IN THE SUPREME COURT
IN AND FOR THE STATE OF FLORIDA

JEB BUSH, GOVERNOR OF THE STATE OF FLORIDA,

Appellant,

v. **CASE NUMBER: SCO04-925**

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

AMICUS BRIEF OF THE ACADEMY OF FLORIDA ELDER LAW ATTORNEYS, INC., AND THE NATIONAL ACADEMY OF ELDER LAW ATTORNEYS

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PRELIMINARY STATEMENT

This is an appeal by Jeb Bush, as Governor of the State of Florida, from an Order of the Honorable W. Douglas Baird granting Petitioner's Motion for Summary Judgment first entered on May 5, 2004 and re-entered on May 17, 2004. That order declared Chapter 2003-418, Laws of Florida unconstitutional, declared Executive Order 03-201 void and enjoined the Governor from exercising any authority or ordering any conduct under the provisions of Chapter 2003-418, Laws of Florida.

Throughout this brief Jeb Bush, Governor of the State of Florida, will be referred to as "Governor" or "Appellant." Michael Schiavo, Guardian of the Person of Theresa Marie Schiavo, will be referred to by name. Theresa Marie Schiavo will be referred to by name.

The Academy of Florida Elder Law Attorneys, Inc. will be referred to as "AFELA." The National Academy of Elder Law Attorneys will be referred to as "NAELA."

References to the record on appeal shall be designated by [Vol.___, p. ___], indicating the Volume of the record followed by the appropriate page citation.

STATEMENT OF INTEREST

The Academy of Florida Elder Law Attorneys, Inc. ("AFELA") is a Florida not for profit corporation with two hundred sixty-seven members, all of whom are attorneys admitted to the Florida Bar and who are also members of the National Academy of Elder Law Attorneys. The National Academy of Elder Law Attorneys, Inc. ("NAELA") is a national non-profit organization of four thousand five hundred elder law attorneys in all fifty states and the District of Columbia. The mission of AFELA and NAELA is to establish their members as the premier providers of legal advocacy, guidance and services to enhance the lives of people as they age.

One of the most significant aspects of an elder law practice is to assist clients in making end of life decisions. This case is one of great legal significance to elder law attorneys and their clients in Florida because it implicates the Florida Constitution's privacy clause as well as In re: Guardianship of Browning, 568 So. 2d 4 (Fla. 1990). Browning is the leading case applying Florida's constitutional privacy provision to guardians who make proxy decisions for medical care in accordance with the expressed wishes of the patient or ward and is relied upon extensively by elder law practitioners and the clients they represent.

SUMMARY OF ARGUMENT

The trial court correctly determined that Chapter 2003-418, Laws of Florida, violates Theresa Schiavo's constitutional right of privacy. The trial court followed the dictates of In re: Guardianship of Browning in finding that Theresa Schiavo would have chosen to be removed from food and hydration if she were competent to do so. Chapter 2003-418 thwarts the trial court's order which was determined pursuant to Theresa Schiavo's desires, as expressed through her guardian.

Chapter 2003-418, Laws of Florida ("the Act") violates the separation of powers doctrine in several respects. First, it confers on the Governor the power to issue and lift a stay whereas the Florida Constitution confers the power to issue and lift stays to the judicial branch.

Second, the Act allows the Governor to override a final judicial order. Finally, the act contains procedural provisions regarding the judiciary which violate the judicial branch's rule-making authority.

ARGUMENT I

THE STATUTE AT ISSUE CONLFICTS WITH FLORIDA'S RIGHT OF PRIVACY EMBODIED IN ARTICLE I, SECTION 23 OF THE FLORIDA CONSITUTION.

STANDARD OF REVIEW: The finding that a statute is unconstitutional is subject to de novo review. North Florida Women's Health & Counseling Svcs., Inc. v. State, 866 So. 2d 612 (Fla. 2003); Caribbean Conservation Corp. v. Florida Fish & Wildlife Conservation Comm'n., 838 So. 2d 492, 500 (Fla. 2003).

Article I, section 23 of the Florida Constitution provides that "Every natural person has the right to be let alone and free from governmental intrusion into the person' s private life. . . ." In 1980, the citizens of Florida made this specific right of privacy a part of their Constitution.

The leading case which discusses Florida's right of privacy is In re: Guardianship of Browning, 568 So. 2d 4 (Fla. 1990). The Florida Supreme Court held in Browning that "a competent person has the constitutional right to choose or refuse medical treatment and the right extends to all relevant decisions concerning one's health. . . ." Id. at 11. The privacy right to choose or refuse medical treatment applies

to competent and incompetent persons alike and may be exercised by proxies or surrogates if the patient is incapacitated. The proxy or surrogate must make the decision the patient would have made under the circumstances. Id. at 12-13. The surrogate must support the decision by clear and convincing evidence. Id. at 15.

Theresa Schiavo has been in a coma since February 25, 1990 and under the guardianship of her husband, Michael Schiavo since June 18, 1990. On February 11, 2000, the trial judge in the guardianship adversary proceeding ordered removal of Mrs. Schiavo's life prolonging medical treatment. This was a final order entered in the guardianship proceedings conducted under the criteria set forth in Browning, and under the provisions of sections 765.401 and 765.404, Florida Statutes. The trial court determined that Mrs. Schiavo was in a persistent vegetative state and that she would have chosen in February 2000 to withdraw her life prolonging medical treatment (artificial nutrition and hydration). The guardianship court also found that Mrs. Schiavo's proxy proved her wishes by clear and convincing evidence. See Schindler v. Schiavo, 792 So.2d 551, 554 (Fla. 2d DCA 2001) (Schiavo II).

This is a case of substituted judgment under the criteria in Browning. Substituted judgment means "the decision that the clear and convincing evidence shows the ward would have made for herself." Schindler v. Schiavo, 851So. 2d 182, 186 (Fla. 2d DCA 2003) (Schiavo IV). Section 765.401(3), Florida Statutes (2003),

states that substituted judgment is ". . . the decision [that] would have been the one the patient would have chosen had the patient been competent."

The trial judge correctly applied the Browning criteria in determining that Chapter 2003-418, Laws of Florida, and Executive Order 203-201, violated Theresa Schiavo's right of privacy under the Florida Constitution and, specifically, her right to choose or refuse medical treatment. In essence, the legislative act and the executive order substitute the judgment of the Governor for that of Mrs. Schiavo as exercised through her guardian

The facts here are similar to those in Cruzan v. Missouri, 497 U.S. 261 (1990). In that case, the United States Supreme Court confirmed the right of individuals to refuse medical treatment through oral or written expressions of intent and permitted proxies to act for the patient. The Court emphasized in both the majority and dissenting opinions that this was a matter for the states to be decided at the state level. Cruzan established the requirement for clear and convincing evidence to support removal of life prolonging medical treatment in the absence of written advance directives.

Chief Justice Rehnquist's opinion in Cruzan provided that guardianship decisions in such matters may be reconsidered on the basis of new evidence. In Cruzan, new witnesses came forward. The guardianship judge found that Nancy

Cruzan's parents had proved their daughter's wishes for withdrawal of life prolonging medical treatment by clear and convincing evidence and her feeding tube was removed on December 14, 1990. See Colby, The Long Goodbye: The Deaths of Nancy Cruzan (2002). Nancy Cruzan's case was determined using the substituted judgment standard and was based on clear and convincing evidence of what her decision would have been regarding life prolonging treatment had she been competent.

Shortly after the Cruzan decision, Congress passed the Patient Self Determination Act of 1990 which required medical providers to supply information about patients' rights to make health care decisions; document patients' execution of health care advance directives; not require advance directives as a condition of admission; and comply with state laws on advance directives.

After Browning, the legislature amended Chapter 765, Florida Statutes, to provide a specific procedure for the withdrawal of medical treatment in the absence of a written advance directive. §§765.401 and 765.404, Fla. Stat. The Governor's brief suggests that these amendments to Chapter 765 somehow vitiate Browning. That is not the case because section 765.106, Florida Statutes, specifically provides that the provisions of Chapter 765 are cumulative to existing rights and specifically do not impair any existing rights which the patient or his family may have under existing law or state or federal constitutions. As Browning has not been amended, overruled or

distinguished to date, it should remain as the beacon for the right to privacy relating to medical decisions.

The Governor's brief also takes the position that the trial court's orders in guardianship are never "final" so long as the ward is living. Judge Altenbernd's very careful analysis of this question in Schiavo II, 792 So. 2d at 558-559 demonstrated clearly that orders in guardianship adversary proceedings are just as final as those in civil proceedings. The court's permission for Mrs. Schiavo's parents to proceed under Rule 1.540 (b) and (c) of the Florida Rules of Civil Procedure gave ample protection to all interested parties and belies the argument for lack of finality. All parties in the prior Schiavo appeals treated the order of the guardianship court regarding the withdrawal of medical life prolonging procedures as being a final order for purposes of appeal.

The only way to provide certainty for lawyers and litigants in these matters is to affirm the guardianship court's substituted judgment as to Theresa Schiavo's decision had she been competent to make it. Only then will Theresa Schiavo's right of privacy be protected and elder law practitioners be able to advise their clients with certainty on end of life issues.

ARGUMENT

THE ACT IS UNCONSTITUTIONAL ON ITS FACE AS A VIOLATION OF THE FLORIDA CONSTITUTION SETTING FORTH THE SEPARATION OF POWERS DOCTRINE.

STANDARD OF REVIEW: The finding that a statute is unconstitutional is subject to de novo review. North Florida Women's Health & Counseling Svcs., Inc. v. State, 866 So. 2d at 612; Caribbean Conservation Corp. v. Florida Fish & Wildlife Conservation Comm'n., 838 So. 2d at 500.

A. The Act Usurps Judicial Power.

Article II, section 3 of the Florida Constitution, 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.

The legislature is expressly prohibited from encroaching upon the powers of the other governmental branches. Art. III, §12, Fla. Const. Judicial power is vested solely in the supreme court, district courts of appeal, circuit courts, and county courts of this state. Art. V, §1, Fla. Const. The Act at issue here infringes upon that power by vesting in the Governor the authority to: (1) issue a stay of a judicial order; and (2) lift the stay, to the exclusion of a judge or other judicial authority.

The legislature is constitutionally prohibited from authorizing the executive branch to exercise powers that are fundamentally judicial in nature. Dep't of Agriculture & Consumer Svcs. v. Bonanno, 568 So. 2d 24, 33 (Fla. 1990). Here, the Act confers upon the Governor the power to grant a stay of a judicial order, which is itself an exercise of judicial power. In so doing, the legislature has attempted to usurp the judiciary's authority. This court has previously advised one of The Governor's predecessors that such a usurpation violates the separation of powers doctrine where it stated:

> When a court is created, the judicial power is conferred by the constitution, and not by the act creating the court. It was said at an early period in American law that the judicial power in every well-organized government ought to be coextensive with the legislative power so far, at least, as private rights are to be enforced by judicial proceedings. The rule is now well settled that under the various state governments, the constitution confers on the judicial department all the authority necessary to exercise powers as a coordinate department of the government. Moreover, the independence of the judiciary is the means provided for maintaining the supremacy of the constitution.
>
> In a general way the courts possess the entire body of judicial power. The other departments cannot, as a general rule, properly assume to exercise any part of this power, nor can the constitutional courts be hampered or limited in the discharge of their functions by either of the other two branches.

In re: Advisory Opinion to the Governor, 213 So. 2d 716 (Fla. 1968)(quoting 16 Am Jur §219).

The power to issue stays is a judicial function. Landis v. North American Co., 299 U.S. 248, 254 (1936). Moreover, the Florida Constitution confers upon the courts the exclusive power to issue all writs necessary or proper to the complete exercise of their jurisdiction, including stays. Art. V, §5, Fla. Const. Here, the Act confers judicial stay power to the executive branch, in contravention of the separation of powers doctrine, which renders it unconstitutional.

B. The Act Impermissibly Overrides Prior Final Judicial Orders.

The Act impermissibly hampers and limits the discharge of the trial court's mandate by empowering the Governor to stay a judicial order. Following hearing, the trial court entered an order in February 2000 mandating that Theresa Schiavo's feeding tube be removed. The Second District Court of Appeal affirmed that final order on appeal. Schindler v. Schiavo, 780 So. 2d 176 (Fla. 2nd DCA 2001), cert. denied, 789 So. 2d 248 (Fla. 2001) ("Schiavo I"). The Second District pointed out in Schindler v. Schiavo, 851 So. 2d 182 (Fla. 2nd DCA 2003) ("Schiavo IV"), that the final judgment in the Schiavo case was "entered several years ago and has already been affirmed by this court." Id. at 185-186. Moreover, the Florida Supreme Court

declined to review Schiavo I. Id. Thus, there is no question that there was a final judicial order entered disposing of the case on its merits.

The Act impermissibly confers upon the Governor the ability to indefinitely stay the effect of the trial court's final order entered in 2000 which was judicially affirmed in 2001. As the parties had already exhausted judicial review of that final order, the legislative and executive branches were without constitutional authority to interfere with the finality of that judicial mandate through legislative means or executive order. Because the Act allows the Governor to stay a final judicial order, it violates the separation of powers doctrine.

C. The Act Impermissibly Infringes upon the Judiciary's Rule-Making Authority.

The judicial branch, to the exclusion of either the executive or legislative branches, has the exclusive power to promulgate rules for the practice and procedure in all Florida courts. Art. V, § 2(a), Fla. Const. Where the legislature's enactment is procedural, it infringes upon the judiciary's rule-making authority such that the enactment is unconstitutional. Looney v. State, 803 So. 2d 656, 676 (Fla. 2001); Jackson v. Florida Dep't of Corrections, 790 So. 2d 381 (Fla. 2000); Allen v. Butterworth, 756 So. 2d 52 (Fla. 2000). Here, the Act is unconstitutional on its face as it requires that the chief judge of the circuit court appoint a guardian ad litem for the

patient to make recommendations to the Governor and the court, if the Governor issues a stay. Ch. 2003-418, §1(3), Laws of Fla.

Mandating that the chief judge appoint a guardian ad litem infringes upon the judiciary's power to control its own operating procedures. By dictating an internal operating procedure of the judiciary, the legislative branch has impermissibly encroached upon the province of the supreme court and violated the separation of powers doctrine.

CONCLUSION

For all the foregoing reasons, Amici respectfully request this court affirm the trial court's order.

Respectfully Submitted,

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CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of type in this brief is 14 point Times New Roman.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was served by U.S. Mail on the 28th day of July, 2004 to the following parties: **George J. Felos, Esquire** Felos & Felos, P.A., 595 Main Street, Dunedin, Florida 34698; **Thomas J. Perrelli, Robert M. Portman, Nicole G. Berner,** Jenner & Block, LLC, 601 13th Street, NW, Suite 1200, Washington, DC 2005; **Randall C. Marshall**, Legal Director, American Civil Liberties Union of Florida, 4500 Biscayne Blvd, Suite 340, Miami, Florida 33137; **Jay Vail**, Office of the Attorney General, PL-01, The Capitol, Tallahassee, Florida 32399; **David Cortman**, ACLJ, 1000 Hurricane Shoals Road, Suite D-600, Lawrenceville, GA 30043; and **Kenneth L. Connor, Esquire and Camille Godwin, Esquire**, Wilkes & McHugh, P.A., One North Mabry Street, Suite 800, Tampa, Florida 33609.

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