IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
PROBATE DIVISION
UCN 521990GA002908XXGDXX
REF: 90-002908-GD-03

In Re: The Guardianship Of:
THERESA MARIE SCHIAVO,

Incapacitated.

_____/

ROBERT SHINDLER and MARY SCHINDLER,

Petitioners,

v.

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

Respondent.

_____/

CHIEF JUDGE'S ORDER APPOINTING GUARDIAN AD LITEM

THIS CAUSE CAME ON TO BE HEARD pursuant to this Court's order entered in compliance with HB 35-E (Chapter 2003-418, Laws of Florida). Having considered the Act, the "Suggestion of Bias of Proposed Guardian ad Litem" filed by the Petitioners (Robert Schindler and Mary Schindler), the "Response to Petition for Appointment of Guardian ad Litem by Chief Judge Demers and Request for Reconsideration of Order" filed by the Respondent (Michael Schiavo), the "Respondents' Response to the Court's Requests Regarding Guardian ad Litem" filed by the Petitioners (Shindlers), and the amicus curiae memorandum filed by the Governor in the United

States District Court for the Middle District of Florida, Tampa Division, in *Schindler v. Schiavo,* civil case number 8:03-CV-1860-T-26-TGW, this Court enters the following order based on these findings and conclusions.

1. On October 21, 2003, the Legislature passed HB 35-E, which became Chapter 2003-418, Laws of Florida. It authorized the Governor "to issue a one-time stay to prevent the withholding of nutrition and hydration" from the ward in this case.

2. The Governor entered Executive Order 03-201 on October 21, 2003, which provides in part: "effective immediately, continued withholding of nutrition and hydration from Theresa Schiavo is hereby stayed."

3. The Act also requires that when the Governor entered such a stay, "the chief judge of the circuit court shall appoint a guardian ad litem for the patient to make recommendations to the Governor and the court."

4. This Court entered an order on October 22, 2003, giving the parties five days to agree on a Guardian ad Litem and failing agreement of the parties, providing that the court would appoint Dr. Jay Wolfson as the Guardian ad Litem.

5. There is currently pending before another judge in this circuit a declaratory judgment action addressing the validity of this Act. (Case No. 03-008212-CI-20). This order is not and should not be construed in any way, as an indication of whether the underlying Act is constitutional or unconstitutional. It is entered based solely on the presumption that the Act is constitutional because by law, this court must extend such a presumption to the Act until it is determined to be unconstitutional. *Fuchs v. Robbins*, 818 So.2d 460 (Fla. 2002) (state officers must presume legislation affecting their duties to be valid).

6. As to the appointment of the Guardian Ad Litem required by the Act, this Court as Chief Judge makes the following findings:

(a) Upon the Act becoming law and pursuant to its duty under the Act, this Court directed its staff to do a search to attempt to identify a well-qualified person to serve in the limited role established by the Act. The Court sought a person who had knowledge of chapter 765, Florida Statutes, had not expressed a public opinion regarding Ms. Schiavo, could be fair and impartial, and was willing to serve for the compensation provided for in Administrative Order PA/PI CIR 02-10. Dr. Jay Wolfson met these standards, and he was willing to assume this important responsibility.

(b) Based on all of the foregoing considerations, this Court gave the parties five business days to agree to a Guardian ad Litem or the Court would appoint Dr. Wolfson. The parties have not agreed to any other person to assume this responsibility.

(c) Michael Schiavo has indicated that he has no objection to Dr. Wolfson. Robert Schindler and Mary Schindler have claimed that Dr. Wolfson has publicly expressed his opposition to " 'Terri's Bill' " in an interview. Based solely on this interview, they suggest that "Dr. Wolfson has demonstrated bias toward Theresa Marie Schiavo and Petitioners, even prior to his appointment and may not be able to carry out the duties and responsibilities as the Guardian Ad Litem." This Court reviewed the transcript provided by the Petitioners that they assert shows bias on the part of Dr. Wolfson. The Court finds that Dr. Wolfson did not express opposition to " 'Terri's Bill,' " but even if he had, there is no indication that he

will be unable to carry out his duties as a Guardian ad Litem in a fair and impartial manner.

7. In regard to the charge to be given to the Guardian Ad Litem, the Act provides no guidelines or standards, except that the Guardian Ad Litem is "to make recommendations to the Governor and the court." This Chief Judge, in accordance with the Act, must determine the legislative intent. Legislative intent is the polestar that guides this Court's inquiry. *Nettles v. State*, 850 So. 2d 487 (Fla. 2003). Legislative intent is determined primarily from the language of a statute and the Court must first look to the plain meaning of the Act to determine the legislative intent. *State v. City of Clearwater*, 28 Fla. L. Weekly S682 (Fla. Sept. 11, 2003). The Court has reviewed the responses filed by both parties in this cause. Neither of them responded to the legislative intent and both ignored the plain meaning of the Act. The Schindlers' (Petitioners) response is too broad in that they ask this Court to take action that is well beyond the plain meaning of the Act. Mr. Schiavo's (Respondent) response is too narrow in that he asks this Court to take no action pending the determination of the constitutionality of the underlying legislation or, if the Court proceeds, the Guardian ad Litem should be limited to a determination of whether the removal of the ward's nutrition and hydration tube in this case was lawfully ordered by this Court in accordance with the laws of the state of Florida. In regard to the plain meaning of the Act, the Court makes the following findings:

(a) Under this Act, the Governor has the exclusive power to lift the stay that he has imposed. The Court has been given no authority to do so by the Act. Additionally, the only authority that the Governor has been given is to impose the

stay and to lift the stay. The Act does not give the Governor any authority to make any treatment decisions. Accordingly, the legislative intent in requiring a recommendation to the Governor could only be to assist the Governor in determining whether to lift the stay or not. As to this intent, the law is clear on its face, and the Court cannot go behind the plain meaning of the law.

(b) The assigned judge's authority as to the termination of life prolonging procedures is set forth in Chapter 765, which the Legislature first enacted in 1992, and which it has amended several times. The assigned judge in this cause has followed the procedure and applied the standards that the Legislature prescribed. The Second District Court of Appeal has thoroughly reviewed the matter, and upheld the judgment of the assigned judge in several opinions. See *Schindler v. Schiavo* 780 So. 2d 176 (Fla. 2d DCA 2001); *review denied* 789 So. 2d 348 (Fla. 2001); *Schindler v. Schiavo,* 792 So. 2d 551 (Fla. 2001); *Schindler v. Schiavo,* 800 So. 2d 640 (Fla. 2d DCA 2001); *review denied, Schiavo v. Schindler,* 816 So. 2d 127 (Fla. 2002); *Schindler v. Schiavo,* 851 So. 2d 182 (Fla. 2d DCA 2003), *review denied* Case No. 03-1242 (Fla. Aug. 22, 2003). Thus, the trial judge and the appellate courts have acted in accord with the legislative enactments. Indeed, at this time the assigned judge is under a mandate from the Second District Court of Appeal. The Act does not purport to give him any power to do anything other than to follow the mandate in this case. By law, the Legislature is presumed to know that the assigned judge has no authority to do anything under Chapter 765 except to follow the mandate of the Second District and schedule the removal of the nutrition and hydration tube. *City of Hollywood v. Lombardi,* 770 So. 2d 1196

(Fla. 2000) (the Legislature is presumed to know the judicial constructions of a law when enacting new legislation). Accordingly, the legislative intent in requiring a recommendation to the Court could not have been to encourage the assigned judge to depart from his judgment directing the removal of the nutrition and hydration tube under Chapter 765. The legislative intent must be merely to keep the Court advised as to the Guardian Ad Litem's recommendation.

(c) In the Governor's amicus memorandum filed in *Schindler v. Schiavo*, United States District Court, Middle District of Florida, Case No. 8:03-CV-1860-T-26-TGW, the Governor expresses concern about whether the ward might be able to be feed naturally once the feeding tube is disconnected. The amicus does not address in any way whether the feeding tube should be disconnected. The Governor asked the federal judge to consider whether the ward should undergo swallow tests and therapy in an attempt to provide her with the ability to naturally consume sustenance once the feeding tube is disconnected. This issue was thoroughly considered by the assigned state court judge in this case. The judge considered extensive testimony on this matter, heard argument, and entered a detailed order dated March 7, 2000, in which the Court found, inter alia,

> [T]he ward had been administered swallowing tests in 1990, 1991 and 1992. . . . Thereafter, and annually from 1993 through 1996 or 1997, the ward had a speech pathologist examine her and the finding was that she could not be rehabilitated in this regard and that there was a high risk of aspiration.
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> . . .
>
> [A]ttempting oral nutrition would result in aspiration with insufficient nutrition passing to the stomach to maintain her, thereby prolonging her death, if the feeding tube were withdrawn. He testified that such aspiration would lead to infection, fever,

> cough and ultimately pneumonia. This would require suctioning which likely would be fatal.

(Order attached hereto as Attachment A).

Nevertheless, this appears to be a matter about which the Governor is particularly concerned.

8. The parties agree that the Guardian Ad Litem's report should be to the Governor within 30 days. If, however, the law is declared unconstitutional by the judge considering that matter, that ruling will nullify the legal basis for entry of this order. Thus, if the law is declared unconstitutional and no stay of the judgment making such a determination is entered, the Guardian Ad Litem would not be expected to continue his work. On the other hand, if the law is upheld or if a stay of a judgment holding the law unconstitutional is entered, the Guardian Ad Litem would be expected to proceed.

ACCORDINGLY,

IT IS HEREBY ORDERED AND ADJUDGED that:

A. Dr. Jay Wolfson is hereby appointed as the Guardian Ad Litem as required by the Act and shall execute an oath before assuming his duties.

B. Dr. Wolfson is to make a report and recommendations to the Governor as to whether the Governor should lift the stay that he previously entered. The report will specifically address the feasibility and value of swallow tests for this ward and the feasibility and value of swallow therapy. Additionally, the report will include a thorough summary of everything that has taken place in the trial court and the appellate court concerning this case. The recommendations should be directed to the Governor's decision as to whether he should lift the stay.

C. In carrying out his charge, Dr. Wolfson may: (1) review and summarize the court file or record that has been generated in the various appeals pursued in this case; (2) contact and talk with any of the parties or various witnesses that have appeared in this cause; and (3) contact any other individual or source that he considers useful in carrying out his charge. Dr. Wolfson will include a detailed description of his activities as part of his report. Dr. Wolfson will not retain additional experts or incur additional expenses other than his own expenses as provided for in Administrative Order PA/PI CIR 02-10 or this order without leave of Court. Dr. Wolfson shall not disclose information he obtains as a result of this assignment except in reports to the Governor with copies to the Court, served upon counsel for both parties in this cause. The Guardian ad Litem is not a party to this proceeding and may only file a report to the Governor with a copy to the Court. The Guardian ad Litem is not to act as a lawyer for the ward but is to provide information to the Governor.

D. Dr. Wolfson will make his recommendation to the Governor and file a copy in the court file within 30 days of the date of this order unless he receives an extension. If such an extension is sought, the Guardian ad Litem must file a written request to this Court with a copy to the parties.

E. Dr. Wolfson will be compensated at the rate of $50.00 per hour by Pinellas County, which is the contract rate provided to others who provide similar services in this circuit. In addition he will receive mileage in accordance with the provisions of section 112.061, Florida Statutes, and reimbursement for reasonable documented expenses such as photocopies. This order does not preclude Pinellas County from seeking recovery of its costs from the ward's estate.

F. Upon notice from the Court that the law has been declared unconstitutional and no stay entered, Dr. Wolfson will cease his work until a stay is entered. If the law is found to be valid or a stay is entered, Dr. Wolfson will continue his work to conclusion.

G. All parties are ordered to cooperate with and assist the Guardian ad Litem.

H. Persons and entities contacted by the Guardian ad Litem who have information pertaining to the ward, Theresa Marie Schiavo, are directed to cooperate with and assist the Guardian ad Litem to the fullest extent provided by law, including but not limited to providing access to all medical records of the ward and access to the ward herself. This order authorizes the Guardian ad Litem, Dr. Jay Wolfson, to obtain from any entity covered by the Health Insurance Portability and Accountability Act of 1996 (HIPPA) and regulations adopted thereto, health information on Theresa Marie Schiavo. The Guardian ad Litem is prohibited from using or disclosing protected health information obtained pursuant to this order for any purpose other than preparing a report and recommendations to the Governor and filing a copy in the court file. Any protected health information that is obtained and not filed with the Court shall be returned to the covered entity or destroyed at the conclusion of this matter. Any protected health information filed with the Court shall be identified to the Clerk of Court for sealing of the information.

I. This Court reserves jurisdiction to modify this order at any time.

J. This order does not limit the authority of the assigned judge to enter orders concerning the care of the ward.

DONE AND ORDERED this 31st day of October, 2003 at St. Petersburg, Pinellas County, Florida.

DAVID A. DEMERS
CHIEF JUDGE
SIXTH JUDICIAL CIRCUIT

Copies to:

The Honorable Governor Jeb Bush
PL 05 The Capitol
400 South Monroe Street
Tallahassee, FL 32399-0001
Phone No. (850) 488-4441
Fax No. (850) 487-0801

Counsel for Petitioners:

Patricia Anderson, Esquire
447 3rd Avenue N., Ste. 405
St. Petersburg, FL 33701
Phone No. (727) 895-6505
Fax No. (727) 898-4903

Pamela A. M. Campbell, Esquire
150 2nd Avenue North
St. Petersburg, FL 33731
Phone No. (727) 894-7000
Fax No. (727) 821-4042

Lawrence D. Crow, Esquire
1247 South Pinellas Avenue
Tarpon Springs, FL 34689
Phone No. (727) 945-1112
Fax No. (727) 945-9224

Joseph D. Magri, Esquire
5510 West LaSalle Street
Tampa, FL 33607
Phone No. (813) 281-9000
Fax No. (813) 281-2223

Susan Churuti
Pinellas County Attorney
315 Court Street
Clearwater, FL 33756
Phone No. (727) 464-3354
Fax No. (727) 464-4147

Counsel for Respondent:

George J. Felos, Esquire
595 Main Street
Dunedin, FL 34698
Phone No. (727) 736-1402
Fax No. (727) 736-5050

Deborah A. Bushnell, Esquire
204 Scotland Street
Dunedin, FL 34698
Phone No. (727) 733-9064
Fax No. (727) 733-0582

Gyneth S. Stanley, Esquire
1465 S. Ft. Harrison
Clearwater, FL 33756
Phone No. (727) 449-0004
Fax No. (727) 443-5863

Scott Swope, Esquire
2450 Sunset Point Road
Clearwater, FL 33765
Phone No. (727) 726-7900
Fax No. (727) 797-3910

IN THE CIRCUIT COURT FOR PINELLAS COUNTY, FLORIDA
PROBATE DIVISION
File No. 90-2908GD-003

IN RE: THE GUARDIANSHIP OF
THERESA MARIE SCHIAVO,
Incapacitated.

ORDER

THIS CAUSE, came on to be heard on March 2, 2000, upon the Petition for Order Authorizing Evaluation filed herein by Respondents, Robert Schlinder and Mary Schindler. Before the court were the Respondents and their attorneys, Pamela A. M. Campbell, Esquire, and Joseph D. Magri, Esquire. Also present were Petitioner, Michael Schiavo, as Guardian of the Person of Teresa Marie Schiavo, and his attorneys, George J. Felos, Esquire, and Deborah J. Bushnell, Esquire. The court took testimony from three physicians, Jay E. Carpenter, M.D., and John David Young, M.D., for the Respondents; and James Barnhill, M.D., for the Petitioner. The court also received excellent closing arguments from the attorneys. Upon due consideration, the court makes the following findings of fact and conclusion of law.

At the outset of the hearing, the attorney for the Petitioner moved for dismissal of this Petition on two grounds. The first ground was that paragraph 7 of the Petition for Authorization to Discontinue Artificial Life Support was admitted by Respondents in their answer. The second ground was that the issue was res judicata inasmuch as the court in its Order of February 11, 2000 had found "that without the feeding tube she will die in seven to fourteen days". The court denied a Motion for Rehearing, part of which was based upon the matter set for this hearing. The court took said motion under advisement and proceeded with the hearing.

The request is to have Terri Schiavo undergo a swallowing test to determine if she can orally consume nutrition and hydration without a feeding tube. All of the evidence in support of this motion is from doctors Carpenter and Young who

have observed her for 45 minutes and 25 minutes respectively. These observations occurred after the trial and neither doctor consulted any medical evidence with regard to her condition before executing affidavits and then testifying at this hearing.

The uncontroverted evidence from Dr. Barnhill was that the ward had been administered swallowing tests in 1990, 1991, and 1992 with the earliest test having been done at Bayfront Medical Center. This test resulted in a finding that she was not a future candidate. The last of these tests was done at Largo Medical Center and resulted in a finding that there was no swallowing reflex initiated and that the liquid went nowhere. Thereafter, and annually from 1993 through 1996 or 1997, the ward had a speech pathologist examine her and the finding was that she could not be rehabilitated in this regard and that there was a high risk of aspiration.

The physicians for the Respondents testified that it appeared to them that Terri Schiavo was able to handle the normal secretions such as saliva and sinus drainage orally with no drooling. Dr. Carpenter had observed her in a sitting position while Dr. Young did not mention whether she was sitting or in bed. One of the physicians would not say when she would have stabilized after the February 1990 cardiac arrest and would not concede that her treating physician would be in a better position than he to make that diagnosis. The credibility of this witness was therefore compromised.

Dr. Barnhill who had testified at trial had physically examined Terri Schiavo on several occasions. He has also reviewed her records, especially on her ability to swallow. He testified that he agreed with the prognosis of the treating physician, Dr. Gambone, that there was no point in doing another swallowing study since she had not changed since the last study. Dr. Barnhill testified that Terri Schiavo has uninhibited reflex activity which includes a bite reflex resulting in a clenched jaw. This would create a real problem in oral feeding, assuming this was a possibility. He testified that normal people have one-third upper esophagus voluntary reflex with the lower two-thirds of the esophagus being an involuntary reflex. The voluntary reflex is necessary for swallowing.

Dr. Barnhill testified that in his opinion attempting oral nutrition would result in aspiration with insufficient nutrition passing to the stomach to maintain her, thereby prolonging her death, if the feeding tube were withdrawn. He testified that such aspiration would lead to infection, fever, cough and ultimately pneumonia. This would require suctioning which likely would be fatal.

Dr. Barnhill further testified that it is common for patients to be able to swallow saliva but still need feeding tubes. On redirect examination, he testified that it was impossible for Terri Schiavo to be able to take in sufficient sustenance orally to stay alive.

It is clear that the credible testimony was that given by Dr. Barnhill for various reasons, not the least of which is that he has examined Terri Schiavo and reviewed her medical records. While the attorney for Respondents did get him to acknowledge that he could not say with certainty how much of her nutritional requirement she might be able to ingest orally, he was quite positive that in no way could she consume enough in this manner to sustain herself. The court does not feel that another medical procedure merely to specify what portion of insufficiency would result from the removal of the feeding tube warrants the granting of this Petition. Accordingly, it is

ORDERED AND ADJUDGED that the Petition for Order Authorizing Evaluation, be and the same is hereby **denied.**

DONE AND ORDERED in Chambers, at Clearwater, Pinellas County Florida, this 14th day of March, A.D., 2000.

George W. Greer
Circuit Judge

TRUE COPY

GWG/cl
CC: Pamela A. M. Campbell, Esquire
George J. Felos, Esquire
Deborah J. Bushnell, Esquire
Joseph D. Magri, Esquire