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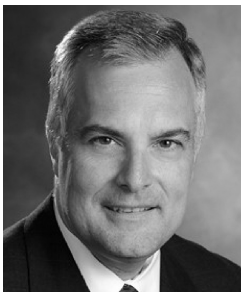
If Terri Schiavo had lived in New Jersey…

By Peter G. Verniero



Peter G. Verniero

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The sad case of Terri Schiavo brings into sharp focus the role of judges in deciding end-of-life and other family law issues. It also raises critical questions about the role of lawmakers in deciding how the judiciary does its work.

Many of the family law issues that I encountered as a state judge, particularly those involving child custody and visitation, would have been better resolved outside the courtroom. The typical case can take years to work through the system, with a child's future or some other fundamental question hanging in the balance.

Some family issues are best handled outside the courtroom. New Jersey seems to have grasped this better than most states.

The delay that comes from a protracted court fight is never good. Children have a need for stability, and litigation is anything but stable or calm. As New Jersey's highest court once stated in a child-visitation case, judges "should avoid interfering with well-settled home environments unless the equities of a given case clearly compel that result."

Judging those equities, however, is extremely difficult, even for the most experienced jurist. What makes a fit parent? Should a grandmother be given the right to visit her grandchild over the strong objections of the child's parents? What school should a child attend? Which divorced parent should have visitation with the child on Thanksgiving or other holidays?

Those questions, as difficult as they are, seem easy when compared with the issues in the Schiavo case, which centered on whether she should have been reconnected to a feeding tube, as her parents urged, or whether she should have remained disconnected, as her husband believed. In advancing their respective positions, both sides claimed to be carrying out the patient's wishes.

New Jersey faced similar issues nearly 30 years ago in the case of Karen Ann Quinlan. In that case, the state Supreme Court permitted Quinlan's father to remove his daughter from a respirator so long as her doctors concluded that there was no reasonable possibility that she would emerge from her comatose state and other procedural steps were followed.

What strikes me about the Quinlan case so many years later is the courage of the Quinlan family to endure a painful episode in full public view. The Quinlans had little choice in seeking judicial intervention because, at that juncture in 1976, the law exposed any person (like a parent or doctor) to criminal liability for removing a person's life-support system. The family was represented by an able and thoughtful attorney, Paul Armstrong, who himself is now a Superior Court judge in Somerset County.

Another striking fact is how New Jersey has been ahead of the rest of the country in coming to grips

with these difficult end-of-life questions. The Quinlan decision and subsequent decisions in the 1980s, which have withstood the test of time, required New Jersey to address what much of the nation is now debating.

Partisan politics should not drive that debate, at least as far as the judiciary is concerned. Indeed, it is clear that the nation's founders intended the judiciary to decide all cases free of political influences and independent of the elected branches. Thus, the suggestion by some in Congress that judges should decide end-of-life disputes to achieve a certain result threatens our constitutional structure. (This assumes that such questions are appropriate for federal review at all, as opposed to being purely issues of state law - a debatable assumption.)

Still, as the elected representatives of the community, lawmakers have an important role to play. For example, a proper legislative response would be to establish the framework for the use of living wills so that there is little doubt about a patient's wishes in these circumstances. Similarly, we all must work to ensure that the decision to remove a person from life support does not become arbitrary.

To their credit, New Jersey lawmakers reacted thoughtfully to the Quinlan case. They established a commission to examine the host of medical and ethical issues that surround a decision to terminate or refuse life support. Rather than mandate future judicial rulings, the Legislature sought to guide the debate by raising the awareness of both the public and medical community and by encouraging a dignified process that all could follow.

My view remains that family law rulings of all types should be sought from judges only as a last resort. When addressing child custody or visitation issues, divorcing or separating parents need to put aside the personal differences that led to their separation, as difficult as that might be. They should make their decisions based solely on what is in their children's best interest - and should avoid running to court whenever possible. As smart and conscientious as a judge might be, he or she is still a stranger to the families at the center of these disputes. Simply put, most family decisions are better made at home.

In particular, the decision to remove life support - whether it is the patient's expressed desire as reflected in a living will or the decision of a loved one acting on that patient's behalf - raises personal, medical and religious issues that are best addressed outside the courtroom. That Schiavo's parents and her husband disagreed made the Schiavo matter especially difficult. Who should speak on the patient's behalf in such situations? That question is a basis for legitimate debate. Demonizing either side or the judiciary as a whole, however, will not help the discussion.

I pray that Terri Schiavo has found peace. My hope for the rest of us is that judges will be asked to intervene in such cases infrequently and that lawmakers will resist the temptation to use these matters to achieve political gain.

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