IN THE CIRCUIT COURT FOR PINELLAS COUNTY, FLORIDA
PROBATE DIVISION
File No. 90-2908-GD-003

IN RE: THE GUARDIANSHIP OF
THERESA MARIE SCHIAVO,
Incapacitated.

MICHAEL SCHIAVO,

Petitioner,

vs.

ROBERT SCHINDLER and MARY SCHINDLER,

Respondents.

ORDER

THIS CAUSE came before the Court on an emergency telephonic hearing on March 25, 2005, for determination of the legal sufficiency of Respondents' Emergency Motion for Injunction and Immediate Relief and Fla. R. Civ. P. 1.540(b)(5) Motion for Relief from Judgment Based Upon the Incapacitated's Articulation of End of Life Wishes. Attached to the Motion were affidavits from a Florida attorney who has represented Mr. and Mrs. Schindler; the sister of Theresa Marie Schiavo; an inventor of a technological device that detects brainwaves and translates them to words; and two doctors. The Court heard legal argument from David C. Gibbs, III, Esq, for Mr. and Mrs. Schindler and from George J. Felos, Esq, for the Petitioner. The Court has also reviewed the Motion and its attachments and the record in this case. Being duly advised in the premises, the Court finds as follows:

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The Respondents have once again moved the Court for relief from its final Orders rendered February 11, 2000, and February 25, 2005, based upon new evidence that Theresa Marie Schiavo has attempted to verbalize her end of life wishes. The Motion alleges that Barbara J. Weller, Esq, visited with her on March 18, 2005, prior to her feeding tube being removed and, in the presence of Suzanne Vitadamo, interacted directly with Terri Schiavo at a cognitive level. The interaction was described by both Ms. Weller and Suzanne Vitadamo in sworn affidavits that were executed on March 22, 2005.

On March 23, 2005, Respondents brought before this Court a Fla. R. Civ. P. 1.540(b)(5) motion for relief from judgment. At the emergency hearing held later that day on the facial sufficiency of that Motion, the Court permitted legal argument on an affidavit by Dr. William Polk Cheshire, Jr. His affidavit, which had been executed that day, described his belief that Mrs. Schiavo's cognition level is higher than was previously determined. At that hearing, neither Ms. Weller's nor Ms. Vitadamo's affidavits were introduced or argued even though Ms. Weller had "promised Terri [that Weller] would tell the world that she had tried to say, 'I want to live.' "

In *In re Guardianship of Schiavo,* 2005 WL 600377, * 3 __ So.2d ___ (Fla. 2d DCA March 16, 2005), the Second District Court of Appeal through Chief Judge Altenbernd stated:

> We note that the case law generally allows a party to file only one motion for relief under rule 1.540(b). [Cite omitted] Indeed, courts have taken the position that they lack authority "to entertain a second motion for relief from judgment which attempts to relitigate matters settled by a prior order denying relief." [Case citations omitted]. Because of the nature of this case, neither the trial court nor this court has enforced these general rules. The Schindlers have filed numerous motions, but

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they have failed to present any lawful basis for relief from judgment.

In dealing with the successive motions, this Court has heard legal argument in order to determine whether the claims rise to a colorable entitlement of relief. This has permitted the Court to sort out claims or issues that have been previously considered by the Court without having to have a full evidentiary hearing. This is the procedure established by the case law. See *In re Guardianship of Schiavo* (Schiavo III), 800 So.2d 640, 644 (Fla. 2d DCA 2001) and cases cited therein. When affidavits have been submitted that were based on evidence that has already been considered by the Court, the Court has properly disregarded the affidavits.

Although more than one motion for relief from judgment has been filed and considered in this case, none of the previous motions have depended on affidavits that were readily available before the previous court hearing on the same issue and were not then presented. Respondents do not get to pick and choose which pieces of available evidence they wish to present on an issue and then, relying on the relaxed rules in this type of case, relitigate the same issue again at another emergency hearing two days later. Respondents have waived their right to raise Terri Schiavo's alleged verbalization when they failed to present the affidavits at the March 23, 2005 hearing. Further, Respondents' Counsel concedes these affidavits were not presented to the Hon. James Whittemore at either of the hearings he conducted this week in federal district court.

Due to the critical nature of this case, this Court does not base its decision solely on the issue of waiver. While not reaching the credibility issues involved, the Court does note that according to both of these

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affidavits, Terri Schiavo's sounds occurred after Ms. Weller took Mrs. Schiavo's arms in both of her hands and this is consistent with evidence presented at the 2002 trial, that from time to time she responds to stimuli, that she makes limited vocalizations, and that she can move and change facial expressions. However, all of the credible medical evidence this Court has received over the last five years is that this is not a cognitive response but rather something akin to a person jerking his/her hand off a hot stove long before he/she has thought about it. Evidence on the stimulus issue and the random verbalizations were a feature of the prior trials and have been considered by this Court. These affidavits in no way show or tend to show anything to the contrary.

In order to show that it is likely that given time Mrs. Schiavo's communication skills could improve beyond those she currently has, a third affidavit was presented that described a device that would allegedly permit a person such as Terri Schiavo to communicate "using the modulated equivalent of prevocalized thoughts" which would then be translated into words using pattern recognition software. It is clear that this device is for patients with cognitive ability whose ability to vocalize is lost. Terri Schiavo is just the opposite. Moreover, the affiant stated that "given that I do not know her or the precise state of her medical condition, particularly the presence and quality of her brainwaves that would be necessary to detect and modulate to output, I cannot render an opinion of the probability of success of this device."

The fourth affidavit, which is from a doctor, relies only on previously considered video clips and suggests that hyperbaric oxygen therapy may improve her condition, which was part of the 2002 trial. The allegations

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presented in the fifth affidavit have nothing to do with this case and have also been previously considered by this Court.

Respondents have not met the burden set forth by the Second District Court of Appeal --

> ... they must establish that new treatment offers sufficient promise of increased cognitive function in Mrs. Schiavo's cerebral cortex—significantly improving the quality of Mrs. Schiavo's life—so that she herself would elect to undergo this treatment and would reverse the prior decision to withdraw life-prolonging procedures.
> (*In re Guardianship of Schiavo* (Schiavo III), 800 So.2d 640, 645 (Fla. 2d DCA 2001).

Based on the Respondents' request for relief, this Court does not find that a colorable entitlement to relief has been established. It is therefore

ORDERED AND ADJUDGED that Respondents' Fla. R. Civ. P. 1.540(b)(5) Motion for Relief from Judgment Based Upon the Incapacitated's Articulation of End of Life Wishes is DENIED as is the additional requested relief.

DONE AND ORDERED in Chambers, at Clearwater, Pinellas County, Florida this 28 day of March, 2005 at 11:45a.m.

GEORGE W. GREER
CIRCUIT JUDGE

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Copies furnished to:
David C. Gibbs, III, Esq.
George J. Felos, Esq.
Deborah A. Bushnell, Esq.
Gyneth S. Stanley, Esq.
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