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TO: The Honorable George W. Greer, Circuit Judge
COPY TO: David Gibbs, Esq. Fax No: (727) 398-3907
YOUR FAX NO: (727) 464-5471
FROM: George J. Felos
DATE: October 25, 2004
NO. OF PAGES (INCLUDING COVER SHEET) 7
OUR REFERENCE: *Theresa Marie Schiavo*
COMMENTS: See attached Motion to Vacate and Notice of Hearing.

Should you not receive all of the pages, please call back immediately at (727) 736-1402.

Francine Wolf

TELECOPIER OPERATOR

FAX NO: (727) 736-5050

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IN THE CIRCUIT COURT FOR PINELLAS COUNTY, FLORIDA
PROBATE DIVISION

IN RE: GUARDIANSHIP OF

THERESA MARIE SCHIAVO,

FILE NO. 90-2908-GD3

Incapacitated.

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

Petitioner,

vs.

ROBERT SCHINDLER and MARY
SCHINDLER,

Respondents.

**MOTION TO VACATE ORDER OF EMERGENCY STAY,
OR IN THE ALTERNATIVE,
MOTION FOR RECONSIDERATION OF ORDER OF EMERGENCY
STAY**

COMES NOW MICHAEL SCHIAVO, as guardian of the person of
THERESA MARIE SCHIAVO, and states:

Facts

1. On February 11, 2000, this Court entered a final order authorizing the discontinuance of the ward's artificial life support.
2. Said Order was appealed and the appellate court's mandate affirming

said Order was issued on April 24, 2001, and is in full force and effect.

3. At 3:53 p.m. on October 21, 2004, respondents served petitioner by fax their motion for emergency stay of execution of this court's February 11, 2000 Order, relying upon Rule of Civil Procedure 1.550(b). The stay requested in the emergency motion was for the time period "pending a final order on their [respondents'] Motion for Relief from Judgment."

4. The aforesaid Motion for Relief from Judgment was dismissed by this Court at 2:41 p.m. on October 22, 2004.

5. Without notice to petitioner or a hearing, (or any opportunity for petitioner to be heard on the emergency motion¹), this Court entered its Order of Emergency Stay at 2:43 p.m. on October 22, 2004, in which it stayed the February 11, 2000 Order until December 6, 2004.

Argument

6. This Court was without subject matter jurisdiction or authority to enter its Order of Emergency Stay. "[A] stay of execution on a judgment this court [appellate court] has affirmed and as to which our mandate has been issued would, in effect, be an avoidance of our mandate as to which the trial court has no

¹Petitioner did transmit to the Court a letter on October 21, 2004 regarding other matters. The letter was prepared before receiving respondents' emergency motion and did not constitute a response to the motion.

jurisdiction... ." *Robbins v. Pfeiffer*, 407 So. 2d 1016 (Fla. 5th DCA 1982). See also, *Milton v. Keith*, 503 So. 2d 1312 (Fla. 3rd DCA 1987) and *Division of Alcoholic Beverages and Tobacco, Department of Business and Professional Regulation v. Tampa Crown Distributors, Inc.*, 745 So. 2d 418, 420 (Fla. 1st DCA 1999).

7. The only exception to the above jurisdictional rule is when the trial court either has before it a pending 1.540(b) motion pertaining to the mandated judgment, or a timely appeal has been filed from an order denying such a 1.540(b) motion. Neither exception applies here. At the time this Court enter its Order of Emergency Stay, the subject 1.540(b) motion was no longer pending, nor was there an appeal filed from this Court's order dismissing respondents' 1.540(b) motion. As such, this Court had no subject matter jurisdiction to stay or alter in any way the February 11, 2000 Order (which, upon issuance of the mandate, became the order of the appellate court). Said emergency order should therefore be vacated.

8. Aside from lack of jurisdiction, and lack of procedural due process (notice and opportunity to be heard), the emergency order violated petitioner's right to fundamental due process because it adjudicated issues not presented by respondents' emergency motion. Fundamental due process is denied a responding

party when the court adjudicates issues not presented by the movant or tried by consent. *Moody v. Moody*, 721 So. 2d 731, 733-734 (Fla. 1st DCA 1998).

9. Here, the only relief requested by respondents was a stay *until* this Court entered a final order on the pending 1.540(b) motion. The Court's emergency order, however, stays the February 11, 2000 Order for a period of time *after* the denial of the 1.540(b) motion. The emergency order, granting relief neither requested by respondents nor the subject of their motion, therefore violates the fundamental due process rights of petitioner.

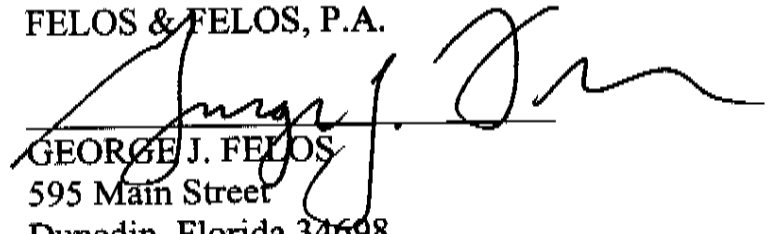
10. Aside from jurisdictional and due process matters, the seven week emergency stay ordered by this Court far exceeds any reasonable time needed by respondents' to file a notice of appeal from the dismissal of the subject 1.540(b) motion and apply to this Court and the appellate court for a stay pending appeal.

WHEREFORE, petitioner respectfully requests this Court to vacate the Order of Emergency Stay; or in the alternative, if this Court does not vacate said order, enter an order shortening the stay.

I HEREBY CERTIFY that a copy of the foregoing was furnished this 25th day of October, 2004 by facsimile transmission and U.S. mail to David C.

Gibbs III, 5666 Seminole Blvd., Ste. 2, Seminole, FL 33772.

FELOS & FELOS, P.A.

A handwritten signature in black ink, appearing to read "George J. Felos", is written over a horizontal line. The signature is fluid and cursive.

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**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,

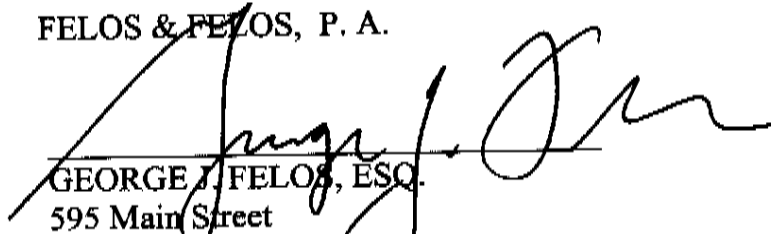
Respondents.

NOTICE OF HEARING

PLEASE BE NOTIFIED THAT MICHAEL SCHIAVO, guardian of the person of
THERESA MARIE SCHIAVO, has set the Motion to Vacate Order of Emergency Stay,
or in the Alternative, Motion for Reconsideration of Order of Emergency Stay, dated
October 25, 2004, for hearing on October 27th, 2004 at 10:30 a.m. before the Honorable
George Greer, Judge of the above court, at the Pinellas County Courthouse, 315 Court
Street, Clearwater, Florida, 34616. One hour has been reserved.

I HEREBY CERTIFY that a copy of the foregoing was furnished by facsimile
transmission and U. S. Mail this 25th day of October 2004, to David C. Gibbs, III, Esq.,
5666 Seminole Blvd., Suite 2, Seminole, Florida, 33772.

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