

IN THE SUPREME COURT
STATE OF FLORIDA

FLORIDA DEPARTMENT OF
CHILDREN AND FAMILIES,
Petitioner on review

S. Ct. No. _____
2D05-_____
L.T.N. 90-2908GD-003
(Pinellas Probate Division)

v.

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

v.

Emergency Relief Sought

ROBERT SCHINDLER and
MARY SCHINDLER

_____ /

**MOTION TO REVIEW DENIAL OF STAY AND VACATUR
OF AUTOMATIC STAY PURSUANT TO FLA. R. APP. P. 9.310(f)**

Comes now the Florida Department of Children and Family Services [hereinafter, "Department"] through undersigned counsel, and files this motion, pursuant to Florida Rules of Appellate Procedure 9.310(f), to reinstate the automatic stay afforded by Florida Rules of Appellate Procedure 9.310(b)(2), and to review the denial of stay by the Second District Court of Appeals. Without a stay, vital issues cannot be reviewed on the merits due to the impending death of Mrs. Schiavo. This Court's jurisdiction is discussed below in paragraph four.

FACTUAL BACKGROUND

1. The Circuit Court, on March 23, 2005, issued an injunction to the Department, attached here as Exhibit A. The injunction was issued upon oral, very short notice and apparently without any affidavits or sworn evidence being

taken or even a written application. The Department filed a notice of appeal from this injunction on March 24, 2005, at which time Judge Greer dissolved the automatic stay afforded by Florida Rules of Appellate Procedure 9.310(b)(2). That Order dissolving the automatic stay is attached as Exhibit B.

2. The Department sought review of the order dissolving the stay in the Second District Court of Appeals. The Department sought for the automatic stay to be re-invoked, or alternately asked the District Court to enter a stay de novo. The District Court denied relief on March 24, 2005 in an Order attached hereto as Exhibit C.

3. The injunction against the Department was entered because the Department filed a statutory notice pursuant to 415.1055, Florida statutes, seeking to conduct its statutory duties involving a disabled adult for whom allegations of abuse were received. The Circuit Court ruled against the Department in a separate Order that is the subject of a separate review. The statutory Notice filed by the Department is attached hereto as Exhibit D.

4. This Court possesses jurisdiction over this motion for stay because it is the Circuit Court's usurpation and abrogation of the legislatively-ordained duties of the Department under section 415.1055 that will be adjudicated, on the merits, upon review. Those merits upon review have not been heard yet by the Second District. The stay is necessary in support of this Court's jurisdiction, because without a stay the ward will die quite soon, mooting and precluding from review the entire constitutional issue relating to the Circuit Court misuse of its authority, in derogation of that of the legislature and executive. This stay motion simply seeks to keep the status quo and permit this real issue of misuse of judicial authority to be reviewed. No reason exists to cause the ward's death before this important issue is litigated.

This Court's jurisdiction on the merits lies on several grounds. First, under Fla. R. App. P. 9.030(a)(1)(A)(ii), this Court has appellate jurisdiction relating to an opinion of the District Court declaring invalid a statute. Although the District Court has not made such a ruling, one is anticipated and even a District Court affirmance without opinion of Judge Greer's Order on the merits has the effect of rendering the statute invalid as to Theresa Marie Schiavo. The exigencies of the case do not permit movant to wait on the District Court, as the ward may die first. To affirm the Circuit Court in this regard would require the District Court to hold that the Department cannot exercise its statutory authority to assess and provide services to this disabled adult, in effect excising or overturning the statute for this case.

This Court's jurisdiction on the merits also is within its discretionary jurisdiction, pursuant to Rule 9.030(a)(2)(A)(iii), as the injunction of the Department, and the arrogation of the Department's legislatively-mandated duties by the Circuit Court, expressly affects (indeed neuters) a class of state officers. Hornbook law states that "it is a fundamental general principal that the judiciary may not encroach upon or usurp the executive function." 10A Fla. Jur.2d Constitutional Law sec. 169 (2005); see, Palm Beach County Sheriff v. State, 854 So.2d 278 (Fla 4th DCA 2003)(ordering DCF to reimburse Sheriff for expenses interferes with legislative and executive agency discretion - Circuit Court exceeded its authority). Judge Greer has violated this canon of Florida jurisprudence and this Court possesses discretionary jurisdiction to right the error. Only a stay can permit eventual review of this issue.

This Court further possesses original jurisdiction under its All Writs powers, and under its powers to afford habeas corpus relief. Rule 9.030(a)(3). Indeed, under its extraordinary jurisdiction this Court in the past has quashed Circuit Court injunctions of executive branch members when the lower court overstepped its

bounds and interfered with executive/legislative authority. E.g., Webb v. Hill, 75 So.2d 596 (Fla. 1954).

The Nature of the 415.1055 Notice That Judge Greer Enjoined

Since receiving allegations on its hotline of abuse of the ward, the Department has conducted an investigation. The affidavit of William Cheshire, M.D., attached to the Notice, describes the nature of this investigation. Cheshire is a distinguished, Board Certified neurologist. The Department and Dr. Cheshire discovered, for example, that Mrs. Schiavo has been recently treated with morphine for pain related to menstrual periods and toothaches. *Pain treatment is inconsistent with persistent vegetative state.* Dr. Cheshire's detailed affidavit describes the high likelihood that Mrs. Schiavo is not in persistent vegetative state; the Department has a statutory duty to investigate potential mistreatment of disabled adults. The Department's Notice is the first step in this process. The Circuit Court, weary of this litigation and desiring finality, ended this process before it has begun. This weariness caused it to act beyond its powers, and abuse its discretion in a way that violates the separation of powers principles of Florida law.

If a stay issues, and the appeal goes forward, this appeal involves two important issues of law: 1) whether Judge Greer properly enjoined the Department; and 2) whether the injunction and interference with the Department's lawful duties pursuant to Fla. Stats. 415.1051 impermissibly violates the separation of powers between the legislative branch and the judicial branch. Art II, Sec. 3, Florida Constitution.

The Department is charged by Florida statute with carrying out its duties under 415.1051. The constitutional issue of whether the Circuit Court has impaired legislative intent by precluding operation of 415.1051 and 425.102(26) is an important one. The Legislature has said that Mrs. Schiavo is entitled to this

investigation, and the Department should carry it out. Judge Greer has ordered to the contrary, in effect re-writing the statute book in the interest of speed and finality of judgment. The interest of a speedy resolution is an unworthy one, given that what is at stake goes beyond the life of one ward, to the question of unconstitutional encroachment upon legislative/administrative authority.

Without a stay, a disabled adult will become ineligible for Department services, which she is entitled to under statute. At a very minimum she is entitled, per statute, to a proper investigation of abuse claims received by the Department. Moreover, and equally important, the constitutional issue arising under the Florida Constitution will be incapable of review. Accordingly, the Department hereby moves to reinstate the automatic stay pursuant to Fla. R. Civ. P. 9.310(b)(2). Alternately, it prays this Court to reverse the Second District's denial of a stay de novo.

RESPECTFULLY SUBMITTED,

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CERTIFICATE SERVICE AND FONT REQUIREMENTS

I hereby certify that the petition was prepared using Times New Roman 14 point font.

I hereby certify that the foregoing was served by fax and US. Mail to George Felos, 595 Main St., Dunedin Fla. 34698; David Gibbs, 5666 Seminole Blvd. Ste. 2, Seminole Fl. 33772; Gyneth Stanley, 1465 S. Ft. Harrison Avenue

Ste 202, Clearwater, Fl. 33756; Hamden Baskin, 13577 Feather Sound Drive Ste 550, Clearwater, Fl. 33762, Deborah Bushnell, 204 Scotland St, Dunedin, Fl. 34698; Joseph Magri, 550 N. Reo St, Ste. 301, Tampa, Fl. 33609; Greg Thomas, P. O. Box 1288 Tampa, Fl. 33601 on this 24th day of March, 2005.
