IN THE FLORIDA SUPREME COURT

FILED
THOMAS D. HALL
APR 12 2001
CLERK, SUPREME COURT
BY_____

IN RE: Guardianship of:

THERESA MARIE SCHIAVO,

Incapacitated.

Case No. SC01-559

ROBERT SCHINDLER and MARY SCHINDLER,

Appellants,

v.

MICHAEL SCHIAVO, as Guardian of the person of THERESA MARIE SCHIAVO,

Appellee.

EMERGENCY MOTION FOR STAY

COME NOW, Appellants/Respondents Robert and Mary Schindler ("Schindlers") by and through their undersigned attorney and hereby file this Emergency Motion for Stay, pursuant to Rule 9.310 of the Florida Rules of Appellate Procedures, and state as follows:

1. On February 11, 2000, the trial court issued an order authorizing removal of Teresa Marie Schiavo's ("Terri") feeding tube. The Schindlers timely

filed an appeal with the Second District Court of Appeals (the "Second District"). On March 24, 2000 the trial court stayed execution of the order until "...thirty (30) days beyond the exhaustion of all appellate remedies herein, without prejudice for the Appellants to seek to lift the stay." See paragraph 4 of Appendix A.

2. All appellate reviews have not been completed. The Schindlers have filed a timely Notice of Appeal to the Florida Supreme Court. St. Paul v. IINA, 675 So.2d 590 (Fla 1996). A jurisdictional brief was filed on March 30, 2001.

3. Counsel for the Schindlers received the Second District's mandate as an exhibit to Michael Schiavo's ("Schiavo") amended petition to the lower court to lift the stay under Rule 9.310(e) of the Florida Rules of Appellate Procedures. He claimed the trial court lacked jurisdiction to continue the stay. A hearing was set for Thursday, March 22, 2001.

4. After receipt of the Mandate and the amended petition which for the first time disclosed Mr. Schiavo's plan to challenge the jurisdiction of the lower court to continue the stipulated stay, the Schindlers filed an Emergency Motion to Recall Mandate and Stay on March 21, 2001. On March 22, 2001, the Second District issued an Order recalling the Mandate for a period of 30 days. The Order provides that the Mandate will issue on April 20, 2001.

5. On March 28, 2001, the trial court denied the motion to lift stay pending the issuance of a firm mandate from the Second District (see Appendix B). However, the trial court accepted an argument that once the Mandate is issued its stay is automatically lifted under Rule 9.310(e). As a result the 30 day period following exhaustion of all appellate remedies will not be enforced.[1]

6. The Schindlers could not be sure from the language of the decision the significance of the statement that the mandate would reissue on April 20, 2001. However, because it may have been to ensure further briefing and consideration of a longer stay and because of the suggested course contained in State v. Roberts, 661 So.2d 8721, 822 (Fla. 1995), on March 30, 2001 they filed another Motion for Stay with the Second District and requested expedited ruling if the March 22, 2001 Order was their final position. On April 3, 2001 Mr. Schiavo filed a response.

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[1] We do not agree that the lower court had to so read Rule 9.310(e). The stay entered was a stipulated stay between the parties. However, Mr. Schiavo argued the parties cannot give the lower court "jurisdiction" not allowed by Rule 9.310(e). The parties were not giving the court jurisdiction over Terri Schiavo, it had that already and will retain it until at least her death. If issues arise surrounding the pulling of her feeding tube or otherwise the trial court will undoubtedly decide them. It would be wise to let trial courts know the limits of their authority in these circumstances. These cases involve peoples' lives. The stays entered need to reflect that fact. Nevertheless, we are confronted with the trial court's statement of its belief and must petition this court for redress on that basis.

7. On April 10, 2001 the Second District denied the Schindlers' Motion for Stay (see Appendix C).

8. Therefore, the Schindlers request that the Florida Supreme Court enter a stay of the Mandate until after review by this Court. The Supreme Court has the jurisdiction to entertain and rule on a motion to stay pending a discretionary appeal to the Florida Supreme Court, even after denial of the motion by the Second District. State v. Roberts, supra, at 822.

9. If the Florida Supreme Court does not stay the trial court decision to remove Terri's feeding tube, she will die pending the Schindlers' appeal to the Florida Supreme Court. In fact, she may die during the period while appellants and appellee are filing their respective jurisdictional briefs within the applicable time frame required by the rules and awaiting ruling by the Florida Supreme Court as to whether it will accept jurisdiction.

10. It is respectfully submitted that the standards set forth in State ex rel. Price v. McCord, 380 So.2d1037 (Fla. 1980) are met in this case.[2] The stay is essential for the simple reason than that the harm will be final and nonremediable if the stay is not granted. Moreover, as discussed in its jurisdictional brief this Court

[2] We question whether McCord ought to even control this case. This case is more akin to those involving loss of life where stays should be liberally granted. See, McCall v. State, 186 So. 667, 669 (Fla. 1939).

should exercise jurisdiction over this case and as discussed below we submit that there is a likelihood the Schindlers will prevail on the merits.

11. In response to the Schindlers' Motion for Stay before the Second District, Mr. Schiavo argued that every day Terri is artificially sustained against her will is the real harm of this case. This argument is disingenuous in the circumstances of this case. Not only do close family members disagree as to her wishes, if Mr. Schiavo is to be believed he waited more than eight (8) years after her accident to petition for the removal of the feeding tube. The accident was on February 25, 1990 and the petition was on May 11, 1998. In a 1992 medical malpractice trial Mr. Schiavo thought her wishes of such little importance when requesting future medical expense to care for her for the rest of her life that he never mentioned them, let alone claimed as he does now that every day she is artificially sustained is the real harm to her. It should be clear his delay was not because he thought Terri would recover. A few years before he filed the petition he became engaged, and still is, to another woman he owns a home with. Surely Mr. Schiavo does not alone control when waiting is harmful. There are important appellate issues to be resolved which need to be resolved before the feeding tube is removed.

12. In opposing the stay, Mr. Schiavo also challenged the likelihood of success on the merits and appended motions and denials of stay in In re

Guardianship of Browning, 568 So.4 (Fla. 1990) and Satz v. Perlmutter, 362 So.2d 160 (Fla. 4th DCA 1979), approved 379 So.2d 359 (Fla. 1980). See Appendices D and E, respectively. These cases are distinguishable because a stay was sought by the State and all close family members appear to have been in agreement as to the individual's wishes and result. The State unsuccessfully tried to stay the discontinuance of life support until appeals concluded. This case should not be affected by these decisions for two reasons. First, all close family members do not agree that this is what Terri wanted. In fact, her parents and her siblings, who were very close to her throughout her life, emphatically disagree. Second, the very notion that we know what Terri wanted is contradicted by the issues presented by this appeal. As will be presently discussed, there is simply no way that one can be confident that Terri's wishes were fairly arrived at in this case.

Likelihood of Success on the Merits

13. A pretrial guardian *ad litem* was appointed, reviewed the facts, interviewed witnesses, and concluded that Michael Schiavo and the parents both had "... at least the appearance of, if not actual, conflicts of interest ..." (R. 8, 1258-1259). He also concluded that:

> "The petition filed by the guardian seeking the withdrawal of the ward's feeding tube, which will inevitably result in the ward's death, appears on its face to be an action by

> "the guardian against the ward," which requires the appointment and involvement of a guardian *ad litem* pursuant to Fla. Stat. §744.319 (1977)."[3]

Therefore he requested that a guardian *ad litem* be appointed to represent the ward at all further proceedings including trial. However, the trial court denied the request and discharged the guardian *ad litem*.

14. As a result, Terri was unrepresented during the trial. Despite recognizing potential conflicts between the guardian and Terri, the Second District did not agree a guardian *ad litem* had to be appointed to represent Terri during the trial. This was inconsistent with Florida's statutory scheme requiring either replacement of the guardian or appointment of a guardian *ad litem* to represent the ward at trial or both. See, e.g., Fla. Stat. §§ 744, 391, 309, 446, 474, 5215 and 3715. Therefore it is also inconsistent with what this Court and others require when the law requires a guardian *ad litem* to represent a ward. See, e.g., Savage v. Rowell Distributing Corp., 95 So.2d 415, 418 (Fla. 1957); Brown v. Ripley, 119 So.2d 712 (Fla. 1st DCA 1960); see, also, Glatthow v. Hoequist, 600 So.2d 1205, 1208 (Fla. 5th DCA 1992); Morgan v. Tirgeon, 755 So.2d 161, 162 (Fla. 4th DCA

[3] This should have read "744.391."