THE *SCHIAVO* DECISION: EMOTIONAL, BUT LEGALLY CONTROVERSIAL?

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Abstract

Although the decision to withdraw artificial nutrition and hydration from Terri Schiavo attracted an enormous amount of international publicity, from a legal perspective the decision was unsurprising. This article explores this view by comparing the law that governs the withholding or withdrawal of life-sustaining medical treatment in Florida where the Schiavo decision was made, and the equivalent law in Queensland. It concludes that although the legislation is expressed in different terms, the same decision would be reached if a case similar to Terri Schiavo's arose in Queensland. Indeed, it is suggested that this conclusion is also likely to be reached in other common law jurisdictions.

Introduction

The life and death of Terri Schiavo attracted international attention. A decision made by a judge in Florida became a matter of interest worldwide at the highest levels prompting comments from the President of the United States, George W Bush, and the late Pope, John Paul II. Many of those who commented on the case expressed outrage and regarded the decision to withdraw Terri Schiavo's treatment to be an act of unlawful killing.

Certainly, this case was a tragic one, although the same could be said for any case involving a decision to withhold or withdraw life-sustaining medical treatment that results in someone's death. However, was the decision to withdraw Terri Schiavo's artificial nutrition and hydration a controversial one from a legal perspective? Was the Florida legislation that facilitated the withdrawal of that treatment so remarkable? Could the same decision have been lawfully reached in other jurisdictions?

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This article seeks to answer these questions by examining the law in two jurisdictions on different sides of the world: Florida and Queensland. Florida is the law under which the Schiavo case was decided and Queensland was chosen as the jurisdiction that probably has Australia's most progressive legislation on the issue of withholding and withdrawing life-sustaining medical treatment.[1] This article considers how these decisions are made for adults who lack capacity in Florida, and draws on the Schiavo case to illustrate how the law operates. It then considers the legislative framework in Queensland and examines whether the Schiavo case would have been decided in the same way in that jurisdiction. The article concludes by comparing the law in these two jurisdictions, and commenting on whether the Schiavo case is as remarkable as is suggested by the degree of intense public scrutiny that it attracted.

Before reviewing the law in these two jurisdictions, a brief comment about terminology is necessary. Treatment that is needed to sustain or prolong life is commonly referred to as 'life-sustaining medical treatment'. This sort of treatment includes procedures such as cardiopulmonary resuscitation, assisted ventilation and artificial nutrition and hydration. However, different terms for this sort of treatment are used in the Florida and Queensland statutes. The Florida statute refers to a 'life-prolonging procedure', which it defines as:

> 'Life-prolonging procedure' means any medical procedure, treatment, or intervention, including artificially provided sustenance and hydration, which sustains, restores, or supplants a spontaneous vital function. The term does not include the administration of medication or performance of medical procedure, when such medication or procedure is deemed necessary to provide comfort care or to alleviate pain.[2]

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1 The Queensland Law Reform Commission carried out a detailed investigation of guardianship laws during the 1990s. The Commission reviewed the existing laws and carried out an exhaustive consultation process with a wide range of people and groups. Those consulted included people who needed assistance with decision making, carers of those people, peak interest groups, health professionals, relevant government bodies and those holding statutory positions. The legislation that was ultimately enacted in Queensland is based largely on the Commission's recommendations. The relevant Commission publications are *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability,* Report No 49 (1996); *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability,* Draft Report No WP43 (1995); *Assisted and Substituted Decisions: Decision-making for People Who Need Assistance Because of Mental or Intellectual Disability,* Discussion Paper No WP38 (1992); and *Steering Your Own Ship?,* Issues Paper No MP1 (1991).

2 Fla. Stat § 765.101(10) (2005). This section was different in 1998 when the *Schiavo* case first began in that it did not specifically refer to the provision of artificial sustenance and hydration as being a life-prolonging procedure. The section was amended to its present form in 1999.

The Queensland legislation uses the term 'life-sustaining measure', which it also defines:[3]

> **5A Life-sustaining measure**
>
> (1) A 'life-sustaining measure' is health care intended to sustain or prolong life and that supplants or maintains the operation of vital bodily functions that are temporarily or permanently incapable of independent operation.
>
> (2) Without limiting subsection (1), each of the following is a 'life-sustaining measure'
>
> (a) cardiopulmonary resuscitation;
>
> (b) assisted ventilation;
>
> (c) artificial nutrition and hydration.
>
> (3) A blood transfusion is not a 'life-sustaining measure'.

Despite the difference in terminology, it is clear that both definitions include the provision of artificial nutrition and hydration, which was the life-sustaining medical treatment withdrawn from Terri Schiavo and being considered in this article.

Withholding and Withdrawing Life-Prolonging Procedures in Florida

This section of the article examines the law in Florida regarding decisions to withhold or withdraw life-prolonging procedures from an adult who lacks capacity to make such a decision. It will then specifically consider Terri Schiavo's case which concerned withdrawing artificial nutrition and hydration that was being provided to her via a percutaneous endoscopic gastrostomy (PEG) tube.

The Law

In 1992, the Florida legislature enacted a framework that provided for advance decision making about medical treatment.[4] The '[l]egislative findings and intent'[5]

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3 *Powers of Attorney Act 1998* (Qld) (the 'PAA') and *Guardianship and Administration Act 2000* (Qld) (the 'GAA') sch 2 s 5A.

4 Now contained in the 2005 Florida Statutes, ie. Fla. Stat. § 765.101-546 (2005). To the extent that they are relevant to this article, any amendments that have been made to the legislation since enactment will be noted.

5 Fla. Stat § 765.102 (1) (2005).

set out at the beginning of the relevant chapter make clear that the wishes of the adult, if they can be ascertained, are paramount:

> The Legislature finds that every competent adult has the fundamental right of self-determination regarding decisions pertaining to his or her own health, including the right to choose or refuse medical treatment. This right is subject to certain interests of society, such as the protection of human life and the preservation of ethical standards in the medical profession.[6]

2.1.1 Who decides?

Under Florida law, an adult can make the decision as to whether to accept or refuse a life-prolonging procedure in the future through a type of 'advance directive' called a 'living will'. The statute defines an 'advance directive' to mean:[7]

> … a witnessed written document or oral statement in which instructions are given by a principal or in which the principal's desires are expressed concerning any aspect of the principal's health care, and includes, but is not limited to, the designation of a health care surrogate, a living will …

A 'living will' (or 'declaration') is then defined as meaning:[8]

> (a) A witnessed document in writing, voluntarily executed by the principal in accordance with s.765.302; or
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> (b) A witnessed oral statement made by the principal expressing the principal's instructions concerning life-prolonging procedures.

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6 Ibid. This reflects the common law as set out in *In re Guardianship of Browning, 568 So. 2d 4, 9 (Fla. 1990).* (This case is also sometimes known as *State v Herbert.*) In that case, the Florida Supreme Court upheld Browning's right to make choices pertaining to her health, even after she had lost capacity. It held that everyone has the right to sole control of his or her person and, accordingly, Browning had the fundamental right to self-determination, often referred to as a 'right to privacy'. In Florida, the right to privacy is expressly set out in article 1, section 23 of the *Florida Constitution*. This can be contrasted with the *United States Constitution*, where the right to privacy is not express, but rather has been held at common law to be an implied right: *Griswold v Connecticut,* 381 U. S. 479 (1965).

7 Fla. Stat § 765.101(1) (2005). The definition of advance directive also includes an anatomical gift made pursuant to part X of chapter 732 of the statute.

8 Fla. Stat § 765.101(11) (2005).

Alternatively the adult can specifically appoint another person, through a type of advance directive known as a 'health care surrogate designation', to be a 'surrogate', that is, someone who is authorised to make health care decisions in the event that the adult loses capacity.[9] The adult can also include specific instructions about life-prolonging procedures in this document.

If an adult has not completed a living will setting out his or her wishes and has not completed a health care surrogate designation, the legislation then entrusts decision making to a 'proxy'.[10] A proxy is the first in the following list who is readily available, competent and willing to act:[11]

- A judicially appointed guardian or guardian advocate;
- A spouse;
- An adult child;
- A parent;
- An adult sibling (or a majority of them who are reasonably available for consultation if there is more than one);
- An adult relative who has exhibited special care and concern for the adult, has maintained regular contact and is familiar with the adult's activities, health, and religious or moral beliefs;
- A close friend; or
- An appropriately licensed or qualified clinical social worker.

Finally, there is also another potential decision making mechanism in cases where there is no advance directive, where the adult is in a persistent vegetative state[12] and there are no family or friends who are available or willing to act as a proxy.[13] In such a case, a judicially appointed guardian and the adult's attending

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9 'Surrogate' is defined as 'any competent adult expressly designated by a principal to make health care decisions on behalf of the principal upon the principal's incapacity': Fla. Stat § 765.101(16) (2005). 'Incapacity' or 'incompetent' means that the patient is physically or mentally unable to communicate a wilful and knowing health care decision: Fla. Stat 765.101(8) (2005). A determination of capacity is made in accordance with Fla. Stat § 765.204 (2005).

10 Fla. Stat § 765.401 (2005).

11 Fla. Stat § 765.401(1) (a) – (h) (2005).

12 The authors are aware of the terminology that is increasingly preferred to describe such patients: 'post-coma unresponsiveness'. See National Health and Medical Research Council, *Post-Coma Unresponsiveness (Vegetative State): A Clinical Framework for Diagnosis: An Information Paper (2003)* [v-vi] <http://www.nhmrc.gov.au/publications/_files/hpr23.pdf> at 19 October 2005. However, for the purposes of this article, the terminology used in the legislation in both Florida and Queensland will be used: 'persistent vegetative state'.

13 Fla. Stat § 765.404 (2005).

physician, in consultation with a medical ethics committee, is entitled to decide to withdraw or withhold life-prolonging procedures.[14]

2.1.2 Criteria for decision making

The conditions that must be satisfied before a life-prolonging procedure can be withheld or withdrawn depend upon who the decision maker is.

- **Decision made by adult**

If the adult completed a living will that stated that he or she did not want to receive a life-prolonging procedure, then that direction must be followed if certain conditions are met.[15] The first condition is that the adult must not have a reasonable medical probability of recovering capacity.[16] He or she must also be suffering from either a 'terminal condition', an 'end-stage condition' or be in a 'persistent vegetative state'.[17] The assessment of the treating physician that the patient is in one of these conditions must also be confirmed by a second physician.[18] Finally, any limitations expressed orally or in a written declaration must have been considered and satisfied.[19] Where there is a dispute about the

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14 Fla. Stat § 765.404(2) (2005).

15 Fla. Stat § 765.304(1) (2005).

16 Fla. Stat § 765.304(2)(a) (2005).

17 Fla. Stat § 765.304(2)(b) (2005). Each of these three terms is defined in the legislation:

'terminal condition' means 'a condition caused by injury, disease, or illness from which there is no reasonable medical probability of recovery and which, without treatment, can be expected to cause death': § 765.304(17);

'end-stage condition' means 'an irreversible condition that is caused by injury, disease, or illness which has resulted in progressively severe and permanent deterioration, and which, to a reasonable degree of medical probability, treatment of the condition would be ineffective': § 765.101(4);

'persistent vegetative state' means 'a permanent and irreversible condition of unconsciousness in which there is:

(a) The absence of voluntary action or cognitive behaviour of any kind; and

(b) An inability to communicate or interact purposefully with the environment': § 765.101(12).

18 Fla. Stat § 765.306 (2005).

19 Fla. Stat § 765.304(2)(c) (2005).

expressed view of the adult, a health care provider must initially refrain from withdrawing treatment, and allow family members to seek a legal review.[20]

Decision made by Surrogate

In deciding whether to withhold or withdraw life-prolonging procedures, a health care surrogate must first attempt to apply what is commonly referred to as the 'substituted judgment test'. This is a subjective test and requires the surrogate to make a decision based on what he or she believes that the adult would have wanted had he or she been competent.[21] This test derives from the adult's constitutional right to privacy, in that if he or she had capacity and wanted treatment withdrawn, then his or her wishes would be carried out.[22]

If the surrogate has nothing to indicate what the adult would have wanted, he or she must then make a decision based on the 'best interests' test.[23] In contrast to the substituted judgment test, best interests is an objective test and seeks to ascertain what is the best decision that can be made for the adult, in all the circumstances.[24]

There is, however, a range of limits on a surrogate's decision making power. As was the case for living wills, the adult must not have a reasonable medical probability of recovering capacity,[25] and must also have either an end-stage

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20 Fla. Stat § 765.304(1) (2005).

21 Fla. Stat § 765.205(1)(b) (2005).

22 In re Guardianship of Browning, 568 So. 2d 4, 9 (Fla. 1990).

23 Fla. Stat § 765.205(1)(b) (2005).

24 For a discussion of the best interests test, see John A. Robertson, '*Cruzan* and the constitutional status of non treatment decisions for incompetent patients' (1991) 25 *Georgia Law Review* 1139. The Supreme Court of Washington in *Re Guardianship of Grant,* 747 P.2d 445 (1987) indicated that the following non exclusive list of factors was relevant in making this determination: evidence about the patient's present level of physical, sensory, emotional, and cognitive functioning; the degree of physical pain resulting from the medical condition, treatment, and termination of the treatment, respectively; the degree of humiliation, dependence, and loss of dignity probably resulting from the condition and treatment; the life expectancy and prognosis for recovery with and without treatment; the various options; and the risks, side effects, and benefits of each of those options.

25 Fla. Stat § 765.305(2)(a) (2005). This reflects the common law as set out in *In re Guardianship of Browning, 568 So. 2d 4, 9 (Fla. 1990).*

condition, a terminal illness, or be in a persistent vegetative state.[26] Again, the requirement of independent certification of the adult's medical condition applies.[27]

There are also two additional constraints on a surrogate's decision making power that do not apply to living wills. The first is that the adult patient has not excluded the health care surrogate from making decisions to withhold or withdraw life-prolonging procedures, as it is possible to appoint a surrogate without such power.[28] The second is where the adult is pregnant and the foetus has not yet reached viability, as a decision to withhold or withdraw life-prolonging procedures requires the adult (or the court) to have given that authority expressly.[29]

Decision made by Proxy

Where the adult had not completed a health care surrogate designation, decisions on their behalf can be made by a proxy. Again, the proxy must first apply the substituted judgment test,[30] and then fall back on the best interests test in those cases where the wishes of the adult cannot be ascertained.[31] The law for proxies differs from that which governs health care surrogates, however, because stronger evidence is required before a decision to withhold or withdraw life-prolonging procedures can be made. A proxy's decision must be supported by 'clear and convincing evidence' that the decision is what the adult would have chosen. If

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26 Fla. Stat § 765.305(2)(b) (2005).

27 Fla. Stat § 765.306 (2005).

28 Fla. Stat § 765.305(1) (2005).

29 Fla. Stat § 765.113(2) (2005). 'Viability' means that stage of foetal development when the life of the unborn child may with a reasonable degree of medical probability be continued indefinitely outside the womb. Notwithstanding the provisions of this subsection, the woman's life and health shall constitute an overriding and superior consideration to the concern for the life and health of the foetus when such concerns are in conflict: Fla. Stat § 390.0111(4) (2005).

30 Fla. Stat. § 765.401(2) (2005). The legislation reflects the common law position as set out in *In re Guardianship of Browning, 568 So. 2d 4, 13 (Fla. 1990)*.

31 § 765.401(2) (2005). At the time of the initial application to withdraw the artificial nutrition and hydration by Michael Schiavo, this section did not provide for a best interests test. Instead § 765.401(2) (1998) said: 'Any health care decision made under this part must be based on the proxy's informed consent and on the decision the proxy reasonably believes the patient would have made in the circumstances.' The law at that time is set out in Richard L Pearse Jr, *Report of Guardian Ad Litem*, 29 December 1998, 10.

<http://www.miami.edu/ethics/schiavo/122998%20Schiavo%20Richard%20Pearse%20GAL%20report.pdf> at 19 October 2005. The provision was amended on 1 July 2001 to include a best interests test.

there is nothing to indicate what the adult's wishes would have been, the proxy must make a decision which accords with the adult's best interests.[32] If there is any ambiguity, the court must presume that the adult would have chosen 'to defend life in exercising his or her right to privacy.'[33]
As was the case for health care surrogates and decisions made under living wills, the adult must also not have a reasonable medical probability of recovering capacity, and there must be independent medical certification[34] that he or she has an end-stage condition, is in a persistent vegetative state, or has a terminal illness.[35] Similarly, court authorisation is required if the adult is pregnant and the foetus has not yet reached viability.[36]

Judicially Appointed Guardian and Others

In limited circumstances, a judicially appointed guardian and the adult's attending physician, in consultation with a medical ethics committee, may decide to withdraw or withhold life-sustaining treatment.[37] Those circumstances are:

- The adult is in a persistent vegetative state (as determined by currently accepted medical standards);[38]
- The adult's condition is permanent and there is no reasonable medical probability for recovery;[39]
- The adult does not have an advance directive and there is no evidence of his or her wishes;[40]
- A reasonably diligent inquiry reveals no family or friends who are willing and able to act as a proxy;[41] and
- Such a course of action is in the adult's best interests.[42]

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32 Fla. Stat § 765.401(3) (2005).

33 *Schindler v Schiavo,* 780 So. 2d 176, 179 (Fla. 2d DCA 2001) quoting *In re Guardianship of Browning* 543 So. 2d 258, 273 (Fla 2d DCA 1989).

34 Fla. Stat § 765.306 (2005).

35 Fla. Stat § 765.305 (2005).

36 Fla. Stat § 765.113(2) (2005).

37 Fla. Stat § 765.404(2) (2005).

38 Fla. Stat § 765.404 (2005).

39 Fla. Stat § 765.404(2) (2005).

40 Fla. Stat § 765.404 (2005).

41 Ibid.

42 Fla. Stat § 765.404(2) (2005).

2.1.3 Appeal avenues

An adult's family, the health care facility, the attending physician, or any other interested person who is directly affected by a decision to withhold or withdraw life-prolonging procedures can seek an expedited judicial review of a decision.[43] The grounds upon which review can be sought include:[44]

- The decision is not in accord with the adult's known wishes or the provisions of the legislation;
- The surrogate or proxy was improperly designated or appointed, has failed to discharge duties, is unable to discharge duties due to incapacity or illness, or has abused his or her powers; and
- The adult now has sufficient capacity to make his or her own health care decisions.

In addition, a person who objects to such a decision being made is entitled to have recourse to the usual appellate avenues.[45]

The *Schiavo* Case

The *Schiavo* case was complex and involved interfamilial disputes and multiple court hearings. It also led to an amendment of the statute that governed withholding and withdrawing life-prolonging procedures, as well as the enactment of a statute specifically designed to overturn a court decision allowing Terri Schiavo's artificial nutrition and hydration to be withdrawn. The case also resulted in constitutional challenges to these enactments. It is beyond the scope of this article to review all of the legal nuances that arose in the history of this litigation. Instead, the background facts as found to exist in judicial proceedings will be outlined, as well as the relevant Florida law and how it was ultimately applied in the Schiavo context. Where relevant, the matters that were in dispute between Terri's husband and her parents and how those disputes were resolved will be considered. Finally, there will be a brief consideration of the nature and impact of the legislative intervention that occurred in this dispute.

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43 Fla. Stat § 765.105 (2005).

44 Ibid.

45 In *Schiavo* itself, for example, Terri Schiavo's parents appealed against the initial decision of the Guardianship Court to both Florida's Second District Court of Appeal and the Florida Supreme Court. These appeals are discussed in more detail later in the article.

Background

On 25 February 1990, Terri Schiavo, aged 27, suffered a cardiac arrest as a result of a potassium imbalance and, although resuscitated by paramedics, lapsed into a comatose state. She eventually emerged from the coma. However, she never regained consciousness. Terri suffered anoxia (loss of oxygen to the brain) which resulted in severe brain damage. A PEG tube was inserted to administer artificial nutrition and hydration, as Terri lacked the capacity to swallow on her own.

Terri was married to Michael Schiavo at the time of the incident. On 18 June 1990, Michael Schiavo successfully applied to be appointed as his incapacitated wife's legal guardian to administer her affairs, and her parents, Mr and Mrs Schindler, did not object.[46] Until early in 1993, Michael and Mr and Mrs Schindler largely agreed on the course of treatment being provided to Terri. From this time onwards, however, the parties were in dispute to a significant degree in a range of issues regarding Terri's care. First, there was disagreement about who should be responsible for making decisions about Terri's health care. Secondly, the parties were in conflict about the treatment that Terri would have wanted had she been able to make the decision. Thirdly, the parties' views were polarised as to whether Terri was in a persistent vegetative state. The final and pivotal issue was whether Terri's artificial hydration and nutrition should be withdrawn.

Who decides?

Terri Schiavo had not prepared a living will or a health care surrogate designation. Under the Florida legislation, Terri's husband, as her judicially appointed guardian, was recognised as her proxy.[47] This enabled him to make health care decisions on Terri's behalf.

Although Michael Schiavo had power, as his wife's legal guardian, to consent to such withdrawal, he placed the decision in the hands of the Guardianship Court due to the high level of conflict between himself and his wife's parents about the decision.[48] In May 1998, he applied to the Guardianship Court as Terri's legal guardian, seeking an order to terminate life-prolonging procedures by withdrawing her artificial nutrition and hydration.

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46 In July 1993, however, the Schindlers made an unsuccessful application to the Guardianship Court to remove Michael Schiavo as Terri's legal guardian.

47 Had he not been her legal guardian, he would also have been first in line to be proxy, as Terri's spouse: Fla. Stat § 765.401(1) (2000) now Fla. Stat § 765.401(1) (2005).

48 *In re Guardianship of Schiavo,* 780 So. 2d. 176 (Fla. 2nd DCA 2001).

Criteria for Decision Making

To succeed in his application to withdraw Terri's artificial nutrition and hydration, Michael Schiavo had to satisfy three conditions. The first was that, applying the substituted judgment test, there was clear and convincing evidence that Terri would have wanted the treatment to be withdrawn.[49] The best interests test was not part of the applicable Florida law at the time the case was heard.[50]

To determine whether there was clear and convincing evidence, the court examined the reliability of claims that Terri had made oral statements about her wishes. The court heard evidence from Michael Schiavo, his brother, his sister-in-law and the Schindlers as to what Terri's wishes would have been. Michael Schiavo asserted that prior to her cardiac arrest, Terri had on several occasions expressed the view that she would not want to be kept alive in such circumstances.[51] As the only evidence before the court was oral expressions by Terri of her wishes, the court stated that the accuracy and reliability of this oral evidence could be challenged.[52] The Schindlers attempted to challenge these assertions. However, the court remained satisfied that Terri Schiavo had made 'reliable oral declarations' which were consistent with the action that her guardian, Michael Schiavo, wanted to take.[53] This was sufficient to constitute 'clear and convincing evidence' of Terri's wishes.

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49 Fla. Stat § 765.401(3) (2000).

50 Initially, when the application was filed there was no reference to 'best interests' in the legislation. An amendment was made in 2000 to Fla. Stat § 765.404 (2000) so that the best interests test was relevant for discontinuing life-prolonging procedures. However, this test only applied in cases where there was a person in a persistent vegetative state who had no friend or family member to be appointed as proxy. The current best interests test was included in 1 July 2001: Fla. Stat § 765.401(3) (2001).

51 Michael Schiavo and his brother and sister-in-law gave evidence as to oral statements Terri Schiavo had made while she was still alive, to the effect that she would not want to be kept alive by artificial life support and would not want to be a burden on anyone.

52 *In re Guardianship of Schiavo,* 780 So. 2d. 176 (Fla. 2nd DCA 2001).

53 It is interesting to note that the court had previously appointed Richard Pearse, a lawyer, as guardian ad litem to review the request to withdraw treatment. Pearse was not satisfied that the evidence as to oral statements Terri had made before her cardiac arrest were clear and convincing. Further, his report suggested that Michael Schiavo's change of heart in relation to his wife's medical treatment occurred only after he received litigation settlement monies. The report recommended that Michael's application to withdraw artificial nutrition and hydration be denied and that a guardian ad litem be appointed to represent Terri Schiavo's interests in any future proceedings: Richard L. Pearse Jr, above n 31. However, the Court dismissed

The second and third conditions were that Terri must not have had a reasonable medical probability of recovering capacity, and that she was in a persistent vegetative state.[54] In this case, the Court was satisfied that that Terri was in a persistent vegetative state and so accordingly, on 11 February 2000, Judge Greer of the Guardianship Court made an order for the withdrawal of Terri Schiavo's PEG tube.

Legislative Intervention

One of the notable features of the *Schiavo* case was the extent of judicial review sought by the Schindlers.[55] Judge Greer first ordered the withdrawal of the PEG tube on 11 February 2000. However, the numerous appeals, stays and reviews that were instituted, effectively postponed Terri Schiavo's death for more than five years.

Some of this litigation was prompted by intervention in the *Schiavo* case by the legislature. On 21 October 2003, shortly after one of the times when Terri Schiavo's PEG tube was withdrawn, the Florida State legislature intervened by passing the *Starvation and Dehydration of Persons with Disabilities Prevention Act.* This legislation declared that the Governor of Florida could issue a one-time stay of the court order removing the PEG tube. It also authorised the Governor to appoint a guardian ad litem to review the matter and report back to both the executive and the chief judge of the relevant Florida court.[56]

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the guardian ad litem's report on the basis that Pearse held personal views on the withdrawal of life-prolonging procedures that had not been disclosed to the court at the time of his appointment.

54 Fla. Stat § 765.305 (2000).

55 The details of the many legal proceedings which ensued have been comprehensively covered in other writings: see for example, O Carter Snead, 'Dynamic Complementarity: Terri's Law and Separation of Powers Principles in the End-of-Life Context' (2005) *Florida Law Review* 53 and Danuta Mendelson and Michael Ashby, 'The medical provision of hydration and nutrition: Two very different outcomes in Victoria and Florida' (2004) 11 *Journal of Law and Medicine* 282.

56 The law authorised the Governor to issue a one-time stay to prevent the withholding of artificial nutrition and hydration from a patient if, as of October 15, 2003: (a) the 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. Under the law, the Governor could lift the stay at any time. The Act included a sunset provision, providing it would expire fifteen days from the date of its enactment. See the discussion in O Carter Snead, above n 55.

Accordingly, Governor Jeb Bush issued an executive order on 21 October 2003 that Terri's health care provider reinstate her PEG tube.[57] This legislation, known as 'Terri's Law', was overturned on 23 September 2004 by the Florida Supreme Court on the basis that it was unconstitutional.[58] The Court held that it was a violation of the separation of powers as the legislature had encroached on the judicial decision making function of the courts.[59] Further, the Act had delegated legislative power to the Governor, being a member of the Executive.[60] The court also held that the legislation purported to apply to a limited class of people, in effect, only to Terri Schiavo, which was also unconstitutional.[61]

After the PEG tube was again withdrawn on 18 March 2005, the dispute moved into the legislative realm for a second time, with the United States Congress also seeking to intervene. It passed legislation purporting to divest certain Federal Courts with jurisdiction over the issues in the *Schiavo* case.[62] This Act was again held to be unconstitutional by the United States Court of Appeals for the Eleventh Circuit as a breach of the separation of powers. The court held that the legislature was encroaching on the role of the judiciary, as each branch of government (the executive, the legislature and the judiciary) should be independent of the others.[63] The Schindlers were then unable to pursue their case further in the Federal Courts.

Terri's Death

Terri Schiavo finally died on 31 March 2005. Judge Greer of the Guardianship Court subsequently ordered that Michael Schiavo administer his wife's estate. A post mortem was conducted and the autopsy report concluded that although Terri's condition was 'consistent' with her being in persistent vegetative state, a post mortem examination cannot prove or disprove such a diagnosis because that

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57 Florida, 105th Regular Session; Executive Order 201 (2003 FL EO 201), which directed those caring for Terri to immediately provide nutrition and hydration to her by means of gastronomy tube, or by any other method determined appropriate.

58 *Bush v Schiavo*, 885 So. 2d 321 (Fla. 2004).

59 Ibid.

60 Ibid.

61 This is a breach of the requirement of formal legality under the rule of law, in particular, 'generality' which requires that laws must be addressed to classes or groups of people, not to a particular person or specific occasion as was the case with 'Terri's Law'. For a discussion of formal legality, see Bottomley and Parker, *Law in Context* (2nd ed. 1997) Federation Press, 49.

62 Pub. L. 109-3.

63 *Schiavo v Schiavo*, No 05-11628, (11th Cir. 2005).

can only be ascertained through a clinical examination of a living patient.[64] The report did conclude, however, that Terri Schiavo had 'suffered a severe anoxic brain injury' and that her brain weight was approximately half of what would be expected.[65]

Withholding and Withdrawing Life-Sustaining Measures in Queensland

Having outlined the legal framework that exists in Florida, and how the *Schiavo* case was decided within that framework, this section of the article considers the equivalent issues in the Queensland context.

The Law[66]

In Queensland, both the common law and legislation may be relevant when decisions are made about withholding and withdrawing life-sustaining measures from adults who lack capacity to make such a decision for themselves. The two pieces of legislation that apply in this area, the *Powers of Attorney Act 1998* (Qld) (the *'PAA'*) and the *Guardianship and Administration Act 2000* (Qld) (the *'GAA'*), create a legal framework for this kind of decision making. However, these statutes expressly state that the inherent jurisdiction of the Queensland Supreme Court is not affected by their enactment.[67]

This means that if guidance or a determination is needed regarding a decision to withhold or withdraw life-sustaining measures, a person has two options. First, he or she may pursue the matter through the Guardianship and Administration Tribunal (the 'Tribunal') which is established by the *GAA*.[68] Alternatively, a person may seek resolution of the matter from the Supreme Court relying on its inherent jurisdiction and, in particular, its *parens patriae* jurisdiction. To date, only the Tribunal has considered applications about the withholding or withdrawing of life-sustaining measures from adults, so this article will focus on this aspect of the Queensland law.

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64 Jon R Thogmartin, *Report of Autopsy: Theresa Schiavo*, 13 June 2005 [8] <http://www.miami.edu/ethics/schiavo/061505-autopsy.pdf> at 19 October 2005.

65 Ibid [8]-[9].

66 For a detailed discussion of the Queensland law in relation to withholding and withdrawing life-sustaining measures, see Ben White and Lindy Willmott *Rethinking Life-Sustaining Measures: Questions for Queensland* (2005) <http://www.law.qut.edu.au/research/lifesustain/> at 19 October 2005.

67 *PAA* s 109, *GAA* s 240.

68 *GAA* s 81.

As was the case under Florida law, there are two matters that must be considered before such a decision can be made:

- who can make a decision to withhold or withdraw this treatment; and
- the criteria that must be considered in making the decision.

Who Decides?

If an adult lacks the capacity needed to make a decision about whether to withhold or withdraw a life-sustaining measure, then some other decision making mechanism is required. The legislation regards this kind of decision as being one about 'health care',[69] and sets out a list of potential decision making mechanisms.[70] The decision making mechanism that operates will be the first of following that applies to a particular fact situation.

The first is an advance health directive completed by the adult. The *PAA* facilitates an adult giving a direction in an advanced health directive about particular treatment that the adult does not wish to receive at a later date when the adult is no longer able to decide for him- or herself.[71] Such a directive may include instructions to refuse a life-sustaining measure.[72]

The second potential decision making mechanism is a guardian appointed by the Tribunal to make a decision,[73] or an order of the Tribunal itself.[74]

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69 *PAA* and *GAA* sch 2 s 5(2). Pursuant to that provision, 'health care', of an adult, includes withholding or withdrawal of a life-sustaining measure for the adult if the commencement or continuation of the measure for the adult would be inconsistent with good medical practice.

70 *GAA* s 66.

71 *PAA* pt 3. Note that 'advance health directive' as used in the *PAA* and *GAA* is a reference to a directive completed in accordance with the formal requirements of the *PAA*. It does not include a reference to a common law advance directive. See further in this regard Ben White and Lindy Willmott, 'Will You Do As I Ask? Recognition of Instructions about Health Care under Queensland's Legislative Regime' (2004) 4 *Queensland University of Technology Law and Justice Journal* 77.

72 *PAA* s35(2)(b).

73 The Tribunal has exclusive jurisdiction to appoint a guardian to make decisions about 'personal' matters on behalf of the adult: *GAA* s 12. Such decisions include decisions about 'health care'. 'Health care' includes a decision to withhold or withdraw a life-sustaining measure: see above n 69.

74 Since its inception, the Tribunal has been involved in a number of decisions regarding the withholding and withdrawing of life-sustaining measures including *Re MC* [2003] QGAAT 13, *Re TM* [2002] QGAAT 1 and *Re RWG* [2000] QGAAT 2.

The third potential decision making mechanism is an attorney appointed under an enduring power of attorney[75] or under an advance health directive.[76]

The fourth and final mechanism, if none of the previous ones apply, is that the decision is made by a 'statutory health attorney'. This is another term that is defined in the *PAA*[77] and again a priority list is used with the statutory health attorney being the first person in the list who is 'readily available and culturally appropriate' to make the decision:

- The first possible statutory health attorney is the spouse of the adult, provided that the relationship is close and continuing. It is important to note that 'spouse' will include de facto partners (both heterosexual and same sex partnerships).[78]

- If such a spouse is not available, the next potential statutory health attorney is the adult's carer, provided that the carer is eighteen years of age or over and is not a paid carer of the adult. The definition of a 'paid carer' is important because it specifically excludes those who receive a State or Commonwealth carer payment or other similar benefit, or who are funded from compensation awarded due to the adult with impaired capacity being injured through negligence.[79] Accordingly, a person providing care in those circumstances is not regarded as a paid carer and so is still eligible to be the adult's statutory health attorney.

- If the adult does not have a carer, the third option is a close friend[80] or relation[81] of the adult who, again, must be eighteen or over and must also not be a paid carer. If more than one person falls within this description, then any one of them may make the decision.

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75 The *PAA* empowers an adult to appoint an attorney to make decisions about personal matters (which includes health matters) should the adult later lose his or her capacity to make the decision: *PAA* s 32.

76 An adult can appoint an attorney under an advance health directive to make decisions about health matters: *PAA* s 35(1)(c).

77 *PAA* s 63.

78 *Acts Interpretation Act 1954* (Qld), s 32DA.

79 *PAA* sch 3, *GAA* sch 4.

80 A 'close friend' of a person, means 'another person who has a close personal relationship with the first person and a personal interest in the first person's welfare': *PAA* sch 3, *GAA* sch 4.

81 A 'relation' is defined quite widely and includes, for example, a spouse, a person related by blood, marriage, adoption or other relationships, a dependant, or a member of the same household: *PAA* sch 3.

- A final option, if an adult has none of these other people available, is that the Adult Guardian will act as the statutory health attorney. The Adult Guardian is a position established by the statutory regime,[82] and that person is charged with the responsibility of protecting the rights and interests of adults with impaired capacity.[83] The rationale in making the Adult Guardian a decision maker of last resort is that there will always be someone who can make this decision for an adult who lacks capacity.

The legislation is clear in setting out how or from whom consent is to be obtained. As has been discussed, it sets out a hierarchy of decision making mechanisms and, for the last of these mechanisms, the statutory health attorney, it sets out a further prioritised list of people who are empowered to act in this role. However, despite this comprehensive approach, problems can arise.

A classic situation is where there are two or more eligible statutory health attorneys who disagree about how an adult should be treated. This might occur, for example, if there is more than one 'relation' who would qualify as a statutory health attorney for the adult. In a situation such as this, the Adult Guardian may become involved, first through mediation.[84] If attempts made to resolve the dispute in this way are unsuccessful, the Adult Guardian is empowered to make the decision on behalf of the adult.[85] Intervention by the Adult Guardian may also be necessary if a guardian or attorney is behaving in a way that is inconsistent with the principles set out in the legislation. If a decision is being made (or not made) for an adult in a manner that is contrary to the health care principle, the Adult Guardian is entitled to intervene and exercise power for the health matter.[86] These kinds of problems may also be resolved before the Tribunal, which is empowered to hear applications seeking a declaration, order, direction, recommendation or advice in relation to a matter involving an adult under the *PAA* and the *GAA*.[87]

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82 The position was originally established by the *PAA* ch 7 in 1998. However, this chapter was later repealed and the provisions relevant to the Adult Guardian now appear in the *GAA* ch 8.

83 *GAA* s 174.

84 *GAA* s 174(2)(c).

85 *GAA* s 42.

86 *GAA* s 43.

87 *GAA* s 115. The Tribunal also has the specific power to consent to the withholding or withdrawal of a life-sustaining measure: *GAA* s 82(1)(f).

Criteria for Decision Making

The legislation guides decision making for all kinds of medical treatment including decisions to withhold or withdraw life-sustaining measures. The law treats decisions made in advance health directives (where the decision is made by the adult through this document) differently from decisions made by another person on behalf of the adult. The latter category is referred to generically in this article as a 'substituted decision maker', regardless of whether the decision maker is someone close to the adult, the Adult Guardian or the Tribunal. The law that applies to these two different decision making streams will be considered separately.

Decision made by Adult

Advance health directives are legally binding documents and must be followed by health professionals who provide care to the adult.[88] A failure to comply with a lawful request in a directive can result in both criminal and civil actions being brought against the relevant health provider for assault.[89] There are, however, particular conditions that must be met before a direction to withhold or withdraw a life-sustaining measure can operate.

The *PAA* provides that such a direction cannot operate unless two or three conditions are met, depending on the circumstances.[90] The first condition is that the adult's health must be sufficiently poor, and the legislation requires the adult to fall within one of four categories. The adult must:

- have a terminal illness (or a condition that is incurable or irreversible) from which the adult is expected to die within a year;
- be in a persistent vegetative state;

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88 To be binding, an advance health directive must satisfy the formal requirements for completion as set out in the *PAA*: ch 3 pt 4. An advance health directive under the Queensland legislation therefore does not include a common law advance directive. See above n 71.

89 The *GAA* creates an offence for health care to be provided contrary to the consent regime established by the legislation: s 79. The civil consequences of providing health care contrary to an adult's direction in an advanced health directive are not affected by the *PAA* or *GAA.* Note, however, the defences that are available under s 103 *PAA* to a health provider who does not comply with a direction in an advance health directive. The appropriateness of these defences are considered in Ben White and Lindy Willmott *Rethinking Life-Sustaining Measures: Questions for Queensland*, above n 66, [45]-[47].

90 *PAA* s 36(2).

- be permanently unconscious; or
- have an illness or injury of such severity that there is no reasonable prospect that the adult will recover to an extent that life-sustaining measures will not be needed.[91]

The second condition is that the advance health directive can only apply if the adult has no reasonable prospect of regaining the capacity needed to make decisions about his or her health.[92]

The third condition applies only if the direction in an advance health directive is that the adult not receive artificial nutrition and hydration. In these circumstances, the directive will only operate if the commencement or continuation of this treatment would be inconsistent with good medical practice.

If these two conditions (or three if it relates to artificial nutrition and hydration) are satisfied, the advance health directive is legally binding and must be followed. By contrast to when consent is given by another, there is no requirement to consider tests such as the best interests of the adult or whether the treatment is the option that is the least restrictive of his or her rights.[93] The adult has made the decision for him- or herself through an advance health directive, and so the legislation imposes fewer limitations on the extent to which that decision to withhold or withdraw a life-sustaining measure can operate.

Decision made by Substitute Decision Maker

The law is more complex if an advance health directive is not being relied upon, and instead consent is being given by a substitute decision maker. The *PAA* and the *GAA* do provide guidance, however, for the people who are making these decisions on behalf of another. Schedule 1 in both Acts sets out a number of principles that must inform these sorts of decisions. They are separated into the 'general principles' and the 'health care principle'. The general principles apply to all decisions made under the legislation, of which withholding and withdrawing life-sustaining measures is just one, and so are necessarily broad. The health care principle is to be used for health related decisions only, which obviously includes the sorts of decisions being discussed.

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91 *PAA* s 36(2)(a).

92 *PAA* s 36(2)(c).

93 If consent is given by a substitute decision maker, regard must be had to the principles set out in the health care principle: *PAA* and *GAA* sch 1 Health Care Principle 12. This and the General Principles are considered in more detail in the next section.

The principles that are likely to be particularly relevant to a decision to withhold or withdraw life-sustaining measures include those that require consideration of:

- the adult's views and wishes, if they are known;[94]
- whether the decision is 'least restrictive of the adult's rights';[95]
- what is in the adult's best interests;[96] and
- the adult's dignity.[97]

The decisions made, guided by these principles, will depend heavily on the circumstances of each case, and particularly on the condition of the patient. In a recent decision of the Guardianship and Administration Tribunal, *Re MC*,[98] the Tribunal referred to all of these principles but seemed to place considerable emphasis on the invasive nature of the treatment (or whether the treatment would be least restrictive of Mrs C's rights), a consideration of what Mrs C would have wanted and what would be in Mrs C's best interests.[99]

Even if a substitute decision maker, after considering these principles and how they apply to the adult, decided to withhold or withdraw the life-sustaining measure, the legislation contains one further safeguard that must be considered before that decision can be made. The consent to withhold or withdraw the life-sustaining measure given on behalf of the adult cannot operate unless the adult's health provider reasonably considers that the commencement or continuation of the measure is inconsistent with good medical practice.[100] 'Good medical practice' is defined in the legislation by reference to recognised medical standards, practices and procedures of the medical profession in Australia, as well as recognised ethical standards.[101] In other words, the legislation prohibits the health provider from acting on a consent to withhold or withdraw a life-sustaining measure unless this threshold is satisfied.

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94 *PAA* and *GAA* sch 1 General Principle 7.

95 *PAA* and *GAA* sch 1 Health Care Principle 12(1)(a).

96 *PAA* and *GAA* sch 1 Health Care Principle 12(1)(b)(ii).

97 *PAA* and *GAA* sch 1 General Principle 3.

98 [2003] QGAAT 13.

99 After considering these principles at length, and applying them to the facts of thecase, the Tribunal consented to the withholding of artificial nutrition and hydration to Mrs C.

100 *GAA* s 66A.

101 *PAA* and *GAA* sch 2 s 5B.

Appeal Avenues

If a decision to withdraw or withhold a life-sustaining measure is made by a guardian or attorney, another 'interested person' may still apply to the Tribunal asking it to consider the matter.[102] An 'interested person' is defined to mean a person who has a sufficient and continuing interest in the adult.[103] Once the matter is before the Tribunal, it can assess the situation for itself and make an order in relation to whether the treatment should be withheld or withdrawn.[104]

Appeal avenues also lie from a decision of the Tribunal. A person can appeal to the Supreme Court against a Tribunal decision as of right if the appeal is on a matter of law.[105] If the appeal is about a question of fact, then leave must first be obtained from the Supreme Court.[106]

The usual appeal structure would apply in relation to decisions of the Supreme Court.

Schiavo in Queensland

If a situation similar to that which arose in Terri Schiavo's case occurred in Queensland, there are two potential legal pathways that might be relevant. As was mentioned earlier, one is to apply to the Supreme Court seeking resolution of the matter under its *parens patriae* jurisdiction.[107] The other, which is considered in detail here, is the statutory regime established by the *PAA* and *GAA*. Under this regime, decisions about withholding and withdrawing life-sustaining measures are likely to be considered and resolved by the Tribunal.

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102 *GAA* s 115.

103 *PAA* sch 3, *GAA* sch 4. The legislation confers on the Tribunal the power to decide who is an interested person: *GAA* s 126.

104 GAA s 82(1)(f).

105 *GAA* s 164. Only an 'eligible person' as defined in s 164(3) can appeal against a Tribunal decision.

106 *GAA* s 164(2).

107 See, for example, *State of Queensland v Nolan* [2002] 1 Qd R 454 where the Supreme Court, in the exercise of its *parens patriae* jurisdiction, declared that an operation to separate conjoined twins to be lawful, even though it would result in the death of one of the twins.

Who Decides?

Terri Schiavo had not filled in an advanced health directive, nor had she completed an enduring power of attorney appointing someone to act as her attorney to make health care decisions should she lose capacity. In such a case, there are a number of ways in which a decision could be made on her behalf.

First, the person designated by the *PAA* to be Terri's statutory health attorney will have the power to decide whether the artificial nutrition and hydration should be withdrawn. The first choice on the list that is set out in the legislation is the spouse of the adult, provided that the relationship is close and continuing. Michael Schiavo was Terri's spouse, and the evidence produced at the various trials suggested that the relationship remained close and continuing. Nevertheless, questions were raised about the state of their relationship given that he had a girlfriend with whom he had a child. If it were shown that the relationship was not close and continuing, then the next statutory health attorney on the list is a close friend or relative. This would include Terri's parents. Ultimately then, the quality and type of relationship that Michael and Terri had at the time that the health decision needed to be made would be critical to establishing who was the statutory health attorney.

Although it is likely that Michael would have been the statutory health attorney, and so entitled to make the decision, the legislation provides some alternative avenues that could have been pursued by the Schindlers. If the Schindlers believed that Michael was making a health care decision (namely the withdrawal of treatment) that was not in Terri's best interests, they could notify the Adult Guardian. The legislation confers a power on the Adult Guardian to exercise power for a health matter if he or she considers that the attorney (here, Michael) is making a decision that is contrary to the health care principle.[108]

Alternatively, the Schindlers could choose to bring an application before the Tribunal. If this matter were brought before the Tribunal, it would have a range of options open to it. The Tribunal could appoint a guardian to make health decisions on behalf of Terri. If satisfied that an appointment was needed, the Tribunal could appoint the Schindlers, Michael or the Adult Guardian.[109] Another

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108 *GAA* s 43. Under Health Care Principle 12, a power should only be exercised if it is necessary and appropriate to maintain or promote the adult's health or wellbeing, or if it is, in all the circumstances, in the adult's best interests.

109 *GAA* s 12. However, such an appointment could only be made if there was a need for an appointment. As Michael was already the statutory health attorney with the necessary powers to make decisions about health care, the Tribunal would need to be satisfied that, for some reason, it would be more appropriate for the Tribunal appointed guardian to make such decisions.

option would be for the Tribunal to make the decision itself about whether to withhold or withdraw the artificial nutrition and hydration. There have been a number of decisions in which the Tribunal was called upon to make this kind of decision.[110]

Criteria for Decision Making

As required by Florida law, Michael Schiavo demonstrated that there was 'clear and convincing evidence' that Terri would not have wanted her life to be artificially continued in her condition. The Florida court also found that Terri did not have a reasonable medical probability of recovering capacity, and that she was in a persistent vegetative state. Having met these conditions, the decision was made to withdraw artificial nutrition and hydration.

In Queensland, the legislation takes a different approach. Whether the decision is made by a statutory health attorney, a guardian, the Adult Guardian or Tribunal, the legislation requires the decision maker to consider a range of principles. The principles that may be relevant to a decision to withhold or withdraw a life-sustaining measure include the following.

- ***Adult's views and wishes, if they are known***[111]

In the *Schiavo* case, there was 'clear and compelling' evidence that Terri would not have wanted to be artificially kept alive in her condition. Although not determinative in Queensland, her views and wishes would be very persuasive in determining whether to withdraw her treatment.[112]

- ***Adult's best interests***[113]

What is in the 'best interests' of Terri would require a consideration of her current condition, the nature of the proposed treatment (for example, whether it is intrusive treatment) and the likelihood of that treatment improving her condition. The medical evidence in the *Schiavo* case was that the PEG feeding was not providing any therapeutic benefit because it would not improve Terri's medical

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110 *Re MC* [2003] QGAAT 13, *Re TM* [2002] QGAAT 1 and *Re RWG* [2000] QGAAT 2.

111 *PAA* and *GAA* sch 1 General Principle 7(4) and Health Care Principle 12(2).

112 In both *Re MC* [2003] QGAAT 13 and *Re TM* [2002] QGAAT 1, the views and wishes of the adult were considered by the Tribunal in deciding that treatment should be withheld or withdrawn.

113 *PAA* and *GAA* sch 1 Health Care Principle 12(1)(b)(ii).

condition. Under the Queensland law, it is unlikely that the continuation of treatment would have been regarded as being in Terri's best interests.[114]

- ***Respect for adult's human worth and dignity as an individual***[115]

In one of the cases where a decision was made to withhold artificial nutrition and hydration, the Tribunal accepted a submission of the Adult Guardian that the adult's 'human worth and dignity has been taken away by a futile medical intervention that is not allowing her to die naturally and is artificially prolonging the process'.[116] The same observation could have been made in Terri's case.

- ***Least restrictive of the adult's rights***[117]

In Queensland, the power for a health matter can only be exercised in a way that is least restrictive of an adult's rights. This means that if there is a choice between a more or less intrusive way of meeting a need of the adult, the less intrusive way must be chosen. This principle has been considered relevant in decisions about withholding or withdrawing treatment. In a case involving a 62 year old woman with severe dementia in the final stages of her disease and who had lost her swallowing reflex, the insertion of a PEG tube was held not to be the option least restrictive of her rights.[118] When considering whether to perform an invasive medical procedure or not, given that the woman was in the terminal phase of her illness and was dying, the Tribunal considered that the least intrusive option was not to insert the PEG.[119]

Terri's situation was different. She was not suffering from dementia, nor was she in the final stages of a progressive illness. However, in line with how this principle has been interpreted to date, it would be open to the Tribunal to find that the ongoing provision of nutrition and hydration through a PEG tube was intrusive treatment that was restrictive of her rights.

After considering each of these principles, it is quite likely that a decision maker would consent to the withdrawing of Terri Schiavo's medical treatment.

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114 In *Re MC* [2003] QGAAT 13, for example, the medical evidence before the Tribunal was that the PEG tube was not providing any therapeutic benefit to the adult, so could not be regarded as being in the adult's best interest.

115 *PAA* and *GAA* sch 1 General Principle 3.

116 *Re MC* [2003] QGAAT 13 at [67].

117 *PAA* and *GAA* sch 1 General Principle 7(3)(c) and Health Care Principle 12(1)(a).

118 *Re TM* [2002] QGAAT 1 at [164]-[165].

119 Ibid.

However, as discussed in the previous section of this article, because of the seriousness of a decision to withhold or withdraw life-sustaining measures, the legislation has one further safeguard: a decision to withdraw such treatment cannot operate unless the adult's doctor reasonably considers that the commencement or continuation of the measure is inconsistent with good medical practice.

In the *Schiavo* case, it is likely that this safeguard would have been satisfied. Although the Schindlers claimed that their daughter was responsive to stimuli, the consensus medical diagnosis was that Terri was in a persistent vegetative state and there was no available treatment that could improve her condition. Accordingly, a health provider would have been entitled to act on the consent given to withdraw Terri's artificial nutrition and hydration.

Conclusion

This article examined the law that governs the withholding and withdrawal of life-sustaining medical treatment in both Florida and Queensland. Both jurisdictions regulate who makes the decision, and how that decision is to be made.

Although the legislation in each jurisdiction is quite different in a number of respects, there are some common threads that can be drawn. First, in both jurisdictions, it is likely that Michael Schiavo would have been charged with the responsibility to make decisions about Terri's health care. Further, in both Florida and Queensland, this decision can be made by another person or body such as a Court or Tribunal in appropriate circumstances. This may be the case if, for example, Michael did not want the responsibility for the decision about treatment, or if the Schindlers alleged that Michael was making the decision on improper grounds.

Secondly, the statutes in both jurisdictions set out the criteria that govern how the decision should be made. At the time of the *Schiavo* case, a decision to withdraw treatment could only be made if there was 'clear and convincing evidence' that this is what Terri would have wanted. The legislation has since been amended so that such a decision can now also be made if it is regarded as being in her 'best interests'. In Queensland, the views and wishes of the adult, and the adult's best interests are also relevant. In addition, regard must be had to the adult's dignity and whether the proposed treatment is the option least restrictive of the adult's rights. Although the language used in each jurisdiction is different, the same kinds of factors are relevant in assessing whether the respective criteria are satisfied.

Thirdly, in addition to the above criteria, both Florida and Queensland have safeguards that mean that life-sustaining medical treatment cannot be withdrawn

or withheld unless the adult is in sufficiently poor health. In Florida, the adult must not have a reasonable medical probability of regaining capacity, and must either have an end-stage condition, be in a persistent vegetative state or have a terminal illness. Although an equivalent provision does not exist in the Queensland legislation, a health provider must not withhold or withdraw treatment unless the provision of that treatment is inconsistent with good medical practice. It is unlikely that this condition will be satisfied unless the adult is sufficiently ill.

As we have seen in this article, the *Schiavo* case probably would have been decided in the same way in Queensland. This is not surprising. It is also likely that the same outcome would have been reached in other common law countries. There have been a series of cases around the world over the past decade that have considered when it is lawful to withhold or withdraw life-sustaining medical treatment. The landmark English case is *Airedale NHS Trust v Bland*.[120] Anthony Bland was seriously injured in the Hillsborough football ground disaster in 1989, which left him in a persistent vegetative state. The application to withdraw life-sustaining medical treatment was made by the hospital treating Anthony Bland, with the full support of his family, his doctor and independent physicians. The House of Lords held that it was lawful to discontinue certain life-sustaining medical treatment including artificial nutrition and hydration. Since *Bland*, there have been a number of cases in which a court or tribunal has reached a similar conclusion.[121]

There are obvious similarities in the *Schiavo* and *Bland* cases. The bulk of the medical opinion was that the patients were in a persistent vegetative state and that there was no treatment available that could improve their condition. The crucial difference, however, was that in the *Schiavo* case the adult's family was divided about the appropriate course of action. If there had been agreement to either withdraw or continue with treatment, it is highly unlikely that the case would have captivated the world's interest.

The *Schiavo* case received an unprecedented amount of publicity. The speculation about Terri Schiavo's medical condition and her prognosis, the applications to court, the allegations and cross-allegations about the motives of the people involved, the various appeals made by the Schindlers and the views of religious

120 [1993] AC 789.

121 See, for example, *Isaac Messiha (by his tutor Magdy Messiha) v South East Health* [2004] NSWSC 1061, *Re MC* [2003] QGAAT 13, *Re BWV; Ex parte Gardner* (2003) 7 VR 487, *Re TM* [2002] QGAAT 1, *Re RWG* [2000] QGAAT 2, *Re G* [1997] 2 NZLR 201, *Auckland Area Health Board v Attorney-General* [1993] 1 NZLR 235, *In the Matter of a Ward of Court* [1995] 2 ILRM 401, *and Law Hospital NHS Trust v Lord Advocate* (1996) SLT 848.

and interest groups were reported in great detail in the United States and around the world.

Yet from a legal perspective, the authors contend that the only controversial aspect of the *Schiavo* case was the legislative intervention by Florida's Governor, Jeb Bush, and later by the United States Congress. The decision by Justice Greer of the Guardianship Court in Florida to withdraw the artificial nutrition and hydration was legally uncontroversial. The findings of the court were that Terri Schiavo was in a persistent vegetative state, had no prospect of recovery and had previously in her life expressed the view that she would not have wanted to be kept alive in that condition. She had been sustained for 15 years through the provision of artificial nutrition and hydration. The decision of Justice Greer was unremarkable from a legal perspective, and the same result would have been reached in other common law jurisdictions.