

COMMENTARY

TERRI SCHIAVO AND THE LAW

*Thomas C. Marks, Jr.**

This is not a law review article. Rather, it is a brief description of the legal battle over whether to remove the feeding and hydration tube which is keeping Terri Schiavo alive. The battle of and for “public opinion,”¹ which has also been waged over this issue is beyond the scope of what I have to say here. The legal battle is not about whether Terri has a hypothetical right to refuse medical treatment under the privacy guarantee in the Florida Constitution. Article I, Section 23 is “an independent, freestanding constitutional provision which declares the fundamental right to privacy.”² So, clearly, she has that right if certain conditions exist. She must be in a persistent vegetative state³ and—there being no form of advanced directive⁴—there must be clear and convincing evidence of what her wishes would have been if she could have envisioned her situation while still physically able to make her wishes known.⁵ Therefore, the battle has centered on whether Terri is or is not in a persistent vegetative state and what would Terri’s wishes be regarding the continued life support provided by the feeding and hydration tube if she could tell us.

This brief commentary is based primarily upon the briefs submitted by the petitioner, Michael Schiavo, and the respondent, Governor Jeb Bush. Two District Court of Appeal cases are also cited. Finally, I have relied on my own knowledge as a teacher of the Florida Constitution.

* Member, Professional Board of Editors, *State Constitutional Commentary*, *Albany Law Review*; Professor of Law, Stetson University College of Law.

¹ Brief of Respondent at 4, *Schiavo v. Bush* (Fla. Cir. Ct. 2003) (No. 03-008212-CI-20).

² *Winfield v. Div. of Pari-Mutuel Wagering*, 477 So. 2d 544, 548 (Fla. 1985).

³ Petitioner’s Brief at 3, 20, *Schiavo v. Bush* (Fla. Cir. Ct. 2003) (No. 03-008212-CI-20); Brief of Respondent at 3, *Schiavo* (No. 03-008212-CI-20).

⁴ Petitioner’s Brief at 5, 8, 12, *Schiavo* (No. 03-008212-CI-20).

⁵ *In re Guardianship of Browning*, 568 So. 2d 4 (Fla. 1990).

This protracted battle, or at least the initial circumstances leading to it, began on February 29, 1990 when Terri “suffered cardiac arrest and was rushed to the hospital.”⁶ This multi-year battle which was primarily between her husband as guardian and her parents⁷ apparently ended when the circuit court, having found both the above conditions met,⁸ directed “the guardian to remove the ‘nutrition and hydration tube’ on October 15, 2003.”⁹ It was removed on that date.¹⁰

But the battle was not over. A new player had now taken the field. The Florida Legislature with virtually unprecedented speed enacted legislation that gave the Governor legal grounds to have the feeding and hydration tube replaced. This was accomplished on October 21, 2003.¹¹ The guardian, Terri’s husband, sought to have the law declared unconstitutional and the entry of a “permanent injunction prohibiting its effect and any actions taken by state officials pursuant to its terms.”¹² The grounds alleged in support of this motion were, generally stated, that:

- 1) Terri’s rights under the Florida constitutional privacy guarantee had been violated by the Legislature and the Governor;
- 2) The legislation was a violation of “separation of powers;”
- 3) The legislation violated “equal protection;”
- 4) The legislation was a bill of attainder;
- 5) The legislation was an “invalid special law;” and
- 6) The legislation was “unconstitutionally vague.”¹³

The respondent’s brief on behalf of Governor Jeb Bush basically denied the various grounds for unconstitutionality put forward by Mr. Schiavo as petitioner.¹⁴ In addition, the Governor proposed that the request for an injunction was improper because, among other things, the Governor was new to the case and, hence, none of the prior findings were binding upon him. The Governor contended that he should have the opportunity to establish that Terri’s privacy rights were not violated by the feeding and hydration tube.¹⁵

As I am writing this brief comment, I am looking at a February 13, 2004 decision of the Second District Court of Appeal reversing

⁶ Petitioner’s Brief at 3, *Schiavo* (No. 03-008212-CI-20).

⁷ *Id.* at 2–4.

⁸ *Id.* at 3–4.

⁹ *Id.* at 5.

¹⁰ *Id.*

¹¹ *Id.* at 6.

¹² *Id.* at 43.

¹³ *Id.* at i–ii.

¹⁴ Brief of Respondent at iii, *Schiavo v. Bush* (Fla. Cir. Ct. 2003) (No. 03-008212-CI-20).

¹⁵ *Id.* at ii, 2.

the circuit judge's refusal to allow the Governor to take "the deposition of seven witnesses."¹⁶ The court reversed the circuit judge's protective order because "[a] complete bar to the taking of any depositions may cause harm to the Governor that will not be remediable on appeal from a final judgment."¹⁷ As the court's opinion explained, this was not an unqualified victory for the Governor. But for now the case proceeds.

There are obviously important issues in this case that go beyond Terri's tragic situation and have substantial consequences for Florida's constitutional law. They can be only briefly considered. First, was "chapter 2003-418, Laws of Florida, popularly known as Terri's Law"¹⁸ a valid general law? A general law must apply uniformly throughout the state.¹⁹ If it is found not to be a valid general law then it would be considered a special law and be constitutionally infirm because the conditions that attach to the enactment of a special law were not met.²⁰ Is it a general law? With great deference to both petitioner and respondent, it seems to me as a teacher of Florida constitutional law that it comes down to interpreting the quote from *Department of Legal Affairs v. Sanford-Orlando Kennel Club*,²¹ cited in the respondent's brief: "A general law operates uniformly [throughout the State], not because it operates on every person in the state, but because every person brought under the law is affected by it in a uniform fashion."²²

¹⁶ Bush v. Schiavo, 866 So. 2d 136, 137 (Fla. Dist. Ct. App. 2004).

¹⁷ *Id.*

¹⁸ *Id.* The text of Terri's Law is as follows:

Section 1. (1) The Governor shall have the authority to issue a one-time stay to prevent the withholding of nutrition and hydration from a patient if, as of October 15, 2003:

- (a) That patient has no written advance directive;
- (b) The court has found the patient to be in a persistent vegetative state;
- (c) That patient has had nutrition and hydration withheld; and
- (d) A member of that patient's family has challenged the withholding of nutrition and hydration.

(2) The Governor's authority to issue the stay expires 15 days after the effective date of this act, and the expiration of that authority does not impact the validity or the effect of any stay issued pursuant to this act. The Governor may lift the stay authorized under this act at any time. A person may not be held civilly liable and is not subject to regulatory or disciplinary sanctions for taking any action to comply with a stay issued by the Governor pursuant to this act.

(3) Upon the issuance of a stay, the chief judge of the circuit court shall appoint a guardian ad litem for the patient to make recommendations to the Governor and the court.

Section 2. This act shall take effect upon becoming a law.

2003 Fla. Laws ch. 418.

¹⁹ See Petitioner's Brief at 38-40, *Schiavo v. Bush* (Fla. Cir. Ct. 2003) (No. 03-008212-CI-20); Brief of Respondent at 40-42, *Schiavo* (No. 03-008212-CI-20).

²⁰ Petitioner's Brief at 38, *Schiavo* (No. 03-008212-CI-20).

²¹ 434 So. 2d 879 (Fla. 1983).

²² Brief for Respondent at 40, *Schiavo* (No. 03-008212-CI-20).

Can, to take the suggestion of respondent, there be a class of one like this upon which the law can operate uniformly? The Legislature certainly tried to create one.

Whether it succeeded is another matter. Without naming Terri, the law clearly applies only to her.²³ Can there be a valid class of one? It seems to me that for there to be a valid class of one like this there would have to be something unique about Terri's situation. Is there? I don't know and neither brief seems to fully address the point, although the respondent's brief does point out, in another context, that in comparison to Estelle Browning, Terri has a long life expectancy even if on life support.²⁴

If Terri's Law is a valid general law, does it encroach on the power of the judiciary to interpret the constitution to resolve individual cases?²⁵ The aspect of the constitution is, of course, privacy as applied to Terri Schiavo.²⁶ These questions are gone into at length in both briefs. The key issue here, as I see it, is whether the legislature can authorize the Governor to undo a seemingly valid judicial decision to remove Terri's feeding and hydration tube in order to allow the Governor time to challenge, not the court's interpretation of the privacy law itself, but the facts to which the law was applied that originally caused the Florida Circuit Court to order the removal of the feeding and hydration tube.²⁷ This is a very difficult issue. Should the awesome responsibility for this decision rest solely with the judiciary or should the legislature be allowed to provide for the Governor's intervention in order to establish facts that might sustain Terri's life support under the existing state of the law? Both sides seem to address this issue and, of course, reach different conclusions. My guess is that, given the gravity of the issue, the Second District may ultimately lean toward allowing the Governor to pursue the opportunity that the Legislature has attempted to give him. If it does and if the Florida Supreme Court accepts review, my guess is that it is likely to go along as well. But who knows? As the Second District pointed out, "[a] legislative act impinging on the right of privacy is presumptively unconstitutional unless proved valid by the state."²⁸ The Governor is attempting to overcome the "presumptive

²³ Petitioner's Brief at 39, 40, *Schiavo* (No. 03-008212-CI-20).

²⁴ Brief for Respondent at 13, *Schiavo* (No. 03-008212-CI-20).

²⁵ Petitioner's Brief at 23, 25, *Schiavo* (No. 03-008212-CI-20).

²⁶ *Id.* at 7.

²⁷ *Id.* at 25; Brief for Respondent at 25, *Schiavo* (No. 03-008212-CI-20).

²⁸ *Bush v. Schiavo*, 861 So. 2d 505, (Fla. Dist. Ct. App. 2003).

2004]

Terri Schiavo and the Law

847

unconstitutionality” by showing that the facts do not support removing Terri from life support and the state can thus satisfy the compelling governmental interest test.²⁹ In my opinion, he should be given the chance. This it seems to me is the crux of the case, *if and only if* “Terri’s Law” is a valid general law. In comparison, the other issues raised by the petitioner seem somewhat small indeed.³⁰

²⁹ Petitioner’s Brief at 8, *Schiavo* (No. 03-008212-CI-20).

³⁰ “Terri’s Law” was in effect declared unconstitutional by the trial court and the Governor has appealed the decision to the Second District Court of Appeal. While publication of this issue of *State Constitutional Commentary* was pending, that appeals court invoked a unique procedure to seek review of the case by the Florida Supreme Court without the appeal court having first rendered a decision itself.