IN THE FLORIDA SUPREME COURT
CASE NO. SC03-1242

IN RE: THE GUARDIANSHIP OF THERESA MARIE SCHIAVO, Incapacitated.	)	
ROBERT SCHINDLER and MARY SCHINDLER, Petitioners,	)	Petition from the Second District Court of Appeal Case No. 2D02-5394
vs.	)	
MICHAEL SCHIAVO, as Guardian of the person of THERESA MARIE SCHIAVO, Respondent.	)	

JURISDICTIONAL BRIEF OF RESPONDENT

GEORGE J. FELOS, ESQ.
Florida Bar No. 226653
FELOS & FELOS, P. A.
595 Main Street
Dunedin, Florida 34698
(727) 736-1402
Attorneys for Respondent

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PRELIMINARY STATEMENT

The Respondent, MICHAEL SCHIAVO, as Guardian of the person of THERESA MARIE SCHIAVO, was the Appellee in the district court of appeal. He is referred to in this brief as "Respondent."

Petitioners, ROBERT SCHINDLER and MARY SCHINDLER, were the Appellants in the district court of appeal and were the movants in the trial court. They are referred to in this brief as "Petitioners."

The June 6, 2003 opinion of the Second District Court of Appeal is appended to this brief and is referred to as *Schiavo IV*. Appendix citations are designated as "A". The appellate court's three previous published decisions in this case are *Schindler v. Schiavo (In re Guardianship of Schiavo)*, 780 So.2d 176 (Fla. 2d DCA 2001), *Schindler v. Schiavo (In re Guardianship of Schiavo)*, 792 So.2d 640 (Fla. 2d DCA 2001), and *Schindler v. Schiavo (In re Guardianship of Schiavo),* 800 So.2d 640 (Fla. 2d 2001). They are respectively referred to as *Schiavo I, Schiavo II*, and *Schiavo III*.

Petitioners' recitation of the case and facts is inaccurate, and is presented contrary to the Rules of Appellate Procedure and dictates of this court. Therefore, Respondent elects to include a Statement of the Case and Facts in this brief.

STATEMENT OF THE CASE AND FACTS

Petitioners disregard the role of "facts" in a jurisdictional brief. Briefs on jurisdiction are limited solely to the issue of the supreme court's jurisdiction. Fla. R. App. P. 9.120(d). For purposes of determining jurisdiction, this court 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, and the facts must appear within the four corners of the majority decision. *Reaves v. State*, 485 So.2d 829, 830 (1986). Further, jurisdictional briefs, per the above rule, are subject to the formalities specified in rule 9.210, which requires supporting reference for factual recitations.

Petitioners' Jurisdictional Brief is replete with unreferenced "facts" that are nowhere to be found in the subject opinion of the court of appeal. Many of these alleged "facts" are half-truths and innuendo, many are not even found in the record, and many are outright falsehoods.[1] Refuting these inaccuracies and

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[1]For instance, Petitioners falsely state that the ward "left no advance directive," which is defined in Section 765.101(1), Florida Statutes, (brief at 1 and 5). To the contrary, the ward's advance directives "gave the trial court a sufficient basis to make this decision for her." *Schiavo I*, 780 So.2d at 180. Petitioners falsely insinuate medical "neglect" (brief at 4 and 9), but according to the appellate court, Respondent: "has always attempted to provide optimum treatment for his wife. He has been a diligent watch guard of Theresa's care..." *Schiavo I*, 780 So.2d at 177-178. Petitioners falsely characterize Respondent's motives as those of a "husband who is tired of having a disabled wife" (brief at 7), yet the appellate court finds that: "Theresa has been blessed with...a loving husband. ...Michael has continued to care for her and visit her all these years." *Schiavo I*, 780 So.2d at 177.

falsehoods requires delving into the long record and history of this case, which not only would take much of the length of this brief, but would be inappropriate in a jurisdictional brief. The appropriate response to Petitioners' Jurisdictional Brief would be a motion to strike. Due to the time sensitive nature of this case, however, Respondents will not subject to the Ward to added delays by filing such a motion. Therefore, to refute Petitioners' subject factual misrepresentations, Respondent refers this court to the history of this case as contained in his Emergency Motion To Vacate Stay with exhibits, filed herein on July 30, 2003.

No doubt, parties ignorant of the purpose of jurisdictional briefs might inject extraneous material in an attempt to argue the case on the merits. In this case, however, Petitioners' inappropriate, inaccurate, and propagandized brief is not the result of ignorance, it is intentional. In the previous appearance of this case before the court (SC01-2678), a sizable portion of Petitioners' jurisdictional brief, filed by identical counsel, was stricken by this court because Petitioners did then what they are now doing, (see Motion to Strike Portion of Respondents' Jurisdictional Brief, and this court's March 14, 2002 order granting the motion in SC01-2678). Worse, some unreferenced and inaccurate "facts" contained in the Petitioners' current brief are identical to those previously stricken by this court. Petitioners' Jurisdictional Brief not only intentionally flaunts the rules of appellate

procedure, it is a contemptuous attempt to improperly influence this court.[2]

Concerning the facts *relevant* to this proceeding, Respondent faces some difficulty in presenting the same because, frankly, it is a real challenge to discern the alleged basis for jurisdiction from the dross in Petitioners' brief. First, Petitioners argue that this court may have direct appellate jurisdiction under Art. V, Section 3(b)(1), framing this as an appeal from a final judgment imposing the death penalty (brief at 4). This is another crass and contemptuous attempt to propagandize this case, and is so lacking in any possible legal substance, its advancement is sanctionable.[3]

Petitioners also cite Art. V, Section 3(b)(7), but wholly fail in their brief to make any specific argument or cite any case to support a claim that they are

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[2]Petitioners also improperly quote portions of the trial court's November 22, Order, and make erroneous attempts at summarizing the same (brief at 4 and 8). While Respondent highly recommends the trial court's subject order and wishes this court would review the same, it simply cannot be utilized by Petitioners in an attempt to establish conflict jurisdiction.

[3]Petitioners likewise propagandize this matter by erroneously describing this as Florida's "first case of euthanasia" involving "withdrawal of food and water" (brief at 5 and cover page). First, this court has made it abundantly clear that decisions to refuse or have withdrawn medical treatment "allow the natural course of events to occur," and are legally and morally distinct from "physician-assisted suicide through self-administration of a lethal dose of medication." *Krischer v. McIver*, 697 So.2d 97, 102 (Fla. 1997). Second, this case involves "the removal of the nutrition and hydration tube," *Schiavo IV*, A 12, which this court has previously ruled is "*artificial* life-support" and "medical treatment" that a patient has the right to refuse. *In re Guardianship of Browning*, 568 So.2d 4, 11-12 (Fla. 1990), emphasis added.

entitled to the issuance of a writ of prohibition or other extraordinary writ. Respondent is simply at a loss to present facts pertinent to this vacant claim.

Regarding Petitioners' reliance upon Art. V, Section 3(b)(3), their brief fails to recite which, if any, of the bases for review in that provision apply. Petitioners specifically request this court to "take jurisdiction" to correct "manifest injustice" (brief at 10), but that is not a basis for accepting review under Art. V, Section 3(b)(3). As best as Respondent can determine, Petitioners assert jurisdiction on a claim that the appellate court required the trial court to employ an improper burden of proof at the subject evidentiary proceeding. Although Petitioners never specifically state that said requirement "conflicts" with any other appellate decision, Respondent assumes that Petitioners' alleged basis for jurisdiction is that of "conflict." Respondent will therefore review the case history regarding the burden of proof.

As explained by the appellate court in *Schiavo IV*, (*quoting Schiavo III*):

> "In *Schiavo I*, we affirmed the trial court's decision ordering Mrs. Schiavo's guardian to withdraw life-prolonging procedures. *Schiavo I*, 780 So. 2d 176 (Fla. 2d DCA), *cert. denied*, 789 So. 2d 348 (Fla. 2001) (table). In so doing, we affirmed the trial court's rulings that (1) Mrs. 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 Mrs. Schiavo would have chosen in February 2002 to withdraw the life-prolonging procedures." A 3-4.

In *Schiavo III* the appellate court requires the guardianship court to conduct an evidentiary hearing on Petitioners' 1.540(b)(5) motion. The appellate court notes that under federal case law, a proponent of a motion for relief from judgment under the federal counterpart to rule 1.540(b)(5), "must prove entitlement by clear and convincing evidence." 800 So.2d at 645. Despite this enunciated standard, the appellate court reduces Petitioners' 1.540(b)(5) burden of proof for the remanded proceeding: "the Schindlers, as the proponents of the motion, must prove only by a preponderance of the evidence that the initial judgment is no longer equitable." *Id*.

Respondent sought discretionary review of *Schiavo III* in this court (SC01-2678), arguing (among other things) in his jurisdictional brief that the appellate court's lowering of the burden of proof conflicted with *Wilson v. Charter Marketing Co.*, 443 So.2d 160, 161 (Fla. 1st DCA 1983), (prior brief at 8). Petitioners did not seek this court's review of *Schiavo III* and, in discussing the subject burden of proof issue in their jurisdictional brief, made no objection to the preponderance of evidence standard placed upon them, (prior brief at 7-8). This court declined to review *Schiavo III*. 816 So.2d 129 (Fla. 2002).

Schiavo IV is an appeal from the trial court's denial of Petitioners'

1.540(b)(5) motion after the mandated evidentiary hearing. The appellate court affirms the trial court's denial of the 1.540 motion, finding: "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." A 6, 11.

The only mention in *Schiavo IV* about the evidentiary proceeding burden of proof is as follows: "On remand, we permitted the parents to present evidence to establish by a preponderance of the evidence that the judgment was no longer equitable." A 5.

SUMMARY OF ARGUMENT

Schiavo III set the burden of proof to be used at the subject evidentiary hearing, and that became the law of the case. This court has no authority to review the ruling of *Schiavo III* since it is the law of this case and that decision is not before the court for review. In any event, placing the burden of proof upon the proponent of a rule 1.540(b)(5) motion is fully in accord with Florida law.

ARGUMENT

All questions of law which have been decided by the highest appellate court become the law of the case which, except in extraordinary circumstances, must be followed in subsequent proceedings, both in the lower and appellate courts. *Brunner Enterprises v. Dept. of Revenue*, 452 So.2d 550, 552 (Fla. 1984). And,

the power to change the law of the case in an extraordinary circumstance vests in the appellate court that "had established" or "had determined the law of the case." *Id*.

Simply, even if this court believed that the burden of proof applied at the evidentiary proceeding were erroneous, it is without authority to change the law of the case set by the appellate court in *Schiavo III*. The Petitioners had an opportunity to seek this court's review of the burden of proof issue by asking this court to review *Schiavo III*. They failed to do so. Even if the *Schiavo III* burden of proof ruling were in conflict with other appellate decisions, *Schiavo III* is now final and settled, and cannot now serve as the basis for conflict jurisdiction to review the appellate court's subsequent decision in *Schiavo IV*.

Petitioners argue that *Browning* and its predecessors require a clear and convincing evidence standard, and that the *Schiavo III* court improperly shifted the burden to them (brief at 4 and 7). Petitioners disregard the obvious fact that Respondent *already* proved at the initial trial by clear and convincing evidence that the Ward is entitled to have artificial sustenance discontinued pursuant to her wishes. A 4. That judgment is *res judicata*. Respondent was not required to do so again because Petitioners filed a motion to vacate that judgment.

The obvious distinction between the trial proceedings and the 1.540(b) proceeding is also recognized by the appellate court:

"We are not reviewing a final judgment in the appellate

> proceeding. The final judgment was entered several years ago and has already been affirmed by this court. The Florida Supreme Court declined to review this case... Today, our review is limited to an order denying a motion for relief from judgment." A 8.

The general rule in court proceedings is that the party seeking affirmative relief bears the burden of proof, *Florida Dept. of Transportation v. J.W.C Company, Inc.*, 396 So.2d 778, 788 (Fla. 1st DCA 1981). Petitioners cite no authority whatsoever for the proposition that Respondent had the burden of disproving Petitioners' contentions at the 1.540(b) evidentiary proceeding. The burden there properly rested upon the Petitioners.

Petitioners also complain that the appellate court reviewed the trial court's denial of the 1.540(b) motion under an "abuse of discretion" standard (brief at 8). Again, Petitioners cite no case or authority to contradict the appellate court's applied standard, nor do they cite any case that conflicts with the numerous decisions cited by the appellate court in support of the applied standard. A 8-9. In any event, Petitioners' argument is moot because, as stated by the appellate court: "if we were called upon to review the guardianship court's decision de novo, we would still affirm it." A 10.

Finally, Petitioners' claim that conflicting evidence in a case such as this mandates continued artificial life support because *Browning* expounds "principles of...unanimity" (brief at 8). There is no specific citation to *Browning* for this proposition, because none exists. Florida law does not give a relative of an

incapacitated patient the right to veto the patient's medical treatment wishes. To the contrary, as pointed out by the *Browning* appellate court, evidentiary conflicts do not prohibit such decision making: "It is possible for the evidence in such a case to be clear and convincing, even though some evidence may be inconsistent." 543 So.2d at 273. In any event the appellate court here does not particularly find a conflict of evidence on the remanded issue, but states that Petitioners "presented little testimony" on the subject. A 7.

This court has held that in order to constitute an express conflict, the constitutional standard is whether the decision of the district court on its face collides with a prior decision of this court, *Kincaid v. World Insurance Co.*, 157 So.2d 517, 518 (Fla. 1963), and the conflict must be such that if the later decision and the earlier decision were rendered by the same court, the former would have the effect of overruling the latter. *Kyle v. Kyle*, 139 So.2d 885, 887 (Fla. 1962). Further, this court long ago ruled that inherent or so called "implied" conflict may no longer serve as a basis for this court's jurisdiction. *Dept. of Health v. Nat. Adoption Counseling*, 498 So.2d 888, 889 (Fla. 1986).

Petitioners have failed to demonstrate that *Schiavo IV* expressly conflicts with any other appellate decision, and even if implied conflicts were sufficient to confer jurisdiction, no such conflicts appear on the face of said opinion.

CONCLUSION

Under the constitutional plan of the State of Florida, the powers of this court to review decisions of the district courts of appeal are limited and strictly prescribed. It was never intended that the district courts of appeal should be intermediate courts. This appellate court after its careful and exhaustive review of the record correctly affirmed the guardianship court's order in consonance with the law. This court should decline to exercise its discretionary jurisdiction, as no grounds exist for this court to so exercise the same.

Respondent respectfully requests this court to promptly deny the application for discretionary review, and if such denial is issued prior to the expiration of the appellate court's stay, also requests that the stay be lifted with instructions to the appellate court to immediately issue its mandate.

Respectfully submitted,

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George J. Felos

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished this 12th day of August, 2003 by U.S. mail to Patricia Fields Anderson, Esq., 447 3rd Avenue N., Suite 405, St. Petersburg, Florida, 33701.

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George J. Felos, Esq.
FELOS & FELOS, P.A.
595 Main Street
Dunedin, Florida 34698
(727) 736-1402
Florida Bar No. 226653
Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

I CERTIFY that this computer-generated brief is submitted in Times New Roman 14-point font.

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George J. Felos, Esq.