

IN THE CIRCUIT COURT FOR PINELLAS COUNTY, FLORIDA
PROBATE DIVISION

IN RE: THE GUARDIANSHIP OF

THERESA SCHIAVO,

CASE NO. 90-2908GD-003

AN INCAPACITATED PERSON.

REPORT OF GUARDIAN AD LITEM

RICHARD L. PEARSE, JR., as guardian ad litem for TERESA SCHIAVO, an incapacitated person, submits the following report to this Court:

1. AUTHORITY OF GUARDIAN AD LITEM. The undersigned guardian ad litem was appointed by order of this Court dated June 11, 1998. The order appointing the undersigned directed that "the Guardian Ad Litem shall make such inquiry as is deemed necessary and shall file a written report and recommendations with the Court." The undersigned guardian ad litem filed an oath of guardian ad litem with the clerk of this Court on or about June 22, 1998.

2. THE WARD. The ward is THERESA MARIE SCHIAVO, a 32 year old white female who has resided at Palm Gardens of Largo, a skilled nursing facility located at 10500 Starkey Road, Seminole, Florida, since March, 1994.

The ward is the daughter of ROBERT SCHINDLER and MARY SCHINDLER, to whom she was born on December 3, 1963. The ward is the wife of MICHAEL SCHIAVO, to whom she was married on November 10, 1984. The ward has no children. The ward was raised as a Roman Catholic and, according to the ward's parents, continued to practice her religion.

In 1990, the ward suffered cardiac arrest. Although she was resuscitated, the ward sustained profound hypoxic brain damage and has been comatose ever since. She receives food and water through a gastric feeding tube which was placed shortly after the arrest occurred. She is incontinent of bowel and bladder.

The ward has been neurologically evaluated several times since suffering the cardiac arrest. The most recent such evaluation by Dr. Jeffrey Karp dated September 11, 1998, indicates that the ward "is in a chronic vegetative state" and that the ward exhibits "an absence of voluntary activity or cognitive behavior, and [an] inability to communicate or interact purposefully with her environment." According to Dr. Karp, based on the duration of the ward's condition, "her chance of any improvement to a functional level is essentially zero."

Based on examination of the ward's medical records by the undersigned and a telephone interview with the ward's current primary care physician, Dr. Vincent Gambone, it appears that Dr. Karp's opinion of the ward's condition and prognosis is substantially shared among those physicians who have recently been involved in her treatment.

Concerning her physical health, the ward is presently stable. She has no infections or skin breakdown. She has developed contractures of certain of her joints despite receiving regular physical therapy. Although, according to Dr. Gambone, the ward's susceptibility to infection and injury is heightened by her

chronic vegetative state, there is a potential that she may live a normal life span.

According to the ward's mother, MARY SCHINDLER, the ward exhibits certain reactions to her presence which she ascribes to some kind of low-level cognitive function. The same reactions have been observed by nursing home staff members who indicated that they are random and not predictably in response to any specific stimulus.

The only consistent responses related to the undersigned guardian ad litem is that the ward will respond to a deep pain stimulus by moaning and will open her eyes in response to noise. Otherwise, the ward appears to be totally non-responsive.

The ward apparently never executed a living will or any writing expressing her intention concerning the withholding or withdrawal of artificial life prolonging procedures. No person interviewed by the undersigned indicated having any knowledge of any written advance directive of the ward.

3. THE WARD'S HUSBAND. The ward's husband is MICHAEL SCHIAVO, a 35 year old white male. He and the ward have been married since November 10, 1984. They have no children.

Prior to the ward's cardiac arrest, according to Mr. SCHIAVO the two enjoyed a happy marriage and were looking forward to having a family. He worked as a restaurant manager and had held several different jobs after moving to Florida shortly after the marriage.

The ward's husband was appointed guardian of her person on *. and has served in that capacity since.

From the time of the ward's initial cardiac arrest through February, 1993, the ward's husband played a very active and aggressive role in pursuing treatment for her, all with the cooperation of the ward's parents, ROBERT and MARY SCHINDLER. He pursued aggressive medical and surgical treatment of the ward, including the surgical placement of experimental electrodes in an effort to stimulate the ward's damaged brain to restore itself. He visited the ward regularly and was actively and closely involved with every aspect of her care and rehabilitation. He was an aggressive advocate for the ward, and never hesitated to question the nursing home staff concerning matters that he didn't understand or like. A previously appointed guardian ad litem for the ward referred to Mr. SCHIAVO as "a nursing home administrator's nightmare."

In addition, the ward's husband pursued negligence litigation arising from the ward's treatment following her cardiac arrest which eventually resulted in judgments for the ward netting the ward's estate in excess of \$750,000.00 as well as a substantial personal award for his loss of the ward's consortium which were paid in early 1993.

In February, 1993, the ward's husband and her parents had a falling out. Mr. SCHIAVO claims the argument arose because he refused to share the settlement money with the SCHINDLERS. They, on the other hand, claim that Mr. SCHIAVO failed to honor

commitments he had previously made to continue to seek aggressive treatments for the ward's condition. The SCHINDLERS retained counsel and sought Mr. SCHIAVO's removal as guardian, but were ultimately unsuccessful.

After February, 1993, Mr. SCHIAVO'S attitude concerning treatment for the ward apparently changed. Early in 1994, for example, he refused to consent to treat an infection from which the ward was then suffering and ordered that she not be resuscitated in the event of cardiac arrest. The nursing home where she resided at that time sought to intervene, which ultimately led the ward's husband to reverse his decision and authorize antibiotic treatment. It also resulted in a transfer of the ward to the nursing home where she now resides. Mr. SCHIAVO admitted to the undersigned that he essentially gave up hope that the ward would recover about four years after the accident.

Regarding the pending petition filed by Mr. SCHIAVO to withdraw the gastric feeding tube which sustains the ward, he claims that the ward told him after their marriage that she would not want to be kept alive artificially. He indicates that she related her feelings to an uncle of hers who was severely injured in an automobile accident and was comatose for a time. At one point, according to Mr. SCHIAVO, during a train trip from Pennsylvania to Florida in the mid-1980s, the ward told her husband that if she were ever in a situation of being artificially maintained that she wanted the life support removed.

Mr. SCHIAVO indicated strongly to the undersigned that his petition to withdraw life support has nothing to do with the money held in the guardianship estate, which he would inherit upon the ward's death as her sole heir-at-law.

Mr. SCHIAVO has admitted at least two romantic involvements since the ward's accident. It is apparent that he has reached a point where he has no hope of the ward's recovery and wants to get on with his own life. He indicates that he wants the life support withdrawn because that is what the ward would want, and that she is his responsibility because he is her husband.

4. THE WARD'S PARENTS. The ward's parents are ROBERT and MARY SCHINDLER who reside in St. Petersburg, Florida.

Prior to the ward's accident, her parents indicated they had a close relationship with her. The ward spent a great deal of time in her parents' home, especially when her husband was at work. Contrary to the ward's husband's assertions, the ward's parents believed that the ward's marriage to her husband was in difficulty during months prior to the accident. Mrs. SCHINDLER has indicated in prior testimony that the ward told her that she was no longer in love with her husband and was considering ending their marriage. The ward's husband denies this, as indicated above.

From the time of the ward's accident, the ward's parents have been vitally interested in her welfare. Until February, 1993, the SCHINDLERS worked cooperatively with Mr. SCHIAVO; in

fact, he lived with them in their home for a number of months following the ward's accident.

After the falling out between the ward's parents and her husband, Mr. and Mrs. SCHINDLER pursued removal litigation in an effort to have Mr. SCHIAVO removed as their daughter's guardian and to have themselves appointed guardians of her person. Their efforts in removing the ward's husband were unsuccessful and were ultimately dropped. They have also pursued litigation against him to gain access to medical and financial information concerning the ward which was withheld by the ward's husband, with only partial success. They express extreme frustration with the current situation in which they have virtually no input into the decision making progress concerning their own daughter.

The ward's parents visit her regularly but at times when they won't have to confront Mr. SCHIAVO. Mrs. SCHINDLER feels strongly that the ward does respond to her presence during these visits as evidenced by various reactions of the ward to being talked to and touched. The reactions of the ward have been observed by nursing home staff members, but they believe that such reactions are coincidental. Nevertheless, Mr. and Mrs. SCHINDLER harbor a deeply held belief that the ward is aware of their presence at some level.

The ward's parents both acknowledge that the ward never discussed with them what her intentions would have been concerning the withholding or withdrawal of artificial life-

prolonging procedures. They also have no knowledge that the ward spoke of these matters with anyone else.

The ward's parents goal is to have their daughter restored to their care. They indicate that they understand Mr. SCHIAVO'S desire to get on with his own life and would have no objection to his seeking a divorce from their daughter. Their plan would be to care for her with the feeding tube in place until she died naturally, using the guardianship estate as a means of supporting her.

5. FINANCIAL STATUS. A review of the inventory and various annual financial returns reveals that the initial inventoried value of the guardianship estate was \$776,254.69 and that the latest reported market value as of the close of fiscal year ending 4/30/98 was \$713,828.85. The estate is presently administered by SouthTrust Bank as guardian of the ward's property. The estate is invested in a diversified portfolio of stocks, bonds, mutual funds and other securities. The undersigned guardian ad litem is aware of no evidence that the ward's estate has been mismanaged.

6. POTENTIAL CONFLICTS OF INTEREST. The pending application by the ward's husband for withdrawal of the ward's feeding tube which would inevitably result in the ward's death creates at least the appearance of, if not actual, conflicts of interest involving both the ward's husband and her parents.

All parties to this proceeding acknowledge that the ward has no will so that, upon her death, her entire estate will pass to

her intestate heir(s). Thus, if the ward dies while married to Mr. SCHIAVO, he inherits the entire guardianship estate. On the other hand, if the marriage between the ward and her husband is dissolved the ward's parents become her intestate heirs and they (or the survivor of them) will inherit the ward's estate upon her death. Thus, the Mr. SCHIAVO will realize a substantial and fairly immediate financial gain if his application for withdrawal of life support is granted. On the other hand, Mr. SCHIAVO'S petition for withdrawal of life support is denied, it may be anticipated that he would seek to dissolve his marriage to the ward, in which case the ward's parents become her sole heirs-at-law. Of course, given the potential that the ward may have a normal life expectancy, there is no way to quantify the projected potential financial gain to the ward's parents upon her eventual death because there is no reliable way of predicting how much of her estate will be left.

7. SUMMARY OF APPLICABLE LAW. The governing statute in this proceeding is Chapter 765, Florida Statutes, dealing with advance directives for health care. Specifically, Fla. Stat. 765.401 provides:

(1) If the patient has not executed an advance directive, or designated a surrogate to execute an advance directive, or the designated or alternate surrogate is no longer available to make health care decisions, health care decisions may be made for the patient by any of the following individuals, in the following order of priority, if no individual in a prior class is reasonably available, willing, or competent to act:

(a) The judicially appointed guardian of the patient, who has been authorized to consent to medical treatment, if such guardian has previously been appointed; however, this paragraph shall not be construed to require such appointment before a treatment decision can be made under this subsection;

(b) The patient's spouse;

(c) An adult child of the patient, or if the patient has more than one adult child, a majority of the adult children who are reasonably available for consultation;

(d) A parent of the patient;

(e) The adult sibling of the patient or, if the patient has more than one sibling, a majority of the adult siblings who are reasonably available for consultation.

(f) An adult relative of the patient who has exhibited special care and concern for the patient and who has maintained regular contact with the patient and who is familiar with the patient's activities, health, and religious or moral beliefs; or

(g) A close friend of the patient.

(2) Any health care decision made under this part must be based on the proxy's informed consent and on the decision the proxy reasonably believes the patient would have made under the circumstances.

(3) Before exercising the incapacitated patient's rights to select or decline health care, the proxy must comply with the pertinent provisions applicable to surrogates under this chapter, except that a proxy's decision to withhold or withdraw life-prolonging procedures must be supported by clear and convincing evidence that the decision would have been the one the patient would have chosen had the patient been competent. [Emphasis supplied.]

(4) Nothing in this section shall be construed to preempt the designation of persons who may consent to the medical care or treatment of minors established pursuant to s. 743.0645.

The controlling case is In Re Guardianship of Browning, 568 So. 2d 4 (Fla. 1990), wherein the Supreme Court of Florida held

that a competent individual has the right choose or refuse medical treatment, including artificial life-prolonging procedures; that such right extends to incapacitated persons and may, under appropriate circumstances, be exercised by an appointed surrogate or proxy; and that in the absence of a written direction by the principal the decision to withhold or withdraw life support must be supported by clear and convincing evidence to do so would have been the principal's decision if he or she could have made it.

Also instructive are In Re Guardianship of Browning, 543 So.2d 258 (Fla. 2d DCA 1989); Slomowitz v. Walker, 429 So.2d 797, 800 (Fla. 4th DCA 1983); and Migliore v. Migliore, 717 So.2d 1077 (Fla. 4th DCA 1998), which deal with the "clear and convincing" standard applicable in this case.

8. GUARDIAN AT LITEM'S OPINION AND RECOMMENDATIONS. The principal issue presented in this case is whether the ward, if capable, would direct the removal of her feeding tube given her present circumstances.

There is no written advance directive of the ward in this case. Based on Browning, there is no presumption that evidence of oral statements of the ward is clear and convincing; that burden remains with the Petitioner.

The only direct evidence probative of the issue of the ward's intent is the hearsay testimony of her husband, Mr. SCHIAVO, who seeks withdrawal of the ward's feeding tube which would inevitably result in her death. However, his credibility

is necessarily adversely affected by the obvious financial benefit to him of being the ward's sole heir at law in the event of her death while still married to him. Her death also permits him to get on with his own life.

In the opinion of the undersigned guardian ad litem, Mr. SCHIAVO'S credibility is also adversely affected by the chronology of this case. For the first four years (approximately) following the ward's accident, he aggressively pursued every manner of treatment and rehabilitation conceivable, as well as lawsuits to compensate the ward for her injuries in connection with which he presumably argued that she would require substantial funds for future care and treatment. At or around the time the litigation was finally concluded, he has a change of heart concerning further treatment which lead, according to the ward's parents, to his falling out with them. From that point forward, the ward's husband has isolated the ward from her parents, has on at least one occasion refused to consent for the ward to be treated for an infection, and, ultimately, four years later, has filed the instant petition for the withdrawal of life support on the basis of evidence apparently known only to him which could have been asserted at any time during the ward's illness.

Since there is no corroborative evidence of the ward's intentions, and since the only witness claiming to have such evidence is the one person who will realize a direct and substantial financial benefit from the ward's death, the

undersigned guardian ad litem is of the opinion that the evidence of the ward's intentions developed by the guardian ad litem's investigation does not meet the clear and convincing standard. Based on Migliore v. Migliore, 717 So.2d 1077 (Fla. 4th DCA 1998), the credibility of the witness is a factor to be considered in determining whether evidence is clear and convincing.

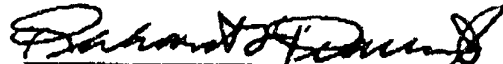
Given the inherent evidentiary problems already mentioned, together with the fact that the ward has been maintained on the life support measures sought to be withdrawn for the past 8 years, it is the recommendation of the guardian ad litem that the petition for removal be denied.

In fairness to the Petitioner, should this Court disagree with the foregoing analysis of the evidence and find it to clearly and convincingly reflect the actual wishes and intentions of the ward, the guardian ad litem believes that Browning controls and, in that case, the feeding tube should be withdrawn.

The undersigned guardian ad litem further asserts and recommends that due process requires that the ward's interests continue to be represented in all further proceedings herein, whether by the undersigned guardian ad litem or another appointed guardian ad litem or other appropriate fiduciary.

Under penalties of perjury, I declare that I have read the foregoing and the facts and matters alleged therein are true and correct to the best of my knowledge and belief.

I HEREBY CERTIFY that a true copy of the foregoing was furnished by U.S. Mail, postage prepaid, to PAMELA A.M. CAMPBELL, 535 Central Avenue, Suite 403, St. Petersburg, FL 33701-3701, DEBORAH A. BUSHNELL, 204 Scotland Avenue, Dunedin, FL 34698, and GEORGE J. FELOS, 640 Douglas Avenue, Dunedin, FL 34698, on this 29th day of December, 1998.



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