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# Dynamic Complementarity: Terri's Law and Separation of Powers Principles in the End-of-Life Context

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DYNAMIC COMPLEMENTARITY: TERRI'S LAW AND SEPARATION OF POWERS PRINCIPLES IN THE END-OF-LIFE CONTEXT

O. Carter Snead\*

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I. INTRODUCTION

The bitter dispute over the proper treatment of Theresa Marie Schiavo—a severely brain damaged woman, unable to communicate and with no living will or advance directive—has garnered enormous attention in the media, both national and international. What began as a heated

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disagreement between Ms. Schiavo's husband and parents has mushroomed into a massive political conflict involving privacy advocates on one side, and right to life and disability activists on the other. The battle has raged on the editorial pages of the world's newspapers, in the courts, and ultimately, in the legislative and executive branches of the Florida state government. After nearly three years of acrimonious litigation between Michael Schiavo (Ms. Schiavo's husband) and the Schindler family (Ms. Schiavo's parents), a Florida court ordered that nutrition and hydration for Ms. Schiavo be discontinued. Six days after implementation of the court's order, the Florida Legislature passed "Terri's Law," authorizing the Governor, under certain prescribed circumstances, to issue a one-time stay of court-ordered withdrawal of life-sustaining measures, and to appoint a guardian ad litem to review the matter and report back to the executive branch and the chief judge of the relevant Florida court. Pursuant to this new authority, the Governor stayed the order issued by the court, and nutrition and hydration were restored to Ms. Schiavo.

To date, the public debate on this matter has been framed as a conflict between or a balancing of abstract concepts such as "the right to die," "the sanctity of life," and "the rights of the disabled." Little scholarly attention has been paid, however, to an enormously important question at the heart of this matter, namely, what the proper roles of the various branches of government are in a case such as Schiavo's. The proper question is not *whether* the government has a role in a dispute such as this—it clearly became involved once the matter moved to the state courts—but rather *how* the government should be involved. Which branch, if any, should have the last word in such a dispute? In these cases, should the relationship between governmental branches be hierarchical or complementary? Which branch of government is best situated to resolve these disputes? This Article, using the Schiavo case as the relevant point of departure, essays to address these questions. Specifically, the questions presented are twofold: (1) Were the Florida Legislature's (and by extension, the Governor's) actions in the Schiavo case consistent with the constitutional principles of separation of powers? (2) If so, did the actions of the executive and legislative branches in this case promote or undermine the purposes and logic of the Florida laws governing end-of-life decisionmaking, taken as a whole? That is, is Terri's Law wise public policy from a structural, governmental view?

Part II of this Article sets forth the relevant factual predicates underlying the Schiavo case, describing the circumstances of Ms. Schiavo's illness and incapacity, the procedural history of the legal dispute, and the legislative (and ultimately executive) response. To properly analyze Terri's Law according to separation of powers principles, it is crucial to give a full and precise account of the nature and character of the various actions taken by the relevant governmental branches. What

is the proper way to characterize what happened here? Did the Florida Legislature and Governor Jeb Bush merely intervene in a finally adjudicated matter because they disapproved of the result, or on the other hand, did the political branches constitutionally (and wisely) exercise their powers in order to advance a legitimate governmental interest? Answering these questions depends on a very clear understanding of the facts.

Part III of this Article explores the relevant legal authorities on the issues of separation of powers, guardianship, and withdrawal of life-sustaining measures. To discern whether Terri's Law and the Governor's actions run afoul of the separation of powers, it is necessary to understand the area of the law in which they occurred. More importantly, to normatively assess the actions of the governmental branches, it is necessary to appreciate the values that the Florida guardianship and end-of-life regulatory framework seeks to defend and the harms and abuses that it seeks to avoid.

Part IV of this Article synthesizes both the factual predicates and the relevant legal authorities in an effort to draw a conclusion about the legitimacy of Terri's Law (and the Governor's actions pursuant to it) in light of both the doctrine of separation of powers and the purpose and logic of the Florida regulatory scheme in this domain, taken as a whole.

Before moving forward, it is useful to note briefly what this Article does *not* purport to address. This Article is not about "the right to die" or "the right to life" in the abstract. Indeed, it does not even venture a guess as to who—Michael Schiavo or the Schindler family—is properly representing the wishes and best interests of Theresa Marie Schiavo. These are surely important questions, but they are beyond the scope of the present inquiry. This Article is intentionally agnostic on the question of how finally to treat Ms. Schiavo. Rather, the object of this Article is to explore a vexing question regarding the separation of powers in the domain of guardianship and end-of-life decisionmaking. In this way, the inquiry is procedural, but located in a particular substantive context.

## II. BACKGROUND

In describing the facts in this case, it is worthwhile to highlight common errors made by commentators and even parties to the present case. Some commentators have framed this matter simply as the case of an incapacitated woman wishing to die, but being ghoulishly kept alive by her parents (and their activist supporters) with the aid of the Governor and the legislature. As the following account of the factual underpinnings at work here will demonstrate, it is not nearly so simple. There are numerous conflicts and ambiguities—particularly regarding Ms. Schiavo's intentions—that attend this case. To fully and fairly venture an argument

regarding the proper role of government in a case such as this, it is crucial to understand and appreciate these complexities.

### A. *Ms. Schiavo's Illness and Incapacity*

On February 25, 1990, Theresa Schiavo suffered a cardiac arrest.<sup>1</sup> During the several minutes prior to the arrival of the paramedics, Ms. Schiavo suffered from anoxia (loss of oxygen to the brain), causing serious brain damage.<sup>2</sup> She lost consciousness and fell into a coma.<sup>3</sup> Doctors later concluded that her heart attack was due to an imbalance in her potassium level.<sup>4</sup> The cause of this dramatic drop has not been clearly identified.<sup>5</sup>

Ms. Schiavo spent the next two and a half months at a Florida hospital, eventually emerging from her comatose state, but not regaining consciousness.<sup>6</sup> Thereafter, she was discharged to a rehabilitation facility.<sup>7</sup> One and a half months later, she was transferred to another hospital facility for additional rehabilitation measures.<sup>8</sup> In September 1990 she came home, but only weeks later, she returned to a rehabilitation facility.<sup>9</sup>

The clinical records in Ms. Schiavo's case file show that she was not responsive to various tests, including neurological and swallowing examinations.<sup>10</sup> Following months of therapy, Ms. Schiavo was formally deemed by physicians to be in a "persistent vegetative state."<sup>11</sup> "Persistent vegetative state" is a diagnostic term of art developed by the American Academy of Neurology:

The vegetative state is a clinical condition of complete unawareness of the self and the environment, accompanied by sleep-wake cycles, with either complete or partial preservation of hypothalamic and brain-stem autonomic functions. In addition, patients in a vegetative state show no evidence of sustained, reproducible, purposeful, or voluntary behavioral responses to visual, auditory, tactile, or noxious stimuli; show no evidence of language comprehension or expression; have bowel and bladder incontinence; and have

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1. Jay Wolfson, A Report to Governor Jeb Bush in the Matter of Theresa Marie Schiavo, at 7 (Dec. 1, 2003).

2. *Id.*

3. *Id.*

4. *Id.* at 8.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 9.

variably preserved cranial-nerve and spinal reflexes. We define persistent vegetative state as a vegetative state present one month after acute traumatic or nontraumatic brain injury or lasting for at least one month in patients with degenerative or metabolic disorders or developmental malformations.<sup>12</sup>

More importantly for present purposes, "persistent vegetative state" is also a legal category, defined by Florida law as "a permanent and irreversible condition of unconsciousness in which there is: (a) The absence of voluntary action or cognitive behavior of any kind. (b) An inability to communicate or interact purposefully with the environment."<sup>13</sup> The significance of this legal definition to the Schiavo case is discussed below.

Ms. Schiavo received rehabilitation therapy and treatment at various locations throughout 1990, ultimately returning to a skilled care facility in Florida.<sup>14</sup> Neurological exams and physical, occupational, and speech therapy continued through 1994.<sup>15</sup>

Ms. Schiavo is not in a coma.<sup>16</sup> She has cycles of wakefulness and sleep.<sup>17</sup> She does not speak.<sup>18</sup> When she is awake, her eyes are open, she groans, and she makes noises that suggest crying or laughter.<sup>19</sup> Her eyes seem to track movement.<sup>20</sup> There is videotape footage in which Ms. Schiavo appears to smile at her mother and her eyes seem to follow the movement of a balloon held by her father.<sup>21</sup> Observers, including the guardian ad litem appointed (and later dismissed) for Ms. Schiavo, have been unable to independently determine that these "were consistent, repetitive, intentional, reproducible, interactive, and aware activities."<sup>22</sup> With the aid of their retained experts, Michael Schiavo and the Schindler family vigorously dispute the significance of these gestures and actions, and they strongly disagree as to whether they indicate cognitive or merely reflexive function.<sup>23</sup>

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12. The Multi-Society Task Force on PVS, Am. Acad. of Neurology, *Medical Aspects of the Persistent Vegetative State—First of Two Parts*, 330 NEW ENG. J. MED. 1499, 1499 (1994).

13. FLA. STAT. § 765.101(12) (2003).

14. Wolfson, *supra* note 1, at 8-9.

15. *Id.* at 9.

16. *Id.* at 8.

17. *Id.* at 29-30; Schindler v. Schiavo, 780 So. 2d 176, 177 (Fla. 2d DCA 2001).

18. Wolfson, *supra* note 1, at 9.

19. *Id.* at 30.

20. *Id.*

21. Brief of Amici Curiae Not Dead Yet et al. in Support of Plaintiff's Motion for Preliminary Injunction, Schindler v. Schiavo, No. 8:03-CV-1860-T-26-TGW (M.D. Fla. dismissed Oct. 10, 2003).

22. Wolfson, *supra* note 1, at 30.

23. Schiavo v. Schindler, No. 90-2908-GB-003, 2002 WL 31817960, at \*3 (Fla. Cir. Ct. Nov. 22, 2002).

Prior testing performed in 1991, 1992, and 1993 found that Ms. Schiavo lacked the capacity to swallow on her own.<sup>24</sup> No such testing has been performed since that time.<sup>25</sup> The Schindler family and its experts argue that Ms. Schiavo could benefit from swallow therapy; they argue that, at the very least, testing for swallow potential should be conducted for Ms. Schiavo.<sup>26</sup> If Ms. Schiavo can swallow (or could be made capable of swallowing), artificial hydration and nutrition could be removed without resulting in Ms. Schiavo's demise, rendering moot the most hotly contested questions in the present dispute.<sup>27</sup>

Finally, and importantly, Ms. Schiavo's condition is not imminently life threatening. If she continues to receive artificial nutrition and hydration, or develops the capacity to swallow on her own, she is expected to live for many more years.<sup>28</sup>

### B. *Medical Malpractice Suit*

In the early 1990s, shortly after Ms. Schiavo's collapse, Michael Schiavo brought a medical malpractice lawsuit on behalf of himself and his wife against the obstetrician who had previously been providing fertility therapy to Ms. Schiavo.<sup>29</sup> In 1993, the action was resolved in favor of the Schiavos, resulting in awards of \$750,000 for economic damages to Ms. Schiavo and \$300,000 to Michael Schiavo for loss of consortium and non-economic damages.<sup>30</sup> These damages were calculated in reliance on Michael Schiavo's testimony that he would provide health care for his incapacitated wife, whom he expected to live out her normal life span.<sup>31</sup>

If Ms. Schiavo were to die, the balance of her award would pass to Michael Schiavo under the Florida laws of intestacy.<sup>32</sup> If Michael Schiavo divorced Ms. Schiavo, the balance of the funds would likely pass to her parents.<sup>33</sup>

There is some dispute about the disposition of Ms. Schiavo's award. According to the recently filed guardian ad litem report, the money was held in trust, with SouthTrust Bank as the guardian and independent

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24. Wolfson, *supra* note 1, at 27.

25. *See id.* at 28.

26. *See generally* Memorandum of Amicus Curiae Jeb Bush, Governor of the State of Florida, in Support of Plaintiff's Motion for Preliminary Injunction, *Schindler v. Schiavo*, No. 8:03-CV-1860-T-26-TGW (M.D. Fla. dismissed Oct. 10, 2003).

27. Wolfson, *supra* note 1, at 27.

28. *Schindler v. Schiavo*, 780 So. 2d 176, 177 (Fla. 2d DCA 2001).

29. Wolfson, *supra* note 1, at 9.

30. *Id.* at 9; *Schindler*, 780 So. 2d at 178.

31. *See, e.g.*, Jurisdiction Brief of Petitioners, Robert and Mary Schindler at 1, *Schindler v. Schiavo*, 855 So. 2d 621 (Fla. 2003).

32. *Schindler*, 780 So. 2d at 178.

33. *Id.*

trustee.<sup>34</sup> The report notes that the fund was “meticulously managed and accounted for and Michael Schiavo had no control over its use.”<sup>35</sup> The report concludes that the records on this point are “excellently maintained” and reveal no evidence of mismanagement of Ms. Schiavo’s estate.<sup>36</sup> On the other hand, it has been reported that Michael Schiavo has had access to Ms. Schiavo’s funds.<sup>37</sup> According to one account, Michael Schiavo has spent the balance of his and his wife’s medical malpractice award on the legal efforts described below.<sup>38</sup>

### C. *The Litigation: Regarding the Guardianship of Theresa Marie Schiavo*

*Seeds of the dispute.* In early 1994, Ms. Schiavo developed a urinary tract infection.<sup>39</sup> Michael Schiavo elected not to treat the infection, and simultaneously requested a “Do Not Resuscitate” order for Ms. Schiavo, in the event that she suffers another cardiac arrest.<sup>40</sup> In response, the nursing facility formally resisted the order.<sup>41</sup> Michael Schiavo cancelled the order but relocated Ms. Schiavo to another facility.<sup>42</sup>

Believing that Michael Schiavo was not acting in their daughter’s best interests, the Schindlers initiated an action to remove him as her legal guardian.<sup>43</sup> This effort was unsuccessful, and it was ultimately dismissed with prejudice by the court in 1996.<sup>44</sup> Relations with Michael Schiavo deteriorated dramatically to the point where a court had to order Mr. Schiavo to share copies of Ms. Schiavo’s medical reports with her parents and to permit health care personnel to discuss Ms. Schiavo’s condition with her parents.<sup>45</sup>

In 1997, Michael Schiavo initiated proceedings to withdraw nutrition and hydration from Ms. Schiavo.<sup>46</sup> The first petition to discontinue life support was filed in May 1998.<sup>47</sup> Pursuant to standard procedure, the court appointed a guardian ad litem (Richard Pearse, an attorney) to review

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34. Wolfson, *supra* note 1, at 9.

35. *Id.*

36. *Id.*

37. See, e.g., *Bush Seeks Probe of 10 Hang-Ups in Schiavo Case*, TAMPA TRIB., Dec. 23, 2003, Metro section, at 1.

38. *Id.*

39. Wolfson, *supra* 1, at 10.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 9-10.

44. *Id.* at 11.

45. *Id.*

46. *Id.*

47. *Id.*



Michael Schiavo's request.<sup>48</sup> Mr. Pearse determined, in a report submitted on December 20, 1998, that Ms. Schiavo was in a persistent vegetative state with no chance of improvement.<sup>49</sup> He concluded, however, that the hearsay evidence adduced by Michael Schiavo in support of his claim that his wife's wishes would have been to discontinue life-sustaining nutrition and hydration under the present circumstances was not clear and convincing<sup>50</sup> and thereby failed to satisfy the requisite standard of proof under Florida law.<sup>51</sup> Moreover, Mr. Pearse noted that Michael Schiavo's hearsay testimony about his wife's intent was "necessarily adversely affected by the obvious financial benefit to him of being the sole heir at law."<sup>52</sup> Mr. Pearse was particularly struck by Michael Schiavo's dramatic change in attitude towards his wife's treatment after the malpractice award was granted.<sup>53</sup> Mr. Pearse recommended that Michael Schiavo's petition for the removal of the feeding tube be denied, unless the court felt, contrary to Mr. Pearse's conclusion, that the hearsay evidence regarding Ms. Schiavo's intent was clear and convincing.<sup>54</sup> Mr. Pearse also recommended that a guardian ad litem represent Ms. Schiavo's interests in all future proceedings.<sup>55</sup> Michael Schiavo filed a "Suggestion of Bias" against Mr. Pearse shortly thereafter, arguing that the guardian ad litem unfairly focused on Michael Schiavo's conflict of interest and not on the Schindler family's.<sup>56</sup> He additionally argued that Mr. Pearse's report contained certain omissions and factual errors.<sup>57</sup> Mr. Pearse submitted his petition for additional authority or discharge in February 1999.<sup>58</sup> He received his discharge four months later, and no new guardian ad litem was appointed.<sup>59</sup>

On February 11, 2000, the trial court ordered Ms. Schiavo's nutrition and hydration withdrawn.<sup>60</sup> There followed a protracted and acrimonious struggle in which Michael Schiavo sought to establish that his wife's intent under the circumstances would be to terminate nutrition and hydration. In support of this proposition, he testified that his wife had, in various conversations many years prior, orally expressed to him that she would not

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48. *Id.*

49. *Id.*

50. *Id.* at 11-12.

51. *Id.* at 22 (citing *State v. Herbert*, 568 So. 2d 4 (Fla. 1990)).

52. *Id.* at 12.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 13.

59. *Id.*

60. *Id.*

want to continue living under artificial life support.<sup>61</sup> Specifically, he testified that once, Ms. Schiavo had said that she wouldn't want to live "if I ever have to be a burden to anybody."<sup>62</sup> Michael Schiavo likewise testified that Ms. Schiavo had stated in the past that she did not want her life to be maintained "on anything artificial," would want "tubes and everything taken out," and did not want to be sustained by "a machine."<sup>63</sup> The Schindlers argued that Michael Schiavo was not a fit guardian and could not be trusted to make such decisions on his wife's behalf. They noted that he had been regularly dating other women since 1993, that he failed to provide adequate care and attention to Ms. Schiavo, and that he was wasting the guardianship account.<sup>64</sup> After a number of motions and evidentiary hearings, the trial court ordered that Ms. Schiavo's nutrition and hydration be withdrawn on April 24, 2001.<sup>65</sup>

*Schiavo I.* The Schindler family appealed the trial court's decision to the Second District Court of Appeal, arguing, among other things, that (1) the trial court should have appointed a guardian ad litem for the proceeding and (2) the evidence presented was not sufficient to establish by clear and convincing evidence that, under these circumstances, Ms. Schiavo would wish to discontinue life-sustaining nutrition and hydration.<sup>66</sup>

In analyzing the guardian ad litem issue, the district court noted that Michael Schiavo "invoked the trial court's jurisdiction to allow the trial court to serve as [Ms. Schiavo's] surrogate decision-maker."<sup>67</sup> The court concluded that the nature of the proceedings was such that a guardian ad litem was not needed:

Under these circumstances, the two parties, as adversaries, present their evidence to the trial court. The trial court determines whether the evidence is sufficient to allow it to make the decision for the ward to discontinue life support. In this context, *the trial court essentially serves as the ward's guardian.* Although we do not rule out the occasional need for a guardian in this type of proceeding, a guardian ad litem would tend to duplicate the function of the judge, would add

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61. See, e.g., Petitioner's Motion for Stay at ¶ 14, *Schiavo v. Schindler*, 816 So. 2d 127 (2002) (unpublished table decision) (asking to stay the Second District Court of Appeal's order, which mandated medical examination of Ms. Schiavo and required an evidentiary hearing).

62. *Id.*

63. *Id.*

64. Wolfson, *supra* note 1, at 14.

65. *Id.*

66. *Schindler v. Schiavo*, 780 So. 2d 176, 178-79 (Fla. 2d DCA 2001).

67. *Id.* at 178.

little of value to this process, and might cause the process to be influenced by hearsay or matters outside the record.<sup>68</sup>

The court next turned to the question of whether Michael Schiavo had proved by clear and convincing evidence that Ms. Schiavo would have wished to discontinue nutrition and hydration under the present circumstances. It framed the question in the following way:

[W]hether Theresa Marie Schindler Schiavo, not after a few weeks in a coma, but after ten years in a persistent vegetative state that has robbed her of most of her cerebrum and all but the most instinctive of neurological functions, with no hope of a medical cure but with sufficient money and strength of body to live indefinitely, would choose to continue the *constant nursing care and the supporting tubes* in hopes that a *miracle* would somehow recreate her missing brain tissue, or whether she 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*.<sup>69</sup>

The court noted that, under the laws of Florida, in making a decision regarding the termination of life-sustaining measures, the surrogate “‘should err on the side of life. . . . In cases of doubt, we must assume that a patient would choose to defend life in exercising his or her right of privacy.’”<sup>70</sup> The court noted that the hearsay statements regarding Ms. Schiavo’s wishes were “‘few and . . . oral.’”<sup>71</sup> Nevertheless, the court concluded that such evidence, along with other evidence about Ms. Schiavo, “‘gave the trial court a sufficient basis to make this decision for her.’”<sup>72</sup> Accordingly, the district court affirmed the trial court’s decision.<sup>73</sup> The Schindler family sought review of the district court decision in the Florida Supreme Court, but review was denied on April 18, 2001.<sup>74</sup> The next day, Ms. Schiavo’s nutrition and hydration tube was clamped.<sup>75</sup>

*Schiavo II.* Two days later, the Schindler family filed a motion for relief from judgment, arguing that new evidence, including testimony from a former girlfriend of Michael Schiavo, established that, contrary to

68. *Id.* at 179 (emphasis added). Note that in *Schindler v. Schiavo*, 792 So. 2d 551, 557 (Fla. 2d DCA 2001), the court acknowledged that “Mr. Schiavo, as guardian, requested the court to function as the proxy in light of the dissension within the family.”

69. *Schindler*, 780 So. 2d at 180 (emphasis added).

70. *Id.* at 179 (quoting *Herbert v. State*, 543 So. 2d 258, 273 (Fla. 2d DCA 1989)).

71. *Id.* at 180.

72. *Id.*

73. *Id.*

74. *Schindler v. Schiavo*, 789 So. 2d 348, 348 (Fla. 2001).

75. Wolfson, *supra* note 1, at 15.

Michael Schiavo's testimony at trial, he and Ms. Schiavo never discussed what her wishes would have been under the present circumstances.<sup>76</sup> The trial court denied the motion as untimely because it was filed beyond the one-year limitations provision specified by the relevant rule of procedure.<sup>77</sup> Immediately thereafter, the Schindlers filed a civil complaint as "natural guardians" for their daughter, alleging that the newly discovered witness (Michael Schiavo's former girlfriend) would prove that Michael Schiavo had perjured himself by testifying as to Ms. Schiavo's intentions regarding her own care under these circumstances, and that the trial court had relied on this perjured testimony in reaching its conclusion to terminate Ms. Schiavo's nutrition and hydration.<sup>78</sup> In connection with this complaint, the Schindlers moved for a temporary injunction of the trial court's order.<sup>79</sup> The trial court granted the motion, and nutrition and hydration were restored to Ms. Schiavo.<sup>80</sup> In response, Michael Schiavo filed an emergency motion with the district court to enforce the trial court's original order to discontinue nutrition and hydration.<sup>81</sup>

On consolidated appeal, the district court affirmed the trial court's holding that the Schindler family's motion for relief had been untimely, but noted that on remand, the Schindlers would be permitted to file a revised motion for relief under a separate rule of procedure<sup>82</sup> if they could

plead and prove newly discovered evidence of such a substantial nature that it proves either (1) that Mrs. Schiavo would not have made the decision to withdraw life-prolonging procedures fourteen months earlier when the final order was entered, or (2) that Mrs. Schiavo would make a different decision at this time based on developments subsequent to the earlier court order.<sup>83</sup>

The court directed the trial court to refrain from enforcing its original order until the Schindlers had an opportunity to file a proper motion for relief, as described above.<sup>84</sup>

In the course of its analysis, the district court shed a great deal of light on the nature of the court's order to withdraw nutrition and hydration from Ms. Schiavo. The court explained:

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76. *Schindler v. Schiavo*, 792 So. 2d 551, 555 (Fla. 2d DCA 2001).

77. *Id.* (citing FLA. R. CIV. P. 1.540(b)(2), (3)).

78. *Id.* at 555-56.

79. *Id.* at 556.

80. *See id.*

81. *Id.*

82. FLA. R. CIV. P. 1540(b)(5).

83. *Schindler*, 792 So. 2d at 554.

84. *Id.*

The order requiring the termination of life-prolonging procedures is not a standard legal judgment, but an order in the nature of a mandatory injunction compelling certain actions by the guardian and, indirectly, by the health care providers. Until the life-prolonging procedures are discontinued, such an order is entirely executory, and the ward and guardian continue to be under the jurisdiction and supervision of the guardianship court. As long as the ward is alive, the order is subject to recall and is executory in nature.<sup>85</sup>

The court also noted that the trial court's order was compulsory; it did not merely vest discretion in the guardian to discontinue life support: "The guardian was obligated to obey the circuit court's decision and discontinue the treatment."<sup>86</sup>

The court partially dismissed the Schindler family's separate civil action against Michael Schiavo, and it reversed the related temporary injunction.<sup>87</sup> The concerns of the Schindlers, the court reasoned, were best addressed in the context of the pending guardianship matter.<sup>88</sup> The court likewise denied Michael Schiavo's motion to enforce the trial court's order withdrawing nutrition and hydration.<sup>89</sup> In so doing, the district court noted that the trial court should have the discretion to manage its original order, especially in light of the fact that the Schindlers had standing to file a motion for relief, as described above.<sup>90</sup>

*Schiavo III.* Following the district court's instruction in *Schiavo II*, the Schindler family filed an amended motion for relief from the trial court's order withdrawing nutrition and hydration from their daughter.<sup>91</sup> The Schindlers also filed a "Petition for Independent Medical Examination," a petition for removal of guardian, and a motion to disqualify the original trial judge (Judge Greer).<sup>92</sup> The trial court summarily dismissed all of these motions.<sup>93</sup>

The Second District Court of Appeal, without discussion, affirmed the trial court's dismissal of the Schindler family's motion for removal of

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85. *Id.* at 558-59 (footnote omitted).

86. *Id.* at 559 n.5.

87. *Id.* at 562-63.

88. *Id.* at 563.

89. *Id.*

90. *Id.*

91. *Schindler v. Schiavo*, 800 So. 2d 640, 642 (Fla. 2d DCA 2001).

92. *Id.* at 643.

93. *Id.*

Michael Schiavo as guardian and for removal of Judge Greer.<sup>94</sup> It more fully treated the Schindler family's remaining claims.

In their amended motion for relief, the Schindlers argued that it was no longer equitable to give effect to the trial court's original order to withdraw nutrition and hydration from their daughter for two reasons: (1) evidence from three new witnesses (two close female associates of Michael Schiavo and the husband of one of these women) challenging the trial court's conclusion that Ms. Schiavo would have wanted nutrition and hydration withdrawn under these circumstances;<sup>95</sup> and (2) evidence, including numerous affidavits of experts, that their daughter was *not* in a persistent vegetative state, and that current accepted medical treatment existed that could restore her ability to eat and speak.<sup>96</sup> The district court rejected the first argument, affirming the trial court's conclusion that the new evidence of Ms. Schiavo's intentions "failed to present a colorable claim for entitlement to relief from the judgment."<sup>97</sup>

As for the Schindler family's second basis, the district court concluded that it was improper for the trial court to summarily dismiss the claim absent an evidentiary hearing, in light of the sworn testimony that Ms. Schindler might benefit from further medical treatment.<sup>98</sup> The court concluded that, because the Schindlers presented new evidence on this point, and because the court must in these circumstances "assume that a patient would choose to defend life in exercising the right of privacy," the trial court should have concluded that there was a colorable entitlement to relief sufficient to justify an evidentiary hearing.<sup>99</sup> The appellate court thus directed the trial court on remand to conduct a hearing to determine whether the new evidence was sufficient to establish that "the current final judgment [was] no longer equitable."<sup>100</sup> On remand, the Schindlers were to bear the burden of showing by a preponderance of the evidence that the "new treatment offers sufficient promise of increased cognitive function in Mrs. Schiavo's cerebral cortex—significantly improving the quality of Mrs. Schiavo's life—so that she herself would elect to undergo this treatment and would reverse the prior decision to withdraw life-prolonging procedures."<sup>101</sup>

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94. *Id.*

95. *Id.*

96. *Id.* at 643-44. One expert, an osteopathic physician, swore under oath that Ms. Schiavo had "a good opportunity to show some degree of improvement if treated" with his prescribed therapy. *Id.* at 644.

97. *Id.* at 643.

98. *Id.* at 644-45.

99. *Id.* at 645.

100. *Id.*

101. *Id.*

The district court treated the Schindler family's request for an independent examination as a request for discovery within the proceeding before the guardianship court.<sup>102</sup> It directed the trial court to permit this to go forward, subject to several limitations.<sup>103</sup> The district court ordered the trial court to permit the Schindlers to choose two doctors to present their views at an evidentiary hearing.<sup>104</sup> The court further ordered the trial court to permit Michael Schiavo to offer his own two experts for rebuttal purposes.<sup>105</sup> Finally, the appellate court directed the trial court to appoint a new independent physician to examine and evaluate Ms. Schiavo's present condition.<sup>106</sup> The district court urged the parties to come together to agree on an independent, board-certified neurologist or neurosurgeon.<sup>107</sup> In the event that there was no agreement on this point, the court directed the trial court to appoint this expert.<sup>108</sup> The district court concluded that the five experts should each file a report, to be presented at the evidentiary hearing before the trial court.<sup>109</sup> The district court noted that the purpose of the evidentiary hearing was to determine

Mrs. Schiavo's current medical condition, the nature of the new medical treatments described in the affidavits and their acceptance in the relevant scientific community, the probable efficacy of these new treatments, and any other factor that the trial court itself determines to be necessary for it to decide whether this evidence calls into question the initial judgment.<sup>110</sup>

*Schiavo IV*. On remand, the Schindlers and Michael Schiavo presented evidence to the trial court (as the district court had prescribed in *Schiavo III*) in an effort to determine if "new treatment exist[ed] which offer[ed] such promise of increased cognitive function in Mrs. Schiavo's cerebral cortex that she herself would elect to undergo this treatment and would reverse the prior decision to withdraw life-prolonging procedures."<sup>111</sup> The Schindlers tendered testimony from a board-certified neurologist and a board-certified expert in radiology and nuclear medicine.<sup>112</sup> Michael

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102. *Id.* at 646.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 647.

111. *Schindler v. Schiavo*, 851 So. 2d 182, 185 (Fla. 2d DCA 2003).

112. *Id.* at 184.

Schiavo submitted testimony from two board-certified neurologists.<sup>113</sup> The parties could not agree on the selection of the fifth expert, so the trial court selected an additional neurologist.<sup>114</sup> Each physician reviewed Ms. Schiavo's medical records, including brain scans, and conducted a neurological examination.<sup>115</sup> This evidence, along with videotapes of Ms. Schiavo, was presented to the trial court and subject to cross-examination.<sup>116</sup> The neurologist selected by the Schindlers testified that "vasodilation therapy and hyperbaric therapy 'could help [Ms. Schiavo] improve.'"<sup>117</sup> He did not, however, testify that any "specific function" would improve, nor did he claim that it would "restore her cognitive functions."<sup>118</sup> The therapies he advocated aimed at increasing blood flow and oxygen to damaged brain tissue, but the therapies could not regenerate dead tissue.<sup>119</sup> The experts retained by the parties disagreed as to "whether [Ms. Schiavo] ha[d] a small amount of isolated living tissue in her cerebral cortex or whether she ha[d] no living tissue in her cerebral cortex."<sup>120</sup>

However, the evidentiary hearing focused principally on another issue, namely, whether Ms. Schiavo was indeed in a "persistent vegetative state."<sup>121</sup> On this point the experts vigorously disagreed. The experts for the Schindlers were persuaded that Ms. Schiavo was not in a persistent vegetative state based on her actions and responses to physical and verbal contact with her mother.<sup>122</sup> The physicians retained by Michael Schiavo and the physician appointed by the court disagreed.<sup>123</sup> The trial court was persuaded by this latter testimony and held specifically that "Mrs. Schiavo remained in a permanent vegetative state."<sup>124</sup> The court further concluded that the Schindlers had failed to show by a preponderance of the evidence that there was "a treatment in existence that offered such promise of increased cognitive function in Mrs. Schiavo's cerebral cortex that she herself would elect to undergo it at this time."<sup>125</sup> Accordingly, the trial court denied the Schindler family's motion for relief from the original judgment, and it rescheduled the removal of hydration and nutrition for

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113. *Id.*

114. *Id.*

115. *Id.* at 184-85.

116. *Id.* at 185.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*



Ms. Schiavo.<sup>126</sup> The Schindlers immediately appealed.<sup>127</sup> The trial court then stayed its own order, pending the decision of the district court.<sup>128</sup>

The Second District Court of Appeal noted at the outset that its review was limited to the denial of the motion for relief of judgment; the court was not reviewing the original final judgment itself.<sup>129</sup> The court pointed out that the standard of review in this context is very deferential; some authorities go as far as to suggest that the trial court's decision may not be reversed "absent a showing of a gross abuse of discretion."<sup>130</sup> The court rejected requests by the Schindlers to conduct a de novo review of the trial court's judgment.<sup>131</sup> Nevertheless, the court stated that it had, in fact, carefully reviewed the evidence presented below, and if it were to conduct a de novo review, it would still affirm the lower court's decision.<sup>132</sup>

In affirming the trial court's conclusion, the district court elaborated on what it considered to be the heart of the dispute:

[I]n the end, this case is not about the aspirations that loving parents have for their children. It is about Theresa Schiavo's right to make her own decision, independent of her parents and independent of her husband. In circumstances such as these, when families cannot agree, the law has opened the doors of the circuit courts to permit trial judges to serve as surrogates or proxies to make decisions about life-prolonging procedures. It is the trial judge's duty not to make the decision that the judge would make for himself or herself or for a loved one. Instead, the trial judge must make a decision that the clear and convincing evidence shows the ward would have made for herself. . . . It may be unfortunate that when families cannot agree, the best forum we can offer for this private, personal decision is a public courtroom and the best decision-maker we can provide is a judge with no prior knowledge of the ward, but the law currently provides no better solution that adequately protects the interests of promoting the value of life.<sup>133</sup>

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126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 185-86.

130. *Id.* at 186 (citing various district court decisions).

131. *Id.*

132. *Id.*

133. *Id.* at 186-87 (citations omitted). This reflection on the nature and substance of the process for guardianship decisions is enormously important and is discussed at length below.

Following the decision of the Second District Court of Appeal, the trial court set October 15, 2003 as the date for termination of nutrition and hydration for Ms. Schiavo.<sup>134</sup>

#### D. Legislative and Executive Response

On October 15, 2003, Ms. Schiavo's nutrition and hydration tube was disconnected.<sup>135</sup> She was expected to die of starvation and dehydration within seven to fourteen days.<sup>136</sup> However, Governor Jeb Bush convened a special session of the state legislature for the purpose of considering a possible statutory response to the circumstances of Ms. Schiavo and other patients like her.<sup>137</sup> The Florida Constitution requires that new "legislative business" transacted at a special session be introduced if both houses of the legislature consent or if the business is within the purview of the Governor's proclamation or communication.<sup>138</sup>

On October 21, 2003, the state legislature passed "Terri's Law."<sup>139</sup> The law authorizes the Governor to

issue a one-time stay to prevent the withholding of nutrition and hydration from a patient if, as of October 15, 2003:

- (a) That patient has no written advance directive;
- (b) The court has found that patient to be in a persistent vegetative state;
- (c) That patient has had nutrition and hydration withheld; and
- (d) A member of that patient's family has challenged the withholding of nutrition and hydration.<sup>140</sup>

Under the law, the Governor may lift the stay at any time.<sup>141</sup> Moreover, the law immunizes from civil liability and regulatory or disciplinary sanctions anyone taking action to comply with it.<sup>142</sup> Upon the issuance of a stay, the chief judge of the relevant circuit court would be directed to appoint a guardian ad litem for the patient to make recommendations to the

134. Wolfson, *supra* note 1, at 17.

135. *Id.* at 18.

136. See, e.g., Vickie Chachere, *Judge Orders Feeding Stopped*, BRADENTON HERALD, Sept. 18, 2003, Local section, at 5.

137. See generally *Woman's Fate May Be Left to Bush: House Votes to Give Governor a Say in Brain-Damaged Patient's Case*, ORLANDO SENTINEL, Oct. 21, 2003, at A1.

138. FLA. CONST. art. III, § 3(c)(1).

139. 2003 Fla. Laws ch. 418.

140. *Id.*

141. *Id.*

142. *Id.*

Governor and the court.<sup>143</sup> The law included a sunset provision, providing for its expiration fifteen days following the date of its enactment.<sup>144</sup>

Immediately following the law's enactment, Governor Bush, pursuant to his new authority, intervened in the Schiavo matter, ordering a stay of the trial court's order.<sup>145</sup> Nutrition and hydration were restored to Ms. Schiavo.<sup>146</sup> Thereafter, a guardian ad litem, Dr. Jay Wolfson, was appointed for Ms. Schiavo.<sup>147</sup> On December 1, 2003, he filed a 38-page report, describing the facts of the Schiavo matter and recommending that the Governor should lift or maintain the stay depending on whether "valid, independent scientific medical evidence clearly indicate[d] that [Ms. Schiavo] ha[d] a reasonable medical hope of regaining any swallowing function and/or if there [was] evidence of cognitive function with or without hope of improvement."<sup>148</sup> Dr. Wolfson also concluded that there was "feasibility and value in swallowing tests and swallowing therapy being administered if the parties agree[d] in advance as to how the results of these tests [would] be used."<sup>149</sup> Dr. Wolfson concluded that the weight of the medical evidence suggested that Ms. Schiavo was "in a persistent vegetative state with no likelihood of improvement," supporting the claims that "she [could not] take oral nutrition or hydration and [could not] consciously interact with her environment."<sup>150</sup> Curiously, however, Dr. Wolfson included the following footnote regarding the evidence of Ms. Schiavo's condition:

But that is not enough. This evidence is compromised by the circumstances and the enmity between the parties.

....

Until and unless there is objective, fresh, mutually agreed upon closure regarding measurable and well-accepted scientific bases for deducing Theresa's clinical state, Theresa will not be done justice. There must be at least a degree of trust with respect to a process that the factions competing for Theresa's best interest can agree. To benefit Theresa, and in

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143. *Id.*

144. *Id.*

145. Wolfson, *supra* note 1, at 18.

146. *Id.*

147. *Id.*

148. *Id.* at 33.

149. *Id.*

150. *Id.*

the overall interests of justice, good science, and public policy, there needs to be a fresh, clean-hands start.<sup>151</sup>

Regarding the litigation, Dr. Wolfson concluded that “the trier of fact and the evidence that served as the basis for the decisions regarding Theresa Schiavo were firmly grounded within Florida statutory and case law.”<sup>152</sup> Finally, Dr. Wolfson recommended that his appointment be extended until the matter was resolved.<sup>153</sup> Following the issuance of the report, Dr. Wolfson was dismissed from service as guardian ad litem by the court.<sup>154</sup>

Michael Schiavo has filed suit, claiming that “Terri’s Law” is unconstitutional both facially and as applied to Ms. Schiavo.<sup>155</sup> He has argued, among other things, that it violates the doctrine of separation of powers provided by the Florida and United States Constitutions.<sup>156</sup> This lawsuit is ongoing.<sup>157</sup>

### III. RELEVANT LEGAL AUTHORITIES

Because this Article seeks to explore whether Terri’s Law respects separation of powers principles, it is necessary to briefly set forth, in a general way, the legal authorities most relevant to this question. To this end, the sections below include an overview of the right to refuse medical treatment, the governance of end-of-life decisions, and the doctrine of the separation of powers. While federal constitutional law informs all of these accounts, for obvious reasons, the discussion that follows focuses on Florida law. Florida law on these questions closely tracks its federal analogue; to the extent that it departs from federal constitutional law, this is noted.

#### A. *Refusal of Unwanted Medical Treatment*

The Supreme Courts of the United States and Florida have both acknowledged that a competent person has a right to refuse unwanted medical treatment.<sup>158</sup> The Florida Supreme Court has further recognized

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151. *Id.* at 33 n.1.

152. *Id.* at 34.

153. *Id.*

154. Order Discharging the Guardian ad Litem, *Schindler v. Schiavo*, No. 90-002908-GD-03 (Fla. Cir. Ct. Dec. 17, 2003).

155. *See Schiavo v. Bush*, No. 03-008212C1-20, 2004 WL 980028 (Fla. Cir. Ct. May 5, 2004).

156. *Id.*

157. Shortly before this article went to the press, the Florida Supreme Court issued an opinion passing on the constitutionality of Terri’s Law. *See infra* Part V for a brief discussion.

158. *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 279 & n.7 (1990) (locating this interest in the “liberty clause” of the Fourteenth Amendment and explicitly rejecting the view that the right to refuse treatment is grounded in a generalized constitutional right of privacy); *State v.*

this right regardless of the nature of the medical procedure in question, be it "ordinary or extraordinary, life-prolonging, life-maintaining, life-sustaining, or otherwise."<sup>159</sup> Moreover, this right is not lost due to incapacity or incompetence; an individual in a non-cognitive condition and thus unable to express herself is nevertheless entitled to have her wishes regarding medical treatment respected.<sup>160</sup> In cases involving living wills or advance directives, discerning such wishes may prove to be a relatively straightforward matter. In cases where there is no prior written declaration by the patient regarding her wishes, however, things are much more complicated and fraught with possible risks. Florida permits surrogate or proxy decisionmakers to exercise the choice that the incompetent patient *would have made*, given the circumstances, subject to procedures discussed below.<sup>161</sup>

States have the duty to ensure that an individual's wishes regarding acceptance or refusal of medical treatment are observed.<sup>162</sup> Accordingly, states may erect certain procedural safeguards to prevent abuse and to guarantee that the individual's preferences are truly being implemented. For example, in *Cruzan*, the United States Supreme Court held that "a State may apply a clear and convincing evidence standard in proceedings where a guardian seeks to discontinue nutrition and hydration of a person diagnosed to be in a persistent vegetative state."<sup>163</sup> Florida has adopted this evidentiary standard for such circumstances.<sup>164</sup>

There are rare instances in which a state's interest is held to be sufficiently compelling to outweigh an individual patient's clearly expressed desires to refuse medical treatment.<sup>165</sup> Such compelling interests can include "state interests in the preservation of life, the protection of innocent third parties, the prevention of suicide, and maintenance of the ethical integrity of the medical profession."<sup>166</sup> To overcome a patient's clearly stated intentions in these circumstances, the state's actions in

Herbert, 568 So. 2d 4, 10 (Fla. 1990) (grounding the interest in the "right of privacy" provided by the state constitution) (courts and commentators often refer to this case as *In re Guardianship of Browning*).

159. *Herbert*, 568 So. 2d at 11 n.6.

160. *Id.* at 12.

161. *See id.* at 13. It bears noting, however, that in *Cruzan*, the United States Supreme Court made clear that due process *does not require* "the State to repose judgment on these matters with anyone but the patient herself." 497 U.S. at 286.

162. *Herbert*, 568 So. 2d at 13.

163. *Cruzan*, 497 U.S. at 284.

164. *Herbert*, 568 So. 2d at 15.

165. *Id.* at 13-14.

166. *Id.* at 14.

pursuit of this compelling interest must be both narrowly tailored and the least intrusive means available.<sup>167</sup>

In sum, patients, whether competent or incompetent, have the right to refuse medical treatment. Various states, including Florida, ensure the reliability of this process by adopting high evidentiary standards, such as “clear and convincing,” and impose the burden of proof on the party seeking to discontinue life-sustaining measures.

### B. Regulation of End-of-Life Decisionmaking

In 1992, shortly after the Florida Supreme Court's *Herbert* decision, the Florida Legislature enacted Chapter 765,<sup>168</sup> a fairly comprehensive legal regime, to regulate the domain of end-of-life decisionmaking.<sup>169</sup> The chief animating principle of Florida's guardianship scheme is to discern and vindicate the intentions of the patient.<sup>170</sup> Accordingly, the wishes of the patient, if they can be identified, are paramount. If the intentions of the patient cannot be discerned, a decision will be made that reflects her “best interest[s]” under the circumstances.<sup>171</sup> If there is ambiguity, the court must presume that the patient would have chosen “to defend life in exercising his or her right of privacy.”<sup>172</sup>

Part IV of Chapter 765, “Absence of Advance Directive,” governs circumstances, like those of Schiavo, in which there is no prior written declaration of intention regarding end-of-life care.<sup>173</sup> For those cases, Florida has adopted a “substituted judgment” standard: a third party is empowered to carry out the patient's wishes, to the extent that the decisions are supported by evidence that this is *what the patient would have chosen if competent*.<sup>174</sup> In this way, Part IV adopts the reasoning provided by the court in *Herbert*:

[I]t is important for the surrogate decisionmaker to fully appreciate that he or she makes the decision which the patient would personally choose. In this state, we have adopted a concept of “substituted judgment.” One does not exercise another's right of self-determination or fulfill that person's right of privacy by making a decision which the state, the

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167. *Id.*

168. 1992 Fla. Laws ch. 199.

169. See FLA. STAT. § 765.101-546 (2003).

170. *Id.* § 765.401(3).

171. *Id.*

172. *Schindler v. Schiavo*, 780 So. 2d 176, 179 (Fla. 2d DCA 2001) (quoting *Herbert v. State*, 543 So. 2d 258, 273 (Fla. 2d DCA 1989)).

173. See §§ 765.401-404.

174. See, e.g., *Rainey v. Guardianship of Mackey*, 773 So. 2d 118, 121 (Fla. 4th DCA 2000).

family, or public opinion would prefer. The surrogate decisionmaker must be confident that he or she can and is voicing the *patient's* decision.<sup>175</sup>

In cases such as Ms. Schiavo's, where the now-incompetent patient has not previously designated a third-party decisionmaker, Part IV of Chapter 765 provides for health care "proxies" to act on her behalf, subject to certain procedural limitations.<sup>176</sup> The statute supplies a list of persons who may serve as proxies in this context.<sup>177</sup> Proxies may, under the appropriate circumstances, authorize the decision to withdraw "life-prolonging procedures,"<sup>178</sup> defined as "any medical procedure, treatment, or intervention, including artificially provided sustenance and hydration, which sustains, restores, or supplants a spontaneous vital function."<sup>179</sup> Prior to authorizing termination of life-prolonging procedures, two physicians must document<sup>180</sup> that the "patient does not have a reasonable medical probability of regaining capacity," the "patient has an end-stage condition," the "patient's physical condition is terminal," or as is alleged in Ms. Schiavo's case, the "patient is in a persistent vegetative state" (PVS).<sup>181</sup> PVS is defined as "a permanent and irreversible condition of unconsciousness in which there is . . . [an] absence of voluntary action or cognitive behavior of any kind."<sup>182</sup> A proxy may authorize termination of life-prolonging procedures *only if* the decision is "supported by clear and convincing evidence that the decision would have been the one the patient would have chosen had the patient been competent, or, if there is no indication of what the patient would have chosen, that the decision is in the patient's best interest."<sup>183</sup>

In situations where a patient lacking an advance directive is in a PVS and "for whom, after a reasonably diligent inquiry, no family or friends are available or willing to serve as a proxy," life-sustaining measures may be discontinued *only if*:

(1) The person has a judicially appointed guardian representing *his or her best interest* with authority to consent to medical treatment; and

175. *State v. Herbert*, 568 So. 2d 4, 13 (Fla. 1990) (quoting *Herbert*, 543 So. 2d at 269) (alteration in original) (citation omitted).

176. § 765.401.

177. *Id.*

178. § 765.401(2).

179. § 765.101(10).

180. *Id.* § 765.401(1)(h).

181. *Id.* § 765.305.

182. *Id.* § 765.101(12).

183. *Id.* § 765.401(3).

(2) The guardian and the person's attending physician, in consultation with the medical ethics committee of the facility where the patient is located, conclude that the condition is *permanent* and that there is *no reasonable medical probability for recovery* and that withholding or withdrawing life-prolonging procedures is in the *best interest of the patient*.<sup>184</sup>

The Florida Guardianship Law, Chapter 744, explicitly states that “[n]o judge shall act as guardian after this law becomes effective.”<sup>185</sup>

All decisions made pursuant to Chapter 765 of the Florida Statutes governing end-of-life decisions are subject to expedited judicial review.<sup>186</sup> Bases for review include claims that the treatment decision is contrary to the patient's known desires or to the provisions of Chapter 765; the proxy has failed to or is unable to discharge his duties; the proxy has abused his powers; or the patient has sufficient capacity to make her own health decisions.<sup>187</sup> A court's order to withdraw life-prolonging procedures, “in the nature of a mandatory injunction,” is strictly executory in nature.<sup>188</sup> That is, until the death of the patient in question, the court retains jurisdiction over the patient and her guardian, and the order is subject to revision.<sup>189</sup>

In sum, the principal goal of Florida's statutory scheme governing end-of-life decisionmaking is to identify and vindicate the wishes of the patient regarding her treatment, while avoiding abuse and exploitation of vulnerable individuals. Thus, Florida requires that any third party decision to terminate life-prolonging procedures be supported by clear and convincing evidence that the decision is what the patient herself would have chosen under the circumstances. To further safeguard the interests of patients with no living will or advance directive, Florida additionally requires a showing that the patient is suffering from a persistent vegetative state, with no reasonable probability of regaining capacity. If these very high evidentiary standards cannot be satisfied, the proxy must choose treatment options according to the patient's best interests. In circumstances where a friend or family member cannot serve as a proxy decisionmaker, Florida law requires the appointment of a guardian to represent the patient's best interests. Florida law expressly states that judges may *not* serve as guardians in this context. As a final measure against potential

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184. *Id.* § 765.404 (emphasis added).

185. *Id.* § 744.309(1)(b).

186. *Id.* § 765.105.

187. *Id.*

188. *Schindler v. Schiavo*, 792 So. 2d 551, 559 (Fla. 2d DCA 2001).

189. *Id.*



abuse, in the face of ambiguity, the courts are to presume that the patient would have desired to continue life-sustaining measures.

### C. Separation of Powers

The United States and Florida Constitutions each establish a tripartite system of government, in which the branches—executive, legislative, and judicial—are separate and distinct. The Florida Constitution explicitly provides: “The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.”<sup>190</sup> This principle of separation of powers is animated chiefly by the concern “that the fusion of the powers of any two branches into the same department would ultimately result in the destruction of liberty.”<sup>191</sup> Thus, the purpose and goal of the doctrine of separation of powers is to safeguard the freedom of citizens and to prevent arbitrary and oppressive acts by those with governmental authority.

For the present inquiry, it is worth briefly reflecting on which powers are uniquely reposed in the various branches under Florida law, both generally and in the context of end-of-life decisionmaking. Unlike the United States Congress, which can act only pursuant to those powers enumerated by the Constitution,<sup>192</sup> the Florida Legislature is vested with the plenary authority to enact laws, subject only to limitation by the state constitution.<sup>193</sup> Such laws are to apply prospectively and must be of general and uniform application.<sup>194</sup> The legislative branch bears the responsibility to protect the rights of citizens,<sup>195</sup> and it has the exclusive obligation to enact social policy.<sup>196</sup> Most importantly for present purposes, the legislature defines and administers the regulation of end-of-life decisions.<sup>197</sup> The judicial department, by contrast, enjoys the exclusive power to “administer justice and resolve disputes within the common law and the laws established by the legislature.”<sup>198</sup> As the United States

190. FLA. CONST. art. II, § 3.

191. *Chiles v. Children*, 589 So. 2d 260, 263 (Fla. 1991) (citing *Ponder v. Graham*, 4 Fla. 23, 42-43 (Fla. 1851); THE FEDERALIST NOS. 47, 51 (James Madison)).

192. See generally *United States v. Morrison*, 529 U.S. 598, 607 (2000) (“Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution.”); *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819); *Marbury v. Madison*, 5 U.S. 137, 176 (1803).

193. FLA. CONST. art. III, § 1; *Bd. of Pub. Instruction v. Wright*, 76 So. 2d 863, 864 (Fla. 1955) (en banc).

194. *Ponder*, 4 Fla. at 34-35.

195. *Satz v. Perlmutter*, 379 So. 2d 359, 361 (Fla. 1980).

196. *Krischer v. McIver*, 697 So. 2d 97, 104 (Fla. 1997).

197. See, e.g., FLA. STAT. § 765.101-546 (2003).

198. FLA. CONST. art. V, § 3.

Supreme Court stated in *Plaut v. Spendthrift Farm, Inc.*,<sup>199</sup> the judicial branch has the power to render a judgment that “‘conclusively resolves the case’ because ‘a “judicial Power” is one to render dispositive judgments.’”<sup>200</sup> In the end-of-life context, the courts in Florida exercise a supervisory role, emerging both from the equitable powers of chancery<sup>201</sup> and from positive designation by the relevant Florida statutes.<sup>202</sup> Because the end to be served by the judicial role in such matters is not finality but rather the proper administration of the person and her estate, the courts retain jurisdiction until the death of the ward. Finally, the executive branch has the sole responsibility and power to “take care that the laws be faithfully executed.”<sup>203</sup> The Governor is charged by statute with the authority to “procure and secure protection to life, liberty, and property of the inhabitants of the state.”<sup>204</sup> In certain matters affecting vulnerable individuals, such as the mentally ill or otherwise incompetent, the executive branch is empowered to intervene to safeguard their interests.<sup>205</sup>

There are essentially two ways in which the principle of separation of powers can be violated: (1) if one branch encroaches upon or nullifies the powers of another; or (2) if one branch improperly delegates its own, or another branch’s, constitutionally-assigned authority to a separate branch of government.<sup>206</sup> Most relevant to the present inquiry are those violations in which another branch of government seeks to nullify a pronouncement of the judicial department, or in which the legislature delegates its authority in a constitutionally improper fashion. Each will be taken separately.

Courts both in Florida and in the federal system “‘possess the entire body of judicial power’” and are not to be “‘hampered or limited in the discharge of their functions by either of the other two branches.’”<sup>207</sup> Respect for separation of powers in this context necessarily requires that final judgments of courts not be subject to review or interference by the other branches of government. The insulation of the judicial branch from such encroachment “serves both to protect ‘the role of the independent

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199. 514 U.S. 211 (1995).

200. *Id.* at 219 (quoting Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 926 (1990)).

201. *Schindler v. Schiavo*, 792 So. 2d 551, 558 (Fla. 2d DCA 2001).

202. *See, e.g.*, FLA. STAT. § 744.1085 (2003) (assigning delegation and determination of guardianship to courts).

203. FLA. CONST. art. IV, § 1.

204. FLA. STAT. § 14.01 (2003).

205. § 415.1051 (empowering the Florida Department of Children and Families to intervene unilaterally under certain circumstances to defend the interests of a vulnerable adult at risk of death or serious injury).

206. *Chiles v. Children*, 589 So. 2d 260, 264 (Fla. 1991).

207. 16 AM. JUR. 2D *Constitutional Law* § 259 (2004).

judiciary within the constitutional scheme of tripartite government' and to safeguard litigants' 'rights to have claims decided before judges who are free from potential domination by other branches of government.'"<sup>208</sup> It follows, therefore, that the executive branch has no authority, nor can it be given authority, to review or oversee judicial decisions.<sup>209</sup> Similarly, the legislature cannot reverse, nullify, or overturn a court's final judgment through legislative enactment. In *Plaut*, Justice Scalia, writing for the majority, traced the historical and philosophical underpinnings of this doctrine, arguing by reference to *Federalist* Numbers 81 and 78, and concluded: "Having achieved finality, however, a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable to *that very case* was something other than what the courts said it was."<sup>210</sup> In his account, Scalia makes clear the distinction between the unique and exclusive roles of the legislature and the judiciary. The role of the judicial department is to interpret and apply the law relevant to a given case at a given time.<sup>211</sup> In this sense, final judgments are always backwards looking. By contrast, legislation is, with a few well-defined exceptions, always prospective.<sup>212</sup> It is the role of the legislature to say what the law *will be*. Lawmakers are thus free to alter the future effect of laws that they deem to be ill-advised through the formal legislative process. In this way, legislation can affect the outcome of matters before the courts that are not yet final. Final judgments, however, are fixed and beyond the reach of legislation.

Separation of powers principles are also offended when a branch of government delegates its own, or another's, exclusively held authority to another branch.<sup>213</sup> The legislature cannot, for example, delegate powers exclusively reposed in the judicial department to the executive branch.<sup>214</sup> To determine whether a given power is exclusive to one branch, one must consider the constitutional text and history, along with the nature of the activity in question.<sup>215</sup> If the authority in question is not exclusive to one branch, the delegation of the authority is not unconstitutional.<sup>216</sup>

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208. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986) (citation omitted) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 583 (1985); *United States v. Will*, 449 U.S. 200, 218 (1980)).

209. *In re Advisory Opinion to the Governor*, 213 So. 2d 716, 720 (Fla. 1968) (per curiam).

210. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995).

211. *See id.*

212. *See id.*

213. *Chiles v. Children*, 589 So. 2d 260, 264 (Fla. 1991).

214. *Canney v. Bd. of Pub. Instruction*, 278 So. 2d 260, 262 (Fla. 1973).

215. *Simms v. State*, 641 So. 2d 957, 961 (Fla. 3d DCA 1994).

216. *Id.* at 960.

The legislature is constitutionally prohibited from assigning its own exclusively held power to other branches through excessive delegation.<sup>217</sup> To be sure, legislatures may, and routinely do, delegate authority to the executive branch to administer a statutory scheme; in so doing they oftentimes provide to the relevant agency a measure of discretion to flesh out the underlying law's contours.<sup>218</sup> To pass constitutional muster, however, such authority may not be utterly open-ended and must provide "some minimal standards and guidelines ascertainable by reference to the [underlying] enactment."<sup>219</sup> In short, the executive official must be given guidance as to the intention of the act itself, so as not to cede the "discretion as to What the law shall be,"<sup>220</sup> which, of course, is the province of the legislature alone.

#### IV. ANALYSIS AND SYNTHESIS

Having set forth the underlying factual predicates and provided a broad-stroke outline of the relevant legal authorities, the ground is sufficiently prepared to turn directly to the two questions at the heart of the inquiry: Does Terri's Law violate the constitutional doctrine of separation of powers? If not, is it wise public policy, in light of the values and logic that animate Florida's laws governing end-of-life decisionmaking?

##### A. *Does Terri's Law Violate Separation of Powers?*

There are three possible arguments that the Florida legislature ran afoul of the doctrine of separation of powers in enacting Terri's Law: (1) the legislature improperly delegated its lawmaking authority to the Governor by failing to provide adequate guidelines and standards for the administration of the underlying act; (2) the legislature delegated authority to the Governor that is exclusively judicial in nature; and (3) the legislature effectively nullified the action of the judiciary by empowering the Governor to overturn its order directing the removal of Ms. Schiavo's nasogastric tube. Each will be taken in turn, with greatest attention given to the third, as it seems to be the most complicated and the most interesting challenge to the legislature's actions in the Schiavo matter.

##### 1. Delegation of Standardless Legislative Authority?

Did the legislature leave the Governor with no standards or intelligible principle as to how to administer the law in question? Did it, in effect,

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217. *See Askew v. Cross Key Waterways*, 372 So. 2d 913, 918-19 (Fla. 1978).

218. *See id.* at 924.

219. *Id.* at 925.

220. *Conner v. Joe Hatton, Inc.*, 216 So. 2d 209, 211 (Fla. 1968).

empower the Governor to be “the law maker” rather than its administrator? It seems not. First, the Governor’s discretion is limited dramatically by the prerequisite conditions that must obtain before he can act pursuant to the statute; the Governor can intervene only in very narrowly-defined circumstances. As stated above, Terri’s Law authorizes the Governor to stay a court-ordered withdrawal of life-preserving procedures and appoint a guardian ad litem for the patient when: (1) the patient has no written advance directive; (2) the court has found the patient to be in a persistent vegetative state; (3) the patient has had nutrition and hydration withheld; and (4) a member of the patient’s family has challenged the withholding of nutrition and hydration.<sup>221</sup> Moreover, the clear intention of the law is to augment the already extant statutory framework regulating end-of-life decisions by allowing for the appointment of a guardian ad litem, under narrowly prescribed circumstances, to make recommendations to the Governor and to the relevant court.<sup>222</sup> The goals of Terri’s Law and the current law governing this matter are coextensive: to discern and vindicate the wishes of the now-incompetent patient; failing that, to act in her best interests; and to avoid irreversible abuse or error. The fact that the Governor has a measure of flexibility in invoking his authority under Terri’s Law does not seem to be fatal; there is ample precedent for allowing an executive official some discretion in administering otherwise narrowly drawn statutes.<sup>223</sup> Indeed, “[t]he legislature may enact a law complete in itself, which leaves some discretion in the operation and enforcement of the law with an administrative official.”<sup>224</sup>

## 2. Delegation to the Executive of Exclusively Judicial Authority?

Does Terri’s Law vest in the Governor powers that are exclusively reposed in the judicial branch? To answer this question, one must “consider the essential nature and effect of the governmental activity to be performed.”<sup>225</sup> The domain in question is the regulation of end-of-life decisionmaking and guardianship. Under Terri’s Law, the Governor has the authority, under narrow circumstances, to stay a court-ordered

221. 2003 Fla. Laws ch. 418.

222. *Id.*

223. *See, e.g.,* N. Broward Hosp. Dist. v. Mizell, 148 So. 2d 1, 2, 5 (Fla. 1962) (upholding an act authorizing an agency to act “so that the welfare and health of patients and the best interests of the hospital may at all times be best served”); *E.M. Watkins & Co. v. Bd. of Regents*, 414 So. 2d 583, 588-89 (Fla. 1st DCA 1982) (holding that “good cause” is not too ambiguous a standard to satisfy nondelegation doctrine concerns); *Albrecht v. Dep’t of Envtl. Regulation*, 353 So. 2d 883 (Fla. 1st DCA 1977) (upholding the authority of an agency to determine whether a proposed project will be “contrary to public interest”).

224. *E.M. Watkins & Co.*, 414 So. 2d at 588.

225. *Simms v. State*, 641 So. 2d 957, 961 (Fla. 3d DCA 1994).

withdrawal of nutrition and hydration and appoint a guardian ad litem.<sup>226</sup> In Florida, guardianship and end-of-life decisionmaking are not exclusively governed by the courts. The judiciary certainly has a role in this area, by virtue of the equitable powers of chancery and by statutory delegation. However, this area is principally, though not exclusively, governed by the legislature. As discussed above, it has enacted a fairly robust and comprehensive regulatory framework, providing guidance for surrogate and proxy decisionmaking in this context, with high evidentiary standards and procedures.<sup>227</sup> Nothing indicates that the authority over end-of-life decisionmaking “is an exclusive and pure power which the Constitution requires to be confined to a single branch of government.”<sup>228</sup> Subject to appropriate standards, the legislature is free to delegate to other branches, as it already has done, in its effort to administer its regulation of the end-of-life context. In short, there is nothing intrinsically judicial in nature about the guardianship or end-of-life domain. Accordingly, it does not offend separation of powers principles to delegate some authority to the executive branch to govern in this area.

Are separation of powers principles offended by virtue of the simple fact that it was the *Governor* who stayed the court’s order directing the withdrawal of Ms. Schiavo’s nasogastric tube? Executive interventions following judicial pronouncements are not unprecedented. Pursuant to the Governor’s constitutionally based clemency authority, he can “grant full or conditional pardons, restore civil rights, commute punishment, and remit fines and forfeitures for offenses.”<sup>229</sup> Similarly, by legislative enactment, the Governor has the authority to stay executions of those convicted and sentenced to death.<sup>230</sup> Indeed, the Supreme Court of the United States has upheld a statute deeming Georgia’s Governor “an ‘apt and special tribunal’” to pass on questions of the sanity of convicted prisoners sentenced to death.<sup>231</sup> Thus, executive intervention following a judicial decision does not, per se, violate separation of powers. But this does not settle the matter; in fact, it may be the wrong question. The inquiry, rather, should focus on the constitutionality of the underlying authority itself—namely, Terri’s Law. The question should be formulated as follows: Did the *legislature*, in enacting Terri’s Law, impermissibly and

226. 2003 Fla. Laws ch. 418.

227. See *supra* text accompanying notes 109-24.

228. *Simms*, 641 So. 2d at 961 (discussing the authority to protect children and terminate parental rights).

229. FLA. CONST. art. IV, § 8.

230. FLA. STAT. § 922.06 (2003).

231. *Solesbee v. Balkcom*, 339 U.S. 9, 12 (1950) (quoting *Nobles v. Georgia*, 168 U.S. 398, 409 (1897)).

unconstitutionally nullify, overturn, or reverse the actions of the judicial branch?

### 3. Does Terri's Law Unconstitutionally Nullify an Action of the Judicial Branch?

It is inarguable that by enacting Terri's Law, the Florida legislature effectively overturned the Florida court's order directing the withdrawal of nutrition and hydration from Ms. Schiavo. This seems to be the paradigm example of nullification of one branch's actions by another that strikes at the heart of separation of powers. It turns out, however, that the constitutionality of this action is quite a complicated question.

It is certainly true that the legislature cannot use its lawmaking function to simply overturn the final judgment of a court.<sup>232</sup> There was no ambiguity in Justice Scalia's pronouncement in *Plaut* that "[h]aving achieved finality, . . . a judicial decision becomes the last word of the judicial department" that may not be disturbed by retroactive legislation.<sup>233</sup> Justice Scalia was careful to point out, however, that this holding did not disturb the doctrine, articulated 140 years earlier in *Pennsylvania v. Wheeling & Belmont Bridge Co.*,<sup>234</sup> that the legislature *does* have the authority to alter the prospective effect of previously entered executory judgments authorizing injunctive relief.<sup>235</sup> The *Wheeling Bridge* doctrine was revisited five years after the *Plaut* decision in *Miller v. French*,<sup>236</sup> a case that has important implications for the Schiavo matter and the propriety of the Florida legislature's actions in that context.

In *Miller v. French*, the Court addressed a challenge to the Prison Litigation Reform Act of 1995.<sup>237</sup> Among other things, the Act "establishe[d] standards for the entry and termination of prospective relief in civil actions challenging conditions at prison facilities."<sup>238</sup> The Act's strictures applied not only prospectively to injunctions that might be issued in the future, but also *retrospectively* to those injunctions already in effect from executory judgments *in prior cases*.<sup>239</sup> The Act provided a mechanism for defendants or intervenors to move to terminate these prior executory judgments.<sup>240</sup> Moreover, a separate section of the Act provided that a motion for termination should "operate as [an automatic] stay" of

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232. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995).

233. *Id.*

234. 59 U.S. 421 (1856).

235. *Plaut*, 514 U.S. at 232.

236. 530 U.S. 327 (2000).

237. *Id.* at 331.

238. *Id.* at 333.

239. 18 U.S.C. § 3626 (2000).

240. *Id.* § 3626(b)(2).

the court's previously issued injunctive relief, beginning thirty days after the motion is filed and ending when the court rules on the motion.<sup>241</sup> The prisoners challenged this provision on the grounds that it violated the principles of *Plaut*, namely that the legislature was barred by the doctrine of separation of powers from overturning previously entered judgments through retroactive legislation.<sup>242</sup> The Court reaffirmed that *Plaut* stood for the proposition that the legislature could not nullify the final word of the judicial department in this manner.<sup>243</sup> However, invoking the logic of *Wheeling & Belmont Bridge Co.*, the Court rejected the prisoners' claims on the grounds that "[p]rospective relief under a continuing, executory decree remains subject to alteration due to changes in the underlying law."<sup>244</sup> That is, because the previously entered injunctions were *executory judgments* subject to the continuing supervision of the issuing courts, they were *not* final judgments for purposes of separation of powers analysis.<sup>245</sup> In this way, the Court echoed the logic of an opinion of the United States Court of Appeals for the Eleventh Circuit written three years earlier. In that case, involving the superintendent of a Florida state prison, the court explained that for purposes of separation of powers analysis:

[A] true "final judgment" . . . means not an appealable judgment, but one that represents the "last word of the judicial department with regard to a particular case or controversy." Consent decrees are final judgments, but not the "last word of the judicial department." District courts retain jurisdiction over such decrees not only to ensure compliance, but also to amend them as significant changes in law and fact require. . . . The PLRA's termination provision thus does not undermine the finality of a final judgment in the separation-of-powers sense.<sup>246</sup>

The Eighth Circuit reached the same result in a similar case, holding that the legislature's actions could alter previously entered decrees because such judgments were "an executory form of relief that remain[ed] subject to later developments."<sup>247</sup> In short, executory judgments that are subject to continuing review by the issuing court are deemed *not final* for purposes of separation of powers, even though they are final for purposes of appeal.

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241. *Id.* § 3626(e)(2).

242. *Miller*, 530 U.S. at 343.

243. *Id.* at 343-44.

244. *Id.* at 344.

245. *Id.* at 347.

246. *Dougan v. Singletary*, 129 F.3d 1424, 1426 (11th Cir. 1997) (footnotes omitted) (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995)).

247. *Gavin v. Branstad*, 122 F.3d 1081, 1087 (8th Cir. 1997).



To discern the significance of the *Wheeling & Belmont Bridge Co.* doctrine, as elaborated by *Miller*, to the present inquiry, it is necessary to evaluate the precise nature of the court order directing removal of Ms. Schiavo's nasogastric tube. If it is a final judgment, à la *Plaut*, then it is not subject to alteration by virtue of changes in the law enacted by the Florida legislature. If, however, the judgment is executory, and thus subject to continuing review of the guardianship court—much like the consent decrees in *Miller*—then it would seem that the legislature could, consistent with separation of powers principles, alter its effects through legislation. Which type of judicial remedy is it? For the answer to this crucial question, we need look no further than to the Florida court's own words, quoted earlier:

The order requiring the termination of life-prolonging procedures is not a standard legal judgment, but an order in the nature of a mandatory injunction compelling certain actions by the guardian and, indirectly, by the health care providers. Until the life-prolonging procedures are discontinued, *such an order is entirely executory*, and the ward and guardian *continue to be under the jurisdiction and supervision of the guardianship court*. As long as the ward is alive, *the order is subject to recall and is executory in nature.*<sup>248</sup>

Thus, it seems that the court's order to remove Ms. Schiavo's nasogastric tube was injunctive and executory in nature, subject to continuing review by the court and subject to recall based on changes in underlying circumstances. By virtue of the *Wheeling & Belmont Bridge Co.* doctrine, as elaborated by *Miller*, the court's order remained subject to changes in the underlying law. Terri's Law constituted such a change in the law. In a certain sense, the Governor's stay of the court's order in the Schiavo matter served the same ends as the automatic stay provision of the PLRA: to freeze and preserve the status quo such that the change in the law can be implemented. In *Miller*, the change in the law included a review of the propriety of previously entered executory decrees. In *Schiavo*, the change in the law included a review of the facts and circumstances by a guardian ad litem.

Thus, under the principles articulated in *Wheeling & Belmont Bridge Co.*, as elaborated by *Miller*, it would seem that the Schiavo matter presents one of the narrow classes of cases in which the legislature can, consistent with separation of powers principles, enact legislation that alters previous actions of the judicial branch.

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248. *Schiavo v. Schindler*, 792 So. 2d 551, 559 (Fla. 2d DCA 2001) (emphasis added).

### B. *Is Terri's Law Wise Public Policy?*

Having established that the application of Terri's Law to Ms. Schiavo's case does not run afoul of principles of separation of powers, the question remains whether Terri's Law is normatively sound public policy from a structural, governmental point of view. That is, does this legislative intervention in the Schiavo matter advance the goals and logic underlying the Florida laws governing end-of-life decisionmaking as a whole? To address this question, it is useful to reprise briefly the substance of the animating principles of this regulatory regime and then to measure the effects of Terri's Law against these principles.

As discussed extensively above, the Florida laws governing end-of-life decisionmaking for patients like Ms. Schiavo, who lack a living will or advance directive and are unable to communicate their wishes, are aimed chiefly at discerning and implementing the intentions of such patients. Proxies or surrogates making decisions on behalf of such patients bear the burden of proving by clear and convincing evidence—a very high evidentiary standard—that they are choosing the option that the patient *would have chosen* under the circumstances. They are not to substitute their own wishes or views for those of the patient. Moreover, courts weighing these claims are required to resolve any ambiguity in favor of continuing, rather than terminating, life-sustaining measures. If the proxy is not able to satisfy these procedural standards, the decision must be made according to the patient's best interests. Moreover, as discussed above, the guardianship court retains jurisdiction over the patient and her proxy, even after it has issued an order to withdraw nutrition and hydration, in the event that a change in the underlying facts or law would make it inequitable to maintain the order's effect. In this way, the Florida regime is designed to provide maximal safeguards against any possible abuse or erroneous termination of life-sustaining measures. This is as it should be, given the unique vulnerabilities and risks in this context. As the court in *Cruzan* stated:

An erroneous decision not to terminate results in a maintenance of the status quo; the possibility of subsequent developments such as advancements in medical science, the discovery of new evidence regarding the patient's intent, changes in the law, or simply the unexpected death of the patient despite the administration of life-sustaining treatment at least create the potential that a wrong decision will eventually be corrected or its impact mitigated. An erroneous

decision to withdraw life-sustaining treatment, however, is not susceptible of correction.<sup>249</sup>

The legislature, in enacting Terri's Law, moved to fill a perceived void in the extant legal framework for circumstances presenting a unique risk of abuse or error: that is, where life-sustaining measures for an incompetent patient with no advance directive or living will are ordered terminated, in the face of objections by family members. There were regulatory standards in place to provide guidance in circumstances in which there is a designated proxy who is acting on behalf of the now-incompetent patient. In such cases, the proxy implements the decision that the patient *would have made* under the circumstances.<sup>250</sup> Similarly, there were regulatory standards in place to provide oversight for those situations in which there is no proxy willing or able to serve in this capacity. In those cases, decisions can be made by an appointed guardian acting in the patient's best interests.<sup>251</sup> However, there were no regulatory standards to deal precisely with the Schiavo matter, a case in which (1) the now-incompetent patient has no living will or advance directive, (2) the patient has no officially designated proxy, (3) the court has refused to appoint a guardian, reserving for itself (contrary to Florida law) the authority to, in its words, "essentially serve[] as the ward's guardian,"<sup>252</sup> (4) not all of the probative evidence relating to the patient's intentions has been admitted and considered due to technical, procedural strictures,<sup>253</sup> (5) due to the procedural posture, the burden has been shifted to the parents to argue that Ms. Schiavo *would not* want to terminate nutrition and hydration, thus inverting the logic of the Florida laws,<sup>254</sup> and (6) the bulk of the legal and factual dispute before the court has not focused on the question of patient intent or best interests, as the statutory framework requires, but instead on ancillary questions such as the patient's underlying condition and the possible benefits of other therapies.<sup>255</sup> Even the court lamented that the extant regulatory landscape did not provide an adequate process for resolving such disputes:

It may be unfortunate that when families cannot agree, the best forum we can offer for this private, personal decision is

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249. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 283 (1990).

250. FLA. STAT. § 765.401(2) (2003).

251. *Id.* § 765.404(1). Note, again, that judges are precluded from acting as guardians under these circumstances. *Id.* § 744.309(1)(b).

252. *Schindler v. Schiavo*, 780 So. 2d 176, 179 (Fla. 2d DCA 2001).

253. *Schindler v. Schiavo*, 800 So. 2d 640, 643 (Fla. 2d DCA 2001); *Schindler v. Schiavo*, 792 So. 2d 551, 555 (Fla. 2d DCA 2001).

254. *Schindler*, 800 So. 2d at 645; *Schindler*, 792 So. 2d at 554.

255. *Schindler*, 800 So. 2d at 645.

a public courtroom and the best decision-maker we can provide is a judge with no prior knowledge of the ward, but the law currently provides no better solution that adequately protects the interests of promoting the value of life.<sup>256</sup>

Thus, it seems that in the pre-Terri's Law regulatory regime, in which the judicial department and litigation were the only means of resolving disputes in this context, the values underlying the guardianship laws were not adequately vindicated. Litigation is adversarial in nature, with stringent procedural guidelines and rigid evidentiary rules. Standing alone, it perhaps lacks the institutional flexibility necessary to adequately serve as a truth-finding mechanism in a manner appropriate to the guardianship context. The Florida Supreme Court in *Satz v. Perlmutter*<sup>257</sup> echoed this view in the following powerfully worded statement:

Because the issue [of termination of life-sustaining treatment] with all its ramifications is fraught with complexity and encompasses the interests of the law, both civil and criminal, medical ethics and social morality, it is not one which is well-suited for resolution in an adversary judicial proceeding. It is the type [of] issue which is more suitably addressed in the legislative forum, where fact finding can be less confined and the viewpoints of all interested institutions and disciplines can be presented and synthesized. In this manner only can the subject be dealt with comprehensively and the interests of all institutions and individuals be properly accommodated.<sup>258</sup>

Thus, the Florida legislature created a new layer of process for such cases with its enactment of Terri's Law. In narrow circumstances, Terri's Law allows the executive branch to appoint a guardian ad litem to review the relevant facts and circumstances and report back to the Governor and the chief judge of the relevant state court, in an effort to ensure that there has been no error or abuse in discerning the now-incompetent patient's true intentions or, failing that, best interests. The guardian ad litem is able to take notice of evidence that had been procedurally defaulted during the court proceedings, and can focus single-mindedly on questions involving the patient's intent or failing that, her best interests, the matters at the heart of the Florida laws governing this domain.

Interestingly, the guardianship regime seemed to anticipate the possibility of the legislature stepping in to remedy perceived gaps in the legal framework. As the Florida court pointed out in *Schiavo I*, orders

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256. *Schindler v. Schiavo*, 851 So. 2d 182, 186-87 (Fla. 2d DCA 2003).

257. 379 So. 2d 359 (Fla. 1980).

258. *Id.* at 360.

issued in this context are executory in nature and thus subject to changes in the underlying facts or law. This allowed the structural flexibility for the legislature to intervene in a manner that is consistent with separation of powers principles. The addition of the executive branch in this context to administer the new legislative enactment effectively creates a system in which all branches of government are working together to implement the spirit of the laws themselves. Thus, with the addition of Terri's Law, Florida's system of governance of end-of-life matters utilizes all branches of government, each applying its own unique institutional competence to identify and implement the wishes of the now-incompetent patient or, failing that, seeking to act in her best interests.<sup>259</sup> It is an example of the dynamic complementarity among the branches of government contemplated by the very doctrine of separation of powers itself. Indeed, it promotes the central aim of separation of powers: to avoid the concentration of power in one governmental branch and thus safeguard the cause of liberty for all citizens.

#### V. POSTSCRIPT

Shortly before this Article went to press, the Florida Supreme Court issued an opinion declaring Terri's Law unconstitutional.<sup>260</sup> The court held that the law violated the principle of separation of powers because it constituted an encroachment on the authority of the judicial branch,<sup>261</sup> and because it delegated legislative authority to the executive branch without providing adequate guidelines or standards for the exercise of such authority.<sup>262</sup>

The court's analysis of the judicial encroachment question was quite spare. The court acknowledged that the key question in this context is whether the underlying judgment is final or executory.<sup>263</sup> However, without discussion (indeed without reference to any relevant precedent whatsoever) and contrary to the logic of the Florida guardianship regime and the clear language of the District Court of Appeal (designating its own order as "executory"), the court simply asserted that the underlying judgment was final for purposes of separation of powers analysis.<sup>264</sup> For the reasons discussed extensively above, this conclusion is erroneous.

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259. At the time of this writing, Terri's Law has expired due to its sunset provision. It remains to be seen if or how the legislature will permanently amend the guardianship and end-of-life laws to address concerns like those presented in the Schiavo matter.

260. *Bush v. Schiavo*, No. SC04-925, 2004 WL 2109983 (Fla. Sept. 23, 2004).

261. *See id.* at \*8-9.

262. *See id.* at \*9-13.

263. *Id.* at \*8.

264. *Id.*

The court's discussion of the legislature's delegation of authority was more extensive. The court opted to treat the law as standing alone, rather than as a part of the larger framework of the Florida guardianship regime.<sup>265</sup> As such, the court concluded that the law lacked adequate standards to guide Florida's executive branch in exercising its discretion.<sup>266</sup> While this is a much closer question than the judicial encroachment issue, the court's decision to evaluate the law in the abstract and outside of its larger regulatory context was a failure of statutory construction. It seems clear that in enacting Terri's Law, the legislature intended to augment the already extant regulatory mechanisms for guardianship. Viewed in light of that overarching statutory context, it seems that the executive's discretion was sufficiently cabined by the clearly stated aims and objectives of Florida guardianship law, for reasons discussed above.

Shortly after the announcement of the Florida Supreme Court's opinion, the Governor of Florida announced his intention to appeal the matter to the United States Supreme Court.<sup>267</sup>

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265. *See id.* at \*12.

266. *See id.* at \*12-13.

267. *See Mitch Stacy, Gov. Bush Granted a Stay As He Appeals Schiavo Case*, MIAMI HERALD, Oct. 28, 2004, at B6.

