FILED
IN THE FLORIDA SUPREME COURT THOMAS D. HALL
CASE NO. SC03-1242

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CLERK, SUPREME COURT

BY _____

IN RE: THE GUARDIANSHIP OF THERESA MARIE SCHIAVO, Incapacitated.	
ROBERT SCHINDLER and MARY SCHINDLER, Petitioners/Appellants, vs. MICHAEL SCHIAVO, as Guardian of the person of THERESA MARIE SCHIAVO, Respondent/Appellee.	Petition from the Second District Court of Appeal Case No. 2D02-5349

EMERGENCY MOTION TO VACATE STAY

COMES NOW the Respondent/Appellee, MICHAEL SCHIAVO, as Guardian of the person of THERESA MARIE SCHIAVO, and states:

Introduction

1. This proceeding marks the eleventh application for appellate review--the third before this Court--in a case "addressing a bitter dispute among the members of Mrs. Theresa Schiavo's family over her medical condition and her right to

forego life-prolonging medical procedures." *Schindler v. Schiavo (In re Guardianship of Schiavo)*, 800 So.2d 640, 641.[1] The long and tortuous history of this case is recited in the guardian's Motion for Stay filed in SC01-2678, (exhibit "1" hereto), and in the district court's published opinions, which are listed in the current opinion of June 6, 2003, (exhibit "2" hereto).

2. To briefly summarize, a petition to discontinue the ward's artificial life support was filed in May 1998. A week-long trial in January 2000, in which the ward's intent and medical condition were hotly contested, resulted in an order granting the guardian's petition. The trial court's order was affirmed by the district court in January 2001, and both this court and the United States Supreme Court declined requests for review.

3. On April 24, 2001, upon conclusion of the first round of appeals, the ward's artificial life-prolonging procedures were discontinued. Two days later the parents sought an injunction to restore artificial feeding, swearing in a 1.540(b)

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[1]The previous two applications to this Court for discretionary review were SC01-559 and SC01-2678. There have been seven applications to the Second District Court of Appeal: 2D00-1269, plenary appeal; 2D01-1863, appeal from denial of 1.540(b)(2) and (3) motion; 2D01-1891, appeal from circuit civil injunction; 2D00-1269, motion to enforce mandate; 2D01-3626, appeal from August 2001 denial of 1.540(b)(5) motion; 2D02-4317, review of denial of request for additional tests; and, 2D02-5394, appeal from November 2002 denial of 1.540(b)(5) motion. There has been one application to the United States Supreme Court, application number 00A926.

motion--upon the alleged hearsay of a new witness--that the guardian lied at trial about his wife's intent. The trial court denied the motion as untimely on its face, and the parents immediately filed a separate action in the general civil division of the circuit court and obtained the injunction through another judge. The injunction, (fraudulently procured, as shown by the eventual testimony of the alleged "new witness"[2]), was vacated by the district court in July 2002.

4. As a result of the delay gained by the injunction, the parents procured affidavits of new doctors that formed the basis of another motion to vacate the order permitting withdrawal of artificial life support. In August 2001, the trial court denied the new motion because the condition of the ward had not changed and the new doctors merely disagreed with the medical conclusions of the guardian's trial experts. The district court, (apparently ignoring the legal prerequisites for rule 1.540(b)(5) relief[3]), reversed the trial court and mandated

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[2]The "new witness" repudiated the parents' version of her subject oral statement and explained that she had refused to give the parents a written statement because she was pressured to give a misleading statement. She also testified that the parents' operative told her that her statement was needed "to get this feeding tube hooked back up so I have time to get more dirt" on the guardian. (The pertinent testimony excerpts are contained in the guardian's May 30, 2001 filing with the district court, exhibit "3" hereto.)

[3]At oral argument, the first question the district court asked of guardian's counsel was, "In a case such as this, involving life or death, can't we disregard legal procedure?"

the October 2002 evidentiary proceeding that is now the subject of the current appeals.

5. According to the district court in its June 6, 2003 decision: "It is likely that no guardianship court has ever received as much high-quality medical evidence in such a proceeding..." and the "extensive additional medical testimony in this record only confirms once again the guardianship court's initial decision" (exhibit "2" at 6 and 11). The district court then instructs the guardianship court to proceed to reschedule removal of the ward's artificial life support upon issuance of the mandate (at 12).

6. On June 20, 2003 the parents filed a Motion to Withhold the Mandate to permit them to proceed with supreme court review. The district court denied this motion on July 9, 2003, (exhibit "4" hereto). The parents on July 22, 2003 repeated their request for a stay and, inexplicably, the district court reversed itself by entering a stay on July 25, 2003, (exhibit "5" hereto).

Argument

7. A party seeking to stay the decision of the district court while discretionary review is sought in the supreme court must demonstrate that the stay is "essential." To determine whether the stay is essential, the court is to consider the likelihood that jurisdiction will be accepted by the supreme court, the

likelihood of ultimate success on the merits, the likelihood of harm if no stay is granted, and the remediable quality of any such harm. *City of Miami v. Arostegui*, 616 So.2d 1117, 1121 (Fla. 1st DCA 1993); *Price v. McCord*, 380 So.2d 1037, 1038-1039 (Fla. 1980).

8. The district court fails to explain in its order of stay how the foregoing legal standard was applied, and one doubts that such an exercise was ever undertaken. In this case the parents' endless appeals have prompted an endless series of *de facto* automatic stays initiated by or approved by the district court. While certainly in a case like this a request for stay during appellate review must be given the most careful consideration, granting a stay should not be automatic. Such stays are contrary to the judicial policy of this state.

9. In *Satz v. Perlmutter*, 362 So.2d 160 (Fla. 4th DCA 1978), *approved*, 379 So.2d 359 (Fla. 1980), after a stipulated stay was lifted, the attorney general requested both the court of appeal and the supreme court to stay the mandate of the appellate court that permitted the patient's respirator to be disconnected. The attorney general argued that, "His death might very well render moot petitioner's efforts to obtain review in this case." Both the Fourth District Court of Appeal and the supreme court denied the state's motions to stay the mandate. The patient died prior to the supreme court's decision. (Appended hereto as exhibit "6" is a

copy of the Emergency Motion For Stay, and Order denying the same issued by the supreme court on September 29, 1978 in *Satz v. Perlmutter*.)

10. Again, in *In re Guardianship of Browning*, 568 So.2d 4 (Fla. 1990), both the district court and this court denied the state attorney's motions to stay the mandate of the district court of appeal, even though the district court certified to the supreme court a question of great public importance. The motions were denied notwithstanding that the state attorney argued the stay was necessary "to preserve the *status quo* and life of Estelle M. Browning" pending supreme court review of the certified question. (Appended hereto as exhibit "7" are copies of the appellate court's Order denying the Motion to Stay Mandate, the Motion For Stay of Mandate filed in the supreme court, and the supreme court's ultimate Order denying the Motion For Stay of Mandate.)

11. This court recognized in those cases that, after an extensive trial and full appeal resulting in court authorization to remove artificial life support, postponing that decision would do more harm in the long run both to the patient and society at large. This court in *Browning* stressed the need for prompt and swift resolution of these cases when the legal system becomes involved. *Browning,* 568 So.2d at 16, n. 17. There is obviously a balance that must be maintained between promptness and meaningful appellate review. The district

court, however, has so skewed that balance, that "promptness" has become a mockery in this case.

12. It has been over five years since the petition to remove artificial life support was filed, over three and a half years since the trial court initially determined that artificial life support should be discontinued, over two and a half years since the trial judge's initial decision was affirmed by the district court, and close to two years since the district court mandated its ill-decided and useless evidentiary proceeding, (which was, in essence, a retrial on the ward's medical condition and prognosis). The district court's quest for perfect certainty has trampled upon the ward's personal liberty by keeping her force-fed against her will for an additional two years. While the district court sees its primary role as protecting "the interests of promoting the value of life" (exhibit "2" at 11), it apparently has failed to remember that "to condemn persons to lives from which they cry out for release is nothing short of barbaric." *Martin v. Martin*, 450 Mich. 204, 538 N.W.2d 399, 402 (1995).

13. THERESA MARIE SCHIAVO's intent not to be artificially sustained in her current condition, (as found by the trial court and upheld by the district court), is constitutionally protected, and implementation of that intent is necessary to protect her fundamental liberty interests. Each additional day she is artificially

sustained is in derogation of her personal liberty and her protected right of privacy. A stay during further proceedings in this cause would do nothing but frustrate THERESA SCHIAVO's wishes and personal liberty.

14. In addition to the harm to the ward, failure to vacate the stay is also harmful from a policy standpoint. This case is already a tragedy and failure of judicial system of this state. The endless and repetitive legal proceedings and perceived impotence of the judiciary to reach a conclusion have resulted in a loss of faith and confidence in the judiciary. The dangers of such public perception were best expressed by FATHER GERARD MURPHY, who testified at trial. FATHER MURPHY is a Roman Catholic Priest, hospital chaplain and director of pastoral care, biomedical ethicist, and is the diocesan spokesman on issues involving removal of artificial life support. A staunch opponent of assisted suicide, FATHER MURPHY testified about the "dark horizons" of this case. According to FATHER MURPHY, people are terrified of a case like this, where a patient is kept alive for years in a horrific state, against his or her wishes. Cases like this, he believes, stokes the public's support of assisted suicide and is why people, while they are still able to do so, would "line up to take a pill or shot and go to sleep," rather than lose the control of their own fate and become hopelessly mired in the legal/medical system.

15. On the jurisdictional issue, this court, for purposes of determining whether to invoke discretionary jurisdiction, is limited to the facts which appear on the face of the opinion. *Hardee v. State*, 534 So.2d 706, 708 (Fla. 1988.) The record itself cannot be used to establish jurisdiction because the facts must appear within the four corners of the majority decision. *Reaves v. State*, 485 So.2d 829, 830 (1986).

16. The guardian asserts that any reading of the district court's opinion can lead to only one conclusion--there is no basis upon which this court can invoke its discretionary jurisdiction. Therefore, under the standard set in *City of Miami v. Arostegui*, *supra*, the stay should be vacated because there is no "likelihood that jurisdiction will be accepted."

17. The guardian does not lightly request emergency relief in this motion. Doubtlessly, others may argue that, given the ward's continued artificial feeding for over five years during this litigation, "what's another month or two" at this stage of the proceedings? The fact is, not one member of this court would so casually dismiss just one day of existence in the horrific state of THERESA SCHIAVO if he or she or member of their family were subjected to the same fate. THERESA SCHIAVO, who was meticulous in her appearance, has lost her entire privacy. Her involuntary bladder and bowel functions are cleaned by others. Her

legs, which unavoidably and permanently are locked in contracture from her neurological injury, must be pried open to clean her menses. Would any of us tolerate being kept alive artificially in that state against our will for just one more day, one more week, one more month?

18. And while THERESA SCHIAVO lacks consciousness and has no appreciation of her current state, that cannot be a justification for perpetuating that state against her will. To subscribe to that justification only demeans her dignity as a human being. THERESA SCHIAVO's dignity has been stripped away through these legal proceedings. This unfortunate young woman, who was repulsed by the thought of artificial life support and proclaimed "no tubes for me," had videotapes of herself with a feeding tube sticking out of her gut broadcast over television for the world to see in these last proceedings. With almost everything in this life taken from her, this court can respect and uphold her dignity by giving immediate effect to her wishes.

19. If this court upon reviewing the district court's opinion concludes that there is little likelihood it will accept this case for review, then the stay should immediately be lifted. The stay should be lifted not just because it is the right and just thing to do, it should be lifted because that is what the law provides. If the law supports the lifting of the stay, how can this court in good conscience keep it

in place, perpetuating the ward in this horrific state against her will. The guardian asks that you follow the law, however unpopular that decision may be among the fanatic opponents to personal choice that reportedly are funding the opposition in this case.

20. THERESA MARIE SCHIAVO has been ill-served by the judicial system of this state. The courts have permitted the same issues to be perpetually relitigated without legal reason or justification. It is time to give back to her, in some small way, what has been taken away. The stay should be vacated and she should be permitted to have the artificial means prolonging her death removed--now.

WHEREFORE, the guardian respectfully requests this court to:

A. Immediately order appellants to respond to this motion within forty-eight hours;

B. Expedite consideration of this motion;

C. Enter and immediately transmit to the district court an order vacating its stay with instructions to the district court to immediately issue and transmit its mandate to the trial court;

D. Issue such other relief this court deems just and proper.

I HEREBY CERTIFY that the foregoing was furnished by overnight

delivery this 30th day of July, 2003, to Patricia Fields Anderson, Esq., 447 3rd Avenue N., Suite 405, St. Petersburg, Florida 33701.

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