

LIFE, DEATH, AND ADVOCACY: RULES OF PROCEDURE IN THE CONTESTED END-OF-LIFE CASE

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We live in an amazing time. Advances in medicine and technology have given doctors the power to save lives that would almost certainly have been lost in the past.¹ But such advances in life-saving techniques have their downsides as well. As numerous courts have recognized, doctors now have the power to preserve life—or at least the physiological attributes of life—past the point at which many of us would care to live.² As medical professionals' ability to preserve life increases, so do conflicts concerning

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1. *E.g. Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261, 270 (1990) (noting that cases concerning the right to refuse medical treatment have increased due to “the advance of medical technology capable of sustaining life well past the point where natural forces would have brought certain death in earlier times”). This same point was noted over twenty-five years ago in the groundbreaking “right to die” case involving Karen Quinlan. *In re Quinlan*, 355 A.2d 647, 652 (N.J. 1976) (concerning “the prolongation of life through artificial means developed by medical technology undreamed of in past generations of the practice of the healing arts. . .”).

2. *E.g. Cruzan*, 497 U.S. at 292 (Scalia, J., concurring) (describing the case as dealing with “difficult, indeed agonizing, questions that are presented by the constantly increasing power of science to keep the human body alive for longer than any reasonable person would want to inhabit it”); *id.* at 301 (Brennan, Marshall, Blackmun, J.J., dissenting) (quoting *Rasmussen v. Fleming*, 741 P.2d 674, 678 (Ariz. 1987) (en banc), “Medical technology has effectively created a twilight zone of suspended animation where death commences while life, in some form, continues. Some patients, however, want no part of a life sustained only by medical technology. Instead, they prefer a plan of medical treatment that allows nature to take its course and permits them to die with dignity.”); *Gray v. Romeo*, 697 F. Supp. 580, 584 (D.R.I. 1988) (explaining that, “[d]ue to advances in medical care, it is possible in some circumstances to sustain the body’s biological functions for extended periods of time while the patient has no sense of pain or pleasure, fear or joy, love or hate, understanding or appreciation, taste or touch or smell or any other aspect of life’s experience, with no realistic possibility of sentient life”).

whether such treatment should be rendered. The litigants in such contests include family members, medical institutions, the person whose possible death is at issue, the state, and occasionally, even total strangers. The task of making decisions in these contests often falls to judges. These contests at the twilight of life and death, and the roles that various actors in the legal system take in resolving them, are the subject of this Article.

The types of end-of-life situations are varied, including questions as diverse as the treatment decisions for premature infants, the removal of life-sustaining measures from incompetent adults, and the refusal of medical treatment by competent, terminally ill adults.³ The court system, with its adversarial dispute-resolution process, is by no means the optimal way to deal with such end-of-life disputes. There is general agreement that treatment decisions—including decisions to withhold life-sustaining treatment—are best made in the context of the family with the advice of medical professionals, religious advisors, and other support groups.⁴ One court stated the following in rejecting a proposed rule requiring court involvement in all end-of-life cases:

3. *Infra* pt. I (surveying the range of end-of-life cases).

4. *See generally* *Satz v. Perlmutter*, 379 So. 2d 359, 360 (Fla. 1980) (recognizing that making rules to govern end-of-life decisions may be best done in the legislature, but further noting that, “[n]evertheless, preference for legislative treatment cannot shackle the courts when legally protected interests are at stake.”); *Mack v. Mack*, 618 A.2d 744, 762–63 (Md. 1993) (McAuliffe, J., Murphy C.J., dissenting) (discussing general agreement that end-of-life decisions are best made between and among doctors and medical personnel with the court system involved only in the event of a dispute); *id.* at 770–771 (Chasnow, J., Murphy C.J., concurring in part and dissenting in part) (same and collecting authorities); *In re Farrell*, 529 A.2d 404, 415 (N.J. 1987) (stating, “[o]nly unusual circumstances, such as a conflict among the physicians, or among the family members, or between the physicians and the family or other health care professionals, would necessitate judicial intervention” in most end-of-life cases); Thomas L. Hafemeister, *End-of-Life Decision Making, Therapeutic Jurisprudence, and Preventative Law: Hierarchical v. Consensus-Based Decision-Making Model*, 41 Ariz. L. Rev. 327 (1999) (generally advocating the use of a consensus-based building, decision-making structure in end-of-life cases); Thomas L. Hafemeister & Donna M. Robinson, *The Views of the Judiciary Regarding Life-Sustaining Medical Treatment Decisions*, 18 L. & Psychol. Rev. 189, 198–199 (1994) (describing the reported view of trial judges handling end-of-life cases that courts are the appropriate decision makers when the family cannot agree); Diane E. Hoffmann, *Mediating Life and Death Decisions*, 36 Ariz. L. Rev. 821 (1994) (generally advocating a decision-making structure using consensus-based building in end-of-life cases); *see also* Coordinating Council on Life-Sustaining Medical Treatment Decisionmaking by the Courts, *Guidelines for State Court Decision Making in Life-Sustaining Medical Treatment Cases* 36–37 (2d rev. ed., West 1993) (suggesting as a guideline that a court should not entertain jurisdiction in an end-of-life case unless the parties are not in agreement as to the key issues).

[T]he time of the decision to withdraw life sustaining treatment is one fraught with pain and anxiety for those who love the patient. To compound the suffering with a court proceeding is insensitive and unnecessary. What special knowledge or insight does the court have in these painful and intimate situations?⁵

Of course, we do not live in a perfect world. The approach to the end of life is sometimes the breeding ground for disputes about what course of action should be taken when an accident or disease has caused a person to exist in a “twilight zone of suspended animation where death commences while life, in some form, continues.”⁶ It is in these situations, the contested end-of-life cases, that the legal system, for better or worse, provides the stage upon which the almost metaphysical issues of life and death must be played out.

Needless to say, the substantive law governing how an end-of-life dispute is to be resolved is a critical feature of how these cases are litigated.⁷ There is, however, another equally important facet of the resolution of such contested end-of-life cases that receives far less attention: the way in which lawyers and judges use and apply applicable rules of procedure in these disputes can often be as important as the substantive law.⁸ As any practicing

5. *In re Fiori*, 652 A.2d 1350, 1356 (Pa. Super. 1995).

6. *Cruzan*, 497 U.S. at 301 (Brennan, Marshall, Blackmun, JJ., dissenting).

7. *E.g. In re Martin*, 538 N.W.2d 399, 406–411 (Mich. 1995) (discussing substantive and evidentiary standards for surrogate decision-making concerning an incompetent patient); *In re Guardianship of L.W.*, 482 N.W.2d 60, 69–84 (Wis. 1992) (discussing the competing standards for judging the scope of a guardian’s legal authority to direct that life-sustaining measures be removed from an incompetent adult ward). These substantive law issues are also discussed in the academic literature. *E.g.* Martha Minow, *Beyond State Intervention in the Family: For Baby Jane Doe*, 18 U. Mich. J.L. Reform 933, 969–989 (1985) (discussing the importance of such issues as who decides about the removal of life-sustaining procedures and what standards should be used to make the determination); Rebecca Morgan, *Florida Law and Feeding Tubes—The Right of Removal*, 17 Stetson L. Rev. 109 (1987) (generally discussing appropriate standards for the removal of feeding tubes); Nancy K. Rhoden, *Litigating Life and Death*, 102 Harv. L. Rev. 375 (1988) (generally critiquing accepted substantive standards used by courts to make treatment decisions for incompetent patients).

8. When I refer to “procedure” or “procedural rules” in this Article, I mean all of the various codes that regulate litigation behavior in a civil lawsuit, including rules of both trial and appellate procedure in both the federal and state courts. Broadly speaking, the ethical rules governing litigation behavior can also be considered procedural in some respects. Accordingly, I will also discuss them as appropriate.

trial or appellate lawyer knows, such procedural rules are an integral part of the tools they use as advocates to advance their clients' cases, no matter what the nature of the dispute.⁹

This Article's focus is on the way in which rules of procedure in civil cases can and should be employed to handle a contested end-of-life case.¹⁰ I consider the matter from two perspectives: that of the lawyer litigating the case and that of the judge having to make the often-heartbreaking decisions involved. A lawyer must be able to recognize how rules of procedure can be used offensively or defensively in these highly contested matters. At the same time, judges at both the trial and appellate levels need to be aware not only of the potential uses and misuses of procedure by advocates in these unusual cases, but also that the emotional nature of the facts could tempt judges to craft ad hoc procedures. I argue that following neutral, generally applicable procedural rules offers the judiciary a better approach to handling these cases. In essence, the rules provide a safe haven in the storm that often ensues in a highly contested end-of-life case.

The Article proceeds as follows: Part I briefly surveys the various end-of-life cases with which courts can find themselves dealing.¹¹ This Part is designed to provide a context within which to understand the uses of neutral procedural rules. Part I also presents an in-depth case study of a single contested right-to-die

9. *E.g.* Jack H. Friedenthal, Mary Kay Kane & Arthur R. Miller, *Civil Procedure* §1.1, 1–4 (3d ed., West Group 1999); Jay Tidmarsh & Roger H. Transgrud, *Complex Litigation and the Adversary System* 3–27 (Found. Press 1998) (excerpting various discussions concerning the importance of various aspects of a procedural system).

10. One could include establishing the standard of proof by which such cases are to be resolved as part of "procedure." For example, the accepted standard employed in end-of-life cases requires that matters be established by clear and convincing evidence, more than must be shown in the normal civil case. *See Mack*, 618 A.2d at 753–756 (adopting the clear and convincing standard and noting cases from jurisdictions utilizing that standard). Establishing the standard of proof is, no doubt, critical in resolving certain end-of-life cases. *See Cruzan*, 497 U.S. at 286–287 (recognizing that imposing the clear and convincing evidence standard can have the effect of depriving loving family members of the ability to make decisions for their relatives); *Conservatorship of Wendland*, 28 P.3d 151, 169 (Cal. 2001) (stating, "[t]he function of a standard of proof is to instruct the fact finder concerning the degree of confidence our society deems necessary in the correctness of factual conclusions for a particular type of adjudication, to allocate the risk of error between the litigants, and to indicate the relative importance attached to the ultimate decision"). The focus of this Article, however, is on how litigants and courts use more "everyday" aspects of procedure in civil cases, such as pleading, discovery, motion practice, and appellate review.

11. *Infra* nn. 17–140 and accompanying text (discussing end-of-life cases and Terri Schiavo).

case, the battle concerning the removal of Terri Schiavo's feeding tube, that typifies many of the points considered in the balance of the Article.

Part II focuses on the lawyers in these cases.¹² First, I survey how procedural rules have been, and can be, used by advocates.¹³ An understanding of the avenues provided by neutral procedural rules will enhance the ability of counsel to protect their clients' interests in the end-of-life case. In addition, I hope to sound a note of caution for lawyers in these disputes. There are serious potential pitfalls that exist if procedural rules are misused in a blind desire to serve the needs of a client. For example, the temptation to ignore ethical constraints on the use of certain litigation devices or to warp neutral procedural rules beyond recognition is quite strong given the stakes in an end-of-life case.¹⁴ It is important that lawyers in these cases fully contemplate the "dark-side" or abuse of procedure that, unfortunately, can also be a part of these contests.

Finally, Part III considers the judges who are forced to grapple with the profound questions of life and death these cases invariably raise.¹⁵ Judges need to be aware that the litigants will often be pressing the envelope of procedural rules when they are litigating these matters. Judges themselves may be similarly tempted to bend neutral procedural rules to take into account the consequences of an erroneous decision.¹⁶ I argue that judges should resist the temptation to apply neutral procedural rules in any special way in contested end-of-life cases. The sentiment to do so is strong because of what is on the line. It is precisely because there is so much at stake, however, that judges should look to neutral procedural rules as a means to ensure that their decisions are based on the law and not on the understandable emotion that is present in every contested end-of-life case. Through the application of such generally applicable procedural rules, judges will be

12. *Infra* nn. 141–193 and accompanying text (discussing the lawyer's role in end-of-life cases).

13. *Infra* nn. 141–183 and accompanying text (discussing the use of procedural rules).

14. *Infra* nn. 184–193 and accompanying text (discussing the ethical traps lawyers can fall into if procedural rules are misused).

15. *Infra* nn. 194–261 and accompanying text (discussing procedure in end-of-life cases).

16. *Id.*

more able to provide justice to the parties and, perhaps equally as important, retain the public's confidence in the adjudicative process.

In the end, there is actually precious little the legal system can do to relieve the pain and suffering, both emotional and physical, present in end-of-life cases. By definition, when the courts need to be involved in such deeply personal decisions, other support networks such as the family have broken down. Thus, the courts start out as a second-best option. However, there are things that can be done to optimize this sub-par forum. One critical thing to do is to understand the way in which neutral procedural rules do and do not work in these cases. Indeed, the lawyers and judges involved in the process have an obligation to reinforce their understanding of such rules to safeguard the rights of those people at the heart of the disputes—the people standing at the threshold of death.

I. THE CONTOURS OF A CONTESTED END-OF-LIFE CASE

A. What is an End-of-Life Case?

The end-of-life case comes in many guises, ranging quite literally from the nursery to the nursing home. The disputes include competent adults seeking to end life-sustaining treatment,¹⁷ the removal of life-sustaining measures from children,¹⁸ physician-

17. *E.g. Bowia v. Super. Ct.*, 179 Cal. App. 3d 1127, 1134, 1136 (Cal. App. 2d Dist. 1986) (competent adult seeking right to terminate involuntary forced feeding); *Bartling v. Super. Ct.*, 163 Cal. App. 3d 186, 189 (Cal. App. 2d Dist. 1984) (competent adult seeking right to terminate various life-sustaining measures); *Satz*, 379 So. 2d at 360 (competent adult with terminal illness seeking to refuse life-sustaining treatment); *McKay v. Bergstedt*, 801 P.2d 617, 620 (Nev. 1990) (competent adult seeking right to terminate artificial respiratory support); *Farrell*, 529 A.2d at 408 (competent adult seeking right to terminate artificial respiratory support).

18. *E.g. In re Guardianship of Barry*, 445 So. 2d 365, 367 (Fla. 2d Dist. App. 1984) (indicating standards for removal of life-sustaining measures from children); *In re AMB*, 640 N.W.2d 262, 268–269 (Mich. App. 2001) (developing standards for removal of life-sustaining measures from infants); *In re Weber v. Stony Brook Hosp.*, 456 N.E.2d 1186, 1187 (N.Y. 1983) (considering questions of standing to contest decision by parents to cease life-sustaining medical treatment). Cases involving children, especially infants, are similar to those involving an adult, who has never been competent, facing an end-of-life issue. *E.g. Superintendent of Belchertown St. Sch. v. Saikewicz*, 370 N.E.2d 417, 419 (Mass. 1977) (dispute concerning the withholding of aggressive medical treatment from a mentally retarded adult patient); *L.W.*, 482 N.W.2d at 63 (involving never-competent adult in persistent vegetative state as a result of cardiac arrest); see generally Deborah K. McKnight &

assisted suicide,¹⁹ and even certain abortion-related matters.²⁰ Perhaps the most common end-of-life case, however, involves an incapacitated adult who was once competent, but is no longer, due to an accident or some disease.²¹ It is this type of case that serves as the most likely breeding ground for a contested end-of-life dispute.

The adults in these end-of-life cases can be placed into two broad groups. First, there are those people who are in a persistent vegetative state. These people are alive in the sense that their bodies continue to support basic life functions such as the maintenance of temperature, respiration, and circulation without artificial means; however, they do not appear to experience “either self-awareness or awareness of the surroundings in a learned

Maureen Bellis, *Foregoing Life-Sustaining Treatment for Adult, Developmentally Disabled, Public Wards: A Proposed Statute*, 3 Am. J. L. & Med. 203 (1992) (discussing issues concerning the end-of-life case and never-competent adults).

19. *E.g. Vacco v. Quill*, 521 U.S. 793, 797–798 (1997) (challenge to New York State statute prohibiting physician-assisted suicide); *Wash. v. Glucksberg*, 521 U.S. 702, 707–708 (1997) (challenge to Washington State statute prohibiting physician-assisted suicide).

20. An example of a dispute concerning abortion that could be classified as an end-of-life case is the recent attempt by Governor Jeb Bush of Florida to have a guardian appointed for the fetus of a mentally retarded rape victim. Sherry F. Colb, *Governor Jeb Bush Send Lawyers to Represent a Fetus: Targeting a Mentally Retarded Pregnant Woman for Pro-Life Intervention*, Findlaw (Aug. 27, 2003) (available at <http://writ.news.findlaw.com/colb/20030827.html>) (critically discussing the actions of Governor Bush); Abby Goodnough, *Guardian Sought for Fetus of Retarded Floridian*, 14 N.Y. Times A5 (Aug. 22, 2003); see also Carrie Ann Wozniak, Student Author, *Difficult Problems Call for New Solutions: Are Guardians Proper for Viable Fetuses of Mentally Incompetent Mothers in State Custody?* 34 Stetson L. Rev. 193 (2004) (arguing that, because a fiduciary duty exists between an incompetent mother and her guardian, it would constitutional under Florida and federal law to appoint a guardian for the mother’s viable fetus).

21. *E.g. Cruzan*, 497 U.S. at 266–67 (adult in persistent vegetative state as a result of car accident); *Conservatorship of Wendland*, 28 P.3d at 154 (minimally conscious adult injured in car accident); *McConnell v. Beverly Enter.-Conn., Inc.*, 553 A.2d 596, 598 (Conn. 1989) (adult in persistent vegetative state due to car accident); *In re Guardianship of Browning*, 568 So. 2d 4, 8 (Fla. 1990) (adult in persistent vegetative state due to stroke); *In re Guardianship of Schiavo*, 780 So. 2d 176, 177 (Fla. 2d Dist. App. 2001) [hereinafter *Schiavo I*] (adult in persistent vegetative state due to “a cardiac arrest as a result of a potassium imbalance”); *In re Gardner*, 534 A.2d 947, 948–949 (Me. 1987) (adult in persistent vegetative state resulting from car accident); *Mack*, 618 A.2d at 746 (adult in persistent vegetative state due to car accident); *Brophy v. New Eng. Sinai Hosp., Inc.*, 497 N.E.2d 626, 628 (Mass. 1986) (adult in persistent vegetative state as a result of rupture of brain aneurysm); *Elbaum ex rel. Elbaum v. Grace Plaza of Great Neck, Inc.*, 544 N.Y.S.2d 840, 842 (N.Y. App. Div. 2d Dept. 1989) (adult in persistent vegetative state as a result of “subarachnoid bleeding”); *In re Fiori*, 652 A.2d at 1360 (adult in persistent vegetative state as a result of motorcycle accident and later hospital incident).

manner.”²² In the words of one court, the body of a person in a persistent vegetative state “is alive and may well stay alive for years, [but] his cognitive function has been so thoroughly destroyed that he does not know he is alive. He feels no pain and he feels no pleasure.”²³

The second broad type of cases concerns a once-competent adult who is rendered incompetent for one reason or another, but who is not technically in a vegetative state.²⁴ Unlike those persons in a vegetative state, the individuals in these cases are not totally unaware of their surroundings.²⁵ There should be no doubt, however, that individuals in such a minimally conscious state are often suffering in the limbo of life-and-death as much as a person in a vegetative state. The main difference is that they have some minimal awareness of their environment.²⁶

22. *Cruzan*, 497 U.S. at 266, n. 1 (quoting *In re Jobes*, 529 A.2d 434, 438 (N.J. 1987) (discussing the accepted definition of “vegetative state”); see also *Mack*, 618 A.2d at 746 (stating, “[t]he distinguishing feature of a patient in a persistent vegetative state is wakefulness without awareness”).

23. *Fiori*, 652 A.2d at 1351.

24. *E.g. Wendland*, 28 P.3d at 154 (minimally conscious adult injured in car accident); *Martin*, 538 N.W.2d at 402–403 (adult with severe physical and mental impairments due to car accident); *In re Conroy*, 486 A.2d 1209, 1216–1217 (N.J. 1985) (elderly woman “with serious and irreversible physical and mental impairments”); *In re Westchester Cty. Med. Ctr.*, 531 N.E.2d 607, 608–609 (N.Y. 1988) (mentally incompetent but conscious adult suffering from ailments associated with strokes); *In re Edna M.F.*, 563 N.W.2d 485, 486–87 (Wis. 1997) (incompetent and minimally conscious adult patient with Alzheimer’s dementia).

25. *E.g. Wendland*, 28 P.3d at 154–55 (describing ward’s limited awareness of his surroundings); *Conroy*, 486 A.2d at 1217 (describing a patient’s limited response to physical stimuli); *Edna L.M.*, 563 N.W.2d at 492 (Abrahamson, C.J., concurring) (describing patient’s limited response to physical stimuli).

26. The description of a person in such a minimally conscious state illustrates both the nature of the condition as compared with the vegetative state and the poor physical state in which the patients often exist:

At the time of trial, Ms. Conroy was no longer ambulatory and was confined to bed, unable to move from a semi-fetal position. She suffered from arteriosclerotic heart disease, hypertension, and diabetes mellitus; her left leg was gangrenous to her knee; she had several necrotic decubitus ulcers (bed sores) on her left foot, leg, and hip; an eye problem required irrigation; she had a urinary catheter in place and could not control her bowels; she could not speak; and her ability to swallow was very limited. On the other hand, she interacted with her environment in some limited ways: she could move her head, neck, hands, and arms to a minor extent; she was able to scratch herself, and had pulled at her bandages, tube, and catheter; she moaned occasionally when moved or fed through the tube, or when her bandages were changed; her eyes sometimes followed individuals in the room; her facial expressions were different when she was awake from when she was asleep; and she

While there are important differences between the two groups, for the purposes of this Article, the distinction between minimally conscious patients and those in a persistent vegetative state is not significant. The reason is that, in one form or another, the basic question presented in all of these “once-competent-adult” cases is whether to continue to support the patient’s life through some type of artificial means. In turn, this leads to the central issue a court must address: would the person have intended, when competent, to continue receiving life-sustaining treatment?²⁷ As the bodies of most people in a vegetative or minimally-conscious state can still support the basic functions of life, the treatment in question is often the provision of nutrition and hydration through artificial means.²⁸

There are a number of different ways in which a once-competent person’s intentions could be determined. For example, competent adults can essentially preemptively dictate their wishes concerning treatment as an incompetent by taking certain actions while they are competent.²⁹ Most commonly, this direction

smiled on occasion when her hair was combed, or when she received a comforting rub.

Conroy, 486 A.2d at 1217.

27. See *Browning*, 568 So. 2d at 13 (quoting *In re Guardianship of Browning*, 543 So. 2d 258, 269 (Fla. 2d Dist. App. 1989) (“[I]t is important for the surrogate decisionmaker to fully appreciate that he or she makes the decision which the patient would personally choose.”); *In re Jobes*, 529 A.2d 434, 436–437 (N.J. 1987) (stating, “we are mindful that the patient’s right to self-determination is the guiding principle in determining whether to continue or withdraw life-sustaining medical treatment; that therefore the goal of a surrogate decision-maker for an incompetent patient must be to determine and effectuate what that patient, if competent, would want . . .”).

28. *E.g. Cruzan*, 497 U.S. at 267 (dispute involving removal of artificial nutrition and hydration); *Browning*, 568 So. 2d at 7–8; *Mack*, 618 A.2d at 746; *Brophy*, 497 N.E.2d at 627; *Martin*, 538 N.W.2d at 401; *Conroy*, 486 A.2d at 1216; *Fiori*, 652 A.2d at 1351, 1352; *Edna M.F.*, 563 N.W.2d at 487. It is common to consider the provision of nutrition and hydration through artificial means as a form of medical treatment, at least in end-of-life cases. See Fla. Stat. § 765.101(10) (2003) (including “artificially provided sustenance and hydration” as part of definition of “life-prolonging procedure”); see also *Mack*, 618 A.2d at 756 (interpreting the relevant Maryland Living Will Statute, Md. Est. & Trusts Code Ann. § 13-708 (2003), to apply to artificial nutrition and hydration).

29. Unif. Rights of the Terminally Ill Act § 2, 9C U.L.A. 318–320 (1989); Unif. Rights of the Terminally Ill Act § 2, 9C U.L.A. 348 (1985). The Uniform Health-Care Decisions Act has been adopted in total or with minor changes by California, Delaware, Hawaii, Maine, Mississippi, and New Mexico. 9, 1B U.L.A. 8 (Supp. 1993). The 1989 version of the Uniform Rights of the Terminally Ill Act has been adopted in whole or in relevant part in Montana, Nevada, Ohio, Oklahoma, Rhode Island, and the U.S. Virgin Islands. 9C U.L.A. 6 (Supp. 1989). The 1985 version of the Act has been adopted in total or in large measure by Alaska, Arkansas, Iowa, Missouri, Nebraska, and North Dakota. 9C U.L.A. 339 (Supp.

is given through an advance health-care directive or “living will.”³⁰ In addition, many states provide means by which an incompetent person who did not make a formal living will before becoming incapacitated, may have life-sustaining treatment discontinued. Among other things, many states provide for the judicial determination that the person, despite the failure to take steps to express his or her wishes while competent, would not have intended to receive life-sustaining treatment in his or her current condition.³¹ It is in this latter situation that the truly contested end-of-life case will often arise.

B. The Truly Contested End-of-Life Case

As we have seen, the end-of-life case comes in many forms. Many of these cases are in the court system not because of a true adversarial contest, as one anticipates in a standard civil case, but often as the result of laws requiring, or appearing to require, formal court approval before life-sustaining procedures can be withdrawn.³² The focus of this Article is on those cases in which there is a true adversarial contest that must be resolved in the court system much as with any other civil case. Such contests can develop in a number of ways, including disputes between family members over what should be done in terms of removing life-sustaining measures,³³ refusals of health-care providers to abide

1985).

30. *E.g.* Unif. Health-Care Decisions Act § 2, 9, 1B U.L.A. 151–152 (1993); Unif. Rights of the Terminally Ill Act § 2, 9C U.L.A. 318–319 (1989); Unif. Rights of the Terminally Ill Act § 2, 9C U.L.A. 348 (1985); Fla. Stat. §§ 765.302–304 (2003); *Cruzan*, 497 U.S. at 291 n. 4 (O’Connor, J., concurring) (collecting state statutes providing for living wills or the appointment of health care proxies).

31. *E.g.* Unif. Health-Care Decisions Act § 5, 9, 1B U.L.A. 167–168 (1993); Unif. Rights of the Terminally Ill Act § 7, 9C U.L.A. 328–329 (1989); Fla. Stat. § 765.401 (2003); Fla. Stat. § 765.404 (2003).

32. *Browning*, 568 So. 2d at 7–8; *McKay*, 801 P.2d at 619; *Conroy*, 486 A.2d at 1216; *Edna M.F.*, 563 N.W.2d at 487; see Hafemeister & Robinson, *supra* n. 4, at 196–197 (discussing the reality that many end-of-life cases are not presented in the traditional adversary posture).

33. *E.g. Mack*, 618 A.2d at 747–748 (dispute between wife and father of injured patient); *Martin*, 538 N.W.2d at 402 (dispute between wife and parents of injured patient). *Martin* also inspired academic commentary concerning, in part, the contentious nature of the litigation. *E.g.* Andrew J. Broder & Ronald E. Cranford, “*Mary, Mary, Quite Contrary, How Was I to Know?*” *Michael Martin, Absolute Prescience, and the Right to Die in Michigan*, 72 U. Det. Mercy L. Rev. 785 (1995); Thomas J. Marzen & Daniel Avila, *Will the Real Michael Martin Please Speak Up! Medical Decisionmaking for Questionably Competent*

by the wishes of family members concerning an end-of-life issue,³⁴ intervention by political figures in an effort to stop the implementation of an end-of-life decision,³⁵ or even attempts by strangers to interfere in an unfolding end-of-life drama.³⁶ Uses and abuses of procedure can play a particularly important role in these cases.

Procedural issues can prove to be critical in these contested end-of-life cases for a number of reasons. Understanding matters such as how one becomes a formal party to the case, how one can obtain preliminary relief, how one can obtain the information necessary to convince the trier of his or her position, or how to obtain prompt and effective appellate review, to name but a few, can spell the difference between the ultimate success or failure of the litigation. It is equally true that the temptation to push the

Persons, 72 U. Det. Mercy L. Rev. 833 (1995). The reasons for these types of family disputes are varied, including a continuation of longstanding family animosity, honest disagreements about the best course of treatment, differing perceptions of their loved one's past statements about death and dying, and even desires for personal gain. See Hafemeister, *supra* n. 4, at 351–352 (discussing range of reasons leading to family disputes in end-of-life cases). Judges who have handled end-of-life cases cite dealing with disputes between and among the patient's family members to be a significant source of concern for them. *E.g.* Hafemeister & Robinson, *supra* n. 4, at 218–219 (compiling survey results).

34. *E.g. Gray*, 697 F. Supp. at 583–584 (hospital refuses to comply with family members' wishes to remove life-sustaining measures from patient); *Bartling*, 163 Cal. App. 3d at 189 (hospital refuses to comply with patient's wish to discontinue life-sustaining procedures); *In re Est. of Longeway*, 549 N.E.2d 292, 293 (Ill. 1989) (nursing home intervenes in probate proceedings in an attempt to block the removal of life-sustaining measures from elderly stroke victim); *Elbaum*, 544 N.Y.S.2d at 842 (petition to withdraw artificial nutrition and hydration actively opposed by nursing facility).

35. *E.g. Barry*, 445 So. 2d at 368 (state attorney general contested parents' decision to terminate life-sustaining measures for their critically ill child); *In re Rosebush*, 491 N.W.2d 633, 635 (Mich. Ct. App. 1992) (local prosecutors sought to block removal of life-sustaining measure from minor child); *Quinlan*, 355 A.2d at 650–651 (state attorney general intervenes in action to oppose request for removal of life-sustaining measures from incompetent adult in vegetative state); *Fiori*, 652 A.2d at 1352–1353 (state attorney general contested request of parent to remove life-sustaining measures from incapacitated adult child); *Gilmore v. Finn*, 527 S.E.2d 426, 428, 430–432 (Va. 2000) (discussing how the governor sought to prevent removal of life-sustaining measures).

36. *E.g. Advoc. Ctr. for Persons with Disabilities, Inc. v. Schiavo*, 2003 U.S. Dist. LEXIS 19949 at *1 (M.D. Fla. Oct. 21, 2003) (discussing how the Advocacy Center, allegedly an organization authorized by the Florida governor to protect the rights of disabled persons, brought suit to prevent the removal of artificial nutrition and hydration from an adult in a persistent vegetative state); *Protec. & Advoc. Sys., Inc. v. Presbyterian Healthcare Serv.*, 989 P.2d 890, 891 (N.M. App. 1999) (not-for-profit corporation dealing with the rights of disabled persons seeks to block the removal of life-sustaining measures from mentally retarded stroke victim); *Weber*, 456 N.E.2d at 1187 (challenge to parents' adoption of a conservative course of medical treatment for a critically ill infant child filed by "a person not related or known to the family").

boundaries of procedural rules to obtain whatever advantage is possible in the life-and-death struggle will be present.³⁷ And finally, the pressure of the end-of-life case comes to bear directly on the court system and its judges. Judges can help control and regulate these pressures by employing neutral, generally applicable rules of procedure to resolve the disputes.³⁸

I will return to an in-depth discussion of rules of procedure in an end-of-life case from the perspective of both the lawyers, in Part II of this Article,³⁹ and the judges, in Part III of this Article.⁴⁰ Before doing so, however, I will lay out the story of one currently prominent end-of-life case, that involving Theresa Marie Schiavo (Terri Schiavo).⁴¹ Terri Schiavo's tragic story is an excellent illustration of the importance of procedure in these cases to both lawyers and judges.

C. A Case Study: The Saga of Terri Schiavo

It is difficult to conceive of a dispute more contentious and with more twists and turns than the multiple litigations and political machinations concerning whether Terri Schiavo's artificial nutrition and hydration should be withdrawn. Terri Schiavo and her situation, along with the storm of controversy surrounding her, have been the subject of widespread media coverage.⁴² Moreover, as of the writing of this Article, this dispute has produced at a minimum, four full published opinions of the Florida Second District Court of Appeal in connection with a request to remove life-sustaining measures from Terri Schiavo;⁴³ three denials of

37. *Infra* pt. III (concerning the lawyers involved in these cases).

38. *Infra* pt. III (discussing matters concerning the judiciary).

39. *Infra* pt. II (discussing the role of lawyers in end-of-life cases).

40. *Infra* pt. II, III (discussing the roles of lawyers and judges in end-of-life cases).

41. *Infra* pt. I(C) (discussing the history of the Terri Schiavo case).

42. *E.g.* Craig Pittman, *Judge, Schiavo Can't Recover*, St. Petersburg Times A1 (Nov. 23, 2003); Nat Hentoff, *Deciding 'Quality of Life'*, Wash. Times, www.washtimes.com/op-ed/20031102-111409-2098r.htm (Nov. 2, 2003); David E. Sanger, *Bush Backs His Brother's Decision in Feeding Tube Case*, N.Y. Times A23 (Oct. 29, 2003); Abby Goodnough, *Victory in Florida Feeding Tube Case Emboldens the Religious Right*, N.Y. Times A1 (Oct. 23, 2003) [hereinafter *Victory*]; Adam Liptak, *In Florida Right-to-Die Case, Legislation Puts the Constitution at Issue*, N.Y. Times A20 (Oct. 23, 2003); Abby Goodnough, *A Right-to-Die Battle Enters its Final Days*, N.Y. Times A12 (Oct. 15, 2003) [hereinafter *Final Days*]; William R. Levesque, *Governor Has A Suggestion in Schiavo Case*, St. Petersburg Times B1 (Aug. 27, 2003).

43. *In re Guardianship of Schiavo*, 851 So. 2d 182 (Fla. 2d Dist. App. 2003) hereinafter

review of these decisions by the Florida Supreme Court;⁴⁴ two actions filed in the federal courts in the Middle District of Florida concerning Terri Schiavo;⁴⁵ two actions in Florida state courts outside of Terri Schiavo's guardianship litigation;⁴⁶ an act of the Florida Legislature attempting to reverse a court's determination that the removal of life-sustaining measures from Terri Schiavo was appropriate;⁴⁷ two other reported opinions of the Second District Court of Appeal in connection with a challenge to the constitutionality of this law;⁴⁸ and a report issued to Florida Governor Jeb Bush by a *guardian ad litem* appointed pursuant to the direction of the Florida Legislature.⁴⁹ I set out the facts underlying this dispute and the various procedural steps that the parties have taken in some detail below.⁵⁰ The reason is that this case provides a nearly textbook example of both the uses and abuses of procedure as well as the means by which neutral procedures can be inappropriately skewed by courts handling these disputes. In other words, the *Schiavo* saga provides an excellent means by which to explore the role of procedure in a contested end-of-life case from the perspective of both lawyers and judges.

"*Schiavo IV*"; *In re Guardianship of Schiavo*, 800 So. 2d 640 (Fla. 2d Dist. App. 2001) hereinafter "*Schiavo III*"; *In re Guardianship of Schiavo*, 792 So. 2d 551 (Fla. 2d Dist. App. 2001) hereinafter "*Schiavo II*"; *Schiavo I*, 780 So. 2d at 176.

44. *Schindler v. Schiavo*, 855 So. 2d 621, 621 (Fla. 2003) (review denied with respect to *Schiavo IV*); *In re Guardianship of Schiavo*, 816 So. 2d 127, 127 (Fla. 2002) (table) (review denied with respect to *Schiavo III*); *Schindler v. Schiavo*, 789 So. 2d 348, 348 (Fla. 2001) (table) (review denied with respect to *Schiavo I*).

45. *Advoc. Ctr. for Persons with Disabilities*, 2003 U.S. Dist. LEXIS 19949 (M.D. Fla. Oct. 21, 2003); *Schindler v. Schiavo*, No. 03-CV-1860 (M.D. Fla. filed Aug. 29, 2003).

46. See *Schiavo II*, 792 So. 2d at 561–563 (discussing case of *Schindler v. Schiavo*, No. 01-003200-CI-11 (Pinellas County Ct. Apr. 26, 2001) (appealed as appellate case no. 2D01-1891); *Schiavo v. Bush*, 2004 WL 980028 (Pinellas County Ct. Oct. 21, 2003).

47. Fla. Stat. § 744.3215 (2003) (commonly referred to as "Terri's Law"); Laurie Cunningham, *Constitutional Breach? Legal Experts Say New Law Allowing Governor to Overrule Courts Violate Separation of Powers*, Daily Bus. Rev. A1 (Oct. 23, 2003); Kelly V. Virella, *Court Issues Stay in Terri's Law Case*, St. Petersburg Times 4B (Nov. 16, 2003).

48. *Bush v. Schiavo*, 861 So. 2d 506 (Fla. 2d Dist. App. 2003); *Bush v. Schiavo*, 871 So. 2d 1012 (Fla. 2d Dist. App. 2004).

49. Memo. From Dr. Jay Wolfson, Terri Schiavo's Guardian Ad Litem to Governor Jeb Bush, Governor of Florida, *Report to Governor Jeb Bush in the Matter of Theresa Marie Schiavo*, (Dec. 1, 2003) (copy on file with *Stetson Law Review*).

50. *Infra* nn. 51–140 (detailing the Terri Schiavo case).

1. Schiavo I: *The Tragedy Begins*

Terri Schiavo is not simply a news story, a cause, or the subject of a lawsuit. She is a person, one who has had to endure something almost unimaginable over the past fourteen years.⁵¹ On February 25, 1990, Terri Schiavo, then twenty-seven years old, “suffered a cardiac arrest as a result of a potassium imbalance.”⁵² Terri Schiavo’s husband, Michael Schiavo, called 911 and she was taken to a hospital.⁵³ The Second District Court of Appeal has determined that, as a result of the events of that February day, “[t]he evidence is overwhelming that [Terri Schiavo] is in a permanent or persistent vegetative state.”⁵⁴ The court continued its description of Terri Schiavo’s physical condition:

Over the span of this last decade, [Terri Schiavo’s] brain has deteriorated because of the lack of oxygen it suffered at the time of the heart attack. By mid 1996, the CAT scans of her brain showed a severely abnormal structure. At this point, much of her cerebral cortex is simply gone and has been replaced by cerebral spinal fluid. Medicine cannot cure this condition. Unless an act of God, a true miracle, were to recreate her brain, [Terri Schiavo] will always remain in an unconscious, reflexive state, totally dependent upon others to feed her and care for her most private needs. She could remain in this state for many years.⁵⁵

In addition to Terri Schiavo’s husband and guardian Michael Schiavo, Terri Schiavo also has her parents, Robert and Mary Schindler.⁵⁶ It appears that Michael Schiavo and the Schindlers initially concurred in treatment decisions concerning Terri Schiavo.⁵⁷ This changed after Michael Schiavo, as Terri Schiavo’s guardian, won a significant award in a medical malpractice action

51. *Schiavo I*, 780 So. 2d at 177.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 177–178.

57. *See id.* (discussing Terri Schiavo’s consistent state from 1990 to the 1998 order); Heddy Murphey, *Beach Party to Aid Comatose Woman*, St. Petersburg Times C1 (Nov. 8, 1990) (discussing Terri Schiavo’s state).

in the early 1990s.⁵⁸ After that lawsuit produced a sizable pool of money, “both Michael and the Schindlers [became] suspicious that the other party [was] assessing [Terri Schiavo’s] wishes based upon their own monetary self-interest.”⁵⁹ This tension between Terri Schiavo’s parents and husband would shape the epic procedural battle to come.

In May 1998, Michael Schiavo petitioned Florida Circuit Court Judge George Greer, who was overseeing Terri Schiavo’s guardianship,⁶⁰ for the entry of an order “authorizing the discontinuance of artificial life support” for Terri Schiavo.⁶¹ The Schindlers actively opposed the entry of such an order.⁶² After conducting a trial, Judge Greer ruled in favor of Michael Schiavo and directed that Terri Schiavo’s life-sustaining measures, namely the provision of nutrition and hydration through a feeding tube, be discontinued.⁶³ That decision was affirmed on appeal.⁶⁴ As described in a subsequent appellate opinion, *Schiavo I* established four points:

(1) [Terri] Schiavo’s medical condition was the type of end-stage condition that permits the withdrawal of life-prolonging procedures, (2) she did not have a reasonable medical probability of recovering capacity so that she could make her own decision to maintain or withdraw life-prolonging procedures, (3) the trial court had the authority to make such a decision when a conflict within the family prevented a qualified person from effectively exercising the responsibilities of a proxy, and (4) clear and convincing evidence at the time of trial supported a determination that [Terri] Schiavo would have chosen in February 2000 to withdraw life-prolonging procedures.⁶⁵

58. *Schiavo I*, 780 So. 2d at 178.

59. *Id.*

60. Judge Greer is sometimes referred to in appellate court opinions, as well as in this Article, as the “guardianship court.” *E.g. Schiavo III*, 800 So. 2d at 642; *Schiavo II*, 792 So. 2d at 554, 555.

61. *Schiavo I*, 780 So. 2d at 177.

62. *See id.* at 177 (discussing the Schindlers’ appeal).

63. *Id.* at 176–177.

64. *Id.*

65. *Schiavo III*, 800 So. 2d at 642.

The decision affirmed in *Schiavo I* did not merely authorize the removal of the life-sustaining measures. As the appellate court explained, “the trial court was not actually giving [Michael Schiavo as guardian] discretion on whether to discontinue the life-prolonging procedures. The guardian was obligated to obey the circuit court’s decision and discontinue the treatment.”⁶⁶

Following the trial, the appeal, and the refusal of the Florida Supreme Court to intervene,⁶⁷ Terri Schiavo ceased receiving artificial nutrition and hydration on April 24, 2001, pursuant to the guardianship court’s order.⁶⁸ Almost immediately thereafter, the Schindlers took two bold procedural steps in an effort to reinstate the life-sustaining measures. First, the Schindlers filed a motion with Judge Greer seeking relief from the judgment that directed the withdrawal of nutrition and hydration.⁶⁹ The motion claimed first, that newly discovered evidence indicated that Terri Schiavo would not have wanted to have artificial nutrition and hydration discontinued; and second, that Michael Schiavo may have perpetrated a fraud on the court.⁷⁰ The guardianship court denied the motion.⁷¹

After the denial of the motion by the guardianship court,⁷² the Schindlers took their second step to ensure that Terri Schiavo would continue receiving artificial nutrition and hydration, by filing a separate action in the general civil division of the circuit court.⁷³ The Schindlers, purportedly as “natural guardians”⁷⁴ of

66. *Schiavo II*, 792 So. 2d at 559 n. 5. This is so because Michael Schiavo did not elect to make a decision to remove life-sustaining measures and then defend that decision in court. *Schiavo I*, 780 So. 2d at 179. Rather, because of his disagreement with the Schindlers, Michael Schiavo “invoked the trial court’s jurisdiction to allow the trial court to serve as the surrogate decision-maker.” *Id.* at 178. This procedural decision as to the form of remedy sought is discussed more fully below. *Infra* pt. II(A)(2).

67. *Schindler v. Schiavo ex rel. Schiavo*, 789 So. 2d 348 (Fla. 2001) (table).

68. *Schiavo II*, 792 So. 2d at 555.

69. *Id.* The Schindlers based their motion on Florida Rule of Civil Procedure 1.540(b)(2)–(3), discussed in greater detail below. *Infra* pt. I(C)(2).

70. *Id.*

71. *Schiavo II*, 792 So. 2d at 555.

72. *Id.*

73. *Id.*

74. “Natural guardians” means the parents of the incompetent person. *Black’s Law Dictionary* 713 (Bryan A. Garner ed., 7th ed., West 1999). The Second District Court of Appeal recognized how unusual such an action was by commenting that the Schindlers used the “natural guardians” formulation “even though they [knew Terri Schiavo was] an adult, married daughter with an appointed legal guardian and a pending guardianship

Terri Schiavo, brought an action against Michael Schiavo.⁷⁵ In addition to seeking monetary relief against Michael Schiavo for mental distress, the Schindlers sought a temporary restraining order that required Terri Schiavo to be provided nutrition and hydration immediately, notwithstanding the contrary order entered by the guardianship court.⁷⁶ A judge in the civil division converted the motion to one for a preliminary injunction and, after a hearing, granted the request for injunctive relief.⁷⁷ Pursuant to the preliminary injunction, Terri Schiavo again began to receive nutrition and hydration through a feeding tube.⁷⁸

2. Schiavo II: *The Tragedy Continues and Neutral Procedures Begin to Warp*

As a result of the Schindlers' two procedural moves, the Second District Court of Appeal faced a number of appeals and other requests concerning Terri Schiavo. Specifically, Michael Schiavo filed an emergency motion with the appellate court seeking to have the mandate of *Schiavo I* enforced (i.e., to enforce the order requiring that Terri Schiavo cease being provided nutrition and hydration through a feeding tube); the Schindlers appealed the guardianship court's denial of the motion for relief from judgment; and Michael Schiavo appealed the preliminary injunction entered in the general civil division.⁷⁹ The appellate court consolidated the appeals for purposes of its decision.⁸⁰

In most respects, the Second District Court of Appeal had treated *Schiavo I* much as it would any other civil appeal, albeit one involving a tragic case with life-or-death stakes. For example, the appellate court applied the traditional deference to the trial court's findings of fact and did not step in and provide litigation alternatives to one party or the other.⁸¹ In short, it took the case as it came, framed within the context of the adversary system. A different picture began to emerge in *Schiavo II* as the court dealt

proceeding." *Schiavo II*, 792 So. 2d at 555.

75. *Id.*

76. *Id.* at 555–556.

77. *Id.* at 556.

78. *Id.*

79. *Id.* at 556–557.

80. *Id.* at 557.

81. *Schiavo I*, 780 So. 2d at 179–180.

with the procedural morass the parties created after Terri Schiavo's artificial nutrition and hydration had been withdrawn.⁸²

Purely as a matter of holdings, the *Schiavo II* court (1) affirmed the denial of the Schindlers' motion for relief from judgment,⁸³ (2) reversed the entry of the preliminary injunction in the separate proceeding in the civil division,⁸⁴ and (3) denied Michael Schiavo's motion to enforce the mandate issued in *Schiavo I*.⁸⁵ A recitation of these ultimate holdings, however, does not do justice to the many unique procedural features in the case. Beginning in earnest in *Schiavo II*, the appellate court began to treat the case differently in important respects from a standard civil dispute, at least in terms of procedure.⁸⁶ Later in this Article, I explain why using such a differential approach to procedure⁸⁷ should be avoided.⁸⁸ At this point, I merely outline the ways in which procedure began to warp in *Schiavo II* in order to set the stage for that later discussion.

The ways in which the appellate court began to employ procedural rules in a differential way in the *Schiavo* matter go to the very heart of the adversarial process.⁸⁹ To begin with, *Schiavo II* reflects an alteration in the traditional relationship between courts and parties. An accepted feature of the adversary civil litigation system in the United States is that a court will generally not save a party from poor decisions made by its counsel.⁹⁰ The

82. *Schiavo II*, 792 So. 2d at 551.

83. *Id.* at 558.

84. *Id.* at 561–562.

85. *Id.* at 563.

86. *Id.* at 557.

87. By “differential approach to procedure,” I refer to instances in which a court makes rulings concerning or using procedure in an end-of-life case differently than it would in another type of civil case.

88. *Infra* pt. III(C).

89. I discuss the essential attributes of the adversary system in greater detail below. *Infra* pt. III(A). The themes appearing in *Schiavo* are also evident in other contested end-of-life cases. *Infra* pt. III(B).

90. The role of the judiciary is described as follows:

The main feature of the adversary system that influences the development of particular procedures is that the parties (or their lawyers) control and shape the litigation. The traditional view is that the judge sits solely to decide disputed questions, most commonly questions of law and procedure. Issues not raised, objections not mentioned, and points not made are, with very few exceptions, waived. The case proceeds only in response to the demands of the litigants. Necessarily, then, the adversary model places enormous emphasis and responsibility on the lawyers; the court maintains a relatively passive role throughout the proceedings.

court sees itself as the organ to resolve the parties' disputes, not an active participant in litigating them.⁹¹ Despite this fundamental precept of the classical adversary system, the appellate court in *Schiavo II* acted quite aggressively as a participant in the litigation.⁹²

The Schindlers had argued in the guardianship court that they were entitled to relief from the judgment ordering the cessation of their daughter's artificial nutrition and hydration on two grounds: (1) that there was newly discovered evidence,⁹³ and (2) because Michael Schiavo had committed a fraud on the court.⁹⁴ The appellate court affirmed the trial court's decision denying the motion for relief from judgment, reasoning that the Schindlers' motion had come too late under the plain language of the relevant procedural rule.⁹⁵

One would think that the court's conclusion that the Schindlers had failed to file a timely motion for relief from judgment would have ended the matter. But that was not the case. Instead, the court took it upon itself to point out an alternate procedural route that the Schindlers could have—but had not—taken to seek relief from the judgment.⁹⁶ Specifically, the court suggested that it might be possible for the Schindlers to seek relief from the judgment by claiming that “it is no longer equitable that

Friedenthal, Kane & Miller, *supra* n. 9, at 2; *see also infra* pt. III(A) (discussing attributes of a “traditional” adversary civil litigation system).

91. Friedenthal, Kane & Miller, *supra* n. 9, at 2; *see also infra* pt. III(A) (discussing judges' neutrality in the adversary system).

92. *Schiavo II*, 792 So. 2d at 558 (showing how the Court offered an alternate route to the Schindlers when the procedural route they had chosen failed).

93. *Id.* The Schindlers relied on Florida Rule of Civil Procedure 1.540(b)(2) as grounds for the motion. *Id.* In particular, the Schindlers argued that Michael Schiavo's former girlfriend would testify that he told her that Terri Schiavo had never discussed the cessation of life-sustaining treatment with her husband. *Id.* at 555.

94. *Id.* at 556. This portion of the motion was based on Florida Rule of Civil Procedure 1.540(b)(3). *Id.* at 558. The Schindlers' claim here was that, based on the former girlfriend's anticipated testimony, Michael Schiavo's trial testimony concerning discussions he had with Terri Schiavo about her wishes concerning medical treatment should she become incapacitated had constituted perjury and, therefore, a fraud on the court. *Id.* at 555–556.

95. *Id.* at 558 (citing the limitation in Florida Rule of Civil Procedure 1.540(b) requiring “[t]he motion [on the grounds asserted by the Schindlers] shall be made . . . not more than 1 year after the judgment, decree, order, or proceeding was entered or taken”). *Id.* It was undisputed that the Schindlers' motion for relief from judgment did not meet this standard. *Id.*

96. *Id.* at 558–561.

the judgment or decree should have prospective application.”⁹⁷ Thereafter, the court remanded the case to allow the Schindlers an opportunity to file a motion for relief from judgment on this judicially suggested ground.⁹⁸ Thus, the court went beyond its traditional role of umpire by taking a more active role as a player in the process.

Schiavo II is also an example of the way in which the relationship between appellate and trial courts can change in the context of an end-of-life case. Under normal rules of procedure, appellate courts give no deference to lower courts in terms of issues of law.⁹⁹ However, they usually show great deference to lower courts in terms of both factual findings and the trial court’s control over the manner in which it conducts proceedings.¹⁰⁰ This traditional relationship between appellate and trial courts began to fray in *Schiavo II*. For example, the appellate court preemptively trumped the trial court’s authority to determine whether the filing of another motion for relief from judgment would operate to automatically stay the judgment.¹⁰¹ The appellate court ruled that such a filing would operate as a stay even though that decision is usually left in the hands of the trial court and no such motion had been made.¹⁰² Thus, the relationship between the court system’s two basic levels began to shift in this case and would do so even more dramatically in *Schiavo III*.

Yet another way in which the *Schiavo II* court indicated its differential approach to procedure was its attitude concerning the importance of the finality of judgments in the civil litigation system. As a general rule, courts employ a number of procedural devices to secure and protect the finality of judgments.¹⁰³ The reason

97. *Id.* at 559 (quoting Fla. R. Civ. P. 1.540(b)(5)).

98. *Id.* at 561. The court also cautioned the Schindlers that “any such motion must allege new circumstances affecting the decision made by the trial judge” and not be merely a means to retry the case. *Id.* at 559–561.

99. Friedenthal, Kane & Miller, *supra* n. 9, at 621.

100. *Id.*

101. *Schiavo II*, 792 So. 2d at 561.

102. *Id.*

103. These devices include, among others, statutes of limitations barring claims after a period of time, principles of claim and issue preclusion, and limitations on an appellate court’s ability to reverse many trial-court decisions. *See generally* Stephen C. Yeazell, *Civil Procedure* 797–798 (5th ed. Aspen L. & Bus. 2000) (discussing means of assuring finality in the civil litigation system).

is straightforward: one of the civil litigation system's main goals is to resolve disputes between the parties with finality and avoid continuous relitigation of such matters.¹⁰⁴

The *Schiavo II* court certainly expressed its desire that the case reach an end and finally be resolved.¹⁰⁵ Yet, it also seriously undermined finality by taking steps to allow challenges to the judgment after there had been a trial, an appeal, a denial of review by the Florida Supreme Court, and the expiration of time in which to seek post-judgment relief.¹⁰⁶ Moreover, it did so only after granting the Schindlers, technically non-parties in the guardianship proceeding, standing to file a motion for relief from judgment and appeal from the denial of that motion.¹⁰⁷ In other words, while ostensibly standing by the importance of finality in civil matters, the appellate court in reality created a process by which the finality of the judgment at issue was dramatically undermined.

3. *Schiavo III: More Freelance Procedural Rulings*

As might have been expected given the court's advice in *Schiavo II*, upon remand, the Schindlers promptly filed a motion for relief from judgment claiming that it was no longer equitable to enforce the judgment ordering the removal of artificial nutrition and hydration from Terri Schiavo.¹⁰⁸ As grounds for the mo-

104. *Id.* Of course, finality is not the only goal of the civil litigation system. See Fed. R. Civ. P. 1 (mandating that the Federal Rules of Civil Procedure "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action"). Nevertheless, finality is an important attribute of a well-functioning procedural system and it should not lightly be discarded, especially only for certain types of cases. See also *infra* pt. III(C)(3) (discussing reasons for avoiding a differential approach to civil procedure in end-of-life cases).

105. See *Schiavo II*, 792 So. 2d at 558 (rejecting extension of one-year period on making certain motions for relief from judgment out of concern about finality); *id.* at 559 (discussing the fact that motions seeking relief from judgment on the grounds that it is no longer equitable are narrowly construed out of concern for finality); *id.* at 564 (encouraging the guardianship court to resolve the matter on remand "with all deliberate speed").

106. *Id.* at 554–555, 561.

107. *Id.* at 557–558. The court reasoned that the Schindlers were "interested persons" in the guardianship proceedings under the relevant Florida statutes. *Id.* at 557. As interested persons, the court determined that they "should have standing—not directly for themselves but in the interest of the ward—to request relief from judgment of a guardianship court when the final order requires termination of life-prolonging procedures." *Id.* at 558.

108. *Schiavo III*, 800 So. 2d at 642–643.

tion, the Schindlers essentially reasserted the two grounds rejected as time-barred in *Schiavo II*: (1) that newly discovered witnesses cast doubt on whether Terri Schiavo expressed a desire to forego life-sustaining treatment, and (2) that Michael Schiavo committed perjury in his trial testimony regarding his wife's desires.¹⁰⁹ The major difference was that, again as suggested by the appellate court, the Schindlers cited Florida Rule of Civil Procedure 1.540(b)(5) as the appropriate procedural device.¹¹⁰

In addition to the motion for relief from the judgment, the Schindlers continued their campaign to stop the judgment's implementation by taking a number of additional procedural steps. First, they submitted a document styled "Petition for Independent Medical Examination" concerning their daughter.¹¹¹ Second, they petitioned the guardianship court for the removal of Michael Schiavo as Terri Schiavo's guardian.¹¹² Finally, they filed a motion to disqualify Judge Greer.¹¹³

Judge Greer denied all four motions/petitions without conducting a hearing.¹¹⁴ The appellate court summarily affirmed the denial of the motions to remove Michael Schiavo as guardian and the request to disqualify Judge Greer.¹¹⁵ However, it reversed the decisions concerning the motion for relief from judgment and the request for an independent medical examination.¹¹⁶

Along the way, the court also further displayed an unwillingness to follow neutral procedural rules. The primary example of this distortion of neutral procedures was the appellate court's treatment of the denial of the Schindlers' petition for an "independent medical examination."¹¹⁷ First, the court again assisted one of the litigants in an unusual way by re-characterizing the request as one for discovery, and thereafter granted the court's

109. *Id.* at 643.

110. *Schiavo III*, So. 2d at 642.

111. *Id.*

112. *Id.*

113. *Id.* at 643.

114. *Id.*

115. *Id.*

116. *Id.* The appellate court reasoned that, while it was suspicious of the evidence that had been submitted in connection with the Schindlers' motion, an affidavit submitted by a doctor raised a "colorable entitlement" to relief in that, if believed, it would establish that Terri Schiavo could possibly be helped by medical treatment. *Id.* at 644-645.

117. *Id.* at 646.

redefined request.¹¹⁸ This was another instance of the court abandoning its role as umpire and stepping into the case as an active player in the adversarial process. The court then went on to give extraordinarily specific instructions to the trial court concerning the procedures to follow on remand in connection with the re-characterized request for discovery.¹¹⁹ The appellate court's unusually detailed directions concerning procedural matters typically left to the discretion of the trial court was another example of differential procedure, here reflected as an alteration of the traditional roles of the trial and appellate courts.

As in *Schiavo II*, the appellate court stressed the importance of speed in the lower court.¹²⁰ Of course, it did so in the same breath as it was creating, largely out of whole cloth, a procedure that was almost certain to engender delay and sow the potential for undermining the finality of the judgment the court itself had affirmed in *Schiavo I*.¹²¹ In short, *Schiavo III* was a continuation of both the use and misuse of procedure by lawyers and the dangers that exist when appellate courts in particular stray from employing neutral procedures.¹²²

118. *Id.*

119. *Id.* at 646–647. For example, the appellate court ordered that the Schindlers and Michael Schiavo each be allowed to designate two doctors to examine Terri Schiavo. *Id.* at 646. The court also directed that the trial court should appoint its own independent medical expert to examine Terri Schiavo. *Id.* The appellate court was quite specific in terms of the qualifications of the independent expert, requiring that he or she should be “very experienced in the treatment of brain damage and in the diagnosis and treatment of persistent vegetative state” as well as being “board-certified in neurology or neurosurgery.” *Id.* Further, the court “recommend[ed]” that each of the experts file written reports concerning their examinations. *Id.* at 647. Finally, the court directed that the trial court hold an evidentiary hearing to resolve the matter. *Id.*

120. *Id.* (“We urge the trial court to conduct this discovery and hearing as expeditiously as possible and without undue delay.”).

121. See *Schiavo I*, 780 So. 2d 176 (affirming the decision of the trial court). This undermining of finality was also caused by the appellate court's decision to hold the Schindlers to a lower-than-usual standard of proof to establish a “colorable entitlement” to relief from judgment. *Schiavo III*, 800 So. 2d at 645 (holding that the Schindlers needed only to establish such a “colorable entitlement” by a preponderance of the evidence instead of by clear and convincing evidence).

122. It should also not be lost here that Terri Schiavo was quite literally in the middle of the epic battle being waged by her loved ones. As a result of the ruling in *Schiavo III*, Terri Schiavo was required to undergo *five* examinations years after a court had already determined that she would not have wished to have life-sustaining treatments continued. See generally *Schiavo I*, 780 So. 2d at 176 (affirming the trial court's determination to remove Terri Schiavo's life-support).

4. Schiavo IV: *The Court Attempts to Finally End the Saga*

After remand, a period of approximately one year elapsed before a hearing was held in response to the dictates of *Schiavo III*.¹²³ At this hearing, the guardianship court heard testimony from the five doctors whose examinations were ordered in *Schiavo III*.¹²⁴ The appellate court described the issue to be resolved through this hearing as whether the new treatment the Schindlers claimed existed “offer[ed] sufficient promise of increased cognitive function in [Terri] Schiavo’s cerebral cortex—significantly improving the quality of [Terri] Schiavo’s life—so that she herself would elect to undergo this treatment and would reverse the prior decision to withdraw life-prolonging procedures.”¹²⁵

After the hearing, the guardianship court denied the Schindlers’ motion for relief from judgment.¹²⁶ In June 2003, the Second District Court of Appeal affirmed that decision in *Schiavo IV*.¹²⁷ Thus, after four appellate opinions, almost countless procedural twists and turns, and several distortions in the process by which civil cases are normally resolved, it appeared that the judgment, rendered several years before would finally be enforced and Terri Schiavo’s judicially determined wishes would be carried out.¹²⁸ But that was not to be.

5. *The Saga Continues*

In conformity with *Schiavo IV*,¹²⁹ Judge Greer entered an order directing the guardian to remove the medical device providing

123. The guardianship court held an evidentiary hearing from October 11, 2002, through October 22, 2002. *In re Guardianship of Schiavo*, 2002 WL 31817960 at *1 (Fla. Cir. Nov. 22, 2002). *Schiavo III* had been decided on October 17, 2001. *Schiavo III*, 800 So. 2d at 640.

124. *Schiavo IV*, 851 So. 2d at 184–185.

125. *Id.* at 184 (quoting *Schiavo III*, 800 So. 2d at 645).

126. *Guardianship of Schiavo*, 2002 WL 31817960 at *5.

127. *Schiavo IV*, 851 So. 2d at 183. Thereafter, the Second District Court of Appeal denied the Schindlers’ motion for rehearing, *Schindler v. Schiavo*, 2003 Fla. App. LEXIS 14167 at *1 (Fla. 2d Dist. App. July 9, 2003) (mem.), and the Florida Supreme Court denied review. *Schindler v. Schiavo*, 855 So. 2d 621 (Fla. 2003) (table).

128. *See supra* nn. 43–50 and accompanying text (discussing the chronology of the Schiavo litigation).

129. *Schiavo IV*, 851 So. 2d at 183.

Terri Schiavo with artificial nutrition and hydration on October 15, 2003.¹³⁰ The order was carried out, and Terri Schiavo's feeding tube was removed on that date.¹³¹ At this point, however, events took a rather dramatic twist.

On October 21, 2003, after an intense political campaign by what is often described as the "religious right,"¹³² the Florida Legislature passed,¹³³ and Governor Jeb Bush signed,¹³⁴ "Terri's Law."¹³⁵ Terri's Law gave the governor the power to issue a "one-time stay" of any judgment authorizing the withholding of nutrition and hydration from a person so long as certain conditions were met.¹³⁶ Terri Schiavo's case satisfied the statutory criteria and, immediately after the law became effective, Governor Bush issued the "stay."¹³⁷ Pursuant to the governor's direction, and notwithstanding the contrary court order, a feeding tube was reinserted in Terri Schiavo's body, and she began artificially to receive nutrition and hydration once again.¹³⁸

Terri's Law and Governor Bush's actions prompted their own type of end-of-life legal battle in which procedure has thus far played a prominent role in Michael Schiavo's efforts to have the legislation declared unconstitutional.¹³⁹ As of the writing of this

130. William R. Levesque, *Judge Sets Day for Feeding Tube Removal*, St. Petersburg Times B1 (Sept. 18, 2003).

131. CNN, *Woman's Feeding Tube Removed*, <http://www.cnn.com/2003/LAW/10/15/coma.woman/index.html> (Oct. 16, 2003).

132. *E.g.* Goodnough, *Victory*, *supra* n. 42, at A1.

133. Fla. H. 35E, Spec. Sess. 2003E (Oct. 21, 2003) (available at <http://www.myfloridahouse.com>); Fla. Sen. 12E, Spec. Sess. 2003E (Oct. 21, 2003) (available at <http://www.myfloridahouse.com>).

134. Fla. Exec. Or. 03-201 (Oct. 21, 2003).

135. House Bill 35E and Senate Bill 12E became Ch. 2003-418, Laws of Florida, popularly known as "Terri's Law." *Schindler v. Schiavo*, 2004 WL 257009 at *1 (Fla. 2d Dist. App. Feb. 13, 2004).

136. *Id.* The law authorized the Governor to issue a one-time stay if three conditions were met, all of which corresponded to Terri Schiavo's situation perfectly. 2003 Fla. Laws ch. 2003-418; Fla. Exec. 06 at 03-201. These conditions included (1) the patient had no written advance health care directive; (2) the patient had been determined to be in a persistent vegetative state; and (3) a member of the patient's family had challenged the withholding of nutrition and hydration. 2003 Fla. Laws ch. 2003-418.

137. William R. Levesque et al., *Gov. Bush's Order Puts Schiavo Back on Fluids*, St. Petersburg Times A1 (Oct. 22, 2003).

138. *Id.*

139. *See Bush v. Schiavo*, 861 So. 2d at 506, 507 (discussing Michael Schiavo's constitutional challenge of Terri's Law). In terms of procedural battles, there have already been motions to dismiss for lack of personal jurisdiction and improper venue, discovery disputes, and moves to disqualify the circuit judge hearing the matter. *See Bush v. Schiavo*,

Article, Terri Schiavo remains attached to a feeding tube, in many ways an unwitting passenger on the procedural rollercoaster built and maintained by her parents and husband, the judiciary, as well as the Legislature and the Governor of the State of Florida.¹⁴⁰

Having seen through the *Schiavo* case an example of the uses and abuses of procedure in a contested end-of-life case, this Article now turns to a focused consideration of this matter from the perspective of both lawyers and judges. Part II addresses the matter from the vantage point of the lawyer while Part III considers the issue from the position of a judge.

II. THE LAWYER'S PERSPECTIVE: PROCEDURE AS A TOOL AND TRAP

Just as one cannot succeed at a game without knowing its rules, one cannot be an effective advocate without knowing procedure—the rules of litigation. If lawyers do not know the rules, they will not be able to successfully navigate the currents and eddies of the civil litigation system.¹⁴¹ This feature of civil litigation is perhaps even more important in the contested end-of-life case, given its stakes. In the first section of this Part, I describe the ways in which procedure can be put to use by lawyers in such

861 So. 2d at 506, 507. (affirming denial of recusal motion and noting the pending interlocutory appeal concerning personal jurisdiction and venue); A.P., *Schiavo Tries to Head Off Governor's Attorneys*, St. Petersburg Times B3 (Nov. 27, 2003) (discussing discovery disputes). As of writing this Article, the circuit court has declared Terri's law unconstitutional under several provisions of the Florida constitution. *Schiavo v. Bush*, Civil Case No. 03-008212-CI-20, *Order Granting Petitioner's Motion for Summary Judgment* (Fla. 6th Jud. Cir. Ct. May 5, 2004). An appeal of this decision is pending as of the publication of this Article.

140. Levesque, *supra* n. 130, at B3.

141. See e.g. Friedenthal, Kane & Miller, *supra* n. 9, at 3 (“[F]or the vast majority of civil actions, the ultimate responsibility for presenting the case remains with the attorneys and it is imperative that they be fully familiar with all the applicable procedural rules so as to ensure the most effective representation of their clients.”); Joseph J. Simeone, *Reflections on Fifty Years of Teaching Civil Procedure*, 47 St. Louis U. L. J. 87, 89 (2003) (“When one boils down the years in law school there are (perhaps arguably) one or two really important courses—Civil Procedure and Legal Research—know the rules and find the law. These are terrific, satisfying, money-making tools which will stand a lawyer in good stead for the remainder of a lawyer's professional life.”); Michael A. Wolff, *The Most Important Course in Law School?* 47 St. Louis U. L. J. 1 (2003) (“Any reasonably literate fool can read about contracts, torts, property—to name just a few subjects randomly chosen—and figure out for himself or herself what is needed. But to navigate the court system, one needs knowledge of procedure that cannot be obtained by solitary reading.”) (footnotes omitted).

contested end-of-life cases, frequently using the *Schiavo* litigation as an example. Equally as important is what can happen when procedure is not used as well as it could have been, a topic I will also highlight.

Such issues, however, tell only a part of the story. The ability to use procedure can also be an ethical trap for lawyers in these cases. Precisely because there is so much at stake in this type of litigation, lawyers may feel pressure to take steps they would never consider in a normal civil case, steps that could very well be violations of the ethical rules governing the conduct of lawyers. I will address this issue—the ethical traps of procedure—in the second section in this Part, again using *Schiavo* as the principal basis for discussion.

A. Procedural Rules as Valuable Tools for Lawyers

Procedural rules, as well as the substantive law for that matter, are not ends in-and-of themselves. Rather, they are means by which lawyers can work to serve their clients' interests. Thus, in a contested end-of-life case, procedural rules in all their forms are means to reach the specific goals of the client, usually either the cessation of some life-sustaining treatment (as with Michael Schiavo, for example) or the maintenance of such procedures (as with Mr. and Mrs. Schindler). In this Part of the Article, I briefly survey the types of procedural rules that are most often important in end-of-life cases, focusing on how they can be used to a litigant's advantage, as well as dangers that occur when procedural steps are neglected.¹⁴² My aim is not to provide a detailed consideration of procedural strategies; rather, I hope to survey the procedural landscape, emphasizing the areas that are most likely to be of significance in a contested end-of-life case. The categories I will discuss include the following: (1) the choice of forum; (2) the framing of the case and the claim for relief, including seeking preliminary relief, as well as the response to the claim for relief; and (3) issues concerning appellate review.

142. In most respects, this survey of procedural steps is not unique to the end-of-life case. I have attempted to select procedural issues that have been or are likely to be particularly significant in this type of case. However, the discussion concerning the uses of procedure is highly adaptable to more generic civil litigation.

1. Choice of Forum

One of the most important decisions a lawyer in any case must make comes before the suit has even been filed: in which court to proceed?¹⁴³ An advocate needs to consider a range of factors when making the venue decision. For example, a lawyer will need to consider whether a given court has the requisite jurisdiction to hear the case, the procedures employed by the court system in terms of devices that can be used both by and against the client, the docket congestion that exists in the court system, the personalities of the judges, and the lawyer's own (and the opponent's) comfort level in the system.¹⁴⁴

The forum choice can be particularly significant in an end-of-life case. Taking just one example, lawyers in some of these cases have concluded—apparently correctly—that their client's interests would be better served by litigating in federal, as opposed to state, court.¹⁴⁵ The possible reasons for such a determination are varied. For example, the lawyer may perceive an advantage in having a life-tenured judge¹⁴⁶ preside over what will usually be an emotional and highly-charged case in the public eye, rather than a judge that may be elected and thus more prone to swings in public opinion.¹⁴⁷ Similarly, a litigant may elect a federal forum to obtain the advantages of a more rapid response to a situation where speed is of the essence.¹⁴⁸

The forum battle may also be waged defensively. In other words, an advocate should recognize that he or she does not nec-

143. See e.g. Friedenthal, Kane & Miller, *supra* n. 9, at 4 (“[T]he potential availability of more than one court in which to litigate a given dispute poses some of the most important and often the most difficult questions facing a litigant.”).

144. *Id.* at 4–5.

145. E.g. *Gray*, 697 F. Supp. at 580 (discussing how the plaintiff seeking permission to terminate life-sustaining treatment for his comatose wife files suit in federal court); *Mack*, 618 A.2d at 747 (plaintiff, the father of a comatose adult patient, filed suit in federal court seeking a temporary restraining order to prevent the transfer of his son to a facility where he believed life-sustaining measures would be removed). You must, of course, have an independent basis for federal subject matter jurisdiction in order to bring a case in federal court. Friedenthal, Kane & Miller, *supra* n. 9. In addition, the Constitution restricts the state/federal choice of forum issue in many cases. U.S. Const. art. III, § 2, cl. 1.

146. Federal judges have life tenure under the United States Constitution. U.S. Const., art. III, § 1.

147. E.g. *Gray*, 697 F. Supp. at 580.

148. See *Mack*, 617 A.2d at 747 (noting how a litigant proceeded in a federal court on a Saturday seeking preliminary injunctive relief).

essarily have to accept the forum selected by an adversary. One can see significant examples of defensive forum maneuvers in contested end-of-life cases such as *Schiavo*. First, when Terri Schiavo's parents failed in their attempts to convince the guardianship court to provide them relief from the judgment ordering removal of their daughter's feeding tube, they immediately sought relief from a judge in a different division of the circuit court.¹⁴⁹ They did so to seek a temporary restraining order that had the same effect as the order they had sought, but not obtained in the guardianship court itself.¹⁵⁰ While the Schindlers were ultimately unsuccessful in that the appellate court reversed the grant of the injunction,¹⁵¹ they were successful in the most important sense given their position in an end-of-life case: they caused their daughter to once again receive life-sustaining treatment.¹⁵² The Schindlers' success was in no small measure the result of counsel's wise and innovative forum selection.¹⁵³

One can also see such defensive forum activity in the litigation spawned by Terri's Law. In that case, Michael Schiavo filed suit against Governor Jeb Bush in circuit court in Pinellas County.¹⁵⁴ Governor Bush's response to Mr. Schiavo's complaint was to seek dismissal based on, among other grounds, the fact that venue in Pinellas County was improper and that the Pinellas Circuit Court lacked personal jurisdiction over him.¹⁵⁵ In other

149. *Schiavo II*, 792 So. 2d at 561–563. Such a choice between courts within the state system can also present itself in the offensive posture at the commencement of a lawsuit rather than taking steps in response to an adversary's choice. *McConnell*, 553 A.2d at 599 (affirming the jurisdiction of the superior court over an end-of-life action and rejecting the claim that jurisdiction was exclusive in the probate court).

150. *Schiavo II*, 792 So. 2d at 561–563.

151. *Id.*

152. *Id.* at 564 (court remanded the case for further proceedings, namely a hearing concerning the anticipated renewed motion for relief from judgment).

153. The Schindlers also attempted a similar forum-related maneuver later in the litigation saga. After *Schiavo IV* had been decided and there were no state avenues left to pursue, the Schindlers filed suit in the federal district court for the Middle District of Florida seeking to stop the removal of the feeding tube. *Schindler v. Schiavo*, 03-CV-1860 (M.D. Fla., filed Aug. 29, 2003). The federal court granted Michael Schiavo's motion for summary judgment on October 10, 2003. Case docket, PACER <http://pacer.flmd.uscourts.gov/dc/cgi-bin/pacer740.pl> (copy on file with *Stetson Law Review*).

154. Pet. Declaratory Judm. & Reg. Temp. Inj., *Schiavo v. Bush*, 2004 WL 980028 (Fla. 6th Cir., Oct. 21, 2003).

155. *Bush v. Schiavo II*, 871 So. 2d 1012, 1013.

words, the governor's counsel determined that, for whatever reason, he should try to make a defensive forum-related move.¹⁵⁶

The lesson of all of these various cases is that lawyers in end-of-life cases need to consider carefully where to file suit. The question of who will decide the case could quite literally be a life-or-death matter.

2. Framing the Case, Claims for Relief, and Responses

A second area of procedure that is critical in a contested end-of-life case is the framing of the claim, with particular emphasis on the request for relief. It is, of course, important in any civil case to inform the court and other parties what the case is all about—pleadings serve that function.¹⁵⁷ What may be even more important in the contested end-of-life context is the actual relief sought in the action.¹⁵⁸ I will comment briefly on both of these aspects of procedure.

Turning first to the statement of the claim itself, lawyers need to be aware of the various options by which they can reach their clients' goals. Only if the advocate has this knowledge can he or she make a reasoned assessment of which of these avenues provides the *best* means to achieve the objective. Once again, the *Schiavo* matter provides a useful example. As explained by the Second District Court of Appeal, a person wishing to make a decision to terminate life-sustaining treatment for an incompetent person could elect to proceed in one of two ways. "First, the surrogate or proxy may choose to present the question to the court for resolution. Second, interested parties may challenge the decision of the proxy or surrogate."¹⁵⁹ In other words, the operative Florida

156. The governor's actions may also be an example of the ethical trap procedural rules present. If the governor filed these motions to cause delay in the court's substantive consideration of the constitutional challenge to Terri's Law, then he and his counsel would have crossed the ethical line. There is at least a question about motives given the governor's litigation strategy thus far. The general ethical issues are discussed further below. *Infra* pt. II(B) (discussing procedure and ethical considerations for lawyers).

157. See e.g. Friedenthal, Kane & Miller, *supra* n. 9, at 246–247.

158. Undoubtedly, the choice of remedy is also a critical decision in any civil litigation. Friedenthal, Kane, & Miller, *supra* n. 9, at 3 (stating, "an attorney planning to institute litigation must consider what would be the best legal remedy available to meet the needs of the client"). The decision's magnitude is enhanced in the end-of-life context given the quite literally life-and-death stakes.

159. *Schiavo I*, 780 So. 2d at 179 (citing *In re Guardianship of Browning*, 568 So. 2d 4,

law allowed Michael Schiavo, as his wife's guardian, to make a choice between deciding as guardian to withdraw life-sustaining treatment himself or, instead, asking a judge to make such a decision.¹⁶⁰ Michael Schiavo elected the latter method in his quest to remove Terri Schiavo from artificial nutrition and hydration,¹⁶¹ and to quote Robert Frost, that choice "made all the difference."¹⁶²

Knowing that the law provided options concerning how to proceed was significant for Michael Schiavo for a number of reasons. For example, if Michael Schiavo had made the decision himself, the first option, he would almost certainly have been in a defending position in a proceeding commenced by the Schindlers to challenge his decision. On the other hand, by electing to proceed as he did, Michael Schiavo was able to take the initiative and enter the suit in the position of plaintiff or petitioner.¹⁶³ As such, he could make important decisions concerning the framing of the claim and relief.¹⁶⁴ In addition, he was able to make the initial presentation to the court.¹⁶⁵ In short, he was able to set the agenda.¹⁶⁶

The ability to set the agenda and state the claim is also a potential pitfall. First, lawyers run the risk of running afoul of ethi-

16 (Fla. 1990)).

160. *Id.*

161. *Id.*

162. Robert Frost, *The Road Not Taken*, in *The Poetry of Robert Frost* 105 (Edward Connery Lathem, eds., Holt, Rinehart & Winston 1969).

163. *Schiavo I*, 780 So. 2d at 177 (discussing Michael Schiavo's choice to petition the trial court for an order to remove life support).

164. *See id.* (affirming the decision of the trial court).

165. The procedural choice also afforded Michael Schiavo benefits outside the legal proceedings. For example, in what was sure to be a contentious dispute (although it is unlikely that he knew exactly how contentious it would become), he would be able to legitimately take the position that any decision concerning cessation of nutrition and hydration for Terri Schiavo would be the *judge's* and not his. *Schiavo II*, 792 So. 2d at 559 n. 5 (explaining that Michael Schiavo had no discretion in complying with order to cease artificial nutrition and hydration).

166. This is not to say that his choice was without risk. By electing to proceed by giving the choice to the court as a surrogate, Michael Schiavo lost control of the decision. *Id.* For example, he might have decided that making the decision himself was the best option because the possibility of a challenge was slim. Of course, given the length and breadth of the Schindler/Schiavo dispute, the challenge was almost a foregone conclusion. For present purposes, the important point is that a party such as Michael Schiavo should know the procedural options to accurately assess both the potential risks and rewards of a given course of action.

cal limitations on pleading a claim in their zeal to represent clients. This issue is presented more fully in the next section.¹⁶⁷

Second, if lawyers do not adequately prepare and present their clients' cases in the initial pleading, the consequences could be disastrous. For example, as one will recall, one of the ways in which the Schindlers attempted to stop the removal of their daughter's feeding tube was by filing an action in general civil court against Michael Schiavo.¹⁶⁸ The appellate court commented that "[t]he pleadings were poorly drafted and the affidavits were little better."¹⁶⁹ The danger with such inattention to pleadings is that, unless saved by the court,¹⁷⁰ it can affect a party's substantive ability to seek certain forms of relief.¹⁷¹ Thus, lawyers need to be aware of the importance of pleadings to advance the case as well as to avoid harming their clients' interests.¹⁷²

The substantive claim made is only half the battle; the advocate must also consider which remedy to seek. The significance of the remedy requested is perhaps best illustrated by the importance of injunctive relief in a contested end-of-life case.¹⁷³ The importance of the injunction can be seen from the perspective of a

167. *Infra* pt. II(B).

168. *Schiavo II*, 792 So. 2d at 561–562.

169. *Id.* at 561. The court also noted that, "[o]ddly, in the acknowledgment [to the verified complaint], the notary affirmatively states that the Schindlers did not swear to the facts of the complaint under oath." *Id.* at 555. This fact is odd because, by definition, a verified complaint requires that the allegations be made under oath or affirmation. Larry L. Teply & Ralph U. Whitten, *Civil Procedure* 544 (2d ed., Found. Press 2000).

170. *See Mack*, 618 A.2d at 748 (noting that the trial court had allowed a party in a contested end-of-life case to proceed on an issue at trial even though it was argued only in the pretrial memorandum).

171. *See* Fed. R. Civ. P. 8(c) (stating that a party *shall* plead affirmative defenses); Fed. R. Civ. P. 12(h) (certain defenses waived if not asserted in first response to complaint).

172. In *Schiavo III*, the pleading errors did not have any lasting impact, probably because the purpose for the separate action was never really to proceed with the poorly pled claims for monetary relief. *See Schiavo III*, 800 So. 2d at 642 n. 4 (noting that, in the guardianship proceeding, the Schindlers did not file a claim for monetary relief against Michael Schiavo after their separate action had been dismissed).

173. This is not to say that other forms of relief are not also important. For example, parties in these cases could—and have—sought declaratory judgments concerning their rights. *E.g. Gray*, 697 F. Supp. 580, 581; *Ragona v. Preate*, 6 Pa. D. & C.4th 202, 202 (Pa., Lackawana County Ct., 1990); *L.W.*, 482 N.W.2d at 65. The declaratory judgment may not be as useful as an injunction, however, because a declaratory judgment standing alone is not a command to a party to actually take or refrain from taking any action. *See Douglas Laycock, Modern American Remedies Cases and Materials* 517 (3d ed., Aspen L. & Bus. 2002) (stating, "[t]he injunction would include a personal command; the declaratory judgment would not").

person seeking to stop the removal of life-sustaining measures. Such a person has a single immediate goal: keep his or her loved one alive.¹⁷⁴ Thus, a familiarity with the standards for injunctive relief can often be critical to, if not the only way of, achieving your client's goals in a contested end-of-life case.¹⁷⁵

Finally, and very much like a bookend to the importance of asserting claims, is the centrality of responding to them. Procedural systems tend to provide a party with a number of standard options to respond to a claim, ranging from contesting its legal sufficiency to admitting the factual allegations and seeking summary disposition.¹⁷⁶ Litigants in a contested end-of-life case will need to be familiar with these basic options to protect their rights.

Lawyers in these types of cases should also be aware of more esoteric responses available, given the special nature of the lawsuits. For example, in jurisdictions where court approval is required for all or most decisions to remove life-sustaining treatment, a person opposed to such action may seek to intervene and become a party to the case.¹⁷⁷ Also, a party contesting a guardian's request to stop the provision of life-sustaining treatment can respond, in part, by seeking to remove the guardian.¹⁷⁸ Whether traditional or untraditional, the important point is that an advocate in an end-of-life case must carefully consider the options for responding to the stated request for relief.

3. Appellate Issues

The final procedural area of great importance to the lawyer in an end-of-life case is the availability of appellate review. Quite

174. See *Schiavo II*, 792 So. 2d at 561–563 (discussing the use of injunctions to continue artificial nutrition and hydration); *Mack*, 618 A.2d at 747 (discussing the use of injunctions to continue artificial nutrition and hydration); *Protec. and Advoc. Sys.*, 989 P.2d at 891 (discussing the use of injunctions to continue artificial nutrition and hydration).

175. By the same token, a failure to follow the proper procedures in connection with a request for injunctive relief can be quite dangerous. For example, in *Schiavo II*, the appellate court reversed the entry of a preliminary injunction in part because of insufficient evidence produced in support of the application. *Schiavo II*, 792 So. 2d at 561–563.

176. See Fed. R. Civ. P. 12(b)(6) (allowing motions to dismiss for failure to state a claim); Fed. R. Civ. P. 56 (allowing motions for summary judgment).

177. E.g. *Longeway*, 549 N.E.2d at 293 (nursing facility intervened in action and filed a motion to dismiss a petition which sought to cease artificial nutrition and hydration for an elderly person with severe neurological damage).

178. E.g. *Martin*, 538 N.W.2d at 402.

clearly, it is essential that the advocate understand the basic appellate process, particularly the steps necessary to preserve issues for plenary appeal. There are nuances in appellate practice that are particularly significant in the end-of-life case, however. First, counsel should be fully conversant with the applicable jurisdiction's rules concerning interlocutory appeals.¹⁷⁹ Such appeals often prove to be critical in a contested end-of-life case.¹⁸⁰ Second, but related, lawyers should consider using the extraordinary writ of mandamus in appropriate circumstances.¹⁸¹ As with interlocutory appeals, writs of mandamus have also been used successfully in contested end-of-life cases.¹⁸² Finally, attorneys should be aware of the rules regarding the ability to reach the highest tribunal in the applicable court system.¹⁸³ It may be that a given state's Supreme Court will be the best forum to hear a dispute, especially if the litigant is moving into legally uncharted waters. Thus, knowing the possibilities for getting there could prove a decisive procedural move.

179. See generally Friedenthal, Kane & Miller, *supra* n. 9, at 600–608 (comparing and contrasting various jurisdictions' approaches to interlocutory appeals).

180. See *Schiavo II*, 792 So. 2d at 557 (noting that Michael Schiavo “filed a nonfinal appeal” of a lower court's grant of injunctive relief to Terri Schiavo's parents). Thereafter, the court reversed the grant of the injunction to the Schindlers, vindicating the use of the interlocutory appeal. *Id.* at 562.

181. The writ of mandamus is an order from an appellate court to a lower court judge to take a certain action. Friedenthal, Kane & Miller, *supra* n. 9, at 615 n. 25.

182. *E.g. Bowvia*, 179 Cal. App. 3d at 1146 (demonstrating how a writ of mandamus can be used to gain a grant for a preliminary injunction).

183. The various court systems in the United States have different rules governing when the system's highest court may hear a dispute. In the federal court system, appeals to the highest court are largely at the discretion of that court, while in others, such as New York, appeals to the highest tribunal are allowed as of right in a wide range of matters. Friedenthal, Kane & Miller, *supra* n. 9, at 6–7. Lawyers in several end-of-life cases have used a variety of procedural moves to reach the state's highest court. See *e.g. Longeway*, 549 N.E.2d at 292 (Illinois Supreme Court agreeing to hear a direct appeal of an order dismissing a petition seeking to terminate a patient's nutrition and hydration); *Mack*, 618 A.2d at 748 (Maryland Court of Appeals granting writ of certiorari to hear dispute prior to the intermediate appellate court's consideration of the appeal); *Superintendent of Belcher-town Sch.*, 370 N.E.2d at 417 (Massachusetts Supreme Judicial Court granting a request for direct review of the trial court's decision refusing to force the use of medical procedures on an incompetent adult); *Jobes*, 529 A.2d at 437 (New Jersey Supreme Court granting petition for direct appellate review of the trial court's decision to authorize the removal of a patient's nutrition and hydration); *L.W.*, 482 N.W.2d at 63 (appeal taken to the Wisconsin Supreme Court using the statutory procedure provided for bypassing intermediate appellate court).

As this brief survey has shown, an attorney representing a client in a contested end-of-life matter will have to be fully familiar with all of the applicable rules of procedure. If the lawyer is not, the client's interests will likely suffer. But there is more to the use of procedure from the lawyer's perspective that must be addressed.

B. Procedural Rules as Ethical Traps for Lawyers

Lawyers in end-of-life cases face enormous pressure, far beyond that experienced in the "normal" civil suit. The reason is quite simple: it can never be far from the lawyer's mind that the end result of the litigation can be the death of another human being. The various procedural tools available to lawyers as part of the civil litigation system are not only valuable to achieving goals within the confines of the rules, but also can become the means to go beyond what is appropriate in a desire to achieve the client's objectives at whatever cost.¹⁸⁴ While resort to such tactics may be understandable given the stakes in these cases, lawyers should be aware of the potential misuse of procedure and guard against engaging in unethical litigation conduct.¹⁸⁵

To somewhat simplify the situation, a lawyer's ethical conduct in a given lawsuit is governed by two bodies of rules: the applicable professional responsibility rules in effect in that jurisdiction (and the other jurisdictions in which the lawyer is admitted to practice)¹⁸⁶ and the rules or procedures governing civil practice in the court system itself.¹⁸⁷ As relevant here, an important aspect of both sets of rules is that a lawyer must not take actions in a lawsuit that are without legal or factual merit or that are taken for an improper purpose, such as to needlessly delay the proceed-

184. See ABA, *Annotated Model Rules of Professional Conduct* 3.1 cmt. 1 (5th ed., West 2003) (stating that lawyers have a duty not to abuse legal procedures even if it would be in the client's best interest).

185. I wish to be clear that the discussion that follows is not meant to accuse any specific attorney of unethical conduct. Rather, I discuss specific cases as a means of providing examples of litigation conduct that could be viewed as approaching the line between the ethical and the unethical. In other words, this brief part of the Article is meant to serve as a cautionary tale for practitioners in this area.

186. ABA, *supra* n. 184, at vii.

187. *E.g.* Fed. R. Civ. P. 11 (requiring attorneys to sign all documents submitted to the court); Conn. Sup. Ct. R. 10-5; Mo. R. Civ. P. 55.03; N.J. R. Ct. 1:4-8.

ings.¹⁸⁸ Lawyers in contested end-of-life cases can easily put themselves in a position of potentially running afoul of both of these general types of rules. Indeed, in their zeal, usually to stop the removal of life-sustaining treatment, lawyers in certain contested end-of-life cases have taken actions that directly implicate both of these ethical duties.¹⁸⁹

I survey only a few examples of such conduct to provide a flavor of the ethical dangers that are present in these cases. For example, in several cases, persons not even related to the parties have commenced legal action to oppose requests to cease life-sustaining treatment, even though the applicable law almost certainly did not allow such an action.¹⁹⁰ In other cases, the courts have questioned whether pleadings or other papers filed in end-of-life cases had sufficient merit.¹⁹¹ In still others, parties have filed motions to remove the judge for apparently doing nothing more than making decisions with which that party disagreed.¹⁹²

188. See Model R. Prof. Conduct 3.1 (ABA 2004) (requiring a good faith legal and factual basis for a claim or defense); Model R. Prof. Conduct 3.2 (ABA 2004) (stating, “[a] lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client”); Fed. R. Civ. P. 11(b)(1)–(3) (stating that actions may not be taken “for any improper purpose, such as . . . to cause unnecessary delay” and requiring a legal and factual basis for claims and defenses).

189. See ABA, *supra* n. 184 (discussing lawyer’s duties).

190. *E.g.* *Schiavo II*, 792 So. 2d at 556 (noting that Mr. and Mrs. Schindler brought an action “as the ‘natural guardians’ of [Terri] Marie Schiavo, even though they [knew] she is an adult, married daughter with an appointed legal guardian and a pending guardianship proceeding”); *Protec. & Advoc. Sys.*, 989 P.2d at 895–896 (court rejects standing for not-for-profit entity unrelated to person in the litigation for whom order was sought discontinuing life-sustaining treatment); *Weber*, 456 N.E.2d at 1187–1188 (court rejects standing for a person “not related or known to” the parents of a child for whom life-sustaining treatment was to be discontinued); *Gilmore*, 527 S.E.2d at 435 (court rejects standing of Commonwealth’s governor to oppose removal of life sustaining measures while also ruling that the governor’s actions did not violate Virginia’s counterpart to Rule 11).

191. *E.g.* *Schiavo III*, 800 So. 2d at 644 (expressing skepticism about affidavit submitted in connection with motion for relief from judgment); *Schiavo II*, 792 So. 2d at 555 (questioning whether motion for relief from judgment was supported by unsigned affidavits and affidavits that did not require witness to swear or affirm the truth of the matters asserted); *id.* at 558 (holding that position asserted on appeal was “expressly contrary to case law”); *id.* at 562 (holding that complaint failed to state a cause of action seeking the claimed relief). Interestingly, with respect to the witness whose testimony the *Schiavo III* court questioned, the same court noted in its follow-up opinion that the affiant “who was so critical in this court’s decision to remand the case, made no further appearances in these proceedings.” *Schiavo IV*, 851 So. 2d at 184; see also Broder & Cranford, *supra* n. 33, at 804 n. 97 (noting that the judge in an end-of-life case described a motion for removal of a guardian as “utterly ridiculous”).

192. *E.g.* *Bush*, 861 So. 2d at 507 (affirming the denial of a recusal motion that had

The fact is that the litigants and their counsel in these cases may have had the best intentions, but the applicable ethical and procedural codes charged the lawyers with the obligation to ensure that their conduct met certain minimal standards. At the very least, the lawyers all came close to the ethical line. Lawyers should always be mindful of the opportunity to make a cutting-edge legal argument, perhaps especially in cases such as these where the law enters uncharted waters,¹⁹³ but they must also temper their innovation and zeal by keeping the important ethical precepts by which our profession is governed in the forefront of their minds.

III. THE COURT'S PERSPECTIVE: PROCEDURE AS A SAVING GRACE?

As we have just seen, the various procedural rules governing a civil lawsuit are important in terms of the litigants reaching their goals. But the value of such rules is not so limited. Particularly in end-of-life cases, the rules should also serve as a means to ensure that judges do not make, or appear to make, decisions for improper, even if understandable, reasons. If courts hearing end-of-life disputes use ad hoc procedures, there is a very real danger that the decision-making process itself will be distorted. Moreover, public confidence in the way these decisions are made will be enhanced if the courts are seen to be employing neutral, generally applicable procedures. The reality is that, given the stakes in these types of cases of incorrect rulings in either direction, any step that can remove a potential source of distortion should be taken.

I begin this Part with a brief discussion of procedural neutrality in the context of the civil justice system. This discussion will set the stage for the particular importance of procedural neutrality in a contested end-of-life case.¹⁹⁴ I then continue by illustrating

been based on judge's judicial statements); *Schiavo III*, 800 So. 2d at 643 (summarily affirming denial of motion to remove judge from case).

193. E.g. Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. Pa. L. Rev. 1999, 2051 (1989) [hereinafter Subrin, *Federal Rules, Local Rules*] ("History teaches that any American procedural model will be modified by the ingenuity of lawyers who have learned to manipulate the rules to the benefit of their clients.").

194. See *infra* pt. III(A) (discussing procedural neutrality in the civil litigation system).

the generic ways that courts across the country have treated the end-of-life cases differently from other civil matters in terms of procedure.¹⁹⁵ Finally, I turn to an analysis of why courts should not treat end-of-life cases differently.¹⁹⁶ In the concluding portion of the Article, I advocate the use of neutral rules of procedure as a court's saving grace in these difficult life-and-death situations.¹⁹⁷

A. Procedural Neutrality in the Civil Litigation System

The "traditional" role of the judge in our adversary litigation system is "characterized by two guiding principles: Judges rel[y] on the parties to frame disputes and on legal standards to help resolve them."¹⁹⁸ Thus, our system of civil justice is, in many respects, based on a belief that judges will act as neutral umpires whose decisions will be based on established rules known to the parties before the contest.¹⁹⁹

This conception of justice flowing from pre-established rules extends beyond the substantive law to include the application of fair or "neutral" procedures.²⁰⁰ But saying that the adversary system requires neutral procedural rules is only the start of the analysis. One must then define "neutrality." Professor Mark Spiegel has argued that such procedural neutrality encompasses,

195. See *infra* nn. 209–233 and accompanying text (discussing how the courts, procedurally, have treated end-of-life cases differently).

196. See *infra* nn. 234–261 and accompanying text (discussing the problems with treating end-of-life cases differently).

197. See *infra* pt. III(C) (discussing why the courts should not treat end-of-life cases differently).

198. Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 Yale L.J. 27, 29 (2003). In this fascinating article, Professor Molot discusses how the "traditional" conception of judging can be employed today to address problems that can be identified in the contemporary American civil litigation system. Along the way, he canvasses much of the literature concerning the recent attacks on the adversary system and the proper role judges should play in the litigation process. *Id.* at 29–58. To be clear, Professor Molot does not insist that judges confine themselves to the "traditional" modes of adjudication. *Id.* at 74–75. Rather, his thesis essentially is that judges should respond to new procedural challenges "without losing sight of" their traditional roles and the reasons for those roles. *Id.*

199. See *e.g. id.* at 34–58 (discussing judicial roles); Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 Geo. Wash. L. Rev. 1683, 1734–1742 (1992) (discussing the roles of judges in modern procedure).

200. Mark Spiegel, *The Rule 11 Studies and Civil Rights Cases: An Inquiry into the Neutrality of Procedural Rules*, 32 Conn. L. Rev. 155, 162 (1999) ("Whatever one's views about the desirability or inevitability of courts making substantive choices, however, it is generally assumed that a court must use neutral procedures in making these choices to resolve any dispute before it.") (footnote omitted).

at a minimum, “a decision maker who is not biased” and rules that do not explicitly favor one group over another.²⁰¹ It is difficult to argue with either of these fundamental precepts of neutrality.

Another aspect of “neutrality,” one that is more controversial, however, is the degree to which rules must be “trans-substantive”²⁰² in order to qualify as “neutral.”²⁰³ The degree of importance we should attach to trans-substantivism as an attribute of a procedural system has been the subject of much scholarly debate.²⁰⁴ Such trans-substantivity debates within the academy largely concern whether rule promulgators should enact different rules for different types of civil claims. For example, there has been discussion concerning the propriety of having distinct procedures for securities fraud litigation or “complex” cases.²⁰⁵ It is certainly an interesting question whether the legislature (or other appropriate rule-promulgating authority) *should* enact a proce-

201. *Id.* at 162–164.

202. By trans-substantivity, scholars generally mean that the same set of procedural rules will apply to all civil cases regardless of the substantive claims or defense being asserted. *E.g.* Stephen N. Subrin, *Uniformity in Procedural Rules and the Attributes of a Sound Procedural System: The Case for Presumptive Limits*, 49 Ala. L. Rev. 79, 80 (1997) [hereinafter Subrin, *Uniformity in Procedural Rules*] (stating, “[t]rans-substantive uniformity means that the same procedural rules are used for different types of cases, regardless of the substantive law being applied”); Tidmarsh, *supra* n. 199, at 1687 n. 12 (Trans-substantivity “means that the same set of rules applies in all civil cases.”).

203. Spiegel, *supra* n. 200, at 164–168.

204. *E.g.* Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. Pa. L. Rev. 1925, 1929–1941 (1989); Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. Pa. L. Rev. 2067, 2069–2087 (1989); Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 Yale L.J. 718, 732–740 (1975); Benjamin Kaplan, *A Toast*, 137 U. Pa. L. Rev. 1879, 1881 (1989); Maurice Rosenberg, *The Federal Civil Rules after Half A Century*, 36 Me. L. Rev. 243, 246–249 (1984); Spiegel, *supra* n. 200, at 161–168; Subrin, *Federal Rules, Local Rules*, *supra* n. 193, at 2043–2051; Stephen N. Subrin, *Teaching Civil Procedure while You Watch It Disintegrate*, 59 Brook. L. Rev. 1155, 1159–1165 (1993) [hereinafter Subrin, *Teaching Civil Procedure*]; Subrin, *Uniformity in Procedural Rules*, *supra* n. 202, at 80–85; Tidmarsh, *supra* n. 199, at 1687 n. 12, 1746–1749; Carl Tobias, *The Transformation of Trans-Substantivity*, 49 Wash. & Lee L. Rev. 1501 (1992).

205. *E.g.* Subrin, *Uniformity in Procedural Rules*, *supra* n. 202, at 83–84 (discussing procedural breakdown associated with, among other things, congressional enactment of the Private Securities Litigation Reform Act of 1995 that, in part, heightened pleading standards for securities fraud claims); Tidmarsh, *supra* n. 199, at 1808–1809 (discussing trans-substantivity in the context of the complex civil case). Some scholars have also questioned the uniformity of procedure in the federal system based on the proliferation of local rules. *E.g.* Burbank, *supra* n. 204, at 1929–1930; Subrin, *Federal Rules, Local Rules*, *supra* n. 195, at 2018–2021.

dural code specifically for end-of-life cases.²⁰⁶ The fact is, however, that with the exception of isolated, though important, matters such as specifying a heightened burden of proof,²⁰⁷ this has not happened. Therefore, my focus is on an issue related to, but not co-extensive with, traditional trans-substantive debate: whether in a situation in which there are only neutral, generally applicable procedural rules in place, should courts take it upon *themselves* to apply such rules differently in the end-of-life case? As I argue in detail below, they should not do so for a host of reasons.²⁰⁸

B. Procedurally, Courts Treat End-of-Life Cases Differently

An oral argument in a contested end-of-life case began with this question from one of the judges on the appellate panel: “[I]n a case such as this involving life and death, can’t we disregard legal procedure?”²⁰⁹ While most judges are not as open about the differential use of procedure in a contested end-of-life case, even a cursory review of the opinions in these matters leaves no doubt that judges are often inclined to disregard or distort neutral, generally applicable procedural rules.²¹⁰ I have already discussed in a fair degree of detail the *Schiavo* litigation and the manner in which, at various points, courts did not adhere to applicable neutral pro-

206. For example, one could argue that, as Justice Antonin Scalia has mockingly written in another context, “death is different.” *E.g. Wiggins v. Smith*, 539 U.S. 510 (2003) (Scalia, J., dissenting). Notwithstanding Justice Scalia’s attitude, the fact is that death *is* different in many respects than the relief sought in the run-of-the-mill civil case. Thus, there are policy arguments—both related to civil procedure generally and end-of-life substantive law more specifically—that could be made about adopting case-specific procedures. This issue is one that legislators or other rule promulgators should consider. *Cf. Browning*, 568 So. 2d at 16 n. 17 (calling for appropriate entity to draft “a proposed rule establishing procedures for *expedited* judicial intervention as required in [the court’s opinion]”) (emphasis in original).

207. Fla. Stat. § 765.401(3) (requiring clear and convincing evidence for withdrawal of life-prolonging procedures for incapacitated persons under certain circumstances); *see also Cruzan*, 497 U.S. at 283 (discussing use of the clear and convincing evidence standard in an end-of-life case as required by Missouri law).

208. *See infra* pt. III(C) (discussing why courts should follow neutral procedural rules in end-of-life cases).

209. E-mail from George Felos, Esq., counsel to Michael Schiavo, to Prof. Rebecca Morgan, Stetson U. College L., *Schiavo* (Feb. 22, 2002, 2:43 p.m. EST) (copy on file with *Stetson Law Review*) (concerning oral argument in the *Schiavo* litigation).

210. *See supra* pt. II(C) (explaining the “saga” of the *Schiavo* litigation).

cedural rules in that matter.²¹¹ In this section, I provide a more comprehensive description of how courts have acted in this way, focusing on how such deviations raise serious questions about the resolution of such heated end-of-life disputes in an adversary system.²¹²

One will recall that a hallmark of our traditional adversarial civil litigation system is that one party or another has the responsibility to present proof of its claim.²¹³ The court then uses neutral rules to resolve the matter.²¹⁴ A disturbing trend in end-of-life situations is that courts engage in procedural conduct that is antithetical to the essential nature of such an adversary system. Most significant, perhaps, are instances in which courts proceed without the very touchstone of adversarial process: parties who are actually espousing contrary positions and have a real interest in the case. For example, in one case, the court proceeded to decide an end-of-life “dispute” even though the party opposing the claim for relief had “essentially agreed with [the other party] and has accordingly assumed only a token adversarial stance on appeal.”²¹⁵

Although the issue will be discussed in more detail below,²¹⁶ it is worth highlighting the dangers that exist when courts proceed in the absence of adversaries.²¹⁷ First, there is an increased risk of

211. *Id.*

212. I make no claim that every court hearing an end-of-life case applies neutral procedural rules differently than it would in other cases. Rather, my assertion is that the incidence of such differential uses of procedure suggests that this phenomenon is not an isolated occurrence.

213. *See supra* pt. III(A) (discussing procedural neutrality).

214. *Id.*

215. *McKay*, 801 P.2d at 619; *see also Hafemeister & Robinson, supra* n. 4, at 196–197 (discussing results of surveys of state court judges showing that judges are reluctant to dismiss end-of-life cases even if there are no traditional adversaries); *id.* at 210–211, 242–243 (discussing use by some judges hearing end-of-life matters to use *ex parte* hearings).

216. *Infra* pt. III(C).

217. A related danger is the court proceeding with an “adversary” who does not actually have a stake in the matter. The concern in this situation is that the court’s decision-making process will be skewed, or perceived to be skewed, by a political or social agenda of such an interloper. I discuss concerns relating to “political” decisions in more detail below. *Infra* pt. III(C). The danger of such an interloper arises when courts ignore or misapply neutral procedural rules concerning standing. *See e.g. Weber*, 456 N.E.2d at 1187–1188 (affirming the denial of standing to Mr. William Weber because he had no connection to the dispute concerning withdrawal of a child’s life-sustaining treatment). It appears that Mr. Washburn, a political or social activist with respect to the rights of fetuses and disabled infants had the court appoint Mr. Weber as guardian ad litem. *See Michael Vitello*,

error with such a procedure. As Justice William Brennan recognized, adversarial testing “is of particular importance when one side has a strong personal interest which needs to be counterbalanced to assure the court that the questions will be fully explored.”²¹⁸ By definition, parties involved in end-of-life cases have such a “strong personal interest” requiring the counterbalance brought by actual adversaries.²¹⁹ Second, without adversaries to present the proofs, courts will be required to step into the process as more active participants. Thus, courts will be more prone to do what was discussed in detail concerning *Schiavo*, in which the appellate court—in that case not for the lack of actual adversaries—essentially acted as a party in important ways.²²⁰ Third, and in an important way related to the preceding point, there is a danger that the public will be more suspicious of court decisions if the court is actively involved in a non-traditional way. Finally, the courts simply are not institutionally equipped to take on roles more suited to adversaries.²²¹

Courts have also proceeded at odds with the adversarial system in ways less dramatic than acting in the absence of an adversarial contest. For example, courts in both California and Florida have essentially relaxed the requirements for granting injunctive relief to enter orders preventing the withdrawal of life-sustaining measures (or ordering that such measures be started) based on evidentiary records that were entirely inadequate under existing law.²²² Interestingly, both of the appellate courts that eventually reversed the defective injunctive orders specifically refrained from scolding the lower court judges, despite the judges’ clear failure to abide by neutral procedural rules. For example, in *Bouvia v. Superior Court*,²²³ the California appellate court described the trial

Baby Jane Doe: Stating a Cause of Action against the Officious Intermeddler, 37 Hastings L.J. 863, 870–871 (1986) (noting that Mr. Weber was a local lawyer who became involved in the case after Mr. Washburn asked him to be his replacement).

218. *Cruzan*, 497 U.S. at 318 (Brennan, Marshall, & Blackmun, JJ., dissenting).

219. *Id.* (Brennan, Marshall, & Blackmun, JJ., dissenting).

220. *Supra* pt. I(C) (discussing how the appellate court acted as a party).

221. *Infra* pt. III(C) (discussing these points in more detail).

222. *See e.g. Bouvia*, 179 Cal. App. 3d at 1134–1135 (reversing a grant of injunctive relief due to abuse of discretion); *Schiavo II*, 792 So. 2d at 561–562 (reversing grant of injunctive relief due to the inadequate record below and the absence of required findings).

223. 179 Cal. App. 3d 1127.

court as having “the most noble intentions.”²²⁴ Similarly, in *Schiavo II*, the Florida appellate court wrote that “[w]e cannot fault [the lower court judge] for wanting to enter some type of stay order to give himself and the parties the opportunity to review this matter in a more deliberate fashion.”²²⁵ As I discuss below, far from justifying the differential use of neutral procedures in a contested end-of-life case, the fact that these matters are so emotionally taxing is a reason to require adherence to neutral procedural rules.²²⁶

Similarly, courts have ignored evidentiary requirements on which a valid judgment may be based,²²⁷ dispensed with pleadings and hearings on certain issues,²²⁸ and resolved issues even when the parties have expressly withdrawn them from consideration.²²⁹ All of these actions involve either a failure to apply a neutral procedural rule or the application of the rule in a materially different way, based merely on the end-of-life nature of the dispute.²³⁰ A word of caution is appropriate before moving on. I am not asserting that courts should ignore the fact that these matters are quite literally about life and death. Rather, I contend that a court should not distort neutral, generally applicable procedural rules simply because it is an end-of-life matter. To the extent that neutral procedural rules allow for the exercise of judicial discretion,²³¹

224. *Id.* at 1135.

225. *Schiavo II*, 792 So. 2d at 561.

226. *Infra* pt. III(C) (explaining why adherence to neutral procedural rules is necessary).

227. *E.g.* *AMB*, 640 N.W.2d at 269 (describing lower court decision as being based on a “record [that] consists mostly of allegations, unsworn statements, and hearsay”).

228. *See* Hafemeister & Robinson, *supra* n. 4, at 210–211, 242–243 (reporting results of survey of state court judges in which judges reported dispensing with pleadings and hearings in certain end-of-life cases).

229. *Quinlan*, 355 A.2d at 653 n. 3.1.

230. Some appellate courts have also strayed from their traditional role by usurping the role of the trial court to decide the facts. *E.g.* *Martin*, 538 N.W.2d at 401 (noting that the court had conducted a “painstaking review of the facts of this case”); *Westchester County Med. Ctr.*, 531 N.E.2d at 623 (Simons, J., dissenting) (charging that the majority inappropriately re-weighed the facts as found by the lower court); *but see Fiori*, 652 A.2d at 1363 (Wieand, J., concurring) (“An appellate court, it seems to me, must also be cognizant of the profound responsibility which has been vested in the trial court and should not substitute its judgment for that of a trial court.”).

231. *See* Carrington, *supra* n. 204, at 2081–2085 (discussing the importance of flexibility and discretion under procedural rules); Robert E. Keeton, *Time Limits As Incentives in an Adversary System*, 137 U. Pa. L. Rev. 2053, 2055 (1989) (noting Professor Shapiro’s observation that the rulemakers of the Federal Rules of Civil Procedure intended to “es-

however, it is entirely appropriate for the court to take the life-and-death nature of the litigation into account. For example, efforts consistent with generally applicable procedural rules undertaken to expedite consideration of the case would not run afoul of my suggestion.²³² Nor would appellate courts, agreeing to hear appeals of these cases even though the patient has died and the cause is technically moot, violate the position I advocate.²³³ Both of these approaches display an understanding of the challenges an end-of-life case poses without implicating the concerns I discuss in the next section as to why, as a normative matter, courts should avoid creating special procedural rules in this type of litigation.

C. Procedurally, End-of-Life Cases Should Not Be Treated Differently

I have discussed the fact that many courts hearing end-of-life cases do not follow a number of neutral, generally applicable procedural rules.²³⁴ However, judges should not engage in such behavior in these cases for a number of reasons, ranging from their own institutional competence to the public's perception of the adjudication process. In this sub-part, I discuss in detail the reasons a court should follow neutral procedures in end-of-life cases.²³⁵

cape the rigidities and technicalities" of the rules).

232. *E.g. Schiavo III*, 800 So. 2d at 647 (exhorting trial court to proceed as quickly as possible); *Barry*, 445 So. 2d at 372 (stating, "we urge the trial courts to handle these matters on an expedited basis with due concern for the delicacy of the issues and the feelings of the parties involved"); *McKay*, 801 P.2d at 619 n. 1 (noting appellate court's effort to expedite the appeal); *see also* Coordinating Council, *supra* n. 4, at 99 (advocating expediting of appeals in end-of-life cases); Hafemeister & Robinson, *supra* n. 4, at 210 (noting that "[c]ourts appear to be able to expedite [life-sustaining medical treatment] cases within traditional procedural rules, although a substantial minority of these cases are processed in a somewhat different manner"). While he does not raise the concerns addressed in this Article, Professor Hafemeister has questioned whether the fact that end-of-life cases are expedited leads to other issues such as a failure to fully and carefully resolve the issues. *Id.* at 242.

233. Courts do so by holding that the matter is one of importance and that it is likely to recur and evade review. *E.g. Wendland*, 28 P.3d at 154 n. 1; *Bartling*, 163 Cal. App. 3d at 189; *Browning*, 568 So. 2d at 8 n. 1; *McKay*, 801 P.2d at 619-620; *Storar*, 420 N.E.2d at 66-67; *L.W.*, 482 N.W.2d at 64.

234. *Supra* pt. III(B) (discussing the court's departure from neutrality).

235. It is worth reiterating that the position I am advocating does not extend to whether there should be different rules of procedure promulgated for end-of-life cases. That inquiry is the traditional trans-substantive one. *See Carrington*, *supra* n. 204, at 2068 ("judicially-made rules directing courts to proceed differently according to the sub-

While the arguments I advance are, in one form or another, generally applicable to civil litigation, the focus of my discussion is on how the justifications for following neutral rules of procedure are particularly compelling in the contested end-of-life cases. I divide the discussion into three broad areas: (1) the institutional competence of the courts, (2) fairness to the parties, and (3) public perception of and confidence in the adjudicative process.

1. Institutional Competence

The first reason judges should resist the temptation to deviate from neutral, generally applicable rules of procedure in end-of-life cases is that courts are not institutionally well-suited to act outside of their traditional role as disinterested arbitrators of party-initiated disputes.²³⁶ Within the confines of the traditional adversary system, courts are accustomed to having disputes framed by parties who have defined the issues, requested the remedy, and assembled and presented the proof.²³⁷ Accordingly, the procedural rules governing civil litigation are overwhelmingly designed to give the *parties* power to frame the issues and collect information.²³⁸ The courts simply are not constituted with such

stantive nature of the rights enforced is an idea that has been wisely rejected in the past and must be rejected for the present and for the future"). Again, my focus here is whether, in the absence of such validly promulgated case-specific rules, a court should stray from neutral, generally applicable rules of procedure.

236. See Molot, *supra* n. 198, at 60–63 (discussing the “institutional underpinnings” of the judiciary as a justification for trans-substantive rules of procedure generally). Professor Molot also argues that there are “constitutional underpinnings” that counsel in favor of trans-substantivity as well. *Id.* at 63–73.

237. See *supra* pt. III(A) (discussing attributes of the adversary system).

238. *E.g.* Fed. R. Civ. P. 8 (specifying procedures for litigants to state claims and assert defenses); Fed. R. Civ. P. 14 (allowing defending parties the option under certain conditions to implead non-parties); Fed. R. Civ. P. 15 (allowing parties under certain conditions to amend pleadings both with and without court approval); Fed. R. Civ. P. 29 (allowing parties to stipulate with respect to discovery issues); Fed. R. Civ. P. 30 (allowing parties to take depositions); Fed. R. Civ. P. 33 (allowing parties to serve interrogatories); Fed. R. Civ. P. 34 (allowing parties to serve document requests); Fed. R. Civ. P. 56 (allowing parties to move for summary judgment); Fed. R. Civ. P. 60 (providing avenues by which parties may seek relief from judgment). This is not to say that procedural rules do not give courts significant authority over how an action progresses. *E.g.* Fed. R. Civ. P. 16(c) (giving federal courts considerable authority to “take appropriate action” on a number of issues to expedite and streamline litigation). Nor is it the case that procedural rules entirely preclude a court from acting on its own initiative. *E.g.* Fed. R. Civ. P. 11(c)(1)(B) (providing court with the authority to enter an order *sua sponte* to show cause why Rule 11 sanctions should not be entered); Fed. R. Civ. P. 42 (granting district courts the authority to consolidate and

powers under the applicable procedural rules.²³⁹ Yet, when courts in end-of-life cases freelance with respect to procedural rules by, among other things, acting in the role of the litigant; ignoring or misapplying existing evidentiary rules; or dispensing with pleadings and hearings that, in an ordinary civil case, frame the issues for the court, the courts are engaging in precisely the type of activity by which courts go beyond their institutional competence.²⁴⁰

In addition, courts are not institutionally competent to set the parties' litigation goals or determine when those goals have either changed or been realized. The parties, with the advice and guidance of their counsel, have assembled their cases to maximize their chances of reaching their litigation goals. When courts go beyond the role as neutral arbitrators of the disputes presented to them, there is a risk that the parties' goals will less likely be satisfied.²⁴¹

By ignoring neutral procedural rules in these cases, the courts act in uncharted waters, likely increasing both the risk of error as well as the danger that the public, and perhaps the parties, will lose confidence in the courts as institutions to resolve these (and potentially other) disputes.²⁴²

2. Fairness to the Parties

A second reason why courts should follow neutral, generally applicable procedural rules in end-of-life cases is that doing so

sever issues and claims for trial purposes); Fed. R. Civ. P. 59(d) (providing court with authority to order a new trial *sua sponte*). But the fact remains that such court-initiated action is the exception under procedural rules and still must come as part of a party-initiated lawsuit.

239. See Louis L. Jaffe, *The Citizen As Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. Pa. L. Rev. 1033, 1037-38 (1968) (stating, "[t]he court, not being a representative institution, not having initiating powers and not having a staff for the gathering of information, must rely on the parties and their advocates to frame the problem and to present the opposing considerations relevant to its solution").

240. See *supra* pt. III(B) (discussing various ways in which procedure has been warped in contested end-of-life cases).

241. Molot, *supra* n. 198, at 59 n. 129 (quoting Deborah R. Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. Disp. Res. 81, 95, "[t]here is also the possibility that when judges play their traditional role by resolving party-framed disputes based on an identifiable body of law, they will better satisfy the preferences of disputants who 'want neutral third parties to resolve their disputes *on the basis of the facts*'") (emphasis in Hensler).

242. See *infra* pt. III(C)(3) (discussing the lack of confidence).

ensures greater fairness to the parties, one of the cornerstones of a well-functioning procedural system.²⁴³ First, parties enter into any litigation with the reasonable expectation that the court will follow the rules that are in place. Indeed, it is a fundamental component of procedural fairness in our system of civil justice that a litigant have notice of matters central to the resolution of the dispute.²⁴⁴ For this basic reason alone, judges should refrain from changing the rules in a given case.

Moreover, adherence to predefined rules of procedure will more likely ensure fairness because of a decrease in the risk of error.²⁴⁵ As one philosopher argued in discussing end-of-life cases and the rules (mostly substantive) courts should use to decide them: “[c]ase-by-case judgments are susceptible to error also because they leave room for decision makers to bring their self-interest, their prejudices, and their other unwelcome motivations to their work.”²⁴⁶ While one may argue that using neutral rules in a given case could lead to an unfair result in that instance,²⁴⁷ such a focus is too narrow. The appropriate focus should be on the system as a whole so that fairness is maximized for most litigants

243. See Fed. R. Civ. P. 1 (stating that justice, speed, and reduction of litigation costs are goals of the federal civil litigation system).

244. See William Van Alstyne, *Cracks in “The New Property”: Adjudicative Due Process in the Administrative State*, 62 Cornell L. Rev. 445, 487 (1977) (stating that it “is[] plausible to treat freedom from arbitrary adjudicative procedures as a substantive element of one’s liberty . . .”); see also Burbank, *supra* n. 204, at 1931–1932 (arguing that uniformity of result in similar cases must be a goal of a “system that aspires to equal justice”); Carrington, *supra* n. 204, at 2079 (stating, “[o]ne principle, implicit in the need to avoid substantive conflict, is that procedural rules should have general applicability”). A related point has been made by a moral philosopher studying right-to-die issues who argued that courts should avoid making case-by-case determinations in this area in part because of the benefit of the predictability of fixed rules. David Orentlicher, *Matters of Life and Death: Making Moral Theory Work in Medical Ethics and the Law* 14 (Princeton U. Press 2001) (“People can plan their lives much more expansively once they know that they can rely on the existence and enforcement of rules.”). Thus, for example, when courts act in end-of-life cases in ways that undermine the traditional importance of finality in the civil litigation process, they are upsetting the preexisting understanding of at least one of the parties in an unfair way. *Supra* pt. II(C).

245. See Carrington, *supra* n. 204, at 2079 (discussing use of general procedural rules to ensure that similar cases are resolved in a similar manner); Subrin, *Federal Rules, Local Rules*, *supra* n. 193, at 2097 (discussing the need for utilizing general procedural rules to maintain similar results in similar cases).

246. Orentlicher, *supra* n. 244, at 14.

247. See *id.* at 11 (stating, “[w]hen generally valid rules are used, they can appear to be misguided. Since they are by definition imperfect proxies for their underlying principles, they will at times yield results that seem unfair”).

and so that *all* potential litigants will be able to plan reliably for litigation because the rules will be known in advance.²⁴⁸ In short, the application of pre-existing neutral procedural rules is the best means to ensure that the system is handling end-of-life disputes in the fairest way possible.

One may also argue that, in an end-of-life case, an effort to ensure fairness should mean that all decisions, including those related to procedure, are made with an eye toward the reality that an incorrect decision to remove life-sustaining measures will lead to death.²⁴⁹ While it may be descriptively true that death could result from an inaccurate decision, that fact does not change the result advocated in this Article. To begin with, this “life at any cost” attitude could thwart the rights of incompetent individuals to refuse medical treatment because the barriers to having those rights exercised will, in practice, become too high to overcome.²⁵⁰ Moreover, even if such a permanent tilt in the process could pass constitutional muster,²⁵¹ it is inappropriate for the judiciary to make such a decision on a case-by-case basis. Instead, this type of choice should be made, if at all, by the appropriate rule-promulgating authority.²⁵² In the absence of such action, a court

248. *See id.* at 11–12 (arguing that focus on case-by-case rules can distort the “translation of principle to practice”). Some have argued that the just administration of the law must include such consistency in the administration of rules. *E.g.* Tidmarsh & Transgrud, *supra* n. 9, at 3–4 (quoting John Rawls, *A Theory of Justice*, 235–239 (Belknap Press 1971)). Of course, this absolutist position has been heavily debated; *see e.g.* Orentlicher, *supra* n. 244, at 4–8 (discussing a critique of Rawls).

249. *See Martin*, 538 N.W.2d at 401 (taking this general position).

250. Consider, once again, Terri Schiavo. It is true that, if the courts have been incorrect that she would not wish to continue living in her current condition, then her right to life is at stake. However, if it is correct that she would not wish to continue in her current state—a fact found by every court that has considered this matter—then she is being deprived of her right to refuse invasive medical treatment because of a life-at-any-cost mentality.

251. The U.S. Supreme Court has assumed that a person’s “liberty interest” protected by the Fourteenth Amendment includes the right to refuse unwanted medical treatment. *See Glucksberg*, 521 U.S. at 720 (citing *Cruzan*, 497 U.S. at 278–279) (“We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment.”). In *Cruzan*, the Court held that the requirement that a person’s wishes to have such medical treatment cease be proved by clear and convincing evidence did not amount to a violation of the assumed right. *Cruzan*, 497 U.S. at 284–285. The Court has provided little assistance concerning how the right should be interpreted after *Cruzan*. Some state supreme courts have also held that a right to refuse medical treatment is protected by their state constitutions. *E.g. Browning*, 568 So. 2d at 9–12.

252. There are also concerns related to this point concerning the public’s perception of a

should apply the neutral, generally applicable rules of procedure in place as the best means to play to its institutional strength and the most likely way to ensure that the range of rights of the patient or subject of the litigation are secured in the fairest way possible.

3. *Public Confidence in the Adjudicative Process*

Finally, courts should not use ad hoc procedures in contested end-of-life cases because to do so could lead both the parties and, perhaps even more importantly, the public at large to question the legitimacy of the adjudicative process. If judges are seen as “taking sides” by changing the preexisting rules in a case, it is likely the party on the “losing” end will question the integrity of the process.²⁵³ Moreover, the public could also legitimately question whether the choices that are being made are actually based on legal principles or whether the decision is, in fact, nothing more than a political exercise.²⁵⁴ As one scholar commented when arguing in favor of trans-substantivity,

procedures for resolving disputes, therefore, could be regarded as neutral only if they were apolitical. For procedural rules to be apolitical, they should not differentiate on the basis of substance. If rules vary among competing substantive claims, they become political, and under this vision of neutrality, non-neutral. Moreover, the apolitical nature of neutrality is critical because the idea of a neutral apolitical

court as being merely a political decision-maker. I discuss this issue below. *Infra* pt. III(C)(3).

253. See Carrington, *supra* n. 204, at 2074 (“Procedural rules that are, or are even seen to be, designed to favor one set of litigants produce outcomes that are less acceptable to their adversaries. In the larger and most traditional senses of the phrase, Equal Protection of the Law requires a ‘level playing field’ in legal dispute resolution.” (footnotes omitted)).

254. One need only consider the storm of controversy surrounding the contested presidential election in 2000 and the United States Supreme Court’s decision in *Bush v. Gore*, 531 U.S. 98 (2000). There was much academic debate concerning whether the decision was correct, as well as whether it was or would be perceived as political, thereby undermining the authority and legitimacy of the Supreme Court. See generally Louise Weinberg, *Federal Courts and Electoral Politics: When Courts Decide Elections: The Constitutionality of Bush v. Gore*, 82 B.U. L. Rev. 609 (2002); Jeffrey L. Yates & Andrew B. Whitford, *Part I: Bush v. Gore’s Legacy: The Presidency and the Supreme Court after Bush v. Gore: Implications for Institutional Legitimacy and Effectiveness*, 13 Stan. L. & Policy Rev. 101 (2002); John C. Yoo, *Bush v. Gore, In Defense of the Court’s Legitimacy*, 68 U. Chi. L. Rev. 775 (2001).

process is seen to give legitimacy to the substantive choices being made. As long as we get our process right, the substantive choices that result from that process are, by definition, presumptively legitimate.²⁵⁵

Moreover, even if Professor Spiegel's point about trans-substantive rules themselves were not accurate, a court should still not *sua sponte* create such differential rules of procedure. If we are to adopt non-trans-substantive rules, it should only be after a full and open debate in which all interested parties are able to participate. There would certainly be winners and losers in such a process, but that is true of any political activity. If the same action is taken by a court, there is no transparency in the process, and the public's confidence in the institution as a whole will likely suffer.

The bottom line is that, in a very real sense, the effectiveness of a court's role in our system of government is dependant on the public's judgment that the court's decisions are legitimate, and therefore entitled to respect.²⁵⁶ That respect will be lacking in cases—particularly highly charged emotional cases such as those involving the end of life—if courts are not seen as playing by their own rules. In other words, if courts are not careful in terms of how they handle these cases, they may be seen as doing nothing

255. Spiegel, *supra* n. 200, at 165–166 (footnote omitted). *See also* Carrington, *supra* n. 206, at 2074–2079 (generally discussing “[p]olitical [n]eutrality [as] [a] [g]oal in [r]ulemaking”); Molot, *supra* n. 198, at 59 (“[W]hen judges stray from their traditional adjudicative role, they trigger questions regarding the effectiveness and legitimacy of their actions.”); *but see* Burbank, *supra* n. 204, at 1934–1941 (critiquing the general view that a lack of trans-substantivity reflects an inappropriate politicization of the rule-making process).

256. This point has been recognized by the courts themselves. *E.g.* *Bush v. Gore*, 531 U.S. at 128–129 (Stevens, Ginsburg, & Breyer JJ., dissenting) (“Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.”); *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter & Harlan, JJ., dissenting) (“The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.”). It is also a topic of academic notice. *See e.g.* Yates & Whitford, *supra* n. 254, at 106 (“Just as Congress and the presidency rely on their legitimacy for creating opportunities for policy change, the Court relies on its reservoir of institutional legitimacy for obtaining its institutional goals and maintaining its position as one of three coequal and separated powers.”).

more than engaging in the same type of highly partisan action that led the Florida Legislature to interfere in the judicial process by enacting Terri's Law.²⁵⁷ Courts should do everything in their power to avoid that perception.

In the end, there is no question that contested end-of-life cases present judges with incredibly difficult issues to handle. They are called upon to make decisions that, as one court described them, have "incalculable ramifications."²⁵⁸ No judge could (or quite possibly should) turn a blind eye to the human suffering being played out in the drama before them. The cases involve the lives of young children or life-long companions that have been destroyed by illness or accident.²⁵⁹ Not only is the human suffering on display, but the judges assigned to these cases also have a job in which they must play at least some role in that suffering. It is no wonder then that one sees some comments in end-of-life decisions that seem out of place in judicial opinions.²⁶⁰

257. *E.g.* Goodnough, *Victory*, *supra* n. 42.

258. *Martin*, 538 N.W.2d at 401; *see also* Coordinating Council, *supra* n. 4, at 21 (describing end-of-life cases as having "an inevitable social dimension, and that their issues compel us to examine our respect for life, individual autonomy and dignity, justice, equity, and economic constraints on the use of scarce medical resources").

259. *Supra* pt. I (cataloguing the variety of end-of-life cases).

260. *E.g.* *Schiavo IV*, 851 So. 2d at 186 ("The judges on this panel are called upon to make a collective, objective decision concerning a question of law. Each of us, however, has our own family, our own loved ones, our own children. From our review of the videotapes of Mrs. Schiavo, despite the irrefutable evidence that her cerebral cortex has sustained the most severe of irreparable injuries, we understand why a parent who had raised and nurtured a child from conception would hold out hope that some level of cognitive function remained. If Mrs. Schiavo were our own daughter, we could not but hold to such a faith."); *Martin*, 538 N.W.2d at 401 ("The decision to accept or reject life-sustaining treatment has no equal. We enter this arena humbly acknowledging that neither law, medicine nor philosophy can provide a wholly satisfactory answer to this question."); *McKay*, 801 P.2d at 621 ("One of the verities of human experience is that all life will eventually end in death. As the seasons of life progress through spring, summer and fall, to the winter of our years, the expression unknown to youth is often heard evincing the wish to one night pass away in the midst of a peaceful sleep. It would appear, however, that as the scientific community continues to increase human longevity and promote 'the greying of America,' prospects for slipping away during peaceful slumber are decreasing. And, for significant numbers of citizens like [the person at issue in the case], misfortune may rob life of much of its quality long before the onset of winter."); *Jobes*, 529 A.2d at 452 (Handler, J., concurring) ("The decisional chore in these cases is especially difficult because they bring into question the role of courts and, indeed, the role and limits of law. The cases evoke strong emotional reactions, which must be acknowledged as we come to grips with the merits of the controversies."); *see also* Hafemeister & Robinson, *supra* n. 4, at 198–199 (reporting response of survey of state court judges concerning the difficult nature of presiding over end-of-life cases).

The presence of such emotional issues does not, however, provide a justification for the judiciary to deviate from neutral procedural rules to resolve these cases. As demonstrated, applying neutral procedural rules is an important means by which the judiciary may do its best to ensure that the parties are treated in a fair manner, that courts are not acting beyond their legitimate authority or expertise, and that the public remains confident in the decisions of the courts in their life and death task. The courts should, therefore, follow the advice of one judge who wrote that the court must be seen to “decide on legal principles alone. This court must not manage morality or temper theology.”²⁶¹ In summary, the application of neutral, generally applicable procedural rules can be a saving grace for judges called upon to assume, in no small measure, something almost approaching the role of God.

IV. CONCLUSION

“Death will be different for each of us.”²⁶² We all hope that when it is our time, we will pass on in peace, both for our own sakes as well as the sakes of our loved ones. However, as many of the cases discussed in this Article demonstrate, the approach to the end of life can unfortunately be a time of intense conflict between and among the family and friends of the person standing on the threshold of death. In these situations, there will often be no way to resolve the disputes except resort to the civil litigation system.

The lawyer in a contested end-of-life case must be fully familiar with all the rules of procedure that govern its resolution. The lawyer must be conversant with the rules to take the appropriate offensive steps, ranging from choosing the forum to obtaining the type of relief most suited to the client’s litigation goals. In addition, lawyers will need to be prepared to use procedure defensively to respond to the procedural steps taken by an adversary. Only procedural expertise will allow advocates to do so. Of course, lawyers must also be ever vigilant of using procedural tools for improper purposes. The temptations to use a watered-down approach to litigation ethics can be powerful in an end-of-life case,

261. *Ragona*, 6 Pa. D. & C.4th at 203.

262. *Glucksberg*, 521 U.S. at 736 (O’Connor, J., concurring).

and manipulations of procedure can be a significant means by which to engage in such inappropriate conduct. The advocate should do everything in his or her power to resist engaging in such conduct.

The end-of-life case is no less difficult for the courts. For judges to be successful in their role as adjudicators of end-of-life disputes, they must be—and be seen as being—neutral and fair decision-makers. They cannot be perceived to be manipulating the decision-making process to reach a “preferred” result. A significant way in which courts can protect their actual and perceived neutrality is by resisting the temptation to ignore or manipulate neutral procedural rules that might apply in a contested end-of-life case. Instead, courts should employ such rules as they would in any other civil matter. In this way, they will preserve their vital role in the resolution of these extraordinarily difficult matters.

In the end, when they need to be involved in the dying process, both lawyers and judges owe it to society to do all that is possible to be of true assistance in resolving the intense disputes with which they are confronted. They can best do so by knowing the rules of procedure that are applicable in the case and by applying them faithfully.