IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
CIRCUIT CIVIL CASE NO. 03-008212-CI-20
UCN522003CA008212XXCICI

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 FOR SUMMARY JUDGMENT

THIS CAUSE came before the court on Petitioner's Motion for Summary Judgment, with a certificate of service date of November 24, 2003. The court, having reviewed the motion, considered the argument of the attorneys, and having considered the following briefs: "Petitioner's Brief"; "Brief of Respondent Jeb Bush, Governor of the State of Florida"; "Amicus Curiae Brief of Terry Schiavo's Parents Mary and Robert Schindler Supporting Respondents"; and "Brief of Amicus Speaker of the House on the Issue of Separation of Powers," finds that there is ample undisputed record evidence before this court to conclusively demonstrate the unconstitutionality of Ch. 2003-418, Laws of Fla., and the Governor's actions pursuant to its terms. Chapter 2003-418, is unconstitutional, both on its face and as applied to Mrs. Schiavo.

I.

Facial Unconstitutionality

Ch. 2003-418, Laws of Fla., (occasionally referred to herein as the "Act") is unconstitutional on its face because it is an unconstitutional delegation of legislative power to the Governor and because it unjustifiably authorizes the Governor to summarily deprive Florida citizens of their constitutional right to privacy. In both instances, these are pure questions of law that require no evidentiary support under any conceivable circumstance.

A. Unconstitutional Delegation of Legislative Power

Art. II, § 3, Fla. Const., provides that "[t]he powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." This principle, embedded in both the State and Federal constitutions, that the three branches are to be independent and separate of each other, exemplifies the concept of separation-of-powers. *Chiles v. Children A, B, C, D, E, and F*, 589 So.2d 260 (Fla. 1991). It is a safeguard designed precisely to prevent the concentration of power in the hands of one branch. *In re Advisory Opinion to the Governor*, 276 So.2d 25 (Fla. 1973).

The separation-of-powers doctrine "encompasses two fundamental prohibitions. The first is that no branch may encroach upon the powers of another. The second is that no branch may delegate to another branch its constitutionally assigned power." *Chiles*, 589 So.2d at 264. The Act and the Governor's executive order issued pursuant to its terms violate both prohibitions. It is the second branch of the separation-of-powers prohibition,

unconstitutional delegation of legislative power, which renders chapter 2003-418 unconstitutional on its face.

A legislative delegation of power to another branch of government without proper standards and guidelines violates Florida's separation-of-powers prohibition because it permits the other branch the discretion to decide what the law shall be. See *Askew v. Cross Key Waterways*, 372 So.2d 913 (Fla. 1978); *Conner v. Joe Hatton, Inc.*, 216 So.2d 209 (Fla. 1968). This concept is so fundamental and universally accepted that the Florida Supreme Court considers it "hornbook law." *Lewis v. Bank of Pasco County*, 346 So.2d 53 (Fla. 1976). A statute which delegates power to the executive must so clearly define that power that the executive is precluded from acting through whim, showing favoritism, or exercising unbridled discretion. *Id* at 56. "No matter how laudable a piece of legislation may be in the minds of its sponsors, objective guidelines and standards should appear expressly in the act or be within the realm of reasonable inference from the language of the act where a delegation of power is involved and especially so where the legislation contemplates a delegation of power to intrude into the privacy of citizens." *Smith v. Portante*, 212 So.2d 298, 299 (Fla. 1968).

Standards and guidelines are also necessary to accommodate the right to judicial review. "When legislation is so lacking in guidelines that neither the agency nor the courts can determine whether the agency is carrying out the intent of the Legislature in its conduct, then, in fact, the agency becomes the lawgiver rather than the administrator of the law." *Askew*, 372 So.2d at 918. Chapter 2003-418 contains no guidelines, no standards, no reference whatsoever to the individual privacy rights of those who fall

within its terms, which would serve to limit the Governor from exercising completely unrestricted discretion in applying the law to their lives.

Counsel for the Governor argues in his Memorandum of Law in Opposition to the Petitioner's Motion for Summary Judgment that chapter 2003-418 should be read "in para-material (*sic*) with other Florida Statutes relating to guardianship and end-of-life issues." Counsel for the Governor then suggests that pursuant to this canon of statutory interpretation, the Act authorizes the Governor to serve as a proxy and to enter a one-time stay on behalf of Mrs. Schiavo under the general provisions of §765.401, Fla. Stat. (2003). The use of canons of statutory interpretation is certainly appropriate when the language of a statute creates some ambiguity regarding legislative intent. However, "[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *Holly v. Auld*, 450 So.2d 217, 219 (Fla. 1984); *McLaughlin v. State*, 721 So.2d 1170 (Fla. 1998); *Brown v. State*, 848 So.2d 361 (Fla. 4th DCA 2003). Here, the statutory language is crystal clear. The Legislature assigned to the Governor the unfettered discretion to control the nutrition and hydration, indeed the life or death, of a limited class of Florida citizens. There is nothing in the plain statutory language that is vague or ambiguous. Its purpose is readily apparent and straightforward. Under those circumstances, it is not necessary to resort to the *in pari materia* canon of statutory interpretation to discern the Legislature's intent. To do so would infer the existence of some textually unannounced standards.

It must be assumed that the Legislature was aware of the existing provisions of Florida Statutes, chapter 765, and the constitutionally protected right to the privacy of

personal medical decisions under Art. I, § 23, Fla. Const. *Williams v Jones*, 326 So.2d 425 (Fla. 1975) ([T]he Legislature is presumed to know the existing law when it enacts a statute and is also presumed to be acquainted with the judicial construction of former laws on the subject concerning which a later statute is enacted.). Indeed, on page 28 of the Governor's memorandum of law in opposition to Petitioner's motion for summary judgment the Governor suggests that the Act "provides an additional layer of certainty that the patient's actual desires will be carried out." This is an extraordinary assertion, considering the Act contains no language that makes even the slightest reference to those desires, much less suggesting that the Governor is compelled to act in accordance with them.

The terms of the Act affirmatively confirm the discretionary power conferred upon the Governor. He is given the "authority to issue a one-time stay to prevent the withholding of nutrition and hydration from a patient" under certain circumstances, but he is not required to do so. Likewise, the Act provides that the Governor "*may* lift the stay authorized under this act at any time. The Governor *may* revoke the stay upon a finding that a change in the condition of the patient warrants revocation." (Emphasis added). In both instances, there is nothing to provide the Governor with any direction or guidelines for the exercise of this delegated authority. The Act does not suggest what constitutes "a change in the condition of the patient" that could "warrant revocation." Even when such an undefined "change" occurs, the Governor is not compelled to act. The Act confers upon the Governor the unfettered discretion to determine what the terms of the legislation mean and when, or if, he may act under it.

Based upon the Act's clear expression of legislative intent, the court finds that chapter 2003-418 constitutes an unconstitutional delegation of legislative power. This constitutional infirmity appears as a matter of law on the face of the Act itself and requires no additional evidence to demonstrate its existence. However, the unlawful delegation of legislative power is not the only basis upon which the Act is facially unconstitutional.

B. Unconstitutional Authority to Interfere with Right of Privacy

Art. I, § 23, Fla. Const., provides that "[e]very natural person has the right to be let alone and free from governmental intrusion into the person's private life . . ." This specific right to privacy, not found in the United States Constitution, was enacted in 1980 by the citizens of Florida to expressly provide a broader protection of privacy than that available under the Due Process Clause of the Federal constitution. *Winfield v. Division of Pari-Mutuel Wagering, Dep't of Business Regulation*, 477 So.2d 544 (Fla. 1985). The right includes a person's right of self-determination to control his or her own body and guarantees that "a competent person has the constitutional right to choose or refuse medical treatment, and that the right extends to all relevant decisions concerning one's health." *Guardianship of Browning v. Herbert*, 568 So.2d 4, 11 (Fla. 1990). Moreover, the right "should not be lost because the cognitive and vegetative condition of the patient prevents a conscious exercise of the choice to refuse further extraordinary treatment." *John F. Kennedy Memorial Hospital, Inc. v. Bludworth*, 452 So.2d 921, 924 (Fla. 1984). Thus, the privacy right to choose or refuse medical treatment applies to competent and incapacitated persons alike. *Browning*, 568 So.2d at 12.

In the case of an incapacitated person, the right "may be exercised by proxies or surrogates such as close family members or friends." *Id.* at 13. In exercising another's right of self-determination, "[t]he surrogate decisionmaker must be confident that he or she can and is voicing the *patient's* decision. *Id.* The decisionmaker "must be able to support that decision with clear and convincing evidence." *Id.* at 15. A written declaration of the patient's wishes "establishes a rebuttable presumption that constitutes clear and convincing evidence of the patient's wishes." *Id.* at 16. However, in a case where the patient has not executed a written declaration, oral evidence "may constitute clear and convincing evidence." *Id.*

There can be no question that every "patient" who conceivably falls within the terms of the Act possesses a constitutionally guaranteed right to the privacy of his or her personal medical decisions. The Act, in every instance, ignores the existence of this right and authorizes the Governor to act according to his personal discretion. By substituting the personal judgment of the Governor for that of the "patient," the Act deprives every individual who is subject to its terms of his or her constitutionally guaranteed right to the privacy of his or her own medical decisions. As suggested by the Petitioner, even in those instances where the desires of the "patient" correspond with the actions of the Governor, the Act is still unconstitutional because the Governor is not required to consider, much less act in accord with, those desires. It is the unrestricted power to act, regardless of the individual's right of privacy, which creates this fatal constitutional infirmity on the face of the Act.

Although the Act facially interferes with the privacy of all individuals who fall within its terms, that does not end the constitutional inquiry. If the Governor can demonstrate the

existence of a compelling state interest that would justify that interference, and if the interference is accomplished by the least intrusive means available, the Act may yet pass constitutional muster. This court must therefore address these issues in order to determine the existence of facial unconstitutionality based upon interference with the right of privacy.

"Florida's right of privacy is a fundamental right warranting 'strict' scrutiny." *North Florida Women's Health and Counseling Services, Inc.*, 866 So.2d 612 (Fla. 2003). As such, the state has an obligation not to intrude upon an individual's desires regarding life-prolonging procedures unless there is "a compelling interest great enough to override this constitutional right." *Browning*, 568 So.2d at 14. Florida courts have held that an individual's right to forego life-prolonging procedures requires a balancing of the patient's privacy interests against the state's interests in the preservation of life, the prevention of suicide, the protection of innocent third parties, and maintenance of the ethical integrity of the medical profession. *Id. See also In re Guardianship of Barry*, 445 So.2d 365 (Fla. 2d DCA 1984); *Satz v. Perlmutter*, 362 So.2d 160 (Fla. 4th DCA 1978) *affirmed with opinion*, 379 So.2d 359 (Fla. 1980).

Of these specific state interests, the most significant is the preservation of life. However, the state's interest in preserving life does not override an individual's personal choice regarding his or her own medical treatment decisions. Moreover, the state's interest in preserving life is strengthened or weakened based upon whether the person's affliction is curable or incurable. *Browning*, 568 So.2d at 14. Here, the Act in question only authorizes the Governor to act when "[t]he court has found the patient to be in a persistent vegetative state." Specifically under those circumstances, "the state's interests

do not outweigh the right of the individual to forego life-sustaining measures." *Browning*, 568 So.2d at 14. The court therefore finds that the state's interests are insufficient to override privacy interests of any individual who falls within the terms of the Act.

The potential state interests suggested by the Governor are identical to those previously discussed and resolved by the Florida Supreme Court in *Browning*. This court is not required to entertain evidence of the existence of some suggested compelling state interest, if the alleged interest is one that has been previously judicially determined to be legally insufficient to justify government interference with a person's constitutional right of privacy. Additionally, the Governor suggests that, pursuant to Art. I, § 2, Fla. Const., the state has a compelling interest in "ensuring that people with disabilities are not deprived of rights because of their disabilities." However, the Florida Supreme Court in *Browning* conclusively resolved the question of whether a disabled person still retains the personal privacy right to control his or her own medical treatment decisions. As a consequence, the Governor is foreclosed from claiming that the existence of a disability now somehow justifies the state interference authorized by the Act.

Since the Governor has not articulated the existence of a compelling state interest sufficient to override the right of privacy regarding the discontinuation of life-prolonging medical procedures, there is little need to extensively analyze whether the challenged Act exercises its function in the least intrusive means possible. *Winfield* 477 So.2d at 547; *In re T.W.*, 551 So.2d 1186 (Fla. 1995); *B.B. v. State*, 659 So.2d 256 (Fla. 1995). But some comment is warranted. The Florida Supreme Court has recognized that governmental interference with a citizen's right of privacy by the least intrusive means requires

adherence to procedural safeguards which, at a minimum, necessitates judicial approval prior to the state's intrusion. *Shakman v. State,* 553 So.2d 148 (Fla. 1989). The Act does not include any judicial oversight such as that provided in §765.105, Fla. Stat. (2003), or any other procedural due process safeguards. This court finds that authorizing the Governor to exercise unbridled discretion in making the ultimate decision regarding the life or death of a private Florida citizen, without standards, direction, review, or due process protection of that citizen's private desires, exceeds any reasonable concept of "least intrusive means."

This court must assume that this extraordinary legislation was enacted with the best intentions and prompted by sincere motives. However, as the highly respected constitutional lawyer and Senator, Daniel Webster (1782-1852), is widely credited with observing:

> Good intentions will always be pleaded for every assumption of authority. It is hardly too strong to say that the Constitution was made to guard the people against the dangers of good intentions. There are men in all ages who mean to govern well, but they mean to govern. They promise to be good masters, but they mean to be masters.

To preserve the promise of individual liberty and freedom, the Florida Constitution guarantees to every citizen the right to be the master of his or her own personal private medical decisions. Chapter 2003-418 authorizes an unjustifiable state interference with the privacy right of every individual who falls within its terms without any semblance of due process protection. The statute is facially unconstitutional as a matter of law.

II.

"As Applied" Unconstitutionality

As previously indicated, the Act authorizes the Governor to issue a stay and to restore nutrition and hydration to a certain population of "patients" in his sole discretion. However, the Governor is not *required* to do so. The fact that the Governor chose to issue a stay that affected Mrs. Schiavo implicates the constitutional separation-of-powers prohibition against executive encroachment into judicial powers. To the extent that chapter 2003-418 authorized such an encroachment, it is unconstitutionally retroactive legislation.

Undisputed Relevant Facts

The only material facts relevant to an "as applied" analysis of the constitutionality of chapter 2003-418 and the Governor's executive order on the grounds of violation of separation-of-powers and unconstitutionally retroactive legislation are the following:

1. "Petitioner is the duly appointed guardian of the person of Theresa Marie Schiavo." (*Respondent's Statement for Case Management Conference, paragraph 2.a.; case management conference, transcript at page 16, line 1.*)

2. "Theresa Marie Schiavo had no written advance directive." (*Respondent's Statement for Case Management Conference, paragraph 2.f.; case management conference, transcript at page 18, line 3.*)

3. The parties stipulated that the court was authorized to take judicial notice of the identified February 11, 2000, November 22, 2002, and September 17, 2003 orders of the

guardianship court. (*Case management conference, transcript at page 11, line 16, through page 15, line 14.*)

4. "A court has found Theresa Marie Schiavo to be in a persistent vegetative state." (*Respondent's Statement for Case Management Conference, paragraph 2.g.; case management conference, transcript at page 16, line 8.*)

5. "Prior to the enactment of [public law] 03[-]418 that the feeding and hydration tubes had been removed from Theresa Schiavo." (*Case management conference, transcript at page 10, line 25.*)

6. The parties' counsel stipulated to correct copies of the subject statute and executive order, which were submitted to the court. (*Case management conference, transcript at page 9, line 12, through page 10, line 22.*)

7. "The parents of Theresa Marie Schiavo have challenged the withholding of nutrition and hydration," in the context of the executive order. (*Respondent's Statement for Case Management Conference, paragraph 2.i.; case management conference, transcript at page 19, line 2.*)

8. On October 21, 2003, pursuant to HB 35-E, the Governor issued Executive Order No. 03-201, issuing a one-time stay for Mrs. Schiavo and resuming the provision of nutrition and hydration to her. (*Case Management Conference, page 9, line 5 through page 11, line 15.*)

9. On October 21, 2003, "pursuant to the Governor's Executive Order, Theresa Schiavo was removed from her residence at a local hospice," and brought to a hospital, all "without the consent of her husband and duly appointed guardian," to effectuate "the reinsertion of an artificial means for nutrition and hydration." (*Admission of respondents'*

counsel as reflected in paragraph 2 of this Court's November 14, 2003 order vacating automatic stay; transcript of hearing on request for temporary injunction, page 26, line 21.)

10. "Pursuant to the executive order of the Governor[,] that subsequently the feeding and hydration tubes were reinserted." (*Case management conference, transcript at page 11, line 9.*)

Each of the above facts is uncontroverted by the parties.

A. Unlawful Encroachment Upon Judicial Power

This is the other aspect of the separation-of-powers doctrine previously discussed in the examination of the unlawful delegation of legislative power. "[E]ach branch of government has certain delineated powers that the other branches of government may not intrude upon." *Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles*, 680 So.2d 400, 407 (Fla. 1996). The power of the judiciary is "not merely to rule on cases, but to *decide them, subject to review only by superior courts.*" *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19 (1995). Thus, among other things, under the separation-of-powers doctrine, a final judgment of a court cannot be undone by legislation as to the parties before the court. *Id.* Any legislation that hampers judicial action or interferes with the discharge of judicial functions is unconstitutional. *State v. Simmons*, 36 So.2d 207 (Fla. 1948); *Walker v. Bentley*, 660 So.2d 313 (Fla. 2d DCA 1995). The prohibition against intrusion into judicial functions by legislation also applies to executive branch encroachment. *Hall v. Moore*, 777 So.2d 1105 (Fla. 1st DCA 2001); *Advisory Opinion to the Governor*, 213 So.2d 716 (Fla. 1968); *In the Matter of the*

Appointment and Removal of the Janitor of the Supreme Court, 1874 WL 3391 (Wis.). Clearly, there has been such an encroachment in this case.

The judicial branch ruled on this matter with finality. Following over six years of litigation, the guardianship court entered its order of September 17, 2003, pursuant to a specific mandate from the Second District Court of Appeal, which required the Petitioner to remove the nutrition and hydration tube from Mrs. Schiavo. All appeals were exhausted and the parties agree that the tube was in fact removed in compliance with the order.

Notwithstanding the court's order, on October 21, 2003, the Florida Legislature enacted HB 35-E, the Governor signed it into law, and on the same day issued executive order No. 03-201, whereby he ordered the reinsertion of Mrs. Schiavo's nutrition and hydration tube. The executive order, in effect, reversed a properly rendered final judgment outright, thereby constituting a forbidden encroachment upon the power that has been reserved for the independent judiciary in contravention of the separation-of-powers doctrine. "Having achieved finality . . . a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and [the legislature] may not declare by retroactive legislation that the law applicable *to that very case* was something other than what the courts said it was." *Plaut*, 514 U.S. 211 at 227. Because the Governor interfered with the court's prior final adjudication of Mrs. Schiavo's rights through the exercise of powers textually assigned by the Constitution to the judiciary, his executive order is unconstitutional. *B.H. v. State*, 645 So.2d 987, 992 (Fla. 1994). As Justice Antonin Scalia succinctly acknowledged in *Plaut*:

> Not favoritism, nor even corruption, but *power* is the object of the separation-of-powers prohibition. The prohibition is violated when an individual final judgment is legislatively rescinded for even the *very best* of reasons, such as the Legislature's genuine conviction (supported by all the law professors in the land) that the judgment was wrong; and it is violated 40 times over when 40 final judgments are legislatively dissolved. *Plaut*, 514 U.S. at 228.

Here, under the guise of a legislative grant of discretionary authority, the Governor, in effect, rescinded the duly entered final judgment that vested in Mrs. Schiavo the right to discontinue further life-prolonging medical procedures. *Bush v. Schiavo*, 861 So.2d 506 (Fla. 2d DCA 2003) ("On the day that chapter 2003-418 became law, [the Governor] exercised the authority it conveyed to him and ordered the reintroduction of hydration and sustenance to Mrs. Schiavo, effectively overruling the order of the probate division of the circuit court undertaken as a result of this court's mandate in *Schindler v. Schiavo(In re Guardianship of Schiavo)*,851 So.2d 182 (Fla. 2d DCA), *review denied*, 855 So.2d 621 (Fla. 2003)"). The factual basis for this court's determination regarding this issue is simply the following uncontroverted facts:

1. The existence of the final judgment in the guardianship procedure.
2. The stipulated fact that the feeding and hydration tube had been removed pursuant to that order.
3. The enactment of the legislation which is the subject matter of this action.
4. The Governor's executive order issued pursuant to its terms.
5. The stipulated fact that the nutrition and hydration tube was surgically reinserted in compliance with the executive order.

The Governor argues that the "Petition relies upon legal conclusions and 'borrowed facts' gleaned from legal proceedings to which the Governor was not a party and thus had no opportunity to cross examine witnesses or otherwise participate. As such, *res judicata* and collateral estoppel do not apply here." That argument is misplaced, if not misleading. The Governor was not a party to the prior guardianship litigation because he had no legally cognizable interest that would support his participation. He was, and remains, a stranger to Mrs. Schiavo's guardianship proceeding. His only colorable legal interest in Mrs. Schiavo derives from the Act that is the subject of this declaratory action. The legal issue in this litigation is the propriety of the Governor's interference with a previously entered final judgment, not the propriety of the guardianship proceedings. This court would agree with the Governor that *res judicata* and collateral estoppel do not apply in this case. They don't apply because the facts in the guardianship proceeding have no relevance to the issue of the constitutionality of chapter 2003-418. Petitioner has not attempted, nor is he required, to reestablish in this declaratory action the factual basis for the final judgment that was previously issued in the guardianship proceedings. For separation-of-powers analysis, the existence of that duly entered final judgment and the Governor's subsequent interference with it are the only essential factual issues. Both have been established by stipulation.

As it has been applied to Mrs. Schiavo, the Governor's executive order promulgated pursuant chapter 2003-418 constitutes an unconstitutional exercise of judicial power that violates the separation-of-powers provisions of Art. II, § 3, Fla. Const.

B. Unconstitutionally Retroactive Legislation

To the extent that the Act which is the subject matter of this declaratory action authorized the Governor to compel the reinsertion of Mrs. Schiavo's nutrition/hydration tube after her right to the removal of that tube had been judicially approved and ordered, it is unconstitutionally retroactive legislation.

A retroactive statute is one that "purports to determine the legal significance of acts or events that have occurred prior to the date of its enactment." Ray H. Greenblatt, *Judicial Limitations on Retroactive Civil Legislation,* 51 Nw. U.L.Rev. 540, 544 (1956). "A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Landgraf v. USI Film Prods,* 511 U.S. 244, 269-70, (1994). The Act clearly attaches new legal consequences to Mrs. Schiavo's previously adjudicated privacy right. Before its enactment Mrs. Schiavo was permitted to exercise, and indeed was exercising, her right to the privacy of her own medical treatment decisions. Following the passage of the Act, the Governor issued an Executive Order that completely deprived her of the ability to exercise that right.

In determining whether this Act may be applied retroactively, this court must determine: (1) whether there is clear evidence of legislative intent to apply the law retroactively; and (2) whether retroactive application is constitutionally permissible, in that the new law does not create new obligations, impose new penalties, or impair vested rights. *Metropolitan Dade County v. Chase Federal Housing Corp.*, 737 So.2d 494, 499 (Fla. 1999).

The first question in this analysis addresses legislative intent. As a rule of statutory construction, there is a presumption that a statute will only operate prospectively, unless there is a clear expression of legislative intent that it should be applied otherwise. *Campus Communications, Inc., v. Earnhardt*, 821 So.2d 388, 395 (Fla. 5th DCA 2002). In this case, there is no clear expression of legislative intent that the statute should operate to retroactively overturn a previously-entered final judgment specifically ordering the discontinuance of life-prolonging procedures. Accordingly, the Act facially appears to have only prospective application and the Governor's executive order, admittedly reversing the guardianship court's previously entered final judgment regarding the removal of the nutrition/hydration tube, would not be specifically authorized by the Act's own terms. However, the issue of whether or not this Act was intended to have retrospective application is not one that this court is required to resolve in order to determine the constitutionality of the Governor's actions pursuant to its terms. Even if the Act exhibits a specific intent that it be applied retroactively, the executive order entered pursuant to it is still unconstitutional by virtue of the second prong of the analysis.

That second prong focuses on the destruction of existing rights. The law has long disfavored retroactive legislation that destroys existing vested rights.

> As Justice SCALIA has demonstrated, the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. (Citation Note Omitted) Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.
> *Landgraf*, 511 U.S. at 265.

Justice Stevens went on to describe the various provisions of the Constitution that demonstrate this "antiretroactivity" principle, including the *Ex Post Facto* clause, the prohibition against Bills of Attainder, and the Due Process Clause, and stated:

> These provisions demonstrate that retroactive statutes raise particular concerns. The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals.
> *Id* at 266.

"Groups targeted by retroactive laws, were they to be denied all [due process] protection, would have a justified fear that a government once formed to protect expectations now can destroy them." *Eastern Enterprises v. Apfel,* 524 U.S. 498 at 549 (1998).

Similarly, Florida courts have acknowledged that the retroactive abolition of substantive vested rights is prohibited by constitutional due process considerations. *Metro. Dade County,* 737 So.2d at 503; *R.A.M. of South Florida, Inc. v. WCI Communities Inc.*, 2004 WL 591476 (Fla. 2d DCA March 26, 2004).

However, the prohibition against the retroactive destruction of existing rights is not absolute. The determination of the retroactive propriety of a legislative act requires a weighing process involving three considerations: the strength of the public interest served by the statute, the extent to which the right affected is abrogated, and the nature of the right affected. *Department of Transportation v. Knowles,* 402 So.2d 1155 (Fla. 1981) (Citing Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation,* 73 Harv.L.Rev. 692 (1960).). Viewed in the light of these factors, the Act is unquestionably unconstitutional. There is no public interest served by authorizing the Governor to have the unbridled power to overrule a final judgment determining and

declaring the constitutional privacy rights of a Florida citizen. The deprivation of Mrs. Schiavo's privacy right authorized by the Act is total, and bereft of all due process protections. Finally, the privacy right involved is so significant that it is constitutionally guaranteed. The deprivation of vested rights is particularly manifest when the rights being deprived have resulted from a court's issuance of a final judgment specifically acknowledging those rights and ordering conduct consistent with those rights. *Department of Transportation v. Knowles*, supra.

It is difficult to imagine a clearer deprivation of a judicially vested right by retroactive legislation than that which has occurred in this case. The guardianship court issued its final judgment after six plus years of litigation. The guardianship proceeding provided the parties with the full panoply of due process rights, including the extensively exercised right of appellate review. The guardianship court's final judgment established for Mrs. Schiavo a vested right to discontinue further life-prolonging procedures. The subject legislation cannot retroactively create in the Governor some previously nonexistent legal interest in controlling Mrs. Schiavo's private medical decisions after those decisions have been finally adjudicated and her rights thereto vested.

As noted in the discussion of the separation-of-powers infirmity, this court is not relying upon *res judicata* or collateral estoppel to establish facts from the prior guardianship litigation. Those facts have no relevance to the legal issue here being addressed. The only relevant fact regarding the guardianship action that is significant to the constitutional retroactivity analysis of this challenged legislation is the existence of the final judgment itself. That final judgment has been stipulated into evidence by the parties, and the rights it confers are a matter of law.

Because it is a type of retroactive legislation that is not constitutionally prohibited, it is important to briefly distinguish the concept of *remedial legislation* from the circumstances in this case. Remedial legislation is, by its very nature, retroactive in effect. It is legislation that operates in furtherance of a remedy or confirms rights already in existence. However, it may not deprive one of vested rights. *City of Lakeland v. Catinella*, 129 So.2d 133 (Fla. 1961). "Remedial statutes simply confer or change a remedy in furtherance of existing rights and do not deny a claimant his or her vested rights." *Rustic Lodge v. Escobar*, 729 So.2d 1014 (Fla. 1st DCA 1999). As indicated above, Mrs. Schiavo is being deprived of significant vested rights by virtue of the application of this legislation to her. Chapter 2003-418 is not remedial.

As it has been applied to Mrs. Schiavo, the Act constitutes unconstitutionally retroactive legislation.

III.

Remaining Constitutional Issues

Because the Court finds that the actions of the Legislature and the Governor violated Mrs. Schiavo's right to privacy, due process, and the separation-of-powers doctrine; it is unnecessary to address the other constitutional issues raised by Petitioner's action. Those issues include the assertion that the Act constitutes an unlawful Bill of Attainder, is an unlawfully enacted special law, and is unconstitutionally vague. If, upon review, it is ultimately determined that chapter 2003-418 and the Executive Order promulgated under it do not violate those constitutional prohibitions, then some additional factual determinations may be required. At this point, however, there is

sufficient undisputed record evidence through stipulation and judicial notice to find that there is no genuine issue of material fact as to those constitutional issues addressed herein, and that the Petitioner is entitled to a final summary judgment regarding those constitutional issues as a matter of law. However, by not discussing those other issues, the court is not foreclosing the possibility that there may be additional constitutional infirmities. Therefore, it is

ORDERED AND ADJUDGED that the Petitioner's Motion for Summary Judgment be, and the same is hereby **GRANTED**, and it is

FURTHER ORDERED AND ADJUDGED that Ch. 2003-418, Laws of Fla., is determined and herewith declared to be unconstitutional for the reasons herein expressed, and it is

FURTHER ORDERED AND ADJUDGED that Executive Order No. 03-201, be and the same is hereby declared to be void and of no further legal affect.

FURTHER ORDERED that the Respondent, Jeb Bush, Governor of the State of Florida, be and he is hereby enjoined and restrained from exercising any authority or ordering any conduct pursuant to the provisions of Ch. 2003-418, Laws of Fla.

DONE AND ORDERED in chambers at Clearwater, Pinellas County, Florida this _____ **day of May, 2004.**

TRUE COPY
Original Signed
MAY 5 2004
W. DOUGLAS BAIRD
CIRCUIT JUDGE

W. DOUGLAS BAIRD, CIRCUIT JUDGE

Copies Furnished To:

George J. Felos, Esq.
Kenneth L. Connor, Esq.
Thomas J. Perrelli, Esq.
Robert M. Portman, Esq.
Nicole G. Berner, Esq.
Randall C. Marshall, Esq.
David A. Cortman, Esq.
Jay Vail, Esq.

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT IN AND FOR PINELLAS COUNTY, FLORIDA

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

Petitioner,

Case No. 03-8212 CI-20
UCN522003CA008212XXCICI

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

Respondents.
_____/

ORDER GRANTING PETITIONER'S MOTION FOR PROTECTIVE ORDER

THIS MATTER is before the court on the petitioner's motion for protective order. The petitioner is seeking a protective order to prevent the respondents from conducting any depositions in this case.

The petitioner's first attempt to gain a protective order was quashed by the Second District Court of Appeal in its decision of Bush v. State, 866 So.2d 136 (Fla. 2d DCA 2004). As the Second District noted in its decision, to grant a protective order the movant must make a showing of good cause. A court may issue a protective order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense that justice requires." Fla. R. Civ. P. 1.280(c). A "strong showing is required before a party will be denied entirely the right to take a deposition." City of Oldsmar v. Kimmins Contracting Corp., 805 So.2d 1091, 1093, (Fla. 2d DCA 2002). Good cause includes

limiting discovery to the range of permissible issues to be litigated. See Pescod v. Wells Road Veterinary Medical Center, Inc., 748 So.2d 1095 (Fla. 1st DCA 2000).

The Second District in Bush specifically asked this court to "make a determination of the propriety of inquiry into the statute's impact on Mrs. Schiavo, and other factually based aspects of the constitutional challenge to chapter 2003-418." Bush, 866 So.2d at 139. Additionally, this court was to "make a determination of the propriety of any further inquiry into facts adjudicated in the guardianship proceeding." Id. For reasons set forth below, this court finds that it is improper at this time for there to be any further inquiry into the facts of this case.

This court, in its Order Granting Petitioner's Motion For Summary Judgment in favor of the petitioner, has determined that Ch. 2003-418, Laws of Fla. is unconstitutional both on its face and "as applied" to Mrs. Schiavo. The material facts necessary to decide this matter are not at issue. Generally, no facts need to be judicially determined when deciding the facial constitutionality of a statute under these circumstances. See State v. Globe Communications, Corp., 622 So.2d 1066 (Fla. 4th DCA 1993). It is a question of law.

The only material facts relevant to the "as applied" analysis of the constitutionality of chapter 2003-418 on the grounds of violation of separation-of-powers and unconstitutionally retroactive legislation are the following:

1. "Petitioner is the duly appointed guardian of the person of Theresa Marie Schiavo." (*Respondent's Statement for Case Management Conference, paragraph 2.a.; case management conference, transcript at page 16, line 1.*)

2. "Theresa Marie Schiavo had no written advance directive." (*Respondent's Statement for Case Management Conference, paragraph 2.f.; case management conference, transcript at page 18, line 3.*)

3. The parties stipulated that the court was authorized to take judicial notice of the identified February 11, 2000, November 22, 2002, and September 17, 2003 orders of the guardianship court. (*Case management conference, transcript at page 11, line 16, through page 15, line 14.*)

4. "A court has found Theresa Marie Schiavo to be in a persistent vegetative state." (*Respondent's Statement for Case Management Conference, paragraph 2.g.; case management conference, transcript at page 16, line 8.*)

5. "Prior to the enactment of [public law] 03[-]418 that the feeding and hydration tubes had been removed from Theresa Schiavo." (*Case management conference, transcript at page 10, line 25.*)

6. The parties' counsel stipulated to correct copies of the subject statute and executive order, which were submitted to the court. (*Case management conference, transcript at page 9, line 12, through page 10, line 22.*)

7. "The parents of Theresa Marie Schiavo have challenged the withholding of nutrition and hydration," in the context of the executive order. (*Respondent's Statement for Case Management Conference, paragraph 2.i.; case management conference, transcript at page 19, line 2.*)

8. On October 21, 2003, pursuant to HB 35-E, the Governor issued Executive Order No. 03-201, issuing a one-time stay for Mrs. Schiavo and resuming the provision

of nutrition and hydration to her. (*Case Management Conference, page 9, line 5 through page 11, line 15.*)

9. On October 21, 2003, "pursuant to the Governor's Executive Order, Theresa Schiavo was removed from her residence at a local hospice," and brought to a hospital, all "without the consent of her husband and duly appointed guardian," to effectuate "the reinsertion of an artificial means for nutrition and hydration." (*Admission of respondents' counsel as reflected in paragraph 2 of this Court's November 14, 2003 order vacating automatic stay; transcript of hearing on request for temporary injunction, page 26, line21.)*

10. "Pursuant to the executive order of the Governor[,] that subsequently the feeding and hydration tubes were reinserted." (*Case management conference, transcript at page 11, line 9.*)

Each of the above facts is uncontroverted by the parties. And those facts form a sufficient factual basis to support a determination that Ch. 2003-418, Laws of Fla. is unconstitutional "as applied" to Mrs. Schiavo, as set forth in this court's Order Granting Petitioner's Motion For Summary Judgment.

For the reasons set forth in this court's Order Granting Petitioner's Motion For Summary Judgment, this court has also refrained from considering the petitioner's other challenges to the constitutionality of the statute at this time. Therefore, any other facts that may be elicited would be immaterial and irrelevant.

As it stands right now, the undisputed facts in the record establish that the statute is unconstitutional on its face and as applied to Mrs. Schiavo. Any further inquiry into the statute's impact on Mrs. Schiavo, other factually based aspects of the constitutional

challenge, or the facts adjudicated in the guardianship proceedings would be improper at this time. Therefore, the depositions proposed by the respondents are burdensome, oppressive, unreasonable, and not calculated to lead to any admissible evidence on any material factual issue to be resolved at this time. As the petitioner has made a strong showing of good cause to issue the protective order, this court shall grant the petitioner's motion for protective order.

IT IS THEREFORE ORDERED that the petitioner's motion for protective order is **GRANTED.**

DONE AND ORDERED in Chambers at Clearwater, Pinellas County, Florida this _____ day of May, 2004.

TRUE COPY
Original Signed
MAY 5 2004
W. DOUGLAS BAIRD
CIRCUIT JUDGE

W. DOUGLAS BAIRD, CIRCUIT JUDGE

cc: George J. Felos, Esq.
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