

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

IN RE: GUARDIANSHIP OF
THERESA MARIE SCHIAVO,

CASE NO. 2D04-4755
L.T. No.: 90-2908-G D-003

Incapacitated.

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

ROBERT SCHINDLER and MARY
SCHINDLER

Appellants,

vs.

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

Appellee.

**OPPOSITION TO MOTION TO VACATE STAY
AND REQUEST FOR EXPEDITED CONSIDERATION OF
MOTION TO VACATE**

COME NOW the appellants ROBERT and MARY SCHINDLER in
opposition to appellee's Motion to Vacate Stay and Request for Expedited
Consideration of Motion to Vacate Stay and state the following.

Statement of the Case

The relative positions of the parties in the instant case are well-known to this
Court. Appellants are the parents of Theresa Schiavo, the ward of whom appellee
is the husband and guardian. In 2000, the trial court found that Mrs. Schiavo was
in a persistent vegetative state and granted the guardian's petition to withhold Mrs.

Schiavo's food and water. This Court affirmed that decision in *In re Guardianship of Schiavo*, 780 So.2d 176 (Fla. 2d DCA 2001) (*Schiavo I*).

On July 20, 2004, appellants filed a Rule 1.540(b)(5) motion for relief of judgment contending that it is no longer equitable for the February 2000 Order "to have prospective application." Fla.R.Civ.P. 1.540(b)(5). On October 22, 2004, the trial court dismissed the appellants' Rule 1.540(b)(5) motion for relief. (Exhibit A, Order, October 22, 2004). On October 28, the trial court stayed enforcement of its February 2000 Order to permit appellants to prosecute their appeal of the dismissal of their motion for relief of judgment. (Exhibit B, Order, October 28, 2004). The Schindlers had moved for the stay pursuant to Fla.R.App.P. 9.310(a), which gives the trial court "continuing jurisdiction, in its discretion, to grant, modify, or deny such relief."

The only matter before this Court is appellee's Rule 9.310(f) motion to vacate the stay granted by the trial court.

Standard of Review

The standard of a review of an order granting a stay pending appeal is the abuse of discretion standard. *Mariner Health Care of Nashville, Inc., v. Baker*, 739 So.2d 608, 609 (Fla. 1st DCA 1999).

Argument

I. *Schiavo II* did not change the trial court's duties in considering a motion for stay pursuant to Fla.R.App.P. 9.130(a).

Appellee appears to be arguing that *Schiavo II* altered the trial court's responsibilities in its discretionary determination of whether to grant an application for stay pending an appeal of an order disposing of appellant's motion for relief from his February 2000 judgment. *Schiavo II* imposes no such new or additional responsibility upon the trial court's discretion.

Schiavo II did discuss appellate review of future 1.540 motions, promising to expedite the appeal of any further 1.540 orders. However, the Court left to the guardianship court its full discretion to grant or deny a stay of proceedings pending review of its order.

Moreover, if the guardianship court is confident in its own decision and is convinced that an appeal is sought merely to delay its order, the guardianship court can use its discretion in determining whether to grant or deny a stay. This court would review the grant or denial of a stay on an expedited basis. *See* Fla.R.App.P. 9.310(f).

Schiavo II, 792 So.2d 551, 564. *Schiavo II* added no new responsibilities or standards to what has always been the trial court's broad discretion in granting or denying a stay.

A trial court's discretion always includes its consideration of a number of factors, including the relative positions of the parties, the good faith of the party applying for the stay, whether the underlying form of relief sought from the court

was brought in good faith or just as means of delaying the enforcement of the underlying order. *See e.g., Mariner Health Care v. Baker*, 739 So.2d 608 (Fla. 1st DCA 1999) (The trial court denied a request for stay because the applicant had defied and continued to defy a court order compelling discovery); *Polar Ice Cream & Creamery Company v. Andrews*, 159 So.2d 672 (Fla. 1st DCA 1964) (The trial court was within its discretion in denying a stay to a party that was operating its business unlawfully within the state even after permission to do so had been denied by a final court order and after its license to do so had expired under its own terms).

Schiavo II imposed no new responsibilities upon the trial court's consideration of whether to grant a stay. The court's standard for granting or denying the stay remained within its discretion. Fla.R.App.P. 9.310(a) and *Schiavo II*, 792 So.2d at 564.

II. Appellants were not required to show the likelihood of the success of their appeal of the trial court's order on their motion for relief from judgment.

Appellee persists in contending that appellants must demonstrate a reasonable likelihood they can prevail on the merits of an appeal before they are entitled to a stay from the trial court, citing *Perez v. Perez*, 769 So. 2d 389, 390 n.4. (Fla. 3d DA 1999), in support of this contention. Not only is this contention

an incorrect and misleading statement of the principle set out in *Perez*, it is also inapplicable to the trial court's discretion.

The footnote in *Perez* to which appellee refers on page 9 of his Motion to Vacate discusses factors to be considered by the Court of Appeal—not the trial court—in deciding whether to grant a stay. Those factors “include the moving party's likelihood of success on the merits, and the likelihood of harm should a stay not be granted. *See State ex rel. Price v. McCord*, 380 So.2d 1037 (Fla. 1980).” The Court of Appeal did consider whether the moving party in *Perez* was likely to succeed on the merits, but it also decided the likelihood of harm that would result from denial of the stay. “Coupled with our additional concerns regarding the children's schooling and their best interests, greater harm could result if the status quo were not preserved.” *Id.* Status quo in this case is the continued provision of food and water to Theresa Schiavo.

A close reading of *McCord*, *supra*, confirms the interpretation of the *Perez* footnote to the effect that it is the duty of the district court—not the trial court—to consider likelihood of success and likelihood of harm when it decides whether to grant or deny a stay. In *McCord*, the Supreme Court had before it a petition of a writ of mandamus seeking to compel the First District Court of Appeal to issue its mandate in the underlying case. The Supreme Court discussed the interaction of Rules 9.310(e) and 9.340 on the issue of whether a stay issued pursuant to Rule

9.310 is intended to remain in effect through the district court review and on through any discretionary review to the Supreme Court absent any additional stay application. The Supreme Court held that the district court's issuance of its mandate was a ministerial duty absent a new application for and grant of a stay of the district court's mandate.

If a stay has been ordered pending appeal to a district court, it remains effective under Rule 9.310(e) unless the mandate issues or the district court vacates it. The Advisory Committee was of the view that the district courts should permit such stays only where essential. Factors to be considered are the likelihood that jurisdiction will be accepted by the Supreme Court, the likelihood of ultimate success on the merits, the likelihood of harm if no stay is granted and the remediable quality of any such harm.

State ex rel. Price v. McCord, 380 So.2d 1037 (Fla. 1980).

Rule 9.310(a) imposes no duty upon the trial court to specifically review and decide either likelihood of success or likelihood of harm should the stay be denied. Thus the trial court did not abuse its discretion when it did not make a finding of likelihood of success on the merits. Therefore, this Court need only determine whether the trial court abused its discretion when it granted the stay.

III. The trial court did not abuse its discretion when it granted a stay in the proceedings to give appellants the opportunity to appeal to this Court.

The Order of which appellee seeks review stayed the enforcement of the trial court's February 11, 2000, Order to allow appellants

to pursue their appeal to the Second District Court of Appeal pursuant to their October 26, 2004 Notice of Appeal filed herein, and such stay shall terminate and be of no further force and effect upon the earlier of a dismissal of that appeal or the issuance of a Mandate by the Second District Court of Appeal thereon.

Appellee contends that the trial court's grant of the stay of its 2000 Order was an abuse of discretion.

This Court in *Schiavo II* concluded that until the ward dies, an interested party may always challenge the death order on the ground that the prospective application of the final order is no longer equitable.

[W]e conclude that a final order entered in a guardianship adversary proceeding, requiring the guardian to discontinue life-prolonging procedures, is the type of order that may be challenged by an interested party at any time prior to the death of the ward on the ground that it is no longer equitable to give prospective application to the order. *See* Fla. R. Civ. P. 1.540(b)(5).

Schiavo II, at 553. It is true appellants have brought three Rule 1.540(b) motions. (*Schiavo II*); *In re Guardianship of Schiavo*, 800 So.2d 640, 642 (Fla. 2d DCA 2001) (*Schiavo III*); and the Rule 1.540(b)(5) motion herein. These motions have consistently been brought in a good faith effort to raise legitimate issues under Rule 1.540(b) that might possibly save the life of their daughter. These motions have not been brought solely to delay the withholding of their daughter's food and water; they have attempted to raise issues appellants genuinely believe might entitle them to relief from the February 2000 Order.

Appellee has wholly failed to demonstrate that the trial court abused its discretion when it stayed the Order to withhold food and water from Theresa Schiavo pending the appeal of the dismissal of appellants' motion for relief from judgment. It is not enough for appellee to simply disagree with the trial court's stay, he must demonstrate that the trial court made a decision that no reasonable person would make.

Judicial discretion is abused when judicial action is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the view adopted by the trial court. *Canakaris v. Canakaris*, 382 So.2d 1197, 1203 (Fla. 1980). If, however, reasonable people could differ as to the propriety of the action taken by the trial court, then it cannot be said that the court abused its discretion.

Seven Hills, Inc. v. Bentley, 848 So.2d 345, 352 (Fla. 1st DCA 2003). This is a difficult burden to meet given the irrevocable consequences of the denial of the stay.

It will also be difficult to demonstrate that the trial court acted as no reasonable person would when the day before the trial court issued its stay, the Justices of the Florida Supreme Court took the very same action in *Schiavo v. Bush*.

In *Schiavo v. Bush*, appellee brought an action against Governor Bush for a declaratory judgment that chapter 2004-418, Laws of Florida, otherwise known as "Terri's Law," was unconstitutional in authorizing the Governor to issue a one-time stay to prevent the withholding of food and water from Theresa Schiavo.

Judge Baird of the Sixth Judicial Circuit Court, Pinellas County, entered a summary judgment holding that the law is unconstitutional. Governor Bush appealed. This Court certified a question of great public importance. On September 23, 2004, the Supreme Court of Florida held that “Terri’s Law” violated the separation of powers. *Id.*

The Supreme Court issued its *Schiavo v. Bush* Mandate to the Pinellas County Circuit Court on October 22, 2004. (Exhibit C, Supreme Court Mandate, October 22, 2004). The effect of the Mandate was to notify the Circuit Court that its judgment was affirmed, including its order that “Executive Order No. 03-201, be and the same is hereby declared to be void and of no further legal affect.” *Schiavo v. Bush*, 2004 WL 980028, at *12 (Fla.Cir.Ct. May 5, 2004) (Exhibit D). Without the Executive Order staying the enforcement of the 2000 Order, the guardian could again petition the trial court to withhold food and water from the ward, Theresa Schiavo.

Thereafter, Governor Bush moved the Supreme Court to recall its mandate to permit him to seek further review from the United States Supreme Court. On October 27, 2004, the day before the stay granted herein, the Supreme Court recalled its mandate and ordered:

The proceedings in this Court, in the Second District Court of Appeal and in the Circuit Court of the Sixth Judicial Circuit in and for Pinellas County, Florida are hereby stayed to and including November

29, 2004, to allow appellant(s) to seek review in the Supreme Court of the United States and obtain any further stay from the court.

Supreme Court Order, October 27, 2004 (Exhibit E).

As did the trial court below, the Supreme Court saw the reasonableness of staying an action—the withholding of the ward’s food and water—that would otherwise be so final as to be without remedy. In granting the stay, the Supreme Court adhered to its motto on the Supreme Court Seal that obtaining justice may take time, but getting a right result is more important than getting a quick result.

[T]here may not be any “shortcuts” to justice. The legal principles and constitutional rights which have preserved us as a nation are either observed or they are violated. No matter how well intended, there cannot be any “homespun”, “living room” approaches to matters of such grave consequences to one’s freedom. It may take more time of a busy court but as the inscription on our own Supreme Court Seal reminds us: *Sat Cito Si Rect*—Soon enough if correct.

Keller v. State ex rel. Epperson, 265 So.2d 497, 498 (Fla. 1972). The matter before this Court is most literally one of life and death. It is not a waste of time to take the time to permit this Court to consider whether appellants’ contention that if Mrs. Schiavo could make her oral end-of-life decision today, she would not choose death in light of her spiritual leader’s official pronouncement on the subject.

IV. The trial court’s stay pending appeal adheres to Florida courts’ default position that requires those deciding end-of-life matters to support life when there is doubt.

It has long been the default position of this Court that if there is a reasonable doubt about what decision the patient would make regarding foregoing artificially

supplied food and water, “the surrogate decisionmaker . . . must make a decision which supports life.” *In re Guardianship of Browning*, 543 So.2d 258, 261 (Fla. 2d DCA 1989). A court, acting as a court and not a surrogate, must also choose life as its default position. “We reconfirm today that a court’s default position must favor life.” (*Schiavo II*, at 179).

As both the surrogate decisionmaker¹ and the trial court in this case, the trial court adhered to this Court’s default position to support Theresa Schiavo’s life pending review of the dismissal of appellants’ Rule 1.540(b)(5) motion. The lower court’s discretionary decision to support life pending appeal was imminently reasonable in light of what appeared to be a request for this Court to provide a procedure by which the trial court could hear the Schindlers’ motion for relief. “*Schiavo III* set forth a definable methodology that this court followed in determining the prior Rule 1.540(b)(5) motion. There is no similar definable methodology available for this new motion.” (Exhibit A, p. 4). It would be of no benefit to appellants for this Court to define a methodology for determining the latest motion for relief if the ward had died because no stay was granted.

Enforcing the trial court’s February 2000 Order would be the most final of judgments for Mrs. Schiavo; it is one for which she would never have a remedy.

¹ The guardian “invoked the trial court’s jurisdiction to allow the trial court to serve as the surrogate decision-maker.” *Schiavo I*, at 178. The guardian “requested the court to function as the proxy in light of the dissension within the family.” *Schiavo II*, at 557.

Keeping her alive during review of the trial court's order dismissing appellants' Rule 1.540(b)(5) motion has no such finality.

If Theresa Schiavo's constitutional right to privacy is violated by the trial court's stay and if this Court and the Florida Supreme Court and the United States Supreme Court uphold the trial court's decision, Theresa Schiavo's guardian will have a remedy. The provision of her food and water can then be terminated and her privacy interests protected.

On the other hand, if Theresa Schiavo's food and water are withheld and she dies and this Court could develop a definable methodology to determine appellants' new Rule 1.540(b) motion, and the motion was ultimately successful, neither Theresa Schiavo nor appellants would have a remedy to make them whole from the irreparable harm resulting from a wrong decision to deny a stay of enforcement.

An erroneous decision not to terminate results in a maintenance of the status quo; the possibility of subsequent developments such as advancements in medical science, the discovery of new evidence regarding the patient's intent, changes in the law, or simply the unexpected death of the patient despite the administration of life-sustaining treatment at least create the potential that a wrong decision will eventually be corrected or its impact mitigated. An erroneous decision to withdraw life-sustaining treatment, however, is not susceptible of correction. In *Santosky*, [455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982)], one of the factors which led the Court to require proof by clear and convincing evidence in a proceeding to terminate parental rights was that a decision in such a case was final and irrevocable. *Santosky*, *supra*, 445 U.S., at 759, 102 S.Ct., at 1397-1398. The same must surely be said of the decision to

discontinue hydration and nutrition of a patient . . . which all agree will result in her death.

Cruzan v. Missouri Department of Health, 497 U.S. 261, 284, 110 S.Ct. 2841, 2854 111 L.E.2d 224 (1990). Florida's default position of supporting life guards against the irrevocable, irremedial, and irreparable harm that would result from a wrong decision to repeatedly withhold Theresa Schiavo's food and water until she dies.

Conclusion

Schiavo II did not alter the trial court's discretionary responsibilities in determining whether to grant a stay. Appellants were not required to prove the likelihood of the success on appeal of their Rule 1.540(b)(5) motion and, even if they were, the likelihood of harm that would result from the denial of the stay is such that a stay is necessary to effectuate Florida courts' default position to support life if there is any doubt as to what the patient's oral end-of life decision would be.

Appellee did not demonstrate that no reasonable person would have decided to stay enforcement of the February 2000 Order to withhold Theresa Schiavo's food and water. In fact, the Justices of the Florida Supreme Court took the very same action the day before. Thus the trial court did not abuse its discretion when it stayed the 2000 Order to permit appellants to appeal the dismissal of their latest motion for relief of judgment.

WHEREFORE, appellants respectfully request this Court to deny appellee's Motion to Vacate Stay and Request for Expedited Consideration of Motion to Vacate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been mailed by U.S. Mail, postage prepaid, on this 15th day of November 2004 to the following addressees:

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