

LECTURES ON *SCHIAVO*

FELOS ON *SCHIAVO**

Thank you all for coming. Thank you, Rebecca, for the introduction.

I have twenty minutes to discuss the implications of the *Schiavo* case!¹ I think it's fair to say that in taking this case, when Mr. Schiavo walked into my office eight years ago, I wouldn't have had the slightest idea that I'd now be standing up here while the case was still pending, talking about it.

I don't want to talk too much about the specific details of the *Schiavo* case. Instead, I'll focus on its broader trends and implications. My entry into the *Schiavo* case was through the *Browning* case,² which many of you may be familiar with, which is Florida's landmark right-to-die or right-to-refuse-unwanted-medical-treatment case, a case that I argued before the Florida Supreme Court in the late 1980s.

I think one of my biggest surprises about the *Schiavo* case was the controversy that it generated. In the *Browning* case there

* © 2005, George Felos. All rights reserved. Edited transcript of George Felos's comments from the January 28, 2005 live symposium. Mr. Felos, of Felos & Felos, Dunedin, Florida, represented Michael Schiavo in the *Schiavo* litigation. George Felos, a native New Yorker and Florida resident since 1977, is a Dunedin attorney, author, and a nationally recognized expert in right-to-die cases. He also handles probate, guardianship, life planning, trust, real property, and business matters, and his cases include numerous published appellate decisions. Best known for the landmark case that established an individual's constitutional right to refuse or have withdrawn unwanted medical treatment, *In re Guardianship of Browning*, Felos is currently the lead attorney in the Terri Schiavo case—a multi-year struggle to end the artificial feeding of a vegetative young woman. The case has received extensive national media attention, especially since the constitutionally challenged intervention of the Florida Legislature and Governor. Mr. Felos is the author of the non-fiction book, *Litigation as Spiritual Practice*, which was published by Blue Dolphin Publishing, Inc., in August 2002.

1. *In re Guardianship of Schiavo*, 851 So. 2d 182 (Fla. 2d Dist. App. 2003). The *Schiavo* proceedings lasted for several years and included many cases such as *In re Guardianship of Schiavo*, 780 So. 2d 176 (Fla. 2d Dist. App. 2001); *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223 (11th Cir. 2005); and *Schindler v. Schiavo*, 125 S. Ct. 1622 (2005). The Florida District Court of Appeal case listed first in the footnote is just an example of one of the earlier proceedings.

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

was a lot of controversy, but it was expected. That case started in the mid-1980s and was a removal-of-a-feeding-tube case.³

If you're familiar with the area of what's called "right-to-die," the initial cases like *Quinlan*⁴ involved the removal of respirators from patients.⁵ The next wave of cases was the feeding-tube cases⁶ that generated a tremendous amount of controversy in that many people felt, and still feel today, that artificial provision of sustenance and hydration through a tube should not be considered medical treatment, should not be considered artificial life support.

The *Browning* case really represented a shift in public consciousness, public awareness, and also judicial thought. And it was controversial. It generated a lot of strong feelings from those in the religious community, the political community, and among ethicists.

After *Browning* the law became settled, and Chapter 765, the Life-Prolonging Procedure Act in Florida, was amended.⁷ We found that the *Browning* framework and Chapter 765 worked quite well for healthcare providers, patients, and patients' families.

So here came the *Schiavo* case. And in looking at this case from a lawyer's point of view, and perhaps being too sheltered in my viewpoint, I said to myself, "Here's a case that really doesn't change the law. It doesn't contain any groundbreaking legal principles." Words, of course, that I would reflect upon with irony later on.

It was really a case about implementing the oral declarations and wishes of a particular patient under the *Browning* formula.⁸

3. *Id.* at 7–8.

4. *In re Quinlan*, 355 A.2d 647 (N.J. 1976).

5. *E.g. Bartling v. Super. Ct.*, 209 Cal. Rptr. 220 (Cal. App. 2d Dist. 1984); *Foody v. Manchester Meml. Hosp.*, 482 A.2d 713 (Conn. Super. 1984); *Severns v. Wilmington Med. Ctr., Inc.*, 421 A.2d 1334 (Del. 1980); *In re Storar*, 420 N.E.2d 64 (N.Y. 1981).

6. *E.g. Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261 (1990); *Bouvia v. Super. Ct.*, 225 Cal. Rptr. 297 (Cal. App. 2d Dist. 1986); *Brophy v. New Eng. Sinai Hosp., Inc.*, 497 N.E.2d 626 (Mass. 1986); *In re Jobes*, 529 A.2d 434 (N.J. 1987); *In re Conroy*, 486 A.2d 1209 (N.J. 1985).

7. 2004 Fla. Laws ch. 765, amended on April 10, 1992.

8. *In re Guardianship of Browning*, 568 So. 2d at 9–11 (holding that "a competent person has the constitutional right to choose or refuse medical treatment, and that right extends to all relevant decisions concerning one's health").

Little did I know the controversy that would soon erupt over this case.

In looking at this in a little broader picture, I think the Schiavo controversy reflects a shift in societal attitudes and political attitudes in the years since *Browning*. They say the country is becoming more conservative, there's a retrenchment in some areas of personal liberty. That, I think, is what is at the heart of the real controversy of the *Schiavo* case—there is a strong ideological component at stake here.

Let me explain this in a couple of different ways. In the initial trial in January 2000, the parents' testimony was very interesting. They expressed the philosophy that medical treatment should be administered to a patient until the patient died with medical treatment in place, and that medical treatment should be administered to a patient even if it were against the patient's will, because it is God's will that somebody be kept alive at all costs.

I think this ideological component from the opposition in this case is evident in other areas. One of the first briefs filed in the constitutional litigation with Judge Baird in the trial court raises another interesting point. The Governor's brief states that he wasn't here to relitigate the *Browning* case, but that in his opinion the *Browning* court had gone too far in enunciating the privacy rights of Floridians.⁹

I thought that was a really remarkable statement on the part of the Governor. In what aspect did *Browning* go too far? *Browning*, in essence, said that a patient has the right to refuse any type of medical treatment no matter what the type of treatment, no matter what the prognosis—that it's essentially a right of personal liberty that resides with the patient, not the State.¹⁰

Of course, the question in *Browning* was, If the patient can't speak for himself or herself, who makes that decision and what's the standard of evidence?¹¹

9. Mr. Felos personally represented Ms. Browning. *In re Guardianship of Browning*, 568 So. 2d 4 (Fla. 1990).

10. *In re Guardianship of Browning*, 568 So. 2d at 9–11 (holding that “a competent person has the constitutional right to choose or refuse medical treatment, and that right extends to all relevant decisions concerning one's health”).

11. *Id.* at 7–8, 15–16 (noting that the patient's right to privacy controlled the case, and that a surrogate decision-maker “must be able to support that decision with clear and convincing evidence”).

I also find it interesting, in the wake of the Florida Supreme Court decision last Monday,¹² that the Governor has made some statements or suggestions that the law in Florida be changed so that artificial life support cannot be removed unless there is a written declaration by the patient, which would be a very far-reaching change in the law.¹³ As many of you who are familiar with the healthcare field know, I think statistics show that nationwide perhaps twenty, or twenty-five percent at best, of adults have written living wills; perhaps the percentages may be higher in Florida.¹⁴ Therefore, many Floridians, and probably citizens across this country, would be forced to have medical treatment if such a rule were in effect.

So in many ways I see *Schiavo*, and the outcome of *Schiavo*, as an assault and retrenchment on the personal right, the personal-liberty right of refusing unwanted medical treatment. And it's been a successful vehicle, I think, for the opponents of that right for many reasons.

Here, unlike *Browning*, you have a personal dispute between family members. And I'm just a sole practitioner from Dunedin, and I've been amazed—just amazed—at the public relations blitz and propaganda efforts in this case.¹⁵ All you have to do is go on Google and put in “Michael Schiavo,” and by now I'm sure you'll see he conspired with Osama Bin Laden in 9/11. It's just amazing to me the propaganda and smear campaign that's been waged against Mr. Schiavo in the courts, outside of the courts, and in

12. *Bush v. Schiavo*, 125 S. Ct. 1086 (2005) (denying Governor Bush's petition for writ of certiorari).

13. Jerome R. Stockfish, *Tampa Bay Online*, *Bush Still Pushing for Schiavo Legislation*, <http://news.tbo.com/news/MGBA00POL6E.html> (Mar. 25, 2005).

14. Christopher J. Gearson, *AARP Bulletin: A Matter of Life and Death: Schiavo Case Spurs More Americans to Living Wills*, <http://www.aarp.org/bulletin/yourhealth/Articles/a2003-12-09-livingwill.html> (Dec. 2003) (stating that approximately twenty-five percent of all Americans had living wills during 2003); *but see* Adam C. Smith, *Voters: Schiavo Law Was Bad Move*, *St. Petersburg Times* 1A (Dec. 7, 2003) (stating that fifty-four percent of Floridians had a living will during 2003).

15. *E.g.* Joni B. Hannigan, *Florida Baptist Witness*, *Schindler and Schiavo Speak Out on CNN, Fox*, <http://www.floridabaptistwitness.com/1733.article> (Oct. 29, 2003) (utilizing selective quotations to justify the Florida Government's intervention in Terri's case and to suggest that Mr. Schiavo's motivations are the result of foul play and profiteering); *Hannity and Combes* (FOX News Aug. 13, 2003) (TV broadcast) (host commentators championing “err[ing] on the side of life” in any right-to-die dispute and voicing support for the Schindlers).

what I'd call Internet rag journals that try to pawn themselves off as journalism.¹⁶

And this campaign against Mr. Schiavo has had a very chilling effect on the rights of Floridians to refuse medical treatment. I happen to know that personally, because ever since *Browning*, I've gotten calls from attorneys and families around the state, sometimes around the country, facing similar questions.

Take a situation in which there may be a family dispute about medical treatment concerning an incapacitated loved one, in which a number of family members are certain of what the patient would have wanted—"I know Dad wouldn't want that feeding tube or that ventilator or other medical treatment"—and there is a family member who says, "I disagree, I don't care, I'm against it."

And if you have that type of family dispute, what sane family member would say, "Well, gee, let's look to the judicial system to resolve that and enforce the patient's rights?" What sane family would subject themselves to the loss of privacy, to the smear and slander campaigns, or to the bankruptcy of family assets to enter into a judicial process that *Schiavo* has, at least up to now, shown is never-ending and really a revolving door of attempted justice?

I mean, most families—most sane families—would say, "No. Sorry, Dad, sorry, Mom, I know you didn't want that feeding tube, I know you didn't want that ventilator, I know you didn't want that medical treatment, but we're not going to destroy our family by going down the road that the poor Schiavo and Schindler families went down through the judicial system."

They say hard cases make bad law. Hard cases also make bad policy. Even though eventually the court orders may be carried out, and Mrs. Schiavo's feeding tube may be removed according to her wishes, this case has had a huge deterrent effect.

16. See American Patriotic Friends Network, *What Is Michael Schiavo Afraid of?* www.apfn.org/apfn/terri_michael.htm (accessed Sept. 10, 2005) (accusing Michael Schiavo of putting Terri into her coma by severely battering her, of being a "[c]riminal [a]ccording to Florida [s]tate [l]aw," and murdering Terri Schiavo); Deanna Swift, *Some See Hand of Devil in Deaths of Schiavo, Pope*, http://swiftreport.blogs.com/news/2005/04/some_see_hand_o.html (Sept. 11, 2005) (representing as a news article that Michael Schiavo is a mythical Christian figure known as the "Antichrist," an individual who will lead humanity into an apocalypse).

One other aspect of the broader implications of this case is the involvement of political, religious, and ideological groups in this case. There are two organizations, the Alliance Defense Fund and the Life Legal Defense Foundation, which are right-to-life, anti-abortion groups that have funneled hundreds of thousands of dollars into this case.¹⁷ And so, that's another component. If you have a family member who disagrees with a removal of life support and they know that such organizations can funnel huge amounts of funds and resources into the opposition in these cases, again, what other family member wants to buck that?

Also, in the larger implications, this case reminded me a little bit of the cultural or religious wars of the 2004 election.¹⁸ It's the sense that—I think the unfortunate sense in these types of debates—God is on one side. God is on my side.

If you look at the Alliance Defense Fund Web site, the purpose of that organization is to represent the “body of Christ” in the legal system of the United States.¹⁹ I don't want to go too far out on a limb here, but I do want to make this point. If you “Google” Mr. Schiavo and take a look at what is said about him, a lot of it is in that vein. You'll hear words like “demonic,” “servant of the devil,” and “anti-Christ” in connection with him and his position.²⁰

There is a whole component in this case that you can say is involved in the cultural wars of religion, morals, and values, which in this case has also been a microcosm. I guess I wanted to take that tack and speak a little bit about that this morning, because I think in many ways the *Schiavo* case is the focal point for

17. The Alliance Defense Fund donated at least \$300,000 to help pay the Schindlers' legal costs. Stephen Nohlgren & Tom Zucco, *Schiavo Case Has Myriad Fund Sources*, St. Petersburg Times 1A (Mar. 28, 2005). The Life Legal Defense Fund has admitted to contributing a six-figure donation. Bill Berkowitz, *Team Schiavo's Deep Pockets*, <http://www.dissidentvoice.org/Mar05/Berkowitz0328.htm> (Mar. 28, 2005).

18. In an extremely close 2004 presidential election, religious cultural values were perceived by some as being the election's deciding factor. Linda Feldman, *How Lines of the Culture War Have Been Redrawn*, <http://www.csmonitor.com/2004/1115/p01s04-ussc.html> (Nov. 15, 2004).

19. Alliance Legal Defense Fund, *ADF: Guiding Principles*, <http://www.alliancedefensefund.org/about/Purpose/principles.aspx> (Sept. 10, 2005).

20. See Swift, *supra* n. 16 (stating that Terri's death was “an anti-christ move” that marks the fall of Western civilization); Tom Willis, *The Christian Science Association for Mid-America, Evolution, Antichrist[,] and the Murder of Terri Schiavo*, <http://www.csama.org/csaneews/nws200505.pdf> (accessed Sept. 11, 2005) (same).

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a retrenchment and a reactionary push against the right to refuse medical treatment. It's a right that Floridians have enjoyed since the *Browning* decision, but it's a right that may be circumscribed through change in the law, through change in the Florida Constitution, or through what I would call an effort of social intimidation, which makes individuals and families much more reluctant to enforce that right and to provide implementation of that right for their family members.

So, I think my twenty minutes are just about up. Again, I want to thank you for inviting me, and I hope these comments perhaps will be thought provoking in ways you did not anticipate.

Thank you.

(Applause)