

IN THE SUPREME COURT OF FLORIDA

DEPARTMENT OF CHILDREN
AND FAMILY SERVICES

CASE NO.: SC05-
L.T. CASE NO.: 2D05-1300

Petitioner,

v.

MICHAEL SCHIAVO,
IN RE: THERESA M. SCHIAVO

Respondent.

_____ /

DEPARTMENT’S ALL-WRITS PETITION

Pursuant to Florida Rule of Appellate Procedure 9.030(a)(3), in accordance with Article V, section 3(b)(7), Florida Constitution, the Florida Department of Children and Family Services, [hereinafter, “Department”], by its undersigned lawyer, hereby petitions this Court for an order staying or enjoining implementation of the February 25, 2005, order of Pinellas County Probate Court in case 90-2908GD-003 directing removal of nutrition and hydration from Theresa Marie Schiavo, pending the earlier of exhaustion of appellate review of the Probate Court’s March 10 and 14 , 2005, orders denying the Department’s motion for intervention and other relief or the completion of the Department’s statutorily-mandated functions in response to pending abuse reports.

BASES FOR INVOKING JURISDICTION

The Department bases its invocation of this Court's jurisdiction on the all-writs provision of the Florida Constitution, found in Article V, section 3(7), as implemented in 9.030(a)(3), Fla. R. App. P.. This petition is timely in that the Pinellas County Probate Court entered the orders from which the Department took appeal on March 10 and 14, 2005, and because the Second District Court of Appeal entered an order on March 16, 2005, denying the Department's motion for an order staying and/or enjoining removal of nutrition and hydration.

FACT STATEMENT

Arrangements have been made for expedited transcription of the relevant hearings and the Department will provide copies of those transcripts when they are all received.

Late last year, this Court resolved a dispute over the constitutionality of legislation applicable to the ward in this matter, in *Jeb Bush, Governor of Florida, et al. v. Michael Schiavo, Guardian: Theresa Schiavo*, 885 So. 2d 321 (Fla. 2004). The Department's actions before the Probate Court and the issues raised by it in the appeal to the Second District Court of Appeal are new and different.

Mrs. Schiavo has been a ward in proceedings pending before the Pinellas County Probate Court for fifteen years. Her husband, Michael Schiavo, is also her court-appointed guardian in those proceedings.

In an order entered February 11, 2000, the Probate Court found by clear and convincing evidence that Mrs. Schiavo would die in seven to fourteen days upon removal of nutrition and hydration.[Appendix, Exhibit 1]

Mrs. Schiavo is not only the ward in the ongoing guardianship proceedings, she is also the disabled and vulnerable adult named as the victim in abuse reports received by the Department February 18 and 21, 2005, pursuant to Chapter 415, Florida Statutes. Unfortunately, each of those abuse reports is “a report involving a guardian of the person” within the contemplation of section 415.1055(9), Florida Statutes. In accordance with that statutory provision, the Department provided written notice of the abuse reports to the Probate Court. The same February 23, 2005, document in which the Department notified the Probate Court of the abuse reports involving the guardian, *i.e.*, Michael Schiavo, also served as an application for five types of relief before the Probate Court. [Appendix, Exhibit 2]

March 7, 2005, the Department filed an amended document, which, although substantively similar, was entitled: “AMENDED NOTICE TO COURT PURSUANT TO SECTION 415.1055(9), F.S. AND VERIFIED

PETITION/MOTION FOR INTERVENTION, STAY OF ORDER OF THE
PROBATE COURT, PETITION FOR INJUNCTION AGAINST
MICHAEL SCHIAVO AND/OR HIS AGENTS, APPOINTMENT OF
LEAL COUNSEL FOR THERESA MARIE SCHIAVO AND CLOSING
AND SEALING OF THE PROCEEDINGS (IN WHOLE OR PART).”

[Appendix, Exhibit 3] The amended application sought the same five forms of relief as had the original application. That is, they both sought (1) Department intervention, (2) injunction (prohibiting removal of Mrs. Schiavo’s nutrition and hydration), (3) stay (postponing removal of nutrition and hydration), (4) closure and/or sealing (denying or limiting public access to statutorily-designated confidential investigation-information), and (5) counsel appointment (as provided in Chapter 415, Florida Statutes, for Mrs. Schiavo as the named victim in proceedings on abuse, neglect or exploitation reports, as well as in section 744,3215, Florida Statutes).

February 25, 2005, the Probate Court entered an order providing in pertinent part:

“...absent a stay from the appellate courts, the guardian, MICHAEL SCHIAVO, shall cause the removal of nutrition and hydration from the ward, Theresa Schiavo, at 1:00 p.m. on Friday, March 18, 2005.”
[Appendix, Exhibit 4]

In support of its amended application during a hearing on March 9, 2005, the Department advised the Probate Court that it is necessary to utilize

the entire statutorily-prescribed sixty-day investigation-period which will end April 20, 2005. [Section 415.104(4), Florida Statutes.] It further advised the Probate Court that removal of nutrition and hydration will render the Department unable to perform its statutorily-mandated protective investigation and it contended that the Probate Court's refusal or failure to extend the existing stay or grant a new stay until April 20, 2005, would also constitute an unconstitutional encroachment of the Department's authority.

March 10, 2005, the Probate Court entered an order denying the Department's application in its entirety. [Appendix, Exhibit 5] On March 14, 2005, it entered an order correcting the March 10 order's erroneous labeling of the Department's amended application on which the court had been proceeding. [Appendix, Exhibit 6]

On March 11, 2005, the Department filed in the Probate Court a motion seeking a stay of the removal order pending appeal. [Appendix, Exhibit 7]

On March 14, 2005, as time was and still is of the essence, and the Probate Court had not addressed the motion for stay, the Department filed a Notice of Appeal. [Appendix, Exhibit 8] On the same day, it filed in the Second District Court of Appeal a petition for an emergency stay and/or

injunction and for a writ of *certiorari* as well as an emergency motion for expedited review and a stay/and or injunction. [Appendix, Exhibits 9 & 10]

On March 16, 2005, the Second District entered an order denying the motion for an order staying and/or enjoining removal of nutrition and hydration. Although the same order granted all other relief requested in the Department's motion, including expedited handling of the review, the expedited schedule established in the Second District's order has the reply brief due March 31, 2005, the thirteenth day after the deprivation of nutrition and hydration commences. According to the clear and convincing findings of the Probate Court, in the event Mrs. Schiavo is still alive on the day the reply brief is due, she will likely be dead the very next day. [Appendix, Exhibits 1 & 11]

At the writing of this petition, the Probate Court has not exercised its concurrent jurisdiction pursuant to 9.600(a), Fla. R. App. P., to entertain the motion for stay of the removal order pending appellate review.

During the last five full fiscal years the Department has received an average of 38,614 reports to the hotline alleging abuse, neglect or exploitation of disabled or vulnerable adults. During that five-year period, the high was fiscal year ending 06/30/02 with 41, 547 and the low was fiscal year ending 06/30/00 with 35, 519.

The Department has today, March 17, 2005, also filed with the Second District a motion seeking certification pursuant to 9.125, Fla. R. App. P..

RELIEF SOUGHT

The nature of the relief sought in this petition is an emergency stay and/or injunction prohibiting removal of nutrition and hydration pending the earlier of exhaustion of appellate review or the completion of the Department's investigation and any hearing or proceedings based on the findings of that investigation if any is or are warranted.

ARGUMENT AND THE LAW

For purposes of this review, this case involves a disabled, vulnerable adult who is the subject of abuse reports received by the Department's hotline on February 18 and 21, 2005. Section 415.104, Florida Statutes, mandates that upon its receipt of a report alleging abuse, neglect or exploitation of a disabled or vulnerable adult as defined by section 415.102(26), the Department "shall...begin within 24 hours a protective investigation...." Section 415.104(4), Florida Statutes, provides that the Department shall complete each such protective investigation within sixty days.

The legislature has recognized Florida's compelling state interest in detecting and correcting abuse, neglect and exploitation of its disabled and vulnerable adults and the Legislature has vested that duty and the requisite authority in the Department. See section 415.101(2), Florida Statutes. Nothing within Chapter 415, Florida Statutes, permits the Department to ignore, waive or in any other way avoid its protective-investigation duties. See again section 415.104, Florida Statutes, as well as section 415.103, Florida Statutes. Indeed, several other provisions of Chapter 415, Florida Statutes, require coordination of the Department's investigations with law-enforcement personnel, including prosecutors. [See *eg.*, sections 415.104 and 415.106, Florida Statutes.] Just as nothing in the statute relieves the Department of its authority or obligations to investigate abuse reports, nothing in the statute authorizes a court to deny or restrict the Department's ability to perform its statutorily-mandated investigative functions. Indeed, as noted below, such denial or restriction is constitutionally impermissible.

On February 25, 2005, two days after the Department notified the court of its having received abuse reports "involving the guardian" of Mrs. Schiavo, the Probate Court, nonetheless, entered its second order directing the guardian to remove nutrition and hydration from Mrs. Schiavo at 1:00 p.m. on Friday, March 18, 2005, [Appendix, Exhibits 2 & 4] thereby

impermissibly encroaching upon the authority of the Department as an arm of the Executive Branch.

In its February 23, 2005, original NOTICE...AND PETITION/MOTION, in its March 7, 2005, AMENDED NOTICE...AND VERIFIED PETITION/MOTION and during a hearing on the amended petition on March 9, 2005, the Department made it crystal clear that the implementation of the removal order will, without doubt, immediately, directly and irreparably hinder the Department's statutorily-required investigation such that the alleged abuse, neglect or exploitation, if any has occurred or is occurring, may be obscured or rendered undetectable.

At the writing of this petition, the Probate Court has not exercised its concurrent jurisdiction pursuant to 9.600(a), Fla. R. App. P., to entertain the motion for stay of the removal order pending appellate review. Moreover, the Second District has denied the Department's similar motion before it.

[Appendix, Exhibit 11]

Given the fact the stay which the Probate Court ordered will expire at 1:00 p.m. tomorrow, Friday, March 18, 2005, and given the fact that the Second District's expedited briefing schedule does not have the reply brief due until the thirteenth day after the nutrition and hydration deprivation commences, the disabled and vulnerable adult who is the subject of the

pending investigation will likely be dead before the reply brief is due to the Second District and she may indeed be dead before the answer brief is due. All the while, as she begins to die at removal if it occurs tomorrow, the Department's ability to conduct its investigation will be irreparably hindered.

Over the years while Mrs. Schiavo has been a disabled and vulnerable adult the Department has in the past received abuse reports alleging that she had been abused, neglected or exploited. The Department completed its statutorily-mandated protective investigation on each such report within the time prescribed by law, *i.e.*, sixty days from its receipt of the abuse report pursuant to section 415.104(4), Florida Statutes. Upon completion of its protective investigation on every one of those prior abuse reports, the Department did not perceive the need to put protective services in place, either through a voluntary plan or through judicial intervention. In these new reports, however, new allegations never having previously been made to the Department require thorough investigation. The investigation is well underway but it is not complete and no findings have yet been made. It would be a travesty for the Department to be unable to complete its investigation while the subject of the investigation is slowly starved and

dehydrated to death; a death the right of which may be important to the Department's investigation.

In Amendments to Florida Rule of Criminal Procedure

3.853(d)(1)(A); *Dean C. Wilson, et al. v. State of Florida*, 857 So. 2d 190 (Fla. 2003), Justices Anstead, Pariente, Lewis and Quince in their concurring opinion in an order on an all-writs petition wrote:

Because such a result would render these proceedings moot and in effect preclude this Court, should it determine it has jurisdiction, from the “complete exercise” of thereof, the deadline...is hereby held in abeyance while this Court considers its jurisdiction and other matters before it. See art.V, §3(b)(7), Fla. Const. By our actions herein, we express no opinion on the merits of the underlying petitions. [857 So. 2d at 190]

Likewise, the Department seeks an abeyance. However, it seeks abeyance not of a statutory deadline pertaining to evidence-preservation but rather of a lower court order pertaining to preservation of evidence in the form of the viable life of the person who is the subject of its abuse investigation.

Separation of Powers has been an issue in some of the *Schiavo* line of cases. In the previous cases, this Court and others considered whether the Executive Branch had unconstitutionally encroached upon the authority of the Judiciary. In *Bush v. Schiavo*, the Supreme Court, quoting this Court, wrote:

As the Second District noted in one of the multiple appeals in this case, we “are called upon to make a collective, objective decision

concerning a question of law. Each of us, however, has our own family, our own loved ones, our own children....But in the end, this case is not about the aspirations that loving parents have for their children. Rather, as our decision today makes clear, this case is about maintaining the integrity of a constitutional system of government with three independent and coequal branches, none of which can either encroach upon the powers of another branch or improperly delegate its own responsibilities. [885 So. 2d at 336-337; internal citations omitted]

In contrast, here, where the statute prescribes a sixty-day period for investigation of abuse reports, the Department contends that a judicial order cutting short that period is an impermissible encroachment by the Judicial Branch on the Executive Branch.

In short, the Department respectfully contends that the Pinellas County Probate Court's March 10 and 14, 2005, orders denying the Department's requested relief constitute an unconstitutional encroachment of Department authority which, under the unique circumstances of this case, will result in material harm that cannot be remedied by appeal absent an order postponing nutrition-and-hydration removal until after the Department is given the statutorily-prescribed time to complete its statutorily-mandated functions in response to the abuse reports. Respectfully, the Department further contends that the Second District's denial of the motion seeking an order staying and/or enjoining the removal furthers that violation of Florida Constitution Article II, section 3.

Respectfully submitted,

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**CERTIFICATES OF SERVICE
AND
FONT-REQUIREMENTS COMPLIANCE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Suggestion has been furnished by facsimile and hand-delivery to these persons:

GEORGE J. FELOS, Esquire, 595 Main Street, Dunedin, FL, 34698-4998; DAVID CHARLES GIBBS, Esquire, 5666 Seminole Boulevard, Suite 2, Seminole, FL, 33772-7328; GYNETH S. STANLEY, Esquire, 1465 South Fort Harrison Avenue, Suite 202, Clearwater, FL, 33756; HAMDEN H. BASKIN, III, Esquire, 13577 Feather Sound Drive, Suite 550, Clearwater, FL, 33762-5527; DEBORAH A. BUSHNELL, Esquire, 204 Scotland Street, Dunedin, FL, 34698; JOSEPH MAGRI, Esquire, 550 North Rio Street, Suite 301, Tampa, FL 33609-1037; and GREGG D. THOMAS, Esquire, P.O. Box 1288 Tampa, FL 33501-1288 on this 17th day of MARCH, 2005.

I ALSO HEREBY CERTIFY that this petition was prepared, served and submitted in Times New Roman 14-point font.

JAMES BRUNER, Esquire