

CYG.

**IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
CIRCUIT CIVIL CASE NO. 03-008212-CI-20**

**MICHAEL SCHIAVO, as Guardian of
the person of THERESA MARIE SCHIAVO,**

Petitioner,

vs.

**JEB BUSH, Governor of the State of Florida,
and CHARLIE CRIST, Attorney General
of the State of Florida,**

Respondents.

**ORDER GRANTING PETITIONER'S MOTION TO VACATE AUTOMATIC
STAY**

THIS CAUSE came before the Court on "Petitioner's Motion to Vacate Automatic Stay," with a certificate of service date of November 12, 2003. The Court, having reviewed the motion, as well as Respondent, Governor Jeb Bush's "Memorandum of Law in Opposition to Petitioner's Motion to Vacate Automatic Stay," and having considered the argument of the attorneys, finds as follows:

1. This action was brought to obtain a declaratory judgment declaring a legislative act designated as HB 35-E (Public Law 03-418) to be unconstitutional, and likewise declaring Executive Order No. 03-201 to be, among numerous other grounds, an unconstitutional violation of the privacy rights of Theresa Schiavo.

2. The Petitioner has asserted, and the respondents have admitted at the initial hearing for temporary relief in this cause, that on October 21, 2003, pursuant to the Governor's Executive Order, Theresa Schiavo was removed from her residence at a local

hospice, without the consent of her husband and duly appointed guardian, and an invasive medical procedure was performed, also without consent of her guardian, that resulted in the reinsertion of an artificial means for nutrition and hydration.

3. Previously, in an opinion of the Second District Court of Appeals dated June 6, 2003, Theresa Schiavo's right to be removed from life prolonging procedures had been confirmed and approved. See *In re Guardianship of Schiavo*, 851 So. 2d 182 (Fla. 2d DCA 2003). This right, Theresa Schiavo's right, was based upon strict compliance with the provisions of Chapter 765 Florida Statutes and the strong privacy provision of the Florida Constitution. Mrs. Schiavo, along with every other citizen of this state has the right to be left alone in his or her private life by this state's government. The legislature enacted Chapter 765 to specifically provide a procedure by which individuals might have their desires regarding life prolonging procedures determined and confirmed. There is no question that Mrs. Schiavo's right to privacy in this regard has been finally and completely determined. In so doing, the court confirmed that Mrs. Schiavo is and has been in a persistent vegetative state for more than twelve years and that there is no medical hope for her recovery. It further finally determined by clear and convincing evidence that it was her desire, not her husband's or her parent's or the court's, but her desire that she not be maintained by life prolonging procedures. The issue of the determination of her desire to exercise her constitutional right of privacy in order to avoid continued life prolonging procedures was fully and vigorously litigated for over six years. All legal means to contest the final judgment regarding her desires have been exhausted in both the state and federal court systems. For all practical and legal purposes, Theresa's desire to no longer be subjected to life prolonging procedures has been finally and

conclusively established as a matter of law. Her right to act on that desire is guaranteed by the Florida Constitution. The Second District Court of Appeals ordered Judge George Greer to enter an order setting the date for the removal of life prolonging procedures, pursuant to Mrs. Schiavo's right. *Id.* at 187. The order was duly entered by Judge Greer and life prolonging procedures were withdrawn on October 15, 2003.

4. The legislative enactment of HB 35-E and the Governor's Executive Order issued pursuant to its authority have unquestionably interfered with and intruded upon Theresa Schiavo's constitutional right of privacy. Of that fact, there is no doubt. The right of privacy is a fundamental right under the Florida Constitution. Any legislation impinging on that right is subject to strict scrutiny. In fact, any legislation which interferes with Mrs. Schiavo's right of privacy is presumptively unconstitutional. See *North Florida Women's Health and Counseling Services, Inc. v. State*, 28 Fla. L. Weekly S549 (Fla. July 10, 2003). In this litigation regarding interference with Mrs. Schiavo's right of privacy the burden is upon the respondents to prove the existence of a compelling state interest that would justify such an intrusion. *Id.*

5. Immediately, upon the passage of HB 35-E and the Governor's issuance of the Executive Order, this action was brought. Although there was a strong legal basis for the immediate issuance of a temporary injunction to enjoin this presumptively unconstitutional legislative and executive action, this court, in deference to the other two branches of government, declined to act until the respondents had been given a full and fair opportunity to brief the issue of constitutionality. This court anticipated that upon receipt of the respondent's brief an explanation of the compelling state interest justifying the interference with Theresa's right of privacy would be revealed. The issue of the

existence or non-existence of that compelling state interest might thereafter require that this court conduct an evidentiary hearing, but at the very least the respondents must first respond to the complaint and articulate a legally viable position regarding this legislation. The timetable for the submission of the respondent's briefs was suggested by counsel for respondents and approved by this court at the initial hearing for temporary relief.

6. Instead of receiving a brief defending the constitutionality of the legislative enactment that was the basis of his interference with the privacy rights of Theresa Schiavo, the Governor moved for dismissal of the action on procedural grounds. That is certainly his right, just as it is his right to appeal this court's denial of that motion. During the pendency of his appeal, the respondents have chosen to avail themselves of the automatic stay provided for in Rule 9.310(b)(2) of the Florida Rules of Appellate Procedure. The petitioner, on behalf of Theresa Schiavo, has sought to vacate the stay.

7. Vacating a stay is normally within the sound discretion of the court. *City of Sarasota v. AFSCME Council '79*, 563 So. 2d 830 (Fla. 1st DCA 1990). The rational behind the automatic stay is set out in *St. Lucie County v. North Palm Development Corp.*, 444 So. 2d 1133, 1135 (Fla. 4th DCA 1984) wherein the court indicated that the automatic stay "involves the fact that planning-level decisions are made in the public interest and should be accorded a commensurate degree of deference and that any adverse consequences realized from proceeding under an erroneous judgment harm the public generally." That rational does not apply in this case, since the effective ability of the Governor to act regarding anyone other than Mrs. Schiavo has now expired. However, when a state agency or officer chooses to invoke the right to an automatic stay, that stay

may only be vacated under the most compelling of circumstances. The court believes that those circumstances exist in this case.

A. First, as previously described, the State of Florida, through the actions of its legislature and Governor are currently depriving Theresa Schiavo of her constitutional right to privacy, which has been previously specifically and conclusively established as a matter of law. Each hour, each day, each week that goes by since the Governor required the reinsertion of her artificial support, Mrs. Schiavo is being prevented from exercising her constitutionally guaranteed and judicially confirmed desire to be free of a continued existence by life prolonging procedures. The deprivation of this right is immediate, ongoing and presumptively unconstitutional. Therefore, the urgency of a final determination of the constitutionality of the legislature's and Governor's actions is compelling. Theresa Schiavo should not be forced to receive unwanted life prolonging procedures for one day more than is reasonably necessary to resolve the legal issue of the state's authority to intrude into her private medical decisions.

B. Secondly, there are no significant adverse consequences to the respondents that will result from a lifting of the stay. At this point, all that this court has required is the filing of a response brief defending the constitutionality of the legislature's enactment. That will eventually have to be done in whatever court this case ultimately resides. Prolonging the inevitable analysis of the substantive legal issues in order to appeal procedural matters is an insufficient justification for the continued violation of Mrs. Schiavo's right to privacy by a presumptively unconstitutional act.

C. Finally, as suggested by the petitioner, if this court lifts the stay and at some subsequent date, prior to the resolution of the procedural issues currently

being appealed, this court finds that temporary injunctive relief is appropriate, any resulting order will be subject to appellate review and the same automatic stay. In short, the respondents in this case will suffer no adverse consequences as a result of the lifting of the stay, and may in fact advance the final resolution of the constitutional viability of their actions for the benefit of all citizens of this state, but most particularly for Theresa Schiavo.

ACCORDINGLY,

IT IS HEREBY ORDERED AND ADJUDGED that:

Petitioner's Motion to Vacate Automatic Stay is **GRANTED**. The Respondents shall file their briefs on the constitutionality of the subject act on or before Monday, November 17, 2003. In doing so, this court emphasizes that the ultimate issue of the constitutionality of HB 35-E and Executive Order No. 03-201 has yet to be determined and that the findings of the court herein should not be interpreted to suggest otherwise.

DONE AND ORDERED at Clearwater, Pinellas County, Florida this ____ day of November 2003.

TRUE COPY
Original Signed
NOV 14 2003
W. DOUGLAS BAIRD
Circuit Judge
Circuit Court Judge

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