IN THE SUPREME COURT OF FLORIDA
CASE NO. SC03-1242

In Re: THERESA MARIE SCHIAVO,

Incapacitated.

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ROBERT and MARY SCHINDLER,

Petitioners,

v.

MICHAEL SCHIAVO,

Respondent.

_____/

EMERGENCY MOTION FOR STAY
PENDING DISCRETIONARY REVIEW

ROBERT and MARY SCHINDLER, Petitioners herein, pursuant to Fla. R. App. P. 9.310, hereby move this Court for its stay pending review by this Court. As grounds, Petitioners say:

On August 4, 2003, Petitioners served their Jurisdiction Brief to this Court, seeking to invoke the discretionary jurisdiction of the Court. Previously, the Second District Court of Appeal stayed issuance of its mandate until 5 p.m. August 25, 2003. The mandate of that court will require the trial court to set a date upon which the starvation and dehydration of Theresa Marie Schiavo ("Terri,"

Petitioners' adult incapacitated daughter) will commence. Petitioners have raised important constitutional and statutory issues about this case in their Jurisdiction Brief, and these proceedings will determine whether Terri Schiavo lives or dies.

Terri is in no crisis or imminent danger of death. Although she swallows her own secretions, she has no other means of life-support than a feeding tube. She breathes on her own and is not on a ventilator. She is, in other words, like thousands of other Floridians, a fact that has not gone unnoticed by the disability rights community.

Likelihood this Court Will Accept Jurisdiction

This Court has not reviewed this case. The last time the case appeared on this Court's docket, Respondent Schiavo was seeking to thwart an evidentiary hearing ordered by the Second District. *In re Guardianship of Schiavo,* 816 So.2d 127 (Fla. 2002)(table), perhaps in an attempt to prevent creation of record evidence of Terri's present condition. Since that time, however, new evidence has been presented to the trial court and considered by the Second District, which has now issued its latest (and fourth) opinion on the case.

In addition, Petitioners recently have filed an affidavit in the trial court from a speech pathologist at the Rehabilitation Institute of Chicago (copy attached), indicating Terri is a candidate for therapy and can improve in meaningful and

significant ways.[1]/ The record of the case is different and more complete, therefore, than previously presented to this Court. The evidence is no longer "overwhelming" that Terri is in a persistent vegetative state, as the Second District stated in its first opinion. *In re Schiavo*, 780 So.2d 176, 177 (Fla. 2d DCA 2001)("*Schiavo I*").

The Second District has now variously described the trial court's function in this case as a guardian, *Schiavo I,* 780 So.2d at 179 ("In this context, the trial court essentially serves as the ward's guardian"), a proxy and a health care surrogate. "In circumstances such as these, when families cannot agree, the law has opened the doors of the circuit courts to permit trial judges to serve as surrogates or proxies to make decisions about life-prolonging procedures." *In re Guardianship of Schiavo*,___ So. 2d ___, 2003 WL 21295656, *4 (Fla. 2d DCA 2003)("*Schiavo IV*"). The statutes are silent on whether a trial court must abandon its traditional role as a neutral arbiter in this type of case and perform one, or even all, of these functions on behalf of a ward. The statutes are likewise silent – save one exception[2]/ – on the standard of proof by which evidentiary disputes are to be adjudicated in these questions of the survival of the ward. It is this silence – of a

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[1]/ Terri's husband/guardian has not permitted any therapy for her in many years.

[2]/ Fla. Stat. § 765.401(3) requires clear and convincing evidence before a proxy may discontinue or withhold life-prolonging treatments.

constitutional Due Process magnitude – addressed in Petitioners' Jurisdiction Brief.

The Second District's own acknowledgment in *Schiavo II* that the death order is in the nature of a prospective mandatory injunction and must constantly be evaluated for its justness as to future application is a tacit acknowledgment of judicial discomfort and uncertainty, given the irreversible consequences. *In re Guardianship of Schiavo*, 792 So.2d 551, 559 (Fla. 2d DCA 2001)("*Schiavo II*")(withdrawal of feeding tube "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.").

Thus, considering society's "unqualified interest in the preservation of life," *Krischer v. McIver*, 697 So.2d 97, 103 (Fla. 1997), and the irreversible nature of ending an innocent life, each of these uncertainties, standing alone, should warrant guidance from the Supreme Court.

Ultimate Success on The Merits

This new record clearly establishes *some* cognitive, voluntary, albeit inconsistent behavior by Terri Schiavo. Those behaviors were not enough for the trial court to forestall her death, however. The Second District, likewise, twice spoke in terms of "increased cognitive function" in its latest opinion as the standard she must meet to survive. *In re Guardianship of Schiavo*, __ So.2d __ , 2003 WL

21295656, *2 and *3 (Fla. 2d DCA 2003)("*Schiavo IV*"). It is clear both the Second District and the trial court made a determination based on her quality of life, i.e., she did not demonstrate sufficient cognition or awareness or voluntary interaction with her environment to warrant continued life. *See, e.g., In re Guardianship of Schiavo*, 2002 WL 31817960, *2 (Fla.Cir.Ct. 2002)("The court finds that based on the credible evidence, cognitive function would manifest itself in a constant response to stimuli.").[3]/ These determinations, moreover, were made on a preponderance standard, even though a life is at stake.

Quality of life determinations truly are the first step backward toward repeating history, as noted by this Court :

> There are times when some people believe that another would be "better off dead" even though the other person is still fighting vigorously to live. Euthanasia is a crime in this state. § 782.08, Fla.Stat. (1987). *See* § 765.11(1), Fla.Stat. (1987). Despite the tremendous advances achieved in this century, the world has witnessed the extermination of retarded and mentally disturbed persons for whom a foreign government decided that death was the proper prescription.

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[3]/ Obviously, this is a test for brain damage, not persistent vegetative state. The statutory definition of PVS does not speak in terms of "increased cognition" or "consistent" or "reproducible" behaviors: it defines PVS as the absence of *any* behaviors showing cognition or awareness of self or environment. Fla. Stat. § 765.101(12). The courts below have disregarded this statutory definition.

In re Guardianship of Browning, 568 So.2d 4, 13 (Fla. 1990).

Even were a proxy or surrogate proceeding under § 765.401, however, in the withdrawal of nutrition and hydration, the proxy is required statutorily to comply also with the dictates of with § 765.305, a statute that requires that Terri show *a complete absence* of voluntary or cognitive behaviors and an "irreversible condition of unconsciousness." *See* Fla. Stat. § 765.101(12).

It is thus beyond the scope of Florida law to end the life of a person who left no advance directive but who is not completely without voluntary or cognitive behaviors, especially where there is legitimate bona fide record evidence that Terri can improve, *were her guardian/husband to permit her the chance.* Such an outcome is euthanasia. Petitioners have every right to expect that this and other provisions of Florida law will be followed in this proceeding to end their disabled daughter's life. Were the Court to accept this case for review, it is clear that Petitioners can make a compelling argument for reversal.

Likelihood of Harm in the Absence of a Stay
and its Irremediable Nature

Schiavo, in his most recent attempt to end his wife's life, claims that every day she lives is another violation of her constitutional rights. From Petitioners' viewpoint, however, every day Terri lives without any attempt to improve her

condition is another missed opportunity and a further violation of her other rights, both constitutional and statutory.[4]/ Their daughter's rights have been routinely disregarded by her guardian/husband since shortly after he received hundreds of thousands of dollars for her care as a result of a November, 1992 jury verdict. He then virtually immediately (July, 1993) ordered her caregivers to withhold antibiotics from her in the admitted expectation that she would expire from an untreated urinary tract infection. From Petitioners' viewpoint, their daughter's statutory and constitutional rights have been repeatedly and flagrantly violated by the guardian/ husband's refusal to make any effort to provide their daughter with any sort of systematic regimen of the most basic therapy or even environmental stimulation, instead allowing her to languish untreated for years. For them, the guardian/husband's plea that he is only carrying out their daughter's wishes when he seeks to end her life rings hollow, indeed, and is merely the latest manifestation of his decade-long odyssey to do away with a disabled wife.

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[4]/ Unfortunately for the parents, if a guardian does not follow the law in tending to a vulnerable and disabled ward and if the court does not enforce the ward's rights in the face of that malfeasance, there is little recourse. A guardian, with a court's blessing, has practically unlimited power to give or to withhold such things as a functioning wheelchair, physical therapy, teeth-cleaning, PAP smears, speech therapy, and visitation with family members. Respondent has withheld all of these things and more since he received the money from the jury verdict, a jury to whom he testified that he intended to care for his wife for the rest of her life.

Since the trial court's original death order in February, 2000, Schiavo has pressed Terri's early death at every opportunity. Most recently, in this Court he has moved that the Second District's stay order be dissolved, so Terri's dreadful death can begin. If this Court does not stay issuance of the Second District's mandate, Petitioners have no confidence the trial court will not order a new death date regardless of what is occurring at the appellate level. Terri's death while the case is pending, obviously, is the ultimate and irremediable harm for which a stay is appropriate.

Death is, indeed, different. *See, e.g., Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909 (1976). This is especially so where Theresa Marie Schiavo has been convicted of no crime, where she had no guardian *ad litem* below to represent her interests, where she left no advance directive, where she presently demonstrates cognitive and voluntary behaviors, where the record is devoid of any statement, even hearsay statement, that she would rather die a gruesome and extended death than live in a disabled condition, where her guardian husband has permitted no therapy for her for more than ten years, and where there is record evidence suggestive of foul play and unrebutted record evidence of the guardian/husband's failure to promote the well-being of his ward.

"We forcefully affirm that Life having been endowed by our Creator should

not be lightly taken nor relinquished." *Corbett v. D'Alessandro*, 487 So.2d 368, 371 (Fla. 2d DCA 1986). If these words have any meaning at all, they must have meaning in this case. That Terri's life should be ended under the circumstances revealed in this record contrasts markedly with the meticulous legislative solicitude shown for the restrictions of a person's liberty. *See, e.g.,* Fla. Stat. § 393.11(7)(g)("All evidence shall be presented according to chapter 90. The burden of proof shall be on the party alleging the appropriateness of the person's admission to residential services. The burden of proof shall be by clear and convincing evidence."). Surely, Terri's life is no less weighty and no less deserving of procedural and substantive protections than her liberty.

The acknowledgment of the State's legitimate interest in these types of cases was stated eloquently and succinctly by the United States Supreme Court more than a decade ago, in the seminal case on the subject:

> We do not think a State is required to remain neutral in the face of an informed and voluntary decision by a physically able adult to starve to death. . . . **It cannot be disputed that the Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment.** Not all incompetent patients will have loved ones available to serve as surrogate decisionmakers. And even where family members are present, "[t]here will, of course, be some unfortunate situations in which family members will not act to protect a patient." [citation omitted]. A State is

> entitled to guard against potential abuses in such situations [by requiring clear and convincing evidence].

Cruzan v. Mo. Dept. of Health, 497 U.S. 261, 280-81, 110 S.Ct. 2841, 2852-53, 111 L.Ed.2d 224 (1990)(emphasis supplied).

The hypothetical scenario posited by the *Cruzan* Court has come to life in this case and should offend the judicial conscience, sufficient to warrant a stay by this Court until its review of the matter is completed. Indeed, in the very same type of case, two years ago the California Supreme Court considered the same question of law as that proposed in Petitioners' Jurisdiction Brief, and observed:

> The function of a standard of proof is to instruct the fact finder concerning the degree of confidence our society deems necessary in the correctness of factual conclusions for a particular type of adjudication, to allocate the risk of error between the litigants, and to indicate the relative importance attached to the ultimate decision. [citations omitted]. Thus, "the standard of proof may depend upon the 'gravity of the consequences that would result from an erroneous determination of the issue involved.' " [citation omitted.]

Conservatorship of Wendland, 28 P.3d 151, 169 (Cal. 2001).

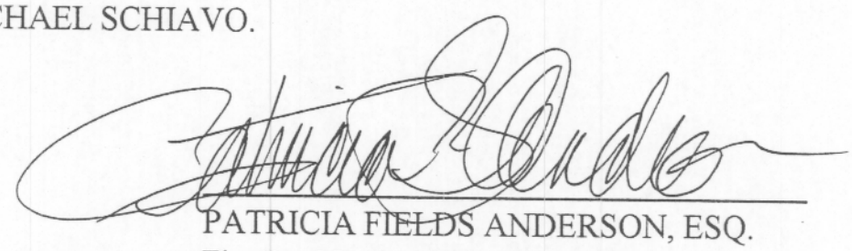
This case represents the very nexus of evidentiary standards and the "gravity of consequences," in a fact scenario so compelling as to warrant this Court's careful and considered judgment and stay of the status quo. This is especially so where the Florida Legislature is considering changes in the laws concerning advance

directives or guardianships that would have the effect of saving the ward's life.[5]/

WHEREFORE Petitioners respectfully request this Court to stay the issuance of the mandate of the Second District Court of Appeal pending the disposition of the case in this Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by facsimile and U.S. Mail this 13th day of August, 2003, to **GEORGE J. FELOS**, ESQ., Felos & Felos, 595 Main Street, Dunedin, FL 34698, Attorney for Respondent, MICHAEL SCHIAVO.



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[5]/ *See* Letter to Anderson from Rep. Kottkamp of 8/11/03, in Appendix hereto.