

**IN THE DISTRICT COURT OF APPEAL
OF THE SECOND DISTRICT OF FLORIDA**

IN RE: GUARDIANSHIP OF
THERESA MARIE SCHIAVO,

CASE NO. 2D05-968

Incapacitated.

L.T. No.: 90-2908-G D-003

ROBERT SCHINDLER and MARY
SCHINDLER

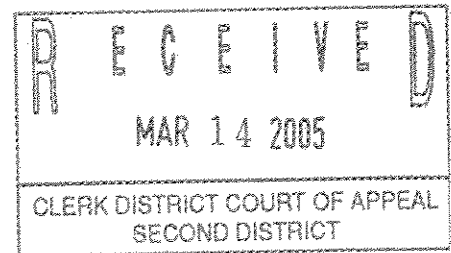
Appeal from the Circuit Court
of Pinellas County, Florida
Probate Division

Respondents/Appellants,

vs.

MICHAEL SCHIAVO, as Guardian
of the person of THERESA MARIE
SCHIAVO,

Petitioner/Appellee.



**APPELLANTS' REPLY TO APPELLEE'S OPPOSITION TO
EMERGENCY MOTION FOR REVIEW OF
TRIAL COURT'S DENIAL OF STAY PENDING APPEAL**

COME NOW Respondents/Appellants Robert and Mary Schindler ("Schindlers" or "Appellants") hereby reply to Appellee's Opposition to Emergency Motion for Review Of Trial Court's Denial of Stay Pending Appeal filed herein March 8, 2005. Appellants continue to request an expedited hearing of their emergency motion.

ARGUMENT

Appellee argues that Appellants' contention that Mrs. Schiavo was not afforded her due process protections is "frivolous," "patently absurd," or an

“abuse of process.” It is his argument that when he was appointed her guardian, he became her representative for all legal issues, that she, as an individual, did not need due process protections because he was there to protect her rights. In this bitterly contested adversary case, the guardian/spouse’s representation of the Ward has been rather like the prospect of a husband representing his wife’s rights in a bitter divorce action, or the state attorney’s office defending a man accused of a capital crime. The inherent conflicts of interest in those relationships are self-evident. The same should be true in an adversary case concerning discontinuance of a ward’s assisted feeding and hydration.

It is Appellants’ argument that in this case in which there has been acrimonious disagreement over Mrs. Schiavo’s end-of-life wishes, as well as, at the very least, the appearance of a conflict of interest on the guardian’s part, due process principles require that Mrs. Schiavo be given the protections of a guardian *ad litem*, that her guardian *ad litem* be given notice of an action to cause her to die by starvation and dehydration, and that he be given authority to retain her own attorney to represent her own legal interests, thus guaranteeing her right to access to courts. She also had the due process right to, but has been denied, an impartial, objective judge. It is not “frivolous,” “patently absurd,” or an “abuse of process” for Appellants to

continue to fight to assure that their daughter's "life support" procedures be discontinued only after a proceeding in which she has been afforded all the due process protections to which she is entitled and Appellants are unapologetic for their vigorous attempts to achieve those protections for her.

I. Florida's guardianship scheme provides due process protections for Wards.

Although the Appellee argues that Florida law makes him Mrs. Schiavo's representative for all purposes, Florida's statutory guardianship scheme proves to the contrary, including within its scheme many specific due process protections for the wards themselves separate and apart from the guardian. Guardianship law and Probate Rules require a guardian *ad litem* to be appointed to represent the ward in actions in which there is a conflict of interest between the guardian and his ward. Fla. Stat. § 744.391. As examples: the ward must be given notice of a petition for extraordinary authority that would affect the ward's interest. Fla. Stat. § 744.3125(1)(n) and Probate Rule 5.635(b)(2). The guardianship court must appoint an attorney to represent the interests of the ward in a proceeding brought by the guardian to obtain the court's authority to take specific extraordinary actions. Fla. Stat. § 744.3725. A guardian may be removed for a breach of his fiduciary duty to his ward. Fla. Stat. § 744.446.

Therefore, despite Appellee's protestations to the contrary, when the guardianship court has an adversarial case concerning discontinuing a ward's assisted feeding and hydration in order cause her death, the ward is statutorily entitled to more due process protections than just a guardian whose interests are adverse to her own.

II. The Florida and United States Constitutions provide due process protections for wards.

When the guardian applied to the court for state authority to terminate Mrs. Schiavo's artificially supplied food and water, he raised a "serious due process issue affecting life" (*Schiavo II*, 792 So.2d at 557). He was expressly asking for state authority to deprive her of her life, liberty, and property. When the State of Florida became involved in discontinuing Mrs. Schiavo's life support, FLA. CONST. art. 1, § 9, and U.S. CONST. amend. XIV required that she be provided with due process of law protections, including but not limited to the right to a fair and impartial tribunal, to have a guardian *ad litem* appointed to protect her personal interests, to receive notice of the proceedings, to be represented by independent counsel, to conduct discovery, to appear in court and present evidence in her own behalf, and to cross-examine adverse witnesses.

In this case of first impression, Appellants contend that the state's authority to discontinue Mrs. Schiavo's assisted feeding to cause her death

constitutes an even more massive deprivation of Mrs. Schiavo's life, liberty, and property interests than does a state determination of her incapacity. Therefore, she is just as entitled to procedural due process as the person who is an alleged incapacitated person and who is the subject of a petition to determine incapacity. The incapacitated person whose life and liberty interests are being curtailed by the state has "a right to the effective assistance of counsel at all judicial proceedings which could result in a limitation on the subject's liberty." *Chalk v. State of Florida*, 443 So.2d 421, 422 (Fla. 2d DCA 1984). *See also, Fey v. Fey*, 624 So.2d 770 (Fla. 4th DCA 1993). Deprivation of Mrs. Schiavo's life interests without affording her due process constitutes fundamental error of constitutional proportions and voids the judgment. *Cole v. State*, 714 So.2d 479, 490 (Fla. 2d DCA 1998) (Judgment "was void for lack of subject matter and personal jurisdiction, and that it was entered in violation of Cole's right to due process and his right to representation by counsel.")

While Florida statutes and case law do not specifically provide that a contested petition for judicial authority to terminate assisted provision of food and water entitles the ward to her due process protections, denying a ward those rights in a case that so clearly and dramatically will deprive her

of her life is a facial violation of the ward's Fla. Const. art. 1, § 9, and U.S. Const. amend. XIV rights to the due process of law, which, at a minimum,

contemplates reasonable notice, a hearing, and the right to effective assistance of counsel at all significant stages of the proceedings, i.e., all judicial proceedings and any other proceedings at which a decision could be made which might result in a detrimental change to the subject's liberty.

Jones v. State of Florida, 611 So.2d 577, 579 (Fla. 1st DCA 1992). *See also, Specht v. Patterson*, 386 U.S. 605, 610, 87 S.Ct. 1209, 1211-13, 18 L.Ed.2d 326 (1967) ("Due process . . . requires that he be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own") and *Ibur v. State of Florida*, 765 So.2d 275, 276 (Fla. 1st DCA 2000) ("Because involuntary commitment is a substantial deprivation of liberty at which fundamental due process protections must attach, the patient cannot be denied the right to be present, to be represented by counsel, and to be heard.").

Mrs. Schiavo's life and liberty interests were decided in this case without her being given even minimal due process rights. The Florida Constitution, Article I, Section 9 mandates that "[n]o person shall be deprived of life. . . without due process of law." Section 1 of the Fourteenth Amendment to the United States Constitution prohibits any state from

“depriv[ing] any person of life, liberty, or property, without due process of law.”

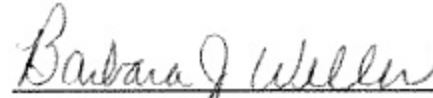
CONCLUSION

Whether an incapacitated person is entitled to her constitutional right to due process of law before she may be caused to die by starvation and dehydration by judicial order, or whether her disability causes her to become merely a *res* entitled to no individual due process protections, is a case of first impression with far-reaching state and federal constitutional implications. If this Court does not grant a stay of the trial court’s March 18, 2005, 1:00 p.m., the time set to begin her dehydration and starvation, she will suffer the most horrific, irremedial, and state-caused deprivation of life possible when it is ultimately determined by this Court or a higher court that she remains a person despite her incapacity and that she is thus entitled to due process protections she did not receive below.

WHEREFORE, Appellants respectfully request that this Court reverse the trial court decision denying their stay motion and that it grant a stay pending final judicial resolution of their pending Rule 1.540(b)(4) motion.

Respectfully submitted,

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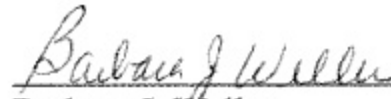
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been mailed on this fourteenth day of March 2005 to the following addressees:

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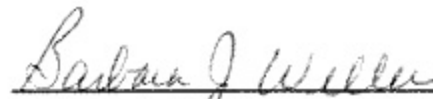
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Barbara J. Weller

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing has been prepared and is submitted in Times New Roman 14-point font.



Barbara J. Weller