IN THE FLORIDA SUPREME COURT
CASE NO. SC01-2678

IN RE: THE GUARDIANSHIP OF THERESA MARIE SCHIAVO, Incapacitated.	)	
MICHAEL SCHIAVO, as Guardian of the person of THERESA MARIE SCHIAVO, Petitioner, vs. ROBERT SCHINDLER and MARY SCHINDLER, Respondents.	)	Petition from the Second District Court of Appeal Case No. 2D01-3626

MOTION FOR STAY

GEORGE J. FELOS, ESQ.
Florida Bar No.: 226653
FELOS & FELOS, P.A.
595 Main Street
Dunedin, Florida 34698
(727) 736-1402
Attorneys for Petitioner

TABLE OF CONTENTS

MOTION FOR STAY

COMES NOW the Petitioner/Appellee, MICHAEL SCHIAVO, as Guardian of the person of THERESA MARIE SCHIAVO, and states:

Introduction

1. The lower court decision, *In re Guardianship of Schiavo,* 800 So.2d 640 (Fla. 2d DCA 2001) was issued October 27, 2001, rehearing denied November 1 and November 7, 2001. Said decision reversed in part the trial court's denial of a Rule 1.540(b)(5) motion for relief from judgment. It also ordered the Ward's medical testing and examination by five doctors, and required an evidentiary hearing. The final judgment in question ordered the discontinuance of the Ward's artificial feeding, said judgment affirmed on appeal in *In re Guardianship of Schiavo,* 780 So.2d 176 (Fla. 2d DCA 2001), *cert. denied*, 789 So.2d 348 (Fla. 2001) case number SC01-559, ("Schiavo I"). (Respondents' unsuccessful efforts to directly challenge the final judgment also took them to federal district court, case number 8:01CV784-T-26EAJ, Middle District of Florida, and the United States Supreme Court, application number 00A926.)

2. Petitioner's Notice to Invoke Discretionary Jurisdiction was filed in the lower court on November 29, 2001, the lower court issued its Mandate on December 28, 2001, and on January 10, 2002 this Court stayed its own proceedings for sixty days or until notice is filed that the parties' mediation effort is at an impasse.

3. Petitioner this date has filed with this Court his Notice of Impasse along

with his Jurisdictional Brief.

4. The Appendix to this motion is the same appendix the parties filed in the lower court. It consists of three volumes, (the first two filed by Respondents/ Appellants below, the third filed by Petitioner/Appellee). The volumes are sequentially numbered: 1-285 for volume I; 286-730 for volume II; and 731-887 for volume III. References to the Appendix, (designated herein as "A"), are by page number only, and do not refer to the volume or the party filing the same in the lower court.

Procedure and Standard of Review

5. Once the lower court's mandate issues and a notice to invoke discretionary jurisdiction has been filed, a motion for stay and to recall a mandate may be filed either in this Court or in the district court of appeal. *State v. Roberts*, 661 So.2d 821, 822 (Fla. 1995).

6. In reviewing a motion for stay of a decision of the district court while discretionary review is sought, this Court considers the likelihood that jurisdiction will be accepted, 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. *City of Miami v. Arostegui*, 616 So.2d 1117, 1121 (Fla. 1st DCA 1993); *Price v. McCord*, 380 So.2d 1037, 1038-1039 (Fla. 1980).

7. When a district court mandates new proceedings in the trial court and there is a reasonable possibility that this Court will accept jurisdiction, this Court will issue a stay and perhaps obviate the necessity for such proceedings. *State v.*

Roberts, *supra*, 661 So.2d at 822. *Roberts* dealt with a mandated new trial. Here, there are mandated medical examinations and tests by five doctors, reports and depositions of the doctors and a scheduled five-day "evidentiary hearing." The scope of these further proceedings are more than analogous to a new trial, and the *Roberts* standard should apply.

Likelihood that Jurisdiction Will be Accepted

8. Petitioner hereby incorporates by reference his Jurisdictional Brief. For the reasons stated therein, Petitioner asserts that there is a reasonable likelihood that this Court will accept jurisdiction.

Issues of Harm

9. In *Roberts* this Court in essence determined that the possibility of an unneeded trial was sufficient "harm" to warrant a stay pending review. The "harm" of an unneeded trial is the wasted expenditure of time, expense and energy, and the inconvenience to all parties. Here, the mandated examination and testing by five doctors, their reports and depositions, and a week-long "evidentiary hearing" that includes testimony of five medical experts, will surpass the expense and effort of most trials.

10. Further, the nature of the "harm" is greater in this case because the State-mandated medical examinations and testing infringe upon the Ward's intimate rights of privacy. The right to control one's own body is part of "those privacy interests inherent in the concept of liberty." *In re Guardianship of Browning,* 568 So.2d 4, 10 (Fla. 1990). The Ward's right to maintain her bodily integrity is not lessened or

lost because of her incapacity, *Browning* at 12, and the fact that she would not be cognizant of such testing and examination does not vitiate her privacy rights. The Ward is entitled to the protection of her personal dignity. The reasonable possibility this Court's review would perhaps obviate the necessity of such examinations, testing and further proceedings warrants the issuance of a stay.

Likelihood of Ultimate Success on the Merits

The Facts

11. The May 11, 1998 Petition For Authorization to Discontinue Artificial Life Support filed in this cause (A 749-752), does not allege that the Ward is in a vegetative state or condition, persistent or otherwise. In fact, no reference whatsoever to such a state or condition is found in the petition. Rather, the petition alleges that the Ward sustained "massive brain damage" as a result of her February 1990 cardio-respiratory arrest, and since the date of the same, has been in an "irreversibly profoundly debilitated condition." These allegations in the petition were admitted by the SCHINDLERS in their Answer to the petition (A 753-754).

12. The petition further alleges that since the date of her cardiorespiratory arrest, "the Ward has lost the ability to intake fluid and nutrition naturally and her life can only be sustained by the artificial provision of nutrition and hydration." This allegation was also admitted by the SCHINDLERS in their Answer (A 753-754).

13. The Guardian further alleges that the Ward is entitled to have artificial life support discontinued pursuant to both statute and Article I, Section 23, of the

Florida Constitution (A 750).

14. At trial, the Guardian testified that the Ward previously stated, while reflecting upon her stroke-impaired but ambulatory uncle, that she didn't want to live "if I ever have to be a burden to anybody..." (A 769-772). The Guardian, and two other witnesses, also testified the Ward made numerous statements, catalyzed by various events, that she didn't want to be kept alive "on anything artificial," would want "tubes and everything taken out," and didn't want to be kept alive "on a machine" (A 772-773, 789-790, 775-776).

15. Introduced at trial were affidavits of the Ward's treating physician and two Board Certified neurologists, all stating that the Ward's condition is "terminal," and that there is no reasonable probability that the Ward can recover competency so that she could make medical treatment decisions for herself (A 811-813). The Ward is "terminal" because, as testified by the doctors, she has an irreversible medical condition--inability to intake fluid and nutrition naturally--for which there is no treatment or cure and which, without medical treatment, will result in her death (A 777-778, 791-792).

16. The additional trial testimony of two of the doctors, that the Ward is in a persistent vegetative condition, is consistent with the September 11, 1998 evaluation of the third doctor, in which he indicates that the Ward "is in a chronic vegetative state" and that "her chances of any improvement to a functional level is essentially zero" (A 756). The patient's medical charts are replete with references to the same diagnosis from the other medical providers (A 777, 783-784).

17. The neurologist testifying at trial stated that the Ward's CT scan indicated that much of her brain tissue has died and has been replaced by spinal fluid. He was careful to state that his diagnosis was not solely made on that basis:

> "Now you don't make that diagnosis on the scan alone. You make it in conjunction with the history and the physical findings and you have to put all three together. The scan *supports* the clinical findings of a patient who has only reflex behavior and no awareness, therefore, no consciousness." (A 777, 782, emphasis added.)[1]

This doctor also reviewed the patient's EEG, which was "very abnormal" and consistent with his diagnosis (A 777, 784).

18. At trial, MARY SCHINDLER testified that her daughter responds to her (A 793-797). Respondents introduced at trial a short videotape of the Ward and her mother, the latter testifying that she was "sure" that the Ward started crying in response to her voice (A 798-799). On cross-examination, however, after the replaying of the tape, MRS. SCHINDLER finally admitted that her daughter starts moaning after she places her hand under the Ward's neck and there is bodily stimulation (A 800-801). The neurologist later testifies that the Ward's said

---

[1]Respondents' make much of the fact that one of their proffered doctors states in an affidavit that the Ward "has viable brain tissue" because her cerebellum has not been replaced by spinal fluid (A 67-68). The cerebellum, however, as noted by the lower court, affects motor functions, not cognition. *In re Guardianship of Schiavo*, 792 So.2d 551, 560 (Fla. 2d DCA 2001), ("Schiavo II").

moaning is a reflex action to the painful stimulus of lifting her head (A 785-788).

19. In final argument, the Guardian's counsel asserted that the Ward need not be vegetative in order for tube-feeding to be discontinued (A 808-809):

> "As in Browning, under the Browning standard, you don't have to be in a permanent vegetative state to have artificial life support removed. You don't have to have any particular degree of consciousness.
>
> * * *
>
> [I]f you had a patient who lost the ability to swallow and was competent, they could refuse artificial provision of sustenance because it's medical treatment. So upon a finding by this Court that there is reliable evidence of Terri's intent that she did not want to be kept alive artificially...whether she has a minimal degree of consciousness is irrelevant and has no bearing whatsoever in this case."[2]

20. The lower court granted the petition to discontinue artificial life support on February 11, 2000 (A 814-823), finding "beyond all doubt that THERESA MARIE SCHIAVO is in a persistent vegetative state" and that the medical evidence "conclusively establishes that she has no hope of ever regaining consciousness and therefore capacity, and that without the feeding tube she will die in seven to fourteen days" (A 819). The court also found clear and convincing evidence that

---

[2]"[W]e fail to see a significant legal distinction" between Mrs. Browning who "was not in a total comatose state" compared to a patient who was. "[T]he right here is one of self-determination that cannot be qualified by the condition of the patient..." *In re Guardianship of Browning*, 568 So.2d 4, 12-13 (Fla. 1990). Nevertheless, Respondents argue that it is illegal in Florida to terminate artificial feeding unless the patient is in a permanent vegetative condition (A 73, 215).

the relief sought in the petition was in conformity with the Ward's intent.

21. After trial, the SCHINDLERS filed a Motion For Rehearing questioning the Ward's diagnosis of persistent vegetative state and, despite their pleading admission, also disputed her inability to receive nourishment in an oral manner (A 824-839). In support of the motion, the SCHINDLERS attached, among other things, the affidavits of three doctors who, in person, observed the Ward after trial and believed she was "responsive" to her mother (A 836-839). The trial court denied the Motion For Rehearing (A 840-843), noting there was nothing therein to indicate that the medical evidence was not available prior to trial or could not have been procured with reasonable diligence. The court also noted that it had the opportunity to observe via the videotape essentially what the affiants observed, and otherwise found the affidavits unpersuasive (A 841).

22. The SCHINDLERS then filed a petition for an order authorizing an evaluation of the Ward to make a determination as to her ability to swallow and take in nutrition orally (A 844-845). The petition is based on the observations of the SCHINDLERS' physicians that: the Ward could swallow her saliva secretions and swallowed water put on her lips (A 836-839). The court held an evidentiary hearing, (over the Guardian's objection that the matter was *res judicata*), and after hearing testimony from two physicians for the SCHINDLERS and one for the

Guardian, denied the petition (A 850-852). In its order, the court noted evidence that: the Ward had three previous swallowing tests and annual reviews for a number of years thereafter; it is common that patients can swallow saliva but still need feeding tubes; the tests and evaluations showed the Ward had no swallowing reflex and there was a high risk of aspiration; the Ward had clenched jaw which would create a problem in oral feeding, assuming this was a possibility; attempts at oral nutrition would result in aspiration which would lead to infection, fever, cough and ultimately pneumonia, which likely would be fatal; and, in any event, the Ward could not consume enough in this manner to sustain herself (A 851-852).

23. The SCHINDLERS appealed the order granting the petition to discontinue artificial life support, as well as the orders denying their Motion For Rehearing and Motion For a Swallowing Evaluation (A 853-854). The trial court was affirmed by the district court, and this Court declined review, *supra* at paragraph 1.

24. Over one year after the final judgment, the SCHINDLERS alleged in a 1.540(b)(2) and (3) motion--based upon allegations of newly discovered evidence and intrinsic fraud-- that Mr. Schiavo lied at trial. The district court in Schiavo II affirmed the trial court's denial of the motion as untimely on its face. 792 So.2d at 558. The district court also found that the ward's "condition is legally a 'terminal

condition'" per section 765.101(17), Florida Statutes (2000), and permitted the SCHINDLERS to file a "facially sufficient" motion for relief from judgment under rule 1.540(b)(5) on the grounds that it is no longer equitable that the judgment have prospective application. The court cautioned, however, that such motion should not be filed merely to delay an order with which an interested party disagrees or to retry an adversary proceeding, and that "the rule requires the movant to establish that new significant evidence or substantial changes in circumstances *arising after* the entry of the judgment make it 'no longer equitable' for the trial court to enforce its earlier order." 792 So.2d at 560, 554, emphasis added.

25. After Schiavo II the Respondents filed in the trial court a 1.540(b)(5) motion restating and expanding upon their intrinsic fraud claim (A 214). The motion also presented medical-related claims based upon the affidavits of eleven persons. Six affidavits are from physicians (A 3-26, 43-64, 67-68, 181-209), one is from a psychologist (A 65-66), one is from a nurse (A 85-161), one is from a nursing assistant (A 177-180), one is from someone who "worked" at a nursing home (240-241), and one is from a Monsignor (A 162-164).

26. Two of the doctors and the psychologist are either proponents, patients, associates or collaborators of Dr. Hammesfahr, who is one of the other affiants (A 58, 15, 5, 60-61). Dr. Hammesfahr promotes his "therapy," purportedly based on

"vasodilation within the brain," which he claims allows the treatment of "reversible brain deficits," primarily from stroke (A 4-6).[3] His purported "therapy" pre-dates the February 2000 trial by many years. In his May 6, 2001 affidavit, Dr. Hammesfahr states that he developed this method "[a] number of years ago," applied for a patent in January of 1996, and published an article on the same in 1997 (A 4, 15).

27. Two of the other doctors are proponents of "hyperbaric oxygen treatment" (A 43-56, 181-209). "Hyperbaric oxygen" is oxygen under greater pressure than at normal atmospheric pressure, and "hyperbaric oxygen therapy" is the use of a hyperbaric chamber containing oxygen to treat carbon monoxide poisoning, gas gangrene, skin and tissue problems, smoke inhalation, and conditions requiring recompression, such as the bends. Am Jur Proof of Facts 3d, *Taber's Cyclopedic Medical Dictionary*, 16th ed. (1989). Neither is hyperbaric oxygen treatment a new therapy, as one affiant states he has been practicing it "since 1972" and published an article about the purported therapy and vegetative patients in 1986 (A 43, 49).

28. The remaining doctor, apparently unaffiliated with the others, offers no

---

[3]The "Hammesfahr therapy" is debunked by Steven Novella, M.D., of the Yale University School of Medicine, in his article posted on the "Quackwatch" website (A 867-868).

treatment or therapy for the Ward (A 63-64).

29. Primarily as a result of viewing the trial videotape of the Ward, (but also upon review of the some of the Ward's pre-trial medical records and tests, and review of the affidavits filed with Respondents' motion for rehearing, *supra* at paragraph 21), the doctors and psychologist opine that the Ward appears to have responsiveness and is not vegetative (A 6-7, 43, 58, 60-61, 64, 65, 183). While three of the doctors suggest that their respective "therapies" could improve the Ward's condition, none of the affidavits at all claim that the Ward can regain capacity to make her own medical treatment decisions, can ever be sustained without artificial provision of sustenance, or can ever improve to a condition where she is not dependent on the care of others.

30. The nurse's affidavit critiques the Ward's pre-trial medical records dating from "1990 until October 1999" (A 85). The nursing assistant who occasionally took care of the Ward during a few months in 1997, offers her subjective opinion that the Ward "is in there" (A 179). The person who once "worked" at the nursing home and took care of the Ward "on several different occasions," offers her subjective opinion that she "is not vegetative" (A 241). The Monsignor's affidavit is the only one of the eleven affidavits that relates any fact or pertains to any matter or situation occurring subsequent to the February 11, 2000 final judgment. The

Monsignor relays his observations and interpretations of the patient made during his visits that commenced post-trial, and offers his subjective belief that she is not vegetative (A 163). His observations and interpretations are remarkably similar in nature to those testified to at trial by Respondents (A 793-797).[4]

31. The trial court, without holding an evidentiary hearing, denied Respondents' 1.540(b)(5) motion in a series of orders (A 576-585, 592-594, 693-696) holding:

> As to the medical support for the Motion, the Court is unable to find anything more than a disagreement with the diagnosis rendered in January of 2000...Medicine is not a precise science and doctors will therefore, not always agree. (A 582)
> These [doctors'] affidavits...deal almost exclusively with matters available and argued at the January 2000 trial. These doctors simply disagree with the medical evidence adduced at trial. (A 593)
> This affidavit [of the nursing home "worker"] contains conclusion with no predicate for them. [The nurse]...examined Terri Schiavo's medical records from 1990 through November of 1999. Clearly this evidence was available and discussed at trial. [The Monsignor] gives lay opinions, which may or may not even be admissible evidence...they are certainly inconclusive. [The nursing assistant]...who worked some 5 to 6 months...in 1997. This was

---

[4]The Ward's cognitive status was much disputed at the trial at which eighteen witnesses testified (A 814). The trial court, noting that "perceptions may become reality to the person having them," finds "overwhelming credible evidence...that Terri Schiavo has been totally unresponsive...that her movements are reflexive and predicated on brain stem activity alone," and that such "movements are occasional and totally consistent with the testimony of the expert medical witnesses" (A 819). Not only did the trial court hear testimony, it also "had the opportunity to observe via video tape essentially" the same type of sounds and movements of the Ward to which Respondents and their proponents ascribe cognition (A 841).

> clearly pre-trial. (A 580-581)
> This review pursuant to Rule 1.540[(b)(5)]...only provides for extraordinary relief for exceptional circumstances and does not permit a retrial because Mr. and Mrs. Schindler have found additional evidence. Rather, there must be 'significant new evidence or substantial change in circumstances arising after the entry of the' Order that 'makes it no longer equitable for the Trial Court to enforce its earlier order.'...The Motion...seeks to relitigate that which has previously been tried and the trial resolution has been affirmed on appeal. (A 694-695)

32. The appellate court reversed the trial court, holding that the affidavit claim of only one doctor, Webber, "raises the motion to the level of colorable entitlement requiring an evidentiary hearing." 800 So.2d at 646. The court does not limit the hearing to Dr. Webber's proposed treatment--cardiovascular medication style of therapy ["Hammesfahr therapy"]--but also permits a hearing on the other purported therapy, hyperbaric oxygen treatment, for which no colorable entitlement was shown. The court's rationale for permitting the same is that "the opinions of the remaining doctors may have been limited by their inability to examine Mrs. Schiavo or obtain necessary diagnostic information..." 800 So.2d at 646. As to the claims of intrinsic fraud, the district court affirms the trial court's conclusion that the proffered evidence failed to present a colorable claim. The lower court adds, however, "We assume without deciding that such allegation could be sufficient to obtain relief under rule 1.540(b)(5)." 800 So.2d at 643. The court also lessens the movants' burden of proof on remand from the legally indicated "clearly

convincing" standard to a "preponderance" standard. 800 So.2d at 645.

Webber Affidavit

33. The lynchpin for the district court's reversal of the trial court is the affidavit of Dr. Webber (A 60-62). The district court finds that the affidavit raises a colorable claim because "only Dr. Webber has gone so far as to suggest that available treatment could restore cognitive function to Mrs. Schiavo." 800 So.2d 646. Dr. Webber, who does not claim to be a neurologist, did not examine the Ward, but only "looked at" her pre-trial medical records and "studied" the trial videotape (A 60, paragraph 3). Based upon that, in Webber's opinion the Ward is not vegetative because she "exhibits purposeful reaction to her environment, particularly her mother..." and [her eye movements] "are particularly suggestive that she recognized family members and responded" (A 60-61, paragraph 4). Dr. Webber concludes that the Ward has a "good opportunity" for cognitive and physical improvement--enhanced speech clarity and complexity, release of contractures, and better awareness of surroundings--if treated with the "Hammesfahr therapy" (A 61, paragraphs 6-8).

33. Webber's affidavit cannot raise a colorable claim for entitlement to relief because it raises no matters "arising after the entry of judgment" or that "come to fruition after a final judgment," as is required under Rule 1.540(b)(5). Webber's

purported treatment pre-dates the trial by years, *supra* at paragraph 26. But even if the treatment were indeed "new," there is no proper predicate to support the claim of possible efficacy on the Ward. Webber suggests that the treatment can help a *non-vegetative* Ward, but his opinion that she is non-vegetative is solely based upon his interpretation of the Ward's pre-judgment condition, not any post-judgment change.

34. Treatment. The appellate court describes the subject "cardiovascular medication style of therapy" as "new treatment." It is important to understand how "new" evidence is distinguished under Rule 1.540 (b). The distinction between Rule 1.540(b)(2), "newly discovered evidence," and 1.540(b)(5), new evidence that it is "no longer equitable that the judgment or decree should have prospective application" 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). *Pollock* cites *Hensel v. Hensel*, 276 So.2d 227, 228 (Fla. 2d DCA 1973), which explains:

> "[T]he equities spoken of in ground No. 5 of the rule are those which come to fruition *after* a final judgment, not those which would theretofore have been available as defenses to the action. That is so because to say, in the language of the rule, that it is 'no *longer* equitable' that a judgment be given prospective effect is to say that it once was equitable that it have such effect. This in turn, of course, presupposes that the judgment was valid to begin with."

That is why, here, the district court repeatedly cautioned Respondents that any 1.540(b)(5) motion filed must establish matters *arising after* the entry of the judgment. *Supra* at paragraph 24.

35. Therefore, evidence of an alleged treatment existing at the time of trial cannot raise a colorable claim for relief under the 1.540(b)(5) motion. The fact that Webber's "treatment" is not "new"--in that it existed and was used years before the trial in this cause, *supra* at paragraph 26--precludes Appellants' relief under Rule 1.540(b)(5).[5] The lower court's decision--that evidence existing at the time of trial

[5]While the court describes Webber's treatment as "new,"closer examination of the opinion reveals that the court does not contend that the subject treatment was discovered or developed subsequent to trial. Rather, the opinion indicates, (as the record confirms), that the treatment was available at the time of trial but not discussed. As the opinion notes, Webber bases his opinion as to the alleged efficacy of this "treatment" on his "years of practice." The court also states that the 2000 trial focused on the ward's intent "and not on whether any available medical treatment could improve her condition," and describes the treatment as "new evidence of additional medical procedures." 800 So.2d 643-644. Respondents admitted in their trial court pleadings that the Wards condition was "irreversible," *supra* at paragraph 11. The appellate court seems to be holding that when a trial doesn't fully "focus" on an issue due to a pleading admission, such issues are then fair grist for 1.540(b)(5) proceedings.

is sufficient to sustain a 1.540(b)(5) motion--is contrary to prevailing law, contrary to its own former pronouncements in the same case, and in essence, does away with the one-year limitation provision governing rule 1.540(b)(2).[6]

36. PersistentVegetative State. Even if Dr. Webber's "treatment" had been developed after the trial, the 1.540(b)(5) motion still does not raise colorable entitlement to relief because it lacks an essential predicate--that the Ward is non-vegetative. Dr. Webber does not state that he is able to improve the condition of a patient in a persistent vegetative state. Rather, he states that he has successfully treated "patients with brain deficits similar to Mrs. Schiavo's" (A 61). The "similar" patients, however, are not patients in vegetative states, but patients "similar" to the way Webber sees the Ward: a patient who "exhibits purposeful reaction to her environment" and "recognized family members and responded," *supra* at paragraph 32.

37. Webber's claim of possible improvement for a "responsive non-vegetative" Ward is irrelevant without a facially sufficient 1.540(b)(5) showing that

---

[6]The alleged "new treatment" cannot even sustain a 1.540(b)(2) "newly discovered evidence" claim. Respondents failed to file a timely 1.540(b)(2) claim, and even had they done so, they have never alleged or demonstrated that evidence of the "new treatment" could not have been discovered before the trial by the exercise of due diligence, *City of Winter Haven v. Tuttle/White Const'rs.*, 370 So.2d 829, 831 (Fla. 2d DCA 1979), which is the movant's burden to establish, *Brown v. McMillian*, 737 So.2d 570, 571 (Fla. 1st DCA 1999).

THERESA SCHIAVO is no longer in a persistent vegetative state. Without such a foundational showing, the opinion regarding possible improvement does not present any competent evidence, because the opinion would not be relevant or material to the condition of *this* patient. For example, if Dr. Webber opined that he could successfully treat TERRI SCHIAVO because he has successfully treated patients in diabetic comas, his opinion would only be sufficient if combined with a predicate showing that THERESA SCHIAVO was in a diabetic coma. When a predicate "omits a fact so obviously necessary to the formation of an opinion," the opinion is neither sustainable, competent, nor admissible. *Nat Harrison Associates, Inc. v. Byrd*, 256 So.2d 50, 53 (Fla. 4th DCA 1971); *Huff v. State*, 495 So.2d 145, 148 (Fla. 1986); *Ullman v. City of Tampa Parks Dept.*, 625 So.2d 868, 873 (Fla. 1st DCA 1993); *Centex-Rooney Const. v. Martin County*, 706 So.2d 20, 28 (Fla. 4th DCA 1997).

38. Webber's opinion that the Ward has cognizance is exclusively based upon trial-contemporaneous information (A 60, paragraph 3), not matters coming to fruition or arising *after* trial, as is required by Rule 1.540(b)(5). Such is the same for the opinions of all of Respondents' other doctors. In fact, Respondents proffer nothing in their motion showing that the Ward's condition has changed at all since trial. All the affidavits deal with matters occurring at or prior to trial,

excepting the Monsignor's affidavit, which relates impressions of the Ward almost identical to that relayed at trial by MARY SCHINDLER, *supra* at paragraph 30.

39. The trial established "beyond all doubt that THERESA MARIE SCHIAVO is in a persistent vegetative state," *supra* at paragraph 20, and the same was affirmed on appeal. It is *res judicata*, and for purposes of Rule 1.540(b)(5), THERESA SCHIAVO was in a persistent vegetative state at the time of trial. Nothing has been proffered to show that her condition has changed subsequent to trial. Therefore, Webber and the other doctors cannot sufficiently opine that TERRI SCHIAVO can recover *because they have successfully treated non-vegetative patients*. With an insufficient 1.540(b)(5) predicate to show that the ward is non-vegetative, Webber's affidavit cannot raise "colorable entitlement requiring an evidentiary hearing" as held by the lower court.

40. In essence, what has happened here is that Respondents' doctors have reviewed the trial-related evidence and "dispute the diagnosis of persistent vegetative state based on the records available to them..." 800 So.2d 644. If this is sufficient to warrant a hearing, as ruled by the lower court, *id*., one would also have to conclude that in any trial involving a conclusion based upon expert testimony, a Rule 1.540(b)(5) motion is sufficient if an expert found after trial reviews trial evidence and renders a contrary opinion. That is simply not the state of the law.

41. If the mandated evidentiary hearing proceeds, the opinions of Respondents' doctors as to possible improvement would be inadmissible in evidence unless the foundational basis of their opinions were first proved, to wit: that TERRI SCHIAVO is cognitive, responsive, and not in a vegetative condition. In essence then, the purpose for the hearing on remand would not be to determine if a non-vegetative patient could be successfully treated, but would be to determine whether THERESA SCHIAVO is in a vegetative condition. As there has been no proffered sufficient evidence that the Ward's condition has changed since trial, such a remand would truly be nothing more than a retrial on the issue of the Ward's condition and would conflict with the lower court's own prior admonition that 1.540(b)(5) proceedings should not be filed "to retry an adversary proceeding." *Supra* at paragraph 24.

Patient Intent

42. Decision making in cases like this based upon "objective" or "best interest" standards--factors other than the patient's intentions--were rejected by both the district court and this Court in *In re Guardianship of Browning*, 543 So.2d 258, 273 (Fla. 2d DCA 1989), 558 So.2d 4, 13 (Fla. 1990). Under the law of this state regarding medical treatment decision-making, patient intent is paramount:

> We emphasize and caution that when the patient has left instructions regarding life-sustaining treatment, the surrogate *must* make the medical choice that the patient, if competent would have made, and not one that the surrogate might make for himself or herself, or that the surrogate might think is in the patient's best interests. *Browning*, 586 So.2d at 13,

emphasis added. Further, this Court has been particularly careful not to tread on the slippery slope of having it, the State or persons other than the patient, impose upon the patient their judgment as to whether or not there is sufficient quality of life to make the patient's life worth living. *Id*.

43. In this case the patient has stated that she did not want to be kept alive artificially, wanted tubes and everything taken out, and did not want to be kept alive if she were dependent on the care of others, *supra* at paragraph 14. Her wishes were not conditioned or qualified by her being in a vegetative condition, or in any other particular condition, and the Guardian's petition does not specifically allege that the Ward is either in a terminal or vegetative condition, *supra* at paragraph 11.

44. In this case, pled and tried on both the Ward's constitutional and statutory claims, it was pled, admitted and proved at trial that the Ward suffers from an irreversible profoundly debilitated condition, has lost the ability to intake fluid and nutrition naturally, and her life can only be sustained by artificial provision of nutrition and hydration, *supra* at paragraphs 11 and 12.

45. Therefore, in this case, in order to present a facially sufficient motion

under Rule 1.540(b)(5), Respondents' had to present newly-arising sworn facts of substantial changes in circumstances post-trial showing that: the Ward is able to naturally intake sustenance and hydration in an amount necessary to permanently sustain herself; the Ward is now capable of making her own medical treatment decisions; or there has now developed a treatment that will enable her to do either of the above. The motion fails because none of the affidavits claim, show or demonstrate in any way that the Ward is now able, or can be treated to enable her to intake food and water orally in order to sustain herself. Nor do any of the affidavits claim that the Ward is mentally competent, or with treatment, could regain mental capacity. As such, the motion was facially deficient and properly denied by the trial court.

46. The appellate court, however, disregards the Ward's intent. Instead of reviewing the motion in view of the Ward's expressed wishes not to be kept alive artificially, the court makes "cognitive function" the dispositive factor that governs review of the motion. As shown *infra*, by doing this, the court not only acts contrary to established law, it improperly engages in quality-of-life determinations, substituting its values for that of the patient.

47. Cognition. The lower court asserts it is the possibility that treatment could "restore cognitive function," (Webber's affidavit), that raises the claim to

colorable entitlement. According to the court, "increased cognitive function in Mrs. Schiavo's cerebral cortex" is synonymous with "significantly improving the quality of Mrs. Schiavo's life." 800 So.2d at 646, 645. Who is to say that cognitive function of the patient would increase the quality of her life? To THERESA SCHIAVO--with resulting awareness of her predicament, capacity to experience pain, and with her expressed revulsion of artificial life support and tubes--increased cognitive function might be a curse rather than a blessing. The lower court, by assuming that improved cognition in and of itself benefits the patient, has entering upon the slippery slope of imposing upon the patient its own values as to quality of life. This is contrary to *Browning*.

48. The right to refuse or have withdrawn unwanted medical treatment is not dependent upon the mental status of the patient. As part of the fundamental right of privacy expressly enumerated in Article I, Section 23 of the Florida Constitution, everyone has a fundamental right to the sole control of his or her person, including the right to determine what shall be done with his own body. *Browning* 568 So.2d at 10. As a result, a competent individual has the constitutional right to refuse medical treatment *regardless of his or her medical condition*. *Id*., emphasis added. Therefore, one need not be terminally ill or beyond recovery**,** or in any other particular physical or mental condition in order to exercise that right because,

the right involved here is one of self-determination that cannot be qualified by condition of the patient. 568 So.2d at 13. Further, the constitutionally protected right to choose or reject medical treatment is not lost by virtue of physical or mental incapacity or incompetence. 568 So.2d at 12.

48. In *Browning* the patient's condition was disputed and, as here, there were claims that Mrs. Browning would follow a visitor with her eyes and make noises interpreted as attempts at communication. *Browning* at 568 So.2d at 9. Because this Court determined that Mrs. Browning's right to withdraw medical treatment "cannot be qualified by the condition of the patient," the Court held, "we fail to see a significant legal distinction" between Mrs. Browning who "was not in a total comatose state" compared to a patient who was. *Browning*, 568 So.2d at 12-13.

49. The trial here established that the Ward cannot be sustained without provision of artificial life support, and that her expressed intent was not to be kept alive artificially or with tubes. This, in conjunction with the medical evidence showing lack of capacity or ability to regain capacity (*supra* at paragraphs 15 and 16), required by *Browning*, 568 So.2d at 16, established the Ward's constitutional case for removal of unwanted medical treatment. Respondents' motion offers nothing to dispute these conclusions. Promise of some cognitive function, (there

has been absolutely no claim that the Ward's capacity to make decisions could be restored), is simply irrelevant to the real issue--can the Ward sustain herself without artificial feeding.

50. The appellate court apparently believes that a life with some cognizance is worth living, even at the price of being artificially fed through a tube. THERESA SCHIAVO has chosen otherwise. She has not conditioned her refusal of artificial feeding upon her mental status. The district court stated that "the courts must and will make the necessary decisions for Mrs. Schiavo." 800 So.2d at 647. The least we can expect for MRS. SCHIAVO is that the courts honor her intent, not impose upon her their own values and wishes.

51. Terminal Condition. In addition to the constitutional right to refuse or have withdrawn unwanted medical treatment, Floridians have the statutory rights afforded them by Chapter 765. Under the facts of this case--no written living will and no written designation of surrogate or proxy--the statute does require that the patient have an end-stage condition, be in a persistent vegetative state *or* have a terminal condition in order to terminate artificial life support. Section 765.305(2)(b), Florida Statutes, (2000). Of course, the statutory scheme cannot limit the scope of the constitutional right, and in any event, the statute specifically states that its provisions "do not impair any existing rights...which...a patient...or a

patient's family may have under the...State Constitution..." Section 765.106.

52. As with the constitutional right, patient intent is paramount under the statute. Section 765.401(3).[7] Further, the patient need not be in any particular mental condition in order to have his or her statutory right effected, as it is lack of capacity that triggers the statutory plan. Sections 765.305(2)(a) and 765.204(3).

53. While the Ward's artificial feeding may be independently discontinued pursuant to her constitutional rights, she is also "terminally ill" pursuant to Chapter 765 and entitled to relief thereunder. The evidence regarding the Ward's statutory terminal condition dovetails with evidence regarding the enforcement of her constitutional rights. The subject physicians swore in their affidavits that the Ward's condition was "terminal" and that she irremediably lacked the capacity to make medical treatment decisions. These conclusions were also established by physician testimony at trial. *Supra* at paragraphs 15 and 16. The trial court's finding that "without the feeding tube she will die in seven to fourteen days" (A 819), establishes that the Ward is in a terminal condition. This finding was affirmed on appeal in Schiavo I. Further, the district court's holding in Schiavo II

[7]Subsequent to the trial in this cause, the subject statute has been amended to permit the proxy, in the absence of a written living will or written designation of surrogate, to withhold or withdraw life prolonging procedures when that decision "is in the patient's best interest" and "there is no indication of what the patient would have chosen..." Ch. 2001-50, sect. 7, at 1565, Laws of Fla.

that "[h]er condition is legally a 'terminal condition'...Section 765.10(17), Fla. Stat.," is the law of the case. 792 So.2d at 560.

54. Respondents' motion not only fails to present any change of circumstances since trial, it fails to present any evidence whatsoever to show that the Ward is no longer dependent on artificial feeding. Neither does it show that there is a treatment that can restore her ability to intake sufficient nutrition and hydration to sustain herself naturally. None of the affidavits make or suggest such a claim, and therefore the motion does not raise a colorable claim for relief from judgment.

55. Nursing assistant Heidi Law does state that she saw the Ward swallow water from melting ice used to keep her mouth moistened (A 179), and Dr. Maxfield, upon reviewing the SCHINDLER's prior physician affidavits, suggests the Ward is able to swallow because "she handles her saliva" (A 182, 183). Neither, however, allege new evidence or a new circumstance arising after trial, nor do either allege that said swallowing indicates the Ward can nutritionally sustain herself without tube feeding. The claims that the Ward could intake sustenance naturally because she allegedly swallowed water and could handle her saliva, were raised in the February 21, 2000 Motion for Rehearing and thoroughly examined by the court at the March 2, 2000 evidentiary hearing on the petition for swallowing

evaluation at which two physicians of Respondents' choice testified (*supra* at paragraph 22). In its order denying the petition for swallowing evaluation, the trial court specifically noted testimony to the effect that "it is common for patients to be able to swallow saliva and still need feeding tubes" (A 852). The trial court also found that attempts at oral nutrition would result in aspiration which would lead to infection, fever, cough and ultimately pneumonia, which likely would be fatal; and, in any event, the Ward could not consume enough in this manner to sustain herself (A 851-852). The trial court's order was affirmed on appeal and is *res judicata*. *Supra* at paragraphs 1 and 23).

56. Again, even if the 1.540(b)(5) motion presented new matters, which it does not, it is facially insufficient because it fails to demonstrate a change to what is *res judicata*--that it is impossible for TERRI SCHIAVO to naturally take in sufficient sustenance orally in order to stay alive and there is nothing in existence to alter that. Even if the suggestion of increased cognition--made by the new witnesses critiquing old evidence--were proved true, that does not alter the reality that THERESA SCHIAVO would have to continue to be artificially sustained contrary to her wishes. Such would ignore her intent, impinge upon her free will, and violate her constitutional and statutory rights.

Discovery Issue

57. In conjunction with their 1.540(b)(5) motion, Respondents requested discovery--the examination and testing of the Ward--claiming that "fairness" and"justice" required the same (A 77). The essence of Respondents' argument is, "How can we prove that the Ward's condition has changed since the trial, as required by Rule 1.540(b)(5), if our doctors can't examine her and the basis for their opinions is therefor limited to the trial evidence?" This argument was rejected by the trial court, which denied the 1.540(b)(5) motion without permitting the requested discovery.

58. The trial court's ruling is well-supported in law. Both *Dynasty Express Corp. v. Weiss*, 675 So.2d 235, 239 (Fla. 4th DCA 1996) and *Southern Bell Tel. & Tel. Co. v. Weldon*, 483 So.2d 487, 489 (Fla. 1st DCA 1986) hold that, "*If* the allegations of the moving party's motion for relief from judgment raise a colorable entitlement to...relief ... permissible discovery prior to the hearing, is required." Emphasis added. Limiting discovery to colorable claims is essential, otherwise, Rule 1.540(b) motions would permit fishing expeditions for disgruntled litigants and would promote endless litigation.

59. Respondents, however, found sympathy in the district court for their position. There, the appellate court rules that discovery should have been afforded on the medical claims that did not raise colorable entitlement to relief, and on that

basis orders discovery and a hearing on such claims. *Supra* at paragraph 32. This ruling is contrary to prevailing law, bad policy, and significantly impairs the finality of judgments.

Burden of Proof

60. As the district court indicates, a 1.540(b)(5) challenge is "extraordinary" and under federal law the movant must prove entitlement by clear and convincing evidence. 792 So.2d at 554; 800 So.2d at 645, *citing Stokors v. Morrison*, 147 F.3d 759, 761 (8th Cir. 1998). The federal standard was adopted in Florida in *Wilson v. Charter Marketing Co.*, 443 So.2d 160, 161 (Fla. 1st DCA 1983). While *Wilson* was a 1.540(b)(3) case, the federal standard apparently applies to all Rule 60(b) motions where "courts typically require that the evidence in support of the motion for relief be 'highly convincing'..." *Gonzalez v. Gannett Satellite Information Network, supra*, 903 F.Supp. at 331.

61. Nevertheless, the district court lessens the movants' burden of proof on remand from the legally indicated "clearly convincing" standard to a "preponderance" standard. 800 So.2d at 645. This, again, significantly impairs the finality of judgments.

Intrinsic Fraud

62. The district court assumes that allegations of intrinsic fraud "could be

sufficient to obtain relief under Rule 1.540(b)(5)," *supra* at paragraph 32. Although only dicta, the court's statement touches on an issue of great importance, because it alters the difficult balance set in *DeClaire v. Yohannen*, 453 So.2d 375 (Fla. 1984), and also runs counter to the prevailing interpretation limiting Rule 1.540(b)(5) relief to changes in circumstances arising after the entry of a final judgment. *Hensel v. Hensel*, 276 So.2d 227, 228 (Fla. 2d DCA 1973), *State v. Wright*, 498 So.2d 1008, 1009 (Fla. 2d DCA 1986), and Schiavo II, 792 So.2d at 559-560. In essence, the lower court does away with the one-year limitation period for intrinsic fraud under Rule 1.540(b). Although the holding is the form of dicta, its effect can be far-reaching and substantially work to impair the finality of judgments.

Policy Considerations

63. Respondents' primary argument is that distinctions of legal procedure are irrelevant in a case such as this, involving "a life-or-death decision-making process" (A 77). Since, as Respondents' claim, the trial court "heard only one side of the Terri Schiavo story," the case should be reopened "for reasons of equity," rather than concluded by Petitioner's effort to "kill her" (A 226, 228). As such, Respondents find meaningless here the legal distinction between 1.540(b)(2) evidence "in existence *at the time* of judgment," and 1.540 (b)(5) evidence of

"matters accruing after entry of the final judgment," *supra* at paragraph 34.

64. Respondents' argument found a sympathetic ear in the lower court.[8] Not only does the district court appear unconcerned with the procedural difference between Rule 1.540(b)(2) and (b)(5), it has endeavored--in its rule-expanding holdings on discovery and burden of proof--to facilitate an attack on the final judgment. Petitioner has not asked the lower court to decide this case on some "technicality." Rather, Petitioner has asserted that there are sound policy reasons behind these post-judgment procedures, and because those reasons *particularly* apply to cases like this, they should not be discarded here.

65. Need for Objectivity. First, in a general sense, the law and its procedures provide the judiciary objective guidelines to apply in deciding cases. No one expects or believes that judges do not carry with them thoughts, feelings and beliefs about a wide range of subjects. Litigants do expect, however, that judges will objectively apply the law to the facts in decision-making, despite their personal feelings or beliefs. No one expects or wants judges to abandon compassion. Compassion, however, need not and should not exclude dispassion. Absent the application of objective standards, winning or losing your case would depend more

[8]At oral argument, the first question the court asked of Petitioner's counsel was, "In a case such as this, involving life or death, can't we disregard legal procedure?"

upon the judge assigned to the case, than the law involved. In theory, and what is strived for, is a legal system where the same result is obtained no matter which judge is assigned to the case.

66. The benchmark of legal procedure is nowhere needed more than in cases involving the removal of artificial life support. Perhaps more than in any other kind of case, these cases--that raise issues regarding religion, philosophy, morals, and personal beliefs about death and dying--have the potential of arousing deeply held feelings. Judges are not automatons. The judiciary must be particularly careful to maintain dispassion in these cases, and thoughtful adherence to legal procedures assists them in doing so.

67. Petitioner has repeatedly argued that all that has now been raised by Respondents' doctors could have been litigated at the initial trial, and that no reason has been shown to explain why it was not. The lower court, however, acknowledges that "when numerous doctors dispute the diagnosis of persistent vegetative state based on the records available to them, it is difficult for judges untrained in any medical specialty to summarily reject their opinions..." 800 So.2d at 644. The lower court, influenced by the suggestion of increased cognition, *id.*, and guided by its *own belief* that increased cognition here would increase the Ward's quality of life, *supra* at paragraph 47, finds it "difficult" to follow legal

procedure. Here, adherence to legal procedure was needed to prevent the lower court from imposing its beliefs upon the Ward.[9]

68. Finality and Promptness. The law regulating post-judgment proceedings involves two primary competing interests: promoting and maintaining the finality of judgments; and, redressing possible injustice. In construing the one-year limitation in Rule 1.540(b) in a slightly different context, this Court declined to expand the grounds on which final judgments may be attacked:

> Public policy has always favored the termination of litigation after a party has had an opportunity for a trial and an appeal of the trial court's judgment. Consequently, the grounds upon which a final judgment may be set aside, other than by appeal, are limited in order to allow the parties and the public to rely on duly entered final judgments. *Declaire v. Yohanan*, 453 So.2d 375, 380 (Fla. 1984).

69. The lower court justifies its decision--one that abandons well-established limitations upon the attack of final judgments--upon the "default position" that requires defense of life. 800 So.2d at 645. In essence, the lower court has treated

---

[9]The same lower court, in *Browning*, expressed its discomfort with the idea of terminating artificial feeding when the patient retains cognizance. The court describes the case of the marginally cognizant Mrs. Browning as:

> "a case in which the patient wishes to discontinue medical treatment because the *quality of her life* is so poor that she prefers the death which would naturally occur in the absence of artificial feeding...
> ...the act intuitively feels closer to suicide..." 543 So.2d at 270, emphasis added.

this case, procedurally, like a death penalty case, and one could fairly argue that what the lower court's decision does in this case is create an "ineffective assistance of counsel" defense in removal of life support cases. This is an unsound policy that should be rejected by this Court.[10]

70. While courts should act in consonance with the sanctity of life, the patient's constitutional right is also of paramount importance. According to this Court, "We can conceive of few more personal or private decisions concerning one's body that one can make in the course of a lifetime...[than] the decision of the terminally ill and their choice of whether to discontinue necessary medical treatment." *Browning* at 568 So.2d at 10, quoting *In Re T.W.*, 551 So.2d 1186, 1192 (Fla. 1989). This Court in *Browning* has stressed the need for prompt and swift resolution of these cases when the legal system becomes involved. *Browning*, 568 So.2d at 16, n. 17, *see also* 543 So.2d at 269.

71. The ease or difficulty to which final judgments in these cases may be attacked, directly impacts upon the patient's constitutional right to refuse or have withdrawn unwanted medical treatment. Given the prospect of truly unending

---

[10]In *Browning*, the district court's cumbersome guidelines and requirements were not adopted by this Court. Rather, this Court promulgated a more streamlined procedure for implementing a patient's constitutional right to refuse or have withdrawn unwanted medical treatment. 586 So.2d at 14-16.

litigation as offered by this high-profile case, how many families might there be who give up legal pursuit of the patient's remedies, or don't even bother to engage the legal system to enforce the patient's rights? What sane family would choose to bankrupt itself by seeking elusive redress in the legal system to resolve an end-of-life care dispute? Public perception that the judiciary is unable to reasonably handle these cases has such deleterious consequences.

72. One of those deleterious consequences was best expressed by Father Gerard Murphy, who testified at trial, (see Petitioner's filing in SC01-559). Father Murphy is a Roman Catholic Priest, hospital chaplain and director of pastoral care, biomedical ethicist, and is the diocesan spokesman on issues involving removal of artificial life support. A staunch opponent of assisted suicide, Father Murphy testified about the "dark horizons" of this case. According to Father Murphy, people are terrified of a case like this, where a patient is kept alive for years in a horrific state, against his or her wishes. Cases like this, he believes, stokes the public's support of assisted suicide and is why people, while they are still able to do so, would "line up to take a pill or shot and go to sleep," rather than lose the control of their own fate and become hopelessly mired in the legal/medical system.

73. This case not only negatively impacts society at large, for THERESA SCHIAVO, it proves true the aphorism, "justice delayed is justice denied." While

it is true THERESA SCHIAVO was artificially sustained for many years before the subject petition to discontinue artificial life support was filed, it is also true that it has been almost four years since the petition was filed, over two years since the trial court determined that artificial life support should be discontinued, and over one year since the trial judge's decision was affirmed by the appellate court. THERESA MARIE SCHIAVO's intent not to be artificially sustained in her current condition, (as found by the trial court and upheld by the appellate court), is constitutionally protected, and implementation of that intent is necessary to protect her fundamental liberty interests. Each additional day she is artificially sustained is in derogation of her personal liberty and her protected right of privacy.

74. Not only does the lower court's decision impinge upon the Ward's liberty each continuing day she is artificially sustained against her will, the decision raises the real possibility that her intent will never be honored. The Second District's mandated "evidentiary hearing" has been scheduled as a week-long proceeding in October, 2002. If the Guardian prevails at that hearing and the final judgment is sustained, that decision will prompt Respondents' full appeal to the district court. Resolution of that appeal will take this case into the mid-part of 2003. But even if the Guardian prevails on that appeal, there is still no end to this case in sight.

75. Aside from any further appeal to this Court or to the United States Supreme Court, the Second District then permits further trial proceedings to challenge the final judgment:

> [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." 792 So.2d at 553, emphasis

added. After the current 1.540(b)(5) proceeding and resulting appeals are finished, whenever that might be, Respondents are authorized to then file another 1.540(b)(5) challenge. And based upon the district courts' last decision, all Respondents need do to entitle themselves to an evidentiary hearing on a new challenge is present the affidavit of one doctor who states that he or she has a proposed treatment, not discussed previously, that can restore some cognitive functioning to the Ward.

76. And what is the possibility that a doctor can be found to swear to a "treatment" that, in essence, offers no *real* promise to the Ward? The possibility is substantial. This case has shown, as do other cases of this nature, that there is fierce cultural battle being waged by a small-but-vocal minority that believes, on religious or moral grounds, that it is grievously wrong to terminate any patient's artificial feeding. This case has attracted such individuals and organizations, as well

as other parties having their own agendas. Already, an organization that equates removal of feeding tubes with "murder" unsuccessfully attempted to intervene in the trial court (A 848-849), and a state legislator unsuccessfully attempted to intervene in earlier proceedings before this Court. Some doctors who observed the Ward immediately after trial or whose affidavits were later filed, are either members or directors of the organization that unsuccessfully tried to intervene at trial (A 836, 65). For a doctor who believes that "extremism in the defense of virtue is no vice," an affidavit is a small price to pay to prevent the "murder" of THERESA SCHIAVO.[11]

76. So, for Petitioner, who has not only persevered for years in his efforts to fulfill his wife's wishes (A 773), but has endured years of harassment,[12] when is

---

[11]One of Respondents 1.540(b)(5) doctors swears, without any knowledge of the Ward's wishes on the subject, that terminating her nutrition and hydration "amounts to murder" (A 44).

[12]This Court will no doubt hear Respondents' repeated charges that Petitioner is ill-motivated because: he has been involved with other women; he is now "engaged"; he has financial motives; he has "neglected" Terri's care after obtaining malpractice money to care for her for life; and that he lied at trial about her intent. These claims, except the last, were raised by respondents in a 1993 proceeding to remove Petitioner as guardian, were resolved in favor of the guardian, and the Petitioners' dismissed their claim with prejudice (A 731-748). The trial court rejected the same claims, raised again by respondents, holding:

> By all accounts, Mr. Schiavo has been...very motivated in pursuing the best medical care for his wife...it is undisputed that he [Mr. Schiavo] was very aggressive with nursing home personnel to make certain that

enough enough? Facing now years of additional litigation with no reasonable prospect of conclusion, no one would fault him from departing from this struggle. And should he do so, what would be the mortal end of THERESA SCHIAVO? With no one to vigorously pursue her wishes, THERESA SCHIAVO could very well end up slowly wasting away in some Medicaid bed for the next forty years, a situation one court has described as "abhorrent" and "inhumane." *In re Guardianship of Myers*, 610 N.E. 2d 663, 670 (Ohio Ct. App. 1993).

77. Here, the district court's "default position to defend life" is not grounded in law and makes so porous judicial decisions to remove artificial life support, that legal proceedings in and of themselves can become the vehicle in which to defeat the rights of the patient. The lower court's decision unduly and unnecessarily circumscribes an individual's constitutional and statutory right to refuse or have

---

> she received the finest in care...Mr. Schiavo continues to be the most regular visitor to his wife...[and the wards' treating physician] even noted that close attention to detail has resulted in her excellent physical condition and that Petitioner [Mr. Schiavo] is very involved" (A 816, 817).

On appeal, the appellate court found "no evidence" that Petitioner "seek[s] monetary gain" from his actions. 780 So.2d at 178. As to the charge that Petitioner lied at trial, this was rejected by the trial court, (A 583-584), with said court affirmed on appeal. 800 So.2d at 643.

To this date, Respondents are pursuing a civil action against Petitioner for monetary damages, claiming that his "intolerable course of conduct" in seeking the removal of his wife's artificial life support has caused them "extraordinary mental anguish." 792 So.2d at 556.

withdrawn unwanted medical treatment. Thus, should this Court accept jurisdiction, there is a reasonable likelihood that Petitioner will prevail on the merits.

Conclusion

78. Petitioner has demonstrated that there is a reasonable likelihood this Court will accept jurisdiction, that the nature of the harm occasioned by the lower court's order warrants a stay, and that there is a reasonable likelihood that Petitioner would prevail on the merits of this case. Therefore, it is respectfully requested that this Court issue an order staying the decision of the lower court and the proceedings specified therein, pending review by this Court.

Respectfully submitted,

_____
George J. Felos

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was hand delivered this ____ day of February, 2002, to: Patricia Fields Anderson, Esq., 447 3rd Avenue N., Suite 405, St. Petersburg, Florida 33701; and Larry D. Crow, Esq., 1247 S. Pinellas Avenue, Tarpon Springs, Florida, 34689.

George J. Felos, Esq.
FELOS & FELOS, P. A.
595 Main Street
Dunedin, Florida 34698
Telephone: (727) 736-1402