

**IN THE CIRCUIT COURT FOR PINELLAS COUNTY, FLORIDA  
PROBATE DIVISION**

IN RE: GUARDIANSHIP OF  
THERESA MARIE SCHIAVO,

UCN NO.: 521990GA002908XXGDXX

Incapacitated.

REF. NO.: 90-2908GD-003

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

Petitioner,

vs.

ROBERT SCHINDLER and MARY  
SCHINDLER,

Respondents.

**MEMORANDUM IN OPPOSITION TO MOTION FOR  
RELIEF FROM JUDGMENT**

COMES NOW MICHAEL SCHIAVO, as guardian of the person of  
THERESA MARIE SCHIAVO, and hereby files this memorandum opposing the  
motion for relief from judgment, and states:

Preliminary determination.

1. Movants request this Court to hold an evidentiary hearing on the matters  
raised in the motion. Under Florida law, however, a party is not entitled to an  
evidentiary hearing on a rule 1.540(b) motion if it is facially deficient,  
*Flemenbaum v. Flemenbaum*, 636 So. 2d 579, 580 (Fla. 4th DCA 1994):

“If a motion on its face does not set forth a basis for relief,

then an evidentiary hearing is unnecessary. The time and expense of needless litigation are avoided and the policy of preserving finality of judgments is enhanced.”

Likewise, a prima facie showing which would justify relief from judgment is required before a formal evidentiary hearing or permissible discovery may be had on the motion. *Dynasty Express Corp. v. Weiss*, 675 So. 2d 235, 239 (Fla. 4th DCA 1996).

2. Thus, this Court must first determine that the motion is facially sufficient before it can order an evidentiary hearing. Because the motion is facially insufficient, (for reasons, some of which are shown below), this Court should deny the motion without granting an evidentiary hearing.

No change in circumstances.

3. Movants claim the speech given by Pope John Paul II on March 20, 2004 is a “new development” that warrants vacating this Court’s February 11, 2000 final judgment. The basis for movants’ claim is that the ward purportedly would not now choose to withdraw artificial feeding because the Pope’s speech, “tantamount to a divine command,” has now made such an act “a sin of the gravest proportions” that would “imperil her immortal soul” (motion at pages 9, 3 and 2). This argument fails on its face for numerous reasons, not the least of which is movants’ unsupported, cynical and disrespectful attempt to mischaracterize the

nature and effect of the Pope's statement.

4. Statement not *ex cathedra*. In order for the Pope's statement to be considered a "divine command" that would "imperil [the ward's] immortal soul," the statement would have to have been made *ex cathedra*:

"The Vatican Council has defined as 'a divinely revealed dogma' that the Roman Pontiff, when he speaks *ex cathedra*—that is, when in the exercise of his office as pastor and teacher of all Christians he defines, by virtue of his supreme Apostolic authority, a doctrine of faith or morals to be held by the whole church—is, by reason of the Divine assistance promised to him in Blessed Peter possessed of that infallibility with which the Divine Redeemer wished His Church to be endowed in defining doctrines of faith and morals..." New Advent Catholic Encyclopedia, *Infallibility*, at page 15, (attached as exhibit "A").

Because the failure to comply with an *ex cathedra* pronouncement is "under pain of incurring spiritual shipwreck" (*Id.* at page 16):

"[F]or an *ex cathedra* decision it must be clear that the Pope intends to bind the whole church. ...[T]he presumption is that unless the Pope formally addresses the whole Church in the recognized official way, he does not intend his doctrinal teaching to be held by all the faithful as *ex cathedra* and infallible." *Ibid.*

5. The motion fails to affirmatively demonstrate that the Pope's statement was made *ex cathedra*, and such a conclusion cannot be presumed. Since the Pope often speaks "in his private capacity as a theologian, preacher or allocutionist," *ex cathedra* teaching "is not attributed to every doctrinal act of the pope..." (*Id.* at

page 15). Thus, the motion on its face does not demonstrate that failure to follow the Pope's statement would have the spiritual consequences which movants' claim would change the ward's previous decision.

6. Further, contrary to movants' unsubstantiated assertions, prominent Catholic theologians and administrators acknowledge that the Pope's statement was not issued *ex cathedra*:

"It's a speech, so clearly this is not an 'ex cathedra' pronouncement. It's not infallible, and it's not an encyclical."—Franciscan Father Maurizio Faggioni, consultant to the Vatican's doctrinal congregation (*See [www.catholicnews.com/data/stories/cns/20040407.htm](http://www.catholicnews.com/data/stories/cns/20040407.htm)*)

"The pope's speech 'was not scnt as part of the official church teachings.'" Dr. Charles Daschbach, director, St. Joseph's Hospital, Phoenix, Arizona ([www.the-tablet.co.uk/cgi-bin/citw.cgi/past-00174](http://www.the-tablet.co.uk/cgi-bin/citw.cgi/past-00174))

*See also* the news release of the Catholic Health Association of the United States (<http://chausa.org/newsrel/r040401a.asp>) and the article in *The Florida Catholic* newspaper "Schiavo case highlights confusion over Catholic teaching on end-of-life issues," (June 24, 2004, A18, attached hereto as exhibit "B"), both referring to the Pope's talk as an "allocution."

7. No change in church policy. Even if the Pope's pronouncement were "official," the motion fails to demonstrate that the same constitutes a change in church policy. To the contrary, as stated in the article cited by movants and

attached as an exhibit to their motion, the Pope was “reaffirming” church principles. While “no one is worthless or beyond our loving concern”:

“This does not mean that patients must accept tube feeding in cases where they would see it as an unwarranted intrusion that only increases their suffering. When discussing the burdens and benefits of medical procedures, the Church has always recognized that these judgments have a subjective element, and that patients’ own assessments are to be given great weight.” Richard M. Doerflinger, Deputy Director, Secretariat for Pro-Life Activities, U.S. Conference of Catholic Bishops, “Human dignity in the ‘vegetative’ state.”

8. The foregoing statement of church policy that movants have adopted and made part of the motion, is entirely consistent with the trial testimony of Father Murphy: patients are morally bound to accept “proportionate” treatment but not “disproportionate” care; the “moral criteria” for examining whether care is proportionate or disproportionate “is the subjective standard of the patient”; and, although there is a presumption in favor of providing nutrition and hydration to all patients, the removal of Theresa Schiavo’s feeding tube “would be consistent with the teachings of the Catholic church” (trial transcript at pages 187-189, 191, 213-214). *See also* [www.catholicnews.com/data/stories/cns/20040407.htm](http://www.catholicnews.com/data/stories/cns/20040407.htm), “The pope’s speech is very much in line with previous church positions going back to Pope Pious XII.” –Franciscan Father Maurizio Faggioni, consultant to the Vatican’s doctrinal congregation.

9. Other commentators agree that the Pope's statement is not seen as a "ban" on withdrawing feeding tubes, "Most ethicists and theologians reject such an extreme interpretation" (*The Florida Catholic*, June 24, 2004, exhibit "B"):

"The pope's use of the words "in principle" as a qualifier, seems to make his allocution consistent with current church teaching,' said Philip Boyle, an ethicist with Catholic Health East, which operates facilities in eleven states including Florida." *Id.*

See also the news release of the Catholic Health Association of the United States (<http://chausa.org/newsrel/r040401a.asp>), which states that the current Ethical and Religious Directive permitting removal of feeding tubes "remains in effect."

Affidavits legally insufficient.

10. Movants, in the affidavits attached to their motion, try to characterize the ward as a practicing Catholic. Not only are the affidavits irrelevant, they are legally insufficient because they are contrary to the law of this case, are untimely, and do not comprise cognizable evidence under rule 1.540(b)(5).

11. Law of the case. At the January, 2000 trial in this cause, movants testified about the ward's Catholic education and church attendance, as did the guardian, (trial transcript at pages 329-30, 564, and 36-37). This issue was resolved by the appellate court, which held, "She had been raised in the Catholic faith, but did not regularly attend mass or have a religious advisor... ." *Schiavo I*,

780 So. 2d at 180.

12. Movants cannot properly raise issues which have been presented and decided by the appellate court in an appeal from a previously entered final judgment, and the trial court may not change the law of the case as determined by the highest court hearing the case, since enunciations in a prior appellate decision in the same cause become the law governing that case. *Kruger v. Hawkins*, 429 So. 2d 1299 (Fla 4<sup>th</sup> DCA 1983), *Basic Energy Corp. v. Hamilton County*, 667 So. 2d 249 (Fla. 1<sup>st</sup> DCA 1995), and *Airvac, Inc. v. Ranger Ins. Co.* 330 So. 2d 467 (Fla. 1976). Therefore, movants are prohibited from relitigating the issue of whether or not the ward was a practicing Catholic.

13. Untimely. This Court has already ruled and the appellate court has affirmed (*Schiavo II*, 792 So. 2d at 558), that movants are time barred under rule 1.540(b) from presenting “newly discovered” evidence as grounds for vacating this Court’s final judgment. Thus, even if movants’ proffered evidence were truly “newly discovered,” (which, of course, it cannot be since all of the purported evidence was known to movants at the time of the trial), it is now time barred.

14. Affidavits are not cognizable 1.540(b)(5) evidence. The distinction between Rule 1.540(b)(2) “newly discovered evidence,” and 1.540(b)(5) “no longer equitable that the judgment or decree should have prospective application”

evidence is: the former “refers to evidence of facts in existence *at the time* of judgment of which the aggrieved party was excusably ignorant...” *Gonzalez v. Gannett Satellite Information Network*, 903 F. Supp. 329, 332 (N.D.N.Y. 1995); while the latter pertains to “matters accruing after entry of the final judgment...” *Pollock v. T & M Investments, Inc.*, 420 So. 2d 99, 102 (Fla. 3d DCA 1982). Thus, 1.540(b)(2) “new evidence” cannot provide grounds for relief under rule 1.540(b)(5). That is why, here, the appellate court repeatedly cautioned that any 1.540(b)(5) motion filed must establish matters *arising after* the entry of the judgment. *Schiavo II*, 792 So. 2d at 559-60.

15. Even if the purported affidavit evidence were true, were previously unknown to movants, and could not have been discovered by them prior to the trial with due diligence, it nevertheless pre-existed the January, 2000 trial. Such purported evidence therefore is legally insufficient to form the basis for a 1.540(b)(5) motion.

#### Irrelevance.

16. The whole issue of the ward’s religious beliefs is irrelevant to this matter because the ward left specific oral advance directives covering the subject medical treatment choice. Therefore, it is unnecessary to inquire into the ward’s religious beliefs.

17. As noted in ~~the~~ Hastings Center, Guidelines on the Termination of Life-Sustaining Treatment and the Care of the Dying, (1987): “Where a patient who had decision making capacity at the time, has left...clear oral directions, and these directions seem intended to cover the situation presented, *the surrogate should follow the directions*” (at page 28, emphasis added). It is only when such directions are lacking, that an investigation into the patient’s value system should be made: “If the patient has left no directions about the treatment in question, the surrogate should apply what is known about the patient’s preferences and values, trying to choose as the patient would have wanted” (*Ibid*).

18. Since this court (as affirmed by the appellate court) has held that the ward’s declarations are clear and convincing evidence of her intention to terminate the subject medical treatment, the inquiry sought by movants is collateral and irrelevant.

Movants cannot meet their burden of proof.

19. Movants, as proponents of the motion, have the burden of proving that the final judgment is no longer equitable. *Schiavo III*, 800 So. 2d at 645. Movants assert that the ward “has now changed her mind about dying,” yet can never prove such a contention since the ward, (as held on numerous occasions by this Court and the appellate court), totally lacks any thought process with which she could

“change her mind.”

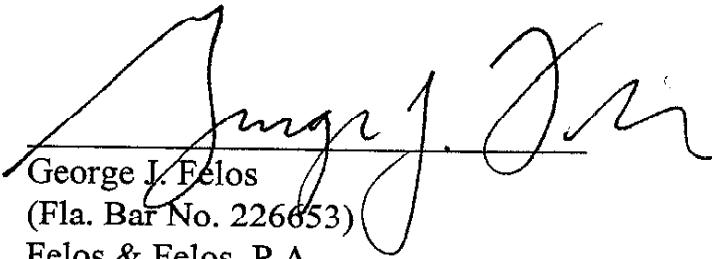
20. Further, even if one were to assume that the Pope’s statement were issued *ex cathedra*, and further assumed that the consequences of acting contrary to the statement are those asserted by movants, it would be sheer speculation to conclude that the speech would affect the ward’s behavior, (were she now capable of making choices). Catholic laity often disagree with and disregard such Papal pronouncements.

“Thirty years ago when Pope Paul VI issued the *Humanae vitae*, which condemned the use of any means of birth control other than the rhythm method, over 600 theologians signed dissenting statements. And ever since, the polls have consistently shown that the vast majority of the Catholic laity disagree with their churches’ official position and practice birth control in good conscience. To cite just two examples: A 1992 Gallop poll showed that 80% of U. S. Catholics disagreed with the statement: ‘Using artificial means of birth control is wrong.’ And a 1996 study conducted by Father Thomas Sweetster for the Parish Evaluation Project found only 9% of Catholics who consider birth control to be wrong.” See <http://www.uscatholic.org/soundboard/1998/jun/bc2.html>.

21. Movants are asking this Court to do what the supreme court refused to do in *Browning*—accept an argument that would paralyze the substituted-judgment standard by constantly speculating whether or not circumstances may have changed the patient’s mind. Since “human limitations preclude absolute knowledge” of the patient’s wishes, “we cannot avoid making a decision in these

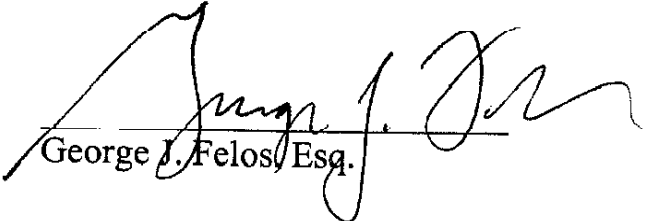
circumstances, for even the failure to act constitutes a choice.” *In re Guardianship of Browning*, 568 So. 2d 4, 13 (Fla. 1990). In essence, even assuming movants’ assertions to be true, movants seek to avoid this Court’s final judgment on, at best, the merest of speculation. This they are not permitted to do.

WHEREFORE, the guardian respectfully requests this Court to deny the motion for relief from judgment, without granting any evidentiary hearing.

  
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(Fla. Bar No. 226653)  
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#### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by U.S. mail to Patricia Fields Anderson, 447 3<sup>rd</sup> Avenue North, Ste. 405, St. Petersburg, Florida 3370, attorney for Respondents, this 24<sup>th</sup> day of August, 2004.

  
George J. Felos Esq.