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MONEY, FEAR AND PREJUDICE: WHY THE COURTS KILLED TERRI SCHIAVO

*Priscilla Norwood Harris**

*"Terri Schiavo died on March 31, 2005, not from her 1990 brain injury but because of prejudice, the common assumption that life with a significant disability is not worth living."*¹

I. INTRODUCTION

On March 31, 2005, thirteen days after the court-ordered removal of her feeding tube, Theresa Marie Schindler Schiavo (Terri) died from dehydration.² At the time of her death, Terri did not suffer from a terminal condition; if provided with nourishment, her life expectancy was at least ten years.³ Since February 1990, Terri had been unconscious.⁴ Terri left no living will or written directive as to her wishes.⁵ Family members vehemently disagreed as to whether Terri, raised in the Catholic faith,⁶ would have wanted her feeding tube removed.⁷ To legally end Terri's life,

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¹ Laura Hershey, *Killed by Prejudice*, THE NATION, Apr. 14, 2005, <http://www.thenation.com/doc/20050502/hershey>.

² See Vickie Chachere, *Her Death Doesn't End Accusations, Bitterness*, CHI. SUN-TIMES, Apr. 1, 2005, at 6, available at 2005 WLNR 5299381; John-Thor Dahlburg, *The Death of Terri Schiavo: Schiavo's Death Marked by Rancor*, L.A. TIMES, Apr. 1, 2005, at 1, available at 2005 WLNR 23342414; Robert T. George, *Terri Schiavo: A Right to Life Denied or A Right to Die Honored*, 22 CONST. COMMENT. 419, 425 (2005); William Yardley, *On the Day After, Attending to the Details of Death*, N.Y. TIMES, Apr. 2, 2005, at A8, available at 2005 WLNR 5155422.

³ David C. Gibbs, III, *Gibbs on Schiavo*, 35 STETSON L. REV. 17, 17 n.1 (2005) [hereinafter Gibbs, *Gibbs on Schiavo*].

⁴ See *In re Guardianship of Schiavo*, No. 90-2908GD-003, 2000 WL 34546715, at *1 (Fla. Cir. Ct. Feb. 11, 2000) (order granting discontinuance of artificial life support of Terri Schiavo) [hereinafter 2000 Death Order].

⁵ *Id.* at *3.

⁶ *Id.* The court notes upfront: "Terri Schiavo was reared in a normal, Roman Catholic nuclear family." *Id.* at *1.

⁷ See *In re Guardianship of Schiavo*, 916 So. 2d 814, 816 (Fla. Dist. Ct. App. 2005) (case involved "bitter conflict within this family"); Commentary, *Media Still Obstinate Wrong About Terri Schiavo*, N. COUNTRY GAZETTE, June 8, 2008,

Florida law required the person petitioning for her death to provide “clear and convincing evidence” that Terri wished to die in order to overcome the presumption in favor of life.⁸

Terri’s situation eventually received extensive media coverage, but only several years after Florida Circuit Judge, George W. Greer, had signed the February 2000 order to end her life.⁹ Even before hearing any evidence as to Terri’s wishes, various judges effectively decided in favor of death by approving the use of Terri’s money to fight for her death.¹⁰ Beginning in 1997 and before any court had legally determined Terri’s wishes according to Florida law, various Florida state judges authorized Terri’s husband, Michael Schiavo, to use Terri’s funds to finance the death fight.¹¹ These funds came from various malpractice suits filed by Michael on Terri’s behalf.¹² As a result of those suits, in November 1993, Terri’s assets were valued at \$761,507.50.¹³ Over four years later (and after four years of medical bills), in April 1998, Terri’s assets were valued at \$713,825; less than four years later, as of June 2001, only \$350,000 remained.¹⁴ As of March 2005, only between \$40,000 and \$50,000 remained.¹⁵ Terri died a pauper.

At the pivotal hearing of January 2000, the only actual evidence of Terri’s wishes consisted of casual hearsay statements made by Terri to

http://www.northcountrygazette.org/2008/06/11/wrong_about_schiavo/ [hereinafter *Media Still Wrong*] (“battle” between husband who wanted Terri dead and parents who wanted her alive).

⁸ *In re Guardianship of Browning*, 568 So. 2d 4, 15 (Fla. 1990).

⁹ See discussion *infra* Part VII.

¹⁰ *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Sept. 3, 1999) (order authorizing payment of interim cost advance to attorney); *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Mar. 11, 1998) (order authorizing payment of cost retainer to attorney instituting action regarding withdrawal of life support systems); *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. May 14, 1997) (order authorizing guardian to employ and pay an attorney).

¹¹ See *supra* note 10.

¹² Petition for Approval of Settlement, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Jan. 27, 1993).

¹³ See Petition to Defend Against Petition for Removal of Guardian, Petition to Appoint Guardian, and Petition to Hire/Pay Att’y for such Def., *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Nov. 4, 1993) [hereinafter *Petition to Defend Against Removal & for Fees*].

¹⁴ Anita Kumar & J. Nealy-Brown, *Funds Meant for Schiavo’s Medical Care Dwindle*, ST. PETERSBURG TIMES, June 3, 2001, at 1B, available at 2001 WLNR 11053690 (without graphics) & <http://www.apfn.org/apfn/money.pdf> (with graphics) [hereinafter Kumar & Nealy-Brown, *Funds Dwindle*]; Wesley J. Smith, *The Interview That Wasn’t*, DISCOVERY, Oct. 28, 2003, available at <http://www.discovery.org/a/1616>.

¹⁵ *Schiavo’s Settlement Spent on Care, Legal Bills*, ORLANDO SENTINEL, Mar. 27, 2005, at A22, available at 2005 WLNR 23743975 [hereinafter *Settlement Spent*]. But see William R. Levesque, *As Schiavo Settlement Disappeared, So Did a Relationship*, ST. PETERSBURG TIMES, Mar. 30, 2005, at 1A, available at 2005 WLNR 23886570 [hereinafter Levesque, *Settlement Disappeared*] (stating that \$70,000 remained).

various family members and a friend of Terri's from the 1980s.¹⁶ Faced with a lack of hard evidence, the trial court relied on "expert" testimony as to how Americans in general feel about death.¹⁷ The trial court even heard the testimony of a priest, who had never met Terri, to establish the extent of Terri's Catholic faith and the Church's position on withholding nutrition from an incompetent.¹⁸ Subsequently and inevitably, on February 11, 2000, Judge Greer issued his order sealing Terri's fate ("Death Order").¹⁹

The State of Florida failed Terri yet again when its appellate courts allowed these errors to stand.²⁰ Appellate review was limited in the early, crucial years of the battle for Terri's life. Terri's parents appealed the Death Order, which contained critical factual findings, to the Second District Court of Appeal.²¹ With little discussion, the court affirmed that part of the order determining Terri's wishes and, remarkably, the Florida Supreme Court refused to even review that decision.²² With little deliberation and amazing speed, the federal courts offered no further protection.

The media also failed Terri on a grand scale, by neglecting to accurately report the facts of Terri's case or to identify and analyze the applicable law.²³ The media conducted faulty and legally irrelevant polls showing that most Americans thought Terri should die.²⁴ As one commentator

¹⁶ See Transcript of Trial at 372-73, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Apr. 17, 2000) (testimony of Mary Schindler on January 25, 2000); Excerpts of Trial at 53-90, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Feb. 11, 2000) (testimony of Diane Myer on January 26, 2000); discussion *infra* Part V.E (testimony of Michael Schiavo, Scott Schiavo, and Joan Schiavo).

¹⁷ See discussion *infra* Part G.II; see also Transcript of Trial at 281-323, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Jan. 24, 2000) (testimony of Beverly Tyler).

¹⁸ See discussion *infra* Part G.I; see also Transcript of Trial, *supra* note 17, at 178-223 (testimony of Father Gerard Murphy), available at http://www6.miami.edu/ethics/schiavo/doc_files/Testimony_of_Father_Gerard_Murphy.doc.

¹⁹ Kitty Bennett & David Karp, *Four Pivotal Moments in the Case*, ST. PETERSBURG TIMES, Apr. 1, 2005, at 6A, available at 2005 WLNR 23869370.

²⁰ See, e.g., *Schindler v. Schiavo*, 780 So. 2d 176, 179-80 (Fla. Dist. Ct. App. 2001), *reh'g denied*, No. SC01-559 (Fla. 2001) [hereinafter *Schiavo I*].

²¹ *Id.*

²² See *Id.*

²³ See Nat Hentoff, *Terri Schiavo, Judicial Murder*, VILLAGE VOICE, Mar. 30, 2005, at 36, available at 2005 WLNR 7503506 [hereinafter Hentoff, *Judicial Murder*] ("disgracefully ignorant coverage of the case by the great majority of the media"); June Maxam, *An Apology Due Terri Schiavo*, N. COUNTRY GAZETTE, Nov. 23, 2007, <http://www.northcountrygazette.org/2007/11/23/an-apology-due-terri-schiavo/>; Commentary, *Media Continues To Falsely Report Schiavo Case*, Oct. 31, 2007, N. COUNTRY GAZETTE, <http://www.northcountrygazette.org/2007/10/31/media-continues-to-falsely-report-schiavo-case/>; *Media Still Wrong*, *supra* note 7. But see Lili Levi, *A New Model for Media Criticism: Lessons from the Schiavo Coverage*, 61 U. MIAMI L. REV. 665, 666 (2007) ("Ultimately, this article concludes that despite the sound and fury from critics, the mainstream print and broadcast press for the most part did a credible job in its coverage of the *Schiavo* case.").

²⁴ See discussion *infra* text accompanying notes 491-94.

concluded, “media malpractice” was committed in regard to the *Schiavo* case.²⁵ This same media was noticeably missing in the early years of the battle over Terri’s life—the key years. With the exception of the *St. Petersburg Times* and the *Orlando Sentinel*, the media did not report on the battle for Terri’s life, which began in 1993, until many years later. In those early years, however, forces were put in motion that ultimately sealed Terri’s fate. Due to the lack of media coverage of these early events, the public was kept ignorant of these crucial, earlier forces. The media never investigated these earlier forces or questioned the factual findings determined in the early proceedings.

Why did the courts allow Terri’s money to be spent to fight for her death and not for her life? Why did the courts fail to appoint an attorney for Terri? Why on the basis of such questionable evidence did the courts authorize the killing of Terri? Why did most members of the media support Terri’s killing and sway the public to also support the killing? This article posits that fear and prejudice, combined with the use of Terri’s monies to fight for her death and the lack of independent legal representation, inexorably caused her death. The judicial system failed to follow the rule of law. The media failed to fully report the facts. The public failed to understand the facts and the law.

Does any of this matter? After all, Terri is dead. Nothing can bring her back. But it still matters. It matters because under Florida law the real issue is what Terri would have wanted, not what any of the rest of us might have wanted in her situation, and certainly not what any of us fear might happen to us.²⁶ It matters because we are still alive, and any of us could find ourselves in Terri’s situation. We deserve decisions based on the rule of law, not based on which side is better funded, not based on the fear of “living like that,” not based on a prejudice against those who do. Fortunately, by implementing a few modest proposals, we can ensure that the rule of law prevails in the future, even if it did not do so for Terri.

²⁵ Wesley J. Smith, *How Media Falsehoods Become Postmodern Reality*, SECONDHAND SMOKE, Sept. 6, 2006, <http://www.wesleyjsmith.com/blog/2006/09/how-media-falsehoods-become-postmodern.html>. Moreover, “the power of media [is] to create an alternative reality by misstating the facts about important stories, which over time, due to the sheer power of repetition, has the effect of literally rewriting history.” *Id.* One reporter described the actions of the press in regard to Terri as “a systemic failure.” Nat Hentoff, *Terri Schiavo Suffered From “Longest Public Execution in American History,”* DEMOCRACYNOW.ORG, Mar. 31, 2005, <http://www.democracynow.org/article.pl?sid=05/03/31/1558242>.

²⁶ See discussion *infra* Part IV.A.

II. FACTUAL BACKGROUND

A. Early Lack of Media Coverage

In 1990 and 1991, the *St. Petersburg Times* carried a few articles about Terri Schiavo, whom it described as a “woman in a coma.”²⁷ The *St. Petersburg Times* was also one of only a very few major newspapers that covered the pivotal February 2000 hearing that led to Judge Greer’s Death Order.²⁸ Significant coverage in other newspapers began much later. For example, it was several months after the February 2000 hearing before the *Philadelphia Inquirer* ran its first article, in June 2000.²⁹ Another year passed before the *New York Times* first reported on Terri, in April, 2001, describing her as merely a “comatose woman.”³⁰ The article reported that Terri had been in a coma for eleven years, at which time her nourishment had been briefly removed pursuant to a court order.³¹

B. Limited Facts Commonly Reported in Later Coverage

1. Terri’s Life Before Her Collapse

Others have discussed many, but not all, of the relevant facts of Terri’s life.³² On December 3, 1963, Theresa Marie Schindler was born in

²⁷ See, e.g., Heddy Murphey, *Beach Party to Aid Comatose Woman*, ST. PETERSBURG TIMES, Nov. 8, 1990, at 1, available at 1990 WLNR 1789286; *St. Petersburg Beach Has Special Day for Coma Victim*, ST. PETERSBURG TIMES, Feb. 17, 1991, at 3, available at 1991 WLNR 1926567.

²⁸ Anita Kumar, *Judge: Schiavo’s Life Can End*, ST. PETERSBURG TIMES, Feb. 12, 2000, at 1A, available at 2000 WLNR 2504412 [hereinafter Kumar, *Judge*].

²⁹ Kristin E. Holmes, *Relatives Clashing in Court Over Comatose Woman’s Fate*, PHILA. INQUIRER, June 23, 2000, at B1, available at 2000 WLNR 2410791.

³⁰ *Judge Orders Patient Fed*, N.Y. TIMES, Apr. 28, 2001, at A13, available at 2001 WLNR 3365794.

³¹ *Id.*

³² See, e.g., Kelley Benham, *A Struggle to the End: Terri’s Two Lives*, ST. PETERSBURG TIMES, Apr. 1, 2005, at 1A, available at 2005 WLNR 23864064 [hereinafter Benham, *A Struggle*]; Hentoff, *Judicial Murder*, *supra* note 23; KATHY CERMINARA & KENNETH GOODMAN, UNIVERSITY OF MIAMI ETHICS PROGRAMS, KEY EVENTS IN THE CASE OF THERESA MARIE SCHIAVO (Dec. 27, 2008), http://www6.miami.edu/ethics2/schiavo/terri_schiavo_timeline.html [hereinafter UMIAMI TIMELINE] (last visited Oct. 17, 2008); Matt Conigliaro, *The Terri Schiavo Information Page*, ABSTRACT APPEAL, May 1, 2005, <http://abstractappeal.com/schiavo/infopage.html>; Joan Didion, *The Case of Theresa Schiavo*, 52 N.Y. REV. OF BOOKS no. 10, June 9, 2005, available at <http://www.nybooks.com/articles/18050>. Many of these facts also appear in a report prepared by Jay Wolfson, Terri’s third guardian *ad litem*. See JAY WOLFSON, GUARDIAN AD LITEM, A REPORT TO GOVERNOR JEB BUSH AND THE 6TH JUDICIAL CIRCUIT IN THE MATTER OF THERESA MARIE SCHIAVO (Dec. 1, 2003), reprinted in Jay Wolfson, *Schiavo’s Lessons for Health Attorneys When Good Law is All You Have: Reflections of the Special Guardian Ad Litem to Theresa Marie Schiavo*, 38 J. HEALTH L. 535, 552-81 app. A (2005).

Pennsylvania to Robert and Mary Schindler.³³ Terri was of the Catholic faith and attended Catholic schools throughout her childhood, including Archbishop Wood High School.³⁴ Terri was chubby as a child and had an ongoing battle with her weight; when she graduated from high school in 1981, she weighed between two hundred³⁵ and two hundred fifty pounds.³⁶ She was five-foot-three to four inches tall.³⁷ Terri dreamed of getting married³⁸ and soon lost fifty³⁹ to one hundred pounds.⁴⁰

Terri met Michael Schiavo during her second semester at Bucks County Community College.⁴¹ Michael quickly asked Terri out and Terri was soon on her first real date.⁴² Michael was reportedly the first boy Terri ever kissed.⁴³ After five months of dating, Michael proposed and Terri accepted.⁴⁴ They married on November 10, 1984.⁴⁵

In 1986, Terri and Michael moved to St. Petersburg where the couple lived in a condominium owned by Terri's parents, the Schindlers.⁴⁶ Terri

³³ Tim Reid, *Bush Overrides Coma Ruling*, THE AUSTRALIAN, Mar. 22, 2005 at 10, available at 2005 WLNR 4351629; UMIAMI TIMELINE, *supra* note 32; see also Benham, *A Struggle*, *supra* note 32; Didion, *supra* note 32.

³⁴ Benham, *A Struggle*, *supra* note 32; Debbie Cenziper, *The Life of Terri Schiavo*, MIAMI HERALD, Mar. 20, 2005, at 1A, available at 2005 WLNR 23035087 [hereinafter Cenziper, *Life of Terri*]; Dahleen Glanton, *Before Tragedy, an Ordinary Life*, CHI. TRIB., Mar. 27, 2005, at 9, available at 2005 WLNR 23389143; Didion, *supra* note 32.

³⁵ Benham, *A Struggle*, *supra* note 32; Phil Long & Erika Bolstad, *The Terri Schiavo Case*, HOUSTON CHRON., Apr. 1, 2005, at A1, available at 2005 WLNR 24648527 [hereinafter Long & Bolstad, *Schiavo Case*].

³⁶ Maya Bell, *Schiavo Dies; Her Life Offers Lessons*, ORLANDO SENTINEL, Apr. 1, 2005, at 1A, available at 2005 WLNR 23748576 [hereinafter Bell, *Lessons*]; Arian Campo-Flores, *The Legacy of Terri Schiavo*, NEWSWEEK, Apr. 4, 2005, at 22, available at <http://www.newsweek.com/id/49520?tid=relatedcl>; Long & Bolstad, *Schiavo Case*, *supra* note 35.

³⁷ Bell, *Lessons*, *supra* note 36; Allen G. Breed, *Before She was a Cause, She Had Life of Her Own*, ST. PAUL PIONEER PRESS, Oct. 26, 2003, at A3, available at 2003 WLNR 14718122.

³⁸ Benham, *A Struggle*, *supra* note 32.

³⁹ *Id.*; Cara Buckley, *Terri Schiavo – A Tragic Life Comes to a Quiet End*, CHARLESTON GAZETTE, Apr. 1, 2005, at 1A, available at 2005 WLNR 5137022; Jennifer Frey, *Who was Terri?*, HOUSTON CHRON., Mar. 27, 2005, at A2, available at 2005 WLNR 24647386.

⁴⁰ Bell, *Lessons*, *supra* note 36; Long & Bolstad, *Schiavo Case*, *supra* note 35.

⁴¹ Benham, *A Struggle*, *supra* note 32; Didion, *supra* note 32.

⁴² Benham, *A Struggle*, *supra* note 32; Kelley Benham, *A Thousand Words About the Terri Schiavo You Never Knew*, ST. PETERSBURG TIMES, Nov. 13, 2003, at 1D, available at 2003 WLNR 3825529.

⁴³ Anna Badkhen, *Schiavo Shied Away from the Spotlight*, S.F. CHRON., Mar. 26, 2005, at A1, available at 2005 WLNR 4749988; Benham, *A Struggle*, *supra* note 32; Cenziper, *Life of Terri*, *supra* note 34; Michael Daly, *Beginning of Terri's Sad End*, N.Y. DAILY NEWS, Mar. 30, 2005, at 23, available at 2005 WLNR 25242394; Didion, *supra* note 32; Frey, *supra* note 39; Glanton, *supra* note 34; Jerry Schwartz, *This was Theresa: Romantic and Kind and Self-Conscious*, THE STAR-LEDGER, Apr. 1, 2005, at 6, available at 2005 WLNR 5114951.

⁴⁴ Benham, *A Struggle*, *supra* note 32; see also Campo-Flores, *supra* note 36; *She Opened Pandora's Suitcase: Assessing Terri Schiavo*, THE ECONOMIST, Apr. 2, 2005, at 81.

⁴⁵ Benham, *A Struggle*, *supra* note 32; Glanton, *supra* note 34; Didion, *supra* note 32.

⁴⁶ Benham, *A Struggle*, *supra* note 32; David Sommer, *She Found Joy in Small Things*, TAMPA TRIB. Apr. 1, 2005, at 8, available at 2005 WLNR 13855691; Didion, *supra* note 32.

had two cats that she overfed, but she herself weighed only around 110 pounds.⁴⁷ The Schindlers and Terri's brother, Bobby Schindler, moved to Florida soon thereafter.⁴⁸ Terri's brother later moved into the same apartment complex as Terri and Michael.⁴⁹ In Florida, Terri kept her weight down, wore bikinis, and had a good tan.⁵⁰ In 1989, Terri began seeing a fertility expert.⁵¹

2. Terri's Life After the Collapse

In the early morning of February 25, 1990, Michael awoke to a "thud," caused by Terri hitting the floor, and he called 911.⁵² At some point, Terri's heart stopped beating, depriving her brain of oxygen.⁵³ The cause of Terri's fall is unknown,⁵⁴ but some believe that Terri suffered from a chemical imbalance due to an eating disorder.⁵⁵ The paramedics took Terri to Humana Northside Hospital where she stayed until May 12, 1990.⁵⁶ Upon discharge, Terri was sent to College Park Skilled Care and Rehabilitation Facility.⁵⁷

Terri left no power of attorney, living will, advance directive, or any estate-planning document.⁵⁸ On June 18, 1990, Michael was appointed her plenary guardian.⁵⁹ As guardian, Michael made decisions concerning Terri's medical treatment and legal claims arising from her injuries.⁶⁰

⁴⁷ Badkhen, *supra* note 43; Benham, *A Struggle*, *supra* note 32.

⁴⁸ Benham, *A Struggle*, *supra* note 32.

⁴⁹ *Id.*; Chris Gray & Larry Lewis, *Many Recall Schiavo as Fight Plays Out*, PHILA. INQUIRER, Nov. 2, 2003, at B1, available at 2003 WLNR 14769029; Michael Martinez & Patrick Kampert, *Pressure Builds for Husband to Talk*, CHI. TRIB., Oct. 24, 2003, at 11, available at 2003 WLNR 15384832.

⁵⁰ Bell, *Lessons*, *supra* note 36; Anita Kumar, *A Family Divided*, ST. PETERSBURG TIMES, Jan. 30, 2000, at 1B, available at 2000 WLNR 2493038.

⁵¹ See Bell, *Lessons*, *supra* note 36 (Terri and Michael moved to Florida in 1986 and about three years later they sought fertility treatment).

⁵² Abby Goodnough, *Gov. Bush Seeks Another Inquiry In Schiavo Case*, N.Y. TIMES, June 18, 2005, at A1, available at 2005 WLNR 9670154 [hereinafter Goodnough, *Gov. Bush Inquiry*].

⁵³ Campo-Flores, *supra* note 36; Goodnough, *Gov. Bush Inquiry*, *supra* note 52.

⁵⁴ David Sommer, *Schiavo Autopsy*, TAMPA TRIB., June 16, 2005, at 1, available at 2005 WLNR 13846025.

⁵⁵ Editorial, *Terri Schiavo's Affliction*, BOSTON GLOBE, Apr. 5, 2005, at A14, available at 2005 WLNR 5284181.

⁵⁶ UMIAMI TIMELINE, *supra* note 32.

⁵⁷ *Id.*

⁵⁸ See Lisa Greene, *Schiavo Legacy Proves Lasting*, ST. PETERSBURG TIMES, Mar. 26, 2006, at 1A, available at 2006 WLNR 5273505.

⁵⁹ *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. June 18, 1990) (order determining total incapacity and appointing plenary guardian); David Sommer, *State's High Court Tosses Out Terri's Law*, TAMPA TRIB., Sept. 24, 2004, at 1, available at 2004 WLNR 18476750; UMIAMI TIMELINE, *supra* note 32.

⁶⁰ See Report of Guardian *Ad Litem* at 4-6, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Dec. 30, 1998), available at

In November 1990, Michael took Terri to California for experimental brain treatment by Dr. Yoshio Hosobuchi.⁶¹ After returning from California, in January 1991, Terri was placed in Mediplex Rehabilitation in Bradenton, Florida, where she stayed until July 1991.⁶² At that time Terri was moved to Sabal Palms, a skilled care facility, where she stayed until Michael removed her in 1994.⁶³

On February 14, 1993, Michael and the Schindlers parted ways after an argument at the Sabal Palms Facility.⁶⁴ Michael claimed the Schindlers asked for a portion of the medical malpractice award.⁶⁵ The Schindlers claimed that they wanted more money spent on Terri's care.⁶⁶

Shortly thereafter, on July 29, 1993, the Schindlers filed the first of several petitions for the removal of Michael as Terri's guardian of the person.⁶⁷ On February 17, 1994, Circuit Court Judge Thomas E. Penick appointed John Pecarek as guardian *ad litem* for Terri—the first of two such guardians.⁶⁸ Pecarek later determined that Michael “was doing a great job for his wife.”⁶⁹ The removal case against Michael was later dismissed.⁷⁰

http://www6.miami.edu/ethics/schiavo/pdf_files/122998_Schiavo_Richard_Pearse_GAL_report.pdf [hereinafter 1998 GAL Report]; Abby Goodnough, *Bitter Schiavo Case Broke up a Close Family*, INT'L HERALD TRIB., Mar. 28, 2005, at 1, *available at* 2005 WLNR 4821645 (“Michael Schiavo filed a malpractice lawsuit”); Anita Kumar, *Schiavo Transferred to Hospice Center*, ST. PETERSBURG TIMES, Apr. 18, 2000, at 1B, *available at* 2000 WLNR 2518742 (“Hospice officials said they abide by whatever treatment the guardian, or in this case Michael Schiavo, asks for - even if that treatment is opposed by a doctor.”); Jan Warner & Jan Collins, *Who Speaks For Terri?*, TAMPA TRIB., Apr. 12, 2004, at 13, *available at* 2004 WLNR 18492137 (“Her husband, who lives with another woman and their two children, is allowed to speak for Terri Schiavo.”).

⁶¹ Murphey, *supra* note 27 (one of the first articles about Terri); UMIAMI TIMELINE, *supra* note 32. From the date of its first article about Terri on November 15, 1990, until March 2005, the St. Petersburg Times published around five hundred articles concerning Terri Schiavo. See Mike Wilson, *15 Years Ago, Terri Schiavo's 'Last Hope,'* ST. PETERSBURG TIMES, Mar. 24, 2005, at 1E, *available at* 2005 WLNR 4648880.

⁶² UMIAMI TIMELINE, *supra* note 32.

⁶³ *Id.*

⁶⁴ Melanie Ave & David Karp, *After Jury Award, Battle Lines Drawn*, ST. PETERSBURG TIMES, Mar. 23, 2005, at 1A, *available at* 2005 WLNR 23864102; UMIAMI TIMELINE, *supra* note 32.

⁶⁵ Ave & Karp, *supra* note 64.

⁶⁶ *Id.*

⁶⁷ William R. Levesque, Carrie Johnson & Anita Kumar, *Without a Ruling, the Wait Continues*, ST. PETERSBURG TIMES, Mar. 22, 2005, at 1A, *available at* 2005 WLNR 23899652 [hereinafter Levesque et al., *Wait Continues*].

⁶⁸ *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Feb. 17, 1994) (order appointing guardian *ad litem*); Patrick Kampert, *Emotional and Monetary Costs are High*, CHI. TRIB., Mar. 24, 2005, at 16, *available at* 2005 WLNR 23483745 [hereinafter Kampert, *Emotional Costs*].

⁶⁹ Kampert, *Emotional Costs*, *supra* note 68; see also UMIAMI TIMELINE, *supra* note 32.

⁷⁰ *Short Life, Long Fight*, TAMPA TRIB., Apr. 1, 2005, at 10, *available at* 2005 WLNR 13855700; Richard Willing, *Shift to Federal Court Raises New Set of Questions in Case*, USA TODAY, Mar. 22, 2005, at 3A, *available at* 2005 WLNR 4432217.

In May 1998, Michael filed a petition to remove Terri's feeding tube,⁷¹ which the Schindlers opposed.⁷² The current and last presiding judge, Judge Greer, appointed a second guardian *ad litem* for Terri, Richard Pearse.⁷³ Starting on January 24, 2000, a five day hearing was held in Florida before Judge Greer ("2000 Hearing").⁷⁴ Judge Greer heard testimony from eighteen witnesses.⁷⁵ On February 11, 2000, Judge Greer issued the Death Order.⁷⁶

C. Facts Not Widely Reported by the Media

1. Michael as Guardian and His Unilateral "Do Not Resuscitate" Order

The Schindlers claim to have received no notice of the guardianship proceeding that Michael initiated on May 22, 1990.⁷⁷ On June 18, 1990, Terri was judged incapacitated, and Michael was appointed the plenary guardian.⁷⁸ Michael filed an initial guardianship plan on September 6, 1990,⁷⁹ but did not file a subsequent plan until April 9, 1992.⁸⁰ In October of 1991, Judge Robert F. Michael approved Michael's guardianship report.⁸¹ In March 1992, however, another judge disapproved a later guardianship report filed by Michael in January 1992, finding that it lacked

⁷¹ UMIAMI TIMELINE, *supra* note 32; see also Kampert, *Emotional Costs*, *supra* note 68; Kumar, *Judge*, *supra* note 28; Rachel La Corte, *Husband, Parents Struggle Over Helpless Woman*, ORLANDO SENTINEL, Dec. 26, 2002, at B2, available at 2002 WLNR 12782637; Mitch Stacy, *Appeals Court Urged to Preserve Feeding of Disabled Woman*, MIAMI HERALD, Apr. 5, 2003, at 1B, available at 2003 WLNR 14862671.

⁷² Kumar, *Judge*, *supra* note 28; UMIAMI TIMELINE, *supra* note 32.

⁷³ *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. June 11, 1998) (order appointing guardian *ad litem*); UMIAMI TIMELINE, *supra* note 32. As discussed *infra* note 125 and accompanying text, Pearse spent twenty-five hours preparing a report for Judge Greer and was paid \$4,511.95 for his fees and costs.

⁷⁴ Bennett & Karp, *supra* note 19.

⁷⁵ *Id.*

⁷⁶ 2000 Death Order, *supra* note 4 at *7.

⁷⁷ MARY & ROBERT SCHINDLER WITH SUZANNE SCHINDLER VITADAMO & BOBBY SCHINDLER, A LIFE THAT MATTERS 42 n.1 (2006) [hereinafter SCHINDLER, A LIFE THAT MATTERS]; Verified Petition for Appointment of Guardian, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. May 22, 1990). Some have stated that Michael was appointed Terri's guardian "without any objection from the family." Wolfson, *supra* note 32, at 545.

⁷⁸ *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. June 18, 1990) (order determining total incapacity and appointing plenary guardian).

⁷⁹ Initial Guardianship Plan, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Sept. 6, 1990).

⁸⁰ Annual Guardianship Plan, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Apr. 9, 1992).

⁸¹ *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Oct. 4, 1991) (order approving review of guardian report).

a beginning balance, as well as itemized receipts.⁸² Subsequently, Michael filed another report which was approved in May 1992.⁸³

On October 19, 1992, approximately one month prior to the jury verdict in favor of Terri, Michael resigned as guardian of the property, and a corporate trustee, Barnett Trust, was appointed his successor.⁸⁴ In its petition seeking appointment as guardian of the property, Barnett Trust valued Terri's assets at \$139,000 and listed Terri's next of kin as spouse, mother and father.⁸⁵

In the beginning months of 1993, Terri's medical malpractice claims settled,⁸⁶ one after a jury verdict in Terri's favor.⁸⁷ In April 1993, Barnett Trust resigned as guardian of the property and was replaced by Southtrust Bank.⁸⁸ In its petition seeking appointment, Southtrust Bank valued Terri's assets at \$700,000 and listed Terri's next of kin as spouse, with no mention of a mother and father.⁸⁹

On July 29, 1993, the Schindlers sought the removal of Michael as Terri's guardian.⁹⁰ In this petition, the Schindlers alleged that: (1) Michael had failed to take care of Terri's medical needs; (2) Michael had abused his guardianship powers by not allowing Terri's parents access to her medical information; and (3) Michael had a conflict of interest because he was Terri's heir.⁹¹

After the First Removal Petition was filed, Terri suffered from a urinary tract infection while at Sabal Palms in July or August of 1993.⁹² At that

⁸² *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Mar. 16, 1992) (order disapproving review of guardian report).

⁸³ *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. May 8, 1992) (order approving review of guardian report).

⁸⁴ *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Oct. 19, 1992) (order accepting resignation of guardian and order appointing successor plenary guardian); Resignation & Petition for Discharge, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Oct. 19, 1992).

⁸⁵ Petition for Appointment of Successor Plenary Guardian, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Oct. 19, 1992).

⁸⁶ Petition for Approval of Settlement, *supra* note 12.

⁸⁷ See UMIAMI TIMELINE, *supra* note 32.

⁸⁸ Resignation & Petition for Discharge, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Apr. 7, 1993); Petition for Appointment of Successor Plenary Guardian, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Apr. 7, 1993).

⁸⁹ Petition for Appointment of Successor Plenary Guardian, *supra* note 88.

⁹⁰ Petition for Removal of Guardian & Appointment of Guardian, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Aug. 3, 1993) [hereinafter First Removal Petition]; see also Levesque et al., *Wait Continues*, *supra* note 67.

⁹¹ First Removal Petition, *supra* note 90.

⁹² Deposition of Michael Schiavo at 12-15, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Nov. 19, 1993), available at <http://health.groups.yahoo.com/group/forthelifeofterrishchiavo/message/4/> (pages 1-54) & <http://health.groups.yahoo.com/group/forthelifeofterrishchiavo/message/5?var=1> (pages 52-92) [hereinafter 1993 Michael Dep.]; Raja Mishra, *Conflicting Memories About Schiavo's Wishes*, BOSTON

time Michael discussed Terri's condition with one of Terri's doctors, who informed Michael that without treatment, Terri would develop sepsis and die.⁹³ After this discussion, Michael ordered the Sabal Palms personnel to refrain from treating Terri's infection.⁹⁴ At the same time, Michael also requested a "Do Not Resuscitate" (DNR) order for Terri.⁹⁵

On February 15, 1994, Judge Penick appointed Daniel P. Nievinski as court monitor.⁹⁶ No report from the monitor appears on the docket.⁹⁷ No explanation for the lack of such report appears in the docket or court files.⁹⁸ Also on February 15, 1994, Sabal Palms moved for a temporary restraining order against Michael.⁹⁹ It alleged in its motion that Michael came to Sabal Palms in a "belligerent manner" and that the staff there was

GLOBE, Mar. 28, 2005, at A1, available at 2005 WLNR 4825897 [hereinafter Mishra, *Conflicting Memories*].

⁹³ 1993 Michael Dep., *supra* note 92, at 14-15.

⁹⁴ *Id.* at 14; see also June Maxam, *Michael Schiavo: The Whole Truth and Nothing But The Truth?*, N. COUNTRY GAZETTE, May 24, 2006, <http://www.northcountrygazette.org/articles/052406TheWholeTruth.html>. Maxam reports that after speaking with Dr. Mulroy, Michael "plan[ned] to kill Terri by withholding treatment from her . . ." *Id.* Sabal Palms treated the infection, and Terri lived. See SCHINDLER, A LIFE THAT MATTERS, *supra* note 77.

⁹⁵ 1993 Michael Dep., *supra* note 92, at 86-87.

⁹⁶ *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Feb. 15, 1994) (order appointing monitor), available at <http://www.northcountrygazette.org/documents/nievinski.pdf>. The order was signed on February 4, 1994, but not filed until February 15, 1994. See *id.* At that time, Florida law provided for the appointment of monitors as follows:

The court may, upon inquiry from any interested person or upon its own motion in any proceeding over which it has jurisdiction, appoint a monitor. The monitor may investigate, seek information, examine documents, or interview the ward and shall report to the court his findings. The court shall not appoint as a monitor a family member or any person with a personal interest in the proceedings. Unless otherwise prohibited by law, a monitor may be allowed a reasonable fee as determined by the court and paid from the property of the ward. No full-time state, county, or municipal employee or officer shall be paid a fee for such investigation and report.

FLA. STAT. ANN. § 744.107 (West 1994).

⁹⁷ Pinellas County Circuit Court Probate Docket, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. 1994).

⁹⁸ *Id.* One reporter has provided the following explanation: "According to the Schindlers, within days [court monitor] Nievinski filed a report with Penick recommending that Schiavo be removed as guardian. Penick reportedly refused to accept the court monitor's report and instead appointed John Pecarek as a guardian *ad litem* on Feb. 17, 1994." June Maxam, *The Schiavo Case and Witness Tampering*, N. COUNTRY GAZETTE, Oct. 8, 2007, <http://www.northcountrygazette.org/2007/10/08/the-schiavo-case-and-witness-tampering/> [hereinafter Maxam, *Witness Tampering*]; see also June Maxam, *Fascination With Death: George's Wish*, N. COUNTRY GAZETTE, June 18, 2007, <http://www.northcountrygazette.org/2007/06/18/fascination-with-death-george%e2%80%99s-wish/>.

⁹⁹ Motion for Temporary Restraining Order, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Feb. 15, 1994), available at <http://www.northcountrygazette.org/documents/temporaryrestrainingaffidavit0294.pdf>; Maxam, *Witness Tampering*, *supra* note 98.

in “fear of great bodily harm.”¹⁰⁰ On February 17, 1994, Judge Penick issued Michael an order to show cause as to why he should not be removed as guardian for Terri.¹⁰¹ Judge Penick later dissolved the order and denied the motion.¹⁰²

Also on February 17, 1994, Judge Penick appointed Pecarek as guardian *ad litem* for Terri but limited Pecarek’s responsibility to an investigatory role.¹⁰³ The order appointing Pecarek limited his involvement to: (1) analyzing Terri’s physical condition; (2) evaluating her living conditions; and (3) meeting with the nursing staff to investigate Michael’s disturbances.¹⁰⁴ Pecarek spent a total of nine and one half hours on these assignments and requested fees of \$1,425.00, which he received.¹⁰⁵ He concluded that Terri’s situation was “hopeless,” that Michael “acted appropriately and attentively toward [Terri],”¹⁰⁶ and that Michael “was doing a great job for his wife.”¹⁰⁷

After Michael’s deposition in November of 1993, the Schindlers amended their first removal petition on March 4, 1994.¹⁰⁸ They alleged that Michael had a conflict of interest for several reasons: (1) he was having a sexual relationship with another woman; (2) he failed to adequately care for Terri because he directed the nursing home not to treat her bladder infection, knowing that lack of treatment would kill Terri; and (3) his anticipated inheritance was being depleted for Terri’s medical care.¹⁰⁹ The Schindlers also alleged that Michael had violated Florida guardianship law by deliberately acting to end Terri’s life.¹¹⁰

At the hearing on March 4, 1994, Judge Penick did not allow the Schindlers’ attorney, James Sheehan, to cross-examine Pecarek about his

¹⁰⁰ See *supra* note 99.

¹⁰¹ *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Feb. 17, 1994) (order to show cause).

¹⁰² *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Mar. 29, 1994) (order denying motion for temporary restraining order).

¹⁰³ *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Feb. 17, 1994) (order appointing guardian *ad litem*).

¹⁰⁴ *Id.*; Maxam, *Witness Tampering*, *supra* note 98.

¹⁰⁵ Verified Petition for Order Authorizing Payment of Guardian *Ad Litem* Fees, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Mar. 1, 1994); *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Mar. 2, 1994) (order approving fees for guardian *ad litem*).

¹⁰⁶ Report of Guardian *Ad Litem*, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Mar. 2, 1994); Kampert, *Emotional Costs*, *supra* note 68; see also UMIAMI TIMELINE, *supra* note 32.

¹⁰⁷ Report of Guardian *Ad Litem*, *supra* note 106; Kampert, *Emotional Costs*, *supra* note 68.

¹⁰⁸ Amended Petition for Removal of Guardian, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Mar. 4, 1994).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

report.¹¹¹ At the hearing Judge Penick also reportedly told Sheehan that the case "is closed" and "is over."¹¹²

On July 7, 1995, Michael filed a motion to dismiss the Schindlers' amended first removal petition for lack of prosecution.¹¹³ Shortly thereafter on September 18, 1995, the Schindlers voluntarily dismissed their removal petition with an agreement that Michael would not seek attorneys' fees from them.¹¹⁴ Later, at the 2000 Hearing, one of Michael's attorneys tried to use this dismissal to argue that the Schindlers were collaterally estopped from making certain arguments, but Judge Greer disagreed.¹¹⁵

2. Michael's Early Retirement

Shortly after Terri's collapse, Michael stopped working.¹¹⁶ For several years, he went to school and lived off of Terri's paychecks, life insurance, and social security disability payments.¹¹⁷ Michael also filed medical malpractice suits on Terri's behalf and for himself.¹¹⁸ In addition, and as discussed in more detail *infra*, Terri's monies were used to pay Michael's attorneys to fight for her death.¹¹⁹

3. Terri's Lack of Legal Representation

No judge ever appointed an attorney to represent Terri's interests.¹²⁰ Instead, Terri had only guardians *ad litem* appointed before the Death

¹¹¹ Maxam, *Witness Tampering*, *supra* note 98; SCHINDLER, A LIFE THAT MATTERS, *supra* note 77, at 60.

¹¹² SCHINDLER, A LIFE THAT MATTERS, *supra* note 77, at 60.

¹¹³ Respondent's Motion to Dismiss for Lack of Prosecution, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. July 7, 1995).

¹¹⁴ Notice of Voluntary Dismissal with Prejudice, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Sept. 18, 1995). In his motion to dismiss Michael stated that there had been no activity in the case for over one year. See Motion to Dismiss, *supra* note 113.

¹¹⁵ Transcript of Trial at 365-67, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Jan. 25, 2000).

¹¹⁶ See 1993 Michael Dep., *supra* note 92, at 19-20 (containing Michael's statements that he was attending school).

¹¹⁷ *Id.* at 19-20, 73, 78-81.

¹¹⁸ See Laurie Cunningham, *Showdown Over Terri*, 79 MIAMI DAILY BUS. REV. (Number 52) 8 (2004); Christopher Hook & Paul S. Mueller, *The Terri Schiavo Saga: The Making of a Tragedy and Lessons Learned*, 80 MAYO CLINIC PROC. (Issue 11) 1449 (2005), available at 2005 WLNR 18387115; Anita Kumar, *Deciding the Fate of Terri*, ST. PETERSBURG TIMES, Jan. 25, 2000, at 1A, available at 2000 WLNR 8809256 [hereinafter Kumar, *Deciding the Fate*].

¹¹⁹ See discussion *infra* Part III.B.

¹²⁰ See Pinellas County Circuit Court Probate Docket, *supra* note 97 (showing that no order appointing attorney for Terri was ever recorded).

Order.¹²¹ As discussed *infra*, Florida law clearly distinguishes between the function of appointed legal counsel, on the one hand, and the more limited function of a guardian *ad litem*.¹²² But even the limited protection provided by a guardian *ad litem* was largely missing in Terri's case—only two were appointed before Judge Greer issued the Death Order.¹²³ The first, John Pecarek, spent a grand total of nine and one-half hours determining whether Michael should be removed as guardian, produced a four-page report in which his factual findings comprised only one page, and requested \$1,425.00 in fees.¹²⁴ The second, Richard L. Pearse, spent only twenty-five hours, about three working days, and was paid \$4,511.95 in fees and costs.¹²⁵ To his credit, Pearse did a more thorough job than Pecarek had done. Pearse produced a fourteen-page report in which he concluded that Michael's credibility was "adversely affected" by his financial conflict of interest and by the "chronology of this case;" Pearse described this as including Michael's change of heart concerning Terri's treatment after the medical malpractice litigation ended, Michael's isolation of Terri, and Michael's decision to refuse to treat an infection.¹²⁶ However, once Pearse filed his damning report, Terri had no attorney to use that report and argue on her behalf.

4. Michael's Involvement with Other Women

Michael began dating other women in 1993,¹²⁷ while Terri was at Sabal Palms. According to Michael, as of November 1993, he had been in "intimate relationship[s]" with two women: one lasted eight months, the

¹²¹ *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Feb. 17, 1994) (order appointing guardian *ad litem*); *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. June 11, 1998) (order appointing guardian *ad litem*).

¹²² See *infra* Part V.C.

¹²³ See *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Feb. 17, 1994) (order appointing guardian *ad litem*); *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. June 11, 1998) (order appointing guardian *ad litem*).

¹²⁴ Verified Petition for Order Authorizing Payment of Guardian *Ad Litem* Fees, *supra* note 105; *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. March 2, 1994) (order approving fees for guardian *ad litem*).

¹²⁵ Stipulation Regarding Payment of Fees to Guardian *Ad Litem*, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Aug. 27, 1999). Michael had earlier objected to Pearse's fees. Objection to Pearse's Request for Fees, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. June 16, 1999). Michael had also alleged bias on the part of Pearse. Suggestion of Bias on Part of Guardian *Ad Litem*, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Feb. 3, 1999).

¹²⁶ See 1998 GAL Report, *supra* note 60, at 11-14.

¹²⁷ See 1993 Michael Dep., *supra* note 92, at 3-8; see also Jamie Thompson, *She's the Other Woman in Michael Schiavo's Heart*, ST. PETERSBURG TIMES, Mar. 26, 2005, at 1A, available at 2005 WLNR 23879414 ("He [Michael] decided to date about three years after Terri collapsed, Schiavo's lawyer said during the 2000 trial.").

other had been going on for three months.¹²⁸ In the Schindlers' first removal petition, they alleged in part that the court should remove Michael as guardian because he was "engaged in a relationship with a person other than his wife."¹²⁹ On August 26, 1993, Michael filed a motion to dismiss, claiming that this allegation was not stated with particularity and that the Schindlers did not allege that the relationship was "improper."¹³⁰

At the 1993 deposition where Michael admitted being "intimate" with two women, the Schindlers' attorney, James Sheehan, repeatedly tried to probe Michael about these relationships.¹³¹ At one point Michael's attorney, Steven Nilsson, specifically instructed Michael not to provide the name of the woman with whom he was currently involved¹³² even though Nilsson had filed a motion to dismiss the Schindlers' petition, based, in part, on an alleged lack of specificity.¹³³

On March 4, 1994, the Schindlers filed the Amended First Removal Petition, alleging that Michael had "been involved in a sexual relationship with someone other than his wife."¹³⁴ However, in September of 1995, due to their apparent fear of legal fees being assessed against them, the Schindlers voluntarily dismissed their petition.¹³⁵

¹²⁸ *Id.*

¹²⁹ First Removal Petition, *supra* note 90.

¹³⁰ Motion to Dismiss Petition for Removal of Guardian & Appointment of Guardian & to Strike Certain Portions Thereof, *In re* Guardianship of Schiavo, No. 90-2908GD-003 (Fla. Cir. Ct. Aug. 26, 1993) [hereinafter Motion to Dismiss Petition for Removal].

¹³¹ See 1993 Michael Dep., *supra* note 92, at 3-8.

¹³² The exchange went as follows:

Q: [by Sheehan] Are you presently—you're married to Terry Schiavo, correct?

A: [by Michael] Yes, I am.

Q: Are you presently involved in a romantic relationship with anyone?

A: Yes, I am.

Q: And who is that?

MR. NILSSON: I'll instruct the witness not to answer that in terms of identification. If you have other questions about the relationship, though, please ask.

MR. SHEEHAN: What is the basis?

MR. NILSSON: Just right of privacy.

MR. SHEEHAN: Whose right of privacy?

MR. NILSSON: That individual's.

MR. SHEEHAN: Okay. Can you at least tell me her first name?

MR. NILSSON: I'm going to instruct the witness not to answer that either, but if you have questions about the relationship, other than her name, ask him and they'll be answered.

See 1993 Michael Dep., *supra* note 92, at 3-4. Earlier in August, Michael had moved to dismiss the first removal petition claiming that it lacked particularity in regard to Michael's relationships with other women. Motion to Dismiss the Petition for Removal, *supra* note 130.

¹³³ Motion to Dismiss the Petition for Removal, *supra* note 130.

¹³⁴ Amended First Removal Petition, *supra* note 108.

¹³⁵ Notice of Voluntary Dismissal with Prejudice, *supra* note 114.

Sometime in or about 1995 Michael began dating Jodi Centonze.¹³⁶ Michael was not often questioned about his relationship with Centonze. One of the few times occurred on November 4, 2002, when Michael and George Felos, one of his attorneys, appeared on *CNN*, and Michael was questioned by correspondent, Connie Chung.¹³⁷ Part of the interview went as follows:

CHUNG: Michael, but you will admit that, now you have a girlfriend and that you have a child by that woman, that you apparently do want to start a different life and a new life away from this wife that you have.

SCHIAVO: Well, I got on with a portion of my life. But I still will stick by my wife and make sure that her wishes are carried out.

FELOS: Connie, I want to add that there are many, many situations where there are very long-term marriages, especially elderly spouse, and one has Alzheimer's. And they don't recognize their spouse. They have to be institutionalized.

Should those people just die alone or should they be able to form new relationships and have some companionship? I mean, I think that happens many times. But they don't abandon their spouse. They make sure that they have proper care and that the spouse's wishes are carried out . . .¹³⁸

Michael filed his petition seeking authorization to kill Terri in 1998.¹³⁹ In the year preceding his decision to file, Michael had clearly moved on with his life. For example, when Michael's mother, Clara Schiavo, died from cancer in 1997,¹⁴⁰ her obituary did not even list Terri as a surviving family member.¹⁴¹ Instead, Clara Schiavo was described as the "devoted mother of . . . Michael R. and his fiancé [sic] Jodi of Florida."¹⁴²

¹³⁶ Hugo Kugiyu, *A Husband's Certainty*, *NEWSDAY*, April 14, 2003, at A10.

¹³⁷ *Connie Chung Tonight: Interview with Michael Schiavo and His Attorney, George Felos* (CNN television broadcast, Nov. 4, 2002), transcript available at <http://edition.cnn.com/TRANSCRIPTS/021104/cct.00.html>.

¹³⁸ *Id.* The elderly spouse situations referred to by Felos usually do not involve spouses obtaining court approval to withhold nutrition from their spouses suffering from Alzheimer's. Moreover, is removing feeding tubes "mak[ing] sure that [the patient has] proper care"? *Id.*

¹³⁹ Petition for Authorization to Discontinue Artificial Life Support, & Suggestion for Appointment of Guardian *Ad Litem*, *In re* Guardianship of Schiavo, No. 90-2908GD-003 (Fla. Cir. Ct. May 11, 1998) [hereinafter *Petition to Kill*].

¹⁴⁰ Kugiyu, *supra* note 136.

¹⁴¹ June Maxam, *Schiavo-Centonze Marriage at Risk*, *N. COUNTY GAZETTE*, Jan. 29, 2006, <http://www.northcountrygazette.org/articles/012906MarriageAtRisk.html> [hereinafter *Maxam, Marriage at Risk*].

¹⁴² Maxam, *Marriage at Risk*, *supra* note 141. The obituary provided:

Clara M. Schiavo (nee Henkell), passed away Wednesday, July 2, 1997. For the past five years she was a resident of Seminole, Fla., living formerly for 30 years in Junewood,

Less than a year after Terri's death, in January 2006, Michael married his long-time girlfriend, Jodi Centonze.¹⁴³ By that time, he had been in a relationship with Centonze for at least five years and had fathered two children by her.¹⁴⁴ Even though Michael admitted his intimate relationships with other women in sworn testimony and on national television, the mainstream media frequently failed to mention this fact¹⁴⁵ or if mentioned it at all, treated it as irrelevant.¹⁴⁶

5. Terri's Medical Condition

Terri was not terminally ill. She did not have cancer or any other lethal disease. In fact, experts had predicted that she would live at least another

Levittown. She was the assistant personnel manager for the Gimble Department Store, formerly located in the Oxford Valley Mall, for ten years. She was a member of Hope Lutheran Church in Levittown for 30 years. She was the beloved wife of William F. and the devoted mother of William F. Jr. and his wife Joan of Mayfair, Stephen O. and his wife Pamela of Fairless Hills, Brian J. and his wife Donna of Newtown, Scott E. and his wife Karen of Indiana and Michael R. and his fiancé Jodi of Fla. She was the dear grandmother of William J., Aleen C., Steven G., Kelly M., Scott R., Lisa M. Thomas M. and Ryan A. She is also survived by her sister, Joan May Enoch of Delran, N.J. Relatives and friends are invited to her viewing Mon., 10:30 a.m. until noon and to her funeral service at noon in the Campbell & Thomas Funeral Home, 905 Second St. Pike (at Old Bustleton Pike), Richboro. Her interment will take place in Sunset Memorial Park.

Id.

¹⁴³ See UMIAMI TIMELINE, *supra* note 32.

¹⁴⁴ Kelley Benham, *Storm Over Schiavo to Remarry*, ST. PETERSBURG TIMES, Jan. 21, 2006, at 1A, available at 2006 WLNR 1177464; Associated Press, *Despite Pleas, Schiavo Says, He Couldn't Divorce Sick Wife*, PHILA. INQUIRER, Mar. 27, 2006, at B05, available at 2006 WLNR 5022338.

¹⁴⁵ For example, from 2001 to 2003, the *New York Times* never mentioned that Michael had been intimately involved with several women. See, e.g., Shaila K. Dewan, *Love and Death; It May Be A Family Matter, But Just Try To Define Family*, N.Y. TIMES, Oct. 26, 2003, at 41, available at 2003 WLNR 5656829 ("the Florida Legislature has stripped Mr. Schiavo of his right to make choices for his wife"); Abby Goodnough, *Governor To Appeal Right-To-Die Ruling*, N.Y. TIMES, Nov. 11, 2003, at A16, available at 2003 WLNR 5242175 ("husband of the woman, Terri Schiavo"); Abby Goodnough, *Setback For Jeb Bush Over Feeding Tube*, N.Y. TIMES, Nov. 8, 2003, at A11, available at 2003 WLNR 5233006 ("Mrs. Schiavo's husband"); Abby Goodnough, *Spouse Fights New Law Over Feeding Tube*, N.Y. TIMES, Oct. 30, 2003, at A16, available at 2003 WLNR 5666357 ("husband of Terri Schiavo"); Reuters, *Judge Rules Man May Let Wife Die*, N.Y. TIMES, Aug. 9, 2001, at A18, available at 2001 WLNR 3388902 ("Michael Schiavo, husband of Therea Schiavo"); Donald G. McNeil, Jr., *In Feeding-Tube Case, Many Neurologists Back Courts*, N.Y. TIMES, Oct. 26, 2003, at 118, available at 2003 WLNR 5657969 ("Mrs. Schiavo" and "husband Michael"); Reuters, *Ruling To Remove Life Support*, N.Y. TIMES, Nov. 23, 2002, at A14, available at 2002 WLNR 4435020 ("her husband, Michael Schiavo"). One article did mention Michael's new girlfriend Jodi, though the article still portrayed Michael as the loving husband fighting for Terri's wishes against her controlling parents. See Abby Goodnough, *With His Wife in Limbo, Husband Can't Move On*, N.Y. TIMES, Nov. 2, 2003, at 118, available at 2003 WLNR 5647067.

¹⁴⁶ For example, the *Orlando Sentinel* reported: "Her husband, who once flew his wife to California for experimental brain treatments, visits her several times a week, although he now is engaged to another woman." Associated Press, *Woman in Long Coma May Be Allowed to Die*, ORLANDO SENTINEL, Feb. 12, 2000, at D5, available at 2000 WLNR 8623040.

ten years, maybe even as long as fifty-one years.¹⁴⁷ But despite the fact that Terri was not terminal, Michael decided, during the last five years of her life, not to house her in a rehabilitation facility, but in a facility for those near death, the Woodside Hospice House in Pinellas Park, Florida.¹⁴⁸ From 1992, the year that Michael received the malpractice awards, until her death in 2005, “Terri received absolutely no rehabilitative services, swallowing tests, or therapy of any kind.”¹⁴⁹

6. Terri’s Tortured Death

Before Terri’s death, many sources, including the *New York Times*, relied on experts to predict that her death would cause her “little discomfort.”¹⁵⁰ Afterward, many sources painted a pastoral picture, reporting that Terri’s death from dehydration was “painless.”¹⁵¹ One source stated that Terri “died a ‘gentle’ death Thursday, cradled in the arms of her husband and surrounded by stuffed animals, flowers and hospice workers.”¹⁵² These sources, however, gained this information from George Felos, the attorney who had led the charge for Terri’s death. According to Felos, Mrs. Schiavo died a “calm, peaceful and gentle death.”¹⁵³

Others disagree:

A conscious person would feel it [dehydration] just as you and I would Their skin cracks, their tongue cracks, their lips crack. They may have nosebleeds because of the drying of the mucous membranes, and heaving and vomiting might ensue because of the drying out of the stomach lining.¹⁵⁴

¹⁴⁷ DAVID GIBBS & BOB DEMOSS, *FIGHTING FOR DEAR LIFE* 70-73 (Bethany House Publishers 2006) [hereinafter GIBBS, *FIGHTING FOR LIFE*].

¹⁴⁸ See GIBBS, *FIGHTING FOR LIFE*, *supra* note 147, at 75; Yardley, *supra* note 2. According to one writer: “[F]rom the point of view of the Schindlers, the move to a hospice facility, for which insurance eligibility requires certification by a doctor that the patient has only six months to live and in which the patient relinquishes all treatment other than that for pain, could be meant only to facilitate that order [to remove the feeding tube].” Didion, *supra* note 32.

¹⁴⁹ GIBBS, *FIGHTING FOR LIFE*, *supra* note 147, at 73.

¹⁵⁰ John Schwartz, *Experts Say Ending Feeding Can Lead to a Gentle Death*, N.Y. TIMES, Mar. 20, 2005, § 1, at 29, available at 2005 WLNR 4309246.

¹⁵¹ See, e.g., Kathleen Fackelmann, *Schiavo Not Likely to Experience a Painful Death, Neurologists Say*, USA TODAY, Mar. 24, 2005, at 3A, available at 2005 WLNR 4605063.

¹⁵² Sean Mussenden, Maya Bell & Wes Smith, *Schiavo Dies 9:05 A.M.*, ORLANDO SENTINEL, Apr. 1, 2005, at A1, available at 2005 WLNR 23748565 [hereinafter Mussenden et al., *Schiavo Dies*].

¹⁵³ *Id.*; *Schiavo Dies After Long Legal Battle*, FORT WORTH STAR-TELEGRAM, Apr. 1, 2005, at A1, available at 2005 WLNR 5087498.

¹⁵⁴ Hentoff, *Judicial Murder*, *supra* note 23 (quotations omitted).

In a chapter entitled "The Big Lie," one of the Schindlers' attorneys described this painless death scenario as "starvation spin control."¹⁵⁵ He also criticized the "medical experts" relied upon by the *New York Times*,¹⁵⁶ as well as the "expert" relied upon by Michael's attorney, George Felos.¹⁵⁷ No member of Terri's birth family was present at her death.¹⁵⁸ Her parents were not at the hospice facility.¹⁵⁹ Her brother, Bobby Schiavo, and her sister, Suzanne Vitadamo, were not allowed to be with Terri when she "passed away at 9:05" in the morning.¹⁶⁰ Michael barred them from the room twenty minutes before Terri died.¹⁶¹

III. FOLLOWING THE MONEY

A. Donations and Lawsuits

Soon after Terri's collapse, people in the local community gave fundraising parties to pay for the costs of the trip to California and the experimental medical treatment that insurance would not cover.¹⁶² Approximately \$20,000 was raised.¹⁶³ Michael also filed several suits on behalf of Terri.¹⁶⁴ He filed two suits against Terri's former employer, Prudential Insurance Company of America.¹⁶⁵ The first settled in July 1990.¹⁶⁶ In the second suit Michael alleged that Terri was "entitled to long-term nursing care."¹⁶⁷

On February 18, 1992, Michael filed a malpractice claim against G. Stephen Igel, M.D. and Joel S. Prawer, M.D. on behalf of Terri, and also a

¹⁵⁵ GIBBS, FIGHTING FOR LIFE, *supra* note 147, at 127.

¹⁵⁶ *Id.* at 128. Others criticized the *New York Times* as well. See Thomas Sowell, *Let's Be Clear: She is Being Killed*, N.J. REC., Mar. 23, 2005, at L11, available at 2005 WLNR 4622136 ("A *New York Times* headline on March 20 tried to assure us: 'Experts Say Ending Feeding Can Lead to a Gentle Death' but you can find experts to say anything. In a Dec. 2, 2002 story in the same *New York Times*, people starving in India were reported as dying, 'often clutching pained stomachs.'").

¹⁵⁷ GIBBS, FIGHTING FOR LIFE, *supra* note 147, at 128-30.

¹⁵⁸ *Id.* at 168-69; SCHINDLER, A LIFE THAT MATTERS, *supra* note 77, at 6-8.

¹⁵⁹ See GIBBS, FIGHTING FOR LIFE, *supra* note 147, at 168-69.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*; See also Mussenden et al., *Schiavo Dies*, *supra* note 152.

¹⁶² Murphey, *supra* note 27; *St. Petersburg Beach Has Special Day for Coma Victim*, *supra* note 27, at 3.

¹⁶³ 1993 Michael Dep., *supra* note 92, at 73-74.

¹⁶⁴ See Hook & Mueller, *supra* note 118; Cunningham, *supra* note 118; Kumar, *Deciding the Fate*, *supra* note 118.

¹⁶⁵ Wilson, *supra* note 61.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

claim on behalf of himself for loss of consortium.¹⁶⁸ Michael wanted \$20 million in damages.¹⁶⁹ This amount was based on the projections of Michael's experts that Terri would live 51.27 years.¹⁷⁰ In August of 1992, Michael reached a settlement agreement with Dr. Prawer for \$250,000.¹⁷¹ In January 1993, Michael petitioned for and was given court approval for the \$250,000 settlement with Dr. Prawer.¹⁷² Earlier, in October 1992, Michael resigned as guardian of the property¹⁷³ and was replaced by Barnett Trust.¹⁷⁴ At that time, and before resolution of the other malpractice claim, Terri had approximately \$139,000 of assets.¹⁷⁵

In November 1992, a trial was held concerning the malpractice claim against Dr. Igel.¹⁷⁶ At trial, Michael testified that he would care for Terri for the rest of her life.¹⁷⁷ Later, a verdict was entered in favor of Terri and Michael; Terri was found seventy percent at fault, Dr. Igel thirty percent at fault.¹⁷⁸ Terri was determined to have a life expectancy of seventeen years.¹⁷⁹ The reduced verdict consisted of \$1,434,081.30 for Terri, and

¹⁶⁸ Laura Griffin, *Malpractice Suit Brings \$2-Million to Woman Left in Vegetative State*, ST. PETERSBURG TIMES, Nov. 12, 1992, at 3B, available at 1992 WLNR 2039160.

¹⁶⁹ GIBBS, FIGHTING FOR LIFE, *supra* note 147, at 71.

¹⁷⁰ *Id.* at 71-73.

¹⁷¹ See June Maxam, *Schiavo Judge Signs False Order*, N. COUNTRY GAZETTE, Aug. 6 2006, <http://www.northcountrygazette.org/articles/080406FalseOrder.html> [hereinafter Maxam, *False Order*]. The Florida Department of Health later exonerated Prawer of any negligence. June Maxam, *Time to Unseal the Schiavo Financial Records*, N. COUNTRY GAZETTE, Apr. 9, 2006, <http://www.northcountrygazette.org/articles/040906SchiavoRecords.html>.

¹⁷² Petition for Approval of Settlement, *supra* note 12; see also Maxam, *False Order*, *supra* note 171 ("[Judge] Penick had approved the out of court settlement of \$250,000 from the Prawer claim in July, 1992, at the same time [Michael] Schiavo was reportedly living with [Cindy] Shook.").

¹⁷³ Resignation & Petition for Discharge, *supra* note 84; Petition for Appointment of Successor Plenary Guardian, *supra* note 85.

¹⁷⁴ *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Oct. 19, 1992) (order accepting resignation of guardian and order appointing successor plenary guardian).

¹⁷⁵ Petition for Appointment of Successor Plenary Guardian, *supra* note 85.

¹⁷⁶ Cunningham, *supra* note 118.

¹⁷⁷ The trial has been described as follows: "At the trial, in November 1992, Michael spoke optimistically. 'I see myself hopefully finishing school and taking care of my wife,' he said. 'I want to bring my wife home.' His lawyers asked for \$12 million for Terri's treatment and care, on the presumption that she would live another 51 years, and \$4 million to compensate Michael for the loss of his wife." Kugiya, *supra* note 136; see also GIBBS, FIGHTING FOR LIFE, *supra* note 147, at 70-73 (Michael sought \$20 million).

¹⁷⁸ Stewart, Tilghman, Fox & Bianchi, P.A.: Verdicts and Settlements, http://www.stfbllaw.com/TOCVerdictsandSettlements.jsp#verdict_9 (last visited Oct. 18, 2008). According to the website of the firm that handled the case, the result was a "\$6,880,000 verdict, reduced by seventy percent comparative negligence, against a doctor who failed to diagnose an eating disorder which caused serious injury to plaintiff." *Id.*

¹⁷⁹ Laura Griffin, *Malpractice Suit Brings \$2-Million to Woman Left in Vegetative State*, ST. PETERSBURG TIMES, Nov. 12, 1992, at 3B, available at 1992 WLNR 2039160.

\$630,000 for Michael,¹⁸⁰ though a settlement was later reached.¹⁸¹ The attorneys who represented Terri and Michael in the malpractice actions received a total of \$516,880.¹⁸² After reduction for attorney's fees and costs, Terri received approximately \$700,000 and Michael \$300,000.¹⁸³

In April 1993, Terri's assets were valued at \$776,254.¹⁸⁴ In November 1993, Michael valued Terri's assets at \$761,507.50.¹⁸⁵ In April 1998, Terri's assets were valued at \$713,825.¹⁸⁶ Terri's assets consisted of "blue chip" stocks that were doing quite well during that time period.¹⁸⁷ Once the fight for Terri's death started, the amount quickly dwindled.¹⁸⁸ As of June 2001, Terri's assets were valued at \$350,000.¹⁸⁹

*B. Using Terri's Money to Pay Michael's Attorneys to Fight for Her Death*¹⁹⁰

From the beginning, numerous requests for attorneys' fees were filed along with requests for permission to sell assets.¹⁹¹ From the beginning, Michael had access to Terri's malpractice award which he used to pay attorneys such as George Felos.¹⁹² Notably, although Michael himself received \$300,000 for his loss of consortium claim, he used Terri's money, not his own, to fight for her death.¹⁹³ In fact, the first order issued by

¹⁸⁰ Petition for Approval of Settlement, *supra* note 12. Daniel Grieco, II, represented Michael. See Larry Copeland & Jill Lawrence, *Feud May Be as Much Over Money as Principle*, USA TODAY, Mar. 24, 2005, at 3A [hereinafter Copeland & Lawrence, *Feud*]. Grieco received twenty-five percent or \$129,220. Petition for Authority to Reimburse Costs to Counsel in Med. Negligence Action, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct., June 17, 1993)[hereinafter *Petition to Reimburse Costs*].

¹⁸¹ After the verdict, Dr. Igel's insurance company agreed to settle the claims for a total of \$2,000,000. Petition for Approval of Settlement, *supra* note 12.

¹⁸² *Petition to Reimburse Costs*, *supra* note 180.

¹⁸³ Expenses and costs amounted to \$53,854.77, and health care debts equaled \$173,510.84. *Id.* Some thought Terri received over \$700,000 and Michael \$300,000. See Copeland & Lawrence, *Feud*, *supra* note 180; Levesque, *Settlement Disappeared*, *supra* note 15.

¹⁸⁴ See Levesque, *Settlement Disappeared*, *supra* note 15.

¹⁸⁵ Petition to Defend Against Removal & for Fees, *supra* note 13.

¹⁸⁶ See 1998 GAL Report, *supra* note 60, at 11-14; Kumar & Nealy-Brown, *Funds Dwindle*, *supra* note 14.

¹⁸⁷ Kumar & Nealy-Brown, *Fund Dwindles*, *supra* note 14.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ This article focuses on the time period ending June 2001.

¹⁹¹ See Pinellas County Circuit Court Probate Docket, *supra* note 97 (listing all petitions for attorney fees and to sell assets from May 22, 1990 through November 7, 2005).

¹⁹² See Gibbs, *Gibbs on Schiavo*, *supra* note 3, at 22-23.

¹⁹³ See June Maxam, *Schiavo Claims Warrant Forensic Accountant*, N. COUNTRY GAZETTE, Dec. 30, 2006, <http://www.northcountrygazette.org/articles/123006SchiavoClaims.html>. ("most of [the medical malpractice award] went towards the legal fees needed to gain judicial permission to kill her"); see also Fox on the Record with Greta Van Susteren: Interview with Scott Schiavo, Michael Schiavo's

Judge Greer after being assigned Terri's case, approved a petition requesting attorney's fees for George Felos, the attorney Michael hired to help him end Terri's life, who billed at a rate of \$195 an hour.¹⁹⁴ Felos had years of experience litigating life-ending cases.¹⁹⁵ He had successfully argued the Florida Supreme Court case upon which Judge Greer based his Death Order, *In re Browning*.¹⁹⁶ Felos had "a reputation as the person to see when you want to let someone die."¹⁹⁷

As stated *supra*, in June of 1990, Circuit Judge Robert F. Michael appointed Michael as the plenary guardian of Terri.¹⁹⁸ The initial inventory of Terri's assets was filed on August 20, 1990,¹⁹⁹ but later sealed on November 25, 2003.²⁰⁰ From January 1991 until July 1991, Terri was receiving treatment at the Mediplex Rehabilitation Facility in Bradenton, Florida (Mediplex).²⁰¹ For part of that time period, the Mediplex submitted bills totaling over \$85,000, for services including physical and speech therapy.²⁰² An earlier bill from another provider of services to Terri was submitted for the time period of February 1990 to January 1991 and totaled over \$20,000.

As discussed *supra*, in the beginning months of 1993, Terri's medical malpractice claims settled.²⁰³ Two weeks after the award was finalized, Michael and the Schindlers parted ways.²⁰⁴ After receiving the settlement, Michael spent Terri's money primarily on attorneys, first for defending him from being removed as guardian, and later for advocating for Terri's

brother (Fox television broadcast Mar. 23, 2005), transcript available at 2005 WLNR 4440991. Concerning Michael's money: "VAN SUSTEREN: But [i]s there anything left of that \$700,000 or the \$300,000? SCHIAVO: No, ma'am. The \$300,000 was Michael's money that he put himself through respiratory school and nursing school for several years and—but the money that was Terri's money is basically all gone." *Id.*

¹⁹⁴ *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. May 14, 1997) (order authorizing guardian to employ and pay an attorney).

¹⁹⁵ As of 2001, Felos had taken on at least ten life-ending cases. See Sharon Tubbs, *The Spirit and the Law*, ST. PETERSBURG TIMES, May 25, 2001, at D1, available at 2001 WLNR 11029486.

¹⁹⁶ See *In re Guardianship of Browning*, 568 So. 2d 4 (Fla. 1990); see also George Felos, *Felos on Schiavo*, 35 STETSON L. REV. 9 (2005). In *Browning*, the eighty-six-year-old patient had left a written directive in which she "stipulated that she desired not to have 'nutrition and hydration (food and water) provided by gastric tube or intravenously.'" 568 So. 2d at 8.

¹⁹⁷ Tubbs, *supra* note 195.

¹⁹⁸ UMIAMI TIMELINE, *supra* note 32.

¹⁹⁹ Initial Verified Inventory, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Aug. 20, 1990).

²⁰⁰ *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. May 25, 2003) (court sealed inventory in envelope, no tangible court order exists on the docket).

²⁰¹ UMIAMI TIMELINE, *supra* note 32.

²⁰² Request for Notice & Copies, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. July 1, 1991).

²⁰³ Petition for Approval of Settlement, *supra* note 12, at 76.

²⁰⁴ GIBBS, FIGHTING FOR LIFE, *supra* note 147, at 73.

death.²⁰⁵ Michael filed numerous petitions seeking the payment of attorney fees.²⁰⁶ For example, on September 9, 1993, Michael requested payment of \$1,500 from the guardian's trust fund as a retainer for Steven Nilsson.²⁰⁷ On November 4, 1993, Michael sought permission from Judge Greer to hire and pay Steven Nilsson to defend against the First Removal Petition at an hourly rate of \$125; in that petition Michael valued Terri's assets at \$761,507.50.²⁰⁸ On January 3, 1994, the order granting Michael's petition was issued.²⁰⁹

Other petitions for attorney fees for the guardian of the person soon followed. On April 14, 1994, Michael filed a petition seeking reimbursement for attorney fees and costs that Michael had paid to Nilsson²¹⁰ that the court granted in the amount of \$5,904.95 on July 26, 1994.²¹¹ On October 26, 1994, Michael sought the payment of attorney

²⁰⁵ See Gibbs, *Gibbs on Schiavo*, *supra* note 3, at 22-23; see also Kumar & Nealy-Brown, *Funds Dwindle*, *supra* note 14 (most of the money spent between 1999 and 2001 was "on the intense legal fight that made its way to the U.S. Supreme Court").

²⁰⁶ See, e.g., Petition for Order to Pay Retainer, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Sept. 9, 1993) (attorney Wilson); Petition to Defend Against Removal & for Fees, *supra* note 13 (attorney Nilsson); Verified Petition for Order Authorizing Payment of Att'y Fees & Costs at 769-70, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Oct. 26, 1994) (attorney Bushnell); Verified Petition for Order Authorizing Payment of Att'y Fees & Costs, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Sept. 22, 1995) (attorney Bushnell); Verified Petition for Order Authorizing Payment of Att'y Fees & Costs, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Sept. 26, 1996) (attorney Bushnell); Petition for Authorization to Employ & Pay an Att'y Pursuant to Authority to Represent, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Apr. 14, 1997) (attorney Felos); Petition for Authorization to Pay Cost Retainer to Att'y Instituting Action Regarding Withdrawal of Life Support Sys., *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Nov. 17, 1997) (attorney Felos); Verified Petition for Order Authorizing Payment of Att'y Fees & Costs, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. June 11, 1998) (attorney Bushnell); Verified Petition for Order Authorizing Payment of Att'y Fees & Costs, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Nov. 20, 1998) (attorney Bushnell); Petition to Pay Costs Advanced to Att'y, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. June 11, 1998) (attorney Felos); Verified Petition for Order Authorizing Payment of Att'y Fees & Costs, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Nov. 24, 1999) (attorney Bushnell).

²⁰⁷ Petition for Order to Pay Retainer, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Sept. 9, 1993).

²⁰⁸ Petition to Defend Against Removal & for Fees, *supra* note 13. As of March 29, 1994, Terri's assets had decreased to \$692,655.76. Petition for Order Authorizing Sale of Sec., *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Mar. 29, 1994). But by April 1998, the value had increased to \$713,828.85. See 1998 GAL Report, *supra* note 60, at 8.

²⁰⁹ *In re Guardianship of Schiavo*, No. 90-2908GD-003 at 187 (Fla. Cir. Ct. Jan. 3, 1994) (order authorizing defense against petition for removal of guardian and appointment of guardian and to hire and pay an attorney for such defense).

²¹⁰ Petition for Order Authorizing & Directing Guardian of the Prop. to Reimburse Michael Schiavo for Att'y Fees & Costs Incurred in Defending Against Order to Show Cause & Motion for Restraining Order, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Apr. 14, 1994).

²¹¹ *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. July 26, 1994) (order authorizing and directing guardian of the property to reimburse Michael Schiavo for attorney fees and costs incurred in defending against order to show cause and motion for restraining order).

fees for his new attorney, Deborah Bushnell, and her paralegal, in the amount of \$5,623.75.²¹² The court authorized this payment on January 30, 1995.²¹³ On September 22, 1995, Michael again sought the payment of attorney fees and costs for Bushnell, this time in the amount of \$2,209.31.²¹⁴ The court authorized this payment on October 18, 1995.²¹⁵ On September 26, 1996, Michael sought the payment of attorney fees for Bushnell in the amount of \$2,293.59.²¹⁶ The court authorized this payment on October 22, 1996.²¹⁷

In 1997, Michael began to spend more of Terri's money hiring specialists to fight for Terri's death.²¹⁸ Earlier, on December 13, 1995, Deborah Bushnell had a thirty-minute telephone conversation with George Felos concerning "assistance with analysis of life-prolonging procedures statute and *Browning* case."²¹⁹ That same day, Bushnell billed for researching "life-sustaining procedures."²²⁰ In April of 1997, Michael first sought authorization to hire and pay the firm of Felos & Felos for the withdrawal and/or refusal of medical treatment for Terri and included a proposed order to that effect.²²¹ The requested billing rate was \$195 an hour.²²² After the proposed order was stamped "Not Signed,"²²³ one of

²¹² Verified Petition for Order Authorizing Payment of Att'y Fees & Costs at 769-70, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Oct. 26, 1994).

²¹³ *In re Guardianship of Schiavo*, No. 90-2908GD-003 at 797 (Fla. Cir. Ct. Jan. 30, 1995) (order authorizing payment of attorney's fees and costs).

²¹⁴ Verified Petition for Order Authorizing Payment of Att'y Fees & Costs, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Sept. 22, 1995).

²¹⁵ *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Oct. 18, 1995) (order authorizing payment of attorney fees and costs).

²¹⁶ Verified Petition for Order Authorizing Payment of Att'y Fees & Costs, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Sept. 26, 1996).

²¹⁷ *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Oct. 22, 1996) (order for attorney fees).

²¹⁸ See, e.g., Petition for Authorization to Employ & Pay an Att'y Pursuant to Authority to Represent, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Apr. 14, 1997); Petition for Authorization to Pay Cost Retainer to Att'y Instituting Action Regarding Withdrawal of Life Support Sys., *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Nov. 17, 1997); Verified Petition for Order Authorizing Payment of Att'y Fees & Costs, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. June 11, 1998).

²¹⁹ Verified Petition for Order Authorizing Payment of Att'y Fees & Costs, *supra* note 216.

²²⁰ *Id.*

²²¹ Petition for Authorization to Employ & Pay an Att'y Pursuant to Authority to Represent, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Apr. 14, 1997). According to sources, Michael contacted Felos as early as 1995. See Gibbs, *Gibbs on Schiavo*, *supra* note 3, at 18-19 n.4.

²²² Petition for Authorization to Employ & Pay an Att'y Pursuant to Authority to Represent, *supra* note 221. Judge Greer later increased to the hourly rate to \$225. *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Apr. 28, 2000) (order authorizing adjustment of attorney's fee rate).

²²³ *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Apr. 21, 1997) (order authorizing guardian to employ and pay attorney pursuant to authority to represent). The unsigned order also contained a notation that Terri's parents had not been given notice. See *id.*

Michael's attorneys, Deborah Bushnell, wrote a letter to the court about the wording of any order authorizing the hiring of such attorneys for such purposes.²²⁴ Writing as if authorization for the withdrawal was a given, she wrote that the parents would be "approached gently" by George Felos concerning the withdrawal of medical treatment; she requested that Judge Mark Shames not include language in his order that the attorneys were being hired to obtain such withdrawal.²²⁵ The order authorizing the hiring of the Felos firm, however, provided that the firm was "to represent petitioner in connection with the issue of withdrawal and/or refusal of medical treatment for the ward"²²⁶

On November 17, 1997, Michael sought more authorization to use Terri's assets to pay George Felos in the quest to obtain legal approval for killing Terri.²²⁷ The order authorizing such payment was issued by Judge Bruce Boyer on March 11, 1998.²²⁸ Two months later Michael, through his attorney George Felos, filed the Petition to Kill.²²⁹ Recognizing that the Schindlers would oppose this Petition to Kill, Michael also filed a Declaration of Adversarial Proceeding.²³⁰ Michael sought more fees on June 11, 1998,²³¹ and the court authorized their payment on June 30, 1998.²³² Michael sought further court approval to pay Bushnell in November of 1998²³³ which the court approved.²³⁴

²²⁴ Letter from Deborah Bushnell, Attorney at Law, to Judge Shames, Florida Circuit Court (May 6, 1997), available at <http://judgegeorgegreer.com/docs/bushnell051497.pdf>.

²²⁵ See *id.*

²²⁶ *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. May 14, 1997) (order authorizing guardian to employ and pay an attorney).

²²⁷ Petition for Authorization to Pay Cost Retainer to Att'y Instituting Action Regarding Withdrawal of Life Support Sys., *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Nov. 17, 1997).

²²⁸ *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Mar. 11, 1998) (order authorizing payment of cost retainer to attorney instituting action regarding withdrawal of life support systems).

²²⁹ Petition to Kill, *supra* note 139.

²³⁰ Declaration of Adversary Proceedings, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. May 11, 1998).

²³¹ Verified Petition for Order Authorizing Payment of Att'y Fees & Costs, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. June 11, 1998).

²³² *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. June 30, 1998) (order authorizing payment of attorney's fees and costs).

²³³ Verified Petition for Order Authorizing Payment of Att'y Fees & Costs, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Nov. 20, 1998). The entry for December 24, 1997 concerned "problems with treating physician and experts, and need to get new doctors." *Id.* A later entry on March 6, 1998 concerned a call from George Felos updating Bushnell "on obtaining new doctors for petition re life support." *Id.*

²³⁴ *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Dec. 18, 1998) (order authorizing payment of attorney's fees and costs).

During 1999, Michael continued to seek court approval to pay his attorneys with Terri's money: he sought attorney fees in February;²³⁵ an amended, more detailed, petition for Felos & Felos was filed on August 20, 1999²³⁶ (in Judge Greer's first ruling, he authorized such payments);²³⁷ and in November, a petition for fees for Bushnell was filed,²³⁸ which the court granted in December.²³⁹

In 2000, with court approval, Michael continued using Terri's money to pay his attorneys; for example, within three days of Judge Greer issuing the Death Order, Michael filed another petition for attorney fees.²⁴⁰ On March 15, 2000, Michael filed a petition requesting that Judge Greer seal the petitions seeking fees paid to his attorneys, Felos, Stanley, and Bushnell.²⁴¹ On March 27, 2000, Judge Greer sealed such petitions, but only for the attorneys representing Michael.²⁴² Michael continued to file petitions seeking authorization to pay attorney fees during the time the Schindlers were appealing the Death Order, and for following years. In May of 2001, shortly after the appellate court affirmed part of the Death Order dealing with Terri's wishes, Michael filed several petitions seeking more attorney fees and costs.²⁴³ Judge Greer granted all of them, one on the same day in which it was filed,²⁴⁴ and the others the day after.²⁴⁵

²³⁵ Petition for Authorization to Pay Cost Advance to Att'y Instituting Action Regarding Withdrawal of Life Support Sys., *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Feb. 4, 1999) ("An additional cost deposit of \$5,000.00 is necessary at this time to prepare this case for trial.").

²³⁶ Amended Petition for Authorization to Pay Interim Cost Advance to Att'y, Felos & Felos, P.A., *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Aug. 20, 1999).

²³⁷ See *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Sept. 3, 1999) (order authorizing payment of interim cost advance to attorney, Felos & Felos, P.A.).

²³⁸ Verified Petition for Order Authorizing Payment of Att'y Fees & Costs at 1477, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Nov. 24, 1999).

²³⁹ *In re Guardianship of Schiavo*, No. 90-2908GD-003 at 1477 (Fla. Cir. Ct. Dec. 17, 1999) (order authorizing payment of attorney's fees and costs).

²⁴⁰ Petitioner's Motion to Strike the Motion to Intervene Brought by Prof'l for Excellence in Health Care, Inc. & Petitioner's Motion for Att'y Fees to be Paid by the Proposed Intervenor & its Att'y, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Feb. 14, 2000).

²⁴¹ Petition to Seal Att'y Fee Petitions, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Mar. 15, 2000). The Schindlers likewise sought to seal their petitions for attorney fees for their attorney, Pamela Campbell. Petition to Seal Att'y Fee Petitions, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Mar. 27, 2000). Judge Greer did not award them fees and did not grant their petition. *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Mar. 27, 2000) (order to seal attorney fee petitions for Felos, Bushnell, and Stanley).

²⁴² *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Mar. 27, 2000) (order sealing attorney fee petitions for Felos, Stanley, and Bushnell).

²⁴³ See, e.g., Petition Authorizing Interim Cost to Att'y, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. May 8, 2001); Petition for Att'y Fees, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. May 14, 2001).

²⁴⁴ *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. May 8, 2001) (order authorizing payment of interim cost to attorney).

As of June 2001, only \$350,000 remained of Terri's money.²⁴⁶ Three years earlier, as of April 1998, Terri's assets had totaled approximately \$713,000.²⁴⁷ According to one source, as of June 2001, Michael had paid \$247,852.79 to his attorneys, with \$214,478.94 going to George Felos, the death specialist.²⁴⁸ According to the Schindlers, from 1993 until May 15, 2001, judges in the case had approved approximately \$200,000 in payments to Felos.²⁴⁹ In the time after May 2001, Michael continued to deplete Terri's trust to pay his attorneys, especially George Felos; from May 15, 2001 to May 28, 2002, Felos was awarded over \$145,000.²⁵⁰ From June 1993 to May 2002, Michael's various attorneys were awarded a total of \$485,048.97 in fees and costs.²⁵¹ Even after Terri's death, Felos was seeking attorney fees from her estate in the amount of \$441,535.25.²⁵²

To pay all of his attorneys Michael had to sell the assets in Terri's trust fund, such as stock.²⁵³ Michael filed numerous petitions seeking authorization for the sale of various assets held in trust for Terri.²⁵⁴ For

²⁴⁵ Petition for Att'y Fees, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. May 15, 2001).

²⁴⁶ Kumar & Nealy-Brown, *Funds Dwindle*, *supra* note 14.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ See Notice of Filing Summary of Att'y Fees, Costs & Other Charges, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. July 2, 2002).

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² June Maxam, Commentary, *Michael Schiavo—What Goes Around, Comes Around*, N. COUNTRY GAZETTE, May 15, 2007, <http://www.northcountrygazette.org/2007/05/15/commentary-michael-schiavo—what-goes-around-comes-around/>.

²⁵³ See Petition for Order Authorizing Sale of Sec., *supra* note 208. Such petition states in part: It is expedient, necessary and in the best interest of the guardianship estate to liquidate the assets listed in Section 2 herein to raise cash to provide for the regular monthly expenses of the Ward, to reimburse MICHAEL SCHIAVO, Guardian of the Person for sums paid to STEVEN G. NILSSON as attorney fees, cost and retainer, and for further attorney fees pursuant to Order . . . entered January 2, 1994 *Id.* Later petitions obfuscated the fact that assets were being liquidated to pay attorneys' fees: "It is expedient, necessary and in the best interest of the guardianship estate to liquidate \$35,000 of . . . U.S. Treasury Notes . . . to provide for the regular monthly expenses of the Ward and for payment of other fees and expenses which are anticipated." Petition for Order Authorizing Sale of Sec., *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. May 3, 1994). See also Petition for Order Authorizing Sale of Assets, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Dec. 6, 1994) (same language except \$15,000 of notes were at issue).

²⁵⁴ Petition for Order Authorizing Sale of Sec., *supra* note 208 (1,100 shares of stock); Petition for Order Authorizing Sale of Assets, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. May 4, 1994) (\$35,000 of Treasury Notes); Petition for Order Authorizing Sale of Assets, *supra* note 253 (\$15,000 of Treasury Notes); Petition for Order Authorizing Sale of Assets, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. June 1, 1995) (\$30,000 of Treasury Notes); Petition for Order Authorizing Sale & Purchase of Assets, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Jan. 24, 1996) (1,250 shares sold; 400 shares purchased); Petition for Order Authorizing Sale of Assets, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Dec. 23, 1996) (\$25,000 of Treasury Notes); Petition for Order Confirming Liquidation of Assets, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. May 2, 2001) (\$50,000 Philip Morris bond; 200 shares of

example, on March 29, 1994, Michael sought authorization to sell securities to provide for the monthly expenses of the ward, for reimbursement of attorney fees, and for future attorney fees.²⁵⁵ In this petition, Michael alleged that the current value of Terri's trust was \$692,655.76, with an annual yield of 4.66%, and an estimated annual income of \$32,274.²⁵⁶ The court granted the petition on April 11, 1994.²⁵⁷ On May 4, 1994, Michael sought additional authorization to sell Terri's assets, including United States Treasury ("Treasury") notes.²⁵⁸ The court authorized the sale of approximately \$35,000 of Treasury notes on July 26, 1994.²⁵⁹ On December 6, 1994, Michael filed another petition seeking authorization to sell assets, including more Treasury notes and stocks.²⁶⁰ The court granted this petition on January 25, 1995.²⁶¹

In 1995 and 1996, Michael continued to sell Terri's assets with court approval. On June 1, 1995, Michael filed another petition seeking authorization to sell assets, including \$30,000 of Treasury notes.²⁶² The court granted this order on June 5, 1995.²⁶³ On January 24, 1996, Michael

Microsoft); Petition for Order Confirming Liquidation of Assets, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. June 7, 2001) (\$50,000 utility bond; 1,450 shares of stock, including Microsoft, Disney, Hewlett Packard, and Home Depot); Petition for Order Authorizing Sale of Assets, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. July 30, 2001) (1,668 shares of stock, including Microsoft, Exxon Mobil, Home Depot, and Walmart); Petition for Order Authorizing Sale of Assets, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Nov. 2, 2001) (1,650 shares of stock, including Disney, Walmart, and Norfolk Southern); Petition for Order Confirming Liquidation of Assets, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Feb. 4, 2002) (400 shares of Microsoft; 400 shares of Coca Cola); Petition for Order Authorizing Sale of Assets, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Feb. 20, 2002) (452 shares of stock, including Home Depot); Petition for Order Confirming Liquidation of Assets, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. June 12, 2002) (200 shares of Microsoft); Petition for Order Authorizing Sale of Assets, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. June 12, 2002) (700 shares of stock and \$50,000 bond); Petition for Order Authorizing Liquidation of Remaining Guardianship Assets, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. June 14, 2002) (two \$50,000 bonds and 814 shares of stock).

²⁵⁵ Petition for Order Authorizing Sale of Sec., *supra* note 208.

²⁵⁶ *Id.*

²⁵⁷ *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Apr. 11, 1994) (order authorizing sale of assets and securities).

²⁵⁸ Petition for Order Authorizing Sale of Assets, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. May 4, 1994).

²⁵⁹ *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. July 26, 1994) (order authorizing sale of asset by guardian of the property).

²⁶⁰ Petition for Order Authorizing Sale of Assets, *supra* note 253. The Treasury notes, worth \$65,000, were to mature on May 15, 1996, and Michael wanted to liquidate \$15,000 of the notes. *Id.*

²⁶¹ *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Jan. 25, 1995) (order authorizing sale of assets).

²⁶² Petition for Order Authorizing Sale of Assets, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. June 1, 1995). Michael wanted to liquidate all \$30,000 worth of the Treasury notes. *Id.*

²⁶³ *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. June 5, 1995) (order authorizing sale of assets).

filed a petition seeking authorization to sell 1,250 shares of various stocks and to buy 400 shares of other stock.²⁶⁴ The court granted this petition two days later on January 26, 1996.²⁶⁵ On December 23, 1996, Michael filed yet another petition seeking authorization to sell assets, including \$25,000 of Treasury notes.²⁶⁶ The court granted this order on December 31, 1996.²⁶⁷

The petitions seeking authorization to sell assets continued in following years, though Michael did not file such petitions in the year immediately prior to filing the Petition to Kill.²⁶⁸ In fact, Michael waited until after the appellate court affirmed part of the Death Order, in May of 2001, to seek further authorization for the sale of Terri's assets.²⁶⁹ Within two months of the *Schiavo I* decision,²⁷⁰ Michael filed a petition seeking *confirmation* for liquidating Terri's assets.²⁷¹ Thus, it seems that Michael sought not authorization, but an after-the-fact confirmation for liquidation that had already occurred. Two days later Michael received such confirmation.²⁷²

Moreover, though Michael himself received \$300,000 from Terri's malpractice suit, his own attorney, Deborah Bushnell, "did not know how it was spent or whether any is left" as of March 2005.²⁷³ Apparently Michael did not believe strongly enough in Terri's "right-to-die" to spend his own money for the cause.

As stated, as of June 2001, only about \$350,000 remained of Terri's money,²⁷⁴ but the use of Terri's money to fight for her death continued. Within two years, in March 2003, lawyers for Michael Schiavo "told reporters that Terri Schiavo receives Social Security benefits and Medicaid

²⁶⁴ Petition for Order Authorizing Sale & Purchase of Assets, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Jan. 24, 1996).

²⁶⁵ *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Jan. 26, 1996) (order for sale of assets).

²⁶⁶ Petition for Order Authorizing Sale of Assets, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Dec. 23, 1996).

²⁶⁷ *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Dec. 31, 1996) (order authorizing sale of assets).

²⁶⁸ See Pinellas County Circuit Court Probate Docket, *supra* note 97.

²⁶⁹ See *id.* at 9-18 (between Dec. 23, 1996 and May 2, 2001, no such petitions filed). During this time period, however, the Guardian of the Property liquidated a Philip Morris \$50,000 bond on November 2, 1999, and 200 shares of Microsoft stock on February 29, 2000, and later sought court approval. Petition for Order Confirming Liquidation of Assets, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. May 2, 2001).

²⁷⁰ See *Schiavo I*, *supra* note 20.

²⁷¹ Petition for Order Confirming Liquidation of Assets, *supra* note 269.

²⁷² *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. May 4, 2001) (order confirming liquidation of assets).

²⁷³ *Settlement Spent*, *supra* note 15.

²⁷⁴ Kumar & Nealy-Brown, *Funds Dwindle*, *supra* note 14.

for some basic care costs.”²⁷⁵ One source stated that “Felos was previously paid \$358,434 out of [Terri’s] fund.”²⁷⁶ Though fees charged for speaking to the media were questioned by the clerk of the court’s office in 2000, Felos was paid for the hours he spent speaking to the media; such payment was not disapproved by Judge Greer.²⁷⁷ Another lawyer hired by Michael was “paid approximately \$80,000 from the fund.”²⁷⁸ Simple math shows that these fees alone totaled \$438,439. Because Judge Greer sealed attorney fees petitions filed by Michael’s lawyers,²⁷⁹ it is impossible to say exactly how much of Terri’s money was spent on attorneys fighting for her death.

According to George Felos, as of October 2003, only \$55,000 to \$65,000 was left in Terri’s fund.²⁸⁰ According to Bushnell, as of March 2005, only \$40,000 to \$50,000 remained, and that was to be saved for litigation expenses.²⁸¹ However, Bushnell stated elsewhere that most of the \$70,000 would be spent paying back Medicaid.²⁸² In fact, Michael had spent so much money on lawyers that at Terri’s death the Hospice deemed Terri to be an indigent; the government was actually paying her bills.²⁸³ Moreover, Bushnell said in March of 2005:

²⁷⁵ Chris Gray, *Both Sides in Schiavo Fight Point to Control of Money*, PHILA. INQUIRER, Oct. 29, 2003, at A5, available at 2003 WLNR 14764020 [hereinafter Gray, *Control of Money*].

²⁷⁶ Diana Lynne, *Constitutional Showdown Brewing over Terri’s Law*, WORLDNETDAILY.COM, Oct. 24, 2003, http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=35258. In March 2005, Felos admitted to receiving \$340,000 in legal fees. Larry Fish, *The Schiavo Case Simply Can’t End*, PHILA. INQUIRER, Mar. 14, 2005, at B1, available at 2005 WLNR 22991475.

²⁷⁷ Kumar & Nealy-Brown, *Funds Dwindle*, *supra* note 14.

²⁷⁸ Lynne, *supra* note 276.

²⁷⁹ *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Mar. 27, 2000) (order to seal attorney fee petitions).

²⁸⁰ Sean Mussenden & Greg Groeller, *Husband Still Fights to End Wife’s Life*, ORLANDO SENTINEL, Oct. 24, 2003, at B1, available at 2003 WLNR 15532043.

²⁸¹ *\$1 Million Payout is Virtually Gone*, CHARLOTTE OBSERVER, Mar. 27, 2005, at 6A, available at 2005 WLNR 4781209.

²⁸² Levesque, *Settlement Disappeared*, *supra* note 15.

²⁸³ See Gray, *Control of Money*, *supra* note 275. In October of 2003, George Felos stated that “a court has approved her for Medicaid coverage to pay part of the \$5,000-a-month basic care costs.” Mary McLachlin, *Schiavo’s Doctor Quits Case*, PALM BEACH POST, Oct. 24, 2003, at 1A, available at 2003 WLNR 2809318. Felos and Deborah Bushnell, another attorney for Michael, both stated that same month that “[a] fund for indigent patients run by the Hospice of the Florida Suncoast paid for up to \$5,000 a month of hospice care.” Gray, *Control of Money*, *supra* note 275; see also *CourtTVNews: Lawyers Bill Allen and Wesley Smith Discuss the Legal and Bioethical Issues* (CourtTV television broadcast Mar. 24, 2005), transcript available at http://www.courtTV.com/talk/chat_transcripts/2005/0324schiavo-debate.html. Part of the debate went as follows:

Question from [R]usty: Who is currently paying for Terri’s care?

Bill Allen: The Woodside Hospice is using their indigent funds for the hospice costs, and her medications and physician bills are paid by Medicaid.

The Hospice of the Florida Suncoast has been paying for most of Schiavo's care for about two years Terri Schiavo also is enrolled in the state Medicaid medically needy program, which pays roughly \$200 a month in medication costs Two years ago, lawyers set up a Medicaid disability trust fund with about \$50,000, the remaining money from Schiavo's malpractice judgment²⁸⁴

This "Medicaid disability trust fund" was set up to "pay . . . for certain medical expenses and legal costs, not including lawyers' fees, and . . . for funeral bills and any other medical expenses after [Terri] die[d]." ²⁸⁵ Thus, Terri's assets were essentially gone at the time of her death.

In the early years, Terri's parents did not have access to Terri's money to pay for attorneys to advocate for Terri's life.²⁸⁶ Mary Schindler began working at a Hallmark store stocking greeting cards,²⁸⁷ presumably to pay the attorney bills. In fact, at the time that they appealed the Death Order, the Schindlers were described as being "financially strapped."²⁸⁸ In 2001, an attorney for the Schindlers stated: "We don't think it's right that her own money, awarded by a jury for her future medical care, is being used to try to kill her."²⁸⁹ The third lead attorney for the Schindlers, David Gibbs III, was not being paid for his services,²⁹⁰ though in later years some private organizations did provide the Schindlers with some funding.²⁹¹ By that

Wesley Smith: What I find terribly ironic, is that in 1998, Terri had more than \$700K in her trust account to pay for her care. The bulk of this money instead went to lawyer George Felos and other attorneys, to help end her life.

Id.; see also Jonathan Weisman & Ceci Connolly, *Schiavo Case Puts Face on Rising Medical Costs*, WASH. POST, Mar. 23, 2005, at A13, available at 2005 WLNR 4561203 (reporting that patient care at Terri's hospice averaged around \$80,000 a year and the hospice paid for much of that care). "Medicaid has covered other medical costs, including prescription drugs," according to Michael's attorneys. *Id.*

²⁸⁴ Lisa Greene, *Medicine, Money and Terri Schiavo*, ST. PETERSBURG TIMES, Mar. 26, 2005, at 8A, available at 2005 WLNR 23768004.

²⁸⁵ *Id.*

²⁸⁶ Gibbs, *Gibbs on Schiavo*, *supra* note 3, at 23; see also GIBBS, *FIGHTING FOR LIFE*, *supra* note 147, at 111. In addition, in July 2002 the Schindlers asked Judge Greer to stop "the drain on [Terri's] resources" by denying any further payment for attorneys' fees. Petition to Deny Further Att'y Fees & Costs, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. July 5, 2002). Less than one week later, Judge Greer denied the petition. *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. July 11, 2002) (order denying petitions for expenditures and fees).

²⁸⁷ Debbie Cenziper, *Desperation Fuels the Family's Ongoing Struggle*, MIAMI HERALD, Mar. 27, 2005, at 1A, available at 2005 WLNR 23043596.

²⁸⁸ Kumar, *Judge*, *supra* note 28, at 1A.

²⁸⁹ Ralph Vigoda, *Their Child and His Wife—But Whose Life?*, PHILA. INQUIRER, Apr. 29, 2001, at A1, available at 2001 WLNR 2405484 (quoting Pat Anderson).

²⁹⁰ Bill Varian, *Schiavo Case Puts 'Legal Missionary' in Spotlight*, ST. PETERSBURG TIMES, Mar. 23, 2005, at 5A, available at 2005 WLNR 4583793.

²⁹¹ See Fish, *supra* note 276.

time, however, Judge Greer had already made the crucial factual finding that Terri would have wanted to die,²⁹² the Second District panel had affirmed that finding on appeal,²⁹³ and the Florida Supreme Court had refused to review that decision.²⁹⁴

IV. FEAR AND PREJUDICE

A. Fear of “Living Like That”

From the beginning, fear played a large part in Terri’s death. In his closing argument to Judge Greer at the 2000 Hearing, Michael’s attorney, George Felos argued: “If there’s no hope of recovery, who—who in their right mind—would want to remain in this condition?”²⁹⁵ He added: “We all want to die with dignity. That’s common sense.”²⁹⁶ The Schindlers repeatedly tried to counter this fear, but to no avail. At oral argument concerning the appeal of the Death Order, Joe Magri, the Schindlers’ attorney, attempted to convince the appellate panel that the issue was *what Terri would have wanted*, and “that testimony about public opinion on artificial life support should not have been allowed.”²⁹⁷ Magri also argued that Terri should have had her own attorney representing her at the 2000 Hearing.²⁹⁸ He further argued, “[w]e have to have standards that focus on the wishes of the individual. In this case, that didn’t happen.”²⁹⁹ He added, “[a]re we going to make decisions on what we in a society think should happen . . . or what the person wanted?”³⁰⁰

Many who are disabled do not agree with Felos’ blanket argument. As one commentator eloquently, indeed, poetically stated:

Terri Schiavo, diagnosed and rediagnosed in the court of world opinion and by “experts” around the globe.

Terri Schiavo, lightning rod for the world’s innermost thoughts about ability and disability.

²⁹² 2000 Death Order, *supra* note 4, at *6.

²⁹³ *Schiavo I*, *supra* note 20.

²⁹⁴ *Id.* at 176.

²⁹⁵ Anita Kumar, *Judge to Decide Fate of Comatose Woman in 2 Weeks*, ST. PETERSBURG TIMES, Jan. 29, 2000, at 1B, available at 2000 WL 2515328.

²⁹⁶ *Id.* Apparently, Felos’ idea of dying with dignity included dying a slow death by dehydration.

²⁹⁷ Anita Kumar, *Families Back in Court in Right-To-Die Appeal*, ST. PETERSBURG TIMES, Nov. 9, 2000, at 1B, available at 2000 WLNR 8761947.

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.*

People see what they want to see.

"If it were me . . ." they say.

Me. Me. Me. That's how the fear starts. If it were me . . .³⁰¹

B. Prejudice Against the Disabled

As noted by a prominent disability activist, who was herself disabled: "While we should not assume that disability prejudice tainted the Florida courts, we cannot assume that it did not."³⁰² According to this same activist,

[t]he social-science literature suggests that the public in general, and physicians in particular, tend to underestimate the quality of life of disabled people, compared with our own assessments of our lives. The case for assisted suicide rests on stereotypes that our lives are inherently so bad that it is entirely rational if we want to die.³⁰³

In addition, there exists an "all-too-common prejudice" that "disabled people are inherently 'worse off,' that [they] 'suffer,' [and] that [they] have lesser 'prospects of a happy life.'"³⁰⁴ The same activist described the *Schiavo* case as follows: "It's frustrating to me that it boiled down in the popular discussion to a conflict between right-to-life and right-to-die. I don't think that's it at all. I think that we ought to analyze the case in terms of disability discrimination."³⁰⁵

Underlying society's view of the disabled is a prejudice that does not mimic other prejudices: "We're still at a point in mainstream culture where disability prejudice doesn't feel like prejudice."³⁰⁶ But yet, to some there

³⁰¹ Helen Henderson, *If Schiavo Were a Capital Case, She Would Live*, TORONTO STAR, Apr. 2, 2005, at L4, available at 2005 WLNR 5151448.

³⁰² Harriet McBryde Johnson, *I Might be in Terri's Bed Soon*, SUNDAY TELEGRAPH (U.K.), Mar. 27, 2005, at 19, available at 2005 WLNR 4787592. Ms. Johnson recently died in her sleep at the age of 50. June Maxam, *Disability Rights Attorney Harriet McBryde Johnson Dies*, N. COUNTRY GAZETTE, June 7, 2008, http://www.northcountrygazette.org/2008/06/07/disability_crusader/.

³⁰³ Harriet McBryde Johnson, *Unspeakable Conversations*, N.Y. TIMES, Feb. 16, 2003, (Magazine) at 50, available at <http://query.nytimes.com/gst/fullpage.html?sec=health&res=9401EFDC113BF935A25751C0A9659C8B63&scp=1&sq=Harriet%20McBryde%20Johnson,%20Unspeakable%20Coversations&st=cse> (statement of Carol Gill).

³⁰⁴ *Id.* (quoting Prof. Peter Singer).

³⁰⁵ Anonymous, *The Utterly Reasonable Harriet McBryde Johnson*, ABILITY MAG., June 1, 2005, at 52, available at 2005 WLNR 12081055 (quoting Harriet McBryde Johnson).

³⁰⁶ *Id.*

exists “rampant prejudice against disability in American culture in general.”³⁰⁷

This widespread prejudice infected Terri’s case. Scott Schiavo, who had visited Terri precisely once in the ten years preceding the 2000 Hearing, testified: “It was very uneasy for me to see her arms and legs, which were curled up, twisted. It was—it was just like it was not Terri. It was like an old beat up car. Just mangled up. It was sickening.”³⁰⁸

Joe Ford, a recent graduate of Harvard College, who is himself disabled, has put it very bluntly: When it comes to disabled people, “many Americans are bigots.”³⁰⁹ To Ford, this bigotry explains the public support for allowing Terri to die because the “American public, to one degree or another, holds that disabled people are better off dead.”³¹⁰ Moreover, with Terri and in other cases, “non-disabled decision makers assert that the disabled person should die because he or she—ordinarily a person who had little or no experience with disability before acquiring one—‘would not want to live like this.’”³¹¹ Ford compared Terri’s state-sanctioned starvation to the eugenics practiced by the Nazi regime:

Prior to the genocide of Jews, Gypsies, and Poles, the Nazis engaged in the mass murder of disabled children and adults, many of whom were taken from their families under the guise of receiving treatment for their disabling conditions. The Nazis believed that killing was the highest form of treatment for disability.³¹²

But one need not look to Nazi Germany for stark comparisons or difficult questions. Why, for example, does our judicial system require a written will before a person can bequeath, say, a refrigerator or a used car, while permitting casual hearsay, offered by witnesses with strong conflicts of interest, to justify ending a human a life?³¹³ Why else but fear and prejudice?

³⁰⁷ Michael Volkman, Op-Ed, *Schiavo is Not Better Off Dead Than Disabled*, ALBANY TIMES UNION, Nov. 2, 2003, at E1, available at 2003 WLNR 708948.

³⁰⁸ Excerpts of Trial, *supra* note 16, at 30. After the 2000 Hearing and before the issuance of the 2000 Death Order, Judge Greer had transcribed the testimony of three witnesses: Scott Schiavo, Joan Schiavo, and Diane Meyer, and filed these excerpts on February 11, 2000. *Id.*

³⁰⁹ Joe Ford, *Focus: Bigotry and the Murder of Terri Schiavo*, THE HARVARD CRIMSON, Mar. 25, 2005, <http://www.thecrimson.com/article.aspx?ref=506716>. Ford also opined: “Our country has learned that we cannot judge people on the basis of minority status, but for some reason we have not erased our prejudice against disability.” *Id.*

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.*

³¹³ See GIBBS, FIGHTING FOR LIFE, *supra* note 147, at 106-09.

V. HOW THE TRIAL COURT FAILED

A. Overview

Several judges presided over Terri's case. Not one of them ever appointed an independent attorney to represent Terri's wishes.³¹⁴ Not one judge ever visited Terri.³¹⁵ Not one judge ever awarded the Schindlers access to Terri's funds to fight for her life.³¹⁶

Of these judges, Judge George Greer presided over the most important proceeding in Terri's case, the 2000 Hearing.³¹⁷ Unfortunately, Judge Greer clearly erred before, during, and after the 2000 Hearing, on both the law and the facts.³¹⁸ As one commentator put it, "Judge Greer's performance has been so deficient that he should be removed from the case forthwith, if not impeached . . ."³¹⁹ Before the trial, Judge Greer allowed Michael to deplete Terri's accounts to fund the fight for her death.³²⁰ He never appointed an attorney to represent Terri.³²¹ During trial, Judge Greer allowed the admission of "expert" testimony concerning end-of-life decisions from a woman who testified about a regional public opinion poll she had taken in Atlanta, not about what Terri herself wanted.³²² He also allowed the admission of testimony concerning the Catholic viewpoint on ending life, by a priest who had also never met Terri.³²³

Immediately after the 2000 Hearing, and in his Death Order, Judge Greer ignored the presumption of life required under Florida law.³²⁴ In

³¹⁴ See Pinellas County Circuit Court Probate Docket, *supra* note 97.

³¹⁵ GIBBS, FIGHTING FOR LIFE, *supra* note 147, at 75; see also Gibbs, *Gibbs on Schiavo*, *supra* note 3, at 29 n.13 (Judge Greer never visited Terri).

³¹⁶ Gibbs, *Gibbs on Schiavo*, *supra* note 3, at 23.

³¹⁷ GIBBS, FIGHTING FOR LIFE, *supra* note 147, at 111.

³¹⁸ See discussion *infra* Part V.B-G.

³¹⁹ William R. Levesque, *Quiet Judge Persists in Schiavo Maelstrom*, ST. PETERSBURG TIMES, Mar. 6, 2005, at 1A, available at 2005 WL 3458687 (quoting Wesley J. Smith).

³²⁰ See *supra* notes 206-67 and accompanying text.

³²¹ Gibbs, *Gibbs on Schiavo*, *supra* note 3, at 23.

³²² SCHINDLER, A LIFE THAT MATTERS, *supra* note 77, at 79-80.

³²³ *Id.* at 80.

³²⁴ See *In re Guardianship of Browning*, 543 So. 2d 258, 273 (Fla. Dist. Ct. App. 1989), approved by 568 So. 2d 4 (Fla. 1990) ("In cases of doubt, we must assume that a patient would choose to defend life in exercising his or her right of privacy."). One commentator has concluded:

The Florida appellate court in *Schiavo* [I] and *Browning* supports this default position regarding an error jeopardizing life. However, in spite of agreement to favor life, the *Schiavo* court appears to apply a less stringent evidentiary standard to protect life. Although the court relied on similar types of oral evidence as *Cruzan* [which the Supreme Court held did not amount to clear and convincing evidence], it found such evidence clear and convincing. This decision was made even though the family was split and issues of bad faith and ulterior motive were suggested.

addition, Judge Greer based the Death Order on casual, general statements made in passing, by Terri, to Schiavo family members, and kept secret for years.³²⁵ These statements did not constitute clear and convincing evidence of Terri's intent as required under Florida law.³²⁶

B. Depleting Terri's Funds to Fight for Her Death

As discussed *supra*, Judge Greer continued to allow Michael to use Terri's malpractice awards, designed for her care, to fight for her death before her wishes were determined.³²⁷ Under Florida law: "A guardian, or an attorney who has rendered services to the ward or to the guardian on the ward's behalf, is entitled to a reasonable fee for services rendered and reimbursement for costs incurred on behalf of the ward."³²⁸ Thus, an attorney is only entitled to fees for "services rendered . . . on behalf of the ward."³²⁹ The Florida Supreme Court, "[w]hen evaluating the scope of attorney compensation provisions in other statutes . . . has allowed fees where the time spent in securing the fee resulted in 'a *substantial benefit*' for the client and the award was consistent with statutory language and

Darren P. Mareiniss, *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) (footnotes omitted). Moreover, "[t]he decision to terminate Ms. Schiavo's life under these circumstances involved a disregard of the 'thoughtful guidelines' required by the Court in *Browning* to ensure that her life support was not being terminated against her wishes." *Brief of Amici Curiae, Not Dead Yet et al., Jeb Bush v. Michael Schiavo*, 20 ISSUES L. & MED. 171, 179 (2004).

³²⁵ See O. Carter Snead, *The (Surprising) Truth About Schiavo: A Defeat for the Cause of Autonomy*, 22 CONST. COMMENT. 383, 400 (2005) (for an excellent and thorough discussion of the testimony relied upon by Judge Greer). Judge Greer also discredited statements made by Terri to her mother and her childhood girlfriend, Diane Meyer, in the summer of 1982, based on finding that these statements were not "germane to this decision" and that Terri made them at "the age of 11 or 12." See 2000 Death Order, *supra* note 4 at 6. Judge Greer thought that Karen Ann Quinlan died six years earlier in 1976. *Id.* Judge Greer was mistaken; Ms. Quinlan actually died in 1985, nine years after being taken off of life support. See GIBBS, *FIGHTING FOR LIFE*, *supra* note 147, at 76-77. Interestingly, Ms. Quinlan was kept on her feeding tube which was not considered life support at that time. *Id.* at 77. In a 2005 motion, the Schindlers brought this mistake to the attention of Judge Greer. See Motion for Relief from Judgment, *In re Guardianship of Schiavo*, No. 90-2908GD-003, at 4 (Fla. Cir. Ct. Mar. 2, 2005) available at <http://judgegeorgegreer.com/docs/030205motforrelief.PDF>. Judge Greer denied their motion, "rul[ing] that this mistake was inconsequential . . ." GIBBS, *FIGHTING FOR LIFE*, *supra* note 147, at 77; see *In re Guardianship of Schiavo*, No. 90-2908GD-003, at 3 (Fla. Cir. Ct. Mar. 9, 2005), available at <http://judgegeorgegreer.com/docs/030905orderdenyquinlan.pdf> (order denying motion for relief from judgment) ("[T]he error regarding the date of Karen Ann Quinlan's death date does not change the court's conclusion that there was clear and convincing evidence supporting its decision on what Theresa Marie Schiavo would have chosen . . .").

³²⁶ See *In re Guardianship of Browning*, 568 So. 2d 4, 15 (Fla. 1990) ("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.").

³²⁷ See *supra* notes 206-272 and accompanying text.

³²⁸ FLA. STAT. ANN. § 744.108(1) (West 1990).

³²⁹ *Zepeda v. Klein*, 698 So. 2d 329, 330 (Fla. Dist. Ct. App. 1997) (quoting FLA. STAT. § 744.108(1) (1995)).

purpose.”³³⁰ Also under Florida law, “[c]ourts must scrupulously oversee the handling of the affairs of incompetent persons under their jurisdiction and err on the side of over-supervising rather than indifference.”³³¹ Moreover, “[a]lthough courts approve annual accountings of guardians, it is highly unrealistic to assume that such an *ex parte* procedure would involve any high level of scrutiny, which is probably why approval is not conclusive.”³³²

Under Florida law, Judge Greer could only legally authorize the hiring and payment of attorneys fighting for the withdrawal of Terri’s feeding tube if those attorneys were providing a “substantial benefit” to Terri.³³³ Obtaining her death by dehydration would only be such a benefit if that was indeed Terri’s wish, but, when he authorized the payments to Michael’s lawyers, Judge Greer had not yet determined Terri’s wishes.

While on-point precedents in this area are sparse, several decisions in various states offer sound guidance. A Michigan appellate court has recognized the absurdity of allowing one-sided funding for death.³³⁴ In approving the payment of attorney fees to respondents who opposed a guardian fighting for the death of the ward with estate funding, the court held:

[The ward’s] estate [is] to be charged with reasonable attorney fees incurred by respondents in their efforts to ensure that [the ward’s] condition, intentions, and best interests are fully considered and protected. Were we to hold otherwise, we would be saying that attorneys who advocate the termination of [the ward’s] life may be paid for all their reasonable services out of his estate but those who advocate keeping him alive may not.³³⁵

By not authorizing funding to the Schindlers, the Florida courts effectively held “that attorneys who advocate the termination of [the ward’s] life may be paid for all their reasonable services out of his estate but those who advocate keeping [her] alive may not.”³³⁶

³³⁰ *Id.* (emphasis added). In *Zepeda*, an attorney sought to recover fees he incurred in litigation against the ward over attorney fees. *Id.* The court held: “Such services are not rendered ‘on behalf of the ward’ within the meaning of the statute.” *Id.*

³³¹ *Sun Bank & Trust Co. v. Jones*, 645 So. 2d 1008, 1017 (Fla. Dist. Ct. App. 1994).

³³² *Bachinger v. Sunbank/South Florida, N.A.*, 675 So. 2d 186, 187 (Fla. Dist. Ct. App. 1996).

³³³ See FLA. STAT. ANN. § 744.108(1) (West 1990).

³³⁴ See *In re Martin*, 504 N.W.2d 917 (Mich. Ct. App. 1993), *rev’d on other grounds*, 538 N.W.2d 399 (Mich. 1995).

³³⁵ *Id.* at 927.

³³⁶ *Id.*

C. Lack of Independent Representation

On May 22, 1990, Michael filed a petition seeking to have Terri declared incapacitated and to have himself appointed plenary guardian.³³⁷ On June 18, 1990, Judge Robert F. Michael granted that petition without ever appointing counsel to represent Terri's interests.³³⁸ At that time, Florida law provided: "The court shall appoint counsel for each person alleged to be incapacitated in all cases involving a petition for adjudication of incapacity and appointment of a guardian. Subject to court approval, the alleged incapacitated person may substitute his own counsel for the counsel appointed by the court."³³⁹ In 1990, Florida law also required the appointment of an "examining committee" within five days of the filing of any petition;³⁴⁰ that never occurred. In 1990, Florida law further provided that a person judged incapacitated retained certain rights, including the right to counsel.³⁴¹ In 1998, at the time Michael filed the Petition to Kill, Florida law remained the same: Terri had a right to counsel.³⁴²

Two judges did appoint a total of two guardians *ad litem* for Terri before the 2000 Hearing.³⁴³ The first, John Pecarek, reported in 1994 that the court should not remove Michael as Terri's guardian.³⁴⁴ Pecarek, who spent nine and one half hours on the case, requested and received fees of

³³⁷ Verified Petition for Appointment of Guardian, *supra* note 77.

³³⁸ *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. June 18, 1990) (order determining total incapacity and appointing plenary guardian).

³³⁹ FLA. STAT. ANN. § 744.331(2) (West 1990). This statute became effective October 1, 1989. *Id.* An early version of the statute had also required the appointment of counsel. FLA. STAT. ANN. § 744.331(4) (West 1989).

³⁴⁰ FLA. STAT. ANN. § 744.331(3) (West 1990).

³⁴¹ FLA. STAT. ANN. § 744.3215 (West 1990) provided in part:

A person who has been determined to be incapacitated retains the right: . . . (d) To be treated humanely, with dignity and respect, and to be protected against abuse and neglect. (e) To have a qualified guardian . . . (h) To receive prudent financial management for his property and to be informed how his property is being managed, if he has lost the right to manage property. (i) To receive necessary services and rehabilitation. (j) To be free from discrimination because of his incapacity. (k) To have access to the courts. (l) To counsel. (m) To receive visitors and communicate with others.

³⁴² See FLA. STAT. ANN. § 744.3215 (1) (West 1997). Moreover, if Terri, or any interested person, had filed a "suggestion of capacity" requiring a hearing, another statute further provided: "If the ward does not have an attorney, the court shall appoint one to represent the ward." FLA. STAT. ANN. § 744.464(2)(e) (West 1997).

³⁴³ *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. June 11, 1998) (order appointing guardian *ad litem*); *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Feb. 17, 1994) (order appointing guardian *ad litem*).

³⁴⁴ Report of Guardian *Ad Litem*, *supra* note 106.

\$1,425.00.³⁴⁵ The second, Richard Pearse, reported in late 1999 that Michael had a conflict of interest and was not credible.³⁴⁶ Pearse spent twenty-five hours on the case and was paid \$4,511.95 for fees and costs.³⁴⁷ Thus, the two worked a combined total of thirty-four and one half hours and received \$5,936.95 in compensation, while Michael's attorneys received hundreds of thousands of dollars.³⁴⁸

At the time Michael filed the Petition to Kill in 1998, Florida law defined "Attorney" and "Guardian *ad litem*" as follows:

(1) "Attorney for the alleged incapacitated person" means an attorney who represents the alleged incapacitated person. Such attorney shall represent the expressed wishes of the alleged incapacitated person to the extent it is consistent with the rules regulating The Florida Bar.

. . . .

(9) "Guardian *ad litem*" means a person who is appointed by the court having jurisdiction of the guardianship or a court in which a particular legal matter is pending to represent a ward in that proceeding.³⁴⁹

Attorneys and guardians *ad litem* serve very different roles. As stated by the New Jersey Supreme Court:

[T]he role of the representative attorney is entirely different from that of a guardian *ad litem*. The representative attorney is a zealous advocate for the wishes of the client. The guardian *ad litem* evaluates for himself or herself what is in the best interests of his or her client-ward and then represent[s] the client-ward in accordance with that judgment.³⁵⁰

The New Jersey Supreme Court provided reasons for the distinctions between the two:

³⁴⁵ *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Mar. 2, 1994) (order approving fees for guardian *ad litem*); Verified Petition for Order Authorizing Payment of Guardian *Ad Litem* Fees, *supra* note 105.

³⁴⁶ Report of Guardian *Ad Litem*, *supra* note 60, at 12.

³⁴⁷ Stipulation Regarding Payment of Fees to Guardian *Ad Litem*, *supra* note 125. Michael had earlier objected to Pearse's fees. Objection to Verified Petition for Order Authorizing Payment of Att'y Fees & Costs, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. June 8, 1999). Michael had also alleged bias on the part of Pearse. Suggestion of Bias on Part of Guardian *Ad Litem*, *supra* note 125.

³⁴⁸ For a discussion of fees paid to Michael's attorneys, see *supra* Part III.B.

³⁴⁹ FLA. STAT. ANN. § 744.102 (1), (9) (West 1997).

³⁵⁰ *In re M.R.*, 638 A.2d 1274, 1283 (N.J. 1994) (quoting Guidelines for Attorneys Appointed to Represent Individuals with Developmental Disabilities). This case dealt with whether an incompetent still retained the capacity to decide with which divorced parent she wished to live. *Id.*

In sum, several reasons support the distinction between an attorney and a guardian *ad litem* for an incompetent. First, the attorney and guardian *ad litem* may take different positions, with the attorney advocating a result consistent with the incompetent's preferences and the guardian urging a result that is different but in the incompetent's best interests. Second, the attorney and guardian may differ in their approaches. When interviewing interested parties, the attorney for an incompetent should proceed through counsel, but often a guardian *ad litem* may communicate directly with other parties. Finally, a guardian may merely file a report with the court, but the attorney should zealously advocate the client's cause.³⁵¹

As with the judges before him, Judge Greer never appointed an attorney to represent Terri and advocate her presumed desire under Florida law—the desire to live—even though her family members disagreed about her wishes.³⁵² In an earlier case where family members disagreed about a patient's decision to die, a California trial court held that “independent counsel would not be helpful or necessary because [the patient's] interests were adequately represented by his mother and sister.”³⁵³ A California appellate court, in reversing that decision, held:

[A] person facing the final accounting of death should not be required to rely on the uncertain beneficence of relatives. Unlike parental termination cases, where a child's interests may be adequately represented by the county welfare agency which is an active and necessary participant in the contest to terminate the parental relationship, [the patient's] mother and sister are not necessary parties to the conservatorship proceedings instituted by [the patient's] wife, nor do they necessarily represent his interests.³⁵⁴

The court concluded: “Because [the incompetent's] very life is at stake, he is entitled to counsel to represent his interests, whatever those interests might be.”³⁵⁵

More recently, in *Al-Joudi v. Bush*, a federal district court was faced with facts that present the opposite of Terri's situation: competent people who refused to eat.³⁵⁶ Detainees at Guantanamo Bay were on hunger

³⁵¹ *Id.* at 1284.

³⁵² Gibbs, *Gibbs on Schiavo*, *supra* note 3, at 23, 18-21. Other courts have appointed attorneys for incompetent victims. For example, in *In re Edna M.F.*, the court appointed a separate attorney “to argue for sustaining the life of Edna M.F.” because both the guardian and the guardian *ad litem* were advocating death. 563 N.W.2d 485, 487 (Wis. 1997).

³⁵³ *Wendland v. Superior Court*, 49 Cal. App. 4th Supp. 44, 52 (Cal. App. Dep't Super. Ct. 1996).

³⁵⁴ *Id.*

³⁵⁵ *Id.* (citation omitted).

³⁵⁶ *See* 406 F. Supp. 2d 13, 23 (D.D.C. 2005).

strikes, and were being force-fed without benefit of counsel.³⁵⁷ The district court held that such detainees were entitled to representation and that their attorneys were entitled to access to the medical records of the detainees.³⁵⁸ The detainees had filed habeas corpus petitions.³⁵⁹ What a bitter irony that one federal court found a right to counsel in such a situation, while the federal courts denied Terri legal representation when the stakes were so much higher.

D. Ignoring the Presumption in Favor of Life

The most critical proceeding, the hearing which led to the Death Order, occurred over a period of five days in January 2000.³⁶⁰ Although he failed to correctly apply the law, Judge Greer did correctly state the applicable standard in the Death Order:

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

³⁵⁷ *Id.* at 15.

³⁵⁸ *Id.* at 23. Concerning prisoners on hunger strikes being force fed, one commentator has stated:

The use of physicians to aggressively break a prison hunger strike raises complex medical ethics and legal issues that have been the subject of international debate for decades. U.S. courts have occasionally been asked to rule on the legality of forced feeding of prisoners and have usually permitted it if done by a physician in a medically reasonable manner for the primary purpose of either preventing suicide or maintaining order in the prison. In terms of American constitutional law, competent prisoners have a constitutional right to refuse treatment, but prison officials may overrule it when they have 'legitimate penological interests,' which include preventing suicide by prisoners and maintaining order in the prison itself.

George J. Annas, *Human Rights Outlaws: Nuremberg, Geneva, and the Global War on Terror*, 87 B.U. L. REV. 427, 449 (2007) (citations omitted).

³⁵⁹ *Al-Joudi*, 406 F. Supp. 2d 13 at 15. Since that decision, Congress passed the Military Commissions Act (MCA) of 2006, Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2636. "[T]he MCA divests federal courts of jurisdiction over all actions filed by aliens captured abroad and detained as enemy combatants at the Guantanamo Bay Naval Base . . . [with certain exceptions], and also that such aliens have no constitutional or common-law right to habeas review." *Al Maqaleh v. Gates*, No. 06-1669, 2007 WL 2059128 at *2 (D.D.C. July 18, 2007) (citing the holding of *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007)). However:

[T]he *Boumediene* decision was by all appearances final, and the law of this circuit firmly established. But on the final day of its term, the Supreme Court reversed course and granted the two petitions for certiorari. *Boumediene v. Bush*, — S.Ct. —, 2007 WL 1854132 (June 29, 2007) (No. 06-1195); *Al Odah v. United States*, — S.Ct. —, 2007 WL 681992 (June 29, 2007) (No. 06-1196). Those petitions directly challenge the D.C. Circuit's resolution of, among other issues, the following question: whether aliens captured and detained by the United States outside of the United States have a right under the Constitution or at common law to challenge their detentions via habeas corpus petitions.

Id.

³⁶⁰ 2000 Death Order, *supra* note 4, at *1.

right of privacy, *In re: Guardianship of Estelle M. Browning* 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;
- 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.”³⁶¹

However, Judge Greer failed to consider the starting point under Florida law for determining the wishes of an incompetent declarant.³⁶² The Second District Court of Appeals had earlier decided this very issue, and its decision was subsequently approved by the Florida Supreme Court.³⁶³ “In making this difficult decision [to terminate life], a surrogate decisionmaker should err on the side of life.”³⁶⁴ The court continued: “In cases of doubt, *we must assume that a patient would choose to defend life* in exercising his or her right of privacy.”³⁶⁵

³⁶¹ *Id.* at **5-6. Michael was the surrogate decision maker by virtue of being appointed guardian in 1990 as well as by being Terri’s husband. This hierarchical way of making decisions has been strongly criticized:

As a result of . . . judicial opinions, the applicable decision-making model is essentially hierarchical in nature. A single individual, the patient or the patient’s decision-making surrogate, is placed at the apex of this model and is given decision-making authority. When the patient lacks current decision-making capacity, most courts essentially seek to place the surrogate in the shoes of the patient and charge the surrogate with making the decision that the patient would have made if the patient currently had decision-making capacity. As will be discussed, this model runs contrary to the consensus-based decision-making model favored by both health care providers and laypersons.

Thomas L. Hafemeister, *End-of-Life Decision Making, Therapeutic Jurisprudence, and Preventive Law: Hierarchical v. Consensus-Based Decision-Making Model*, 41 ARIZ. L. REV. 329, 343 (1999).

³⁶² 2000 Death Order, *supra* note 4.

³⁶³ *In re Guardianship of Browning*, 543 So. 2d 258 (Fla. Dist. Ct. App. 1989), *approved by* 568 So. 2d 4 (Fla. 1990).

³⁶⁴ *Id.* at 273.

³⁶⁵ *Id.* (emphasis added).

E. Lack of Clear and Convincing Evidence

1. The Schiavo Family Statements³⁶⁶

In the Death Order, Judge Greer relied on what have been called the "Schiavo Family Statements" to find that Terri would have wanted to die—four oral statements allegedly made by Terri.³⁶⁷ Two of these statements she allegedly made to Michael, one to Terri's brother-in-law, Scott Schiavo, in February 1986, and one to her sister-in-law, Scott's wife, Joan.³⁶⁸ Significantly, the statements allegedly made to Scott and Joan were brought to the court's attention only after Richard Pearse, Terri's second guardian *ad litem*, issued a report questioning Michael's credibility.³⁶⁹ These alleged oral statements by Terri and their context are as follows:

#1. If [she] "ever had to be a burden to anybody like [her uncle was to her grandmother], [she didn't] want to live like that."³⁷⁰

[Allegedly said to Michael Schiavo during a train ride.]

#2. Do not "keep [me] alive on anything artificial."³⁷¹

[Allegedly said to Michael Schiavo while watching a documentary.]

#3. "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."³⁷²

[Allegedly said to Scott Schiavo at a funeral luncheon for Scott's grandmother in February of 1986.]

#4. "We had watched a movie one time on television. It was about somebody. I don't remember. I don't remember the movie. It was about a guy who had an accident and he was in a comma [sic]. There was no help for him. We had stated that if that ever happened to one of us, in our lifetime, we would not want to go through that. That we would want it stated in our will we should want the tubes and everything taken out."³⁷³

[Allegedly said to Joan Schiavo, who could not remember the date.]

³⁶⁶ Professor Snead does an excellent job discussing this testimony. See Snead, *supra* note 325, at 397-98.

³⁶⁷ 2000 Death Order, *supra* note 4, at *6.

³⁶⁸ Snead, *supra* note 325, at 399.

³⁶⁹ Report of Guardian *Ad Litem*, *supra* note 60, at 12.

³⁷⁰ Transcript of Trial, *supra* note 16, at 30-31 (testimony of Michael Schiavo on January 24, 2000).

³⁷¹ *Id.* at 33.

³⁷² Excerpts of Trial, *supra* note 16, at 15 (testimony of Scott Schiavo on January 24, 2000).

³⁷³ Excerpts of Trial, *supra* note 16, at 40 (testimony of Joan Schiavo on January 24, 2000).

None of these statements, taken singly or collectively, constitutes clear and convincing evidence.³⁷⁴ Notably, all come from Michael's family, none from the Schindlers. Scott's and Joan's statements are redolent of post-hoc justification, coming as they did only when Michael's credibility was seriously questioned by the second guardian *ad litem*. Moreover, the statements simply don't stand up to critical examination.

To begin with, each of the statements was allegedly made in reaction to the medical problems faced by other people, whether real and fictional: Terri's uncle (Statement One); people profiled in a documentary (Statement Two); Scott's grandmother (Statement Three) and a movie character (Statement Four). In contrast to Judge Greer's uncritical acceptance of these alleged statements, Professor Carter Snead has done a point-by-point comparison of Terri's condition with those of the people she had allegedly commented upon:

Ms. Schiavo's uncle's condition was nothing like hers—he suffered from paralysis in one arm, difficulty walking, and slurred speech. Likewise, Ms. Schiavo's condition did not resemble those of the terminally ill comatose character from the movie she and Joan Schiavo purportedly viewed together (to the extent that Joan Schiavo was able to recall the details of this film). Nor was Ms. Schiavo's condition like that of the Schiavo grandmother, who was terminally ill and required all manners of invasive machinery to sustain her life. Finally, it is not clear at all that Ms. Schiavo's condition matched those of the individuals in the documentaries that Mr. Schiavo claimed that they watched together. If Judge Greer had followed the well-developed body of persuasive authority for interpreting such evidence, he would have been compelled to conclude that these statements were not sufficient to support a decision to terminate life-sustaining measures for Ms. Schiavo.³⁷⁵

Professor Snead added that Judge Greer also “chose to rely on statements that were near verbatim examples of comments that courts uniformly deem presumptively unreliable.”³⁷⁶ Professor Snead also criticized Judge Greer for relying on statements made by Michael that were inconsistent with earlier statements,³⁷⁷ including some of Michael's 1992 statements in the medical malpractice case.³⁷⁸

³⁷⁴ See Snead, *supra* note 325. Professor Snead concluded that “the Florida courts abandoned . . . the clear and convincing standard of proof.” *Id.* at 404.

³⁷⁵ *Id.* at 401.

³⁷⁶ *Id.* at 401-02.

³⁷⁷ *Id.* at 402.

³⁷⁸ In 1992, Michael testified as follows:

A: I [Michael] see myself hopefully finishing school and taking care of my wife.

Q: Where do you want to take care of your wife?

Moreover, in Statement Three, Scott Schiavo testified that at the luncheon held after his grandmother's funeral in February of 1986, he and family and friends were sitting around a table talking about his grandmother.³⁷⁹ Terri was sitting at the table to his left.³⁸⁰ Although his grandmother has signed a living will with a DNR request, the doctor treating her immediately before her death did not have a copy, and as a result, the doctor had placed Scott's grandmother on life support.³⁸¹ That decision "upset us all because it was not the way she wanted to be kept alive."³⁸² Terri joined in the discussion and stated: "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."³⁸³

This was the only remark made by Terri to Scott Schiavo,³⁸⁴ and Scott remained silent about the statement until the fall of 1999 when he was questioned by Michael's lawyer, George Felos.³⁸⁵ This was nine years after Terri's accident and over thirteen years from the time when he heard Terri make the statement.

Regarding Statement Number Four, Joan Schiavo did not testify initially as to the time of the statement,³⁸⁶ but under cross-examination she testified that the statements were made within two years after 1985 but before Terri's 1986 move to Florida.³⁸⁷ Joan could not remember the

A: I want to bring her home.

Q: If you had the resources available to you, if you had the equipment and the people, would you do that?

A: Yes. I would, in a heartbeat.

Q: How do you feel about being married to Terri now?

A: I feel wonderful. She's my life and I wouldn't trade her for the world. I believe in my marriage vows.

Q: You believe in your wedding vows, what do you mean by that?

A: I believe in the vows I took with my wife, through sickness, in health, for richer or poor. I married my wife because I love her and I want to spend the rest of my life with her. I'm going to do that.

Didion, *supra* note 32.

³⁷⁹ Excerpts of Trial, *supra* note 16, at 13-14, 24-25 (testimony of Scott Schiavo on January 24, 2000).

³⁸⁰ *Id.* at 24.

³⁸¹ *Id.* at 12.

³⁸² *Id.* at 12-13.

³⁸³ *Id.* at 15.

³⁸⁴ *Id.* at 19.

³⁸⁵ Excerpts of Trial, *supra* note 16, at 18-20.

³⁸⁶ *Id.* at 40 ("We had watched a movie at one time on television.").

³⁸⁷ *Id.* at 44-46. Joan Schiavo's testimony does not match actual events—Joan testified that Terri talked to her about a friend's ill baby in 1985 or 1986; after this "baby" conversation and "within a two year time period maybe," Terri talked to her about a movie with "a guy in an accident." *Id.* at 40, 44-45. This "movie" conversation occurred *before* Terri and Michael moved to Florida. *Id.* at 44-45

name of the movie.³⁸⁸ She did not know what kind of “tubes,” she had seen, whether, for example the tubes were ventilator tubes or feeding tubes.³⁸⁹ She did not know how long the “guy” was in the hospital before he died.³⁹⁰ She never told Michael about these statements.³⁹¹ She, like her husband, waited until 1999 to tell anyone of these statements.³⁹²

2. Comparison of the Schiavo Family Statements with Evidence in Other Cases

Professor Snead reviewed the four alleged statements by Terri, and relied upon by Judge Greer, and compared them to the type of evidence other courts have relied upon in determining whether clear and convincing evidence existed that an incompetent person would want to die. Unbelievably, no court in the *Schiavo* case—trial, appellate, federal or state—undertook such an analysis. Professor Snead concluded:

[S]uch evidence would be regarded as “clear and convincing” is nothing short of astonishing. To the contrary, all of the foregoing comments are paradigmatic examples of statements that courts routinely deem to be presumptively unreliable. First, all of the four statements were “general, remote, and made in casual circumstances.” All of the statements were made at least five years prior to Ms. Schiavo’s collapse. Two of the four statements were made while watching television or movies; one was made during a casual conversation on a train; one was made during an informal (and highly emotionally charged) conversation at a reception following a funeral. Each statement could also fairly be characterized as an “off-hand remark about not wanting to live under certain circumstances made by a person when young and in the peak of health.”³⁹³

Professor Snead added that “all of the statements attributed to Ms. Schiavo were ‘made in response to seeing or hearing about another’s prolonged death,’ a category of comment that courts regularly dismiss as unreliable.”³⁹⁴

Professor Snead also noted the dissimilar nature of Terri’s circumstances:

(emphasis added). According to others, including Joan’s husband Scott, Terri and Michael moved to Florida in 1985 or 1986, but probably 1986. *Id.* at 21 (testimony of Scott Schiavo on January 24, 2000).

³⁸⁸ Excerpts of Trial, *supra* note 16, at 40 (testimony of Joan Schiavo on January 24, 2000).

³⁸⁹ *Id.* at 46.

³⁹⁰ *Id.* at 47.

³⁹¹ *Id.* at 42.

³⁹² *Id.* at 41-42.

³⁹³ Snead, *supra* note 325, at 400-01.

³⁹⁴ *Id.* at 401.

[Terri's] condition was non-terminal. She was not in a coma. Most experts have described her condition as a "persistent vegetative state," characterized by "the absence of cognitive behavior of any kind, and an inability to communicate or interact purposefully with the environment." She was not maintained on a ventilator or other "machine." She did, however, receive artificial nutrition and hydration by means of a PEG tube.³⁹⁵

F. Credible Evidence in Favor of Life that Judge Greer Discounted

Judge Greer found that certain evidence offered to prove that Terri wanted to live was not "germane to [his] decision."³⁹⁶ Specifically, these were statements made by Terri to her childhood friend, Diane Meyer, and to Terri's mother.³⁹⁷ Judge Greer discounted such evidence based on finding that Terri made the statements, concerning Karen Quinlan, when she was only eleven or twelve years old.³⁹⁸ This was erroneous. As before, Professor Snead does an excellent job in pointing out the flaws in Judge Greer's ruling. Concerning Terri's mother's testimony:

Judge Greer deemed the Schindler testimony to be unreliable based on his understanding that Ms. Schiavo's comments were made in 1976 (the year in which Judge Greer thought Ms. Quinlan had died), when Ms. Schiavo was only eleven or twelve years of age. In fact, Judge Greer's understanding of the *Quinlan* chronology was mistaken—Karen Ann Quinlan died in 1985, which would suggest that Ms. Schiavo's remarks could have been made when she was between the ages of seventeen and twenty (as Ms. Schindler had originally asserted at the hearing).³⁹⁹

Professor Snead also stated that "Judge Greer discounted the Meyer testimony based on the same error; he regarded Meyer's testimony as uncredible because Meyer implied that Karen Quinlan was still alive in 1982."⁴⁰⁰ More specifically:

Judge Greer was "mystified" by Meyer's testimony and concluded that the conversation must have taken place in the 1970s, when Ms. Schiavo was a child. But this, of course, was not necessarily so. Thus, Judge Greer discounted evidence that Ms. Schiavo would not choose to decline artificial

³⁹⁵ *Id.*

³⁹⁶ 2000 Death Order, *supra* note 4, at *6.

³⁹⁷ *Id.* at **3, 6.

³⁹⁸ *Id.*

³⁹⁹ Snead, *supra* note 325, at 398.

⁴⁰⁰ *Id.*

nutrition and hydration, based in significant part, on an easily verifiable factual error about a historical event.⁴⁰¹

Other writers have noticed this factual error as well,⁴⁰² but when the Schindlers filed a motion pointing out this very error—that Judge Greer had been mistaken as to the date of death of Quinlan⁴⁰³—he summarily dismissed this argument and denied their motion.⁴⁰⁴

G. Additional Problems with the Evidence

1. Evidence Concerning Terri's Catholic Faith

Serious problems exist with regard to evidence relating to Terri's Catholic faith. The first problem includes the admission of the testimony of Father Gerald Murphy. Michael's attorney offered Father Murphy "as an expert in the area of the Catholic Church's position on end of life care and treatment issues and clinical counseling on end of life care and treatment issues."⁴⁰⁵ Father Murphy did not know Terri and had never counseled her.⁴⁰⁶ He did not hold a high position in the Catholic Church.⁴⁰⁷

⁴⁰¹ *Id.*

⁴⁰² Mishra, *Conflicting Memories*, *supra* note 92; Chris Tisch, *Quinlan Name Resurfaces in Schiavo Arguments*, ST. PETERSBURG TIMES, Mar. 3, 2005, at 1B, available at 2005 WLNR 23772563. For a thorough discussion of the *Quinlan* case, see Annette E. Clark, *The Right to Die: The Broken Road From Quinlan to Schiavo*, 37 LOY. U. CHI. L.J. 385 (2006).

⁴⁰³ Motion for Relief from Judgment, *supra* note 325; see also GIBBS, FIGHTING FOR LIFE, *supra* note 147, at 76-77.

⁴⁰⁴ *In re Guardianship of Schiavo*, No. 90-2908-GD3 (Fla. Cir. Ct. Mar. 9, 2005) (order denying motion for relief from judgment); see also GIBBS, FIGHTING FOR LIFE, *supra* note 147, at 77. Judge Greer denied the motion "rul[ing] that this mistake was inconsequential." *Id.*

⁴⁰⁵ Excerpts of Trial Testimony of Father Murphy at 10, *In re Guardianship of Schiavo*, No. 90-2908-GD3 (Fla. Cir. Ct. Apr. 17, 2000) (testimony of Father Gerald Murphy on January 24, 2000), available at UMIAMI TIMELINE, *supra* note 32.

⁴⁰⁶ See SCHINDLER, A LIFE THAT MATTERS, *supra* note 77, at 80. Even the testimony from a minister, who knew the incompetent patient, concerning general religious beliefs held the patient, has been deemed of little guidance. See *In re Jobes*, 529 A.2d 434, 442-43 (N.J. 1987). There the court held:

In this case, however, Mrs. Jobes' minister testified that her religion neither requires nor forbids medical treatment like that at issue here. Therefore, Mrs. Jobes' religious affiliation does not offer much guidance in determining what her preference would be in this situation.

Thus, we conclude that although there is some "trustworthy" evidence that Mrs. Jobes, if competent, would want the j-tube withdrawn, it is not sufficiently "clear and convincing" to satisfy the subjective test.

Id. at 443 (footnotes omitted). But see *Delio v. Westchester County Med. Ctr.*, 516 N.Y.S.2d 677, 683 (N.Y. App. Div. 1987) ("Father Andrew Varga, a Jesuit priest and a professor of philosophy at Fordham University, testified as an expert on the ethical issues involved in the discontinuance of life-sustaining mechanisms in the event the patient lapsed into an irreversible vegetative condition.").

Inexplicably, the Schindlers' attorney made no objection to the court treating him as an expert.⁴⁰⁸ Nonetheless, Judge Greer should have excluded such "expert" testimony as both irrelevant and incompetent.⁴⁰⁹

Father Murphy testified "about Catholic teaching on the withdrawal of MAHN [medically assisted hydration and nutrition] from PVS patients, opining that the withdrawal would be consistent with Catholic teaching."⁴¹⁰ At the time of his testimony "American bishops had not resolved questions about the treatment of patients in PVS, and the Pope had not spoken to the issue."⁴¹¹ Importantly, "[t]his changed in March 2004, when Pope John Paul II delivered a speech to a scientific conference."⁴¹² In that speech, Pope John Paul II stated:

I should like particularly to underline how the administration of water and food, even when provided by artificial means, always represents a *natural means* of preserving life, not a *medical act*. Its use, furthermore, should be considered, in principle, *ordinary* and *proportionate*, and as such morally obligatory, insofar as and until it is seen to have attained its proper finality, which in the present case consists in providing nourishment to the patient and alleviation of his suffering.⁴¹³

In addition to Pope John Paul II saying that feeding tubes are "'morally obligatory' for most patients in vegetative states . . . high-ranking cardinals have followed up by referencing Schiavo, saying that removing her feeding tube could lead to legalized euthanasia."⁴¹⁴ The Vatican later issued a

⁴⁰⁷ Excerpts of Trial Testimony of Father Murphy, *supra* note 405, at 3, 11 (Father Murphy was pastor of a country parish with 400 members and was the statewide chaplain for the Catholic Medical Association).

⁴⁰⁸ *Id.* at 12 (statement of Ms. Campbell on January 24, 2000, "I have no objection").

⁴⁰⁹ As stated by one scholar:

Even if it is determined that a priest's testimony as to the tenets of a particular faith are relevant to divining the incompetent patient's likely treatment preferences, there still remain two difficult questions: certifying any particular priest as an expert on the subject about which he will testify, and resolving religious differences in a "battle of experts" between multiple clergy experts. These questions become particularly difficult in cases involving religions other than Catholicism, which are unlikely to have as centralized a source of its moral teachings.

Kathleen M. Boozang, *Divining A Patient's Religious Beliefs in Treatment Termination Decision-Making*, 15 TEMP. POL. & CIV. RTS. L. REV. 345, 360 (2006).

⁴¹⁰ Leonard J. Nelson, III, *Catholic Bioethics and the Case of Terri Schiavo*, 35 CUMB. L. REV. 543, 545 (2004-2005).

⁴¹¹ Boozang, *supra* note 409, at 353.

⁴¹² *Id.*

⁴¹³ *Id.* at 353-54.

⁴¹⁴ Manuel Roig-Franzia, *Church's Stand on Feeding Tubes Is Evolving*, WASH. POST, Mar. 27, 2005, available at 2005 WLNR 4769677.

statement calling Ms. Schiavo's death a " 'violation of the sacred nature of life' that had rightly 'shocked consciences.'"⁴¹⁵

Remarkably, when the Schindlers filed a motion pointing out the Pope's flat contradiction of Father Murphy's testimony,⁴¹⁶ Judge Greer was not swayed. He denied the motion in part due to Terri's lack of attendance at mass, and lack of any new information, from a religious advisor, or otherwise, regarding her desires.⁴¹⁷ Evidently, Terri was a good enough Catholic to die, but not a good enough Catholic to live. Or perhaps the position of the Catholic Church on end-of-life issues was only relevant when it could justify Terri's death.

2. Evidence Concerning End-of-Life Decisions

Additional problems are raised with regard to the testimony of Beverly Tyler, Executive Director of Georgia Health Discoveries.⁴¹⁸ Ms. Tyler testified as to the viewpoints of Americans concerning end-of-life decisions.⁴¹⁹ Judge Greer specifically relied on her testimony in the 2000 Death Order to bolster the testimony of Scott and Joan Schiavo.⁴²⁰ Judge Greer found the following:

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.⁴²¹

⁴¹⁵ John-Thor Dahlburg, *Terri Schiavo, 41, Dies*, L.A. TIMES, Apr. 1, 2005, available at 2005 WLNR 5070203.

⁴¹⁶ Motion for Relief from Judgment and Motion to Re-Consider, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. July 20, 2004), available at UMIAMI TIMELINE, *supra* note 32.

⁴¹⁷ *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Oct. 22, 2004) (order denying motion for relief from judgment and motion to reconsider), available at http://www6.miami.edu/ethics/schiavo/pdf_files/102204-denymotion.pdf. In this order, Judge Greer quoted *Schiavo I* to support denying the motion: "[Terri] had been raised in the Catholic faith, but did not regularly attend mass or have a religious advisor who could assist the court in weighing her religious attitudes about life-support methods." *Id.* (quoting *Schiavo I*, *supra* note 20) (emphasis in original).

⁴¹⁸ Transcript of Trial, *supra* note 115, at 281-323 (testimony of Beverly Tyler).

⁴¹⁹ *Id.*

⁴²⁰ 2000 Death Order, *supra* note 4, at *4.

⁴²¹ *Id.*

Judge Greer also relied on Ms. Tyler's testimony to interpret the statements Terri allegedly made to Michael, Scott, and Joan.⁴²² Judge Greer found that these statements "contain[ed] no limitations or conditions."⁴²³ He further found that "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."⁴²⁴ He concluded that the "implicit condition [of no hope of improvement] has long since been satisfied in this case."⁴²⁵

The Schindlers appealed the 2000 Death Order to Florida's Second District Court of Appeal.⁴²⁶ One of their arguments on appeal was "that the trial court should not have heard evidence from Beverly Tyler . . ."⁴²⁷ The appellate court described Ms. Tyler's expertise as follows:

Ms. Tyler has studied American values, opinions, and attitudes about the decision to discontinue life-support systems. As a result, she has some special expertise concerning the words and expressions that Americans often use in discussing these difficult issues. She also has knowledge about trends within American attitudes on this subject.⁴²⁸

The appellate court "doubt[ed] that Ms. Tyler's testimony provided much in the way of relevant evidence."⁴²⁹ The appellate court summarized this testimony: "She testified about some social science surveys. Apparently most people, even those who favor initial life-supporting medical treatment, indicate that they would not wish this treatment to continue indefinitely once their medical condition presented no reasonable basis for a cure."⁴³⁰

The appellate court noted that "[t]here is some risk that a trial judge could rely upon this type of survey evidence to make a 'best interests' decision for the ward."⁴³¹ The court concluded, however, "that the trial judge did not give undue weight to this evidence and that the court made a

⁴²² *Id.* at *7.

⁴²³ *Id.*

⁴²⁴ *Id.*

⁴²⁵ 2000 Death Order, *supra* note 4, at *7.

⁴²⁶ Notice of Appeal, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Mar. 28, 2000); *Schiavo I*, *supra* note 20.

⁴²⁷ *Schiavo I*, *supra* note 20.

⁴²⁸ *Id.*

⁴²⁹ *Id.*

⁴³⁰ *Id.*

⁴³¹ *Id.*

proper surrogate decision rather than a best interests decision.”⁴³² The appellate court failed to mention, much less address, the fact that Judge Greer extensively relied on Ms. Tyler’s testimony in the 2000 Death Order.⁴³³

VI. THE FAILURE OF OTHER COURTS

A. Florida Appellate Courts

As stated, the Schindlers appealed the Death Order.⁴³⁴ On such a direct appeal, a panel of three judges should have carefully reviewed the crucial factual finding that Terri would have wanted her feeding tube removed and determined whether the evidence was “clear and convincing” enough to end Terri’s life.⁴³⁵ Unfortunately, the panel failed to do so.⁴³⁶ Instead, the panel, after giving “lip service” to Florida’s “presumption of life,”⁴³⁷ proceeded to ignore the presumption. In its rush to affirm Judge Greer’s ruling, the panel failed to mention, much less discuss, what the witnesses actually testified to concerning Terri’s wishes.⁴³⁸ In its cursory treatment of the key issue, the panel cited no cases to determine what kind of evidence other courts had determined to be “clear and convincing.”⁴³⁹

Astonishingly, the Florida Supreme Court simply refused to hear the Schindler’s appeal in what was the civil equivalent of a death penalty case.⁴⁴⁰ From that point forward, it would be an uphill battle to fight the Death Order and the crucial factual finding about Terri’s wishes.

⁴³² *Schiavo I*, *supra* note 20.

⁴³³ 2000 Death Order, *supra* note 4, at *4.

⁴³⁴ *Schiavo I*, *supra* note 20.

⁴³⁵ The Michigan Supreme Court has described appellate review in such a situation as answering the following question: “Do the facts presented below provide a sufficient evidentiary basis for the trial court’s determination that the rigorous demands of the clear and convincing standard were met?” *In re Martin*, 538 N.W.2d 399, 413 n.23 (Mich. 1995). There the majority “engage[d] in a de novo review of the facts [and conducted a] careful review of the entire record created below.” *Id.* In addition, as stated by Professor Snead, “the clear and convincing standard—a bulwark against possible abuse and a means of ensuring a reliable result—is an absolutely crucial element of the Florida law’s effort to promote the actual exercise of autonomy by patients no longer capable of expressing their wishes.” Snead, *supra* note 325, at 391.

⁴³⁶ *Schiavo I*, *supra* note 20.

⁴³⁷ *Id.* at 179.

⁴³⁸ *Id.* at 179-80.

⁴³⁹ *Id.* The Court referred only to *In re Browning*, 543 So. 2d 258, 273 (Fla. Dist. Ct. App. 1989), approved by 568 So. 2d 4 (Fla. 1990), which supports “err[ing] on the side of life.” *Id.*

⁴⁴⁰ *Schiavo I*, *supra* note 20.

B. Federal Courts

The majority of federal judges did even less than the Florida state judges to protect Terri's legal right to life. They did, however, act with alacrity. Contrary to the predictions of those in Congress,⁴⁴¹ no federal judge ever issued a stay to keep Terri alive so that her case could be thoughtfully and thoroughly reviewed.⁴⁴² Only two federal judges thought the federal courts should review Judge Greer's factual finding as to Terri's wishes.⁴⁴³ Moreover, although much new evidence emerged since the January 2000 Hearing, Terri never had a new trial.⁴⁴⁴

Several issues were raised at the federal level, all were dismissed at breakneck speed. Several mistakes at the federal level stand out: (1) discounting Terri's lack of representation; (2) the failure to find a lack of clear and convincing evidence; (3) the failure to find state action; and (4) the record pace itself.⁴⁴⁵ First, Terri's parents claimed that Terri was denied procedural due process because Judge Greer failed to appoint a guardian *ad litem* for her.⁴⁴⁶ In ruling against them and denying their injunction, the federal district court held: "[A]ssuming Fourteenth Amendment procedural due process requires the appointment of a guardian *ad litem*, there would be no constitutional deprivation here because three guardians *ad litem* were appointed to represent Theresa Schiavo's interests

⁴⁴¹ "I would expect that a federal judge would grant a stay under these circumstances because Terri would need to live in order for the court to consider the case," said Senate Majority Leader Bill Frist." Levesque et al., *Wait Continues*, *supra* note 67.

⁴⁴² See *Schiavo ex rel. Schindler v. Schiavo*, 544 U.S. 957, 957 (2005) (denying stay); *Schiavo ex rel. Schindler v. Schiavo*, 404 F.3d 1282, 1283 (11th Cir. 2005) (denying motion for an injunction pending appeal); *Schiavo ex rel. Schindler v. Schiavo*, 358 F. Supp. 2d 1161, 1163 (M.D. Fla. 2005) (denying motion for temporary restraining order).

⁴⁴³ *Schiavo ex rel. Schindler v. Schiavo*, 404 F.3d 1270, 1279-82 (11th Cir. 2005) (order denying petition for rehearing en banc) (Tjoflat & Wilson, JJ., dissenting).

⁴⁴⁴ See *CourtTVNews: Lawyers Bill Allen and Wesley Smith Discuss the Legal and Bioethical Issues* (Court TV television broadcast Mar. 24, 2005), transcript available at http://www.courtTV.com/talk/chat_transcripts/2005/0324schiavo-debate.html). Concerning this issue, Smith said:

Much evidence has come in after the first trial. Another one of my problems with this case, is that the first trial record has been hung like a millstone around Terri's neck. So much has come out, that I really think a new trial is in order so it can all come in and be subject to cross-examination. That this isn't happening is another reason why many people see Terri's pending death as a profound injustice.

Id.

⁴⁴⁵ See *supra* note 442 and accompanying text.

⁴⁴⁶ Plaintiff's Complaint for Temp. Restraining Order, Declaratory Judgment, & Preliminary and Permanent Injunctive Relief at 14, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct., Mar. 21, 2005) (No. 8:05-CV-530-T-27TBM), 2005 WL 923409.

over the course of the litigation.”⁴⁴⁷ The court elaborated that John Pecarek and Richard Pearse represented Terri before the Death Order, and Pearse “served as guardian *ad litem* for one year and ultimately testified as a witness in the trial before Judge Greer.”⁴⁴⁸ Though those statements are true, they fail to deal with the quality of the representation. The court neglected to mention that Pecarek spent all of nine and a half hours on the case, and Pearse’s entire “year,” amounted to a mere twenty-five hours.⁴⁴⁹ The federal appellate court did not correct this error.

Second, as discussed *supra*, clear and convincing evidence was lacking as to Terri’s wishes. The Eleventh Circuit disagreed that this resulted in a lack of due process, holding:

The plaintiffs argue that the state courts should have concluded that the clear and convincing evidence standard was not met in this case, but a quarrel with the result of a proceeding does not state a claim that due process was not afforded. Stated differently, procedural due process does not guarantee a particular result.⁴⁵⁰

However, as stated in a dissenting opinion by Judge Tjoflat in another hearing: “The plaintiffs have now stated a plausible claim that the Due Process Clause of the Fourteenth Amendment requires clear and convincing evidence of an individual’s wishes before a state court may order withdrawal of life-sustaining nutrition, hydration, or other medical attention.”⁴⁵¹ Judge Tjoflat continued: “If such a right exists, it is not enough to simply say that the state statute does, in fact, require clear and convincing evidence.”⁴⁵² Judge Tjoflat believed that the Schindlers had demonstrated “some likelihood of success,” and, as a result, he would have issued a preliminary injunction.⁴⁵³ Judge Tjoflat added:

[I]n the case at hand, while it is clear that the state court purported to use the clear and convincing evidence standard, the plaintiffs argue that there is simply insufficient evidence to support its findings under that standard. The relevant question here is whether a rational factfinder could have found by clear and

⁴⁴⁷ *Schiavo ex rel. Schindler v. Schiavo*, 357 F. Supp. 2d 1378, 1386 (M.D. Fla. 2005), *aff’d*, 403 F.3d 1223 (11th Cir. 2005).

⁴⁴⁸ *Id.* at 1386.

⁴⁴⁹ See discussion *supra* Part II.C.3.

⁴⁵⁰ *Schiavo ex rel. Schindler*, 403 F.3d at 1295 (11th Cir. 2005).

⁴⁵¹ *Schiavo ex rel. Schindler v. Schiavo*, 404 F.3d 1270, 1279 (11th Cir. 2005) (order denying petition for rehearing en banc) (Tjoflat, J., dissenting).

⁴⁵² *Id.* at 1279.

⁴⁵³ *Id.* at 1280 (quoting *Productos Carnic, S.A. v. Cent. Am. Beef & Seafood Trading Co.*, 621 F.2d 683, 686 (5th Cir. 1980)).

convincing evidence that Mrs. Schiavo would have wanted nutrition and hydration to be withdrawn under these circumstances.⁴⁵⁴

Third, the federal courts held that Judge Greer—a state trial judge on the state payroll—was not a state actor.⁴⁵⁵ One commentator has thoughtfully criticized this holding, recognizing that the federal appellate court ignored a more recent case and instead relied on a much older case.⁴⁵⁶

Lastly, the frenzied pace of the federal courts⁴⁵⁷ resulted in Terri's case never receiving the review it needed. In his dissent, joined by Judge Wilson, Judge Tjoflat commented on "the hurried pace of this litigation" which had resulted in the court failing to "give the plaintiffs' claims the reasoned attention they deserve."⁴⁵⁸ He noted that prisoners routinely receive injunctions in life-or-death cases:

To give the plaintiffs' claims the reasoned attention they deserve, and to develop the certainty the law demands, we should rehear this case en banc. The United States Supreme Court encourages such caution in life-and-death situations, such as in its federal habeas jurisprudence. The Court has said that "[i]f the district court cannot dismiss the petition on the merits before the scheduled execution, it is obligated to address the merits and must issue a stay to prevent the case from becoming moot" when the prisoner dies. *Lonchar v. Thomas*, 517 U.S. 314, 320, 116 S.Ct. 1293, 1297, 134 L.Ed.2d 440 (1996). Similarly, because the plaintiffs have stated a plausible claim, we should issue an injunction to avoid the case from becoming moot when Mrs. Schiavo perishes.⁴⁵⁹

Thus, according to Judge Tjoflat, more time was needed for the federal courts to determine whether clear and convincing evidence existed. "My contention is that we cannot make this determination now. Instead, the district court should make this determination only after a full and careful review of the evidence, which cannot occur under current time

⁴⁵⁴ *Id.*

⁴⁵⁵ *Schiavo ex rel. Schindler*, 403 F.3d at 1293 n.2; *Schiavo ex rel. Schindler v. Schiavo*, 357 F. Supp. 2d 1378, 1388 (M.D. Fla.), *aff'd*, 403 F.3d 1289 (11th Cir. 2005) ("Moreover, the fact that the claims were adjudicated by a state court judge does not provide the requisite state action for purposes of the statute or the Fourteenth Amendment.").

⁴⁵⁶ Samuel R. Bagenstos, *Judging the Schiavo Case*, 22 CONST. COMMENT. 457, 466-67 (2005). The author also criticized the federal courts for their "undue haste" and for their discounting of the Schindlers' discrimination claims under the Americans with Disabilities Act. *Id.*

⁴⁵⁷ *Id.* at 458-59, 466-71.

⁴⁵⁸ *Schiavo ex rel. Schindler v. Schiavo*, 404 F.3d 1270, 1279 (11th Cir. 2005) (order denying petition for rehearing en banc) (Tjoflat, J., dissenting).

⁴⁵⁹ *Id.*

constraints.”⁴⁶⁰ In other words, “there’s always time to die. I don’t know what the rush was.”⁴⁶¹

VII. THE FAILURE OF THE MEDIA

For many years the media did not cover Terri’s story. Most came to the story after the 2000 Hearing. The majority favored death over life. However, some in the media did report the true facts, did ask questions about the evidence relied upon by Judge Greer in 2000, did stand up for the rights of the disabled community, and did praise efforts to save Terri.⁴⁶² These voices included those who originally thought Terri should die, but who later had changes of heart based on personal experiences.⁴⁶³ Probably the most vocal reporter in the fight for Terri’s life was (and is) Nat Hentoff, a self-avowed atheist formerly with the *Village Voice*,⁴⁶⁴ who labeled Terri’s death “judicial murder.”⁴⁶⁵ These few voices were (and largely still are) ignored by the rest of the press.

Concerning the actual evidence at the 2000 Hearing, most sources fail to examine or list the evidence relied upon by Judge Greer. According to one source, “court transcripts demonstrate that several adversarial hearings found credible evidence—from more than one source—that [Terri] Schiavo didn’t want the health-care measures she ultimately received.”⁴⁶⁶ These

⁴⁶⁰ *Id.* at 1280 n.3.

⁴⁶¹ Bagenstos, *supra* note 456, at 469 (quotations omitted).

⁴⁶² See, e.g. John Kass, *Beware of Letting the Unacceptable Become the Norm*, CHI. TRIB., Apr. 1, 2005, at 2, available at 2005 WLNR 23436127; Jack Kelly, Editorial, *Starved of Justice the Terri Schiavo Case Shows a Judge at His Worst*, PITTSBURGH POST-GAZETTE, Mar. 27, 2005, at J7, available at 2005 WLNR 4789007; Debra J. Saunders, Editorial, *No Choice for Terri*, S.F. CHRON., Mar. 24, 2005, at B9, available at 2005 WLNR 4614077 [hereinafter Saunders, *No Choice for Terri*]. The Berlin, Germany newspaper, *Tagesspiegel* stated that President Bush’s actions concerning Terri “made moral sense.” John Daniszewski, *The Terri Schiavo Case: World Watching, But No Consensus on Ethics of Death*, L.A. TIMES, Mar. 26, 2005, at 22, available at 2005 WLNR 23371373. In an editorial piece, the Berlin newspaper opined: “A person is going to starve to death who is neither suffering from a deadly disease nor has left a living will That may be in accord with the laws in Florida, but then these laws are simply wrong.” *Id.*

⁴⁶³ Mary Mitchell, *It’s Arrogance to Decide it’s time for Schiavo to Die*, CHI. SUN-TIMES, Mar. 31, 2005, at 14, available at 2005 WLNR 5299631.

⁴⁶⁴ See Nat Hentoff, Op. Ed., *Revisiting the Schiavo Case: Terri’s Former Husband is on the Campaign Trail*, WASH. TIMES, Sept. 4, 2006, at A15, available at 2006 WLNR 15344853 [hereinafter Hentoff, *Revisiting the Schiavo Case*]; Hentoff, *Judicial Murder*, *supra* note 23; Nat Hentoff, *The Culture of Death*, VILLAGE VOICE, Dec.3, 2003, at 24, available at 2003 WLNR 13363294; Nat Hentoff, *It’s Not Only About Terri Schiavo*, VILLAGE VOICE, Nov. 26, 2003, at 28, available at 2003 WLNR 13212060; Nat Hentoff, *A Woman’s Life Versus an Inept Press*, VILLAGE VOICE, Nov. 12, 2003, at 28, available at 2003 WLNR 13203233 [hereinafter Hentoff, *Inept Press*].

⁴⁶⁵ Hentoff, *Judicial Murder*, *supra* note 23.

⁴⁶⁶ Cory Franklin & Barry M. Rosenbloom, *7 Lessons from the Schiavo Case*, CHI. TRIB., Apr. 1, 2005, at 27, available at 2005 WLNR 23437663. In fact, only one adversarial fact-finding hearing was held concerning Terri’s wishes and that occurred in January 2000. See Kelly, *supra* note 462 (“All subsequent legal reviews [of the Schiavo case] have been of the law, not of the facts.”). As described

sources failed to list this “credible evidence,” but like most, simply stated a conclusion. One of Michael’s lawyers, Michael Felos, described this evidence on *CNN’s Larry King Live* television show as follows:

KING: Hold it Michael—on hearsay, George [Felos] thought, the only word that she said that is Michael’s, right, George?

FELOS: No. That’s not correct. Because she made those statements to her best friend, Joan and also to her brother-in-law. There were three witnesses and numerous statements to those witnesses over different periods of time. I don’t want to be kept alive artificially. No tubes for me. I want to go when my time comes. If I ever had to be dependent upon anyone, I wouldn’t want to live that way.

I mean, Terri made her wishes clear. And that’s what the court found.⁴⁶⁷

Throughout Terri’s case, the courts and the media mirrored one another. For example, the courts focused on whether Terri “would wish to permit a natural death process to take its course and for her family members and loved ones to be free to continue their lives.”⁴⁶⁸ The media treated Terri’s case as a right-to-die case,⁴⁶⁹ rarely a right-to-life case.⁴⁷⁰ The courts resented what they perceived as interference by the Florida Legislature⁴⁷¹

by one commentator: “Dismayingly, 19 additional judges in six courts, including federal courts, based their terminal judgments on Terri Schiavo entirely on Judge Greer’s ruling. The courts erred fatally in not conducting an investigation of Greer’s entire handling of the case from the beginning.” Hentoff, *Revisiting the Schiavo Case*, *supra* note 464.

⁴⁶⁷ *Larry King Live: Guest Panel Discusses Terri Schiavo* (CNN television broadcast Mar. 18, 2005), transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/050318/lkl.01.html>. Though informed of Michael’s girlfriend and children, Mr. King never asked Michael about how Terri could still be “his life,” when he had started a new family. *Id.*

⁴⁶⁸ *Schiavo I*, *supra* note 20; *Bush v. Schiavo*, 885 So. 2d 321, 325 (Fla. 2004); *Schiavo ex rel. Schindler v. Schiavo*, 404 F.3d 1270, 1278 (11th Cir. 2005) (Carnes & Hull, JJ., concurring).

⁴⁶⁹ See Tim Boyles, *Appeals End in Schiavo Right-to-Die Case*, KAN. CITY STAR, Mar. 19, 2005, at 8, available at 2005 WLNR 22769659; Vickie Chachere, *Fla. Judge Denies New Trial in Schiavo Right-to-Die Case*, PHILA. INQUIRER, Oct. 23, 2004, at A09, available at 2004 WLNR 19352775; John-Thor Dahlburg & David G. Savage, *Right-to-Die Ruling Stands*, L.A. TIMES, Jan. 25, 2005, at 14, available at 2005 WLNR 23360441; Michael McGough, Editorial, *The Schiavo Sideshow: A Poignant and Politicized Human Story Broke No New Constitutional Ground in the Legal Debate Over a ‘Right to Die,’* PITTSBURGH POST-GAZETTE, Apr. 4, 2005, at A17, available at 2005 WLNR 5224767; *New Medical Tests Sought in Schiavo Right-to-Die Case*, CHI. TRIB., Mar. 9, 2005, at 19, available at 2005 WLNR 23477697; *Spiritual Leaders Reflect on Schiavo, Right-to-Die Battle*, CHARLOTTE OBSERVER, Apr. 9, 2005, at 3E, available at 2005 WLNR 5546314; see also Maya Bell, *Schiavo Right-to-Die Case Heading to Florida Court*, ORLANDO SENTINEL, Aug. 30, 2004, at A1, available at 2004 WLNR 20167847. Four years earlier, however, the *Orlando Sentinel* had deemed Terri’s battle a “right-to-life” case. *Comatose Woman May Get the Boot*, ORLANDO SENTINEL, Feb. 26, 2000, at D4, available at 2000 WLNR 8645089.

⁴⁷⁰ *U.S. Bill on Schiavo Introduced*, PHILA. INQUIRER, Mar. 9, 2005, at B10, available at 2005 WLNR 22988386 (“bitter right-to-life case”).

⁴⁷¹ See *Schiavo*, 885 So. 2d at 329-32.

as well as by the United States Congress.⁴⁷² The media likewise resented any legislative involvement in the case,⁴⁷³ but went even further by resenting any outside involvement, treating Terri's case as a "private family matter" which just happened to exclude her parents.⁴⁷⁴

The media, like the courts, also stressed those facts that supported ending Terri's life, not those facts supporting life. One example involved the credibility and the character of the witnesses in the case. After the 2000 Hearing, Judge Greer found Terri's husband, Michael Schiavo, to be a credible witness⁴⁷⁵ even though Terri's appointed guardian *ad litem* had questioned his credibility.⁴⁷⁶ The appellate court let his findings stand.⁴⁷⁷

Likewise, the media often did not focus on the facts that might question Michael's credibility such as the existence of a live-in girlfriend by whom he had two young children or that he had waited seven years to come forward with Terri's wishes while in the meantime living off of money associated with Terri. Many media sources praised Michael and believed that the decision to end Terri's life was Michael's decision and no one else's.⁴⁷⁸ Some polls, based on facts and applicable law gleaned from the media, also showed that the public believed that Terri's fate was best left in the hands of her husband.⁴⁷⁹

⁴⁷² See *Schiavo*, 404 F.3d at 1274-76 (Birch, J., concurring).

⁴⁷³ See Cynthia Tucker, Editorial, *The Terri Schiavo Case: Politicians Can't Pass Up Chance to Pander*, ATLANTA J. CONST., Mar. 23, 2005, at A19, available at 2005 WLNR 4552369; see also Mark Brown, *If Congress Can Save a Life, Could It Also Take One Away?*, CHI. SUN-TIMES, Mar. 22, 2005, at 2, available at 2005 WLNR 4840148 ("There is no room for Congress in [the death] process.").

⁴⁷⁴ See Editorial, *Our Opinion: An Abuse of Power—and Schiavo*, ATLANTA J. CONST., Mar. 22, 2005, at A18, available at 2005 WLNR 4407557 [hereinafter *Our Opinion*]; Opinion, *Let Her Go*, CLEV. PLAIN DEALER, Mar. 24, 2005, at B10, available at 2005 WLNR 4697112. But one columnist has pointed out an inconsistency in this view: "Had Terri Schiavo been pregnant and wanted to abort, her husband would have no legal say in the matter, but he has ultimate power over her life and death[?]" Cal Thomas, *Lessons From Terri Schiavo*, SUN HERALD, Mar. 29, 2005, at C2, available at 2005 WLNR 22861504.

⁴⁷⁵ See 2000 Death Order, *supra* note 4.

⁴⁷⁶ See 1998 GAL Report, *supra* note 60, at 11-14.

⁴⁷⁷ *Schiavo I*, *supra* note 20.

⁴⁷⁸ See, e.g., Patrick Kampert, *Sympathy Grows for the Husband: 'Combative' Michael Schiavo is Less Evident*, STAR-LEDGER, Mar. 24, 2005, at 6, available at 2005 WLNR 23790122; William R. Levesque, *Interview with Michael Schiavo: Who There Would Take Terri's Place*, ST. PETERSBURG TIMES, Mar. 16, 2005, at 1A, available at 2005 WLNR 23770856; Rich McKay & Maya Bell, *Michael Schiavo to Tell His Story*, S. FLA. SUN-SENTINEL, Oct. 26, 2003, at 18A, available at 2003 WLNR 15478294 (describing Michael as a "gentle giant" and one "who never fell out of love with [Terri]"); Mussen, *supra* note 280 ("Intense Pressure Hasn't Changed Michael Schiavo's Mind."). One reporter stated: "Pity Michael Schiavo. He's had his motives and character questioned at every step along the way, had to put up with calumnies flung by religious zealots and wild-eyed conspiracy theorists unable to believe that all he wanted to do was keep a promise to his wife." Leonard Pitts Jr., Editorial, *Shame on Jeb Bush: He Stoops Low to Harass Michael Schiavo*, PITTSBURGH POST-GAZETTE, June 28, 2005, at B7, available at 2005 WLNR 10167596.

⁴⁷⁹ For example, one newspaper poll asked the following question: "Since Terri Schiavo had no living will, whose preferences should be given the most weight, her husband or her parents?" Bill

The media, like the courts, discounted Terri's religious beliefs. Most of the reporters focused not on Terri's own religious beliefs, but on the beliefs of those trying to save her,⁴⁸⁰ treating those opposing the removal of her feeding tube as right-wing "right-to-life zealots,"⁴⁸¹ though many were members of groups supporting rights for the disabled.⁴⁸² It was estimated that "[f]ourteen disability-rights organizations support[ed] keeping Terri alive and getting her any therapy that will help her."⁴⁸³ Moreover, contrary to the assertions of the media, both state⁴⁸⁴ and national,⁴⁸⁵ little meaningful appellate review occurred.⁴⁸⁶

Reporters are not alone in their perspectives; in numerous law review articles, commentators have praised the decision to remove Terri's feeding tube and have criticized the involvement of the other branches of government.⁴⁸⁷ Numerous law professors have opined in support of the

Barrow, *Survey Supports Husband*, MOBILE REG., Nov. 2, 2003, at A1, available at 2003 WLNR 15782105. Respondents answered: the husband, 63%; the parents, 20%; and no answer, 17%. *Id.*

⁴⁸⁰ See, e.g., Mark Lane, *The Fate of Terri Schiavo – Politicians Should Put Up or Shut Up*, SUN HERALD, Mar. 22, 2005, at C2, available at 2005 WLNR 22852028.

⁴⁸¹ See, e.g., Robert Kuttner, Op-Ed., *Exposing Pro-life Zealotry*, BOSTON GLOBE, Mar. 30, 2005, at A15, available at 2005 WLNR 4955235; Leonora LaPeter, *She Still Stands for Terri*, ST. PETERSBURG TIMES, May 17, 2005, at 1B, available at 2005 WLNR 23867753; Pitts Jr., *supra* note 478.

⁴⁸² Groups included Not Dead Yet and the American Catholic Lawyers Association. See Kathy L. Cerminara, *Critical Essay: Musings on the Need to Convince Some People with Disabilities that End-of-Life Decision-Making Advocates Are Not Out to Get Them*, 37 LOY. U. CHI. L.J. 343, 371 n.167 (2006); Hentoff, *Inept Press*, *supra* note 464.

⁴⁸³ Volkman, *supra* note 307.

⁴⁸⁴ For example, a South Florida editor opined: "Nineteen times, judges have sided with Schiavo's husband, Michael, in finding that it was her [Terri's] expressed wish not to be kept alive artificially. In so doing, they have upheld well-established legal principles." Editorial, *Politics Imperils the Rule of the Law*, S. FLA. SUN-SENTINEL, Mar. 24, 2005, at 22A, available at 2005 WLNR 23619518. Other Florida newspapers were equally adamant. See, e.g., Kathy Cerminara, Editorial, *With Schiavo, Congress Thumbs Nose At Courts*, ORLANDO SENTINEL, Mar. 23, 2005, at A15, available at 2005 WLNR 23739416. In an editorial, the *Miami Herald* placed the number of judges at twenty-four not nineteen: "Whatever happens ultimately to Terri Schiavo, no one can say that she hasn't had her day in court. Her case has been litigated for years, heard wholly or in part by more than two dozen judges, and been up to the U.S. Supreme Court five times." Editorial, *A Nation of Laws and of Separate Powers*, MIAMI HERALD, Mar. 25, 2005, at 20A, available at 2005 WLNR 23041802.

⁴⁸⁵ See, e.g., *Let Her Go*, *supra* note 474; Editorial, *Needless Delay in Schiavo Case*, DENVER ROCKY MOUNTAIN NEWS, Mar. 22, 2005, at 30A, available at 2005 WLNR 5245874; *Our Opinion*, *supra* note 474; Editorial, *Tragic Course*, COLUMBUS DISPATCH, Mar. 23, 2005, at 14A, available at 2005 WLNR 24968713; see also Editorial, *Life and Death With Dignity: Intervention Makes Tragic Situation More So*, DALLAS MORNING NEWS, Mar. 22, 2005, at 16A, available at 2005 WLNR 24703101.

⁴⁸⁶ See *supra* Part VI.A.

⁴⁸⁷ See, e.g., William Allen, *Erring Too Far on the Side of Life: Déjà vu All Over Again in the Schiavo Saga*, 35 STETSON L. REV. 123 (2005); Kathy L. Cerminara, *Tracking the Storm: The Far-Reaching Power of the Forces Propelling the Schiavo Cases*, 35 STETSON L. REV. 147, 172-73 (2005); Edward J. Larson, *From Cruzan to Schiavo: Similar Bedfellows in Fact and at Law*, 22 CONST. COMMENT. 405, 408 (2005); Barbara A. Noah, *Politicizing the End of Life: Lessons from the Schiavo Controversy*, 59 U. MIAMI L. REV. 107 (2004); John A. Robertson, *Schiavo and its (In)Significance*, 35 STETSON L. REV. 101 (2005).

decision to remove Terri's feeding tube and were likewise critical of involvement by the other branches.⁴⁸⁸ Others have disagreed.⁴⁸⁹

"Clearly, the public's opinion was frequently shaped by a media that either got the story wrong or didn't push hard enough to get the story right."⁴⁹⁰ Thus, "the press allowed misinformation to be presented as fact."⁴⁹¹ As a result of the failure of the media to report all of the facts and the applicable law, most opinion polls showed that the majority of Americans approved the removal of Terri's feeding tube⁴⁹² and disapproved of the involvement of Congress, the Florida legislature, President Bush, and Governor Jeb Bush.⁴⁹³ However, not all polls agreed,⁴⁹⁴ and one criticized the wording of the questions used in the polls indicating support for removal.⁴⁹⁵ Emotions ran high as organizations and

⁴⁸⁸ See, e.g., Charles Fried, *Federalism Has a Right to Life, Too*, N.Y. TIMES, Mar. 23, 2005, at A17; Adam Liptak, *In Florida Right-to-Die Case, Legislation that Puts the Constitution at Issue*, N.Y. TIMES, Oct. 23, 2003, at A20, available at 2003 WLNR 5652848; *Scholars Applaud Schiavo Decision*, THE RECORDER, Vol. 129, No. 58, Mar. 25, 2005, at 11.

⁴⁸⁹ See, e.g., Michael P. Allen, *Congress and Terri Schiavo: A Primer on the American Constitutional Order?*, 108 W. VA. L. REV. 309 (2005); Steven G. Calabresi, *The Terri Schiavo Case: In Defense of the Special Law Enacted by Congress and President Bush*, 100 NW. U. L. REV. 151 (2006); George, *supra* note 2; Snead, *supra* note 325; Michael Stokes Paulsen, *Killing Terri Schiavo*, 22 CONST. COMMENT. 585 (2005).

⁴⁹⁰ GIBBS, FIGHTING FOR LIFE, *supra* note 147, at 195.

⁴⁹¹ *Id.*

⁴⁹² See e.g., William R. Levesque, Tom Zucco, Carrie Johnson, & Graham Brink, *Schiavo: Same Judges, Same Result*, ST. PETERSBURG TIMES, Mar. 26, 2005, at 1A, available at 2005 WLNR 23872527 (reporting that fifty-two percent agreed with federal judge's decision not to reattach feeding tube); Raja Mishra, *Moral Debate Rekindles as Schiavo's Life Ends*, BOSTON GLOBE, Apr. 1, 2005, at A1, available at 2005 WLNR 5096698 ("[P]olls taken over the last two weeks indicated that a majority of Americans surveyed said they supported the decision to remove Schiavo's feeding tube."); Editorial, *Schiavo's Gone, But the Debate Isn't Over Yet*, BALTIMORE SUN, Apr. 12, 2005, at 15A, available at 2005 WLNR 5688712 (reporting that major polls showed most Americans supported removal); Adam C. Smith, *Fault Lines*, ST. PETERSBURG TIMES, Apr. 3, 2005, at 1P, available at 2005 WLNR 23895527 (claiming "overwhelming support" for removal).

⁴⁹³ See, e.g., *Poll On Schiavo Case*, N.Y. TIMES, Apr. 14, 2005, at A20, available at 2005 WLNR 5803520 (reporting that in a Quinnipiac University Polling Institute survey of Florida voters ("Quinnipiac Survey"), sixty-four percent disapproved of Congress; fifty-nine percent disapproved of the roles played by President George W. Bush and Governor Jeb Bush); Maura Reynolds, *GOP Push on End-of-Life Legislation is Running Around*, L.A. TIMES, Apr. 7, 2005, at 17, available at 2005 WLNR 5392412 ("Several public opinion polls in the days before Schiavo's death showed that a majority of Americans disapproved of the congressional intervention.").

⁴⁹⁴ The Quinnipiac Survey also found that "[e]xactly half of Florida voters agreed with [Judge Greer's] decision to remove Schiavo's feeding tube." Sean Mussenden, *Schiavo Survey: Leaders, Media Mishandled Case*, ORLANDO SENTINEL, Apr. 14, 2005, at B1, available at 2005 WLNR 23695877. That same survey also found that seventy-one percent of Floridians "disapproved of the media's handling of the case" *Id.* The *New York Times* failed to mention those survey results in its article regarding the Quinnipiac Survey. See *Poll on Schiavo Case*, *supra* note 493.

⁴⁹⁵ Debra J. Saunders, *All Wet on Schiavo Story*, S.F. CHRON., Apr. 7, 2005, at B9, available at 2005 WLNR 5421549. According to that article:

individuals took sides based on alleged facts reported by these mainstream media sources.⁴⁹⁶

These failures led to other misconceptions by the public, which permeated the arguments in the battle for Terri's life. Many sources emphasized legal irrelevancies. Those who supported the removal of the feeding tube relied on two common slogans: the first based on a fear of and prejudice towards those with disabilities; and the second based on sexism. The first slogan was that "[n]o one would want to live like that."⁴⁹⁷ The second slogan was that "[a] husband has a right to determine a wife's fate."⁴⁹⁸

Even after Terri's death, the media continued its biased coverage towards death. Both Michael and the Schindlers wrote books about Terri from their respective viewpoints.⁴⁹⁹ The media conducted numerous interviews with Michael, some with his new wife, Jodi Schiavo,⁵⁰⁰ but very few interviews of the Schindlers.⁵⁰¹

Zogby, in a poll commissioned by the Christian Defense Coalition, found that by a 2-to-1 margin—44 percent versus 24 percent—likely voters believe the law should assume a patient wants to live and be kept alive with the help of a feeding tube, if a patient—like Schiavo—left no written statement on end-of-life care. Should hearsay be admissible (as happened with Schiavo), when courts decide if a feeding tube should be removed? Some 57 percent said no; 31 percent said yes. If a disabled person is not terminally ill, not in a coma, not on life support and without a written end-of-life directive, should he or she be denied food and water? Among those polled, 80 percent said no. The poll is not clear cut. A majority of those questioned said elected officials should not intervene when the courts deny rights to the disabled and that elected officials shouldn't intervene to protect a disabled person's right to live, despite conflicting testimony. On the other hand, a razor-thin majority, 44 percent, agreed that the feds should intervene if a state court denies food and water to a disabled person; 43 percent disagreed. The bottom line: The conventional wisdom is off. It may well be that other polls showed voters disapproving of what Washington did, because they didn't know Schiavo left no written directive, that there was conflicting testimony on her end-of-life wishes, or that her husband had two children with another woman.

Id.

⁴⁹⁶ See Brad Parks, 2005: *A Year of Disaster*, STAR-LEDGER, Dec. 31, 2005, at 1, available at 2005 WLNR 22403986 ("Terri Schiavo's right-to-die case in Florida polarized and agonized the nation.").

⁴⁹⁷ Saunders, *No Choice for Terri*, *supra* note 462.

⁴⁹⁸ *Id.*

⁴⁹⁹ See MICHAEL SCHIAVO & MICHAEL HIRSH, *TERRI: THE TRUTH* (2006); SCHINDLER, *A LIFE THAT MATTERS*, *supra* note 77.

⁵⁰⁰ See *The Today Show: Interview with Michael Schiavo* (NBC television broadcast Mar. 27, 2006), transcript available at 2006 WLNR 5123574; *Talk of the Nation: Lessons of the Terri Schiavo Case* (NPR radio broadcast Mar. 30, 2006), transcript available at 2006 WLNR 22955433.

⁵⁰¹ See *Hannity & Colmes: Terri Schiavo's Family Starts Foundation, Releases Book* (Fox television broadcast Mar. 28, 2006), transcript available at 2006 WLNR 5108382.

VIII. SOME MODEST PROPOSALS

People who cannot speak for themselves, like Terri Schiavo, deserve at least the level of protection that death row inmates receive.⁵⁰² As one writer has stated:

After all, we don't starve serial killers, surely it is barbaric and despicable to starve an innocent disabled woman to death. If Terri was a political prisoner Amnesty International and governments might be protesting and it could even be a war crime. But no it's okay, it's only a disabled woman[,] seems to be the dangerous message.⁵⁰³

On the federal level, a civil federal habeas corpus statute is needed to protect incompetents before they die as the result of state action⁵⁰⁴ and the standard required for such determinations should be the same as that used in death penalty cases: "beyond a reasonable doubt";⁵⁰⁵ the stakes, after all, are precisely the same.⁵⁰⁶ Contrary to the opinions of some, federal courts should be reviewing these cases even though already decided by state courts.⁵⁰⁷ According to Senator Tom Harkin:

⁵⁰² Calabresi, *supra* note 489.

⁵⁰³ Penny Bould, *Perspective: So, How Would You Like to Be Starved*, BIRMINGHAM POST (UK), Mar. 31, 2005, at 10, available at 2005 WLNR 5014143.

⁵⁰⁴ With such a statute, it would be easier for federal courts to issue stays.

⁵⁰⁵ As stated by Professor Paulsen: "[E]xcept on the basis of proof beyond a reasonable doubt that the victim possessed and expressed a desire to be killed under the circumstances, state action to deprive the victim of her life fails to satisfy the Due Process Clause of the Constitution." Paulson, *supra* note 489, at 587.

⁵⁰⁶ This is the case even though most states rely on the clear and convincing standard. See *Woods v. Commonwealth*, 142 S.W.3d 24, 43-45 (Ky. 2004).

⁵⁰⁷ One notable opinion in favor of limiting the power of federal courts to review state court judgments provides in part:

And while the case is yet open and pending in the inferior State court, the plaintiff goes into the Circuit Court of the United States, upon the same case and the same evidence, and against the same party, and proceeds to judgment, and then brings here the same case from the Circuit Court, which the law would not have permitted him to bring directly from the State court. And if this court takes jurisdiction in this form, the result, so far as the rights of the respective parties are concerned, is in every respect substantially the same as if it had in open violation of law entertained jurisdiction over the judgment of the State court upon a writ of error, and revised and reversed its judgment upon the ground that its opinion upon the question of law was erroneous. It would ill become this court to sanction such an attempt to evade the law, or to exercise an appellate power in this circuitous way, which it is forbidden to exercise in the direct and regular and invariable forms of judicial proceedings.

Where someone is incapacitated and their life support can be taken away, it seems to me that it is appropriate—where there is a dispute, as there is in this case—that a federal court come in, like we do in habeas corpus situations, and review it and make another determination.⁵⁰⁸

On the state level, courts should not approve the use of a ward's assets to fund the pro-death side of proceedings, especially in states like Florida, where the courts are required to err on the side of life, based upon the presumption that the ward would want to live. The state courts should also adopt specific guidelines for the type of evidence that would support a finding of the ward's intent beyond a reasonable doubt.⁵⁰⁹ Finally, state courts should be lenient in allowing challenges to any decision based on new evidence.

These proposals are not radical. They represent, at most, a tightening of standards that have long existed, but, as in Terri's case, have sometimes been ignored. They grow directly out of experience, and are consistent with our jurisprudence generally. They are modest, but essential.

IX. CONCLUSION

Why rock the boat? As one writer has stated:

After all, this case is supposed to be about Terri's "right to die," even though no one knows for sure that she want[ed] to die. She never wrote a living will or other document asserting as much. A court decided that she would want to die, based on casual remarks she made to her husband, Michael Schiavo, and his brother and sister. She told them she would never want to be kept alive by machines.

I hate to insert facts here, but it is a fact that a feeding tube is not a machine. Yet somehow the courts found that those casual comments have the force of a legal document—and apply to a feeding tube, when they were meant for a respirator.⁵¹⁰

As another commentator has succinctly put it:

Disability prejudice led to the demise of Schiavo, a woman who wasn't dying, at least not until the Florida court ordered her feeding tube removed. Speaking at the time of the Florida court, Harriet McBryde Johnson, the Charleston

⁵⁰⁸ Editorial, *Worthy of Review—The Schiavo Case*, BALTIMORE SUN, Mar. 23, 2005, at 17A, available at 2005 WLNR 4553539.

⁵⁰⁹ The hearsay problem should be specifically addressed by statute.

⁵¹⁰ Saunders, *No Choice for Terri*, *supra* note 462.

disability activist and lawyer, cautioned that “fears of disability . . . sometimes slide from fear to disgust and from disgust to hatred.”

. . . .

A sharp distinction should have been maintained between, on the one hand, fearing for oneself ever living such a life and, on the other, ordering (and supporting) the termination of a life that arouses fear.⁵¹¹

We must protect those who need our protection the most—even if it costs money, even if we fear, and would reject, a similar fate for ourselves, even if we must overcome our deep-seated prejudices against the disabled. Our treatment of people like Terri Schiavo, our respect for their legal rights and, indeed, for the rule of law generally, together form the basis upon which we, as a nation and a people, will ultimately be judged.

⁵¹¹ Chris Gabbard, *Mythology Overwhelmed Facts in Tragic Case of Terri Schiavo*, FLA. TIMES UNION, Mar. 31, 2006, available at http://www.jacksonville.com/tu-online/stories/033106/opl_column.shtml.