SC01-559

IN THE FLORIDA SUPREME COURT

IN RE: The Guardianship of:

THERESA MARIE SCHIAVO,

Incapacitated.

Case No. 2D00-1269

L.T. No. 90-2908-GD-3

MICHAEL SCHIAVO, as Guardian of the person of

THERESA MARIE SCHIAVO,

Petitioner/Appellees,

vs.

ROBERT SCHINDLER and MARY SCHINDLER,

Respondents/Appellants.

JURISDICTIONAL BRIEF

JOSEPH D. MAGRI, ESQUIRE
Florida Bar No. 0814490
MERKLE & MAGRI, P.A.
5510 West LaSalle Street
Tampa, FL 33607
(813) 281-9000
Attorney for Appellants Robert and Mary Schindler

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PETITIONERS' BRIEF ON JURISDICTION

INTRODUCTION

The Petitioners, Robert and Mary Schindler (the "Schindlers"), were the appellants in the District Court of Appeals of Florida, Second District. The Respondent, Michael Schiavo ("Schiavo"), was the Appellee.

STATEMENT OF THE CASE AND FACTS

On February 25, 1990 Theresa Marie Schiavo ("Terri") the wife of Mr. Schiavo and the daughter of the Schindlers, suffered cardiac arrest as a result of a potassium imbalance. Since then Terri has been treated at a hospital and various nursing homes. Terri is being provided food and water through a feeding tube. App. 1, page 2. Schiavo filed an action against the physician who had been treating Terri prior to her cardiac arrest. A sizeable award of money was obtained to care for Terri for the rest of her life. On May 11, 1998 Schiavo, who is Terri's guardian, filed a petition to discontinue Terri's feeding tube. The only evidence of Terri's wishes were alleged oral statements. The petition proceeded under the constitutional guidelines enunciated in In re Guardianship of Browning, 568 So.2d 4 (Fla. 1990). App. 1, Page 5.

A request to have a guardian *ad litem* represent Terri during the trial was rejected. The trial court also accepted and relied upon the testimony of a societal values expert who testified to general societal values, the consistency of Terri's wishes with

those values, and the meaning of words Terri allegedly used, even though she had never met Terri. The petitioners further contended on appeal that the trial court applied a standard other than the clear and convincing evidence standard of Browning, supra. The District Court of Appeals found that there was an apparent conflict of interest between Schiavo and Terri. Nevertheless, the Court did not believe that a guardian *ad litem* had to be appointed to represent her at trial. It felt that "in essence" the trial court acted as both the guardian *ad litem* and the surrogate of Terri. The Court further found that while a societal values expert offered little in the way of relevant testimony, the consideration of that testimony was not reversible error. After reviewing the medical evidence as to Terri's condition, it felt that the trial court considered the appropriate standard in reaching its conclusion. The District Court did not address certain other issues raised by the Schindlers. App. 1, page 5.

On February 8, 2001, a Motion for Rehearing, Clarification, Rehearing En Banc and Certification was timely filed. On February 22, 2001 those Motions were denied.

SUMMARY OF ARGUMENT

Terri's parents want their daughter to live. Her husband, who is openly engaged to a woman he lives with, claims that before her accident she told him repeatedly that she did not want to live like she has for years since, even though he never mentioned this desire in the medical malpractice case in which she netted in excess of $750,000.00

for her care for her life and which he claimed was needed for that purposes. This is money which the husband will inherit if her life is now terminated.

This Court has authority to accept jurisdiction in this case based upon three provisions of Florida Rules of Appellate Procedure 9.030(a)(2). First, under Fla.R. App.P. 9.030(a)(2)(A)(ii), this decision expressly construes the Florida Constitution as to Terri Schiavo's exercise of her right of privacy and also the exercise of her right to enjoy and defend life and liberty, and to pursue happiness.

Jurisdiction also exists under Fla.R.App.P. 9.030(a)(2)(A)(iii), because the decision affects a class of constitutional officers. All Florida judges will now have to choose whether to act as the guardian or surrogate of wards where there is a conflict or potential conflict between the ward and the actual surrogate or guardian of the person. Courts who act as a guardian *ad litem* or surrogate must decide whether to hire expert witnesses, enter objections to various types of evidence, and determine what matters should be brought before the court; and adopt a position of advocacy discouraged by the Code of Judicial Conduct..

Third, this Court has discretionary jurisdiction under Fla.R.App.P. 9.030(a)(2)(A)(iv), because the decision expressly and directly conflicts with this Court's Decision in *In re* Guardianship of Browning, supra, in that it redefines the role the trial court is to play from Browning's more traditional one to a composite role. It also

conflicts with Savage v. Rowell, 95 So.2d 417 (Fla. 1957) by sanctioning the lack of a guardian *ad litem* for a ward when meritorious defenses were not raised. The allowance of societal values experts conflicts with Angrand v. Key, 657 So.2d 1146, 1149 (Fla. 1995), because it allows experts to give opinions about common ordinary matters not involving scientific or artful concepts. It also allows experts and society to intrude on the ward's exercise of her constitutional rights.

ARGUMENT AS TO ISSUE I

The essential issue in this case was ascertaining Terri's wishes about her life and death. In a number of decisions including *In re* Guardianship of Browning, this court has recognized that these issues involve an exercise of her right of privacy and her right to enjoy and defend life and to pursue happiness. Therefore, the decision under review clearly falls within the court's discretionary authority as expressly construing the Florida constitution. Indeed, the District Court's decision expressly stated that the case was being decided "under the constitutional guidelines enunciated in In re Guardianship of Browning, 568 So.2d 4 (Fla. 1990)." As such, this case involves a number of issues which will have a long reach. First, whether guardians *ad litem* need to be appointed when actual or potential conflicts of interest exist, and close family members disagree on the oral wishes of the person whose constitutional rights are being decided. The ward should be represented in these circumstances. Of all the

other state court decisions cited to the District Court, none went forward without a guardian *ad litem* or its equivalent for the ward in these circumstances. This issue is all the more significant because the position the District Court is taking is fundamentally different than the position that the Florida Legislature has taken when conflicts between wards and guardians are at issue. See, e.g., §§ 744. 391, 744. 309, 744.446, 744.474, 744.3215, 744.3715 Fla. Stat. (2001). If decisions are being made about life and death, it should be all the more, not all the less, reason to insure these due process safeguards are in place.

Second, the decision accepts some role for societal values experts who have never met the ward to testify in corroboration of claims that a ward said she wanted to die because the supposed statement came in a fashion the expert believes is normal, and to express an opinion as to the meaning of the every day words the ward used. Concern exists that the witness in the instant case was, and similar witnesses in the future will be, used to encourage a court to accept questionable evidence of intent under pressure of meeting societal values in derogation of the ward's personal exercise of her constitutional rights.[1]

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[1] Additionally, this case was tried under the clear and convincing evidence standard of Browning, which was expressed by petitioners' counsel and the court as "I either believe it or I don't." A standard inconsistent with the clear and convincing standard. Similarly, a swallowing test was not performed despite evidence that Terri could swallow.