished to have life support removed should she suffer such a life altering event leaving her in a permanent vegetative state. Ultimately, Terri laid in a hospice care facility for 15 years, taking in food and hydration by feeding tube, unable to speak for herself, nor according to the medical evidence, think, while her family engaged in a long legal battle over what decision should be made regarding her life prolonging procedures.

The Schiavo Trial and Decision: Judge George W. Greer's "Final Order" of 2/11/2000:

On February 25, 1990 Terri suffered a cardiac arrest due to an apparent imbalance of potassium while at her home located in Pinellas County Florida. She never again regained consciousness and was being nourished and hydrated via a feeding tube. The court action that commenced the proceeding to have Terri's life sustaining tube removed (referred to here as Schiavo: the Trial) was a Petition filed by Terri's husband, Michael Schiavo, in May of 1998.[20] Prior to filing the Petition, however, in 1992 Michael Schiavo filed an action against the

[18] "Life-prolonging procedure" means any medical procedure, treatment, or intervention, including artificially provided sustenance and hydration, which sustains, restores, or supplants a spontaneous vital function. The term does not include the administration of medication or performance of medical procedure, when such medication or procedure is deemed necessary to provide comfort care or to alleviate pain. F.S. 765.101(12).

[19] For a comprehensive overview of the *Schiavo* matter, see *Bush v. Schiavo*, 885 So.2d 321 (Fla. 2004).

[20] *In re: Guardianship of Schiavo*, 2000 WL 34546715, at *6-7 (Fla. Cir. Ct. 2000).

physicians who had treated Terri prior to her cardiac arrest. The suit was successful, and awards were made for loss of consortium and damages, payment occurring in February 1993.[21] The Husband and Terri's parents ceased their amicable relations, and differed greatly on Terri's care going forward. Terri's parents were strongly against the removal of the feeding tube. The Trial Judge, George W. Greer, took notice of possible conflicts of interest by both Terri's husband and her parents involving financial gains from a medical malpractice settlement awarded to Terri. The Trial Court noted that if Terri in fact did pass, Michael stood to inherit the "damages" component of the malpractice suit, but if the Petition was denied, Terri's parents could hope that Michael would divorce Terri, and therefore, they stood as Terri's legal heirs.

Judge Greer appointed a Guardian *Ad Litem* in June 1998 to review the evidence and make a recommendation to the court. The Court however, declined to rely on the Guardian *Ad Litem* report because the *ad litem* was unable to interview all of the witnesses who testified at trial and admitted had he done so, his recommendations might have been different. Judge Greer therefore disregarded his recommendation upon the candid admission of the Guardian *Ad Litem.* The Schindlers, Terri's parents, requested he appoint a new Guardian *Ad Litem*, which he denied, finding the court itself essentially sat in that role, and the work would be duplicative. The Court noted that Terri's Husband, Michael, was the most frequent visitor to Terri's bedside and at all times was perusing the best medical care for his wife. Unfortunately, Terri never made a written living will or advance directive to account for this situation; therefore, the Court was forced to rely on oral statements Terri made to five persons about her thoughts on end of life issues.

Interestingly, there was testimony regarding the Karen Ann Quinlan case outline above. Terri's mother testified that Terri made comments during newscasts that "they should just leave

[21] *Id.* at 2

her (Karen Quinlan) alone when she was 17-20 years of age, but when shown copies of newspaper accounts of the case, she admitted Terri was perhaps 11 or 12 year of age. Judge Greer addressed the testimony of each witness, ultimately finding several of Michael Schiavo's family members to have provided reliable evidence. The Court found these oral statements to be clear and convincing evidence of Terri's intentions not to be kept alive artificially should she fall into a persistent vegetative state.

There was exhaustive testimony regarding Terri's medical condition, i.e., that she was in a persistent vegetative state, as defined under Florida Statute.[22] Judge Greer's found beyond all doubt, the medical determination was supported by scientific evidence and expert testimony and that she had no hope of ever regaining consciousness and therefore capacity, and that without the feeding tube, she would die in seven to fourteen days.

Judge Greer's Order found the case controlled squarely under the *Browning* case, and that all the collateral issues raised outside the courtroom were of no real consequence in following the law as outlined in the three prong test in *Browning.* Judge Greer held that the issue was simply whether there was clear and convincing evidence that Terri made reliable oral declarations which would support what her surrogate (Petitioner/Guardian) now wished to do. The court noted it had previously found the second part of the test, i.e., that the patient does not have a reasonable probability of recovering competency. The court then discussed the third prong, finding there were no limitations or conditions expressed orally by Terri regarding her feelings on continued artificial life support. Based on the foregoing, Michael's Petition for Authorization and Discontinue of Artificial Life Support of Theresa Marie Schiavo was granted by Judge Greer. This Decision would be appealed which is the subject of Schiavo I below.

[22] F.S. 765.101(12).

Schiavo I (The appeal by Theresa's Parents): 1/24/2001

On appeal, *In Re: Guardianship of Schiavo,* the Florida Second District Court of Appeal found that the Trial Court's decision, albeit a difficult one, was supported by competent substantial evidence and correctly applied the law.[23] Terri's parents appealed, requiring the appellate court to revisit the evidence of Terri's medical condition adduced at trial, and found overwhelming evidence that she was in a persistent vegetative state. In fact, the appeals court noted that she was without cognition, a foreign concept to most people. The court found clear and convincing competent evidence to support Judge Greer's judgment that Terri's brain had deteriorated because of the lack of oxygen suffered at the time of the heart attack and that by mid-1996, the CAT scans of her brain showed severely abnormal structure to the point that much of her cerebral cortex was simply gone, replaced by cerebral spinal fluid. The Court confirmed the trial court's finding that medicine could not cure the condition, so unless by act of God, or a true miracle were to recreate her brain, Terri would always remain in an unconscious, reflexive state, totally dependent upon others to feed her and care for her most private needs.

The most significant argument presented on appeal was that the trial court should have appointed a Guardian *Ad Litem* to represent Terri in the original case because Michael Schiavo stood to inherit based on the outcome of the case. The Second District Court noted the Florida Supreme Court in *Browning*, recognized that the circuit court's jurisdiction court could be invoked in two manners: first, the surrogate or proxy might choose to present the question of withholding life support to the court, and second, that interested parties may challenge the decision of the proxy or surrogate. Finding Michael Schiavo used the first approach, the Court found that "the trial court essentially served as the ward's guardian", eliminating the need for a

[23] *In Re: Guardianship of Schiavo,* 780 So.2d 176 (Fla. 2nd DCA 2001)

Guardian *ad litem,* who would duplicate the function of the judge. The court therefore, rejected the parents' argument that a Guardian *ad litem* was required, noting that in most instances a surrogate decision maker is a close relative who stands to inherit, hence, this fact alone is not enough to compel the appointment of a Guardian *Ad Litem*.

The second argument on appeal was that the court should have declined to hear the testimony of one Beverly Tyler who testified as an expert witness on American values, opinions, and attitudes about the decision to discontinue life prolonging procedures. The appellate court was quick to determine that the trial judge gave little weight to this testimony and was able to make a proper decision in the case.

Finally, Terri's parents argued that some of the witness testimony was conflicting and therefore did not meet the clear and convincing evidence standard required by case law. The appellate court disagreed and found that there can be a finding of clear and convincing evidence even in the face of inconsistent or conflicting evidence. The appellate court affirmed the decision, finding that Judge Greer had clear and convincing evidence to answer the question as he did. Florida Governor Jeb Bush would later pass "Terri's Law" which would prevent the removal of her feeding and hydration tube, or require reinsertion, as it turned out. That law was reviewed by the Florida Supreme Court which is the subject of a later section.

Schiavo II "The back door through the circuit civil": July 11, 2001

What is not necessarily published, are the multiple Motions for Relief from Judgment filed by the Schindlers, Terri's parents. In Schiavo II, *In re: Guardianship of Schiavo,* questions concerning the Schindler's standing to continue to fight the Order Discontinuing Terri's life

support were presented.[24] In Schiavo II, the Second District Court of Appeal, had before it three related cases involving the pending guardianship proceeding, and quickly disposed of the issue of standing. The court held that the ward's parents were "interested persons", entitled to appear in an adversary proceeding, and that a final order requiring the guardian to discontinue life-prolonging procedures is the type of order that may be challenged by an "interested party: at any time prior to the death of the ward on the ground that it is no longer equitable to give prospective application to the order. (*citing* Fla. R. Civ. P. 1.540(b)(5)). The logic is simple. There was no true defendant in the action to discontinue, and since Michael Schiavo was guardian and the decision only affects the ward, the right to appeal should possibly be sole with the guardian. The unusual life or death context of this situation, however, moved the court to conclude that "interested persons" should have standing, not for themselves, but in the interest of the ward to request relief from a judgment of the guardianship court, when the final order requires termination of life support.

Interestingly, the appellate court specially admonished the Schindlers, Theresa's parents, not to file Motions for Relief just to delay simply because they disagree with the trial court's order, but that it should be based on a valid basis for relief from the order, and plead and prove newly discovered evidence of such a substantial nature, that it proves either (1) that Theresa would not have made the decision to withdraw life-prolonging procedures fourteen months earlier to withdraw life support when the Final Order was entered, or (2) that Theresa would make a different decision at this time, based on developments subsequent to the earlier court order. Finally, the court advised the trial court to make all efforts to expedite these post judgment challenges. Years would pass, however, before the Final Order was carried out.

[24] *In re: Guardianship of Schiavo,* 792 So.2d 551 (Fla. 2nd DCA 2001),

The Schindlers also filed a motion in Pinellas Circuit Court, civil division, for injunctive relief to require the guardian to resume the treatments. The Guardian countered this motion, with a Motion to Transfer this action to the probate division of the court. The circuit civil judge granted the injunction, and denied Michael Schiavo's Motion to Transfer, which prompted the guardian to file a motion in the appeals court to enforce the mandate of its prior decision upholding the Final Order to terminate the procedures. The Second District reversed both rulings of the civil circuit judge, and denied the guardian's motion to enforce the mandate of the prior decision. The court held that any independent action seeking relief from the order entered in the guardianship case, or any effort to obtain an injunction contrary to the guardianship court's order, must be filed as an adversary action within the guardianship.

Finally, the court also addressed what would surely be additional appeals in the case, particularly from a denial of a motion for relief from the Final Order. The court advised the trial judge to use discretion in granting temporary stays, if it felt confident of its ruling, adding that the appeals court would expedite the disposition of any request for a stay made to the appellate court.

Schiavo III: Gov. Jeb Bush executes Executive Order re-inserting tube pursuant to "Terri's Law": Terri's Law found unconstitutional: 9/23/2004

The list of "interested persons" with apparent standing to interfere with Theresa's right to privacy included the Governor of Florida, who was empowered under the provisions of "Terri's Law", with unfettered discretion to control the nutrition and hydration, indeed the life or death, of a limited class of Florida citizens. Terri's Law, as it became known, was implemented by then Florida Governor Jeb Bush, and authorized the Governor to issue a one-time stay to prevent

the withholding of nutrition and hydration from Theresa Schiavo. Pursuant to this authority, Governor Bush entered Executive Order No. 03-201 on October 21, 2003, requiring re-insertion of the feeding tube, which had been removed under order of the circuit court. Theresa was taken from her room at Hospice on that same day, October 21, 2003, and the feeding tube was reinserted. The Guardian, Michael Schiavo, brought an action in circuit court against Jeb Bush seeking a declaratory judgment that "Terri's Law" was unconstitutional. Circuit Civil Judge Douglas Baird heard arguments at the hearing on Michael Schiavo's Motion for Summary Judgment filed November 24, 2003, and on May 5, 2004, entered his Order Declaring the law unconstitutional on a variety of grounds affirmed by Florida Supreme Court on appeal.

The Florida Supreme Court in *Bush v. Schiavo,* affirmed Judge Baird's Summary Judgment finding that "Terri's Law" was a violation of the separation of powers doctrine of the constitution.[25] The Court couched the question as one calling on the Court to decide the constitutionality of a law passed by the Legislature that "directly" affected Theresa Schiavo. Upholding Judge Baird, the Supreme Court stated "[t]he continuing vitality of our system of separation of powers precludes the other two branches from nullifying the judicial branch's final orders. If the Legislature with the assent of the Governor can do what was attempted here, the judicial branch would be subordinated to the final directive of the other branches. Also subordinated would be the rights of individuals, including the well-established privacy right to self-determination. No court judgment could ever be considered truly final and no constitutional right truly secure, because the precedent of this case would hold to the contrary." The decision handed down in Schaivo II was final and the Legislature's attempt to alter that final judgment is

[25] *Bush v. Schiavo,* 885 So.2d 321 (Fla. 2004).

unconstitutional. For those reasons the Florida Supreme Court affirmed the grant of summary judgment in favor or Michael Schaivo.

The Aftermath of Terri Schiavo

The law regarding the right to privacy and self-determination of one's end of life decisions has not been altered since the Schiavo case.[26] The right to determine one's own wishes in these matters still prevails over the right of the state to preserve life. The case of *Hanford Pinette* was decided after Schiavo.[27] In *Pinette* the patient was in a persistent vegetative state, however, unlike Theresa Schiavo, Mr. Pinette had created a written living will and designated his wife to be his heath care surrogate. Mr. Pinette's wife refused to follow her husband's wishes that he not be kept alive artificially. The hospital brought the matter to court, and Mr. Pinette's life prolonging procedures were ordered terminated.

In 2008, a nursing home was sued for civil liability in failing to carry out the patient's written directive that she not be kept artificially alive.[28] The Personal Representative of Madeline Neumann's estate, brought suit against the home and the physician for willful disregard of advance health care directive, willful disregard of the federal patient self-determination act, common law intentional battery, violation of the Nursing Home Resident's Rights Act, and breach of contract. The trial court granted the home summary judgment as to the health care advance directive count, and the violation of the federal patient self-determination act count, and entered judgment on jury verdict for the estate on the contract claim. The 4th District affirmed, finding the Madeline, who was resuscitated contrary to her living will had no cause of action for

[26] Florida Guardianship Practice 0401 Florida Guardianship Practice HEALTH Care Surrogates, Living Wills, and Related Issues Jason R. Mosley (2014).
[27] *In re: Pinette* (Fla. 9th Cir. Nov. 23, 2004).
[28] *Scheible v. Joseph L. Morse Geriatric Center, Inc.,* 988 So.2d 1130 (Fla. 4th DCA 2008).

violation of the patient's bill of rights, even though nursing home's actions resulted in resident's death in the hospital of other causes as nursing home's infringement did not directly cause her death; rather, the immediate wrong was a prolongation of her life. The case was decided while the Fourth District issued its opinion in *Beverly Enterprises, Inc., v. Knowles*, holding that F.S. 400.023, provided personal representative to bring suit for violation of nursing home resident's rights, *only* when the deprivation cause the patient's death.[29] The Knowles decision was upheld by the Florida Supreme Court.[30]

There is statutory immunity from liability provision found in Florida Statutes, protecting the provider from civil and criminal liability in "carrying out" the healthcare decision, however, failure or refusal, remains actionable.[31]

The Theresa Schiavo case shed light on the importance of Living Wills and other advanced directives. "In the year following her death, the U.S. Living Will Registry, which stores advance directives to make them accessible at any time, saw hits on its website jump from 500 a day to 50,000. It eventually would level off at about 2,500 a day, but Terri Schiavo's death raised public awareness of the importance of living wills."[32] Notwithstanding the foregoing, as estate planners and attorneys know all too well, the discussion with the client regarding Living Wills is far too cursory. Often times the discussion will last no more than a few minutes and is not handled with the care and attention it deserves. If a Living Will is executed, proper care should be taken to update and re-execute the document as the client's estate plan changes.

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[29] *Beverly Enterprises, Inc., v. Knowles*, 766 So.2d 335 (Fla. 4th DCA 2000).
[30] *Knowles v. Beverly Enters.-Fla.,* 898 So.2d 1, 6 (Fla. 2004).
[31] F.S. 765.109
[32] http://www.tbo.com/pinellas-county/10-years-after-death-of-terri-schiavo-demand-for-living-wills-still-strong-20150329/.

Criticism of the Terri Schiavo Decision

Some critics believe that the decision by the Court to terminate Terri's life prolonging procedures is inconsistent with the prior decision in *Cruzan*.[33] The disagreement mainly surrounds what constitutes clear and convincing evidence of an incapacitated patient's wishes to end life prolonging procedures. In *Cruzan* there was a unified family consensus that the patient would want to be removed from life support as well as testimony from a former roommate indicating such. The court found that was not enough to satisfy the clear and convincing evidence standard. Compare evidence to the assertions in *Schiavo* and you can see why some are critical of the decision. In *Schiavo* the family was divided on what they thought Terri would want, rather than a unified family like in *Cruzan*. There was also testimony from Terri's husband who indicated she would not want to be kept alive artificially, similar to the roommate testimony in *Cruzan*. Nevertheless, the court found in this instance there was clear and convincing evidence and Terri was removed from life support. This criticism is misplaced, however, as the trial court found by clear and convincing evidence, that Terry Schiavo evinced her wishes not to be kept artificially alive, and it was the trial court that had the opportunity to weigh the demeanor evidence, which was affirmed after exhaustive appeals.

Physicians Order for Life Sustaining Treatment (POLST)

The POLST movement (physician orders for life sustaining treatment) has swept across the country in the last ten years. POLST provides a patient-centered document that states surrogate decision-makers, DNR desires, and end-of-life wishes in a short document that stays

[33] A Comparison of Cruzan and Schiavo: The Burden of Proof, Due Process, and Autonomy in the Persistently Vegetative Patient, 26 J. Legal Med. 233, 244 (2005)

with the patient. All but five states have a POLST program enacted or in development. If the Living Will was the way of the past regarding end of life decisions then the POLST program is the future, but is fairly unknown in the estate planning community. It is important to note that the POLST does not replace the Living will or health care surrogate, rather it serves a different and more comprehensive purpose.

POLST programs are designed to elicit and to honor the medical treatment goals of persons with advanced progressive illness or frailty by creating a medical order that is immediately effective as opposed to a Living Will which takes effect only if the individual is unable to make health care decisions. A POLST program allows patients to document their choices about the level of intervention the patients want, currently, as they live out the final phase of their lives. The orders always address (CPR), and importantly also can address other end-of-life health care issues, such as the level of medical intervention desired in an emergency, the use of artificially supplied nutrition and hydration, the use of antibiotics, and the use of ventilation. Typically there are three levels of treatment provided for on the POLST document (1) full treatment; (2) limited treatment, where the goal is to treat medical conditions but avoid burdensome measures; and (3) comfort measures only to allow for a natural death. The POLST would ensure the patient is discussing healthcare decisions with a doctor rather than with a lawyer as is the case with Living Wills.

The POLST is a physician's order, therefore raising the question on the effect it has on traditional advance directives. The client should certainly have all the standard advance directives should that be his or her wish prepared by his or her attorney. The attorney may be the first professional to discuss end of life issues with the client, and therefore, introduce the client to the concept. While an attorney cannot prepare or sign the POLST, the attorney should be

involved in the POLST process, and know of its existence, once signed. Attorneys should first take the time to introduce clients to the POLST during any estate planning meeting and explain how it fits in with other advanced directives in the estate planning process. Attorneys should be familiar with how the POLST should be completed as undoubtedly they will be called upon to ensure the POLST is carried out. Doctors will be called upon, and paid, to discuss the execution of the POLST.

2000 WL 34546715
Only the Westlaw citation is currently available.
Florida Circuit Court, Pinellas County,
Probate Division.

In re: THE GUARDIANSHIP OF Theresa Marie SCHIAVO, Incapacitated.

Appellate Case No. 90-2908GD-003.
|
Feb. 11, 2000.

ORDER

GREER, J.

***1** THIS CAUSE came on to be heard upon the Petition for Authorization to Discontinue Artificial Life Support, and Suggestion for Appointment of Guardian Ad Litem. The case was tried before the court sitting without jury during the week of January 24, 2000. Before the court were Michael Schiavo, Guardian of the Person of Theresa Marie Schiavo, (sometimes referred to as "Petitioner"); George J. Felos, Esquire, and Constance Felos, Esquire, attorneys for Petitioner; Robert Schindler and Mary Schindler, the parents of Theresa Marie Schiavo, (sometimes referred to as "Respondants"); and Pamela A.M. Campbell, Esquire, attorney for Respondents. The court took testimony from eighteen witnesses, including the parties, the brother and sister of Theresa Marie Schiavo, (sometimes referred to as "Terri Schiavo"); the brother and sister-in-law of Petitioner, and the treating physician for Terri Schiavo. The court also received into evidence certain exhibits, including CAT scans of Terri Schiavo and, for comparison purposes, Dr. James Barnhill. The court has carefully reviewed its notes, the transcribed testimony of those non-parties who testified to conversations with Terri Schiavo regarding end of life declarations, the report of the Guardian Ad Litem, the video tape (Respondents' Exhibit No.1) and the other exhibits introduced as evidence. The court has also reviewed the case law submitted by and argued on behalf of the parties. Based upon the foregoing, the court makes the following findings of fact and conclusions of law.

Terri Schiavo was reared in a normal, Roman Catholic nuclear family consisting of her parents and her brother and sister. She spent the majority of her life in New Jersey and moved to Pinellas County, Florida in 1986 with her husband, Michael Schiavo, whom she married on November 10, 1984. They had dated for a total of two years, being engaged for year prior to their marriage.

Shortly after the move to Pinellas County by Mr. and Mrs. Schiavo, her parents and sister followed. The families on and off lived together, on and off shared expenses and generally functioned well together. Mr. Schiavo had a series of jobs including manager of a McDonald's restaurant. Terri Schiavo, after a brief period immediately following the move, resumed her employment with Prudential Insurance Company.

On February 25, 1990, in the early morning hours, Terri Schiavo suffered cardiac arrest, apparently due to an imbalance of potassium in her system. Michael Schiavo awakened when he heard a thump, found her lying in the hallway and called 911. He then called her brother who was living in the same apartment complex and her mother. The paramedics came, performed CPR and took her to a hospital. She has never regained consciousness and to this day remains in a comatose state at a nursing home in Largo. Terri Schiavo is currently being nourished and hydrated via a feeding tube and by this Petition her husband seeks authority to withdraw such life support.

***2** In 1992, Michael Schiavo filed an action against the physicians who had been treating Terri Schiavo prior to her cardiac arrest. In late 1992, the case was resolved with a settlement and jury verdict, which resulted in Mr. Schiavo receiving $300,000 as regards his loss of consortium claim and the Guardianship of Theresa Marie Schiavo receiving net funds of $700,000 as regards her damages. Those monies were actually received in February of 1993.

During the period of time following the incident of February 25, 1990 the parties worked together in an attempt to provide the best care possible for Terri Schiavo. On February 14, 1993, this amicable relationship between the parties was severed. While the testimony differs on what may or may not have been promised to whom and by whom, it is clear to this court that such

severance was predicated upon money and the fact that Mr. Schiavo was unwilling to equally divide his loss of consortium award with Mr. and Mrs. Schindler. The parties have literally not spoken since that date. Regrettably, money overshadows this entire case and creates potential of conflict of interest for both sides. The Guardian Ad Litem noted that Mr. Schiavo's conflict of interest was that if Terri Schiavo died while he is still her husband, he would inherit her estate. The record before this court discloses that should Mr. and Mrs. Schindler prevail, their stated hope is that Mr. Schiavo would divorce their daughter, get on with his life, they would be appointed guardians of Terri Schiavo and become her heirs at law. They have even encouraged him to "get on with his life". Therefore, neither side is exempt from finger pointing as to possible conflicts of interest in this case.

By all accounts, Mr. Schiavo has been was very motivated in pursuing the best medical care for his wife, even taking her to California for a month or so for experimental treatment. It is undisputed that he was very aggressive with nursing home personnel to make certain that she received the finest of care. In 1994, Mr. Schiavo attempted to refuse medical treatment for an infection being experienced by his wife. His unrefuted testimony was that his decision was based upon medical advice. Mr. and Mrs. Schindler filed an action to have him removed as Guardian based upon numerous allegations, including abuse. Mr. Schiavo relented and authorized the treatment after which a Guardian Ad Litem appointed by this court found that there was no basis to have him removed. Mr. and Mrs. Schindler ultimately dismissed their petition citing financial considerations as their motivation.

The court heard testimony as to various issues; most of which having little or nothing to do with the decision the court is called upon to make. The court also heard from witnesses who ran the gambit of credibility, from those clearly biased who slanted their testimony to those such as Father Murphy whom the court finds to have been completely candid. The court also has concerns about the reliability of testimony which differed from prior deposition testimony. Vague and almost self serving reasons were given for the changes including reflection, reviewed in another fashion, knowledge that this was a real issue, found a calendar, and so forth, to the extent that at trial recollections were sometimes significantly different and in one case were now "vivid". The court has had the opportunity to hear the witnesses, observe their demeanor, hear inflections, note pregnant pauses, and in all manners assess credibility above and beyond the spoken or typed word. Interestingly enough, there is little discrepancy in the testimony the court must rely upon in order to arrive at its decision in this case.

***3** The Petition under consideration was filed on May 11, 1998 and on June 11, 1998 Richard L. Pearse, Jr., Esquire, was appointed Guardian Ad Litem. On December 30, 1998, Mr. Pearse filed his Report of Guardian Ad Litem, a copy of which is in evidence as Respondents' Exhibit No. 2. An issue was made as to the impartiality of the Guardian Ad Litem. Mr. Pearse readily agreed that he has feelings and viewpoints regarding the withdrawal of feeding and hydration tubes and that he did not so advise the court prior to his appointment. It was suggested that he should not have served as Guardian Ad Litem since he possesses feelings on the subject. The court is unable to agree with that assertion since most attorneys who practice in this area of law surely do have feelings one way or the other. For the court to preclude an attorney from serving as Guardian Ad Litem simply because of feelings would deprive the court of this valuable resource. The court finds that Mr. Pearse did a good job but unfortunately he did not have an opportunity to interview all of those persons who testified at trial. However, that is not his fault. Mr. Pearse did testify that his recommendation was a "close call" and that the outcome of his report may have been changed had he found certain of this other testimony heard by the court to be creditable and reliable. Consequently, the court is unable to rely upon his conclusions except for the fact that he felt Michael Schiavo alone, due to his potential conflict of interest, was not able to provide clear and convincing evidence to support the granting of his Petition.

It has been suggested that Michael Schiavo has not acted in good faith by waiting eight plus years to file the Petition which is under consideration. That assertion hardly seems worthy of comment other than to say that he should not be faulted for having done what those opposed to him want to be continued. It is also interesting to note that Mr. Schiavo continues to be the most regular visitor to his wife even though he is criticized for wanting to remove her life support. Dr. Gambone even noted that close attention to detail has resulted in her excellent physical condition and that Petitioner is very involved. Again, these are collateral issues which have little or nothing to do with the decision the court must render.

There are no written declarations by Terri Schiavo as to her intention with regard to this issue. Therefore, the court

is left with oral declarations allegedly made to parties and non-parties as to her feelings on this subject. The testimony before this court reveals that she made comments or statements to five (5) persons, including her husband and her mother.

There was a lot of testimony concerning the Karen Ann Quinlin case in New Jersey. Mrs. Schindler testified that her daughter made comments during the television news reports of the father's attempts to have life support removed to the effect that they should just leave her (Karen Ann Quinlin) alone. Mrs. Schindler first testified that those comments were made when Terri was between 17-20 years of age but after being shown copies of newspaper accounts agreed that she was 11 perhaps 12 years of age at the time. A witness called by Respondents testified to similar conversations with Terri Schiavo but stated that they occurred during the summer of 1982. While that witness appeared believable at the offset, the court noted two quotes from the discussion between she and Terri Schiavo which raise serious questions about the time frame. Both quotes are in the present tense and upon cross-examination, the witness did not alter them. The first quote involved a bad joke and used the verb "is". The second quote involved the response from Terri Schiavo which used the word "are". The court is mystified as to how these present tense verbs would have been used some six years after the death of Karen Ann Quinlin. The court further notes that this witness had quite specific memory during trial but much less memory a few weeks earlier on deposition. At trial she mentioned seeing the television movie on Karen Ann Quinlin and had no hesitantly in testifying that this was a "replay" of that movie and she watched such replay at college in Pennsylvania. She also knew precisely what song appeared on a TV program on a Friday evening when Petitioner was away at McDonald's training school. While the court certainly does not conclude the the bad joke and comment did not occur, the court is drawn to the conclusion that this discussion most likely occurred in the same time frame as the similar comments to Mrs. Schindler. This could well have occurred during this time frame since this witness and Terri Schiavo, together with their families, spent portions of summer vacation together which would have included the mid-1970's.

***4** Michael Schiavo testified as to a few discussions he had with his wife concerning life support. The Guardian Ad Litem felt that this testimony standing alone would not rise to clear and convincing evidence of her intent. The court is not required to rule on this issue since it does have the benefit of the testimony of his brother and sister-in-law. As with the witness called by the Respondents, the court had the testimony of the brother and sister-in-law transcribed so that the court would not be hamstrung by relying upon its notes. The court has reviewed the testimony of Scott Schiavo and Joan Schiavo and finds nothing contained therein to be unreliable. The court notes that neither of these witnesses appeared to have shaded his or her testimony or even attempt to exclude unfavorable comments or points regarding those discussions. They were not impeached on cross-examination. Argument is made as to why they waited so long to step forward but their explanations are worthy of belief. The testimony of Ms. Beverly Tyler, Executive Director of Georgia Health Discoveries, clearly establishes that the expressions made by Terri Schiavo to these witnesses are those type of expressions made in those types of situations as would be expected by people in this country in that age group at that time. They (statements) reflect underlying values of independence, quality of life, not to be a burden and so forth. "Hooked to a machine" means they do not want life artificially extended when there is not hope of improvement.

Turning to the medical issues of the case, the court finds beyond all doubt that Theresa Marie Schiavo is in a persistent vegetative state or the same is defined by Florida Statues Section 765.101(12) per the specific testimony of Dr. James Barnhill and corroborated by Dr. Vincent Gambone. The medical evidence before this court conclusively establishes that she has no hope of ever regaining consciousness and therefore capacity, and that without the feeding tube she will die in seven to fourteen days. The unrebutted medical testimony before this court is that such death would be painless. The film offered into evidence by Respondents does nothing to change these medical opinions which are supported by the CAT scans in evidence. Mrs. Schindler has testified as her perceptions regarding her daughter and the court is not unmindful that perceptions may become reality to the person having them. But the overwhelming credible evidence is that Terri Schiavo has been totally unresponsive since lapsing into the coma almost ten years ago, that her movements are reflexive and predicated on brain stem activity alone, that she suffers from severe structural brain damage and to a large extent her brain has been replaced by spinal fluid, that with the exception of one witness whom the court finds to be so biased as to lack credibility, her movements are occasional and totally consistent with the testimony of the expert medical witnesses. The testimony of Dr. Barnhill establishes that

Terri Schiavo's reflex actions such as breathing and movement shows merely that her brain stem and spinal cord are intact.

***5** Argument was presented regarding the woman in New Mexico who awakened from a coma a few months ago after sixteen years. Dr. Barnhill testified that he would have to believe that patient had a different kind of condition or else it was a miracle. Since he knew nothing more than what appeared in the newspaper, any medical explanation would be "speculative". The court certainly would have expected a more complete explanation from the stipulated expert but the unrebutted evidence remains that Terri Schiavo remains in a persistent vegetative state. Dr. Barnhill earlier drew the distinction between comas which are catatonic in nature (no brain damage) and those caused by structural brain damage as in this case. Again, the court cannot speculate on the New Mexico situation as neither party has offered evidence in that regard.

The controlling legal authority in this area is a case which arose in St. Petersburg. A little over nine years ago, the Florida Supreme Court rendered its opinion in a case in which the State of Florida was opposing the withdrawal of feeding tubes. In that case Estelle Browning had a living will and the issue was essentially whether or not an incapacitated person possessed the same right of privacy to withhold or withdraw life supporting medical treatment as did a competent person. In re: Guardianship of *Estelle M. Browning* 568 So.2nd 4 (Fla.1990). The Florida Supreme Court began with the premise that everyone has a fundamental right to the sole control of his or her person. They cited in 1914 New York decision in holding that an integral component of this right of privacy is the "right to make choices pertaining to one's health, including the right to refuse unwanted medical treatment". The court also found that all life support measures would be similarly treated and found no significant legal distinction between artificial means of life support. Citing its earlier decision of *John F. Memorial Hospital, Inc. vs Bludworth,* 452 So.2nd 921 (Fla.1984), the Court held that the constitutionally protected right to choose or reject medical treatment was not diminished by virtue of physical or mental incapacity or incompetence. Citing the lower court, the Florida Supreme Court agreed that it was "important for the surrogate decisionmaker to fully appreciate that he or she makes the decision which the patient would personally choose" and that in Florida "we have adopted a concept of 'substituted judgment' ', and "one does not exercise another's right of self-determination or fulfil that person's right of privacy by making a decision which the state, the family or public opinion would prefer".

The Florida Supreme Court set forth a three pronged test which the surrogate (in this case the Petitioner/Guardian) must pursue in exercising the patient's right of privacy, In re: *Guardianship of Estelle M. Browning,supra.*The surrogate must satisfy the following conditions:

> "1) The surrogate must be satisfied that the patient executed any document knowingly, willingly and without undue influence and that the evidence of the patient's oral declaration is reliable;
>
> ***6** 2) The surrogate must be assured that the patient does not have a reasonable probability of recovering competency so that the right could be exercised directly by the patient; and
>
> 3) The surrogate must take care to assure that any limitations or conditions expressed either orally or in the written declaration have been carefully considered and satisfied."

The Florida Supreme Court established the clear and convincing test as a requirement and further held that when "the only evidence of intent is an oral declaration, the accuracy and reliability of the declarant's oral expression of intent may be challenged".

The court is called upon to apply the law as set forth in In re: *Guardianship of Estelle M. Browning,supra,* to the facts of this case. This is the issue before the court. All of the other collateral issues such as how much was raised in the fund-raising activities, the quality of the marriage between Michael and Terri Schiavo, who owes whom between Michael Schiavo and Mr. and Mrs. Schindler, Mr. and Mrs. Schindler's access or lack of access to medical information concerning their daughter, motives regarding the estate of Terri Schiavo if deceased, and the beliefs of family and friends concerning end of life decisions are truly not relevant to the issue which the court must decide. That issue is set forth in the three pronged test established by the Florida Supreme Court in the *Browning* decision, *supra.*The court must decide whether or not there is clear and convincing evidence that Theresa Marie Schiavo made reliable oral declarations which would support what her surrogate (Petitioner/Guardian) now wishes to do. The court has previously found that the second part of that test, i.e. the patient does not have a reasonable probability of

recovering competency, is without doubt satisfied by the evidence.

There are some comments or statement made by Terri Schiavo which the court does not feel are germane to this decision. The court does not feel that statements made by her at the age of 11 or 12 years truly reflect upon her intention regarding the situation at hand. Additionally, the court does not feel that her statements directed toward others and situations involving others would have the same weight as comments or statements regarding herself if personally placed in those same situations. Into the former category the court places statements regarding Karen Ann Quinlin and the infant child of the friend of Joan Schiavo. The court finds that those statements are more reflective of what Terri Schiavo would do in a similar situation for someone else.

The court does find that Terri Schiavo did make statements which are creditable and reliable with regard to her intention given the situation at hand. Initially, there is no question that Terri Schiavo does not pose a burden financially to anyone and this would appear to be a safe assumption for the foreseeable future. However, the court notes that the term "burden" is not restricted solely to dollars and cents since one can also be a burden to others emotionally and physically. Statements which Terri Schiavo made which do support the relief sought by her surrogate (Petitioner/Guardian) include statements to him prompted by her grandmother being in intensive care that if she was ever a burden she would not want to live like that. Additionally, statements made to Michael Schiavo which were prompted by something on television regarding people on life support that she would not want to life like that also reflect her intention in this particular situation. Also the statements she made in the presence of Scott Schiavo at the funeral luncheon for his grandmother that "if I ever go like that just let me go. Don't leave me there. I don't want to be kept alive on a machine." and to Joan Schiavo following a television movie in which a man following an accident was in a coma to the effect that she wanted it stated in her will that she would want the tubes and everything taken out if that ever happened to her are likewise reflective of this intent. The court specifically finds that these statements are Terri Schiavo's oral declarations concerning her intention as to what she would want done under the present circumstances and the testimony regarding such oral declarations is reliable, is creditable and rises to the level of clear and convincing evidence to this court.

***7** Those statements above noted contain no limitations or conditions. However, as Ms. Tyler noted when she testified as to quality of life being the primary criteria in artificial life support matters, Americans want to "try it for awhile" but they do not wish to live on it with no hope of improvement. That implicit condition has long since been satisfied in this case. Therefore, based upon the above and foregoing findings of fact and conclusions of law, it is

ORDERED AND ADJUDGED that the Petition for Authorization to Discontinue Artificial Life Support of Michael Schiavo, Guardian of the Person of Theresa Marie Schiavo, an incapacitated person, be and the same is hereby GRANTED and Petitioner/Guardian is hereby authorized to proceed with the discontinuance of said artificial life support for Theresa Marie Schiavo.

DONE AND ORDERED.

All Citations

Not Reported in So.2d, 2000 WL 34546715