

**U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
Tampa Division**

**THERESA MARIE SCHINDLER
SCHIAVO, et al.,**

Plaintiffs

v.

Case no. 8:093-CV-1860-T-26-TGW

MICHAEL SCHIAVO

Defendant.

_____ /

**ATTORNEY GENERAL AS AMICUS CURIAE
MEMORANDUM OF LAW
ON THE CONSTITUTIONALITY OF CHAPTER 765, F.S.**

Charles J. Crist, Jr., Attorney General of Florida, appears in this action as amicus curiae at the court's request to address the question of the constitutionality of Florida Statutes dealing with the right of severely incapacitated people to refuse artificial, life-prolonging measures. The Attorney General takes no position on the merits of the action or on what should be the done in this tragic case, and appears for the limited purpose of defending the statute as constitutional.

Since the case is presently before the court on the plaintiffs' motion for preliminary injunction, the Attorney General will address the constitutional challenges to Florida law raised in the second amended complaint in light of the arguments made in the plaintiffs' memorandum supporting the motion.

From a reading of the second amended complaint, the Attorney General believes the plaintiffs' claims are:

- Florida law is facially defective because it does not mandate or authorize the appointment of counsel or a guardian ad litem for an incapacitated person in any judicial proceeding to determine if they may refuse artificial, life-prolonging measures. Second amended complaint paragraph 28. The statute at issue appears to be s. 765.105, Fla. Stat., which sets out the procedure for dealing with challenges to the decisions of family members, "surrogates," or "proxies" authorized to make medical decisions on behalf of an incapacitated person to refuse life-prolonging procedures.
- Florida law is facially defective because it allows the refusal of life-prolonging measures without a "specific advance directive to withhold food and water." Second amended complaint paragraph 30. Evidently, the claim is that the U.S. Constitution requires that the incapacitated person must specifically have consented to the withholding of artificial nutrition and hydration.
- Florida law is facially defective because it authorizes a court to permit a refusal of life-prolonging measures upon a preponderance of the evidence. Id. paragraph 30.
- Florida law is facially defective because it discriminates against people in a "persistent

vegetative state" by depriving them of a right to counsel and a heightened burden of proof. Id. paragraph 32.

The second amended complaint does not explain how Florida law is unconstitutional as applied. However, the plaintiffs' memorandum provides further insight into their claims. In fact, it appears that the attack on the statutes' is not on their text but rather on its interpretation and application by the Florida courts. Memorandum at 9-18 ("This statutory construction renders the statutory scheme . . . unconstitutional," at 11; "the DCA has declared that Florida's statutory policy is that there is no per se entitlement to an independent GAL and thus no right to counsel in Chapter 765 proceedings . . ." at 12; "The Florida statutory policy, as enunciated by the DCA . . ." at 13; "Florida's statutory term 'advance directive,' at least as applied to Terri, unconstitutionally allows for the termination of life based on precisely the sort of anecdotal statements deemed legally insufficient . . ." at 16.). From the memorandum, it appears that their claims are more "as applied" than facial -- an attack on how the statutes have been applied in Mrs. Schiavo's case in the state courts.

THE FLORIDA STATUTORY SCHEME FOR THE REFUSAL OF TREATMENT

An understanding of how the law gives effect to the intent by an incapacitated person to refuse extraordinary, life-prolonging treatment is critical.

Everyone has the right to refuse treatment, including life-

prolonging treatment. People who are mentally incapacitated by illness or accident retain this right. Cruzan v. Director, Missouri Department of Health, 497 U.S. 261, 279-280 (1990); John F. Kennedy Memorial Hospital v. Bludworth, 452 So. 2d 921, 924 (Fla. 1984) ("This right of terminally ill patients should not be lost when they suffer irreversible brain damage, become comatose, and are no longer able to personally express their wishes to discontinue the use of extraordinary artificial support systems"); In re Browning, 568 So. 2d 4, 13 (Fla. 1990) ("the right is one of self determination that cannot be qualified by the condition of the patient")

The courts have differed as to the source of this right. In federal constitutional law, the right is an aspect of liberty under the Fourteenth Amendment, arising from the common law right in tort to consent to treatment. Cruzan, at 277-278 ("The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions."). Florida finds the source of the right in its broad right to privacy, which is constitutionally protected. Art. I, sec. 23, Fla.Const. Bludworth, at 924.

The reason mentally incapacitated patients retain this right, even though they are incapable of exercising it themselves, is that medical advances have made it possible to keep the body alive although the brain has ceased to function and there is little or no hope of recovery:

The tremendous advancements in medical technology in the last several years have made it possible to sustain a person who has minimal brain functioning but who does not meet the definition of "brain death" under section 382.085, Florida Statutes (1983). It is now possible to hold such persons on the threshold of death for an indeterminate period of time by utilizing extraordinary mechanical or other artificial means to sustain their vital bodily functions. The procedures used can be accurately described as a means of prolonging the dying process rather than a means of continuing life.

Bludworth, 452 So. 2d at 923. In health, the patient may not have wished for such extraordinary measures to be used.

The core conundrum, though, is how to give effect to this right, since the patient is not capable now of stating her choice. That choice, naturally, falls to a surrogate acting on the patient's behalf. Cruzan at 279-280.

The surrogate is typically a family member, for it is on family members or those closest to the patient on whom the responsibility will fall. Bludworth, 452 So. 2d at 926 ("The decision to terminate artificial life supports is a decision that normally should be made in the patient-doctor-family relationship."); In re Barry, 445 So. 2d 365, 371 (Fla. 2d DCA 1984) ("we recognize that decisions of this character have traditionally been made within the privacy of the family relationship based on competent medical advice and consultation by the family with their religious advisors, if that be their persuasion.").

But the surrogate cannot be allowed to exercise this right of choice without oversight. Bludworth, 452 So. 2d at 924-924 ("The question is who will exercise this right and what

parameters will limit them in the exercise of this right.). There is the danger that the surrogate's decision may not reflect what the patient would do, or there may be disagreements within the family about how the patient would handle the choice. Bludworth, at 926.

Thus, the state may condition the exercise of choice by the surrogate on meeting certain standards of proof. Cruzan, 497 U.S. at 284 (state may impose clear and convincing evidence test in judicial proceeding to determine patient's intent).

Florida requires that the surrogate determine by clear and convincing evidence what the patient would have wanted, not what the family or public opinion would prefer. In re Browning, 568 So. 2d at 13, 15.

Ordinarily, the Florida courts anticipate that these family decisions will be made in the privacy of the home and hospital without resort to the courts. In re Browning, 568 So. 2d at 15; In re Barry, 445 So. 2d at 372 ("judicial intervention need not be solicited as a matter of course").

But there inevitably are times when there are doubts or disagreements about the patient's wishes. The Florida Supreme Court foresaw this problem. Bludworth, 452 So. 2d at 926. Thus, the Florida Supreme Court required the courts to be available to adjudicate these questions, even though there was no specific statutory scheme in place to deal with them. See also In re Barry, 445 So. 2d at 372 ("the courts must always be open to hear these matters at the request of the family, guardian, affected

medical personnel, or the state. In cases where doubt exists, or there is a lack of concurrence among the family, physicians, and the hospital, or if an affected party simply desires a judicial order, then the court must be available to consider the matter.").

Following these seminal Florida decisions, the Florida Legislature enacted the provisions of Chapter 765. These statutory provisions provide a process in which an incapacitated person's intentions can be exercised through family, friends, or guardians -- a process which is consistent with the teachings of Bludworth, In re Browning, and In re Barry.

Chapter 765 makes available a number of vehicles through which an individual can make known her desires about future medical care should she become incapacitated later and unable to express herself. These include written or oral "advance directives,"¹ the appointment of a person to make decisions should incapacity occur, and so on. Sections 765.01(1), 765.202, 765.302 et seq. (living wills), Fla. Stat. We are not concerned with these portions of the law, however, because Mrs. Schiavo left no formal advance directive. We must instead look to what Florida law says to do in the absence of such a directive.

If a person left no advance directive, appointed no surrogate, or left no living will, the law spells out who can

¹ An advance directive is a witnessed written or oral statement that contains a person's directives about their future health care. Sec. 765.01(1), Fla. Stat.

make health care decisions if the person becomes incapacitated and incapable of expressing her intent: A court appointed guardian, the patient's spouse, the patient's adult child, a parent, an adult sibling, an adult relative, a close friend. Sec. 765.401, Fla. Stat. This person is known as a proxy.

As in Browning, the statutes limit the proxy's choice to that which "the proxy reasonably believes the patient would have made under the circumstances." Sec. 765.401(2), Fla. Stat. If there is no indication what the patient would do, generally the proxy is authorized to act in the patient's best interest.

Section 765.402(2) covers continuing care. The rules are different when a person who leaves no formal instructions is in a "persistent vegetative state" and the question is whether to withdraw "life-prolonging procedures." A persistent vegetative state is a legal and medical term of art that describes a condition characterized by a severe loss of brain functioning and the inability to communicate. The statutory definition is "a permanent and irreversible condition of unconsciousness" in which there is an absence of voluntary or cognitive behavior of any kind, and an inability to communicate or interact purposefully with the environment. Sec. 765.101(12), Fla. Stat. Clinicians have described the condition as follows:

Mrs. Gray's treating physician since 1986 at the General Hospital states that her chances of recovery to conscious state are "close to zero." Marcia Gray's brain stem functions are primarily intact, although not entirely, but she exhibits no conscious cognitive, sentient responses which would indicate functioning cerebral hemisphere activity. He suggests that her

responses to noxious stimuli was of questionable significance given the primitive nature of the startle reflex. He does not believe that she will experience hunger, thirst or pain should the feeding be stopped. He states that because her conscious faculties have ceased to function, she would not experience, in his opinion, that sensory recognition. The consulting physician engaged by Mrs. Gray's family also believes strongly that there is no sensation and hence no pain, thirst, or hunger recognition.

Gray v. Romeo, 697 F.Supp. 580, 583 (D. R.I. 1988).

Persistent vegetative states can occur for a variety of reasons. In Mrs. Gray's case it was a stroke. See also In re Browning, 568 So. 2d at 8 (stroke). Severe head injury can also lead to the condition. Wendland v. Superior Court, 49 Cal.App.4th 44, 46 (Cal. App. 3d Dist. 1996) (motorcycle accident).

"Life-prolonging procedures" are any medical procedure, treatment, or intervention that sustains or restores vital functions. Sec. 765.101(10), Fla. Stat. The definition expressly includes "sustenance and hydration."

Unlike continuing care decisions, a decision to end life-prolonging measures for a patient in a persistent vegetative state can only be made by a court-appointed guardian. Sec. 765.404(1), Fla. Stat.

Before making any such decision, the guardian must consult with the patient's physician. Sec. 765.404(2), Fla. Stat. The physician, in consultation with the medical ethics committee of the facility where the patient is being treated, must conclude that the patient's condition is permanent, that there is no reasonable medical probability for recovery, and that withholding

life-prolonging procedures is in the patient's best interest. If no ethics committee is available at the facility, the facility must contact one elsewhere for consultation. Id. The committee must review the decision with the guardian and the physician. Id. Only when these consultations and reviews have been completed can any decision to withdraw life-prolonging measures be carried out.

Not only must the guardian's decision be reviewed by hospital staff, but it is also subject to judicial challenge. Sec. 765.105, Fla. Stat. The statutes provide standing to family members, the health care facility, the attending physician, or any other interested person affected by the decision to seek judicial review. Id. Among other grounds, these challengers may question whether the decision is in accord with the patient's known desires or the patient has sufficient capacity to make his or her own health care decisions. Sec. 765.105(1), Fla. Stat. This review is expedited under Rule 5.900 of the Florida Probate Rules. Sec. 765.404, Fla. Stat. Among other things, these rules require a hearing within 72 hours of the filing of a petition. Rule 5.900(d).

Notice the difference in reasons that may justify discontinuing life-prolonging measures. If there is no judicial challenge, the test is the patient's best interests. If a judicial challenge is made, the guardian may be required to show that the decision is one the patient would have made.

The statute is silent about the burden of proof in such a challenge, and about whether the patient has a right to a

guardian ad litem or to appointed counsel. It is also silent about whether a patient must have expressed a desire about the discontinuance of a specific form of treatment.

The statutes are silent about the right to a legal representative.

Because the statutes are silent about whether a patient has a right to counsel or a guardian ad litem, they are not facially defective. Because they state no preference either way, it is impossible to establish that there is no set of facts under which the law would be valid. See e.g., U.S. v. Grandsen, 212 F.3d 1231, 1236 (11th Cir. 2000).

Florida courts have discretion to appoint a legal representative.

The plaintiffs appear to assert that Florida law does not allow for the appointment of counsel or a guardian ad litem in proceedings such as this. But that contention misunderstands the broad discretion that Florida courts have to appoint counsel or guardians ad litem in such circumstances should one be necessary. In the first Schiavo appeal the district court pointed out that it did not rule out the need for a guardian ad litem. It simply held that such an appointment would usually be duplicative of the court's role. But it emphasized that the appointment of a guardian ad litem was discretionary with the trial court. In re Schiavo, 780 So. 2d 176, 179 (Fla. 2d DCA 2001).

Florida courts also have the discretion and authority to appoint counsel even in the absence of express statutory

authority. O.A.H. v. R.L.A., 712 So. 2d 4 (Fla. 2d DCA 1998).

Since the trial court has both the discretion and authority to appoint either a guardian ad litem or counsel in a proceeding challenging the discontinuance of life-prolonging measures despite specific statutory authority, there is no constitutional infirmity. The failure to make such an appointment in a particular matter is subject to review on appeal in those state proceedings.

The Constitution does not mandate the appointment of a legal representative for the patient in all circumstances.

Moreover, it is questionable whether such appointments are constitutionally mandated in these circumstances. As a general rule, there is no right to appointed counsel in civil cases. Pokuta v. TWA, 191 F.3d 834, 840 (7th Cir. 1999); Lavado v. Keohane, 992 F.2d 601, 605-606 (6th Cir. 1993).

But due process of law does not lend itself to bright line rules. Lassiter v. Department of Social Services, 452 U.S. 18, 24 (1981); Glover v. Johnson, 75 F.3d 264, 269 (6th Cir. 1996) (appointment of counsel in civil case made on a case by case basis). Rather, the court must apply a three-part balancing test to determine if due process requires appointment of counsel. Id. at 27; Mathews v. Eldridge, 424 U.S. 319, 335 (1976). The three factors the court must consider are (1) the private interests at stake, (2) the government's interest, and (3) the risk that the procedures used will lead to an erroneous decision. Lassiter at 27; Mathews v. Eldridge, 424 U.S. at 335.

The private interest is in whether a person will be permitted to exercise her constitutional right to refuse treatment against the opposition of her physician and her health care facility. Bludworth, supra (holding that the physician and facility incur no civil or criminal liability for acceding to the patient's wish). The state's interest is in preserving life. Both the state and the private parties have an interest in whether that decision is a correct one.

The judicial procedures involved are sufficient to protect the state's and the private parties' interest in the correctness of the decision without the right to an appointed legal representative. Florida law allows a broad spectrum of actors to challenge the guardian's decision. Sec. 765.105, Fla. Stat. The Schindlers were able to mount such a challenge in state court, and they have fought a long, tenacious battle.

The pivotal question is whether a legal representative is "essential to accomplish a fair and thorough presentation" of claims. Graham v. State, 372 So. 2d 1363, 1365 (Fla. 1979). Given the fact that s. 765.105 allows broad standing to mount a judicial challenge to the guardian's decision, it is reasonable to assume that the challenger will effectively raise all reasonable arguments against the decision. In this adversary atmosphere, the patient's interests should be sufficiently well represented to foreclose the need for appointed counsel or a guardian ad litem in every case. This does not mean that the trial court would not want to make such an appointment in the

appropriate case.

Thus there is no facial defect to Florida law on this point.

Lassiter points to another reason why appointed counsel and GAL should be a matter for the court's discretion. When the relevant factors balance differently case-by-case, the Supreme Court said, "we cannot say that the Constitution requires [] appointment of counsel in every parental termination proceeding." Id. at 31. The factors will not always reach the same balance. The factors will vary depending on who brings the challenge to the guardian's decision, whether the challenger is able to litigate it appropriately, and whether there are facts (such as suspect motives by guardian and challenger) that militate for independent representation for the patient. Because these factors will vary, the best solution is to leave the question about appointed representation to the discretion of the trial judge, subject to appellate review. Id. at 32.

For these reasons, the Florida Statutes are constitutional.

Florida law requires clear and convincing evidence to support the guardian's decision.

Florida law requires that, when challenged, a proxy's or guardian's decision to discontinue life-prolonging care must be supported by clear and convincing evidence. In re Browning, 568 So. 2d at 15 ("A surrogate must take great care in exercising the patient's right of privacy and must be able to support that decision with clear and convincing evidence.") and at 16; In re Barry, 445 So. 2d at 371-372 ("the court must be satisfied from clear and convincing evidence that [the patient] suffers from an irreversible physical or mental defect, and there is no reasonable probability of [the patient] gaining a cognitive sapient state.").

Although Chapter 765 is silent on the burden of proof, clear and convincing is still the standard required by Florida courts in these situations. See In re Schiavo, 780 So. 2d at 179 ("The clear and convincing standard of proof, while very high, permits a decision in the face of inconsistent or conflicting evidence.").

Florida Statutes do not violate the plaintiffs' rights to equal protection.

The plaintiffs raise only one equal protection issue in the second amended complaint (at paragraph 32), but argue three in their memorandum (at 17-18). Two of the contentions in the memorandum thus are outside the scope of the case as framed by

the pleadings and should not be considered.²

The single equal protection claim alleged in the second amended complaint does not state a claim for a constitutional violation.

The single issue raised in the second amended complaint is the contention that "Florida's statutory scheme . . . treats persons differently based solely on this specific disability" by depriving them of the right to counsel and by failing to apply a heightened burden of proof. They contend that other disabled people, such as those with strokes and Alzheimer's, are afforded counsel and a heightened proof standard when they refuse treatment while incapacitated. Second amended complaint at paragraph 32. In their memorandum, the plaintiffs do not mention right to counsel. They only allege that people in a persistent vegetative state can choose by proxy to refuse treatment "based on casual remarks," while people incapacitated by stroke or Alzheimer's face a higher standard of proof in exercising their right to refuse. Id. at 17.

This allegation makes no sense. The statute in question, the definition of "persistent vegetative state," s. 765.101(12), Fla. Stat., is facially neutral. It merely sets out criteria for a persistent vegetative state. One must be (1) permanently and

² Conley v. Gibson, 355 U.S. 41, 47 (1957); Arrington v. Dickerson, 915 F.Supp. 1503, 1512 (M.D. Ala. 1995) -- the purpose of Fed.R.Civ.P. 8's plain statement rule is to give the defendant fair notice of the claims and grounds on which it rests. Such notice must allow the defendant to respond and raise defenses. Mallett v. Timco Electric Power and Controls Co., 815 F.Supp. 992, 993 (E.D. Tex. 1993).

irreversibly unconscious, (2) lacking the ability for voluntary action or cognition, and (3) unable to communicate or interact purposefully with the environment. The statute is silent about the cause. It focuses only on the present condition or consequence of the cause. As we have seen, people fall into a persistent vegetative state for a variety of reasons. Stroke is one. Gray v. Romeo, 697 F.Supp. 580, 583 (D. R.I. 1988). Alzheimer's conceivably could result in this terrible condition as well. The statute -- and resulting procedures -- apply to all who meet its criteria. The argument that stroke or Alzheimer's victims are treated differently is without foundation.

If the plaintiffs are trying to mount an as-applied challenge to this facially neutral statute, they must allege that the plaintiffs are treated differently than similarly situated people under the statute and the defendant applied the statute purposefully to discriminate against the plaintiff. Strickland v. Alderman, 74 F.3d 260, 264 (11th Cir. 1996). Those allegations do not appear to be made here.

CONCLUSION

In sum, the plaintiffs have not made a persuasive case that Florida Statutes providing a mechanism through which the profoundly incapacitated can exercise their constitutional right to refuse life-prolonging treatment are facially unconstitutional.

RESPECTFULLY SUBMITTED,

CHARLES J. CRIST, JR.
Attorney General

JASON VAIL

Florida Bar no. 298824

Assistant Attorney General
Office of the Attorney
General

PL-01, The Capitol
Tallahassee, Florida 32399
Tel: (850) 414-3300
Fax: (850) 488-4872

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served by U.S. Mail on the following on **October 3, 2003**:

Patricia Fields Anderson
447 Third Ave. North, suite
405
St. Petersburg, FL 33701

George Felos
595 Main St.
Dunedin, FL 34698

Jason Vail

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