IN THE CIRCUIT COURT FOR PINELLAS COUNTY, FLORIDA
PROBATE DIVISION
File N. 90-2908GD-003

In re: THE GUARDIANSHIP OF
THERESA MARIE SCHIAVO,
Incapacitated.

MICHAEL SCHIAVO
Petitioner,

v.

ROBERT SCHINDLER and
MARY SCHINDLER,
Respondents.

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RESPONDENTS' FLA. R. CIV. P. 1.540(b)(5) MOTION FOR RELIEF FROM JUDGMENT PENDING CONTEMPORARY MEDICAL/PSYCHIATRIC/REHABILITATIVE EVALUATION OF THERESA MARIE SCHIAVO

Respondents Robert and Mary Schindler, as interested persons in the welfare of their daughter and the ward herein, Theresa Marie Schiavo, by and through undersigned counsel, pursuant to FLA. R. CIV. P. 1.540(b)(5), and hereby move the Court for relief from its final Order rendered February 11, 2000, in the above-entitled adversary proceeding pending contemporary medical, psychiatric, neurological, and rehabilitative evaluation of Theresa

Marie Schiavo. As grounds for this Motion, Respondents show the following.

I. Mrs. Schiavo's previous evaluations are out-dated

1. Between February 1990 and early 1994, Mrs. Schiavo was examined and evaluated by health-care professionals to determine her diagnosis and prognosis. Since early 1994, Mrs. Schiavo has received only sketchy medical examinations. She has had no treatments or procedures the purpose of which was to ameliorate or rehabilitate her mental and physical condition.

2. In 2000, more than five years ago, Mrs. Schiavo was found by this Court to be in a persistent vegetative state ("PVS"). (Order, February 11, 2000) (Exhibit 1).

3. Three years ago, Mrs. Schiavo was further evaluated by doctors selected by the parties and by this Court and an evidentiary hearing was conducted during which conflicting testimony concerning Mrs. Schiavo's diagnosis and prognosis was elicited. The Court again found that Mrs. Schiavo was in PVS.

4. Less than one-and-a-half years ago, Chief Judge David Demer, Florida 6th Judicial Circuit, appointed Dr. Jay Wolfson, DrPH, JD, as Mrs. Schiavo's guardian ad litem for purposes of advising Florida Governor Jeb

Bush "as to whether the Governor should life the stay that he previously entered." (Dr. Jay Wolfson, "A Report to Governor Jeb Bush and the 6th Judicial Circuit In The Matter of Theresa Marie Schiavo," December 1, 2003). (Exhibit 2).

5. A little over a year ago, Chief Judge David Demer, Florida 6th Judicial Circuit, appointed Dr. Jay Wolfson, DrPH, JD, as Mrs. Schiavo's guardian ad litem for purposes of advising Florida Governor Jeb Bush "as to whether the Governor should life the stay that he previously entered." In his report, Dr. Wolfson advised the Governor that "[t]here is feasibility and value in swallowing tests and swallowing therapy being administered" to Mrs. Schiavo. *Id.*.

6. No swallowing tests were conducted and Mrs. Schiavo was provided with no swallowing therapy to determine whether she could eat food by natural means.

7. It has been at least three years since Mrs. Schiavo's mental and physical condition has been exhaustively evaluated by health-care professionals. It has been some eleven years since she has been provided with any rehabilitation services or any care whose focus was to improve her condition. Since approximately 2000, Mrs. Schiavo has received only the

barest essentials in health care—she is assisted in her eating and drinking by a gastronomy tube inserted during her meal times.

8. She receives no rehabilitation, no socialization, no therapy, little communication, and in a room by herself, without family pictures, sometimes without light. In essence, she has resided, sensory deprived, in astonishingly good health in light of her neglect, with her food and water being provided to her through a tube that has been twice withheld from her and that is at all times threatened with immediate permanent removal.

9. Despite being deprived of food and water for a total of eight days, the strong and plucky Mrs. Schiavo has defied health-care professionals by living well beyond the years statistics show that patients in PVS typically live. It is 2005 and common decency dictates that she be carefully and fully reevaluated and tested using 2005 medical procedures and technology before she is allowed to die because she just must have help in eating. She is entitled to have the chance to relearn to eat and drink on her own, before medical data that is years old is used as a basis to once again discontinue the provision of her food and water based upon an order that is now over five years old.

II. There is a high rate of misdiagnosis of persistent vegetative state.

10. Even Petitioner's expert, Dr. Ronald E. Cranford, testified in 2002 that "there has been concerns [*sic.*] about the misdiagnosis of a vegetative state, both in terms of false positives and false negatives." (2002 Tr. 1098). He admitted that there are occasions when a patient may be diagnosed as being "in a vegetative state. They'll never recover and then later, six months or a year longer they start recovering and they recover a lot." 2002 (Tr. 1099). Another misdiagnosis he was concerned about was in diagnosing a person as being "in a vegetative state and you examine them and find out they're not in a vegetative, they're really minimally conscious or they have more interactivity with their environment or they're even locked in. . . . So obviously diagnosing a patient being in a vegetative state where they're unconscious versus a patient who is locked in who is fully conscious would be a drastically terrible thing to do." (2002 Tr. 1099-1100, Exhibit 3).

11. Dr. Joseph Fin, chief of the medical ethics division of New York Presbyterian Hospital Weil-Cornell Medical Center, stated this month that "one study found that as many as 30 percent of patients identified as being unaware, in a persistently vegetative state, were not. They were

minimally conscious." Benedict Carey, *New Signs of Awareness Seen in Some* N.Y.TIMES, February 8, 2005, at 1A) (Exhibit 4).

12. A 1993 study published in the *Neurology* Journal found the misdiagnosis rate to be as high as 37 percent. N.L. Childs, W.N. Mercer, and H.W. Childs, "Accuracy of diagnosis of persistent vegetative state," NEUROLOGY, 1993;43:1465-1467. (Exhibit 5).

13. A study conducted by the director of medical services, the senior clinical psychologist, and two senior occupational therapists of the Royal Hospital for Neurodisability in London, England, resulted in the distrubing finding that "[o]f the 40 patients referred as being in the vegetative state, 17 (43%) were considered as having been misdiagnosed; seven of these had been presumed to be vegetative for longer than one year, including three for over four years. Most of the misdiagnosed patients were blind or severely visually impaired. All patients remained severely physically disabled, but nearly all were able to communicate their preference in quality of life issues--some to a high level." Keith Andrews, Lesley Murphy, Ros Munday, Claire Littlewood, "Misdiagnosis of the vegetative state: retrospective study in a rehabilitation unit," BMJ, 1996;313:13-16 (6 July) (Exhibit 6).

14. Respondents contend that their daughter has either been misdiagnosed as having no prospect of recovery or improvement or that she has now moved out of that state and into a minimally conscious or locked-in state, and that her continued disability the result of the unconscionable neglect she has suffered at the hands of the guardian.

II. Some severely brain-damaged patients do improve.

15. This month, the nation rejoiced with Sarah Scantlin's family when she began to speak during a speech therapy session for the first time since she was injured in 1984.

16. Sarah's doctor, Bradley Scheel, believes that she is now able to speak because "critical pathways in the brain may have regenerated." *Break of silence is golden after 20 years,* USA TODAY, February 14, 2005, at 4A. (Exhibit 7).

17. Respondents have become acquainted with several people who have survived medical events such as the one Mrs. Schiavo suffered but who, through intense, years-long rehabilitation have made significant recoveries.

18. One such woman, deprived of oxygen flow to her brain for 7 minutes and declared "brain dead," relates to Respondents her ability

> to hear voices, music, but one thing that really stood out were the bedside doctor debates. Sometimes it seemed like shouting

> matches were going on. My parents said that the doctors, armed with a lot of data (brain scans) said that I was in a persistent vegetative state, and that they should be realistic. The doctors had suggested harvesting my organs before the deteriorated. My brother said that I began to cry upon hearing this.

(Letter dated 25 March 2001 to the Schindler Family) (Exhibit 8). This young lady recovered, went on to graduate from Loyola Marymound University in Westchester, California, last year and is now ministering to families with children or loved ones on life support.

19. Respondents contend their daughter has retained, despite her medical, therapeutic, rehabilitative, and cognitive neglect, her ability to respond to them. They also contend that with proper therapy and rehabilitation, she too could improve and be able to communicate to the Court for herself her end-of-life wishes.

III. Mrs. Schiavo has moved into a "minimally conscious state" since her 2002 evaluations three years ago.

20. In 2002, neurologists defined a new diagnostic brain state—the minimally conscious state. The recognition of this newly-defined brain state by neurologist and other mental health care professionals occurred within months of when the last Rule 1.540(b)(5) medical motion was being tried in October 2002.

21. The minimally conscious state is defined as "a condition of severely altered consciousness in which minimal but definite, behavioral evidence of self or environmental awareness is demonstrated." NEUROLOGY 2002;58:349-353, 350-351. (Exhibit 9).

22. The distinctions between the persistent vegetative state and the minimally conscious state are critical in making decisions for the patient, such as "those regarding changes in level of care, disputed treatment decisions, and withdrawal of life-sustaining treatment." *Id.*, 352.

23. Clinical judgments of patient's level of consciousness are difficult and must take into account "sensory deficits, motor dysfunction, or diminished drive [that] may result in underestimation of cognitive ability. . . . It is necessary to exclude aphasia, agnosia, apraxia, or sensorimotor impairment as the basis for nonresponsiveness, as opposed to diminished level of consciousness." *Id.*, 351.

24. A late 2004 editorial by neurologists Drs. Joseph J. Fins and Fred Plum cautions that in their practice of diagnosing their patients

> [n]eurologists . . . have a responsibility to engage in careful diagnostic assessment and to keep abreast of developments that can help distinguish the permanently unconscious from those who may retain some degree of awareness and become capable of meaningful interaction and communication. An important distinction to be made clinically is that between the vegetative and minimally conscious states. Without careful assessment these brain states can be confused and conflated; there can be

> errors of commission from misdiagnosis or omission when patients progress into a minimally conscious state without anyone noticing.

ARCH NEUROL 2004; 61:1354-1355. (Exhibit 10).

25. It is critical to determine whether Mrs. Schiavo has moved from a persistent vegetative state into a minimally conscience state because such minimally conscious patients, "while severely impaired in terms of consciousness, have some definite, but extremely limited, awareness of self or environment, and limited means of communication. They are able to experience paid and suffering to some degree, although often the actual degree of pain and suffering cannot be determined." WEST J MED, 2002; 176:129-130, 129. (Exhibit 11).

26. This Court's 2000 Order authorizing the termination of Mrs. Schiavo's assisted feeding was based upon the Court finding in 2000 that Mrs. Schiavo was in a persistent vegetative state with "no hope of ever regaining consciousness and therefore capacity;" that "she has been totally unresponsive since lapsing into the coma almost ten years ago, and that "under the present circumstances" she would want to die.

27. One doctor who has reviewed Mrs. Schiavo's medical records and a videotape of Mrs. Schiavo declares under penalty of perjury that

> 4. "Ms. Schiavo is not in a persistent vegetative state. Based on the fact that Ms. Schiavo can look around, smile, and

> make verbalizations, it is my opinion that she is not in a persistent vegetative state.
> 5. Since the time of the original court's fuling in the Terri Schiavo matter, a new neurological entity has, subsequently, been defined. This entity is known as the "minimally conscious state." (MCS). . . .
> 6. The new diagnostic bran-damaged category clearly indicates that Terri Schiavo should be re-evaluated for the correct diagnosis, (MCS).

(February 22, 2005, Declaration of Dr. Jacob Green, M.D., Ph.D.) (Exhibit 12).

28. Another doctor, an expert in the area of Decision-Making Capacity, has reviewed material concerning Mrs. Schiavo, and is willing to evaluate her "to detemine whether or not she has emerged from the Minimally Conscious State; and, if so, whether her answers can be considered consistent; and if so, what her wishes are for future care and treatment." (February 22, 2005, Declaration of Dr. Stanley A. Terman, M.D., Ph.D). (Exhibit 13).

29. If Mrs. Schiavo has moved into a minimally conscious state, the circumstances upon which this Court's 2000 Order are based have changed and it would be no longer equitable to enforce it by permitting the guardian to discontinue her life support.

IV. A new neurological test can determine whether Mrs. Schiavo is minimally conscious.

30. In the 2002 medical evidentiary hearing, three doctors testified that there was no test at that time that would confirm that a patient has inner awareness. (See 2002 hearing transcript vol. V, page 813, lines 4-7 (Dr. Bambakidis); vol. VI, page 982, lines 11-16 (Dr. Greer); and vol. VII, page 1228, lines 1-8 (Dr. Cranford), attached hereto). (Exhibits 3 and 14).

31. New brain imaging technologies for detecting the cognitive abilities of a patient are now available. "Several brain-imaging techniques are now available to prove the underlying mechanisms of neurological disorders." ARCH NEUROL 2004; 61;1357-1360, 1358. (Exhibit 15).

32. The fMRI is also "very useful in determining the level of functioning in brain-damaged patients." (February 22, 2005, Declaration of Dr. Philip Kennedy, ¶ 6). (Exhibit 16).

33. In the February issue of NEUROLOGY (2005;64:514-523), Doctors Schiff, Rodriguez-Moreno, Kamal, Kim, Giacino, Plum, and Hirsch published a study that reveals a new diagnostic method of discerning the cognitive level of patients in a minimally conscious state. (Exhibit 17).

34. This study used functional magnetic resonance imaging (fMRI) "to investigate cortical responses to passive language and tactile stimulation

in two male adults with severe brain injuries leading to minimally conscious state (MCS) and in seven healthy volunteers." *Id.*

35. The study results revealed that the MCS patients had brain activity that was remarkably similar to their healthy counterparts when they were subjected to "auditory stimulation with personalized narratives."

36. The conclusion of the professionals conducting the study was that "some MCS patients may retain widely distributed cortical networks that serve language functions with potential for cognitive and sensory function despite their inability to follow simple instructions or communicate reliably." *Id.*

37. In addition to the fMRI, "there are several other recent advances in medical treatment and technology, which may benefit Terri Schiavo. There are newer technologies since what was available in 2002 that will allow us to determine if Terri Schiavo can be assessed for signs of cortical function." (Exhibit 16).

38. The new brain imaging technology must be added to new clinical assessments of Mrs. Schiavo to obtain as accurate picture as possible of her cognitive ability, including her ability to communicate with her family as well as feel the pain that would accompany being starved and dehydrated to death. "Neurological diagnosis should not simply be a reflection of the

practitioner's state of mind but the product of disciplined clinical assessment that is complemented by newly available imaging studies." (Exhibit 10).

V. Therapeutic methods developed since 2000 may help Mrs. Schiavo learn to swallow.

39. A new therapy has been developed that can help patients who cannot swallow. The approach, called VitalStim, was approved by the Federal Drug Administration in the last three years.

40. VitalStim uses small electrical currents to stimulate the muscles responsible for swallowing and has proved to be extremely successful in teaching individuals with dyspahagia to relearn to swallow. *VitalStim: An Exciting New Therapy, proven and painless.* http://www.vitalstimtherapy.com/aboutvs.asp?section=mp. (Exhibit 18).

41. Mrs. Schiavo should be permitting the opportunity to receive VitalStim therapy to help her to relearn how to swallow before her assisted nutrition and hydration is discontinued.

VI. Mr. Schiavo testified that he would want Mrs. Schiavo to receive any treatment that would help her.

42. Respondents feel confident that the guardian will join with them in seeking this Court's authorization to explore whether the new technologies and therapies described above can benefit Mrs. Schiavo. During the 2000 trial, he assured the Court that if he learned of a treatment

that would benefit his wife and ward, he would eagerly pursue the technology for her.

Q Are you aware of any treatment anywhere that can help Terri?

A There is no treatment anywhere that can help Terri. No.

Q. If there were, what would you do?

A I would be there in a heartbeat.

(2000 Trial Tr. 898-899). (Exhibit 19).

The heartbeat has arrived and Respondents would ask the guardian to keep his word and permit Mrs. Schiavo to be reevaluated using 2005 technologies and procedures. In light of the new medical advances that have occurred since Mrs. Schiavo was last diagnosed, it would now be inequitable for the court's 2000 Order to be executed upon medical data that is out-moded and out-dated.

Wherefore, Respondents respectfully request this Court:

a. To relieve them and Mrs. Schiavo from the 2000 order that authorizes the guardian to discontinue Mrs. Schaivo's assisted feeding without further and contemporary examinations, testing, and evaluation to determine that the 2000 and 2002 diagnoses of persistent vegetative state remains to be fact; and

b. If the further testing and evaluation indicates that Mrs. Schiavo's condition has changed since 2002, then to permit an evidentiary hearing to determine if, under the new circumstances, Mrs. Schiavo would still wish to refuse her assisted feeding.

Respectfully submitted,

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