

## Closing the Schiavo Case: An Analysis of Legal Reasoning

CHAD D. KOLLAS, M.D., F.A.C.P., F.C.L.M., F.A.A.H.P.M.<sup>1</sup> and  
BETH BOYER-KOLLAS, M.S., M.Div., Ph.D., C.A.P.C.<sup>2</sup>

### ABSTRACT

The conflict surrounding Terri Schiavo, whom Florida's courts had determined wished not to be kept alive in a persistent vegetative state, played out on a national stage. The dispute between Schiavo's husband and parents engulfed America's legislative, executive, and judicial systems, raising profound questions about the laws and policies that govern advance directives. In this paper, we offer an analysis of the legal reasoning in *Schiavo* and offer predictions about the case's likely impact on law and policy in the future. We reviewed an extensive collection of case materials that included consensus definitions of persistent vegetative state, media reports, court decisions and briefs, legal chronologies, guardian reports, and Schiavo's autopsy report. We also reviewed cases cited as sources for legal reasoning used in *Schiavo*, including *Quinlan*, *Cruzan*, and *Browning*. We also examined the political, cultural, and media factors that affected the conflict. Based upon these reviews, we identified the legal reasoning that decided the Schiavo conflict. We found that Florida's constitutional right to privacy, a principle that shaped the Florida statutory and case law, guided the courts' consistent rulings. The conflict that characterized the case reflected profound differences in American politics rather than a failure of the medical and/or legal systems. The outcome of the Schiavo case remained consistent with established Florida statutory and case law, and honored Terri Schiavo's state constitutional right to privacy. Although *Schiavo* may not affect advance directive law and policy in palliative medicine immediately, evidence suggests it has already increased interest in creating living wills.

### INTRODUCTION

IN NOVEMBER 2002, Last Acts, a highly-acclaimed national coalition dedicated to improving end-of-life care, published the first comprehensive report on the condition of dying in America.<sup>1</sup> Last Acts created state report cards for a variety of quality measures for end-of-life care, including a grade for "quality of state advance directive laws." The state of Florida received an "A" in this category.<sup>1</sup> Only a few months later, however, the controversial case of Terri Schiavo cap-

tured national media attention, eventually deteriorating into a conflict characterized by some scholars as a failure of law, medicine, and ethics.<sup>2</sup> The conflict surrounding the Schiavo case raised fundamental questions about the quality and strength of Florida's advance directive laws and policies related to end-of-life care.<sup>3,4</sup>

In our experiences as providers of palliative care with research interests in legal medicine,<sup>3,4</sup> we had observed that initial reports of the Schiavo conflict examined it from an ethical perspective, often in editorial letters.<sup>2,5</sup> Later articles re-

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<sup>1</sup>Department of Palliative Medicine, M.D. Anderson Cancer Center, Orlando, Florida.

<sup>2</sup>Orlando Regional Medical Center, Orlando, Florida.

viewed the case's chronology, medical, legal, and ethical aspects at a relatively general level but offered little analysis about the legal reasoning applied to the case.<sup>6-8</sup> In a troubling recent development, an apparently thorough examination of the legal aspects of the case contained several substantive errors and failed to include reviews of critical information, including Terri Schiavo's guardian and autopsy reports.<sup>9</sup> Given the prominence of the Schiavo case and the limitations of these previous efforts, we sought to comprehensively analyze, describe, and explain the legal reasoning that characterizes *Schiavo*, producing a detailed review of the many court decisions, motions, orders, petitions and laws involved in its resolution. We also intended to dispel myths, clarify misperceptions, and refute inaccuracies that have come to characterize *Schiavo*, using the most objective information available and citing multiple sources whenever possible. Based upon our findings, we will attempt to predict how the Schiavo case will impact end-of-life health care policy and palliative care in the future.

## METHODS

To prepare this analysis, we reviewed materials from a number of sources. We reviewed the Florida statutes that govern advance directives and proxy decision-making, as well as the Florida Constitution. We also examined copies of original court documents, including specific decisions, case briefs, and other legal documents, such as the reports of the court-appointed guardians assigned to Terri Schiavo. We obtained and reviewed relevant police reports, reports from Florida's Department of Children and Families (DCF), and Terri Schiavo's autopsy report. We analyzed decisions from applicable landmark cases, including *Cruzan* and *Browning*, as well as analyses of the legal reasoning used in those cases. Finally, we reviewed a very large collection of newspaper articles about Terri Schiavo's case that we had compiled between 2000 and 2005.

When evaluating data from these resources, we gave greater weight to primary sources, such as copies of original court documents, over secondary sources, such as newspaper articles, when creating a detailed case chronology. We sought foremost to provide an objective summary of the facts of the case and identify the legal reasoning

applied in key court decisions. We also evaluated this legal reasoning for sufficiency based upon higher court opinions, expert interpretations of legal statutes, and relevant scholarly articles and reviews.

## RESULTS

### *General observations*

Early in the course of our study, we learned that Internet sources offered better access to useful documents and information than MEDLINE searches. For example, a PubMed search conducted on January 18, 2006, for the term, "Terri Schiavo," identified 48 articles,<sup>10</sup> while the same search on the same day using (www.alltheweb.com) identified 3.63 million applicable links.<sup>11</sup> We also noted that the quality of information from Internet sources varied substantially. We found that many articles identified by MEDLINE were editorial in nature, while Internet sites usually contained chronologies with links to copies of original court documents, usually in .pdf format. Notably, Internet chronologies from different sites often appeared to be nearly identical, suggesting that they were "acquired" from a single, but unidentified, primary source.

We also observed that the Schiavo case distinguished itself from its predecessors in several unusual ways. *Schiavo* was one of the most extensively litigated cases in American judicial history.<sup>9</sup> It became politically charged with unprecedented involvement of the state and federal legislative, executive, and judicial branches of government.<sup>6,9</sup> Additionally, "much of the public discussion of the tragedy has been based on inaccurate information regarding the facts of the case and the actual legal and ethical issues involved."<sup>7</sup>

To understand these aspects of the Schiavo case better, and to identify the sources used for legal reasoning, we have expressed many of our findings in the form of a detailed chronology. We found that most useful historical reviews of the Schiavo case were the Guardian Ad Litem report by Dr. Jay Wolfson<sup>12</sup> and the accounts of the relevant case history described by the Florida Supreme Court.<sup>13,14</sup> We also used supplemental material from chronologies on three useful Internet sites,<sup>15-17</sup> although one site has limited access to previously free information<sup>15</sup> and another has restructured its format.<sup>17</sup>

## DETAILED CASE CHRONOLOGY

*The early years (before 1990).* Theresa Marie Schiavo, commonly known as Terri, was born on December 3, 1963, and raised outside of Philadelphia, Pennsylvania.<sup>12,14,18</sup> Terri struggled with obesity throughout her childhood and adolescence, weighing 250 pounds by 1981 during her senior year at a Catholic high school,<sup>19</sup> while standing at just 5 feet 3 inches tall.<sup>20</sup> After losing about 100 pounds on a NutriSystem diet (NutriSystem, Inc., Horsham, PA),<sup>12,19</sup> Terri met her first boyfriend, Michael Schiavo, then married him on November 3, 1984.<sup>12</sup> Most court documents indicate Terri and Michael were happily married,<sup>12,14,18</sup> but some accounts dispute this, with allegations of marital discord just before Terri's collapse at home.<sup>21</sup> Terri lost an additional 40 pounds during a course of treatment by an obstetrician addressing her and Michael's struggles with infertility.<sup>12</sup>

*Prelude to conflict (February 1990 to January 1993).* On February 25, 1990, Terri Schiavo suffered a cardiac arrest at home around 5:30 AM.<sup>22</sup> Court documents and most news reports implicate a cardiac arrhythmia arising from hypokalemia related to Terri's presumed eating disorder as the cause of her cardiac arrest.<sup>12,18</sup> Some sources have incorrectly described Schiavo's collapse as a myocardial infarction,<sup>9</sup> but her autopsy definitively refutes this error.<sup>23</sup> Several sources have also speculated that other factors may have caused or affected Terri's hypokalemia,<sup>12,21</sup> including the possibility that it arose from administration of intravenous fluids and medications, notably epinephrine, given by emergency personnel during her resuscitation efforts.<sup>23</sup>

On June 18, 1990, the Circuit Court of the Sixth Judicial Court of Florida appointed Michael Schiavo as Terri's legal guardian without legal dispute.<sup>24</sup> The court found Terri to be incapacitated due to coma and anoxic encephalopathy.<sup>18,24</sup> For 3 years, Terri continued to receive rehabilitative care in several skilled care facilities, and efforts to treat her condition included a trip to California for implantation of an experimental thalamic stimulator.<sup>6,12,21</sup> She continued to receive physical, occupational, and speech therapy, and periodic neurologic examinations for several years,<sup>2</sup> but she never regained consciousness.<sup>18</sup> During this time, Terri's parents, Robert and Mary

Schindler enjoyed an "amicable" relationship with Michael Schiavo by several accounts.<sup>12,14,18</sup>

In January 1993, Michael Schiavo settled a malpractice case brought against Terri's obstetrician for failure to diagnose her eating disorder as a result of a failure to obtain an adequate medical history.<sup>12,19-21</sup> Michael Schiavo received \$750,000 in economic damages that were placed into a trust for Terri's care, and he received \$300,000 personally for loss of consortium.<sup>12,18,25</sup>

*The guardianship conflict begins (February 1993 to early 2000).* In February 1993, after the malpractice settlement, the Schindlers challenged Michael's guardianship for the first time.<sup>12</sup> Although past legal proceedings had revealed no basis for the removal of Michael as Terri's guardian,<sup>12</sup> the court designated John H. Pecarek, an attorney from Tampa, as Terri's Guardian Ad Litem.<sup>26</sup>

By early 1994, Michael's attitude about Terri's prognosis began to change.<sup>12</sup> After she was transferred to an extended care facility in Largo, Florida, Terri developed a urinary tract infection, and Michael changed her code status to do-not-resuscitate (DNR).<sup>27</sup> When the extended care facility's staff objected to this, Michael revoked the DNR order, but later transferred Terri to a different long-term facility.<sup>12</sup> On March 1, 1994, John Pecarek released his Guardian Ad Litem report, but it described no inappropriate actions on the part of Michael in acting as Terri's guardian, characterizing him as "very aggressive and attentive" with regard to her care.<sup>12</sup> After 2 more years of litigation, the guardianship court dismissed with prejudice the Schindlers' actions to remove Michael as Terri Schiavo's guardian.<sup>12</sup> Three years later (7 years after her collapse) Michael began to plan legal action to withdraw Terri's life support.<sup>12</sup>

In May 1998, Michael formally submitted the first court petition to withdraw Terri's life support.<sup>6,12</sup> On June 11, 1998, the court appointed a new Guardian Ad Litem, Richard Pearse, to review Michael Schiavo's request to withdraw Terri Schiavo's artificial feeding.<sup>12,28</sup> On December 29, 1998, Pearse released his report and confirmed that Terri Schiavo was in a persistent vegetative state (PVS) based upon relevant medical criteria.<sup>28-30</sup> In his report, Pearse found that Michael Schiavo's testimony about Terri's life support preferences was not "clear and convincing," citing Michael's potential conflict of interest re-

garding the inheritance of Terri's settlement after her death.<sup>12,28</sup> Pearse recommended denial of Michael's petition for withdrawal, unless another source of clear and convincing evidence of Terri's wishes about life-prolonging procedures could be identified.<sup>28</sup>

In response to this report, Michael Schiavo's attorneys filed a Suggestion Of Bias motion against Pearse, arguing that Michael had explicitly offered to divest himself of his financial interest in the case in prior legal proceedings.<sup>12</sup> Additionally, Pearse's report suffered from "significant chronological deficits and factual errors, detracting from its credibility."<sup>12</sup> In response to Michael's challenge, Pearse petitioned the court for either additional authority or discharge from the Schiavo case in February 1999.<sup>12</sup> In June 1999, the court discharged Pearse from his guardian duties, and Michael Schiavo regained Terri's guardianship.<sup>12</sup> The Schindlers subsequently pursued several other unsuccessful legal actions to discharge Michael as Terri's guardian and block the petition to remove her life support.<sup>12</sup>

*First order to remove artificial feeding (January 2000 to March 2001).* After hearing numerous petitions from Michael Schiavo and the Schindlers, Judge George Greer, the Circuit Court of the Sixth Judicial Court of Florida in Pinellas County, ordered the removal of Terri's feeding tube for the first time.<sup>31</sup> Judge Greer applied the Florida Supreme Court's decision in *Browning* as the legal basis for his decision in the Terri Schiavo case.<sup>32,33</sup> Judge Greer also cited testimony by Scott Schiavo, Michael's brother, and Joan Schiavo, Scott's wife, as providing "clear and convincing evidence" of Terri's wishes about life prolonging procedures.<sup>12,31</sup> During a hearing regarding Terri's wishes, Scott Schiavo testified that while attending a funeral luncheon for his grandmother, Terri had stated, "Don't let me go on like that. Don't leave me there. I don't want to be kept alive on a machine."<sup>12,31</sup> Joan Schiavo testified that she and Terri had been watching a television movie in which a man was in a coma after an accident, and that Terri wanted it stated in her will that she would want "tubes and everything taken out" if that ever happened to her.<sup>12,31</sup>

The Schindlers subsequently requested that Judge Greer issue an order for the performance of a swallow study to determine if Terri could receive nutrition orally, in the absence of a feeding tube.<sup>34</sup> Judge Greer denied this request, holding

testimony by Dr. James Barnhill, Michael Schiavo's medical witness, who had described Terri's past failures during multiple swallow tests, as clear and convincing.<sup>34</sup> Greer also cited the affidavits of Drs. Jay Carpenter and John David Young, the Schindler's medical witnesses, who testified that while they believed Terri could swallow her own oral secretions, they did not believe she could swallow a sufficient amount of food or liquid to remain alive.<sup>34</sup>

A few months later, the court scheduled more hearings to evaluate what the Schindler's attorneys described as "new evidence."<sup>12</sup> This evidence included new allegations against Michael Schiavo involving marital infidelity, failure to provide adequate care for Terri, and mismanagement of her trust account, creating another challenge to Michael's competency to serve as Terri's guardian.<sup>12</sup> During these hearings, the Schindlers presented "gruesome" testimony about what medical measures they would approve to maintain Terri's life, including amputation of all her limbs if she had developed gangrene or open-heart surgery if she had developed heart disease.<sup>12,35</sup> The Circuit Court denied these motions to remove Michael as Terri's guardian, and Judge Greer scheduled April 24, 2001, as the date for removal of her feeding tube.<sup>12</sup>

*Schiavo I through Schiavo IV (April 2001 to September 2003).* The Schindlers appealed Judge Greer's court order for removal of Terri's artificial feeding to the Florida 2nd District Court of Appeal (2nd DCA) in Lakeland, Florida, in a decision that became known as *Schiavo I*.<sup>18,36</sup> On January 24, 2001, this appellate court issued a ruling that held the following: (1) "The evidence [was] overwhelming that Theresa was in a permanent or persistent vegetative state" that allowed for withdrawal of life prolonging procedures; (2) There was no reasonable probability that Terri would regain the capacity to make a competent decision about withdrawal of life support; (3) A trial court could act as guardian and make a decision when conflict within family prevented a relative's surrogate decision; and (4) The evidence in the case affirmed the trial court's determination that Terri Schiavo would have chosen to forego life-prolonging treatment.<sup>18,36</sup> The appeals court cited its own ruling in *Browning*,<sup>32</sup> the Florida Supreme Court's ruling in *Browning*,<sup>33</sup> and the Florida Statutes<sup>37</sup> as the legal basis for authorizing the withdrawal of Terri Schiavo's life support.

The Schindler's filed an emergency motion to stay the removal of Terri's feeding tube, but the Florida Supreme Court denied this motion on April 18, 2001.<sup>38</sup> On April 26, 2001, Terri's feeding tube was clamped, in accordance with Judge Greer's February 11, 2000 order.<sup>12,31</sup> In response, the Schindlers filed a civil action "in their capacity as 'natural guardians' for Theresa," which resulted in a temporary injunction against the tube removal and a review by the trial court.<sup>12</sup> Michael countered by filing an emergency motion to vacate this injunction, resulting in a second review by a civil trial court, supervised by Judge Frank Quesada, with a subsequent appeal to the 2nd DCA.<sup>12,39</sup>

On July 11, 2001, the 2nd DCA ruled that the Schindlers had standing as parties of interest in Terri's case, and furthermore, they could challenge the probate trial court's order to terminate Terri Schiavo's life support, a decision now known as *Schiavo II*.<sup>39,40</sup> The appellate court also ruled that this challenge could be supported either by new evidence, such as discovery of an advance directive, or a substantive change in circumstances, such as the discovery of a cure for a terminal condition.<sup>39,40</sup> This ruling resulted in referral of the matter back to the guardianship court of Judge Greer for further review.<sup>41</sup>

Upon review in the guardianship court, Judge Greer did not change his order based on his understanding of *Schiavo II*.<sup>39,40</sup> The 2nd DCA subsequently ruled, in a decision that became known as *Schiavo III*, that its opinion in *Schiavo II* had misled Judge Greer.<sup>41,42</sup> The 2nd DCA held that that the Schindlers' challenge offered a "colorable entitlement" to relief from the tube removal order in that Terri might have wanted to pursue new medical treatment, if it had become available since the decision in *Schiavo I*.<sup>18,36,41,42</sup> This "colorable entitlement" was based on the "marginal" testimony of an osteopathic physician, Dr. Webber, who stated he had successfully treated patients in Terri's condition and felt he could help her.<sup>12</sup> The 2nd DCA therefore reversed part of the trial court's decision and ordered a *new* evidentiary trial to determine whether Terri would have wanted to pursue new treatment.<sup>41,42</sup>

The 2nd DCA specified that the new evidentiary hearing would be structured as follows:<sup>41,42</sup> (1) Michael Schiavo would appoint two medical expert witnesses to support his case; (2) The Schindlers would appoint two medical expert witnesses to present their case; and (3) Both par-

ties would choose a fifth medical expert witness jointly, but, if they were unable to agree upon an expert, the trial court would appoint the fifth medical expert witness. Predictably, Michael and the Schindlers could not agree on an expert witness.<sup>12,43</sup> On March 14, 2002, the Florida Supreme Court denied the Schindlers' motion to rehear *Schiavo III*, setting the stage for the second evidentiary hearing in Terri Schiavo's saga.<sup>44</sup>

By May 2002, the 2nd DCA had appointed its own medical expert witness to allow the second evidentiary hearing to proceed.<sup>12</sup> The court granted the medical expert witnesses access to examine Terri and make videotapes to present as evidence at trial.<sup>12</sup> Both sides deposed each medical expert, and each expert also prepared a written report of his findings for presentation at trial.<sup>12</sup> The Schindlers chose two expert witnesses, but "curiously" did not choose Dr. Webber, who had offered the testimony to the 2nd DCA that resulted in the creation of the evidentiary hearing.<sup>12</sup> Dr. William S. Maxfield, a radiologist from Manatee Diagnostic Clinic in Florida, testified that therapy involving hyperbaric oxygen offered "significant probability" for Terri's improvement; Judge Greer pointed out the lack of case studies in the literature that described this treatment for PVS.<sup>6</sup> Dr. William S. Hamasfar, a board-certified neurologist from St. Petersburg, testified that he had patented a vasodilatory therapy for cerebral ischemia, but offered objective evidence of improvement in only 1 of 50 patients whom he had treated.<sup>6</sup>

Michael's witnesses included Dr. Ron Cranford, a professor and former chief of neurology at the University of Minnesota, recognized widely as an expert in PVS, and Dr. Melvin Greer, a professor of neurology at the University of Florida.<sup>6</sup> The court's independent expert was Dr. Peter Bambakidis, a professor of neurology at Case Western Reserve University and clinical physician at the Cleveland Clinic.<sup>6</sup> Both of Michael Schiavo's medical expert witnesses and Dr. Bambakidis testified that Terri Schiavo suffered from PVS with no chance of recovery.<sup>6</sup>

The trial court deemed the testimony of Michael's medical witnesses and its own medical witness to be clear and convincing, thereby upholding its court order to remove Terri's tube feeding.<sup>12</sup> This ruling prompted the Schindlers to pursue yet another wave of appeals and petitions to remove Michael as Terri's guardian.<sup>12</sup> These efforts culminated in an appeal of the ruling from

the second evidentiary hearing, which became known as *Schiavo IV*.<sup>45,46</sup>

On June 6, 2003, after the 2nd DCA panel of judges engaged in "a *de novo* review of all the facts, testimony, and videotapes presented at [the evidentiary] trial,"<sup>12</sup> the appellate court affirmed the trial court's rulings and set a trial court hearing date for the removal of Terri's feeding tube.<sup>12,45,46</sup> In August 2003, the Schindlers appealed the 2nd DCA's decision in *Schiavo IV* to the Florida Supreme Court.<sup>45-47</sup> On August 22, 2003, the Florida Supreme Court denied the Schindlers petition for review, noting that no motion for a rehearing would be entertained.<sup>48</sup> On September 9, 2003, based on the Florida Supreme Court's denial for a rehearing of *Schiavo IV*, Judge Greer set a date of October 15, 2003, for the removal of Terri's feeding tube.<sup>12,49</sup> This represented the second court order for the discontinuation of Terri Schiavo's artificial nutrition.

*The Florida Legislature and governor enter the fray (Fall 2003 to April 2004).* In addition to their earlier Florida Supreme Court petition, the Schindlers had also petitioned the U. S. District Court for the Middle District of Florida, in Tampa, for a review of Terri Schiavo's case. To supplement their review, the District Court judges requested that Florida Attorney General, Charles J. Crist, Jr., provide guidance about the constitutionality of Chapter 765 of the Florida Statutes with regard to Terri Schiavo's case.<sup>50</sup> Crist noted that Chapter 765 represented a legislative response to "seminal Florida [court] decisions"<sup>50</sup> involving surrogate decision-making, including *In re Browning*,<sup>32,33</sup> that will be more fully discussed below, *Bludworth*,<sup>51</sup> and *In re Barry*.<sup>52</sup> Crist concluded that Florida Statute 765 was constitutional and did not violate the Schindlers' or Terri's right to equal protection under the law.<sup>50</sup>

At this point, the "national media coverage, active involvement by groups advocating right to life, and attention by the Florida Governor's office and Florida Legislature, catapulted Theresa's case into a different dimension."<sup>12</sup> Terri's feeding tube was disconnected for the second time on October 15, 2003, per Judge Greer's second court order.<sup>12,49</sup> In a special session held on October 21, 2003, the Florida Legislature passed HB-35E, known as "Terri's Law," giving Governor Jeb Bush special authorization to stay the disconnection of Terri Schiavo's feeding tube and required

the appointment of a new GAL.<sup>12,53-55</sup> On the same day, Governor Bush issued an executive order for a one-time stay of the withholding of Terri's artificial nutrition, and her artificial feeding resumed.<sup>56</sup> On the same day, Michael Schiavo responded by filing an injunction against Governor Bush's executive order in the Circuit Court for Pinellas County.<sup>57</sup>

In late October 2003, the conflict expanded as other political forces joined the dispute. The American Civil Liberties Union (ACLU) joined Michael's legal team.<sup>58</sup> U.S. President George W. Bush announced his support of Florida Governor Jeb Bush's actions, while the American Center for Law and Justice (ACLJ), a legal advocacy group representing the interests of religious conservatives, filed an amicus brief on behalf of the Schindlers.<sup>59,60</sup>

In November 2003, Governor Bush filed a motion to remove Pinellas County Circuit Court Judge Douglas Baird from the case, alleging bias, but Judge Baird refused.<sup>61</sup> An appeals court later rejected Governor Bush's request, and Judge Baird remained on the case.<sup>62</sup> Florida Governor Bush's legal team then sought to reexamine the witnesses who had testified about Terri's life support preferences,<sup>60</sup> although the courts had ruled on Terri Schiavo's wishes previously.<sup>36,39</sup> In a newspaper editorial, Governor Bush explained that he thought Judge Greer had erred in his view of the clear and convincing evidence for Terri's wishes about life support.<sup>63</sup> In response, Michael Schiavo filed a motion for a protective order against Governor Bush to prevent the Governor's legal team from deposing the witnesses that had testified about Terri's wishes, arguing that this issue had already been decided repeatedly.<sup>64,65</sup> Michael Schiavo also filed a motion for a summary judgment from the Pinellas County Circuit Court, arguing Governor Bush's executive order and HB-35E were unconstitutional under Florida law.<sup>66</sup>

On December 1, Jay Wolfson, Dr.P.H., J.D., an attorney and head of the Florida Health Information Center and professor at University of South Florida,<sup>67</sup> published his report after a complete review "of the entire court file of 13 years."<sup>12</sup> Governor Bush had appointed Wolfson as Terri's Guardian Ad Litem pursuant to the passage of HB-35E.<sup>53,54</sup> Wolfson asserted that Governor Bush should lift the stay for three main reasons: (1) The scientific evidence clearly showed Terri was in a persistent vegetative state and would

never be able to swallow independently; (2) The evidence for medical fact was deemed to be clear and convincing by the trier of the fact in the case, Judge Greer; and (3) The rules of the case, which Wolfson identified as Florida case law, including *Browning*, and Florida statutory law, were followed correctly by the courts.<sup>12,68</sup> With this conclusion in mind, Wolfson recommended that he be permitted to assist with mediation of the dispute between the Schindlers and Michael Schiavo to reach a peaceful ending to the conflict.<sup>12</sup>

On December 23, 2003, Judge Baird ruled against Governor Jeb Bush's request for another trial to reexamine Terri's life support preferences, but Governor Bush appealed to the 2nd DCA.<sup>69</sup> On the same date, 3 weeks after the publication of his Guardian Report, Chief Circuit Judge David Demers dismissed Wolfson as Terri's Guardian Ad Litem, thereby restoring Michael as Terri Schiavo's guardian.<sup>70</sup> On January 4, 2004, the Schindlers unsuccessfully petitioned the circuit court to have Wolfson reinstated as Guardian Ad Litem.<sup>71</sup> A few weeks later, as conflict in the Schiavo case continued to grow, Florida Senate President, Jim King, admitted he had felt great pressure to vote for HB-35E and begun to regret his support for the measure.<sup>72</sup>

In a somewhat surprising decision, on February 13, 2004, the 2nd DCA upheld Governor Bush's request to depose witnesses to reexamine Terri's life support preferences citing a legal error by the trial court.<sup>73</sup> Judge Davis explained that this reversal was based upon the trial court's failure to apply the *Morgareidge* intervention rule, as the trial court did not specifically explain, as required by law, why it felt the Schindler's interest in the appeal was legally insufficient.<sup>73-75</sup> Michael again challenged Governor Bush's ensuing attempt to reexamine the witnesses.<sup>76</sup>

In March 2004, the strife and allegations continued. The Schindlers asked Judge Greer to hold Michael in contempt-of-court for not providing information about an alleged change in Terri's condition.<sup>77</sup> Judge Greer denied the Schindlers' motion because it was based on Mrs. Schindler's hearsay testimony, and she failed to directly identify the source of the allegation.<sup>78</sup> A day later, Michael requested that Terri be transferred to a hospital to evaluate puncture wounds on her arms that were found after a visit by the Schindlers.<sup>79</sup> Clearwater police concluded, however, there was "no evidence [that Terri Schiavo was] a victim of foul play."<sup>80</sup>

On April 23, 2004, the 2nd DCA denied a request by Governor Bush for a change in venue to Tallahassee, Florida, and denied the Governor's motion, which had alleged improper venue, to dismiss Michael's motion for summary judgment.<sup>81,82</sup> One day later, George Felos, Michael's attorney, called for Governor Bush's legal team to cease its efforts to reexamine witnesses who had testified about Terri's life support preferences.<sup>83</sup> Later in April 2004, the Schindlers filed suit to have their visitation rights with Terri restored, as Michael, acting as Terri's guardian, had rescinded them.<sup>84</sup>

*Terri's Law declared unconstitutional (May 2004 to January 2005).* On May 5, 2004, Judge Baird upheld Michael's motion for summary judgment, declaring Terri's Law "unconstitutional, both on its face and as applied to Mrs. Schiavo."<sup>85</sup> Baird held that Terri's Law violated Florida's constitutional right to privacy and Florida's constitutional requirement for separation of powers within the state government, specifically citing a legislative and executive encroachment upon judicial powers.<sup>85,86</sup> Governor Bush appealed the decision to the Florida Supreme Court, arguing that the Circuit Court deprived the governor of his due process right to discovery in the case, among other allegations of procedural errors.<sup>87</sup> Michael Schiavo, represented by George Felos and the ACLU, argued that Terri's Law had violated Terri Schiavo's constitutional right to privacy as a Florida citizen and also violated the doctrine of separation of powers.<sup>88</sup> Governor Bush responded to Michael Schiavo's answer brief, repeating his argument that the lower court had violated his due process rights and refuting Michael's assertion that Terri's Law had granted the governor "standardless discretion" to ignore patients' health care choices.<sup>89</sup>

On September 23, 2004, the Florida Supreme Court affirmed the Circuit Court's order, declaring Terri's Law unconstitutional as a violation of the separation of powers doctrine, but without addressing the right to privacy issue that had dominated earlier rulings.<sup>14</sup> In response, Governor Bush filed a motion for rehearing by the Florida Supreme Court on October 4, 2004,<sup>90</sup> but on October 21, 2004, the Florida Supreme Court denied Governor Bush's motion for rehearing.<sup>91</sup> The following day, Governor Bush petitioned the U.S. Supreme Court for a Writ of Certiorari in the case.<sup>92</sup> Awaiting the U.S. Supreme Court's deci-

sion in January 2005, Governor Bush again asserted that the Florida Supreme Court had denied his "federal due-process rights . . . when he was barred from retrying the evidence that prompted a Pinellas County Circuit judge to rule that Terri Schiavo would chose death over her incapacitated state."<sup>93</sup>

*Desperate efforts to maintain Schiavo's artificial feeding (February to March 2005).* On February 24, 2005, at the request of Florida Governor Jeb Bush, the Florida DCF began investigating allegations of physical abuse by Michael against Terri Schiavo.<sup>94</sup> These allegations were made by the Schindlers and based partly upon a bone scan report posted on several Internet sites.<sup>95</sup> A few weeks later, on March 10, 2005, Judge Greer denied DCF's petition to intervene in Terri's guardianship dispute, noting that DCF's actions appeared to be "brought for the purpose of circumventing the Court's final judgment and order setting the [tube] removal date."<sup>96</sup> He also rejected DCF's contention that the timing of the tube removal ordered interfered with their "statutorily-mandated duty to investigate," observing that DCF had admitted it received "scores of abuse reports in [the Schiavo] case which it [had] obviously investigated and found to be unfounded."<sup>96</sup> (Judge Greer later released many of DCF's written investigate reports to the public, but kept sealed those documents used to conduct an *in camera* review.<sup>97</sup> None of the DCF reports recommended removal of Terri or change in her guardianship.<sup>97,98</sup>)

Also, on February 24, 2005, the same day that DCF had announced its plans to investigate the Schindlers' abuse allegations, Judge Greer had temporarily extended the stay that was keeping Terri's feeding tube in place, noting that he needed more time to assess Michael's ability to serve as her guardian.<sup>94</sup> After giving the matter further consideration on March 8, 2005, Judge Greer denied the Schindlers' motion to allow Terri to receive fluids and nutrition orally.<sup>99</sup> Judge Greer based this denial upon past medical testimony<sup>34</sup> that Terri was unable to swallow naturally.<sup>99</sup> One day later, Judge Greer denied the Schindlers' challenge of the legal sufficiency of his feeding tube removal order, a challenge based on the assertion that the court "lacked clear and convincing evidence" when making that decision.<sup>100</sup> The Schindlers' attorneys had argued that one of the witnesses who testified about Terri's

life support preferences had made an error regarding the date of death of Karen Ann Quinlan, and they suggested that the error had adversely affected the quality of the testimony.<sup>100</sup> Judge Greer countered that the testimony in question was not testimony upon which he found "clear and convincing evidence" of Terri's wishes.<sup>100</sup>

On the same day, Judge Greer also denied the Schindlers' motion to perform additional medical testing on Terri Schiavo.<sup>101</sup> The Schindlers had unsuccessfully argued several contentions: (1) that Terri's condition had changed from a PVS to a minimally conscious state; (2) that PVS is often misdiagnosed; (3) that prior medical evaluations of Terri's condition had become outdated; and (4) that a new neurologic test, the functional magnetic resonance imaging (fMRI), had become available and could be used to determine if Terri was in a minimally conscious state rather than PVS.<sup>101</sup> Judge Greer argued that the Schindlers' contentions failed to meet the "colorable entitlement" burden established in Schiavo III by the 2nd DCA.<sup>41,42,101</sup> Greer also cited a medical affidavit that had stated that fMRI was an experimental procedure not yet suitable for widespread diagnostic use.<sup>101</sup> In a response to these hindrances, the Florida Legislature again considered new bills that would have restricted a guardian's ability to discontinue artificial nutrition for an incapacitated person, but did not anticipate passage of any proposed measures as quickly as it had passed Terri's Law.<sup>102</sup>

The Schindlers' setbacks continued, and on March 19, 2005, the U. S. Supreme Court denied, without comment, their motion to reinsert Terri's feeding tube.<sup>103</sup> After this, the Schindler's filed for injunctive relief against the tube removal order with the U.S. District Court for the Middle District of Florida; Michael Schiavo followed with a motion against injunctive relief.<sup>104</sup> On March 22, 2005, the U. S. District Judge James Whittemore denied the Schindler's request for injunctive relief.<sup>105</sup> Judge Whittemore found no merit to the Schindlers' argument that Terri's constitutional "due process" and "equal protection" rights were violated.<sup>105</sup> One day later, the U. S. Court of Appeals denied the Schindlers' motion for a re-hearing for a temporary restraining order, upholding Judge Whittemore's decision.<sup>106</sup>

On March 24, 2005, the U.S. Supreme Court denied Florida Governor Jeb Bush's request for a Writ of Certiorari, thereby denying the Schindlers' request for a stay of enforcement for

the order to remove Terri's feeding tube.<sup>107,108</sup> The Schindlers had also filed an amended motion to the U.S. District Court for the Middle District of Florida, but this motion was also denied after a hearing on March 24, 2005.<sup>109</sup> On March 30, 2005, the U. S. Court of Appeals denied the Schindlers' motion for an expedited hearing of Terri's case, also.<sup>110</sup>

*The U. S. Congress and President enter the conflict (March 2005).* While the Schindlers were pursuing their fading legal options in court, the U.S. Congress became involved in the Schiavo dispute.<sup>6</sup> On March 18, 2005, the House Committee on Government Reform subpoenaed Michael Schiavo to testify about his actions regarding the withdrawal of Terri's artificial feeding.<sup>111</sup> The following day, a bill entitled, "For the Relief of the Parents of Theresa Marie Schiavo," was introduced to Congress, and a compromise version of the bill was passed in both the Senate and House of Representatives on March 20, 2005.<sup>112,113</sup> The Senate's version of the bill sought to give federal courts jurisdiction in the case, and the House of Representative's version had sought broader legislative changes involving the withdrawal of artificial nutrition in incapacitated patients.<sup>112</sup> The compromise bill was signed into law by U.S. President George W. Bush on March 21, 2005, creating the Protection of Incapacitated Persons Act of 2005.<sup>112,113</sup> This Act stated that "[a]ny parent of Theresa Marie Schiavo shall have standing to bring a suit under this Act . . . against any other person who was a party to State court proceedings relating to the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain the life of Theresa Marie Schiavo, or who may act pursuant to a State court order authorizing or directing the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain her life."<sup>112,113</sup>

Additionally, the Protection of Incapacitated Persons Act mandated a comprehensive review of the Schiavo case in the federal court system, "disagreeing with 7 years of court rulings by nineteen judges in seven different courts.<sup>6</sup>" As part of this required review, Federal District Judge James Whittimore declined to resume Terri Schiavo's artificial feeding, supporting Judge Greer's earlier decision.<sup>6</sup> The federal appellate court upheld Whittimore's decision in another review required by the Protection of Incapacitated Persons Act.<sup>106</sup> While the appellate court ac-

knowledged Congress's and the Schindlers' sincere concern for Terri Schiavo, the appellate court criticized Congress for compelling the federal court system to review the case, noting that the Protection of Incapacitated Persons Act violated the constitutional separation of powers doctrine by intruding upon the judiciary's power to direct the review legal cases.<sup>110</sup> It also took issue with Congress's assignment of jurisdiction for the case, which also encroached upon a traditional judicial power.<sup>110</sup> Ultimately, all of the federal courts involved in the mandatory review came to the same conclusion as Florida's courts, supporting the decision to discontinue Terri Schiavo's artificial feeding.<sup>6</sup>

*Terri Schiavo's death and its aftermath.* On March 31, 2005, 13 days after Judge Greer's order discontinued her artificial feeding, Terri Schiavo died in a hospice in Pinellas Park, Florida.<sup>114</sup> Over 2 months later, the Chief Medical Examiner from Pinellas County, Dr. Jon R. Thogmartin, released his autopsy findings on June 13, 2005.<sup>23,115</sup> Thogmartin concluded that Terri had suffered from "marked global anoxic-ischemic encephalopathy resulting in massive cerebral atrophy," creating "severe, irreversible brain damage," and that the autopsy findings were consistent with a diagnosis of a persistent vegetative state.<sup>23,115</sup> Schiavo's autopsy also included a special examination of her brain conducted by Dr. Stephen J. Nelson, a neuropathologist and diplomate of the American Board of Pathology, who noted that "neuropathologic examination of [a] decedent's brain . . . cannot prove or disprove a diagnosis of persistent vegetative state or minimally conscious state."<sup>23</sup>

Terri Schiavo's autopsy report also noted several important findings that refute commonly held misperceptions about her case. First, the examination of Terri Schiavo's brain showed that she suffered from cortical blindness, making it impossible for her to look meaningfully at visual stimuli.<sup>23</sup> Widely publicized videotape sessions had given the public the mistaken impression that she could follow objects with her eyes.<sup>116</sup> Second, the cause of Schiavo's death was dehydration—not starvation, a mistaken belief commonly advanced on several internet sites<sup>117,118</sup>—as evidenced by the presence of ample adipose tissue identified by Dr. Thogmartin.<sup>23</sup> Third, Terri Schiavo's toxicology report showed no trace of morphine or other medications, except for acet-

aminophen (Tylenol), thereby refuting false allegations of death-hastening efforts at Terri's hospice.<sup>23</sup> Thogmartin found no evidence of trauma or abuse, and he questioned the conclusions of the report of Terri's bone scan from November 2003.<sup>23,95</sup> And finally, Dr. Thogmartin concluded that Terri Schiavo "clearly" would have been unable to take nutrition by mouth as a result of the severity of her brain damage, and her autopsy revealed signs of aspiration pneumonia consistent with that finding.<sup>23</sup>

Despite the autopsy findings to the contrary, the Schindlers still expressed concerns that Michael had physically abused Terri and caused her death.<sup>115</sup> Echoing these concerns, Florida Governor Jeb Bush launched a special investigation into the original events surrounding Terri's collapse and Michael Schiavo's call to 911.<sup>119,120</sup> On July 8, 2005, the special prosecutor announced that he found no criminal wrongdoing by Michael related to the 911 call, signaling the end of the state of Florida's unprecedented involvement in the Schiavo case.<sup>121</sup>

## MAIN SOURCES FOR LEGAL REASONING

### *Evolution of "right to die" case law*

*Karen Ann Quinlan.* Karen Ann Quinlan's was the first legal case to explore the "right to die" involving a patient in a persistent vegetative state.<sup>6,122</sup> On April 15, 1975, 22-year-old Quinlan experienced a respiratory arrest, possibly from a drug overdose, although this was never proven.<sup>122</sup> She lapsed into a coma due to resultant anoxic brain injury.<sup>122</sup> Quinlan's parents sought to discontinue her ventilator and took their case to the New Jersey Supreme Court, which ruled that incapacitated patients retain the right to refuse unwanted medical treatment.<sup>6,122</sup>

The New Jersey Supreme Court noted that this refusal right arose from a right to privacy within the New Jersey Constitution.<sup>123</sup> The Court also cited the "unwritten constitutional right to privacy" recognized by the U. S. Supreme Court as implied by the Bill of Rights, so that honoring the wishes of the patient should control the legal outcome of such cases.<sup>124</sup> Additionally, the court held that quality of life could be considered as an additional factor in determining whether to terminate life support in similar cases.<sup>6</sup> At the time,

medical experts involved in Karen Quinlan's care believed she would not survive withdrawal of her respirator, but she did not die after her ventilator was disconnected.<sup>6,122</sup> Her parents continued her artificial nutrition for 10 years, at which time Quinlan died from aspiration pneumonia.<sup>6</sup>

*Nancy Cruzan.* The *Cruzan* decision represented the first time the U.S. Supreme Court became involved in a "right to die" case.<sup>125</sup> On January 11, 1983, Nancy Cruzan became incapacitated from severe injuries suffered in a motor vehicle collision.<sup>125</sup> She suffered prolonged cardiopulmonary arrest and developed severe hypoxemic brain injury, resulting in a persistent vegetative state.<sup>125</sup> Eventually, Nancy Cruzan received a feeding tube for artificial nutrition, but her parents sought to remove the tube in 1987 after she failed to recover.<sup>125,126</sup> A trial court approved the removal of the feeding tube, but the Missouri Supreme Court upheld an appeal by the Missouri Department of Health that contended the evidence for Ms. Cruzan's life support wishes was not clear and convincing.<sup>125</sup> Cruzan's parents appealed to the U. S. Supreme Court.<sup>125</sup>

The U.S. Supreme Court ruled that a competent person has a "liberty interest" under the Due Process Clause in refusing unwanted medical treatment, and this refusal right remains undiminished by incapacitation.<sup>9,125</sup> The Supreme Court also noted, however, that this "liberty interest" is not absolute, but must be weighed against relevant states' interests, such as the interest in the preservation of life.<sup>125</sup> The U.S. Supreme Court noted that although a health care proxy may express an incapacitated patient's wishes, the proxy's expression may be subject to legal challenges by the state.<sup>125</sup> When deciding these legal challenges, the Court held that states may, but are not required to, use a "clear and convincing evidence standard" when determining wishes of incapacitated patients, as Missouri did in the *Cruzan* case.<sup>9,125</sup>

Because the state of Missouri had not found Nancy Cruzan's roommate's testimony about Cruzan's life support wishes to be clear and convincing, Cruzan's artificial feeding was not withdrawn at that time.<sup>9</sup> Subsequently three of Nancy Cruzan's close friends came forward and offered additional evidence of her life support wishes that the courts then deemed clear and convincing, so Cruzan's artificial feeding was stopped on December 14, 1990.<sup>126</sup> She died 12 days afterward.<sup>126</sup>

*Estelle M. Browning*. On November 9, 1985, Estelle Browning, an 89-year-old Dunedin, Florida, woman suffered a massive stroke with an intracerebral hemorrhage, resulting in permanent and irreversible brain damage.<sup>32,33,127</sup> Unable to eat or swallow independently, she received a feeding tube in November 1986.<sup>127</sup> On September 2, 1988, Doris Herbert, who had lived with Ms. Browning from 1982 through 1986, and who was her second cousin and legal guardian, filed a petition to discontinue Browning's artificial feeding.<sup>32,127</sup> Ms. Herbert's legal brief emphasized both Browning's written advance directive that expressly refused artificial nutrition and hydration and Florida's Life Prolonging Procedure's Act.<sup>32,127,128</sup>

The State of Florida argued that Browning did not have a terminal condition, nor was her death imminent, arguing that activation of her living will depended upon the presence of those conditions.<sup>129</sup> Herbert's attorney, George Felos, who later represented Michael Schiavo, argued that an incompetent patient possesses the same right to refuse unwanted medical treatment as a competent patient.<sup>130</sup> He further argued that without artificial nutrition, Browning's condition would have been terminal, and she would have died within approximately 2 weeks after the discontinuation of artificial nutrition and hydration from dehydration.<sup>130</sup>

An amicus brief by the political interest group, Concern for Dying, which supported Herbert's efforts, argued that the right to forego life-sustaining treatment included the right to forego artificial nutrition.<sup>131</sup> Herbert was also joined in her legal battle by the American Geriatrics Society, which argued that "optimal medical decisions are those which advance the well-being of individual rights, as defined by each patient's values and preferences."<sup>132</sup> The Society for the Right to Die supported Herbert, as well, in her efforts to discontinue Browning's artificial feeding, echoing these same arguments and also asserting that Browning's individual rights outweighed the interests of the state of Florida.<sup>133</sup> Given the importance of the issues involved, the Florida 2nd DCA certified the question in the case for special review by the Florida Supreme Court.<sup>32,33</sup>

Although Estelle Browning died on July 16, 1989, making Herbert's claim moot, the Florida Supreme Court presciently accepted "jurisdiction because the issue raised is of great importance and likely to recur."<sup>33</sup> The Court defined the main

issue as "whether the guardian of a patient who is incompetent, but not in a permanent vegetative state, and who suffers from an incurable, but not terminal condition, may exercise the patient's right of self-determination to forego sustenance provided artificially by a nasogastric tube."<sup>33</sup> Based upon the medical evidence, the Court acknowledged that Browning's brain damage was permanent with virtually no chance for recovery and that termination of artificial feeding would result in her death, but it also noted that Browning's life could be lengthened for up to a year through continuation of artificial feeding.<sup>33</sup> The Florida Supreme Court ruled that Florida's constitutional right to privacy controlled the Browning case, noting that every individual "has a fundamental right to the sole control of his or her person."<sup>33</sup> The court further affirmed that an incapacitated person retains this same right to privacy, and that another person may exercise that right on behalf of the incapacitated person.<sup>33</sup>

Citing the likelihood that a similar case might arise in the future, the Florida Supreme Court created an approach for future conflicts in which the state, expressing its interest in preserving life, would dispute the actions of a surrogate, acknowledging that not all surrogates would act in accord with the wishes of the incapacitated person.<sup>33</sup> The Court held that in those cases the surrogate, acting upon explicit instructions from the patient, 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."<sup>33</sup> The Florida Supreme Court further advised, "Likewise, 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.”<sup>33</sup> The Court also recommended that “in determining whether the patient may recover competency or whether a medical condition or limitation referred to in the declaration exists, the surrogate or proxy must obtain, and may rely upon, certificates from the patient’s “primary treating physician” and “at least two other physicians with specialties relevant to the patient’s condition.”<sup>33</sup>

#### *Florida statutory law*

In response to the “seminal decisions” of *Cruzan* and *Browning*, the Florida Legislature enacted the provisions of Chapter 765 of the Florida Statutes, creating key definitions that were critical to the legal reasoning applied in *Schiavo*.<sup>50</sup> These legislative actions affirmed the judicial branch’s view of incapacitated patients’ right to refuse treatment and translated those views into law in the early 1990s.<sup>50</sup>

Chapter 765 formalized “a process in which an incapacitated person’s intentions can be exercised through family, friends, or guardians” consistent with the lessons of *Browning*.<sup>50,134</sup> Chapter 765 also established the hierarchy for designating a surrogate decision maker for a patient who had not specified a preference regarding life-prolonging measures. A court-appointed guardian represented the highest priority source for a proxy, followed by the patient’s spouse, then adult child(ren), then parent(s), then adult sibling(s), then other adult relative(s), and lastly, close friend(s).<sup>135</sup>

The Legislature also defined the term “life-prolonging procedure,” and, from the lessons learned in *Browning*, expressly included artificial nutrition as a life-prolonging procedure.<sup>50,136</sup> It additionally defined the term “living will” as a “witnessed document in writing, voluntarily executed by the principal,” or “a witnessed oral statement made by the principal expressing the principal’s instructions concerning life-prolonging procedures.”<sup>136</sup>

#### *Florida constitutional law*

In addition to its statutes, the Florida courts cited the state constitution as a key source for the legal reasoning in *Schiavo*. Since 1980, the Florida Constitution has contained an expressed right to privacy that states, “Every natural person has the right to be let alone and free from governmental intrusion into the person’s private life except as

otherwise provided herein.”<sup>137</sup> By design, the state legislature intended for this Florida *expressed* right to privacy to surpass the *implied* right to privacy from the United States Constitution.<sup>50,137</sup>

Furthermore, since its adoption, the Florida Constitution has contained an expressed doctrine of separation of governmental powers, which states, “The powers of the state government shall be divided into legislative, executive and judicial branches[;] no person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.”<sup>138</sup> Ultimately, this doctrine provided the basis on which the Florida Supreme Court declared Terri’s Law unconstitutional.<sup>14</sup>

## DISCUSSION

Our results lead us to believe that the most important factor that influenced the legal reasoning applied in *Schiavo* was Florida’s constitutional right to privacy, a principle that shaped the Florida statutory and case law that governed the case. We also believe that the consistency of the court decisions in the *Schiavo* conflict affirms the 2002 Last Acts report’s high grade for Florida’s advance directive laws. Furthermore, we do not view the outcome of the *Schiavo* case as a failure of law, medicine, and ethics, but would argue that the acrimony that characterized the case reflected profound ideological differences in modern American politics.

#### *Incapacitated patients’ right to refuse unwanted medical treatment*

Florida’s constitutional right to privacy provided the foundation for the legal reasoning that led Florida’s courts to consistently decide in favor of withdrawing Terri’s *Schiavo* artificial feeding.<sup>137</sup> This expressed privacy right, which surpasses the implied right to privacy in the U.S. Constitution, assures Floridians’ right to refuse unwanted medical treatment. We also believe our results and analysis of this legal reasoning, which evolved from *Quinlan*<sup>122</sup> to *Cruzan*<sup>125</sup> to *Browning*,<sup>32,33</sup> confirm its validity and affirm the Florida courts’ decisions in *Schiavo*.

Robert Walker describes the evolution of this legal reasoning, which began with *Quinlan*, noting that an incapacitated person possesses the same personal rights as a capacitated per-

son.<sup>122,139</sup> While incapacitated people lack the ability to exercise their rights, their basic personal rights cannot be “extinguished” by their incapacity.<sup>139</sup> To honor an incapacitated person’s basic right, therefore, “another person must exercise the incompetent person’s right on his or her behalf.”<sup>139</sup> In 1990, the Florida Supreme Court heard the *Browning* case because it viewed the right to privacy as a basic personal right, and because it correctly understood that Florida’s courts would undoubtedly face cases like *Quinlan* and *Cruzan* in the future.<sup>32,33</sup> The Court felt that addressing the issue at that time was so important, in fact, that it rendered a decision although Estelle Browning had died before the Court heard her case.<sup>127</sup>

In addition to the Florida Supreme Court’s emphasis on the state’s expressed constitutional right to privacy in *Browning*, it also identified crucial legal elements that would be applied to future cases, like *Schiavo*.<sup>33</sup> The Court recognized the necessity of establishing the medical facts in cases involving the refusal of medical treatment.<sup>33</sup> The Court held that these medical facts should include information about diagnosis and prognosis when considering cases like *Browning*,<sup>33</sup> embracing the “clear and convincing evidence” standard cited in *Cruzan*.<sup>125</sup> The Court also recognized that an incapacitated patient’s proxy might not act in a way that reflected the will or best interest of the patient. Given this, the Florida Supreme Court created guidelines to allow for legal challenges of proxy’s decisions in such cases.<sup>33</sup>

The *Browning* case also revealed several shortcomings in Florida’s advance directive laws in 1990. These included controversies about definitions of terms such as “end-stage” or “terminal condition” and whether artificial nutrition represented a life-prolonging procedure.<sup>33</sup> After *Browning*, the Florida Legislature clarified these definitions in Chapter 765 of the Florida Statutes.<sup>50,128,134–136</sup> Chapter 765 contained the advance directive laws that applied in the *Schiavo* case, laws which reflected the opinions of the medical community and the political will of the Florida citizenry after *Browning*.<sup>50</sup> By defining artificial nutrition as a life-prolonging procedure, Chapter 765 also extended the application of Walker’s line of reasoning to *Schiavo*.<sup>136</sup> The Florida courts ruled repeatedly that Terri Schiavo, if capacitated, would have refused life-prolonging procedures, and because Chapter 765

defines artificial nutrition as a life-prolonging procedure, her refusal of unwanted medical treatment must include the refusal of artificial nutrition.<sup>34,49,136</sup> Chapter 765 also impacted *Schiavo* profoundly because it defined an advance directive as either a written document or an oral statement about a patient’s life support preferences.<sup>136</sup>

#### *Browning created the rules for Schiavo*

Judge Greer and the 2nd DCA applied *Browning* in deciding *Schiavo*, both of which involved disputes about incapacitated patients’ right to refuse unwanted medical treatment.<sup>34,36,39–42,44,46</sup> Our review of those cases affirms the appropriateness of their approach. Furthermore, the Florida courts consistently ruled that the facts of the *Schiavo* case sufficiently fulfilled the legal sufficiency requirements created by Florida Supreme Court in *Browning*, and we again concur.<sup>33–36,39–42,44,46</sup>

In *Browning*, the Supreme Court held that a proxy “must be satisfied that the evidence of the patient’s oral declarations is reliable,” and “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.”<sup>33</sup> Judge Greer held that Terri’s surrogate, Michael Schiavo, had sufficiently determined Terri’s wishes regarding life support, citing his finding of clear and convincing evidence of that fact, the standard set by *Browning*.<sup>33,34</sup> The extensive litigation and unprecedented involvement of all branches of government at both state and federal levels assured as much as humanly possible that any “limitations or conditions expressed orally . . . [had] been carefully considered and satisfied,” again as required by *Browning*.<sup>33</sup> With regard to Michael Schiavo’s role as Terri’s health care surrogate, the courts applied the definitions and proxy hierarchy from Chapter 765 of the Florida Statutes in a straightforward manner.<sup>135</sup> Florida law dictated, therefore, that Michael Schiavo should serve as Terri’s guardian, unless he chose not to serve or unless otherwise determined in a court of law.<sup>135</sup>

Furthermore, both Judge Greer and the 2nd District Court of Appeal found clear and convincing evidence that because of her medical condition, Terri had no “reasonable probability of recovering competence” that would have allowed her to exercise her own rights, again applying the standard from *Browning*.<sup>18,33,34</sup> The courts re-

peatedly established Terri Schiavo's medical diagnosis, her persistent vegetative state, and her prognosis, again applying the clear and convincing evidence standard recommended by the Florida Supreme Court for cases that involved the refusal of medical treatment.<sup>33,34,36,39-42,44,46</sup>

### *Terri's Law and Florida's constitutional separation of powers*

In the Florida Supreme Court hearing that examined the constitutionality of Terri's Law, Michael Schiavo's legal team argued that the law was unconstitutional for two main reasons: (1) it violated Terri's state constitutional right to privacy and (2) it violated the Florida Constitution's doctrine of separation of powers within the state government.<sup>88</sup> Until that point, the Florida courts had largely based their legal reasoning on the case and statutory law that arose from the state's constitutional right to privacy.<sup>33,134,136</sup> The Florida Supreme Court declared Terri's Law unconstitutional based only upon its violation of Florida's constitutional requirement for separation of governing powers.<sup>14,138</sup> The Court found that in passing Terri's Law, the Florida Legislature and Executive Office had encroached upon the power of the Judiciary.<sup>14</sup>

Since the finding of unconstitutionality under Florida's separation of powers doctrine alone voided Terri's Law, the Court did not have to address the possible violation of Terri's right to privacy; a single finding of unconstitutionality sufficed. But, given the lower court's consistent focus on the privacy issue, why did the Florida Supreme Court choose its approach? We believe there are two possible answers to that question. Either the Court saw no reason to depart from its reasoning in *Browning* in the matter,<sup>33</sup> implying that the privacy issue already stood as decided, or the Court purposely avoided the privacy issue, possibly for political reasons. We suspect the latter explanation.

The implied U.S. constitutional "right to privacy" cited in *Cruzan* has also provided a legal basis to protect women's reproductive rights.<sup>124,140</sup> Recent studies suggest that most Americans who were opposed to the removal of Terri Schiavo's life support came from a "pro-life" political background and were viewed by politicians as a part of the base of the Republican party.<sup>141</sup> By deciding the constitutionality of Terri's Law based solely upon its violation of Florida's separation

of powers doctrine, the predominantly Republican Florida Supreme Court avoided alienating these members of the Republican party's voter base in late September of 2004, just weeks before a hotly contested presidential election.

### *The limited effect of federal intervention*

Although politics may have also prompted unprecedented federal involvement in the Schiavo conflict, the only legal decision that arose out of federal intervention came from a federal court review required by the Protection of Incapacitated Persons Act of 2005.<sup>112</sup> As noted above, the federal judges involved in the mandated review overwhelmingly affirmed the appropriateness of Florida's legal decision-making.<sup>6</sup> We feel that it is also very significant that the U.S. Supreme Court would not hear the Schiavo case.<sup>108</sup> We believe the legal reasoning behind the U.S. Supreme Court's non-intervention was simple: consideration of the Florida Supreme Court's decision about Terri's Law, which was based on Florida's constitutional separation of powers, would have implied that the Florida Supreme Court was not the ultimate legal authority over its own state law. Additionally, in response to appeals from the Schindlers, neither the U.S. District Court of Appeals nor the U.S. District Court for the Middle District of Florida found fault with the legal decision-making applied in the Schiavo case.<sup>109,110</sup>

### *Effect on health care policy and the practice of palliative medicine*

Although *Schiavo* resulted in almost no immediate policy changes, many experts believe that the "issues involved in cases like Schiavo's [are] not likely to disappear from the political agenda."<sup>141</sup> Some activists, for example, have characterized *Schiavo* as a disability rights case, suggesting that advocacy groups for the disabled should keep the issue on the political agenda.<sup>142</sup> Similarly, some medicolegal scholars have recently called for the development of a higher legal standard than the "clear and convincing evidence" standard applied in *Schiavo*, although U.S. Supreme Court Justice Brennan, in his *Cruzan* dissent, had argued just as convincingly for a less stringent, "balance of the evidence" standard when determining the life support preferences of incapacitated patients.<sup>9,125</sup> Additionally, the recent confirmation of Judge Samuel Alito's nomination to the U.S. Supreme Court will

likely create a more conservative bench, and it may embolden some political advocacy groups to challenge cases that involve the “right to life.”<sup>143</sup> In spite of these developments, we do not expect that the Schiavo conflict to result in widespread changes in end-of-life health care policy.

Recent surveys indicate that most Americans opposed President Bush’s and Congress’s intervention in the Schiavo case.<sup>141</sup> Additionally, several politicians who intervened in the conflict, including Senate Majority Leader Bill Frist, have publicly expressed their regret about doing so.<sup>72,144</sup> Furthermore, the medical facts published in Terri Schiavo’s autopsy report offer substantial support to Judge Greer’s view of the clear and convincing evidence of her medical condition, legitimizing the *Browning* precedent that placed such judgments in the hands of the trier of the fact.<sup>23,33,145</sup>

Still, we expect that some interest groups will seek to advance their political agenda by capitalizing on the media frenzy that surrounded *Schiavo*. For example, right-to-life advocacy groups have already begun to pressure many state legislatures to adopt new laws that would restrict withholding or withdrawing of artificial nutrition and hydration from incapacitated patients whose advance directives do not contain very specific written instructions about particular clinical situations.<sup>146,147</sup> One state, Louisiana, changed its advance directive laws when the fervor surrounding *Schiavo* was at its peak, but no other states have done so as of this writing.<sup>147</sup> Many members of the hospice and palliative medicine community have expressed concerns about these legislative efforts, but we suspect these new laws will face formidable legal challenges based as they may violate patients’ equal protection rights.<sup>147</sup>

On a more positive note, anecdotal evidence suggests that because of the intense media coverage of Schiavo, there has been an increase in the level of interest for creating living wills.<sup>148</sup> We hope that an increase in the frequency of written expressions of patients’ life support preferences will be the lasting legacy of the Schiavo case.

## CONCLUSION

Our findings suggest that the legal reasoning that ultimately determined the outcome of the Schiavo case reflected the statutory and common

law of Florida, which primarily arose from the Florida Legislature’s response to judicial rulings in *Browning* and *Cruzan* in the early 1990s. Throughout years of court battles, the legal reasoning applied in the case remained consistent and sound, and the facts revealed in Terri Schiavo’s autopsy supported the wisdom of the Florida judiciary in the matter. The courts honored Terri Schiavo’s constitutional right to refuse unwanted medical care, created by her right to privacy, a right directly protected by the Florida Constitution. We believe that it will take time for the passions that characterized the Schiavo conflict to fade but—in spite of renewed efforts by right-to-life advocacy groups to affect sweeping changes in advance directive laws—we predict that *Schiavo* will not substantially alter health policy in palliative medicine in the foreseeable future. It is our hope, however, that the Schiavo case will increase Americans’ awareness of policies that affect hospice and palliative care, thereby encouraging them to participate more actively in their advance care planning.

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Address reprint requests to:

*Chad D. Kollas, M.D.*

*Department of Palliative Medicine*

*M.D. Anderson Cancer Center Orlando*

*1400 South Orange Avenue*

*MP-760*

*Orlando, FL 32806*

*E-mail: chad.kollas@orhs.org*

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