STATE OF FLORIDA
DISTRICT COURT OF APPEAL
SECOND DISTRICT

IN RE GUARDIANSHIP
OF THERSA MARIE SHIAVO

_____/

Case No.2D05-1455

APPELLANT'S INITIAL BRIEF

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STATEMENT OF THE ISSUES

The life of a human being is at risk. The accuracy of court findings as to her medical condition, persistent vegetative state, are now in doubt. Notwithstanding this evidence, the trial court has enjoined the provision of emergency medical services to Theresa Marie Schiavo by the Department of Children and Families, pursuant to its statutory obligations under Fla. Stat. Section 415.1051, Fla.Stat.

The issue before this court is whether the Probate Court had constitutional or statutory authority to enjoin a statutorily-mandated emergency medical treatment and protective services pursuant to Section 415.1051, Fla.Stat. Further, did the trial court abuse its discretion in granting such injunction with virtually no notice and without providing a full opportunity to the Department to present evidence?

PRELIMINARY STATEMENT

Due to the expedited nature of the case, the appellant is unable to provide record citations. However, the references should be specific enough that the pertinent documents can be readily identified.

STATEMENT OF THE CASE

This is an appeal of a nonfinal order of the Probate Court in the guardianship proceeding of Mrs. Schiavo enjoining the Department of Children and Families from examining, hydrating or providing nutrients to Mrs. Schiavo in conjunction with its

statutorily-mandated investigation of new allegations of abuse, neglect or exploitation of Mrs. Schiavo, a vulnerable adult, as the department is independently authorized to do under ch. 415, Florida Statutes.

On March 23, 2005, the Department of Children and Families (DCF), having learned of new allegations of possible abuse or neglect of Mrs. Schiavo, moved to intervene. In particular, the department reported it had received disturbing allegations about the administration to Mrs. Schiavo of morphine for pain, a prescription unreasonable and unnecessary for a person in a persistent vegetative state (PVS). Motion for intervention. The department provided an affidavit by neurologist Dr. William P. Cheshire of the Mayo Clinic, who averred that advances in neuro-science since Mrs. Schiavo's last neurological evaluation years ago and many of her responses to her environment had called into question the diagnosis, accepted by this and the Probate Court, that she is in a persistent vegetative state. Id. The expert, Dr. Cheshire, concluded that Mrs. Schiavo's observed responses and the weaknesses in prior diagnostic tests "all suggest the possibility that she may be at some level consciously aware of pain." Id. at 5.

The fact that her treating physicians evidently have prescribed morphine for pain is inconsistent with a PVS diagnosis, according to Dr. Cheshire.

> Terri has received analgesic medication as treatment for her pain behavior. This seems to be appropriate medical treatment if one cannot know with certainty whether her behavior indicates conscious awareness of pain.

Motion for intervention, Cheshire affidavit at 5-6.

Dr. Cheshire concluded that there now was reason to doubt the PVS diagnosis.

> Based on my review of extensive medical records documenting Terri's care over the years, on my personal observations of Terri, and on my observations of Terri's responses in the many hours of videotapes taken in 2002, she demonstrates a number of behaviors that I believe cast a reasonable doubt on the prior diagnosis of PVS.
>
> * * *
>
> In summary, Terri Schiavo demonstrates behaviors in a variety of cognitive domains that call into question the previous diagnosis of persistent vegetative state. Specifically, she has demonstrated behaviors that are content-specific, sustained, and indicative of cerebral cortical processing that, upon careful neurologic consideration, would not be expected in a persistent vegetative state.
>
> Based on this evidence, I believe that, within a reasonable degree of medical certainty, there is a greater likelihood that Terri is in a minimally conscious state than a persistent vegetative state. This distinction makes an enormous difference in making ethical decisions on Terri's behalf.

Id. at 3, 6.

The department argued that if Dr. Cheshire's views prove to be true — that Mrs. Schiavo was not truly PVS — then there would be no statutory basis to remove her from life support and, in effect, to kill her through neglect. Motion at 4.

In addition, the department told the court that it had received at least 30 new allegations of abuse or neglect involving Mrs. Schiavo. Id. at 2. Some of these allegations alleged "abuse, neglect and exploitation of Mrs. Schiavo by her Husband and Guardian, Michael Schiavo." Id. While some of these latter allegations were not necessarily new, "there was an indication that the conduct alleged was an ongoing activity requiring investigation into the pattern . . ." Id.

Based on these new developments, the department asked the court to permit intervention, and to stay the effectiveness of the order permitting removal of Mrs. Schiavo's feeding tube for the 60-day period allowed under s. 415.104(5), Fla.Stat. in order to permit a protective investigation of these abuse allegations to go forward. Id. at 6-7.

That same day, the Probate Court heard the motion. During the hearing, and without prior notice to any party, the guardian made an emergency oral motion to the enforce the mandate regarding removal of the feeding tube. Order of March 23, 2005. The Department objected to this lack of notice but was required by the trial court to proceed with the hearing.

Without ruling on the motion to intervene, the Probate Court granted the guardian's emergency oral motion and enjoined the department from "from taking possession of Theresa Marie Schiavo or removing her from the Hospice Woodside Facility, administering nutrition or hydration artificially, or otherwise interfering with this Court's final judgment, or causing the same to occur, and all those persons acting in concert with DCF are hereby also restrained." Order of March 23.

In a separate order March 24, 2005, the trial court denied the motion to intervene.

This appeal challenges that order.

STANDARD OF REVIEW

The standard of review for injunctive orders is abuse of discretion. Smith v. Coalition to Reduce Class Size, 827 So. 2d 959, 961 (Fla. 2002). A trial court abuses its discretion when it unreasonably interprets the facts, Trammel v. Bass, 672 So.2d 78, 83 (Fla. 1st DCA 1996), or when it misapplies the law. Talavera v.School Board of Palm Beach County, 129 F.3d 1214, 1216 (11th Cir. 1997).

SUMMARY OF THE ARGUMENT

The trial court's order enjoining DCF from providing emergency medical services to Mrs. Schiavo while it concludes its investigation of the new abuse allegations was an abuse of discretion. Because of the trial court's prior order mandating removal of nutrition and hydration from Mrs. Schiavo, Mrs. Schiavo could die before DCF is able to conclude its investigation into allegations of abuse, neglect or exploitation. Thus, it was an abuse of discretion to enjoin the restoration of such hydration and nutrition while DCF's statutorily-mandated investigation was pending.

Moreover, DCF provided sworn evidence that called into serious doubt the entire basis under which the trial court, and every other court who has reviewed this case, ruled that Terri Schiavo should be starved to death. The courts have assumed that Terri Schiavo is in a "persistent vegetative state". The affidavit of Dr. Cheshire states that it is unlikely that this factual assumption is correct. Based on his years of expertise in this area and his review of records obtained by DCF, as well as a 90-minute personal observation of Mrs. Schiavo in her hospice room, Dr. Cheshire has stated that it is more likely that she is in a state of minimal consciousness. Furthermore, DCF presented uncontroverted evidence from Mrs. Schiavo's own medical records that pain medications, including morphine, were being prescribed to

Mrs. Schiavo. It is accepted medical opinion that pain is inconsistent with a permanent vegetative state.

Despite the provision of this substantial affidavit, as well as the evidence of the administration of pain medication, the trial court summarily granted an un-noticed oral motion to enjoin DCF from complying with its statutorily-mandated emergency medical services. It heard no testimony and gave no time to DCF to make the witnesses available in person or by telephone.

It is difficult to imagine a greater situation of "abuse, neglect or exploitation" than the starvation of a human being in the face of serious doubt about the factual and legal grounds for such starvation. When confronted with such information, DCF has no choice but to investigate and, if the person's life is endangered, to provide emergency medical services.

The obligation to provide such services is an executive function under Article IV of the Florida Constitution. DCF is an executive department. Section 20.19, Fla.Stat. By enjoining DCF from carrying out its statutorily-mandated investigative functions and provision of emergency medical services, the trial court interfered impermissibly with the functions of the Executive Branch, in violation of the separation of powers under Art. I, section 3 of the Florida Constitution.

ARGUMENT

I. The trial court lacked constitutional and statutory authority to enjoin the department's exercise of its protective services authority under ch. 415.

The trial court, sitting as a probate court, did not have statutory authority to enjoin the department from taking action pursuant to a protective services investigation under ch. 415, Fla.Stat. That chapter gives the department plenary authority to conduct such investigations and to take appropriate action, sets forth detailed procedures for such investigations, and provides for prompt judicial review of any actions taken as a result of an investigation in an independent proceeding — not by the probate court in a pre-existing guardianship action.

Section 415.104(1), Fla.Stat., requires the department to begin a protective services investigation within 24 hours of receipt of a report alleging abuse, neglect or exploitation of a vulnerable adult.[1] The statute does not condition or limit the department's authority to conduct such investigations. It does not permit or authorize judicial interference in such investigations. It sets out the steps that must be taken during such investigations. Sec. 415.104(3)-(8), Fla.Stat. The department

[1] A "vulnerable adult" is a person 18 years or older "whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to a mental, emotional, long-term physical, or developmental disability or dysfunctioning, or brain damage . . ."

has 60 days in which to complete a protective investigation. Sec. 415.104(4), Fla.Stat.

Section 415.1051(2), Fla.Stat., further sets out the department's authority to conduct protective services investigations of helpless individuals when "the department has reasonable cause to believe that a vulnerable adult is suffering from abuse or neglect that presents a risk of death or serious physical injury to the vulnerable adult and that the vulnerable adult lacks the capacity to consent to emergency protective services . . ." and that person is unable to give his or her consent. This section has been termed unambiguous in its reach and requirements. Fla. Dep't of Children & Family Servs. v. McKim, 869 So. 2d 760 (Fla. 1st DCA 2004).

Sec. 415.1051(2) does not constrain or limit the department's ability to investigate and to act to protect a helpless person, if it believes it has probable cause that abuse or neglect has occurred. The Legislature's grant of authority thus is plenary, much like the grant of authority to a state attorney to investigate and to prosecute crime. It does not allow for judicial prior restraint of the exercise of this authority.

The statute prescribes when and how the department will exercise its authority Sec. 415.1051(2)(b) and (c), Fla.Stat.

The statute also requires that when the department acts to remove or to require treatment of a helpless, vulnerable person, it must immediately file a petition with the circuit court to authorize such removal and treatment. Sec. 415.1051(2)(b), (d) and (f), Fla.Stat. Such a petition initiates an independent action in the circuit court and not in a probate court. Sec. 414.1051(2)(d), Fla.Stat.

An action initiated under s. 415.1051(2)(b) and (d) is the only lawful mechanism for review of the department's exercise of authority under s. 415.1051(2). This review is post hoc, not pre hoc, to any investigation under ch. 415. See e.g., Fla. Dep't of Children & Family Servs. v. McKim (denying a petition for the provision of protective services).

Significantly, judicial review only occurs if the department acts pursuant to findings made during a protective services investigation. There is no statutory provision for review of any decision to initiate such an investigation, the conduct of that investigation, or of any actions taken pursuant to such an investigation. It is clear from the structure and purpose of s. 415.1051(2) that the Legislature intended the department to act first and seek review afterward. The Legislature does not intend to let lives hang in the balance waiting for the courts to give the department permission to act. The Legislature intended to give the department the tools to act first -- and quickly -- to protect the health and welfare of society's most vulnerable

persons who are powerless to protect themselves, and to establish the propriety of that action afterward.

The Probate Court's injunction thus is unauthorized because the Legislature did not confer on the Probate Court, in an existing proceeding, authority to review the department's decisions arising from a protective services investigation. Rather, that authority lies exclusively with the circuit court in an independent action filed exclusively for the purpose of reviewing the department's actions under ch. 415.

Thus, the order trespasses on, and impermissibly limits authority exclusively conferred on the department by the Legislature and exceeds the statutory authority of the Probate Court. As such, the Probate Court's injunction violates separation of powers limitations in the Florida Constitution. Sec. 3, Art. II, Fla. Const. Hornbook law states that "it is a fundamental general principal that the judiciary may not encroach upon or usurp the executive function." 10A Fla. Jur.2d Constitutional Law sec. 169 (2005); see, "Palm Beach County Sheriff v. State, 854 So.2d 278 (Fla 4th DCA 2003) (ordering DCF to reimburse Sheriff for expenses interferes with legislative and executive agency discretion --- Circuit Court exceeded its authority); State v. Brooke, 573 So. 2d 363, 368-369 (Fla. 1st DCA 1991) (trial court cannot tell the department where to place a foster child when that authority is vested by

statute in the executive branch). The Probate Court order violates this canon of Florida jurisprudence, and cannot be sustained.

The order under review must be reversed.

II. The department's actions under s. 415.1051(2) will not interfere with the final judgment.

The order on appeal prohibits "interfering with this Court's final judgment, or causing same to occur." The final judgment in the guardianship proceeding empowers Mr. Schiavo "to proceed with the discontinuance of said artificial life support for Theresa Schiavo." Order of Feb. 11, 2000, p. 10.[2] Nothing that the department would do under powers conferred by s. 415.1051 would interfere with the final judgment or cause the same to occur.

Any action that the department might take pursuant to its independent statutory authority to investigate and to remedy abuse and neglect of the helpless and disabled does not interfere with Mr. Schiavo's decision-making authority. That authority remains intact. Rather the department's statutory authority, as is clear from

[2] Although the order of Sept. 17, 2003, directs Mr. Schiavo to remove the feeding tube, that order cannot be taken literally. The court did not have the authority to order the removal of the tube. It could only confer on the guardian the authority to make such a decision on the ward's behalf. Sec. 765.401, Fla.Stat.

the statutes cited above, is intended to ensure that the exercise of Mr. Schiavo's authority — like the exercise of any guardian's authority over a ward — is not abused. Those statutes are also intended to protect the independent rights of the disabled, which are not erased by the appointment of a guardian or any order issuing under s. 765.401, Fla.Stat.

The statutory duty to ensure that guardianship powers and the independent rights of the disabled are not abused, as pointed out above, is not subject to the Probate Court's prior review.

Because the department's actions under s.415.1051 cannot as a matter of law interfere with the final judgment, the court abused its discretion in issuing the injunction.

III. The trial court lacks jurisdiction to issue injunctive relief against the department as a nonparty.

The trial court abused its discretion when it issued injunctive relief against the department because it lacked personal jurisdiction of the department, which is not a party to Mrs. Schiavo's guardianship proceedings. Blue Dolphin Fiberglass Pools, Inc. v. Swim Industries Corp., 597 So. 2d 808 (Fla. 2d DCA 1992). Cf. Lindman v. Ellis, 685 So.2d 632, 633 n. 2 (Fla. 2d DCA 1995) (nonparty may not be held in civil contempt).

While the department sought to intervene, which if granted would have given it quasi-party status,[3] the court has denied the motion. Thus, the department is not a party and cannot be enjoined.

CONCLUSION

For these reasons, the court should reverse the decision below and remand for further proceedings.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served by telefax or U.S. mail or hand delivered on

[3] Legal Envtl. Assistance Found. v. Clark, 668 So. 2d 982 , 984 (Fla. 1996).

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