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

In Re: THERESA MARIE SCHIAVO
Incapacitated.

ROBERT and MARY SCHINDLER,
Petitioners,
v.

MICHAEL SCHIAVO,
Respondent.

JURISDICTION BRIEF
OF
PETITIONERS, ROBERT AND MARY SCHINDLER

Petition for Discretionary Review of an Order of
the Second District Court of Appeal Case No 2D02-5394
Affirming the Trial Court's Order of Withdrawal of
Food and Water from an Incapacitated Ward

PATRICIA FIELDS ANDERSON, ESQ.
Fla. Bar No. 352871, SPN 00239231
PATRICIA FIELDS ANDERSON, P.A.
447 Third Avenue North, Suite 405
St. Petersburg, FL 33701
727 / 895-6505; 898-4903 (facsimile)
Attorney for Petitioners

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STATEMENT OF THE CASE AND THE FACTS

This is the third time review has been sought in this Court, but the first time a full evidentiary record concerning the ward's medical condition and prognosis has been present. In February, 1990, Theresa Marie Schiavo ("Terri" or "the ward") collapsed in her home, and interruption of blood flow to her brain resulted in significant brain damage. She left no advance directive expressing her wishes about medical decisions in the event of her incapacity.

Terri Schiavo breathes on her own. She is not on a ventilator or respirator. Although she swallows, she is sustained through a gastric feeding tube. She is not in distress or imminent danger of death.

In November, 1992, Michael Schiavo testified to a Pinellas County jury hearing his medical malpractice claim against Terri's doctors. He made no mention that Terri would rather die than live as a disabled person, but he did testify that he loved his wife and intended to take care of her the rest of her life. The jury awarded significant money to Schiavo, individually and as Terri's guardian. Some eight months later – shortly after he received the verdict money – Schiavo ordered Terri's caregivers not to treat an infection she had developed, in the stated hope she would expire. In the following years up until the present, Schiavo permitted Terri to have no therapy of any kind, whether speech, physical, or any other sort,

aimed at improving her condition.[1]/

In May, 1998, Schiavo filed his petition for withdrawal of feeding and hydration, to which the parents Robert and Mary Schindler ("Petitioners" or "parents") objected. That petition resulted in a bench trial before Hon. George Greer of the Sixth Judicial Circuit in January, 2000. In that trial, Schiavo testified for the first time that years earlier Terri had said at the age of 20 or so that she would not want to be a burden to anyone. Judge Greer found this to be clear and convincing evidence that Terri would want to die rather than live as a disabled person and, further, found her to be in a persistent vegetative state. The following month, Judge Greer entered his first order granting the request to starve and dehydrate Terri.

The parents appealed that order to the Second District Court of Appeal, and appealed its affirmance to this Court, which denied review. *In re Guardianship of Schiavo*, 780 So.2d 186 (Fla. 2d DCA)("*Schiavo I*"), *rev. den*. 789 So.2d 348 (Fla. 2001). Shortly after Terri's death vigil began in the spring of 2001, dramatic new

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[1]/ In November, 2002, the parents discovered a 1991 total-body bone scan report that had been done on Terri some 53 weeks out from her collapse. They presented the report to the trial court, asking for time to do further investigation. The scan showed numerous skeletal irregularities, including a fractured spine, multiple ribs showing signs of injury, and a suspicious area of abnormal ossification on her right femur. The radiologist concluded Terri had a history of trauma; the trial court deemed the report "irrelevant."

evidence surfaced, and Terri's feedings were resumed when the parents filed a motion for relief from judgment, supported by affidavits from seven physicians and health care professionals that Terri is not in a persistent vegetative state and could be helped with proper therapy. Judge Greer denied the motion summarily. The parents again appealed to the Second District, and Schiavo cross-appealed the resumption of the feedings. The Second District reversed and remanded, affording the parents the opportunity to file an amended motion, concluding "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 551, 553 (Fla. 2d DCA 2001)("*Schiavo II*"). Upon remand, Judge Greer again summarily denied the parents' motion without hearing, and the parents again appealed to the Second District. This time, the Second District gave specific instructions as to the format of a mandated evidentiary hearing, an order appealed by Schiavo to this Court, which again denied review. 800 So.2d 640 (Fla. 2d DCA 2001)("*Schiavo III*"), *rev. den.* 816 So.2d 129 (Fla. 2002).

At the evidentiary hearing in October, 2002, six physicians testified for six days, and videotapes of three of the physicians' examination of Terri were

introduced into evidence and are part of the record now. Once again, Judge Greer ordered Terri's death deciding that "cognitive function would manifest itself in a constant response to stimuli," thereby adopting a medical standard inconsistent with Florida's statutory definition of persistent vegetative state. ___ So.2d __, 2002 WL 31817960, *2 (Fla. Cir. Ct. 2002). *See* Fla. Stat. § 765.101(12).

Once again, the parents appealed to the Second District, which affirmed the trial court on an abuse of discretion standard. __ So.2d __, 2003 WL 21295656 (Fla. 2d DCA 2003)("*Schiavo IV*"). The parents timely filed their motion for rehearing, rehearing *en banc* and request for certified question and amended that motion. Upon denial, Petitioners filed their early Notice of Appeal. The Second District stayed issuance of its mandate until 5 p.m. August 25, 2003.

Discretionary jurisdiction is sought pursuant to Art. V § 3(b)(3), § 3(b)(7), and, arguably, § 3(b)(1).

SUMMARY OF THE ARGUMENT

In re Guardianship of Browning, 568 So.2d 4 (Fla. 1990) and its predecessors require that this case be judged by a clear and convincing evidence standard as to all elements necessary to end this young woman's life, including her medical condition and prognosis, especially given the possibility of foul play and neglect and the unified objections of her blood relatives.

ARGUMENT

This is the first case of euthanasia in Florida's reported case law. This case pits two fundamental constitutional rights against each other, and implicates a third,[2]/ in the most tragic circumstances imaginable. Does a disabled young woman who collapsed more than thirteen years ago, who has received no therapy of any sort for years, who survives only on a feeding tube, who is in no distress or imminent danger of death, and who left no advance directive have the inalienable right to continue living, as her parents maintain and as the Florida Constitution guarantees?[3]/ Or may her husband assert her constitutional right of privacy in seeking court approval to stop providing her with food and water? Where, as here, there is an acknowledged sharp conflict among the parties and medical experts

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[2]/ Death is not an ordinary verdict in the civil context, but due process necessarily is implicated where a life will end based on a record of evidentiary conflicts on the fundamental elements of the petitioner's case. *See State v. Klayman*, 835 So.2d 248, 252(Fla. 2003)("We have held that the Due Process Clause of the Fourteenth Amendment forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt.").

[3]/ Article I § 2 of the Florida Constitution, entitled "Basic Rights," provides:

> All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are **the right to enjoy and defend life** and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property;. . . No person shall be deprived of any right because of race, religion, national origin, or **physical disability**.

(emphasis supplied).

about the ward's current medical condition and her prognosis and her wishes, due process and previous holdings of this Court demand that each element necessary to end the ward's life be proved by clear and convincing evidence.

In previous cases involving the withdrawal of a means of medical treatment , the State was a party, seeking to protect society's interest in life. In those cases, the patient's family or friends were in agreement in seeking to end the patient's life. In some of those cases, the patient had executed a written advance directive. *In re Guardianship of Browning*, 568 So.2d 4, 7-8 (Fla. 1990); *Satz v. Perlmutter*, 379 So.2d 359, 360 (Fla. 1980)(". . . **where all affected family members consent**") (emphasis supplied); *Corbett v. D'Alessandro*, 487 So.2d 368 (Fla. 2d DCA 1986); *In re Guardianship of Barry*, 445 So.2d 365 (Fla. 2d DCA 1984). *See also, John F. Kennedy Memorial Hospital, Inc. v. Bludworth*, 452 So.2d 921 (Fla. 1984)(advance directive).

But what are the contours of this constitutional right of privacy, where the patient is merely disabled, unable to communicate her present wishes, and where there is no consensus about her condition or prognosis and where her blood relatives vehemently object to ending her life? The implications of this case have alarmed many disabled persons and organizations, who fear that "quality of life" determinations will be presented to the court masquerading as a "right to privacy"

argument.[4]/ What restraint does the system put on the husband who is tired of having a disabled wife but who refuses to resign as guardian and permit someone else to care for her, someone for whom she would not be a burden?

Apparently sensitive to the potential for abuse, the Legislature has required that a proxy's or a surrogate's decision to forego "treatment" for an incapacitated person – including feeding and hydration – be supported by clear and convincing evidence. *See* Fla. Stat. § 765.401(3). *Browning* itself made clear that substituted judgment as to the withdrawal of a feeding tube must be based on clear and convincing evidence, not just of the patient's wishes, but on the patient's medical condition and prognosis. 568 So.2d at 15 ("A surrogate must take great care in exercising the patient's right of privacy, and must be able to support that decision with clear and convincing evidence."). None of the reported cases involve an intra-family dispute nor conflicting medical opinions about ending the patient's life.

Despite this statutory scheme and this teaching of *Browning*, the Second District instructed the trial court in *Schiavo III* to evaluate the medical evidence and testimony according to a simple preponderance standard and improperly shifted the burden to the parents. *Schiavo III, supra,* 800 So.2d at 645. "On remand, we

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[4]/ Four amicus briefs were filed in support of the parents during the last appeal to the Second District, one of which was from a coalition of disability rights organizations.

permitted the parents to present evidence to establish by a preponderance of the evidence that the judgment was no longer equitable." *Schiavo IV, supra,* 2003 WL 21295656 at *2 (Fla. 2d DCA 2003).

At the evidentiary hearing, the two physicians chosen by the parents (one a neurologist and one a neuroradiologist) both testified that Terri is not in a persistent vegetative state and that medical protocols exist that have improved the condition of other, similar patients. The parents had already submitted affidavits from five other health care professionals to the trial court. The neuroradiologist – with nearly fifty years practicing medicine – testified that certain portions of her brain showed a distinctly more normal appearance in the CT scan done for this hearing, when compared to an earlier scan. The physicians chosen by Schiavo disputed these points. Thus, this record demonstrates a substantial and irreconcilable conflict on a crucial point: her current medical condition and her chances for improvement. Where there is this kind of doubt in the record, Terri's life should not be ended. The Second District's improper use of a preponderance standard of proof in the trial court and an abuse of discretion appellate review standard makes for a lethal combination for the stable but disabled patient, like Terri, who shows no sign of dying on her own, and marks a sharp abandonment of *Browning*'s underlying principles of caution and unanimity.

That *Browning*'s deference to the right of self-determination is not without limits was vividly demonstrated in *Krischer v. McIver*, 697 So.2d 97 (Fla. 1997). In that case, a competent man was before the Court, asking for the right to choose the time and manner of his own death in the future with the assistance of his physician. This Court distinguished its earlier opinions, including *Browning*, and found that "[f]irst, the state has an unqualified interest in the preservation of life." 697 So.2d at 103. The Court found those other interests outweighed the patient's right of privacy. Terri, herself, has a constitutional right not to be put to death just because she's disabled, aside from society's more generalized interest in the preservation of life – especially where she has never been given a chance to get better. This right must be balanced against Schiavo's late-blooming assertion of her right of privacy in such a way as to preserve her life, under these circumstances, but the Second District did not adhere to the protection afforded by the clear and convincing evidence standard.

While this may be the first adjudicated case of intra-family disharmony and contested medical condition to reach this Court, undoubtedly it will not be the last. Inevitably, some other case involving a family's disagreement whether to end the life of a relatively young disabled person will come before this Court.[5/] This Court

[5/] According to the United States Census Bureau statistics for the 2000

(continued...)

should take jurisdiction of the case to correct a manifest injustice and to make clear that Florida does not elevate form over substance, nor has it become a killing ground for the most vulnerable among us.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copy hereof was mailed on this 4th day of August, 2003 to: George J. Felos, Esq., Attorney for Appellee, 595 Main Street, Dunedin, FL 34698.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY this computer-generated jurisdiction brief was prepared in Times New Roman typeface and in 14 point size and otherwise complies with the dictates of the Rules of Appellate Procedure.

PATRICIA FIELDS ANDERSON, ESQ.

[5](...continued)
census, Florida ranks number one in the nation for residents over age 65, with 17.57% of Floridians falling into that category. *See* http://www.census.gov/statab/ranks/rank04.html. Disability is no respecter of age, however, and the Census Bureau estimates some 23.5% – nearly one out of every four – of the 2.2 million non-institutionalized persons of all ages living in the Tampa-St.Petersburg-Clearwater area have some form of disability. *See* http://censtats.census.gov/data/FL/390128280.pdf