No. 05-11556

IN THE

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

THERESA MARIE SCHINDLER SCHIAVO,
Incapacitated *ex rel*, ROBERT AND
MARY SCHINDLER, her Parents &
Next Friends,

Petitioner-Appellant,

---v.---

MICHAEL SCHIAVO, as Guardian of the
Person of Theresa Marie Schindler
Schiavo, Incapacitated,
THE HONORABLE GEORGE W. GREER,
and THE HOSPICE OF THE FLORIDA
SUNCOAST, INC.,

Respondents-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF FOR PLAINTIFF-APPELLANT

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Statement Regarding Oral Argument

Should this Court desire, counsel for Robert and Mary Schindler stand ready to provide oral argument about the due process and religious rights to which incapacitated individuals should be entitled in state proceedings to authorize the termination of the individual's assisted feeding. However, because of the immediacy of the threat that Petitioner will die before oral argument can be heard, Petitioner's next friends will waive oral argument in order to expedite the Court's consideration of this appeal.

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Jurisdictional Statement

This Court has jurisdiction of the final order of the District Court of the Middle District of Florida pursuant to 28 U.S.C. § 1291 which provides that Courts of Appeals shall have jurisdiction of appeals from all final decisions of the District Courts of the United States. The Middle District also had jurisdiction pursuant to Public Law 109-3, which expressly gave the Middle District jurisdiction for this case. The Eleventh Circuit is constituted of Florida, Alabama, and Georgia. 28 U.S.C. § 41.

Statement of the Case

This appeal comes to this Court from a denial of Plaintiff's Motion for Temporary Restraining Order to restrain the further withholding of Plaintiff's nutrition and hydration pending the trial of the claims she raises pursuant to the "For the relief of the parents of Theresa Marie Schiavo Act" a bipartisan law enacted by Congress on March 21, 2005. (Public Law 109-3).

The Plaintiff Theresa Schiavo (hereinafter "Terri" or "Mrs. Schiavo") filed her Complaint For Temporary Restraining Order, Declaratory Judgment, and Preliminary and Permanent Injunctive Relief in the District Court for the Middle District of Florida, Tampa Division, on March 21, 2005. The District Court denied the temporary restraining order on March 21, 2005.

Notice of Appeal of the Order denying the temporary injunction and writ was filed on March 22, 2005.

Course of the Proceedings

The Complaint below sounded in five counts of allegations of violation of Mrs. Schiavo's rights under the Constitution or laws of the United States relating to the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain her life. She raised claims that she was denied her Fourteenth Amendment due process rights and her religious rights under the First Amendment to the United States Constitution.

Statement of Facts

On February 25, 1990, Petitioner's brain was deprived of oxygen during a medical incident of unknown cause. Due to her incapacity resulting from this incident, her husband, Respondent Michael Schiavo, was appointed plenary guardian of his wife on June 18, 1990. On May 11, 1998, Michael Schiavo petitioned the Circuit Court for Pinellas County, Florida, Sixth Judicial Circuit, Probate Division, for authority to discontinue Terri's "artificial life support," which consisted only of assisted feeding through a PEG (percutaneous endoscopic gastrostomy) tube. The petition was filed as an adversary action, with Petitioners herein, Terri's parents, having been served with notice of the proceeding. Petitioner herself did not receive notice of the proceeding.

The case was tried before the state trial court and on February 11, 2000, the trial court:

> ORDERED AND ADJUDGED that the Petition for Authorization to Discontinue Artificial Life Support of Michael Schiavo, Guardian of the Person of Theresa Marie Schiavo, an incapacitated person, be and the same is hereby GRANTED and Petitioner/Guardian is hereby authorized to proceed with the discontinuance of said artificial life support for Theresa Marie Schiavo.

The execution of the Order was stayed to permit the Schindlers time to appeal.

Since the February 11, 2000, Order, Terri's assisted feeding has been discontinued twice, once on April 24, 2001, when her feeding tube was capped, and again on October 15, 2003, when her nutrition and hydration tube was entirely removed and later reinserted. In 2001, Terri's feeding was reestablished in two days by order of a judge in the civil division of the circuit court in response to an injunctive action filed by her parents. *In re Guardianship of Schiavo II*, 792 So.2d 551, 556 (Fla. 2d DCA 2001). In 2003, after Terri had been without food and water for six days, Florida Governor Jeb Bush by Executive Order ordered the tube to be reinserted pursuant to Chapter 2003-418, Florida Laws (referred to herein as "Chapter 2003-418") that had been adopted by the Florida Legislature on October 21, 2003.

The next and most recent death order was issued by the state trial court on February 25, 2005, when the trial court entered an order authorizing a third

removal, this time a complete withholding of all nutrition and hydration from Terri, not merely removal of the feeding tube. In relevant part, the Order provides:

> **ORDERED AND ADJUDGED** that 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.

The Florida District Court of Appeal, Second District, affirmed the trial court's death order on March 16, 2005. (*In re Guardianship of Schiavo*, No. 90-2908-GD-003, 2005 WL 459634 at *5 (Fla. Cir. Ct. Feb. 25, 2005) (*Schiavo V*).

The provision of Terri's nutrition and hydration was discontinued in mid-afternoon of March 18, 2005. Since that time, Terri has had no food or water.

On Monday, March 21, the United States Congress passed, and President Bush signed Public Law 109-3 to specifically authorize Theresa Schiavo's parents to file suit in the Middle District of Florida for the alleged violation of any of Terri's federal constitutional or statutory rights.

Early in the morning of March 21, Robert and Mary Schindler, Terri's parents and next friends, filed the Complaint herein pursuant to the authorization of S. 686. That afternoon, a hearing was held on Plaintiff's motion for a temporary restraining order to restrain the further withholding of Terri's nutrition and hydration pending the resolution of the claims raised in her Complaint. On March 22, 2005, The Honorable Judge Whittemore denied the requested restraining order.

It is from that order denying the temporary restraining order that Theresa Schiavo appeals.

Standard of Review

A mixed standard of review applies to review of the granting or denying of a preliminary injunction. *Bah v. City of Atlanta*, 103 F.3d 964, 966 (11th Cir.1997). A district court's decision to grant a preliminary injunction and the denial of a motion to dissolve a preliminary injunction are reviewed for an abuse of discretion. *Id*.; *Collum v. Edwards*, 578 F.2d 110, 112 (5th Cir.1978). However, questions of law supporting the preliminary injunction are reviewed *de novo*. *Id*.

Summary of Argument

The District Court judge committed reversible error when it denied the injunctive relief requested to keep Theresa Schiavo alive until the merits of her federal claims could be reached in that Court. If she is allowed to die before her claims can be heard, Public Law 109-3 was an exercise in futility. Since Congress cannot be said to have done a vain act, the injunctive relief should have been granted pursuant to Public Law 109-3, Section 3.

The District Court also erred when it based its determination that Theresa Schiavo has no likelihood of success on the merits upon the state court proceedings. Public Law 109-3 requires a *de novo trial* of the merits of Terri's case. It is because the state court proceedings were fatally flawed *ab initio* that

Terri's needs that *de novo* trial. The District Court's review of the state court proceedings was in violation of the new Act and, therefore, reversible error.

It was both legally and factually impossible for Judge Greer to provide Terri Schiavo with adequate representation. Judge Greer should have disqualified himself. Because adequate representation is a question of both fact and law it could not be resolved in a summary proceeding below such as the Plaintiff's motion for TRO.

Argument and Citations of Authority

I. The District Court committed reversible error when it denied the temporary restraining order in violation of Public Law 109-3.

The claim below was before the district court pursuant to Public Law 109-3, which became law on March 21, 2005, and which expressly authorizes the Middle District Court of Florida to hear, determine, and render judgment on a suit or claim by or on behalf of Theresa Marie Schiavo for the alleged violation of any of her rights under the Constitution or laws of the United States relating to the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain her life. The Act further provides that:

> [A]fter a determination of the merits of a suit brought under the Act, the District Court shall issue such declaratory and injunctive relief as may be necessary to protect the rights of Theresa Marie Schiavo under the Constitution and laws of the United States relating to the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain her life.

Section 3.

This Act was passed in the early morning hours of March 21, 2005. Legislative history demonstrates that at the time the Act was being debated, voted upon, and signed by the President, Terri had already been without food and water for almost three days. Congress and the President were well aware and highly motivated by the knowledge that if they did not move with unprecedented speed,

Terri would be dead before her rights could be finally determined under Public Law 109-3.

Section 3 of the Act would be unnecessary unless Congress intended that the merits of the case be reached, and for the merits of the case to be reached, Terri Schiavo must remain alive long enough for her case to be heard on the merits. Terri will not be alive unless a restraining order or stay of the state court proceedings ordering the withholding of Terri's nutrition and hydration is granted. To assume otherwise would be to assume that Congress intended to do a vain and useless act. "We cannot believe that Congress intended a vain and useless act. Any doubt about the matter, however, is fully resolved by the legislative history which shows without question that Congress drew the bill with the evident purpose"[1] of protecting "status and legal rights of incapacitated individuals who are incapable of making decisions concerning the provision, withholding, or withdrawal of foods, fluid, or medical care." (Public Law 109-3, Section 9). Terri is one of those individuals whose "status and legal rights" will be destroyed absent expedited injunctive relief to order immediately establishment of her nutrition and hydration.

[1] *Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department*, 496 F.2d 1017, 1022 (5th Cir. 1974).

By denying a temporary restraining order, the judge has judicially amended Public Law 109-3 by reading Section 3 out of the newly enacted federal law. The District Court was without such authority.

> [T]he role of the judicial branch is to apply statutory language, not to rewrite it. *See Badaracco v. Commissioner*, 464 U.S. 386, 398, 104 S.Ct. 756, 764, 78 L.Ed.2d 549 (1984) ("Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement."); *Blount v. Rizzi*, 400 U.S. 410, 419, 91 S.Ct. 423, 429, 27 L.Ed.2d 498 (1971) ("it is for Congress, not this Court, to rewrite the statute"); *Korman v. HBC Florida, Inc.*, 182 F.3d 1291, 1296 (11th Cir.1999) ("It is not the business of courts to rewrite statutes.").

Harris v. Garner, 216 F.3d 970, 976 (11th Cir. 2000). Clearly the Act assumes the federal court will grant restraining or injunctive relief ordering that Terri's hydration and nutrition be restored to sustain her life until the merits can be heard.

Since Congress is presumed to have intended Section 3 to be read as a part of the Act, the District Court committed reversible error when it effectively rewrote the Act deny the requested injunctive relief. Wherefore Theresa Schiavo respectfully pleads with this Court to grant the injunctive relief denied.

II. The District Court committed reversible error when it held as a matter of law that Plaintiff-Appellant's federal claims would not succeed on the merits.

The claim below was before the district court pursuant to Public Law 109-3, which became law on March 21, 2005, and which expressly authorizes the Middle District Court of Florida to hear, determine, and render judgment on a suit or claim by or on behalf of Theresa Marie Schiavo for the alleged violation of any of her

rights under the Constitution or laws of the United States relating to the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain her life.

In reliance upon that new "For the relief of the parents of Theresa Marie Schiavo Act," Theresa Schiavo's parents brought the action below alleging claims that Theresa's federal rights to due process of the law, equal protection of the law, and federal constitutional and statutory rights to the free exercise of religion had been violated by the state court proceedings that resulted in authorizing her guardian/husband to discontinue her nutrition and hydration to cause her to die.

The new Act instructed the District Court to "determine *de novo* any claim of a violation of any right of Theresa Schiavo within the scope of this Act, notwithstanding any prior State court determination and regardless of whether such a claim has been previously raised, considered, or decided in State court proceedings." (Section 2). Despite these clear procedural instructions, the District Court nevertheless relied upon the prior State court proceedings as its basis for denying Plaintiff-Appellant's motion for a temporary restraining order.

In its consideration of Theresa's motion for a temporary restraining order, the District Court acknowledged that she had demonstrated three of the four elements she needed to obtain the restraining order.

> It is apparent that Theresa Schiavo will die unless temporary injunctive relief is granted. This circumstance satisfies the

> requirement of irreparable injury. Moreover, that threatened injury outweighs any harm the proposed injunction would cause. To the extent Defendants urge that Theresa Schiavo would be harmed by the invasive procedure reinserting the feeding tube, this court finds that death outweighs any such harm. Finally, the court is satisfied than an injunction would not be adverse to the public interest.

(Order, 3-4). She will die without the injunctive relief. Defendants will not be hurt by the relief. An injunction will further the public interest. These important elements were not enough to compel the judge to grant the relief. "Notwithstanding these findings, it is essential that Plaintiffs establish a substantial likelihood of success on the merits, which the court finds they have not done." (Order, 4).

The District Court then committed reversible error by its "consideration of the procedural history of the state court case to determine whether there is a showing of any due process violations." (Order, 5) The Court was in error in referring to the procedural history of the state court case in its determination of the likelihood of success element.

Under the Act, Theresa Schiavo is entitled to a *de novo* determination in the District Court of her claims of violation of her federal rights. The District Court did not conduct a *de novo trial* when it determined no likelihood of success on the merits. It did not even conduct a *de novo review* of the state court proceedings because it does not have the state court trial record before it. It fell back into the error committed throughout the proceedings to determine Terri's due process

rights—it assumed that the state trial court's actions were constitutional under state constitutional decisions.

Every state court review of the termination of Theresa's life support proceeding built upon that shaky foundation of assuming that she received all the process to which she was entitled—that of an attorney well-know for his legal expertise in right-to-die cases chosen by an estranged husband who was already living with and having children by a woman to whom he had already become engaged and who he could marry as soon as Terri died. Terri was doomed. Florida's "substituted judgment doctrine" has given her guardian-husband state license to shockingly neglect his ward-wife. She has had no rehabilitation or therapy in more than eleven years. Had she been given the rehabilitation and therapy to which she was entitled, she might have been able to tell us in plain English today what she truly wants. As recently as last Friday, she certainly made her desire to live known to her parents and to those who take the time to talk with her.

Theresa contends that even if the judge did not violate Florida statutory and constitutional law by becoming an advocate for Terri's right to die, his advocacy denied her due process rights under the *United States Constitution*. When the District Court reviewed the state trial court procedures to determine likelihood of success on the merits, Terri was again doomed. Theresa needed to get to Federal

Court to be able start from the beginning, *de novo*, to determine what her intent would be if she became too ill to decide for herself about continuation of artificially supplied food and water. Public Law 109-3 gave her the authority she needed to do just that. The District Court again shut the door in her face when it denied her the right to live until the merits of her claim could be finally determined.

The State of Florida started down a slippery slope when it began permitting others to decide what a person would decide about continued life support, especially the continued provision of food and water. When cases seeking permission to terminate nutrition and hydration are contested by close family members, logic dictates that extreme care be taken in protecting the person who is the real party-in-interest—the patient. This is especially in the case where the patient has left no written advance directive or appointed no substituted health-care decision-maker and the real truth of the patient is in doubt. Even the dissenters in *Cruzan* recognized that *accuracy* is the touchstone of all substituted judgment inquiries.

> As the majority recognizes, (citation omitted) Missouri has a *parens patriae* interest in providing Nancy Cruzan, now incompetent, with as accurate as possible a determination of how she would exercise her rights under these circumstances. Second, if and when it is determined that Nancy Cruzan would want to continue treatment, the State may legitimately assert an interest in providing that treatment. But *until* Nancy's wishes have been determined, the only state interest

> that may be asserted is an interest in safe-guarding the accuracy of that determination.
>
> Accuracy, therefore, must be our touchstone. Missouri may constitutionally impose only those procedural requirements that serve to enhance the accuracy of a determination of Nancy Cruzan's wishes or are at least consistent with an accurate determination.

Cruzan v. Missouri Department of Health, 497 U.S. 261, 315-316, 318 (1990) (Brennan, Marshall, and Blackmun, JJ., dissenting) (emphasis in the original). Like the Florida Legislature in this case, the Justices expressly distinguished cases in which the families agree from cases like this one in which there is a real controversy over the ward's wishes. *Cruzan*, 497 U.S. at 318.

If a person cannot sell a house without a written document, neither should he be able to starve a patient without a written directive from the person. Neither her parents nor federal courts should be satisfied that a pro-death guardian and a pro-death attorney, neither of whom are interested in discovering Terri's true current medical condition, would adequately represent Terri's right to choose life.

The state court proceedings were fatally flawed because of the federal due process violations alleged in Terri Schiavo's complaint. That Judge Greer followed state constitutional and statutory law does not dispense with the need to determine whether the proceedings complied with the procedures demanded by the United States Constitution.

Terri is entitled under Public Law 109-3 to remain alive while the federal courts determine whether her federal rights were adequately protected. Wherefore Therese Schiavo respectfully pleads with this Court to grant the injunctive relief denied.

III. Whether Judge Greer Compromised His Judicial Independence by Serving as Judge and Surrogate Decision-Maker and Should Have Recused is a Mixed Question of Fact and Law

In *Sandstrom v. Butterworth*, 738 F.2d 1200, 1201 (11 Cir. 1984), this court observed that "[t]he functioning of our legal system occasionally brings into direct opposition fundamental values upon which the entire system rests." This is such a case, not so much because there is any "[a]bsolute conflict[] between these basic values, where preserving one value requires compromise of another," but because the District Court's *approach* to the conflict demonstrates that it was unwilling *even to entertain the possibility* that the Appellants could prove to the jury – *as a matter of fact* – that the *procedure* followed by the Florida courts compromised Judge Greer's independence and deprived Theresa Marie Schiavo of adequate representation, both by a properly trained guardian *ad litem* and by its refusal to appoint independent counsel to represent such a guardian. By starting its analysis with a review of the record and the law in the Florida courts, the District Court not only denied the *de novo* hearing permitted by the jurisdictional statute, P.L. 109-3

§2 (March 21, 2005), but also preempted the role of the jury. U.S. Const. amend. VII (1791).

Under PL 109-3, Terri Schiavo is entitled to a full trial, *de novo*, on her federal claims. In order to make that protection meaningful, her life *must* be preserved while the legal and factual claims are being sorted out. Because a judicial decree authorizing death is the ultimate "final solution," a refusal to grant the TRO, and thus to permit Terri Schiavo to obtain the continued nutrition and hydration she needs to remain alive *and in good health* while these claims are being litigated, violates the very rights that the United States Supreme Court recognized that this is her right in *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990).

> An erroneous decision not to terminate results in a maintenance of the status quo; the possibility of subsequent developments such as advancements in medical science, the discovery of new evidence regarding the patient's intent, changes in the law, or simply the unexpected death of the patient despite …life-sustaining treatment at least create the potential that a wrong decision will eventually be corrected or its impact mitigated. An erroneous decision to withdraw life-sustaining treatment, however, is not susceptible of correction."

Cruzan, 497 U.S. at 283 (majority opinion).

The right to self-determination recognized in *Cruzan* cannot be protected if Terri Schiavo dies during the pendency of these appeals. Appellants respectfully submit that the District Court's order denying the TRO is both legally erroneous, and an abuse of its discretion.

A. The Right to an Independent Tribunal is Fundamental.

In *Sandstrom, supra,* this court recognized that an attorney's allegation that the judge has compromised his judicial independence "are among the most perplexing challenges that this Court encounters" and noted:

> This habeas corpus appeal presents just such a challenge. It involves one manifestation of the tension that exists between the courts' criminal contempt power and various tenets of constitutional due process. In the case at bar, petitioner's conviction for criminal contempt stands in conflict with an important principle of due process--the right to an impartial tribunal. To uphold the state court's adjudication of contempt would necessarily and significantly intrude upon that fundamental due process value. Alternatively, to vindicate the petitioner's right to an impartial tribunal would require imposing some limitation upon courts' traditionally broad contempt authority. Under the circumstances here, however, the potential impairment of the court's power is outweighed by unfairness to the petitioner. We, therefore, resolve the instant conflict of values in favor of due process.

Sandstrom, supra, 738 F.2d at 1201.

B. The District Court's holding that Florida law "merely prohibits a judge from acting as guardian except under certain specified familial circumstances" is wrong as a matter of fact and as a matter of law.

In *Sandstrom*, this court observed that Florida has adopted federal standards for judicial disqualification. In *Scott v. Anderson*, 405 So.2d 228, 233 (Fla. 1st DCA, 1981), the First District Court of Appeal noted:

> The familiar axiom "a man should not be judge of his own case" is of ancient origin, but it has apparently not yet found its way into Florida law to the extent necessary to provide distinct guidelines for deciding under what circumstances a judge must disqualify himself to adjudicate direct criminal contempt charges involving disrespect or

> criticism directed to that judge. *Since the question is ultimately one of federal constitutional import, we must turn to and be guided by the federal decisions.*

quoted in *Sandstrom, supra*, 738 F.2d at 1206 n. 2 (emphasis by this court).

In direct contradiction to this court's holding in *Sandstrom that* "that the facts of the case did not state a constitutional violation, derives from a mixed question of law and fact," the District Court held, in effect, that Appellants could produce *no* set of facts that would lead a jury to conclude that Judge Greer's assumption of inconsistent roles would compromise his independence.

Appellants submit that this result is not only inconsistent with PL 109-3, but also with this court's observation that "[a]djudication before a neutral and unbiased tribunal stands as one of the most fundamental of due process rights," and this court's statement that "… The requirement of neutrality has been jealously guarded by this Court." *Sandstrom*, 738 F.2d at 1210. Appellants recognize that allegations of bias, even those that are founded on questions of law, are "highly personal aspersions leveled at the … trial judge [that] carried "such a *potential* for bias as to require disqualification." *Mayberry v. Pennsylvania,* 400 U.S. 455, 466-467 (1971) (emphasis supplied) (distinguishing the case from *Ungar v. Sarafite*, 376 U.S. 575, 84 S.Ct. 841 (1964) (in which comments to the judge did not rise to the level of a claim of bias).

Appellants did move to have Judge Greer recuse himself, and did move to have Appellant, Michael Schiavo, removed as guardian. In both cases, the allegation that Terri Schiavo and her parents were litigating before a tribunal whose process was irretrievably tainted was both real and palpable. In *Mayberry*, the Supreme Court of the United States addressed precisely this situation, when it noted that "[n]o one so cruelly slandered is likely to maintain that calm detachment necessary for fair adjudication." 400 U.S. at 465, 91 S.Ct. at 505. As this court noted: "The Court's decision did not turn on proof of actual bias, but instead centered around a "presumption" of bias. *See United States v. Meyer,* 462 F.2d 827, 842 (D.C.Cir.1972)." *Sandstrom*, 738 F.2d at 1210.

IV. "Adequate representation" is a mixed question of fact and law that cannot be resolved in a summary proceeding such as a motion for TRO.

A. State and federal standards for guardian advocates made it legally and factually impossible for Judge Greer to provide Terri Schiavo with adequate representation.

Appellants submit that there are far too many mixed questions of fact and law for it to have concluded that Terri Schiavo was adequately represented by her guardians *ad litem*. Perhaps the most important of these disputed questions of fact is whether the temporary guardians *ad litem* were actually qualified to serve as guardians *ad litem* under Florida and relevant federal standards, *and* whether their service in the case was so severely truncated by the Judge's role as Terri's surrogate that Terri actually had no guardian at all.

Appellants begin, as we must, with the Second District Court of Appeal's holding in *Schiavo I* permitting Judge Greer to serve in two roles:

> In this context, the trial court essentially serves as the ward's guardian. Although we do not rule out the occasional need for a guardian in this type of proceeding, a guardian ad litem *would tend to duplicate the function of the judge*, would add little of value to this process, and might cause the process to be influenced by hearsay or matters outside the record.

In re Guardianship of Schiavo, 780 So. 2d 176 at 178(Fla. 2nd DCA 2001) ("*Schiavo I*") (emphasis added).

Appellants submit that the District Court of Appeal's holding not only misconceives the very concept of a guardian ad litem, it is inconsistent with both Florida and federal standards on the two subjects: judicial qualification *and* the professional ethics and "best practice" rules governing Court Appointed Special Advocates [CASAs], including those who represent incapacitated persons like Terri Schiavo.

> Many states have specific statutes mandating when a guardian ad litem or CASA should be appointed. *A guardian ad litem is a specially trained volunteer appointed as an officer of the court to ensure that the best interests of the child are protected* while the child is a ward of the court. In Florida, the guardian ad litem has five basic roles. They are investigator, reporter, protector, spokesperson, and monitor of services provided to the children. The guardian ad litem does not replace legal counsel or the social worker.

Michael J. Dale, *Providing Counsel to Children in Dependency Proceedings In Florida*, 25 Nova L. Rev. 769, 799 (2001) (footnotes omitted) (emphasis added).

Congress has made it clear that the States are required to establish and maintain such standards, and to ensure that their CASAs meet minimum training requirements. See, 42 U.S.C. §§13013; 5106(a) (2005). Florida has done so, Florida Statutes, § 394.4598, and Appellants are entitled to prove *as a matter of fact* that Judge Greer did not follow Florida law in assigning lawyers who may not have had the special training required by Florida law to serve as "Guardian Advocates," *see* Florida Statutes, § 394.4598)("A guardian advocate must meet the qualifications of a guardian contained in part IV of chapter 744….", and that they did not effectively represent her interests. *See also* Administrative Orders of the Sixth Judicial Circuit for Pasco and Pinellas Counties, PA/PI-CIR-02-10 "Court Appointed Counsel Probate and Guardianship Proceedings", FL ST 6 J CIR PA/PI-CIR-02-10.

Given both Congress' and Florida's *statutory* understanding of the role of the guardian ad litem, it is inconceivable that *any* court would rule in a proceeding that will result in the death of the incapacitated person that "in this type of proceeding, a guardian ad litem *would tend to duplicate the function of the judge.*" The role of the judge under Florida and federal standards is equally clear. Canon 3(E) of the Florida Rules of Judicial Conduct provides, in relevant part:

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(c) the judge knows that he or she individually *or as a fiduciary* … has any other more than de minimis interest that could be substantially affected by the proceeding;
(d) the judge …:
(i) is a party to the proceeding;
(ii) is acting as a lawyer in the proceeding;
(iii) is known by the judge to have a more than de minimus interest that could be substantially affected by the proceeding;
(iv) is to the judge's knowledge likely to be a material witness in the proceeding;

The "Definitions" section of the Code of Judicial Conduct provides:

> "Fiduciary" includes such relationships as personal representative, administrator, trustee, *guardian*, and attorney in fact.
> "Judge." When used herein this term means Article V, Florida Constitution judges and, where applicable, those persons performing judicial functions under the direction or supervision of an Article V judge.

Florida Code of Judicial Conduct, Definitions.

Given the four (4) roles of a Guardian Advocate under Florida law, and the fact that a guardian is a "fiduciary" who must act at all times on behalf of his or her ward, there is no question in either fact or law that Judge Greer could not, consistent with Fla. Stat. § 744.309 (1)(b) serve as both guardian and judge.

> **(1) (**b) No judge shall act as guardian after this law becomes effective, except when he or she is related to the ward by blood, marriage, or adoption, or has maintained a close relationship with the ward or the ward's family, and serves without compensation.

See also Fla. Stat §744.309 (3) ("The court may not appoint a guardian in any other circumstance in which a conflict of interest may occur.") In *Re TW*, 551 So.2d

1186, 1190 n. 3 (1989), the Florida Supreme Court made this rule a matter of *Florida* constitutional law

> Under no circumstances is a trial judge permitted to argue one side of a case as though he were a litigant in the proceedings. The survival of our system of justice depends on the maintenance of the judge as an independent and impartial decisionmaker. A judge who becomes an advocate cannot claim even the pretense of impartiality.

Given all this authority, Appellants submit that the District Court's assertion that Fla. Stat. § 744.309 "*merely* prohibits a judge from acting as a guardian except under certain specified circumstances" (emphasis added) is not only wrong on the facts, it is wrong as a matter of both state and federal *constitutional* law.

It is undisputed that Terri Schiavo is not a member of Judge Greer's family, and that, if she had been, he would have been forced to recuse himself. It is also undisputed that he acted throughout most of the trial as her proxy/surrogate for health care decision-making. Under the plain language of the Florida statute, and under the plain language of the decisions of the Supreme Court and of this court dealing with the disqualification of a judge, it is reasonable for Appellants to assert, and prove, that these rules compromised his independence *as a matter of fact*.

B. Appellants are entitled to prove their facts supporting their inadequate representation claim to the jury.

In 1977, a King County, Washington, Superior Court Judge, the Honorable David W. Soukup, established the first Court Appointed Special Advocate (CASA)

program because he recognized that the trier of fact needs adequate facts in order to reach a well-informed decision in a case. He also felt that attorneys and other outside professionals appointed as guardians ad litem often lacked the time and specialized training to investigate cases effectively. *See* National Court Appointed Special Advocates Association.[2] Both Congress and the State of Florida have seen the wisdom of Judge Soukup's insights, and have adopted laws requiring CASA programs and training See 42 U.S.C. §§13013; 5106(a) (2005); Florida Statutes §§ 39.8296, 394.4598[3].

Judge Greer's selection of Jay Wolfson, Ph.D., J.D. as one of Terri Schiavo's temporary guardians ad litem demonstrates why the concerns raised by Judge Soukup and affirmed by both Congress and the State of Florida are present here. Dr. Wolfson is a public health specialist and an attorney. He specializes in *health care financing* and in the "utitlization and cost trends" in managed health care. He is not a physician and has no experience in direct patient care, and, significantly, no experience in the field of neurology. *See* Profile of Dr. Jay

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[2] http://www.nationalcasa.org/JudgesPage/Resource_StartCASA.htm

[3] *See also* Subsec. (a)(1)(A). Pub.L. 108-36, § 113(a)(3)(B) (substituting "fields of medicine, law enforcement, judiciary, social work and child protection, education, and other relevant fields, or individuals such as court appointed special advocates (CASAs) and guardian *ad litem*," for "fields of medicine, law, education, social work, and other relevant fields") and Subsec. (b)(2)(A)(xiii). Pub.L. 108-36, § 114(b)(1)(B)(i), (vii), (2003, which substituted "a guardian *ad litem*, who has received training appropriate to the role, and who may be an attorney or a court appointed special advocate who has received training appropriate to that role (or both)" for "a guardian *ad litem*, who may be an attorney or a court appointed special advocate (or both)."..

Wolfson, on the University of South Florida website: http://hsc.usf.edu/publichealth/eoh/jwolfson/# (last visited March 22, 2005). In addition, there is no evidence that he completed training required by the State of Florida to act as a guardian *ad litem*.

Appellants are thus entitled to plead and prove that the guardians ad litem appointed by Judge Greer were not qualified to represent Terri Schiavo's interest, and did not do so. The District Court's rejection of the TRO thus violates their rights under both PL 109-3 and the Seventh Amendment.

Conclusion

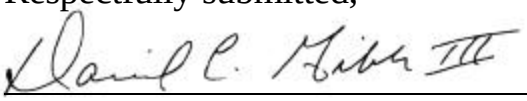
Wherefore, the Plaintiff therefore respectfully requests this court to:

a. Reverse the District Court's denial of Plaintiff-Appellant's request for temporary restraining order;

b. Enter a temporary restraining order and preliminary injunction prohibiting Defendants and anyone acting in concert or participation with them from further withholding Plaintiff's nutrition and hydration or any medical treatment necessary to sustain her life;

c. Order Hospice to immediately transport Terri by ambulance to Morton Plant Hospital for any medical treatment necessary to sustain her life and to reestablish her nutrition and hydration;

Respectfully submitted,



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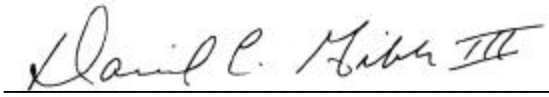
CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.Civ.P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word, 2002.

Dated: March 22, 2005



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing All Writs Petition has been furnished by facsimile transmission and electronic mail to George J. Felos, (727) 736-5050; to Gail Holtzman (813) 223-7166; and to Barry Cohen (813) 2251921, and to Judge Whittemore on this 22nd day of March 2005.

DAVID C. GIBBS III