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 for hearing on January 28, 2005, for determination of the facial sufficiency of ROBERT AND MARY SCHINDLER's Motion for Relief from a Void Judgment under Fla. R. Civ. P. 1.540(b)(4). The Court, heard the argument of Daniel C. Gibbs, III, Esq., for the SCHINDLERS and of George J. Felos, Esq., for the Guardian, MICHAEL SCHIAVO and has reviewed the Respondents' memoranda of law and Petitioner's response thereto, along with the case law and copies of prior Orders and briefs in this matter.

The Respondents in their Motion allege that this Court's Order of February 11, 2000, authorizing the discontinuance of THERESA SCHIAVO's artificially-provided food and water is void because (1) she was never appointed independent legal

counsel in violation of her due process rights; (2) the Court impermissibly applied post-1990 substantive law to her pre-1990 oral declarations regarding end-of-life issues and (3) the Court acted beyond its judicial powers and violated the separation of powers doctrine by making the health-care decision for THERESA SCHIAVO.

Petitioner set Respondents' Motion for hearing in order to determine its facial sufficiency the same as he did in the Respondents' prior challenge under Fla. R. Civ. P 1.540(b)(5). At the hearing, Respondents objected to the Petitioner's failure to file a written response to the Motion and argued that Petitioner was thereby precluded from presenting any "defense" to the motion. This Court ruled that the same procedure used to test the legal sufficiency of Rule 1.540(b)(5) motions would be used in this Rule 1.540(b)(4) proceeding, unless Respondents presented the Court with case law to the contrary. Upon the expiration of the Court-ordered time period, Respondents submitted a second Supplemental Brief in which they reported that after diligent search of Florida case law, they failed to find any case law on that issue. The Court therefore is following the same procedure it has in the past, i.e., finding that a written response to the Respondents' motion is unnecessary and limiting the matter to argument on the legal sufficiency of the motion. If the Respondent shows that the Motion is legally sufficient, the matter will then move forward, to an evidentiary hearing on any factual matters if necessary.

At the hearing, it was apparent that both counsel and the Court were treating the terms "facially sufficient" and "legally sufficient" interchangeably. Although Respondents have argued in their second Supplemental Brief that the issue of the facial sufficiency of their motion is limited to an examination of the motion itself and that nothing else may be considered, that is not the procedure that was followed for the prior Rule 1.540(b)(5) motion. At that time, this Court reviewed the Order at which the Motion for Relief is directed, the appellate opinions generated by the Court's February 11, 2000 Order, and reviewed portions of the record, which included a motion for rehearing and an affidavit setting forth the position of the Church. It is the Respondents' burden to prove the legal sufficiency of their motion to this Court, but the Court does not believe that it is precluded from reviewing the record prior to its determination of whether an evidentiary hearing is necessary or not. *Jacobs v State,* 880 So.2d 548 (Fla. 2004) cited by Respondents simply tracks the procedural requirements of Fla. R. Crim. P 3.850(d) and is not applicable to this case.

Finally, it should be noted that at hearing Respondents' counsel announced that he was prepared to argue the merits of the motion and offered no objection to the Court's stated intent to consider the notation-laden copies of various appellate briefs in this case that were submitted to the Court without objection during the hearing by Petitioner. Under the circumstances of this case, the Respondents waived their

argument that the Court was limited to the four corners of the motion before determining whether an evidentiary hearing is necessary.

Independent Counsel

Respondents argue that THERESA SCHIAVO's nondelegable rights of access to the court, of counsel, and of privacy under Florida Statute 744.3215(1)(k),(l) and (o) were triggered by her Guardian's application to the Court for authority to discontinue her artificially-provided food and water. Respondents cite Florida Statute 744.3725(1), which provides that a court must personally meet with and must appoint independent counsel on an incapacitated person's behalf before a court may permit a guardian to consent on behalf of the ward to certain extraordinary procedures. However, a proceeding which seeks termination of artificially-provided hydration and sustenance is not one of the actions or procedures listed in FS 744.3725(1) and FS 744.3215(4). Prior to 1994, discontinuing a ward's life support systems was included within the statute but it was removed from the statute before the Guardian in this case initiated a petition to remove THERESA SCHIAVO's hydration and sustenance. Florida Statute 744.3725(1) on which Respondents rely is, therefore, simply inapplicable to this proceeding.

The procedure that was followed by this Court was affirmed on appeal in *Guardianship of Theresa Marie Schiavo* ("*Schiavo I*"), 780 So.2d 176 (Fla. 2d DCA 2001). The appellate

court held that it was not necessary for this Court to appoint a guardian ad litem to represent THERESA SCHIAVO's rights.

> ... Because Michael Schiavo and the Schindlers could not agree on the proper decision and the inheritance issue created the appearance of conflict, Michael Schiavo, as the guardian of Theresa, invoked the trial court's jurisdiction to allow the trial court to serve as the surrogate decision-maker.
> ...
>
> ...The two parties, as adversaries, present their evidence to the trial court. The trial court determines whether the evidence is sufficient to allow it to make the decision for the ward to discontinue life support. In this context, the trial court essentially serves as the ward's guardian. Although we do not rule out the occasional need for a guardian in this type of proceeding, a guardian ad litem would tend to duplicate the function of the judge, would add little of value to this process, and might cause the process to be influenced by hearsay or matters outside the record. [*Id.* at p 179].

Although Respondents cite several cases where an alleged incapacitated person before involuntary commitment or while a guardianship is being established is entitled to counsel, they fail to differentiate between such proceedings and this type of proceeding where an incompetent person's guardian or surrogate decision-maker is authorized to exercise her constitutional right of privacy for her. See *In Re Estelle M. Browning,* 568 So.2d 4 (Fla. 1990) (It is important for the surrogate decisionmaker to fully appreciate that he or she makes the decision which the patient would personally choose. In this state, we have adopted a concept of

"substituted judgment."). This Court's Order of February 11, 2000, implemented *Browning's* requirements and the Second District Court of Appeal in *Schiavo I* approved the procedure. The Respondents have failed to show that failure to appoint independent counsel violated statutory or constitutional due process requirements that would void the Court's 2000 Order. In fact, the Respondents acknowledge at page 14 of their second Supplemental Brief that "As far as can be determined after a diligent search of all published state and federal case law, the question of whether an incapacitated person has a due process right to independent counsel in a proceeding intended to obtain state authority to discontinue the person's assisted feeding is a question of first impression in Florida and the United States." If Respondents can find no authority stating that THERESA SCHIAVO has such a due process right, this Court's Order cannot be collaterally attacked as void for not having appointed independent counsel.

Applying Statute Retroactively

Respondents contend that statutes in existence when THERESA SCHIAVO made her oral declarations regarding end-of-life decisions or when she collapsed in February 1990 should have been applied instead of the statutes in existence at the time of the hearing. According to the Second District Court of Appeal in *In Re Guardianship of Theresa Marie Schiavo, (Schiavo II)*, 792 So.2d 551 (Fla. 2d DCA 2001), this Court's 2000 Order was entered pursuant to chapter 765, Florida Statutes (2000) and pursuant to *In re Guardianship of*

Estelle M. Browning, 568 So.2d 4 (Fla. 1990), and determined by clear and convincing evidence that Mrs. Schiavo would then elect to cease life-prolonging procedures if she were competent to make her own decision. A footnote in that appellate opinion provided that "Life-prolonging procedure" was a statutorily defined term, citing § 765.101(10), Fla. Stat. (2000), and specifically recognized that the term included the methods to provide sustenance and hydration that were involved in the case. It is argued that at the time she made her oral declarations, however, the term did not include methods to provide sustenance and hydration. Despite Respondents' contention that it is constitutionally impermissible to apply the statute retroactively, there is no indication that statutes were in fact applied retroactively in this case. In the 2000 Order, the issue that was determined was THERESA SCHIAVO's "intention as to what she would want done under the present circumstances..." (February 11, 2000 Order, p 9) and this Court determined that it was called upon to apply the law as set forth in *In Re Guardianship of Estelle M. Browning, supra.*

Respondents have not presented in their motion or argument any case law or authority showing that what this Court did in 2000 amounted to a retroactive application of a Florida statute which would render the February 11, 2000, Order void and subject to collateral attack.

Separation of Powers

Respondents contend that this Court unconstitutionally encroached on legislative powers by determining what THERESA SCHIAVO's wishes were and by acting as her surrogate-decision maker. However, this Court's decision was partially based on the state constitutional right of privacy, rather than just on Chapter 744 and Chapter 765, Florida Statutes. The procedures that were followed had been approved by the Second District Court of Appeal in both *Browning* and by the subsequent affirmance in *Schiavo I.*

Respondents also suggest that this Court has usurped executive power by acting as the State Attorney and the Department of Children and Families in this matter. *In re Dubreuil,* 629 So.2d 819 (Fla. 1993), however, does not support Respondents' position. It merely holds that the State Attorney must be informed when a patient is refusing medical care so that he/she as a representative of the State may decide whether to seek judicial intervention. Similarly, the fact that Florida Statute 20.19 tasks the Department of Children and Families with ensuring the safety and well-being of the disabled does not show that the Court has acted beyond its judicial powers in this case.

Respondents have not presented any case law or authority showing that this Court's actions violated the separation of powers doctrine and rendered the February 11, 2000 order void. It is therefore

ORDERED AND ADJUDGED that the Fla. R. Civ. P. 1.540(b)(4) Motion for Relief from a Void Judgment filed on

January 10, 2005, by Respondents is DENIED because their motion is not legally sufficient to go forward.

DONE AND ORDERED in Chambers, at Clearwater, Pinellas County, Florida this 11 day of February, 2005.

GEORGE W. GREER
CIRCUIT JUDGE

TRUE COPY

90-2908-GD-003
Copies furnished to:
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