

**IN THE CIRCUIT COURT FOR PINELLAS COUNTY, FLORIDA
PROBATE DIVISION
File No. 90-2908-GD-003**

**IN RE: THE GUARDIANSHIP OF
THERESA MARIE SCHIAVO,
Incapacitated.**

MICHAEL SCHIAVO,
Petitioner,

vs.

**ROBERT SCHINDLER and MARY
SCHINDLER,**
Respondents.

ORDER

THIS CAUSE came before the Court for hearing on March 8, 2005, for determination of the facial sufficiency of Respondents' Fla. R. Civ. P. 1.540(b)(5) Motion for Relief from Judgment Pending Contemporary Medical-Psychiatric-Rehabilitative Evaluation of Theresa Marie Schiavo. The Respondents move the Court for relief from its final Order rendered February 11, 2000, based on several contentions: (1) that her prior evaluations are out-dated and that she is entitled to be reevaluated using 2005 medical procedures and technology; (2) that there is a high rate of misdiagnosis of persistent vegetative state and that some severely brain-injured patients do improve; (3) that she is no longer in a persistent vegetative state but that she has moved into a "minimally conscious state" since her 2002 evaluations; (4) that a new neurological test can determine

whether she is in a minimally conscious state (MCS); (5) that therapeutic methods developed since 2000 may help her learn to swallow; and (6) that her guardian testified that he would want her to receive any treatment that would help her. The Respondents further request that if further testing and evaluation indicates that her condition has changed since 2002, that an evidentiary hearing should be permitted to determine if she would still wish to refuse her assisted feeding.

Attached to Respondents' motion are this Court's February 11, 2000 Order; the guardian ad litem Jay Wolfson's report; pages of prior applicable testimony; reports in the media about brain-injured patients; and reports in medical journals of applicable studies and new diagnostic tools. Respondents' motion is also accompanied by thirty-three affidavits from doctors in several specialties, speech pathologists and therapists, and a few neuro-psychologists, all urging that new tests be undertaken.

The Court heard argument from David C. Gibbs, III, Esq., for the Respondents, and from George J. Felos, Esq., for the Petitioner.

In *In re Guardianship of Schiavo*, 800 So.2d 640 (Fla. 2d DCA 2001) (*Schiavo III*), the Respondents argued that Terri Schiavo's medical condition in February 2000 was misrepresented to the trial court and that she was not in a persistent vegetative state, among other things, and attached several affidavits from doctors, which varied in their bases and suggestions. Dr. Webber's affidavit, which was closely examined by the appellate court, claimed that she was not in a persistent vegetative state and that she exhibited purposeful reaction to her environment and that he might be able to restore her ability to speak and otherwise restore her cognitive function. The Second District Court of Appeal stated, "when numerous doctors dispute the diagnosis of persistent vegetative state based on the records

available to them, it is difficult for judges untrained in any medical specialty to summarily reject their opinions without additional evidence.” The appellate court then discussed the burden the Respondents faced to show that the initial judgment is no longer equitable.

“To meet this burden, they must establish that new treatment offers sufficient promise of increased cognitive function in Mrs. Schiavo’s cerebral cortex—significantly improving the quality of Mrs. Schiavo’s life—so that she herself would elect to undergo this treatment and would reverse the prior decision to withdraw life-prolonging procedures.” *Schiavo III* at p. 645.

As a result of this opinion, a new evidentiary hearing on Terri Schiavo’s condition was conducted in October 2002 and current diagnostic testing procedures and high quality brain scans were undertaken, the results of which were presented to this Court along with evidence of any new medical procedures that would significantly improve the quality of her life. The Order from the 2002 trial reflects the Court’s Order that Terri Schiavo remained in a permanent or persistent vegetative state and that no treatment existed that would significantly improve the quality of her life so that she would reverse the prior decision to withdraw life-prolonging procedures. This Order was affirmed by the Second District Court of Appeal after they closely examined all the evidence in the record and concluded that if they were called upon to review the decision de novo, they would still affirm it. *In re Guardianship of Schiavo (Schindler v Schiavo)*, 851 So.2d 182 (Fla. 2d DCA 2003) (*Schiavo IV*).

Respondents are now again asking the Court to once again determine whether Terri Schiavo remains in a permanent or persistent vegetative state since 2002. Significantly, they are not alleging that any new treatment exists that would significantly improve the quality of her life so that she would

reverse the prior decision to withdraw life-prolonging procedures. They are arguing that a new diagnostic tool, the fMRI, has been developed that is useful in recording brain activity in patients who are in a minimally conscious state. They also allege that the VitalStim swallowing therapy would benefit Terri and they cite patient Sara Scantlin who regained partial ability to speak after being in a coma for many years as a case study showing the improvement possible for severely brain-injured patients.

The Court cannot see how the Respondents have met the burden established by *Schiavo III*. Most of the doctor affidavits submitted are based on their understanding of Terri's condition from news reports or video clips they have seen. Many are obviously not aware of the medical exams undertaken for the 2002 trial since they suggest the very tests that were given at that time or appear to be unaware that batteries of tests have been given at all. Others recommend that the new fMRI test be given since they believe that Terri is not in a permanent or persistent vegetative state based on the available video footage but that she must be in a minimally conscious state or even better. The video footage referred to is either, a portion of, or all of the 4½-hour videotape that was examined at the 2002 trial and was part of the basis of the Court's decision that she remained in PVS, which was affirmed by the Second District Court of Appeal. The minimally conscious state was discussed at some length with witnesses at the 2002 trial so it is certainly not new. According to the article in *Neurology*, the fMRI was employed in a study that showed that some MCS patients may retain widely distributed cortical systems with potential for cognitive and sensory function despite their inability to follow simple instructions or communicate reliably. One of the Respondents' affiants cautions that fMRI testing is an experimental procedure that has shown promise but is not yet routinely used

for clinical purposes and that any fMRI testing should be conducted in an academic setting with ongoing research protocols investigating coma/Vs/MCS. Petitioner contends that no MRI can be conducted on Terri Schiavo without brain surgery to remove a device that was previously inserted in her brain and that such an invasive procedure has not been previously favored. A few of the other affiant doctors have appeared in this case before and their diagnoses and recommended courses of treatment have been previously considered. Although all of the affiants urge that new tests be given, most are vague as to the course of treatment that should be given, while other suggest treatment that has already been considered (e.g., hyperbaric oxygenation). Both sides have cited guardian ad litem Wolfson's report in which he found the evidence of PVS to be compelling.

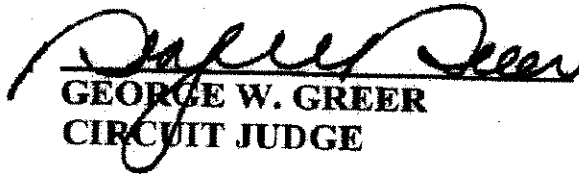
In regard to swallowing tests, she has previously undergone them. The issue of swallowing saliva has also been previously heard by the Court. The Respondents and some of the affiants, notably speech pathologists or therapists, have recommended the swallowing therapy called VitalStim, but notably there has been no allegation that VitalStim can be performed on patients who are in PVS. Dr. Wolfson also recommended such swallowing tests, but only if the parties agreed. Without an agreement to be bound by the results, he suggested that those tests had no feasibility. It is conceded that this was his attempt to broker an agreement between the parties to resolve this matter.

In regard to patient Scantlin, news reports state that she was able to blink on command, and therefore, was apparently not in PVS, so the issue of her improvement has limited, if any, applicability to this case.

Based on the Respondents' request for relief as submitted, this Court does not believe that a colorable entitlement to relief has been established. It is therefore

ORDERED AND ADJUDGED that Respondents' Fla. R. Civ. P. 1.540(b)(5) Motion for Relief from Judgment Pending Contemporary Medical/Psychiatric/Rehabilitative Evaluation of Theresa Marie Schiavo is **DENIED** because the movants have not shown that their motion is legally sufficient to go forward.

DONE AND ORDERED in Chambers, at Clearwater, Pinellas County, Florida this 9 day of March, 2005.


GEORGE W. GREER
CIRCUIT JUDGE

90-2908-GD-003

Copies furnished to:

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