IN THE SUPREME COURT OF THE STATE OF FLORIDA

JEB BUSH, Governor of the State of Florida,	)	
	)	
Appellant,	)	
	)	
vs.	)	**CASE NO. SC04-925**
	)	
MICHAEL SCHIAVO, as Guardian of the person of THERESA MARIE SCHIAVO,	)	
	)	
Appellee.	)	

On Appeal from the Circuit Court for the Sixth Judicial Circuit
In and for Pinellas County, Florida, Circuit Court Case No. 03-008212-CI-20

***AMICUS CURIAE* BRIEF OF TERRI SCHIAVO'S PARENTS MARY AND ROBERT SCHINDLER SUPPORTING APPELLANT AND FILED WITH THE CONSENT OF THE PARTIES**

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IDENTITY AND INTEREST OF AMICI

Amici Mary and Robert Schindler are the parents of Terri Schiavo. Their interest in this case is in saving Terri's life, protecting her from a guardian -- her estranged husband, Michael -- who has flagrant conflicts of interest and who seeks Terri's death, obtaining for Terri a guardian who will zealously seek her welfare, and defending the statute and executive order at issue here which are all that stand between Terri and an excruciating death by starvation and dehydration.[1]

The Schindlers have sought, thus far unsuccessfully, to intervene in the present case. Lacking party status, the Schindlers submit this brief, with the consent of the parties, as amici curiae.

SUMMARY OF ARGUMENT

A central issue in this case is whether Terri Schiavo would choose, with full knowledge of the current circumstances, to refuse necessary food and fluids by tube. Regardless of what Terri might supposedly have chosen years ago, she retains the right under Florida law to change her mind. What Terri "would have"

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[1]See Brophy v. New England Sinai Hosp., 398 Mass. 417, 444 n.2, 497 N.E.2d 626, 641 n.2 (1986) (Nolan, J., dissenting) (detailed description of death by dehydration and starvation).

done today is a question of fact that cannot be resolved on the pleadings. Hence, the order granting summary judgment without discovery or trial must be reversed.

The legislature made no improper delegation of power here. Rather, the legislature made the fundamental policy decision that, in a narrowly defined class of cases involving vulnerable individuals, the Governor should be authorized to intervene and reexamine the situation. This Court has already upheld the authorization of far greater discretionary power by the Executive Branch. Moreover, if the legislation challenged here violates the doctrine of nondelegation, then so do a host of other Florida statutes, such as those giving the Governor broad emergency powers.

There is no violation of Terri's right to privacy at this stage of the proceedings, as her current "would be" wishes remains an unresolved question of fact. Furthermore, the legislative imposition of formalities and safeguards to govern advance decisionmaking -- whether in wills, absentee ballots, or living wills -- is completely proper.

Finally, there is no unconstitutional encroachment on judicial power or retroactivity because the challenged legislation, like a grant of executive clemency, has only prospective effect.

This Court should reverse and remand.

ARGUMENT

The standard of review of a summary judgment order is de novo. Volusia County v. Aberdeen at Ormand Beach, 760 So. 2d 126, 130 (Fla. 2000).

I. THE FACTUAL POSTURE OF THIS CASE, AND TERRI'S RIGHT TO CHANGE HER MIND, REQUIRE REVERSAL ON THE PRESENT RECORD.

The Circuit Court, in deciding this case, held that no factual development was necessary and that Appellee Michael Schiavo was entitled to judgment as a matter of law. As demonstrated in the Governor's brief and the present brief, the Circuit Court was wrong on the law. Moreover, it bears emphasis how fundamentally misguided the Circuit Court was in dismissing the facts as irrelevant.

Central to Michael Schiavo's claim, and the Circuit Court's decision, is the factual premise that denying food and fluids to Terri is simply a matter of effectuating her wishes. This premise, even taken on its own terms, suffers from a gaping logical hole: Terri has the right to change her mind.

No one can argue with a straight face that, under Florida law, a person's past expression of wishes regarding medical treatment irrevocably binds that person to the implementation of those wishes. Indeed, the Florida living will statute itself provides that even written prior wishes only establish a "rebuttable presumption" of a person's

wishes. Fla. Stat. § 765.302(3). Obviously, a competent person can change plans at any time. An incompetent person who regains competence can cancel previous instructions. See Fla. Stat. § 765.304(2)(a) (living will not to be implemented where person has reasonable prospect of recovering mental capacity and personally directing care); Fla. Stat. § 765.305(2)(a) (same for person who did not have a written living will).

The orders in the present case rest on the notion that incompetent individuals should not lose their decisional rights because of their incompetency. E.g., Order Granting Petitioner's Motion for Summary Judgment ("Sum. Judg. Order") at 6; In re Schiavo, 851 So. 2d 182, 186 (Fla. 2d DCA 2003) (Schiavo IV) (case "is about Theresa Schiavo's right to make her own decision, independent of [others]"); see In re Guardianship of Browning, 568 So. 2d 4, 12 (Fla. 1990) ("an incompetent person has the same right . . . as a competent person"). That means Terri likewise retains the right to change course regarding her treatment.

So, for example, if a new drug or adult stem cell therapy were to be developed that could restore Terri to full cognitive function, it would be absurd to pursue her alleged prior wishes to withhold food and fluids instead of asking whether Terri, considering subsequent medical developments, might not rather wish to continue with food and fluids after all. Accord In re Schiavo, 792 So. 2d 551, 560 (Fla. 2d

DCA 2001) (Schiavo II) (medical breakthrough could be circumstance warranting relief from order to withdraw food and fluids); In re Schiavo, 800 So. 2d 640, 645 (Fla. 2d DCA 2001) (Schiavo III) (question is whether new circumstance is such "that she herself . . . would reverse the prior decision to withdraw life-prolonging procedures").

This case presents precisely such a factual question: would Terri, with full knowledge of the present circumstances, want to starve and dehydrate herself to death? For example, if Terri learned that her husband was now living with another woman and that he wanted Terri to die so that he could marry that other woman, would Terri -- out of an instinct for self-preservation or perhaps out of sheer feistiness -- refuse to die a death of her estranged husband's convenience? If Terri knew of the current options for rehabilitative testing and therapy, would she prefer to die? If she knew of her parents' and siblings' valiant, persevering struggles and pleas on her behalf, would Terri decide to accept food and fluids and respond willingly to their loving embrace of her life?

These and other questions go to the heart of Terri's "personal decisionmaking," and they are factual questions that cannot be answered on the pleadings. Without an examination of these factual issues via discovery and trial, the implementation of her supposed prior wishes, frozen in time, is a mockery of the concepts of "freedom of

choice" and "informed consent."

II. THERE IS NO IMPROPER LEGISLATIVE DELEGATION OF POWER HERE.

The Circuit Court erred as a matter of law when it held that Ch. 2003-418, Laws of Fla. (hereafter "the Act"), was an unconstitutional delegation of legislative power.

Under the doctrine of nondelegation of legislative power under the Florida Constitution, the legislature must make the "fundamental and primary policy decisions" and then provide at least "some minimal standards and guidelines" for administration of the statute. Askew v. Cross Key Waterways, 372 So. 2d 913, 925 (Fla. 1978).

Here, the legislature made the "fundamental and primary policy decision" that, in circumstances like Terri's, there is sufficient reason to question the ongoing denial of food and fluids and to authorize life-saving intervention by the Governor.

"In implementing this policy decision," the legislature may transfer "[s]ubordinate functions" to an executive agent or body "with the expertise and flexibility needed to deal with complex and fluid conditions." Microtel, Inc. v. Florida Public Serv. Comm'n, 464 So. 2d 1189, 1191 (Fla. 1985). "Otherwise, the legislature would be forced to remain in perpetual session and devote a large part of its time to regulation." Id. Thus, the legislature

> may enact a law complete in itself, designed to accomplish a general purpose, and may expressly authorize designated officials within valid limitations to provide rules for the complete operation and enforcement of the law within its expressed general purpose.
> . . .
>
> This principle of law is peculiarly applicable to regulations under the police power, since the complex and ever-changing conditions that attend and affect such matters make it impracticable for the Legislature to prescribe all necessary rules and regulations.

State Dep't of Citrus v. Griffin, 239 So. 2d 577, 580-81 (Fla. 1970) (internal quotation marks and citation omitted).

Here, the legislature narrowly delimited the circumstances in which the Governor could intervene and then entrusted to him the "operation and enforcement of the law." The state constitution requires no more. As this Court has observed,

> The Legislature itself is hardly suited to anticipate the endless variety of situations that may occur or to rigidly prescribe the conditions or solutions to the often fact-specific situations that arise.

Avatar Development Corp. v. State, 723 So. 2d 199, 204 (Fla. 1998).

This Court has repeatedly upheld legislative authorizations of executive branch actions far more open-ended than what the Act contemplates. E.g., Avatar, 723 So. 2d at 204 (no improper delegation where Department of Environmental Protection was authorized "to flesh out the Legislature's stated intent" by "creating rules,

regulations and permit conditions necessary to effectuate the Legislature's overall policy"); Microtel, 464 So. 2d at 1191 (no improper delegation where commission was authorized to make certification decision "guided by the discretionary proviso that certification be in the public interest," illuminated by the "clear legislative intent to foster competition"); State Dept. of Citrus, 239 So. 2d at 578-79, 582 (no improper delegation where commission was authorized to promulgate marketing orders, suspend those orders if the Commission "determines that the order does not tend to effectuate the declared purpose of the Act," establish plans and programs for "advertising, merchandising and sales promotion to create new or larger domestic or foreign markets for oranges" (quoting statute), and set assessment rate, subject to a statutory ceiling); State v. Cain, 381 So. 2d 1361, 1362 (Fla. 1980) (no improper delegation where legislature authorized state attorney, "when in his judgment and discretion the public interest requires" (quoting statute), to prosecute, as adults, juveniles who are age sixteen or older, and noting that even "absolute" charging discretion of prosecutor is not an invalid delegation of authority).

Moreover, if the Act challenged here represents an unconstitutional legislative delegation, then a whole host of Florida statutes are likewise unconstitutional. E.g., Fla. Stat. § 6.05 (Governor "may" transfer title to tract of state land, upon application of federal government, for use as lighthouse or other public work); Fla. Stat. §

6.075(1)(a) (Governor "authorized" to cede to National Park Service "such measure of jurisdiction" over certain park lands "as the Governor may deem proper"); Fla. Stat. § 14.021(1) (Governor "is hereby authorized and empowered to promulgate and enforce such emergency rules and regulations as are necessary to prevent, control, or quell violence" during any lawfully declared emergency; such rules and regulations shall affect such persons and facilities "as in the judgment of the Governor shall best provide a safeguard" against violence); Fla. Stat. § 14.022(1), (2), (3)(a), (c) (Governor authorized to take any measure "he may deem necessary" to prevent violence anywhere in the state; authorizing Governor to proclaim emergency danger of violence "when in her or his [sic] opinion, the facts warrant," and to cope with said danger by "any act which would in the Governor's opinion prevent" such danger or by ordering anyone to refrain from doing anything "which would, in the Governor's opinion, endanger life, limb, or property"; authorizing Governor to call out militia and to order "such action as in the Governor's judgment is necessary"; authorizing Governor to direct State Highway Patrol to take such actions as "in the Governor's judgment are necessary in the circumstances"); Fla. Stat. § 922.07 (Governor authorized to stay execution of death where Governor "is informed" the person "may be insane," to appoint a commission of psychiatrists, and to himself "decide," after receiving the commission's report, whether the convicted person has

sufficient mental capacity); Fla. Stat. § 377.03 (Governor authorized "to determine if and when it shall be in the best interest of the state" to withdraw from "The Interstate Oil Compact" and thereupon to effectuate such withdrawal); Fla. Stat. § 450.191(1)(b) (Governor authorized to cooperate with Department of Health "in establishing minimum standards of preventive and curative health and of housing and sanitation in migrant labor camps").

Like these other statutes, the Act at issue here authorizes the Governor to act in certain delineated circumstances, leaving to the Governor the discretion to weigh the factors bearing upon the competing courses of action. This does not violate the Florida Constitution. Plainly, the Legislature cannot sit as an ongoing therapeutic management board or as investigator for individual wards whose guardians develop flagrant conflicts of interest. Hence, it is perfectly sensible for the Legislature to authorize the Governor to handle the actual application of the stay power the Legislature created. The Act falls well within the bounds of permissible legislative authorization of executive action.

III. THERE IS NO DEMONSTRATED VIOLATION OF TERRI'S RIGHT TO PRIVACY AT THIS STAGE OF THE PROCEEDINGS.

Regardless of whether prior proceedings correctly identified what Terri's wishes were at some time in the <u>past</u>, it remains to be adjudicated what her wishes are (or

would be) now. Absent a determination of that factual question, the claim to be enforcing Terri's wishes is a farce. See supra § I.

Terri has lost her ability to choose, not by force of law, but by force of biology. To claim to be implementing her wishes by having a third-party decide for her is therefore inherently artificial. See generally Weber, Substituted Judgment Doctrine: A Critical Analysis, 1 Issues in Law & Med. 131 (1985).

Nevertheless, it is understandable that a legislature might empower individuals to bind themselves, in advance, regarding certain personal decisions. This is the premise of wills (for disposition of property), advance directives (for determination of medical treatment), and absentee ballots (for voting). In such cases, the legislature establishes the necessary formalities. See Fla. Stat. § 732.502 (every will must be in writing); Fla. Stat. § 765.302 (living wills); Fla. Stat. §§ 101.64, 101.65, 101.661 (absentee ballots). Departure from these formalities may invalidate the attempted advance decision, but adherence to the formalities allows a person to make a decision in advance of the date that decision becomes operative.

It is emphatically not the case that persons who become incompetent without formally setting forth their wishes are somehow deprived of constitutional rights. If that were the case, those who become incompetent before dying intestate would need courts to rule as to what kind of written will they "would have" drafted had they been

competent. Courts would likewise be in the business of deciding which candidates the mentally disabled occupants of nursing homes, mental institutions, and homes for the retarded "would have" voted for in the upcoming election. Such is the surreal regime the Circuit Court insists upon for the likes of Terri Schiavo.

Of course, even if the legislature were to adopt such a course as a matter of state policy, the supposed "choices" of the incompetent persons would still suffer from the problem of being frozen in time. Just as a competent person is free to back out of, say, a knee replacement surgery up to the last minute, so an incompetent person -- if that person is to retain the "same rights" as competent individuals -- must be free to change course in light of later developments or even the mere imminence of the consequences. Accord Schiavo III, 800 So. 2d at 645.

In short, the Circuit Court's attempt to elevate the oxymoronic "exercising [of] another's right of self-determination," Sum. Judg. Order at 7, into a rigid state constitutional barrier against any thoughtful reconsideration or reexamination of the incompetent person's supposed desires, is a huge legal overreach.

The Act allows for the restoration and maintenance of the status quo ante while the authorities stop and look both ways before sliding Terri across an intersection of no return. Like the insistence upon formalities in absentee voting and wills, the legislature's intervention to allow a stay of the implementation of alleged past oral

wishes is not a per se constitutional violation.

IV. THERE IS NO UNCONSTITUTIONAL ENCROACHMENT ON JUDICIAL POWER OR UNCONSTITUTIONAL RETROACTIVITY HERE.

The Circuit Court erred as a matter of law in ruling that the Act encroaches upon judicial power or retroactively impacts court judgments in violation of the Florida Constitution. Both of these conclusions rest on the faulty premise that the Act reversed a final judgment.

The Act overturns no legal judgment. Rather, the Act sets the standards prospectively, not retroactively. That is simply not a constitutional problem. As the Second District Court of Appeal acknowledged in a prior decision regarding Terri, "a final order . . . to discontinue life-prolonging procedures, is the type of order that may be challenged by an interested party at any time prior to the death of the ward on the ground that it is no longer equitable to give prospective application to the order." Schiavo II, 792 So. 2d at 553 (emphasis added).

A governor may pardon an offender, commute a sentence, or remit fines, despite a court's final adjudication of guilt and pronouncement of a sentence. Fla. Stat. § 940.01(1). A legislature may authorize post-conviction, post-appeal DNA testing to free wrongfully -- but finally -- convicted alleged offenders. Fla. Stat. § 925.11. A legislature may amend a statute to repudiate a court's contrary construction of its

terms even if the amendment prospectively changes the rules governing some ongoing enterprise (e.g., certain banking transactions) that a court has validated. A city may condemn property even if the landowner has just won a quiet title action against a competing property claimant. In each of these cases, the court's judgment stands, but its prospective effect is altered or even abolished.

The Act operates in the same way. The courts ordered Terri's food and fluids stopped, and they were indeed stopped. But henceforth, the legislature responded, nutrition and hydration may be restored and maintained in a certain class of circumstances encompassing Terri's situation. There is no more of a separation of powers problem here than in any case where the legislature sets the ground rules from now on.

Ironically, the Circuit Court had to acknowledge that the judgment itself in Terri's guardianship case is open to reexamination and alteration prospectively. See Schiavo II, 792 So. 2d at 559 ("As long as the ward is alive, the order is subject to recall"). A fortiori, the legislature can lay down new rules governing the future handling of situations like Terri's.

CONCLUSION

This Court should reverse the judgment of the Circuit Court and remand for further proceedings.

Respectfully submitted,

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July ___, 2004

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served this the ___ day of July, 2004, via overnight delivery upon the following persons:

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CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that the brief complies with the font requirements of Fla. R. App. 9.210(a)(2) and is printed in Times New Roman 14-point font.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities