ARGUMENT AS TO ISSUE II

The court's discretionary jurisdiction is also applicable to this case, because of the obvious implication the court's decision has for all judges. From this point on, judges will be tasked with the responsibility, subject to judicial review, to either appoint a guardian *ad litem* or act as one. In circumstances such as these the later choice compromises the requisite neutrality of the Court under Canon 3 of the Code of Judicial Conduct. Judges will now have to decide whether as a guardian *ad litem* they should hire experts, interrogate or obtain witnesses, object to objectionable matters not objected to by counsel before them, and otherwise decide whether other matters should have been placed before the court (and if they don't?). Moreover, the District Court's decision lets the actual guardian or surrogate decide whether judges must put on this mantle depending on whether they choose the first or second option set forth in Browning. This is an unworkable situation. A single rule applicable to all judges, and to all wards for that matter, ought to be in place. Where close family members disagree over a ward's wishes and actual or potential conflicts exist, a guardian *ad litem* should be appointed. A neutral and detached judge cannot don the mantle of advocacy required in order to safeguard the due process rights of the wards.

ARGUMENT AS TO ISSUE III

While desirous of a reasonably efficient system of review, this Court in Browning, ensured a more substantial review than the decision it considered there.. The District Court in that case felt the surrogate's decision should not be re-weighed and should be upheld if the trial court found that there was evidence by which the surrogate could have determined by clear and convincing evidence that a person wished to die in the circumstances. In Browning, however, this Court required a more substantial and traditional role for the trial court wherein it made that determination. The current District Court decision moves away from Browning by asking trial courts to wear multiple hats in the courtroom, minimizing the improper application of the Browning standard of review, and sanctioning the consideration of clearly irrelevant evidence as to societal values in arriving at the clear and convincing findings. Browning envisioned two situations. One where the guardian first brings the issue to the court and another where a decision to withdraw life support is brought before a court by others. In both instances, the trial court was to act as a traditional fact finder. The District Court's approach changes that. In the former case, the court becomes a surrogate or guardian *ad litem* when a conflict or potential conflict exists. In the latter, the court apparently would act traditionally and appoint a guardian *ad litem*, consistent with Florida's legislative scheme. In the former, the judge may be the one who decides

to hire experts, call additional witnesses, make objections or take other actions to protect the ward. In the latter, someone else would. Similarly situated wards will be treated differently depending on tactical choices of the guardian. Browning never intended that effect.[2]

Similarly, the decision conflicts with Savage v. Rowell Distributing Company, 95 So.2d 415, 418 (Fla.1957) which required reversal where, as here, meritorious defenses existed but were not raised and one was entitled to the appointment of a guardian *ad litem*. This is true regardless of polar opposite litigation positions. Brown v. Ripley, 119 So. 2d 712, 715-716 (Fla. 1st DCA 1960).

The District Court's decision conflicts with this Court's decision in Angrand v. Key, 657 So.2d 1146, 1149 (Fla. 1995) which reversed the trial court's determination allowing expert testimony on the issue of grief and bereavement. This Court obviously felt that grief and bereavement as a result of death are within the every day common ordinary knowledge of jurors. So too is the area of life and death involved herein and societal values experts on the meaning of words and the beliefs of Americans in general simply have no place in cases where the goal is to ascertain an individual's exercise of

[2] Additionally, Browning was never intended to apply to individuals who could swallow on their own and an issue exists concerning that here.

his or her privacy and other constitutional rights unadorned by subjective interpretation infected with the bias of a given social values view.

CONCLUSION

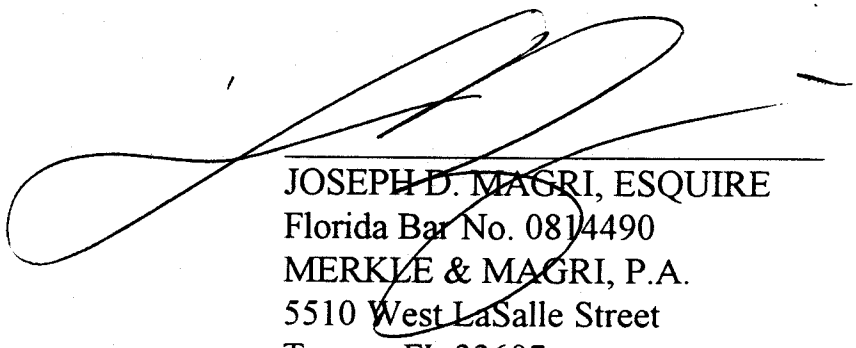
The trial and appellate arguments have stressed Terri's asserted persistent vegetative state. The District Court stresses that as well. While the Schindlers disagreed, they did not present expert testimony while Mr. Schiavo used Terri's money to hire experts. While a guardian *ad litem* could have addressed that, the important point is that the law and facts, not simply her condition, should determine the result legally and practically. See, Mack v. Mack, 329 Md 188, 221-222, 618 A 2d 744, 761 (Md App. 1993), citing Alexander, Medical Science Under Dictatorship, The New England Journal of Medicine, Vol. 241, No. 2, at 39 (July 14, 1949). Dr. Alexander's article describes the origins of German atrocities in the 30s and 40s and summed it up with these words:

> "Whatever proportions these crimes finally assumed, it became evident to all who investigated them that they had started from small beginnings. The beginnings at first were merely a subtle shift in emphasis in the basis attitude of the physicians. It started with the acceptance of the attitude, basic in the euthanasia movement, that there is such a thing as life not worthy to be lived. This attitude in its early stages concerned itself merely with the severely and chronically sick. Gradually the sphere of those to be included in this category was enlarged to encompass the socially unproductive, the ideologically unwanted, the racially unwanted

and finally all non-Germans. But is it important to realize that the infinitely small wedged-in lever from which this entire trend of mind received its impetus was the attitude toward the nonrehabilitable sick."

Rather than being a person whose condition justifies relaxing standards, from many standpoints a person in Terri's condition may be the most appropriate one to address these issues.

Respectfully submitted,



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