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# The Schiavo Case Is Not Judicial Murder

**by Jacob G. Hornberger**

Contrary to popular opinion, the Schiavo case does not involve "judicial murder" or even euthanasia or assisted suicide. Instead, it is a case that turns on a factual determination in a court of law regarding Terri Schiavo's intent with respect to the conditions under which she would want to be kept alive by artificial means.

Most legal disputes involve conflicts over facts. One side says, "She said that if she ever found herself in this type of situation, she would want the tube to be pulled." The other side says, "She never expressed any intent to have the tube pulled and never would have done so."

So, how is that factual dispute to be resolved? Letting everyone search websites on the Internet and then email his vote to the judge? Obviously, that would be silly.

The answer is: in a court of law. That is, in fact, why libertarians maintain that a judicial system is an essential part of limited government — in order to provide people with an independent forum where they can resolve their disputes.

In a courtroom, each side presents his case by relying on the skills of his attorney. Unlike the Internet and television, presentations in the courtroom have to be through the sworn testimony of competent witnesses — that is, witnesses who have personal knowledge of the facts and who are under oath.

Why is it important for witnesses to be under oath? Because oftentimes what a person says under oath (when he is subject to be convicted of perjury) and not under oath are two different things. My father, who was an attorney, once called a man to the witness stand to buttress his client's case. Much to my father's surprise, the man testified exactly contrary to how my father expected him to testify. My father asked the witness, "When I asked you yesterday to tell me what happened, didn't you tell me something exactly opposite to what you're testifying to today?" The man responded, "Yes, but yesterday I wasn't under oath and today I am."

Furthermore, over the centuries an entire body of law has developed with respect to the type of evidence that is admissible in a judicial proceeding. For example, there are rules against

the admissibility of irrelevant evidence and hearsay, a prohibition that has no application on the Internet or in the press.

Once each side presents his case, who makes the decision as to the facts that are in dispute? Ordinarily, that is what juries are for. Thus, if the Schiavo case had been a jury trial, the jury would have been specifically asked whether Terri Schiavo's intent was to have the feeding tube pulled if this type of situation were ever to befall her.

The jury would have been instructed to weigh all the evidence and render its verdict accordingly. Keep in mind also that the jury would have taken an oath to render a true and correct verdict based on the evidence, setting aside any biases or prejudices.

A jury's factual finding is final. And I mean *final*. It cannot be overturned on appeal. That's why juries are so powerful and why people who serve on juries should always take their responsibilities very seriously.

So, why then do losing litigants appeal to higher courts? Because appellate courts, while not having the power to set aside a *factual* determination by a jury, do have the power to reverse cases based on an erroneous *legal* determination by the judge. If the judge has made a mistake on a matter of law (such as whether a certain piece of evidence should have been admitted), the appellate court can correct the mistake by reversing the judgment and remanding the case for a new trial. If someone disagrees with a jury's factual determination, on the other hand, the appellate court has no power to change it.

There is one exception to this rule. If there is *no evidence whatsoever* to support the jury's factual finding, the court of appeals can — and must — set aside the jury's factual determination.

"But the Schiavo case didn't involve a jury trial. The judge made all the determinations without a jury."

That is correct, but in a non-jury trial the principles with respect to factual determinations are no different than they are in a jury trial. In a non-jury case, the judge wears two hats — one hat as the "jury" (or, more accurately, as the "finder of fact") and one hat as the judge. In his role as the fact-finder, the judge determines the facts, just as a jury would. In his role as the judge, he determines the law and applies it.

In a non-jury *civil* case the judge will oftentimes file two separate lists at the end of the trial, one containing his "findings of fact" and the other his "conclusions of law." These two lists assist the appellate court to determine which findings they cannot tamper with (the "findings of fact") and which conclusions they can review for possible error (the "conclusions of law.) (Such lists are not used in *criminal* cases.)

If you have not read the trial court's original opinion in the Schiavo case, it is worth your while to do so. As you read the judge's opinion, see how he distinguishes between "findings of fact" and "conclusions of law," and then examine the reasoning process by which he arrives at the critical factual determination as to Terri Schiavo's intent.

Here is the link to the complete timeline of the Schiavo case, which contains links to many of the pertinent items in the case:

Schiavo Case Timeline

Here is the link to the judge's original decision in the case (Feb. 11, 2001, on the timeline):

Trial Court's Original Schiavo Opinion (pdf file)

In fact, if you have not read the four opinions (yes, four) of the Florida Court of Appeals in this case as well as the opinion of the Florida Supreme Court in the Jeb Bush/Terri's Law case, you owe it to yourself to do so. (My father once told me that the chief justice of the Texas Supreme Court related to him that before publishing a legal opinion, he would give it to his wife, who wasn't a lawyer, to read; if she couldn't understand it, he would rewrite it until she could because he wanted lay people to be able to read and understand his legal opinions.)

As you read the opinions in the Schiavo case, you are likely to discover something interesting: that the facts in the case are markedly different from what you've been seeing on the Internet and on television, where all kinds of unsworn statements, hearsay, and personal opinions are being circulated. You will also see a marked difference between the serious-minded approach that the courts have taken in the Schiavo case and the circus-like environment in which the congressional clowns have operated.

Here are the four legal opinions of the Florida Court of Appeals:

Schiavo I (Jan. 24, 2001, on the timeline) (pdf file)

The next three appellate opinions involved the parents' motion to reopen the original case and to set aside the original judgment based on newly discovered evidence:

Schiavo II (July 11, 2001, on the timeline) (text file)

Schiavo III (Oct. 17, 2001, on the timeline) (pdf file)

Schiavo IV (June 6, 2003, on the timeline) (pdf file)

Here is the Florida Supreme Court's opinion in the Jeb Bush/Terri's Law case:

Florida Supreme Court decision (Sept. 23, 2004, on the timeline) (pdf file)

What was the evidence upon which the trial judge relied in arriving at his "finding of fact" with respect to Terri's intent? The evidence came in the form of sworn oral testimony. Here's what the trial court's opinion stated:

> statements to [Michael] prompted by her grandmother being in intensive care that if she was ever a burden she would not want to live like that. Additionally, statements made to Michael Schiavo which were prompted by something on television regarding people on life support that she would not want to live like that also reflect her intention in this particular situation. Also the statements she made in the presence of Scott Schiavo at the funeral luncheon for his grandmother that "if I ever go like that just let go. Don't leave me there. I don't want to be kept alive on a machine," and to Joan Schiavo following a television movie in which a man following an accident was in a coma to the effect that she

> wanted it stated in her will that she would want the tubes and everything taken out if that ever happened to her are likewise reflective of this intent. The court specifically finds that these statements are Terri Schiavo’s oral declarations concerning her intention as to what she would want done under the present circumstances and the testimony regarding such oral declarations is reliable, is creditable and rises to the level of clear and convincing evidence to this court.

The opinion also pointed out:

> The court has had the opportunity to hear the witnesses, observe their demeanor, hear inflections, note pregnant pauses, and in all manners assess credibility above and beyond the spoken or typed word.

There are people who now say, “If I had been the on a jury in the Schiavo case, I wouldn’t have believed Michael Schiavo or his relatives. I would have rendered a different verdict.”

Fair enough, but there’s one big problem. Those people were not on the jury. They didn’t hear the live testimony. They didn’t watch the witnesses and observe their demeanor. They didn’t take an oath to render a true and correct verdict, setting aside their biases and prejudices. Their opinions are mostly based on what they have seen on the Internet and in the press.

Thus, the Schiavo case was not about whether Michael Schiavo thought it best that his wife die, and it was not about whether her parents thought it best that she live. It was a case about what Terri Schiavo wanted for herself.

If the judge had said, “I’m ordering the tube to be disconnected even though Terri Schiavo intended otherwise,” we would have an entirely different case from the one at hand. But as much as some people might wish that that was indeed the situation in the Schiavo case, that wish is contrary to reality. This case is about a factual determination as to Terri Schiavo’s own intent and a legal determination that under Florida law such intent should be carried out.

Many people, including her parents, are assuming that Terri Schiavo would never have expressed such intent. Yet, is it really beyond the realm of reasonable probability that she would have? After all, lots of people are now rushing out and executing written “living wills” to cover the exact situation that Terri Schiavo is in. Why is it unreasonable to believe that she would have orally expressed the same intent?

Assuming that this was in fact Terri’s intent, which is what the judge (as fact-finder) found, whose intent should the court then honor — hers or her parents’? The law of the state of Florida dictates that her intent is determinative.

Yet, because they either misconstrue the central issue in the Schiavo case — that is, Terri's Schiavo's own intent — or because they simply believe that her intent should not be honored, all too many people, including even some libertarians, suggest that the courts should disregard

Terri's Schiavo's own intent as well as the Florida law that requires that such intent be carried out. What these people are essentially saying is: "I disagree with the choice Terri Schiavo has made for her own life and I support the initiation of force to prevent her husband from carrying it out." Moreover, simply because they disagree with either the findings of fact or the conclusions of law in the Schiavo case, they unfortunately seem all too eager to toss aside the judicial system that they themselves agree is an essential part of the limited government paradigm.

Moreover, those who are suggesting that her husband should simply turn his wife over to her parents are in effect saying, "Your wife's intent shouldn't matter to you. You should honor her parents' wishes instead, and you should simply disregard the promise that you made to your wife."

You might respond, "But that really wasn't Terri Schiavo's intent." Which brings us back to the beginning: This case turns not on "judicial murder" but rather on a factual determination made by the finder of fact in a contested proceeding in a court of a law.

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