

THE JURISPRUDENCE OF LIFE AND DEATH IN THE SUNSHINE STATE

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Florida has one of the strongest abortion rights in the United States. This “right to abortion” did not come from a statute adopted by duly elected members of the legislature accountable to the people. The right came as a result of Florida Supreme Court’s landmark decision of *In re T.W., A Minor*³. In *T.W.*, the Florida Supreme Court, discovered a virtually unfettered right to abortion in Florida’s state constitution, which was found to even extend to minor children over their parents consent or objection. *T.W.* is only one of many cases for which the Florida High Court has received a national reputation, and criticism, for being “activist” and usurping its proper role and authority.

I. LIFE ISSUES

When it comes to issues surrounding the jurisprudence of life and death in Florida, personal autonomy and privacy have consistently trumped the state’s interest in protecting human life. Because of the Florida court’s judicially created right to abortion, Florida Court’s have routinely invalidated sanctity of life legislation to protect human beings from the unborn to the elderly and disabled.

Abortion

The centerpiece of any discussion of the law on abortion in Florida will necessarily require an understanding of Article I, Section 23 of the Florida Constitution. Adopted in 1980,

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³ *In re T.W., A Minor*, 551 So. 2d 1186 (Fla.1989).

this independent, freestanding privacy right has been construed by the Florida Supreme Court as conferring a fundamental right to abortion, even to minors.

The text of Article I, Section 23, reads as follows:

Every natural person has the right to be let alone and free from governmental intrusion into his private life, except as otherwise provided herein. This section shall not be construed to limit the public's right to access to public records.

There are currently ten states that have state constitutional privacy rights of some kind.⁴ In comparing the effect and interpretation of these state privacy amendments, Florida has arguably one of the most powerful and robust abortion rights in the country.

Five states, Alaska, California, Florida, Hawaii, and Montana, have had their state constitutions interpreted as providing an abortion right, even though there is no language expressly setting forth a right to an abortion. The other five states, Arizona, Illinois, Louisiana, South Carolina and Washington have not found a right to abortion in their state Privacy Amendments.

The history, background and development of Florida's state privacy right is important to understanding the present law on abortion in Florida and future of any proposed changes to those laws. The history surrounding Florida's Right of Privacy clearly indicate the privacy amendment was intended as a protection against governmental intrusion into the private sector by means of sophisticated investigative techniques to gather *information*.⁵

Florida's privacy right is broader in scope than that of the federal Constitution.⁶ When Florida voters adopted Article I, Section 23 of the Florida Constitution in 1980, the amendment came at a time when abortions had been legal nationwide for seven years.⁷ The right to abortion was enunciated by the United States Supreme Court by construing penumbra privacy rights in the federal Constitution.

⁴ National Conference of State Legislatures, *Privacy Protections in State Constitutions*, available at <http://www.ncsl.org/programs/lis/privacy/stateconstpriv03.htm> (last visited March 12, 2007).

⁵ Const. Revision Comm'n proceedings (July 6, 1977) (address by Overton, C.J.) (on file with FLA. ST. U. L. REV.) (emphasis added).

⁶ See *Winfield v. Div. of Pari-Mutuel Wagering, Dep't of Bus. Regulation*, 477 So. 2d 544, 548 (Fla. 1985) (stating "it can only be concluded that the [constitutional right to privacy] is much broader in scope than that of the Federal Constitution").

⁷ See *Roe v. Wade*, 410 U.S. 113 (1973).

In contrast to the United States Supreme Court, the concern in Florida was *not related to abortion* but, instead, was over individual informational privacy rights. This Court recognized the intent of the amendment by stating:

Although the general concept of privacy encompasses an enormously broad and diverse field of personal action and belief, there can be no doubt that the Florida amendment was intended to protect the right to determine whether or not sensitive information about oneself will be disclosed to others. The proceedings of the Constitution Revision Commission reveal that the right to informational privacy was a major concern of the amendment's drafters. –

Thus, a principal aim of the constitutional provision is to afford individuals some protection against the increasing collection, retention, and use of information relating to all facets of an individual's life.⁸

In 1980, the legislature passed Committee Substitute for House Joint Resolution No. 387, which was the language approved by the electors in the November 1980 General Election, creating Article I, Section 23.⁹ During the debate from the legislative session, many concerns arose about the possibility of overbroad judicial interpretations of the amendment. State Attorneys feared that the amendment would limit their ability to use surveillance tools and other means to investigate crimes. The prosecutors also believed the amendment would make crimes such as possession of drugs in the home easier to perpetrate with impunity. State Senator Don Childers, D-West Palm, was one of the most ardent opponents of the amendment.¹⁰ Senator Childers' concerns included the legitimization of homosexual relationships, the use of marijuana in homes, police search and seizure, and preservation of the Sunshine Amendment which protects public access to public records.¹¹ Even the most vocal opponents of the amendment expressed no concern for the possibilities of its being construed to grant a possible right to abortion. Furthermore, close scrutiny of tape recordings from the 1980 legislative committee meetings reveal no mention in discussion or debate about abortion rights (let alone abortion rights to a minor without parental or judicial consent) being a potential concern of either

⁸ Rasmussen v. South Fla. Blood Serv., Inc., 500 So. 2d 533, 536 (Fla. 1987) (emphasis added).

⁹ Historical Note, 25A FLA. STAT. ANN. 261.

¹⁰ *Conservatives & Gays Backing Privacy Rule*, ORLANDO SENTINEL STAR, October 27, 1980, at 2C.

¹¹ *Id.*

opponents or proponents of the privacy initiative.¹² Upon examination of the existing documentation of the amendment's development and adoption, it is clear that the historical record is devoid of evidence that Florida's Right of Privacy was intended to confer a right to abortion.

Even though Florida's right of privacy was adopted to address informational privacy, the Florida Supreme Court, in response to legislation designed to protect a minor mother and her unborn baby, took a different stance. After the United States Supreme Court case of *Casey v. Planned Parenthood of Pennsylvania*¹³ Florida's Governor Bob Martinez called an unprecedented special session on abortion in 1988. During this special session, the Florida legislature enacted a parental consent law.¹⁴ The law required a minor to obtain one parent or legal guardians written and informed consent in order to obtain an abortion. In the alternative, there was a judicial bypass mechanism whereby the minor must convince the court that she is sufficiently mature enough to make the decision herself. Finally, if the minor was deemed to be not mature enough, then she could still obtain the surgical procedure if the court found that it was in her best interests. The bill was signed into law.

T.W., an unwed, pregnant fifteen year old, pursuant to the above mentioned Florida statute sought judicial bypass of the requirement of parental consent to legally end her pregnancy. T.W. claimed that (1) she was mature, (2) she was fearful of physical and/or emotional harm if she were required to obtain parental consent from her parents, and (3) that her pregnancy would add to her ill mother's problems.

The trial court appointed a guardian ad litem for the unborn child and conducted a hearing within twenty-four hours of the petition. The trial court ruled that the *judicial bypass* provision was unconstitutional because was vague, and made no provision for testimony to

¹² Audio tape: House Subcommittee on Executive Reorganization (February 12, 1980); House Subcommittee on Executive Reorganization (March 11, 1980); House Governmental Operations (April 9, 1980); House Governmental Operations (April 16, 1980); Senate Committee on Rules and Calendar (May 6, 1980) (on file with Fla. State Archives).

¹³ 505 U.S. 833 (1992).

¹⁴ FLA. STAT. ANN. § 390.0014(4) (a).

controvert that of the minor. The trial court denied the petition for waiver and required T.W. to obtain parental consent. T.W. appealed.

The Fifth District Court of Appeal of Florida ruled that the entire statute was unconstitutional citing numerous defects and dismissed the petition. The guardian ad litem made numerous motions to block the abortion, none of which were successful and the pregnancy was thereafter legally terminated. The guardian ad litem appealed to the Florida Supreme Court. The Florida High Court's decision in this case¹⁵ has become the seminal case in Florida's new right to abortion. The *T.W.* court held;

[U]nder Florida law, prior to the end of the first trimester, the abortion decision may be left to the woman and may not be significantly restricted by the state. Following this point, the state may impose significant restrictions only in the least intrusive manner designed to safeguard the health of the mother.¹⁶

The parental consent law was held to be unconstitutional under Florida Constitution, Article I, Section 23, "because it intrudes upon the privacy of the pregnant minor from conception to birth."¹⁷ This right to abortion found by the court was so strong that it outweighed any interests that the state argued it had in protection of minors and in the rights of parents to engage in their children's decision making. The court held that Florida's right of privacy extends to "[e]very natural person."¹⁸ Minors, the court held, are also are natural persons.

As Justice Grimes explained in his concurring opinion "If the United States Supreme Court were to recede from *Roe vs. Wade*, this *would not* diminish the abortion rights now provided by the privacy amendment of the Florida Constitution."¹⁹ This places Florida in a very stagnate place for any significant changes to its implied right to abortion in a future time where the United States Supreme Court may choose to alter or recede from the precedent articulated in *Roe*. Unless the Florida Supreme Court recognized that *T.W.* was wrongly decided, or the people

¹⁵ *In re T.W.*, 551 So. 2d 1186 (Fla. 1989).

¹⁶ *Id.* at 1193.

¹⁷ *Id.* at 1194.

¹⁸ *Id.* at 1193.

¹⁹ *Id.* at 1202. (emphasis added).

of Florida expressly amend the state constitution with a human life amendment, it appears Justice Grimes opinion would be an accurate statement of the law in Florida in a post-*Roe* environment.

In 1999, over ten years after enacting the parental consent statute above, the Florida Legislature enacted the Parental Notice of Abortion Act.²⁰ The Legislature concluded that in an abortion procedure, an immature minor was unable to make fully informed choices, the physical and emotional consequences of abortion are serious, there is no correlation between the decision to become pregnant and the decision to terminate the pregnancy, parents are in the best place to provide medical information concerning their child, and parents are more likely to ensure that their pregnant minor daughter receives the best medical treatment after the abortion. Furthermore, the Legislature stated that the Act was essential to the state's compelling interest in protecting minors, preserving the family unit, and preserving the parent's fundamental right of rearing their minor child.

In 2003, the Florida Supreme Court heard the case of *North Florida Women's Health and Counseling Services v. State*²¹ in which the plaintiff, representing several abortion clinics, women's rights groups and doctors, sought to enjoin and halt enforcement of the Parental Notice of Abortion Act on the grounds that it imposed a significant restriction on a minor's right of privacy under the Florida Constitution and the Act does not further a compelling state interest through the least restrictive means. The state in *North Florida* argued that the court should abandon the strict scrutiny analysis and adopt the "undue burden" analysis under the Supreme Court's *Casey* decision.²² The Florida Supreme Court rejected this argument reasoning that Florida's free-standing constitutional right to privacy is a fundamental right, and as Justice Shaw stated the "undue burden standard [] is an inherently ambiguous standard and has no basis in Florida's Right to Privacy Clause."²³

Justice Shaw, writing for the majority, concluded that although the requirement of parental notification is not as intrusive as the requirement of parental consent, the intrusion is

²⁰ FLA. STAT. ANN. § 390.01115.

²¹ 866 So. 2d 612 (Fla. 2003).

²² *Id.* at 634.

²³ *Id.* at 635.

still significant.²⁴ The majority opinion held that the Act was a substantial intrusion of the right to privacy that is afforded to minors under Florida's Right to Privacy Amendment.²⁵ Although the majority opinion recognized the state does have at least some interest in the protection of minors and the preservation of the family unit, these interests were not significantly compelling to override Florida's right to privacy.

Justice Pariente, in her concurring opinion, reasoned that even if the state's interest was deemed compelling, the Act does not further the state's compelling interest in the least restrictive means. Although the Act provides for a judicial bypass, Justice Pariente argued the bypass was "cumbersome and burdensome" and will do more harm to the minor than good by threatening confidentiality, adding time to the abortion, and real life logistical difficulties.²⁶

Chief Justice Anstead, in his concurring opinion, further argued that the state's interest is not compelling in that the state has failed to require parental notification in other medical decisions involving a minor's pregnancy including, among other things, pregnancy treatment, adoption of a minor's baby, and treatment of sexually transmitted diseases.²⁷ According to Justice Wells, in his dissent, Chief Justice Anstead's argument, at best reveals an inconsistency in the law but it does not logically follow to his conclusion that the state lacks a compelling interest in the protection of minors. However, as pointed out by Justice Wells, in his dissenting opinion, inconsistencies in legislation are prevalent and all legislation reflects differing policy perspectives.²⁸ Justice Wells stated, "This Court or any court can without difficulty identify statutes which are inconsistent for various reasons. The legislative branch enacts legislation on a wide variety of matters, and there is no way that all legislation on particular subjects is going to meet this exacting test of consistency."²⁹ For instance, under Florida law a minor still must have parental involvement and consent in obtaining a driver's license, body art, possession and use of

²⁴ *Id.* at 631.

²⁵ FLA. CONST. art I, § 23.

²⁶ 866 So. 2d at 655, 656. (Pariente, J., concurring).

²⁷ *Id.* at 641. (Anstead, C.J., concurring).

²⁸ *Id.* at 673. (Wells, J., dissenting).

²⁹ *Id.*

firearms, donation of blood, pari-mutuel activity, and even artificial sun tanning.³⁰ According to Justice Wells, under the majority's reasoning, these laws would also violate the right to privacy and would be subject to being discarded by the court. As Justice Wells points out, "[I]f the judicial branch holds legislation unconstitutional because it does not meet judicial scrutiny for consistency, then there is a real likelihood that legislators will change good and effective statutes merely to avoid this Court's voiding statutes based on legislative inconsistency."³¹

Justice Wells further argued that Florida's Privacy Amendment was never intended to extend to familial matters and was never intended to afford more protection than that offered by the United States Constitution.³² The dissent points out that the majority opinion never addresses the fundamental issue in regards to Florida's right to privacy; that is the "reasonable expectation of privacy."³³ In Florida, in order for the right to privacy to attach, a determination of "whether an individual has a legitimate expectation of privacy [] must be made by considering *all the circumstances*, especially objective manifestations of that expectation"³⁴ In *North Florida*, Justice Wells questioned whether it could be said that a minor has a *reasonable expectation of privacy* in keeping knowledge of medical information from her parents?³⁵ The Florida Supreme Court in the case of *Jones v. State*³⁶, specifically held that minors *do not* have the same level of privacy that adults possess. As Justice Wells, in *North Florida* concluded;

[T]he answer is plain that a statute requiring notice to a parent cannot be an undue burden on the minor's right to privacy, given the fact that a minor has at most a limited reasonable expectation of privacy in respect to the minor's parent and the fact that a parent has a fundamental right in parenting the child.³⁷

After legislative attempts were struck down by Florida courts, in 2004, the Florida Legislature proposed and the voters ratified, by a 65% majority, an amendment to the Florida

³⁰ *Id.* at 667.

³¹ *Id.* at 673.

³² *Id.* at 672.

³³ See *Winfield v. Div. of Pari-mutuel Wagering*, 477 So. 2d 544 (holding that before a right to privacy attaches there must be a reasonable expectation of privacy under Florida law).

³⁴ *Shaktman v. State*, 553 So. 2d 148, 153 (Fla. 1989) (Ehrlich, C.J., concurring) (emphasis added).

³⁵ 866 So. 2d at 672.

³⁶ 640 So.2d 1084 (Fla. 1994).

³⁷ *Id.* at 673-674.

Constitution, that was similar to the 1999 law requiring parental (or guardian) notification in the case of a minor attempting to terminate her pregnancy. Article X § 22 of the Florida Constitution states,

The Legislature shall not limit or deny the privacy right guaranteed to a minor under the United States Constitution as interpreted by the United States Supreme Court. Notwithstanding a minor's right of privacy provided in Section 23 of Article I, the Legislature is authorized to require by general law for notification to a parent or guardian of a minor before the termination of the minor's pregnancy. The Legislature shall provide exceptions to such requirement for notification and shall create a process for judicial waiver of the notification.

The amendment created enabling language which then allowed the legislature to enact a statute to give effect to the amendment. Codified as Section 390.01114, the “Parental Notice of Abortion Act” (hereinafter “Act”) was enacted by the Florida Legislature in May 25, 2005. The Act requires that the parent or legal guardian be notified at least 48 hours before an abortion procedure. If actual notice³⁸ is not possible after reasonable effort, then constructive notice³⁹ must be given. However, notice is not required if (1) a medical emergency exists in which there is insufficient time to notify the parent or guardian; (2) notice is waived; (3) the disability of nonage has been removed; (4) the minor has a minor dependent child; or (5) the minor successfully petitions the court.⁴⁰

The Act has recently withheld federal constitutional scrutiny. In 2006, the plaintiff’s in the case of *Womancare of Orlando v. Agwunobi*⁴¹ challenged the Act on the grounds that, inter alia, it violated a minor’s due process rights by creating the prospect of identification in the judicial bypass process. The Federal District Court for the Northern District of Florida held that the Act was implemented for proper purposes consistent with the “undue burden” test set forth in

³⁸ See FLA. STAT. ANN. § 390.01114(2)(a) (“Actual notice” means notice that is given directly, in person or by telephone, to a parent or legal guardian of a minor, by a physician, at least 48 hours before the inducement or performance of a termination of pregnancy, and documented in the minor's files).

³⁹ See *id.* at (2)(c). (“Constructive notice” means notice that is given in writing, signed by the physician, and mailed at least 72 hours before the inducement or performance of the termination of pregnancy, to the last known address of the parent or legal guardian of the minor, by certified mail, return receipt requested, and delivery restricted to the parent or legal guardian. After the 72 hours have passed, delivery is deemed to have occurred).

⁴⁰ *Id.* at (3)(b).

⁴¹ 448 F. Supp 2d 1309 (N.D. Fla. 2006).

the Supreme Court's *Casey* decision, and the plaintiff did not show that the mandatory reporting requirement places a significant obstacle in the path of a minor seeking an abortion.⁴² The court concluded that although American jurisprudence does not allow a parent to retain absolute veto power over a minor's decision to terminate a pregnancy, the Supreme Court has routinely upheld parental notification statutes in that the state furthers a compelling interest by encouraging an unwed, pregnant minor to seek the advice and guidance of her parents.⁴³

Florida's Parental Notification of Abortion Act was a long awaited victory for pro-life advocates. However, the Act is simply not having the effect it was intended to have. It is interesting to note that the Planned Parenthood organization was listed as a plaintiff in the only case to challenge the Act, *Womancare of Orlando*, while the ACLU has not challenged this Act at all. The fact is that the Planned Parenthood organization and the ACLU have not challenged this Act nearly as vigorously as the 1999 version. In fact, the ACLU targets teens through an advertised website to assist them with "secret abortions."⁴⁴ This is because, besides never being ratified, this is the best that Planned Parenthood and pro-choice advocates could have hoped for. The Act simply lacks the ability to be enforced and is therefore devoid of its intended effect.

Preliminarily, the statute in its current wording is overly broad and ambiguous in key components. The statute fails to define "best interest" of the minor and gives the court no factors to consider in determining whether or not to grant a waiver. This has lead to a lack of consistency waiver of notice cases, thus allowing a judge to make his or her own individualized determination of what is in the best interests of the child arbitrarily, without a standard to consider. The statute also fails to provide a judge with a proper justification to deny a wavier of notice. This vagueness would also allow a judge to be influenced by the race, ethnicity, or financial background of the minor seeking a waiver of notice. The statute fails to establish the standard of proof necessary to determine whether notification is or is not in the best interest of the child.

⁴² *Id.* at 1318.

⁴³ *Id.* at 1314.

⁴⁴ The website is <http://www.pathproject.net>

Secondly, and most importantly, the judicial bypass provision itself has turned into a completely open door for waivers of parental notice of a minor child's contemplated abortion. The Act provides for only a 48-hour timeframe from filing of petition to decision. During this 48-hour time period, judges are required to assign counsel for the minor, conduct a hearing and issue a written opinion of findings supporting their decision. For instance, if a minor files a petition at 4:30 on Friday afternoon, the matter must be decided before 4:30 on Sunday afternoon. There is no leniency in the statute regarding this time period; if the time period elapses the waiver is granted automatically by statute. This is a nearly impossible timeframe for judges to meet.

Proposed changes have included changing the time frame from 48 hours to five days, and instead of waiver automatically being granted, the minor must petition the chief judge for a hearing within five days who must ensure that a hearing is conducted within 48 hours and a decision rendered within 24 hours following the hearing. These proposed changes would ensure that the court is given adequate time to determine whether or not cause exists to circumvent the parents' constitutional right to be informed of their minor daughter's abortion. Although this statute was not intended to create a rubberstamp for minors to obtain abortions, it has. As of October 20, 2006, since the Act went into effect in July 2005, 548 minors have petitioned for a judicial bypass and the bypass has been granted to 514 minors. The above mentioned PathProject website established by the ACLU has accounted for approximately 172 judicial bypasses in Florida.⁴⁵

Finally, the statute allows for the minor to petition any circuit court within the jurisdiction of the District Court of Appeals in which the minor resides. This has opened the door for forum shopping on the part of counsel who seeks to avoid circuit courts in more conservative areas. Counties with more abortion clinics have the highest rates of issued waivers. The counties with the most waivers issued are the counties with the most abortion clinics; these include Palm Beach, Orange and Miami-Dade counties. Counties with no abortion clinics issue

⁴⁵ Steven Ertelt, *Florida Appeals Court Approves Teen's Secret Abortion, Waivers Abused*, LIFENEWS.COM, October 20, 2006, <http://www.lifenews.com/state1905.html>.

the fewest waivers, and in most cases courts in these counties are not petitioned for waivers at all. Proposed changes would also invoke requiring the minor to petition the circuit court in the judicial circuit in which they reside.

This statute clearly lacks the ability to serve its intended purpose and due to the efforts of the ACLU, the statute, in its weakened state, is being abused and the rights of parents to be involved in their minor daughters' life are being circumvented on a far too regular basis. The preceding proposed changes were all included in Florida House Bill 1527.⁴⁶ The Bill died on the House Calendar. Following a thorough reading of Florida's Parental Notification of Abortion Act, and considering its judicial bypass process, it is difficult to think of a scenario where a judge would be correct in denying a petition for waiver of notice.

In March of 2007, a Bill was filed in the Florida House sponsored by the Healthcare Council and Rep. Traviesa (R).⁴⁷ This proposed Bill would require a physician to provide actual notice to the parent or guardian of a minor seeking an abortion at least 24 hours before the abortion can be performed. If actual notice is not available the physician would have to wait 24 hours after constructive notice was given. Constructive notice is notice by mailing. Notice would be deemed given 48 hours after the mailing. If the parent or guardian receiving actual notice indicates that they already have been given notice or that they do not wish to consult with the minor, then the 24-hour waiting period would not apply. In regards to the judicial bypass, the Bill would require appointment of a guardian ad litem for the minor seeking the abortion pursuant to Florida Statutes.⁴⁸ The Bill would also enumerate nine standards for the court to consider, including age, intelligence, emotional stability, credibility and demeanor as a witness, ability to accept responsibility, ability to assess future impact, ability to understand and explain the medical consequences of abortion and ability to apply that understanding to her decision, and an assessment of undue influence on the choice to have an abortion. And in regards to the court proceedings, most importantly, the Bill would require confidentiality and a requirement that the

⁴⁶ H.B. 1527, 2006 Leg., 108th Reg. Sess. (Fla. 2007).

⁴⁷ H.B. 1497, 2007 Leg., 109th Reg. Sess. (Fla. 2007) (Sponsored by Healthcare Council and Traviesa, and co-sponsored by Ford; Kreegel; Legg; Murzin; Proctor; Snyder).

⁴⁸ FLA. STAT. ANN. § 39.407(2)(a) (requiring consent of a parent or legal guardian before medical treatments).

records be closed to the public. The Bill would require the court's decision to be set forth in a written record with detailed findings of factual and legal conclusions as to the minor's maturity. This Bill was passed by the Florida House in April, 2007 by a vote of 71 yeas – 42 nays. However, the Bill died in the Florida Senate in May, 2007.

The Florida Supreme Court's "right to privacy" rationale has also been used to invalidate the prohibition of partial-birth abortions. In 1997, the Florida Legislature passed a bill outlawing partial-birth abortions. Although then Florida Governor Lawton Chiles vetoed the bill, the Florida Legislature in 1998 overrode the veto⁴⁹ and the law became effective; known as the "Partial-Birth Abortion Act."⁵⁰ This Act defined a partial-birth abortion as "a termination of pregnancy in which the physician performing the [abortion] partially vaginally delivers a living fetus before killing the fetus and completing the delivery."⁵¹ Under Florida Statute, Section 390.011, partial-birth abortions were prohibited in the state of Florida except where necessary to save the life of the mother provided that there is no other medical procedure available. The violation of this statute was a third-degree felony.⁵² As soon as the law went into effect the law was challenged and a lower federal court struck the law.

In the 1998 case of *A Choice for Women v. Butterworth*⁵³ the District Court in the Southern District of Florida held that the Act was unconstitutional because it placed an undue burden on a woman seeking a dilation and evacuation (D & E) procedure, a labor induction procedure, or an intact dilation & extraction (D & X) procedure prior to viability of the fetus.⁵⁴ The court held that this was in direct conflict with the Supreme Court's *Casey* decision.⁵⁵ Furthermore, the court held that the act was void-for-vagueness in that it failed to adequately define the conduct it sought to prohibit.⁵⁶

⁴⁹ House (90 yeas, 27 nays); Senate (32 yeas, 7 nays).

⁵⁰ FLA. STAT. ANN. § 390.0111(5).

⁵¹ § 390.011(6).

⁵² § 390.0111(10).

⁵³ 54 F. Supp. 2d 1148 (S.D. Fla. 1998).

⁵⁴ *Id.* at 1155.

⁵⁵ *Casey*, 505 U.S. 833 (1992).

⁵⁶ 54 F. Supp. 2d at 1158 (holding that "partially vaginally delivers" can be interpreted more than one way).

Following the 1998 case of *A Choice for Women*, the Florida Legislature in 2000 again enacted legislation to ban partial birth abortions.⁵⁷ The legislation prohibited the intentional killing of a partially born, living fetus and designates violations as a second-degree felony.⁵⁸ Immediately the ban was challenged in a lower federal court, in the 2000 case of *A Choice for Women v. Butterworth*.⁵⁹ Finding that the plaintiff's had a substantial likelihood of prevailing on the merits the court issued a temporary restraining order enjoining enforcement. In July of 2000, following the Supreme Court's decision in *Carhart v. Stenberg*,⁶⁰ holding Nebraska's Partial Birth Abortion ban unconstitutional, the parties in *A Choice for Women* entered a joint stipulation for permanent injunction of Florida's Partial Birth Abortion ban.

In light of the recent Supreme Court decision in *Gonzales v. Carhart*,⁶¹ it is unclear whether the holding in *A Choice for Women* will be overturned allowing Florida's Partial-Birth Abortion Act to be enforced.

In 1997, the Florida Legislature enacted what became known as the "Woman's Right to Know Act," Section 390.0111 of the Florida Statutes. The Act prohibits the termination of a pregnancy unless the physician obtains the voluntary, and informed consent of the mother.⁶² The Act defines informed consent as orally describing, "The nature and risks of undergoing or not undergoing the proposed procedure that a reasonable patient would consider material" in making the decision," the probable gestational age of the fetus and the medical risks, if any, of carrying the baby to term.⁶³ Moreover, if the woman chooses, the physician must provide printed material describing the fetus, other agencies that offer alternatives to pregnancies and information on the availability of medical assistance benefits for prenatal care, childbirth, and neonatal care.⁶⁴ And the mother must acknowledge in writing that the required information was provided to her.⁶⁵

⁵⁷ FLA. STAT. ANN. §§ 782.30, 782.32, 782.34, 782.36 (2000).

⁵⁸ Defendants convicted of a second degree felony in the State of Florida face a maximum sentence of fifteen years and a maximum fine of \$ 10,000.00. See FLA. STAT. ANN. §§ 775.082(3)(c), 775.083(1)(b) (1999).

⁵⁹ 2000 U.S. Dist. LEXIS 22636 (S.D. Fla. July 11, 2000).

⁶⁰ 530 U.S. 914 (2000).

⁶¹ 127 S. Ct. 1610 (U.S. 2007)

⁶² FLA. STAT. ANN. § 390.0111(3).

⁶³ *Id.* at (3)(a)(1).

⁶⁴ *Id.* at (3)(a)(2).

⁶⁵ *Id.* at (3)(a)(3).

In 1998, the Act was challenged in the Fifteenth Judicial Circuit Court in Palm Beach, County (Florida) by a collection of abortion providers.⁶⁶ In 2004, the Fourth District Court of Appeals held the Act was unconstitutional in that it “imposes significant obstacles and burdens upon the pregnant woman which improperly intrude upon the exercise of her choice between abortion and childbirth.”⁶⁷ Moreover, the court held that the Act violated Florida’s express constitutional right to privacy⁶⁸ in that it does not permit a physician to tailor information to a patient’s circumstance, there is no trimester distinction as set forth in *Roe*, thereby limiting the state’s compelling interest argument and the Act is not narrowly tailored in that “allows a referring physician ...who may have no training or experience in the field, to provide the information, but prohibits a board certified obstetrician/gynecologist who works with the physician performing the abortion from informing the woman of this important information.”⁶⁹ The issue was appealed to the Florida Supreme Court.

In 2005, the Florida Supreme Court, in a unanimous decision overturned the Fourth District’s ruling and held that the Act was constitutional.⁷⁰ The court primarily addressed the plaintiff’s two main challenges to the Act; the term “reasonable patient” is vague; and the Act itself is vague because it is unclear as to whether physicians must inform patients of non-medical risks.⁷¹ The court soundly rejected both arguments and in doing so, the court accepted the state’s interpretation of a “reasonable patient” as one who is specifically presenting herself for an abortion.⁷² In regards to the second argument, the court accepted the state’s interpretation that the Act’s information requirement applies solely to medial and not non-medical risks. Justice Wells, writing for the majority stated, “The doctrine of medical informed consent is rooted in the concepts of bodily autonomy and integrity, and it is logical that physicians be required to inform

⁶⁶ *Crist v. Presidential Women's Ctr.*, L.T. Case No. CL 97-5796 AG (15th Fla. Cir. Ct) (1998).

⁶⁷ *Crist v. Presidential Women's Ctr.*, 884 So. 2d 526, 530 (Fla. 4th DCA 2004) *reversed by* *State v. Presidential Women's Ctr.*, 937 So. 2d 114 (Fla. 2006).

⁶⁸ FLA. CONST. art I, § 23.

⁶⁹ *Crist*, 884 So. 2d at 533.

⁷⁰ *Presidential Women's Ctr.*, 937 So. 2d 114, 121 (Fla. 2006).

⁷¹ *Id.* at 118-119.

⁷² *Id.* at 119.

the patient only and exclusively of the medical risks of terminating or not terminating a pregnancy.”⁷³

Protection of the Unborn from Criminal Violence

Florida is one of ten states that provide partial recognition and protection for unborn victims of criminal violence.⁷⁴ There is no statute in Florida that recognizes unborn children as victims through their entire prenatal development. Florida recognizes unborn children as victims but only during part of the period of prenatal development.⁷⁵ For instance, Florida provides that the “unlawful” killing of “an unborn quick child” is murder as if committed against the mother.⁷⁶ Other provisions cover the killing of an “unborn quick child” as manslaughter, such as vehicular homicide and DUI manslaughter statutes.⁷⁷ Florida defines an “unborn quick child” as one who has attained viability.⁷⁸

The 1997 Florida Supreme Court case of *State v. Ashley*⁷⁹ addresses violent crimes against an unborn child inflicted by the mother. In this unfortunate case, Ashley a pregnant mother, feared she would be cut off financially from her grandmother due to becoming pregnant out of wedlock for the fourth time. She took a firearm and shot herself in the stomach with the intent of killing her unborn child. At the time, Ashley was approximately 26 weeks pregnant. It was determined by doctors that the fetus was shot in the wrist and the surviving baby was removed from the womb. After 15 days outside of the womb, the baby died of “immaturity.” Ashley was charged with murder and manslaughter and the underlying felony of criminal abortion. The trial court dismissed the murder charge and allowed the case to continue on the manslaughter charge. The state appealed and Ashley cross appealed claiming the manslaughter and criminal abortion charge should have also been dismissed. The issue before the Florida

⁷³ *Id.*

⁷⁴ National Right to Life Committee, *State Homicide Laws That Recognize Unborn Victims*, May 9, 2007, at http://www.nrlc.org/Unborn_Victims/Statehomicidelaws092302.html (last visited March 10, 2007)

⁷⁵ FLA. STAT. ANN. §§ 782.09, 782.071, 316.193 (“unborn quick child”).

⁷⁶ § 782.09.

⁷⁷ *Id.*

⁷⁸ See §§ 316.193, 782.09, 782.071 (“the term ‘unborn quick child’ is the same as the term ‘viable fetus,’ which is defined in the following way: ‘... a fetus is viable when it becomes capable of meaningful life outside the womb through standard medical measures.’”).

⁷⁹ 701 So. 2d 338 (Fla. 1997).

Supreme Court was whether an expectant mother can be criminally charged with the death of her “born-alive” child resulting from self-inflicted injuries during the third trimester of pregnancy. The Court held that a mother cannot be so charged because this would be an impermissible expansion of the common law immunity that mothers enjoyed from prosecution for terminating their own fetus.⁸⁰ At common law, a pregnant woman was not criminally liable for harm to her own body that caused injury or death to the fetus. The majority in *Ashley* held that in Florida, there is no “indication whatsoever that the legislature intended to modify the common law principles by eliminating the immunity of the pregnant woman.”⁸¹ The State of Florida has consistently held to the common law principle that in Florida a mother has common-law immunity from criminal prosecution for causing death or injury to her unborn fetus at any stage of viability.

Under similar common law principles, in 1992, the case of *Knighton v. State*⁸² was decided by Florida’s Fourth District Court of Appeals. Defendant Knighton discharged a gun inches away from the unborn child of a pregnant 13-year old girl. The bullet lodged in the head of the unborn child. The mother was rushed to the hospital where the unborn baby, approximately 30 weeks *in utero*, died after being delivered from the womb via a Caesarian section. The baby was born-alive but later died and would have survived but for the gun shot wound. The mother survived. Knighton was adjudicated guilty of murder of the child and aggravated battery on the mother. Knighton appealed the murder conviction on the grounds that the state of Florida has abrogated the “born-alive” doctrine by way of feticide and termination of pregnancy statutes. The court affirmed the conviction reasoning that the common law “born-alive doctrine”⁸³ has not been abolished in the state of Florida and the baby was a human (“born-alive”), who was unlawfully killed during the commission of a felony. The court in passing

⁸⁰ *Id.* at 342.

⁸¹ *Id.*

⁸² 603 So. 2d 71 (Fla. 4th DCA 1992).

⁸³ *See* W. Blackstone, 4 Commentaries on the Laws of England 198 (1769) (“To kill a child in its mother’s womb, is now no murder, but a great misprision: but if the child be born alive, and dyeth by reason of the potion or bruises it received in the womb, it seems, by the better opinion, to be murder”).

mentioned that only Florida's battery statute, which uses the term "person," do not afford protections to unborn children.

In 1984, the case of *Love v. State*⁸⁴ was also decided by Florida's Fourth District Court of Appeals. The court held that the offense of battery, specifically aggravated battery, required a touching of a "person" and that the statutes did not intend for an unborn child to be covered by the statutes.⁸⁵ In March of 2007, a bill in the Florida House attempted to specifically address this issue.⁸⁶ House Bill 71 attempted to correct Florida Statute, Section 782.09 to remove the term "quick" from the definition of the victim (unborn child), and would make a person accountable for "unlawfully killing" of a child at *any* stage of prenatal development.⁸⁷ The bill passed the House but died in the Senate. The bill would have also added language to the statute to hold a person accountable for the "unlawful killing" of an unborn child whether or not they had knowledge of the pregnancy or intent to kill the unborn child. The bill would not have abrogated the common law criminal immunity mothers have for killing by inflicting a fatal wound to their unborn child. The proposed bill did not address battery to an unborn child or seek to add "unborn child" to the definition of "person" in relation to the battery statutes.

The Florida Supreme Court has repeatedly held that there is no cause of action under Florida's Wrongful Death Act for the death of a stillborn fetus.⁸⁸ The rationale for these decisions is that a fetus is not a "person" within the meaning of Florida's Wrongful Death statute.

In 1978, the Florida Supreme Court decided the stunning case of *Duncan v. Flynn*.⁸⁹ Duncan brought a wrongful death suit alleging that his son died during birth due to the negligence of the hospital in failing to recognize that a Cesarean section was required. The

⁸⁴ 450 So. 2d 1191 (Fla. 4th DCA 1984).

⁸⁵ See FLA. STAT. ANN. §§ 784.03, 784.045 (the term "person" was not intended to include an unborn fetus).

⁸⁶ H.B. 71, 2007 Leg., 109th Reg. Sess. (Fla. 2007) (Sponsored by Safety & Security Council and Poppell, and co-sponsored by Baxxley; Carroll; Needelman; Traviesa) (Identical to S.B. 234, 2007 Leg., 109th Reg. Sess. (Fla. 2007)).

⁸⁷ § 782.09.

⁸⁸ See, e.g., *Young v. St. Vincent's Med. Ctr., Inc.*, 673 So. 2d 482 (Fla. 1996); *Hernandez v. Garwood*, 390 So. 2d 357 (Fla. 1980); *Duncan v. Flynn*, 358 So. 2d 178 (Fla. 1978); *Stern v. Miller*, 348 So. 2d 303 (Fla. 1977).

⁸⁹ 358 So. 2d 178 (Fla.1978)

baby's head was expelled for 20 minutes, but the rest of the body could not be delivered. The head of the baby was decapitated and a Cesarean section was subsequently preformed to remove the remaining body of the baby. The death certificate stated the cause of death was strangulation. The total weight of the baby was fourteen pounds eight ounces. The trial court granted summary judgment in favor of the hospital, doctors and insurers. The trial court determined that the fetus was not born-alive and was thus not covered by Florida's Wrongful Death Act. The Second District Court of Appeals addressed the question of whether the baby was born-alive and but for the negligence of the defendants the baby would have lived. Duncan unsuccessfully argued that the fact that the death certificate listed the cause of death as strangulation, there is an inference that the baby was born-alive.

The court realizing that this was a novel issue in Florida looked to a case from 1832⁹⁰ in which the English law said that "[w]ith respect to the birth, the being born must mean that the whole body is brought into the world; and it is not sufficient that the child respire in the progress of the birth," and pointed to several other early cases that have held the same.⁹¹ The court held that in light of the history of laws regarding the death of fetuses, "[t]he prevailing view still requires expulsion from the body of the mother," and attainment of a "separate and independent existence."⁹² The court affirmed the trial court's decision. The Florida Supreme Court in affirming the Second District adopted the Second District's opinion as its own. In the 1980s, several attempts were made to include unborn children under Florida's civil wrongful death statutes. None were successful.

Assisted Suicide

In 1997, the Florida Supreme Court decided the case of *Krischer v. McIver*⁹³ which challenged the state's statutory ban on assisted suicide found in Florida Statutes, Section 782.08. The issue before the court was whether a ban on assisted suicide was contradictory to Florida's

⁹⁰ See, *Rex v. Ann Poulton*, 5 Carr. & P. 332 (1832).

⁹¹ See, e.g., *Wallace v. State*, 10 Tex. Ct. App. 255 (Tex. Crim. App. 1881); *Goff v. Anderson*, 91 Ky. 303, 15 S.W. 866 (1891); *People v. Hayner*, 300 N.Y. 171, 90 N.E.2d 23 (N.Y. 1949) (holding that a live birth required that the child be expelled alive entirely from its mother's body).

⁹² *Duncan v. Flynn*, 342 So. 2d 123, 125 (Fla. 2d DCA 1977).

⁹³ 697 So. 2d 97 (Fla. 1997).

express constitutional right to privacy. Charles Hall, a terminally-ill AIDS patient, was recruited by a front page advertisement in the Hemlock newsletter seeking terminally-ill patients who expected to live less than one year. Dr. McIver, a semi-retired physician, was chosen to represent Mr. Hall in his request to be issued a lethal medication resulting in Mr. Hall's death. Of interest, Dr. McIver and Mr. Hall had never met before the suit was initiated and Dr. McIver's recommendation was based on a review of Mr. Hall's medical records and several observations.⁹⁴ Circuit Court Judge S. Davis Joseph concluded that each individual had the right to determine what course of "medical treatment" to take, including options that would speed up one's death.⁹⁵ The trial court set forth three requirements before the lethal dose could be *self-administered*, "the patient must be (1) competent, (2) imminently dying, and (3) prepared to die."⁹⁶

Without a written opinion, the Fourth District Court of Appeals of Florida certified the issue to the Florida Supreme Court as an issue of *great public importance*. The Florida Supreme Court reversed the trial court's holding finding that there is a distinction between the fundamental right to refuse medical treatment and physician assisted suicide. Justice Grimes writing for the majority relied on an explanation provided by the American Medical Association.⁹⁷ "When a life-sustaining treatment is declined, the patient dies primarily because of an underlying disease....With assisted suicide, however, death is hastened by the taking of a lethal drug or other agent."⁹⁸ The state's compelling interest in preserving life was found to be outweighed by the fundamental right to refuse medical treatment. However, the state's compelling interest is not outweighed in the case of physician assisted suicide. In his dissent, Chief Justice Kogan argued that the analysis should not be "means" based, meaning the method of terminating life, but should include a consideration of where the patient is at the time of the request.⁹⁹ Chief Justice Kogan, who no longer sits on the court, also shared his personal values

⁹⁴ McIver v. Krischer, No. CL 96-1504-AF, slip op. at 6 (Fla. 15th Cir. Ct. Jan. 31, 1997).

⁹⁵ *Id.* at 19, n.6 (emphasis added).

⁹⁶ *Id.* at 11.

⁹⁷ 697 So. 2d at 103.

⁹⁸ *Id.* at 103-104 (citing AMA Council on Ethical and Judicial Affairs, Report I-93-8, at 2).

⁹⁹ *Id.* at 111 (Kogan, J., dissenting).

on human suffering by stating, “What possible interest does society have in saving life when there is nothing of life to save but a final convulsion of agony?”¹⁰⁰

What would be the state of assisted suicide and euthanasia in the state of Florida if the reasoning of Circuit Court Judge Joseph and then Chief Justice Kogan were to become the majority opinion? If the state of Florida recognized assisted suicide as a type of medical treatment then this option would be available to all persons under Florida’s Right to Privacy. The court has also ruled in other cases that the right to refuse medical treatment also extends to competent adults and minors.¹⁰¹ The decision could also be made by a proxy or by guardian of one who is deemed incompetent.¹⁰² However, the fact the trial court attempted to establish parameters within which one could legally terminate their life indicates the inherent problems that are associated with assisted suicide.

In sum, the proposed restrictions and intended safeguards in initiatives to legalize physician-assisted suicide are problematic; they are difficult to define, uncertain in implementation, and create the dilemma of unanticipated and unwanted consequences for those they propose to protect. Resolving uncertainties would likely be a difficult process for clinicians, and the courts, and almost certainly would be involved in further challenges to the implementation of assisted-suicide laws.¹⁰³

Although the United States Supreme Court has held that the Constitution does not grant Americans the right to physician assisted suicide, citizens do have a constitutionally protected fundamental right to refuse medical treatment.¹⁰⁴

In 1990, the case of *In re Guardianship of Browning*¹⁰⁵ went before the Florida Supreme Court. The court addressed the issue of “[w]hether the guardian of a patient who is incompetent

¹⁰⁰ *Id.*

¹⁰¹ See *B.B. v. State*, 659 So. 2d 258 (Fla. 1995) (holding that the constitutional right to privacy extends to minors).

¹⁰² See *In re Guardianship of Barry*, 445 So. 2d 365 (Fla. 2d DCA 1984) (holding that the express right of privacy makes no distinction between competent and incompetent individuals in regards to terminating life support); see also *In re Guardianship of Browning*, 568 So. 2d 4 (Fla. 1990) (holding that the right to choose or refuse medical treatment is not lessened by virtue of incompetency).

¹⁰³ 697 So. 2d at 107.

¹⁰⁴ See *Washington v. Glucksberg*, 521 U.S. 702 (1997) (holding that due process under the Fourteenth Amendment protects the right to refuse medical treatment).

¹⁰⁵ 568 So. 2d 4 (Fla. 1990).

but not in a permanent vegetative state and who suffers from an incurable, but not terminal condition, may exercise the patient's right of self-determination to forego sustenance provided artificially by a nasogastric tube?"¹⁰⁶

In 1985, Estelle Browning executed a living will authorizing the termination of life-prolonging medical treatment. In 1986, Mrs. Browning was admitted to the hospital with a massive brain hemorrhage, and a feeding tube was necessary. After two years of severe complications, Mrs. Browning's guardian petitioned the court to remove the feeding tube. The court acknowledged the living will and heard evidence of oral statements made by Mrs. Browning concerning her desire to refuse life prolonging measures. It was determined that Mrs. Browning would live for approximately one more year on the feeding tube.

In its opinion written by Justice Rosemary Barkett, the court held that Florida's right to privacy guaranteed an individual the right to refuse medical treatment thereby directing the course of their medical treatment. Having concluded that the right to privacy encompasses the right to refuse medical treatment, the court discussed whether this right is the same for incompetent patients. The court concluded that this right may be exercised by not only competent patients but also incompetent patients and their surrogates or proxies. "The primary concern...is that this valuable right should not be lost because the noncognitive and vegetative condition of the patient prevents a conscious exercise of the choice to refuse further extraordinary treatment."¹⁰⁷

Having determined that the right to refuse medical treatment is guaranteed under the right to privacy for both the competent and the incompetent, the question becomes who will exercise the right when the patient is unable to convey his or her wishes? This right may be exercised by the guardian appointed over the ward. This is not intended to be the only person who may exercise this right. This right may also be exercised by proxies and surrogates. "We emphasize and caution that when the patient has left instructions regarding life-sustaining treatment, the surrogate must make the medical choice that the patient, if competent, would have made

¹⁰⁶ *Id.* at 20.

¹⁰⁷ *Id.* at 12 (quoting *John F. Kennedy Mem'l Hosp. v. Bludworth*, 452 So. 2d 921, 924 (Fla.1984)).

(“substituted judgment”) and not one that the surrogate might make for himself or herself (“best interest”) or that the surrogate might think is in the patient's best interests.”¹⁰⁸ The decision must not be made according to what the family or guardian wants but necessarily what the surrogate or proxy feels that the ward wants. Although the state argued that allowing the guardian to decide, on Mrs. Browning’s behalf, to terminate the feeding might not be what Mrs. Browning wants after all, because she is unable to speak, the court relied on the fact the living will was recently executed and stated that “the failure to act constitutes a choice.”¹⁰⁹

In the final analysis *Browning* held that although the state has a compelling interest in the protection of life, the state’s interest life is clearly less compelling in the case of a terminal patient facing impending death.¹¹⁰ Additionally, the court further opined, the surrogate need not obtain judicial approval when a person has expressed, either orally or through living will, their wishes in regards to medical issues. If the wishes are not expressly stated but full responsibility is vested in a proxy then the proxy must be delegated in a prior writing.¹¹¹ The court understood the occasional need for judicial interpretation and thus concluded the courts are always open to hear disputes arising in determining what the patient’s wishes truly are. If there is a disparity in the expressions of the ward, the surrogate or proxy may ask for a judicial determination, or an interested party can challenge the decision of the surrogate or proxy.¹¹²

While the right to refuse medical treatment is protected under Florida’s express constitutional right to privacy,¹¹³ currently Florida law concerning the right to refuse medical treatment is specifically governed by Chapter 765 of the Florida Statutes. Under Chapter 765, every competent adult has the right to refuse medical treatment subject to the interests of protection of life and preservation of ethics in the medical community. So that this right is not lost or diminished due to incompetency, Section 765.102 also allows an individual to execute an advanced directive whereby the course of medical treatment is pre-planned. The advance

¹⁰⁸ *Id.* at 13.

¹⁰⁹ *Id.* at 14.

¹¹⁰ *Id.* at 25.

¹¹¹ *Id.* at 27.

¹¹² *Id.* at 13-14.

¹¹³ FLA. CONST. art I, § 23.

directive can decide if and when to cease life-prolonging procedures or designate another to make the decision for the patient in the event the patient becomes incompetent. The statute further allows for the administration of palliative care to ease the pain and suffering of a patient's final days.

Florida's right to privacy, in regards to refusing medical treatment, applies not only to competent and incompetent adults; the decision extends to children as well.¹¹⁴ The right to refuse medical treatment appears to apply to all medical decisions. In fact, the Florida Supreme Court has consistently upheld a patient's right to refuse medical treatment from blood transfusions without which death would occur,¹¹⁵ to the removal of sustenance.¹¹⁶ *In re Browning* has failed to establish a bright line rule for when the decision to terminate life sustaining medical treatment can be made. The court merely reasoned that since the feeding tube was needed to extend Mrs. Browning's life for more than four to nine days, her condition was terminal. This case does not expressly discuss the result of proxies making decisions on behalf of those who have never been in a state of competence (e.g. mentally handicapped, or infants); however, this case could clearly be cited as authority for upholding such decisions. The decision may be made in writing or orally by the patient while competent. A surrogate must make sure the patient's decisions are reliable, the patient does not have a reasonable probability of recovery, and that all terms are satisfied; a proxy need only confirm the first two.¹¹⁷ If a surrogate relies on oral statements, the burden rests with the surrogate to show by "clear and convincing" evidence that would have been the patient's decision. The court does not discuss the possibility of decisions made on behalf of patients who have never been competent. This is genuine cause for concern.

¹¹⁴ See *In re Barry*, 445 So. 2d 365 (Fla. 2d DCA 1984) (holding that the parents decision to terminate infant sons life support was supported by evidence that the child was terminally ill and incurable).

¹¹⁵ See *Wons v. Pub. Health Trust*, 541 So. 2d 96, 98 (Fla. 1989) (holding "that the state's interest in maintaining a home with two parents for the minor children does not override [plaintiff's] constitutional rights of privacy and religion").

¹¹⁶ See *Satz v. Perlmutter*, 379 So. 2d 359 (Fla. 1980), adopting 362 So. 2d 160 (Fla. 4th DCA 1978) (holding "A competent adult patient, with no minor dependents, suffering from a terminal illness has the constitutional right to refuse or discontinue extraordinary medical treatment where all affected family members consent").

¹¹⁷ *Bludworth*, 452 So. 2d at 926.

Under the Florida and Federal Constitutions, each person is entitled to due process before they are deprived of life, liberty or property. The Supreme Court in Florida, in *In re Browning* and its progeny, has removed the due process protections of the physically and mentally incompetent by allowing a sentence of death to be handed down, without an advance directive, on the outcome of an evidentiary hearing with the lenient standard of “clear and convincing” evidence. The most recent case to bring this issue to light is the case of Terry Schiavo.¹¹⁸ In the end, it was ordered that Terry’s feeding tube and Terry die of malnourishment.

A legal review of abortion and related life issues in Florida would not be complete without some mention of the extensive legal proceedings surrounding the severely disabled citizen Terry Schiavo. Volumes can be written, and in fact volumes have been written, on this sad and unfortunate case which resulted in 12 year long legal battle.

By the time Terry Schiavo died on March 31, 2005, the legal proceedings undertaken to attempt to save or end her life included, fourteen appeals, numerous motions, hearings and petitions just in Florida courts alone. In federal court there were five lawsuits filed. The Florida legislature twice took up bills and once passed a bill called Terry’s law which was struck down by the Florida Supreme Court. A subpoena was issued for Terry to qualify for witness protection and legislation was passed by congress and finally there were no less than four denials of petitions for writs of certiorari by the United States Supreme Court.

The amalgamation of state and federal Schiavo cases leaves Florida with the very real but unwritten precedent that apart from having a living will, end of life decisions for severely injured or elderly persons regarding care, life support and withholding of food and water are left ultimately in the hands of the judiciary. Throughout this controversy Florida courts also seem to continue to categorize food and water as extraordinary care and not ordinary care if administered through a feeding tube or intravenously.

The names Nancy Cruzan and Karen Ann Quinlan used to be the names invoked for the so called, “right-to-die” movement. Terry Schiavo is now clearly the cultural symbol which has eclipsed out these other names in twenty first century end of life cases.

¹¹⁸ Schindler v. Schiavo, 916 So. 2d 814 (Fla. 2d DCA 2005).

Healthcare Rights of Conscience

Rights of conscience for unethical treatment and procedures are becoming increasingly visible issues. This right involves medical providers who wish to refuse treatment or procedures which they consider to be unethical or in violation of their conscience. The extent to which Florida recognizes the right is limited but still relatively strong. Florida Statute, Section 390.0111(8), expressly addresses this issue in the content of abortion and recognizes a medical provider's right to refuse to participate in the termination of a pregnancy. And in 1981, Florida's Third District Court of Appeals in the case of *Kenny v. Ambulatory Ctr. of Miami*¹¹⁹ held that an employee can not be demoted for refusing to participate in abortions because of her religious beliefs.¹²⁰ Moreover, Florida statutes also provide that physicians or *any other person* may refuse to provide contraceptives or other family planning services without incurring liability.¹²¹ Florida is one of four states¹²² with broad refusal statutes that do not specifically mention a pharmacist's liability in refusing to fill emergency contraceptive prescriptions.¹²³ While the ambiguity is such to possibly dissuade pharmacists from relying on the statute for immunity; *Kenny* is arguably in support of a pharmacist's right to refuse to fill what the pharmacist believes is an unethical or immoral treatment.

Cloning

Currently there is no case law or statutes that address human cloning in the state of Florida. In 2003, Florida Senator Daniel Webster¹²⁴ co-sponsored a measure that would ban all human cloning in the state.¹²⁵ The measure died in the judicial committee in May of 2003. Similarly in 2004, seventeen Florida State Representatives cosponsored a bill that would ban

¹¹⁹ 400 So. 2d 1262 (Fla. 3d DCA 1981).

¹²⁰ *See id.* (holding that federal law mandated reasonable accommodation to allow an employee to practice his religion, and adopting the requirement that an employer had to reasonably accommodate an employee's religious practices unless he established that he would suffer undue hardship).

¹²¹ *See* FLA. STAT. ANN. § 381.0051(6).

¹²² Colorado, Florida, Maine and Tennessee.

¹²³ National Conference of State Legislatures, *Pharmacist Conscience Clauses: Laws and Legislation*, March 2007, at <http://www.ncsl.org/programs/health/conscienceclauses.htm> (last visited Oct. 2, 2007).

¹²⁴ District 9, Majority (Republican) Leader.

¹²⁵ S.B. 1726, 2003 Leg., 105th Reg. Sess. (Fla. 2003) (Sponsored by Webster, and co-sponsored by Fasano).

human cloning.¹²⁶ As with its predecessor, the bill died in committee. In March of 2007 there was a bill filed in the Florida House that if passed, would criminalize all human cloning making it a felony, punishable by up to fifteen years imprisonment and up to a \$10,000 fine.¹²⁷ The proposed 2007 bill died in the Florida Senate.

Destructive Embryo Research

Currently there is no case law or statutes in Florida that specifically address the issue of embryonic stem-cell research. However, the issue has been debated in the legislature and in 2007 there were two competing citizen initiative petitions to amend the state constitution relating to the topic but neither succeeded in making the ballot certification for 2008.

The Florida House considered bills that address the issue of state spending for embryonic stem-cell research. One bill, in 2007 sponsored by Rep. Anitere Flores (R), would have provide up to \$200 million dollars, over a ten year period, for ethical adult stem-cell research derived from umbilical cord blood, bone marrow, postmortem tissues (other than abortions), and amniotic fluid and placentas that would normally be discarded after birth.¹²⁸ Another bill, sponsored by Rep. Franklin Sands (D), would have also provided \$200 million dollars, over a ten year period, but for *all types* of stem-cell research including destructive embryonic stem-cells.¹²⁹ Florida Gov. Charlie Crist has announced that he will support the bill that would limit stem-cell research to adult stem-cells.¹³⁰

Additionally, in 2007, two citizen-initiated petitions to amend the Florida constitution regarding embryonic stem-cell research were started. Palm Beach County Commissioner Burt Aaronson¹³¹ is sponsoring a pro-embryonic stem cell research citizen initiated amendment that

¹²⁶ H.B. 559, 2004 Leg., 106th Reg. Sess. (Fla. 2004) (Sponsored by Kallinger, and co-Sponsored by Allen, Altman, Baker, Baxley, Bean, Brown, Brummer, Galvano, Gardiner, Harrington, Kottkamp, Kyle, Murzin, Quinones, Sansom, Stargel).

¹²⁷ H.B. 1065, 2007 Leg., 109th Reg. Sess. (Fla. 2007) (Sponsored by Flores, and co-Sponsored by Traviesa).

¹²⁸ *Id.*

¹²⁹ H.B. 555, 2007 Leg., 109th Reg. Sess. (Fla. 2007) (Sponsored by Sands, and co-sponsored by Fitzgerald, Kiar, Kriseman, Porth).

¹³⁰ Steve Bousquet, *Crist to Embrace Stem Cell Research*, ST. PETERSBURG TIMES, Jan. 31, 2007, available at http://www.sptimes.com/2007/01/31/State/Crist_to_embrace_stem.shtml.

¹³¹ Chair of Floridians for Stem Cell Research and Cures, Inc.

would require the state to provide \$200 million in funding for ten-years.¹³² Meanwhile, Citizens for Science and Ethics, Inc. sponsored a citizen initiated amendment that would prohibit burdening Florida tax payers with the cost of funding embryonic research.¹³³ Both proposed amendments are citizen initiatives and have gathered enough petitions to trigger the Florida Supreme Court's review of its single issue requirement.¹³⁴ The Florida Supreme Court heard oral arguments pertaining to the single subject review in May of 2007 and held that both proposed amendments addressed a single subject; embryonic stem-cell research. Based on the number of petitions the State of Florida requires for an amendment to be placed on the ballot, 611,009 neither amendment will be put before the electorate in 2008. The petitions are good for four years.

II. JUDICIAL RESTRAINT

The Florida Supreme Court has a considerable history of public criticism of its decisions.¹³⁵ Legal commentators, law enforcement officials, right to life advocates, court watchers and libertarian legal scholars have all weighed in with various criticisms of the decisions from the Florida high court over the last two decades. Part of this reputation may be the result of the Court's fortuitous handling of some very high profile controversial cases of national interest like the 2000 Bush-Gore election dispute, the Terry Schiavo case, and most recently, the school voucher decision in *Bush vs. Holmes*. Other reasons for this reputation

¹³² The ballot summary provides as follows: "This amendment appropriates \$20 million annually for ten fiscal years for grants by the Department of Health to Florida nonprofit institutions to conduct embryonic stem cell research using, or using derivatives of, human embryos that, before or after formation, have been donated to medicine under donor instructions forbidding intrauterine embryo transfer. An embryo is 'donated to medicine' only if given without receipt of consideration other than cost reimbursement and compensation for recovery of donated cells." ADVISORY OPINION TO THE ATTORNEY GENERAL RE: FUNDING OF EMBRYONIC STEM CELL RESEARCH.

¹³³ The ballot summary provides as follows: "No revenue of the state shall be spent on experimentation that involves the destruction of a live human embryo." ADVISORY OPINION TO THE ATTORNEY GENERAL RE: PROHIBITING STATE SPENDING FOR EXPERIMENTATION THAT INVOLVES THE DESTRUCTION OF A LIVE HUMAN EMBRYO.

¹³⁴ The Court must review the proposal on two issues: Whether it contains a single subject and whether the ballot summary is fair.

¹³⁵ From this author's research and personal knowledge none of this criticism has been directed at the personal or ethical conduct of the individual members of the court. To the contrary, the Florida Supreme Court has historically been a model of professionalism and dignity in the way they have carried themselves personally and professionally.

involve more legitimate criticisms of certain decisions being result oriented, favoring a more socially liberal bent and failing to give fuller effect to legislative intent or the will of the people in construing the meaning of a statute or constitutional amendment.

Any discussion of the philosophy of the court must fairly require a timeframe in which to answer the question. The composition of the Florida Supreme Court in 2007 is entirely different than it was twenty years ago. For instance, there is not a single justice who currently sits on the Court today that when the landmark abortion case *In re T.W.* was decided in 1987. Therefore, it is unfair to broad brush the philosophy of the court as it has changed considerably over the years. Arguably, the makeup of the court in 2007 is not as liberal as it was during the late 1980's and early nineties.

In particular, during his eight years in office, Republican Governor Jeb Bush appointed two justices Raoul G. Cantero (July 2002) and Kenneth B. Bell (December 2002) who appear to be considerably more conservative in their judicial philosophy and do not hold socially liberal views on abortion. The other five justices on the court in 2007 were all appointed by Democrat Governor Lawton Chiles (Fred Lewis, Charlie T. Wells, Harry Lee Anstead, Barbara J. Pariente and Peggy A. Quince.¹³⁶ But even those Chiles appointees are not as philosophically liberal as the justices appointed by Democratic Governor Bob Graham. Justices Rosemary Barkett (1985-1993), Leander Shaw (1983-2003) and Gerald Kogan (1987-1998), are all Governor Graham appointees. It could be argued that these justices were some of the most philosophically liberal judges that have ever served on the Florida Supreme Court since its founding in 1838. All three of these justices joined in the majority opinion of *In re T. W.*¹³⁷

The current make up of the court appears to be a relative mix of liberal, moderate and more conservative members. The two more conservative members of the court were appointed by Governor Jeb Bush.

¹³⁶ Justice Peggy Quince was the only Supreme Court Justice in Florida's history to be appointed simultaneously by more than one Governor. Her term began the exact moment that then Governor elect Jeb Bush took office. Because of this Bush worked out an agreement with Governor Chiles whereby they both jointly announced Quince's appointment in December of 1998. Governor signed Quince's commission. Three Governors were involved with Quince's appointment. Chiles died in office of a heart attack a few days after the announcement.

¹³⁷ 551 So. 2d 1186.

Justice Cantero was Governor Jeb Bush's first fully independent appointment to the Florida Supreme court. Bush was publicly very clear that wanted judges which understood their limited and restrained role on the bench.

"Increasingly," said Bush, posed strategically with the Supreme Court's white columns as a backdrop, "courts have seized control over policy decisions that are not theirs to make." The courts, he said, "are not mini-legislatures or governors." Bush's comments reflect the tension that has existed among the Supreme Court, the Republican governor and the Legislature during the past four years. Bush and lawmakers have seen the courts strike down priority efforts such as abortion and the death penalty. [] Bush said Cantero is "humble" and shares the philosophy of judicial restraint. "I did ask questions to all the candidates about their view of the role of the judiciary," Bush said. Cantero has never been a judge before. He is a conservative Catholic, like Bush. The governor insists that Cantero's political views were not a factor in his appointment. And Wednesday, Cantero was mum on those views. When asked whether he opposes the death penalty, Cantero said: "I have no views." Florida Supreme Court justices spend about half their time on death penalty cases. Cantero's views on abortion are known: He wrote a letter to the editor of the Miami Herald in 1993 to defend anti-abortion protesters, saying: "Abortions kill children." When asked about abortion Wednesday, Cantero said: "My personal views on any particular issue will not keep me from applying the law, whatever the law is."...

The letter to the editor referenced in the above news article appeared in the Miami Herald on March 20, 1993. The complete letter read as follows:

The man who shot Dr. Gunn in the name of Christ is thoroughly confused about Christ's doctrine. Jesus Christ preached and practiced the active denunciation of immoral conduct, prayer for one's enemies, and subjection to the will of God. He did not preach murder. The pro-life movement is not a fanatical contingent of violence- peddling, self-righteous radicals, as the media portray it. It is an eclectic association of millions of people with firm convictions. It includes women and men, teenagers and elderly, blacks and whites, and people of every religion and occupation. All have different backgrounds, but share one common belief: Abortions kill children. Raoul G. Cantero III, Coral Gables¹³⁸

Governor Bush's second appointment to the state high court was Justice Kenneth B. Bell. Bell has made public statements regarding his judicial philosophy. In his application for the post, Bell noted that the courts "must recognize their role as the 'weakest branch of government' and pay due deference to the legislative and executive branches." He also noted that judges must be committed to a "reasoned vs. 'result-oriented' decisions." "I do not believe in judicial activism,

¹³⁸ MIAMI HERALD, March 20, 1993, at Editorial Page.

either from the left or from the right,”¹³⁹ Pensacola lawyer Alan Bookman, a member of the Florida Bar Board of Governors, called Bell's appointment “absolutely wonderful news for the state of Florida.” Bookman also called Bell a devout Christian and a man of “very strong religious beliefs.”¹⁴⁰

Judicial review is the power of a court to review the actions of the other branches of government or the laws passed by them to determine their constitutionality. The Florida Supreme Court extensively discussed Judicial Review in the case of *Bush v. Holmes*.¹⁴¹ This was a landmark case because it construed one of the first publicly funded private school voucher programs in the country which was spearheaded by Governor Jeb Bush. The court articulated the following principles regarding judicial review:

Indeed, “[w]hen a legislative enactment is challenged the court should be liberal in its interpretation; every doubt should be resolved in favor of the constitutionality of the law, and the law should not be held invalid unless clearly unconstitutional beyond a reasonable doubt.” *Taylor v. Dorsey*, 19 So. 2d 876, 882 (Fla. 1944).

This judicial deference to duly enacted legislation is derived from three “first principles” of state constitutional jurisprudence. First, the people are the ultimate sovereign.... Second, unlike the federal constitution, our state constitution is a limitation upon the power of government rather than a grant of that power.... Third, because general legislative or policy-making power is vested in the - 39 - legislature, the power of judicial review over legislative enactments is strictly limited. Specifically, when a legislative enactment is challenged under the state constitution, courts are without authority to invalidate the enactment unless it is clearly contrary to an express or necessarily implied prohibition within the constitution. *Chapman v. Reddick*, 25 So. 673, 677 (Fla. 1899) (“[U]nless legislation duly passed be clearly contrary to some express or implied prohibition contained [in the constitution], the courts have no authority to pronounce it invalid.”).

¹³⁹ Alisa Ulferts and Steve Bousquet, *Judge Named to High Court: Conservative Kenneth B. Bell Replaces the Florida Supreme Court's Most Liberal Justice*, ST. PETERSBURG TIMES, December 31, 2002, available at http://www.sptimes.com/2002/12/31/State/Judge_named_to_high_c.shtml.

¹⁴⁰ *Id.*

¹⁴¹ [919 So. 2d 392 \(Fla. 2006\)](#).

In spite of the well articulated principles of judicial review in *Holmes* which seem to lean toward judicial restraint in reviewing legislative enactments, the dissenting Justices, Bell and Cantero, did not believe the actual decision of the majority actually followed those principles.

In its construction of this constitutional provision, the majority asserts that it “follow[s] principles parallel to those guiding statutory construction,” yet its reasoning fails to adhere to the most fundamental of these principles. Majority op. at 7. It fails to evince any presumption that the OSP is constitutional or any effort to resolve every doubt in favor of its constitutionality. Therefore, I begin this dissent by stating the fundamental principles that should direct any determination of whether the OSP violates article IX, section 1. Next, I address the text of article IX, section 1. I will show that this text is plain and unambiguous. Because article IX is unambiguous, it needs no interpretation, and it is inappropriate to use - 37 - maxims of statutory construction to justify an exclusivity not in the text. Finally, I find no record support for the majority’s presumption that the OSP prevents the State from fulfilling its mandate to make adequate provision for a uniform system of free public schools....

The majority’s reading of article IX, section 1 is flawed. There is no language of exclusion in the text. Nothing in either the second or third sentence of article IX, 1 requires that public schools be the sole means by which the State fulfills its duty to provide for the education of children. And there is no basis to imply such a proscription.

There is obviously a difference between the statement of a principle and the application of the principle to a set of facts in a case. This application is where judicial philosophy becomes the defining factor as it has in the Florida Supreme Court.

Texas Attorney Colleen Pero’s has written an article entitled, “The Activist Journey of the Florida Supreme Court.”¹⁴². While Pero does not address life issues she does analyze eleven different cases decided by the Florida high court on torts, criminal law and school vouchers. Pero sets forth five criteria for an activist decision. They are:

1. Prompt reaction by the legislature repudiating a court decision and restating the law as written.
2. Unpredictable and inconsistent outcomes when dealing with similar legal principles.
3. Repudiating its own precedent and shopping in other state or international courts to:

¹⁴² See http://www.legalreforminthenews.com/Reports/Florida_Supreme_Court_Report_AJP_7-18-06_Final.pdf (??? The link opened for me fine???)

- a. Find jurisdictions that support its preferred outcome, or
 - b. Determine the majority view and minority view...and then adopt the minority view!
4. Insert non-existent words or ignore the written words in a statute or contract to secure the court's preferred outcome.
5. Use vague or general constitutional language to defeat the clear will of the voters or acts of the legislature.

In Pero's view, "[n]owhere is this pattern of judicial activism more prevalent than in the State of Florida. Examples of the Florida Supreme Court making law can be found as early as 30 years ago, but over the past six to eight years, the court has increasingly ventured into areas commonly considered to be within the exclusive purview of the legislature". She closes her extensive paper with this summary of cases and comments:

One need only review the decisions discussed above to understand how the Florida Supreme Court has overstepped the powers contemplated for the judiciary by the founding fathers. In this handful of cases alone, the Court has written law without the benefit of public input, debate or scrutiny. Instead, in just the last six years, we have witnessed the Florida Supreme Court:

- Declare unconstitutional a constitutional amendment unanimously proposed by the Florida Legislature and passed by 72.8% of the Florida electorate. (4-3)
- Add language to the burglary statute, resulting in the setting aside of two murder convictions, and making it more difficult to prosecute felons. (4-3)
- Determine that the intoxication of drivers causing automobile accidents cannot be considered in determining fault in crashworthiness cases. (4-3)
- Shift the burden of proof in premises slip and fall cases from the plaintiff to the defendant. (4-3)
- Add an element to a crime making it more difficult to prosecute and convict people of possession of drugs and drug paraphernalia. (5-2)
- Disregard the terms of a private contract as well as Florida precedent, and recognize liability where there had been none before. In so doing, they risk increased utility costs for every Florida citizen. (4-3)
- Find that municipalities and other governmental units can be held liable for drowning (and other injuries) resulting from natural occurrences (*e.g.*, riptides) even though they did not intend to operate a swimming area in the location. (4-3)
- Find that the workers' compensation is no longer the exclusive remedy for allegations arising directly out of the claims handling process. (4-3)

- Create a new constitutional mandate, thus holding invalid a scholarship program allowing students in chronically failing public schools an opportunity to either attend a better performing public school, or receive a voucher to attend a private school. (5-2)

All of these examples are activist opinions that have far-reaching public policy implications. All would have benefited from public input, debate and scrutiny. In other words, each would have been better left to legislative resolution. Some also would have been benefited from more serious consideration of Florida precedent. The bottom line is that all would have been decided differently had the court exercised judicial restraint.

Stetson Law School Professor Thomas C. Marks has also written a legal review for the Federalist Society entitled, “The Florida Supreme Court: Judicial Activism & Judicial Self Restraint- Some Examples.”¹⁴³ In this white paper he argues that the Florida court has displayed both judicial activism and judicial restraint in its decisions and summarizes the court’s reputation as follows:

Here, several decisions of the Florida Supreme Court, some of which can be described as activist and others which, on the other hand, exhibit judicial self-restraint, are compared. In this context, “activist” is that which overturns, without adequate reason, the will of the majority as represented by the Florida Legislature and laws that it has passed or something similar. For the purposes of this paper, “self-restraint” is the avoidance of such activism. Before delving into all of this, *two things should be made perfectly clear*. First, and most important, there has not been the slightest whiff of impropriety in any of these decisions, or indeed in the Florida Supreme Court’s decisions overall. Over the years, the Florida Supreme Court has been a model of integrity. It goes beyond integrity. Up to and including now, the court has been a credit to the State of Florida. Also, as co-author Professor Marks has been a teacher of Federal and Florida constitutional law for over 30 years, reason to criticize, as well as praise, the Florida Supreme Court has arisen a number of times. But these criticisms involve issues upon which reasonable people can differ. Examples of judicial activism as well as judicial self-restraint will merely be analyzed here. The reader must decide for herself the appropriateness of the both of these conditions.¹⁴⁴

¹⁴³ See Thomas C. Marks, Jr. and Pamela Buha, *The Florida Supreme Court: Judicial Activism & Judicial Self-Restraint—Some Examples*, Federalist Society White Papers, October 2006, http://www.fed-soc.org/doclib/200705031_floridawhitepaper.pdf

¹⁴⁴ *Id.*

The future philosophy of the Florida Supreme Court rests in the hands of Florida's Governor Charlie Crist. In 2009, Governor Crist will appoint 2 new justices which could significantly alter the ideological and philosophical bent of the court. While Crist campaigned that he would appoint conservative judges, based upon his record of circuit court judicial appointments thus far, he is more likely to appoint status quo Republican judges with a libertarian or moderate bend that will support existing privacy rights and abortion rights.

III. THE COURT

Members of the Florida Supreme Court are appointed by the Governor and are subject to a yes or no merit retention vote every six years. A majority of yes votes keeps the justice on the bench another six years. A majority no votes would remove a justice from the bench and creates a judicial vacancy from which the governor makes a new appointment. The Governor makes the appointments from a list of three to six candidates sent to him by a judicial nominating commission. The nominating commission members are appointed independently by the governor to serve a four year term and with some of the commission members coming from a list submitted by the Florida Bar.

No justice has ever been unseated through the merit retention process in Florida's history. There were however, two organized attempts to unseat Justice Leander Shaw in 1990 and then Rosemary Barkett in 1992, by a Florida based victim's right group called Citizens for a Responsible Judiciary (CRJ). CRJ was headed by Harvard Educated Tallahassee attorney, Timothy J. Warfel. CRJ was joined in coalition by other right to life advocates and conservative grassroots organizations in calling for the repeal of these justices.

While these campaigns to unseat a member of the Florida Supreme Court were unsuccessful, they may have had some value in creating debate and discussion about the issue of judicial activism verses judicial restraint and the appropriate role of the court.

Biographical information of the current members of the Florida Supreme Court

Member	Appointed by/ Year	Term Expires	Miscellaneous
R. Fred Lewis	Governor L. Chiles/ 1998; Re-elected 2006	2013	<p>-Biographical information: J.D. University of Miami School of Law 1972; Bachelor degree from Florida Southern College, 1969; United States Army A.G. School; Florida Supreme Court, 1999.</p> <p>-Political /Professional affiliations: Miami Children’s Hospital Board of Directors; Member of Florida Board of Bar Examiners; Judicial Management Council; Committee on the Rules of Civil Procedure; Committee on Standard Civil Jury Instruction; Code and rules of Evidence Committee; Tallahassee American Inn of Court; Florida Law Related Education program.</p> <p>-Awards: Guardian of the Constitution Award and the Education in Democracy Award, 2006; Great American Law in Education Award, 2005; Justice R. Fred Lewis Award, Honorary Doctor of Law degree from St. Thomas University, 2002; Florida’s Citizen of the Year, 2001; Friends of Justice award from the American Board of Trial Advocates; Public Trust and confidence Award from the Florida Law Related Education Association, 2001. Honorary Doctor of Public Service degree from Florida Southern College, Easter Seals Judge Wilke Ferguson Award for Protector of the Disabled, 2006.</p> <p>-Other: Justice Lewis and his wife Judith attended Florida Southern College together and were married in 1969. They have two children, Elle and Lindsay.</p>
Charles Talley Wells	Chiles/ 1994	2008	<p>- Biographical information: J.D. University of Florida, 1964; Bachelor degree from University of Florida, 1961; Private practice, 1964-1969, 1970-2000; Trial attorney, 1969-1979; Chief Justice of the Florida Supreme Court, July 2000.</p>

			<p>- Political /Professional Affiliations: Former member of Board of Governors of The Florida Bar; Certified mediator of the Florida Circuit Court and United States District Court. Admitted to practice law by all Florida courts in addition to the United States District Court, Middle District of Florida, United States Court of Appeals, Fifth Circuit (now Eleventh Circuit), United States District Court, Southern District of Florida, United States Court of Claims and the Supreme Court of the United States.</p> <p>-Awards: Distinguished Alumnus of the University of Florida in 2001; Legal Aid Society Award of Excellence,1989.</p>
Harry Lee Anstead	Chiles/ 1994	2009	<p>- Biographical information: Master of Laws degree from the University of Virginia; J.D. University of Florida; Bachelor degree from University of Florida; Served in National Security Agency in Washington, D.C between undergraduate and law school; a trial and appellate lawyer in South Florida until 1977; a judge of the Fourth District Court of Appeal, 1977-1994.</p> <p>- Professional affiliations: Served on the Judges Advisory Committee to the ABA Committee on Ethics; boards of trustees of two Florida law schools.</p> <p>- Other: He initiated the creation of a Supreme Court Commission on Professionalism and a permanent Center for Professionalism at The Florida Bar. The American Bar Association has recognized this initiative as the most significant recent professionalism initiative in the nation, and Justice Anstead has been recognized by Florida lawyers as the father of the modern professionalism movement in Florida. He is the author of numerous publications on the law. During his judicial tenure, he has consistently ranked among the highest in statewide polls.</p>
Barbara J. Pariente	Chiles/ 1997; Re-	2013	<p>- Biographical information: J.D. George Washington University Law School, 1973; B.A.</p>

	elected 2006		<p>Boston University; Judicial clerkship with judge Norman C. Roettger, Jr., of the Southern District of Florida, 1973-1975; Private practice, 1975- 1993; Fourth District Court of Appeal, 1993- 1997.</p> <p>-Political /Professional Affiliations: Florida Bar's Commission on the Legal Needs of Children; Governor's Advisory Committee on Character Education; Palm Beach County Chapter of the American Inns of Court; Legal Aid Society of Palm Beach County.</p> <p>-Awards: George Washington University's Distinguished Alumni Award; Florida Chapter of American Academy of Matrimonial Lawyers' Jurist of the Year Award, 2006; Florida Association of School Social Workers' Lifetime achievement Award, Florida Bar Public Interest Law Section's Hugh S. Glickstein Child Advocate of the Year Award, 2005; William M. Hoeverler Judicial Professionalism Award of the Florida Bar's Committee on Professionalism; Florida Association of Women Lawyers' Award in recognition of lifelong dedication to the success of women lawyers in the legal profession, 2001; Lifetime Achievement Award presented by the Palm Beach County Jewish Federation, 1998; Legal Aid Society Civil Litigation Pro Bono Award, 1993.</p>
Peggy A. Quince	Chiles and Bush/ 1998; Re-elected 2006	2013	<p>- Biographical information: J.D. Catholic University of America, 1975; B.S. Howard University, 1970; Private practice, 1977- 1978; Assistant attorney general, 1978-1993; Second District Court of Appeal, 1993- 1998.</p> <p>-Political /Professional Affiliations: Florida Bar; Virginia State Bar; the National Bar Association; the Tallahassee Women Lawyers; the William H. Stafford Inn of Court. Member of the Government Lawyers Section; the Criminal Law Section; the Equal Opportunity Section of the Florida Bar. Former member of the George Edgecomb Bar Association; the Hillsborough County Bar Association;</p>

			<p>Hillsborough Association of Women Lawyers and the Tampa Bay Inn of Court; Appellate Section of the Florida Bar; Supreme Court liaison to the Workers' Compensation Committee; the Judicial Ethics Advisory Committee; and the Supreme Court's Family Court Steering Committee.</p> <p>- Other: The first African-American female to be appointed to one of the district courts of appeal with her appointment by Governor Lawton Chiles to the Second District Court of Appeal. Member of New Hope Missionary Baptist Church. Her civic and community activities include membership in Alpha Kappa Alpha Sorority, Inc., Jack and Jill of America, Inc., the Urban League, the NAACP, and The Links, Inc. She is a recipient of Florida Women's Hall of Fame award, 2007; Margaret Brent Women Lawyers of Achievement Award, 2006; Key to the City of Winter Haven, Richard W. Ervin Equal Justice Award, 2005; Lee County Association for Women Lawyers and the Lee County Bar Association Award, 2004.</p>
Raoul G. Cantero, III	Bush/ 2002	2010	<p>-Biographical information: J.D. Harvard Law School 1985; B.A. Florida State University 1982; law clerk to the Honorable Edward B. Davis, United States District Court for the Southern District of Florida, 1985-1988; Private practice, Adorno firm.</p> <p>-Political /Professional Affiliations: Member of the Board of Directors of Legal Services of Greater Miami, Inc. 1991-1995; Member of the Planning and Zoning Board of the City of Coral Gables, 1993-2001.</p> <p>-Other: First Hispanic to sit on the Supreme Court. Member of the Pastoral Council at St. Augustine Church in Coral Gables, 1990-1997. He has taught at Florida State University's College of Law.</p> <p>-Publications: "Certifying Questions to the Florida Supreme Court: What's So Important?" 76 Fla. Bar. J. No. 5 (May 2002); "Changes to</p>

			the Florida Rules of Appellate Procedure,” 71 Fla. Bar J. No. 11 (Dec. 1997); “Discovery from Medical Experts: How Much is Too Much?”, 16 Trial Advocate Quarterly 1 (Winter 1997); “Non-Final Review of Insurance Coverage Issues: Wading through the Quagmire,” 69 Fla. Bar J. No. 9 (Oct. 1995); and co-author of “Controversy in the Competitive Bidding Process,” 68 Fla. Bar J. No. 9 (Oct. 1994).
Kenneth B. Bell	Bush/ 2002	2010	<p>- Biographical information: J.D. Florida State University College of Law 1982.; B.A Davidson College 1978; Private practice, 1982-1991; Board Certified Real Estate Attorney, 1989; Circuit judge, First Judicial Circuit of Florida, 1991.</p> <p>-Political /Professional Affiliations: Board Certified in Real Estate; Pensacola Area Chamber of Commerce. Liaison to the Local Rules Advisory Committee; the Committee on Standard Jury Instructions in Contract and Business Cases; Member of the American Judicature Society. Former Master Judge in the Pensacola Chapter of the American Inns of Court. Supreme Court's Circuit Committee on Professionalism.</p> <p>- Awards: "Judicial Distinguished Service Award" presented by the Florida Council on Crime and Delinquency, Chapter VI; the "God in Government Award" presented by the Cantonment-Ensley Ministerial Association; the "Above and Beyond Award" presented by the SED Network; a Certificate of Appreciation from the Florida Association of School Resource Officers.</p> <p>-Other: Justice Bell is a seventh-generation Pensacolian. Justice Bell is the first justice from Pensacola in a century, the first from west of Tallahassee since 1917, and the only justice on the Court with prior experience as a trial judge. He is also the first graduate of Florida State University College of Law to serve on the</p>

			Court. Married since 1983, Justice Bell and his wife have four children.
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CONCLUSION

In re T.W. was a rather clear exercise of judicial activism on the part of the court at that time.¹⁶⁰ How the philosophy of the court will evolve in the future will largely depend upon Florida’s new Governor Charlie Crist. In the year 2009, Governor Crist will appoint two new justices to replace Justice Anstead and Justice Wells, who are both subject to mandatory retirement at age sixty-five. These new appointments could have the effect of either creating a new 4-3 majority court that understands the importance of judicial restraint, or reestablishing the existing 5-2 majority view of judicial activism.

If, in the future, the United States Supreme Court recedes in part or in whole from the principles enunciated in *Roe v. Wade*, that decision would have no immediate effect in Florida. Unless a new conservative majority on the Florida Court questions the legitimacy of the *T.W.* decision and disregards it as based upon flawed reasoning;¹⁶² or the people of Florida amend the state constitution and expressly reject a right to abortion; or a Federal Human Life Amendment is passed; then the law on abortion in Florida will remain largely the same for many decades to come.

¹⁶⁰ 551 So. 2d 1186.

¹⁶² Pero in her paper argues in this situation in footnote 1 that “This is not to suggest that repudiating judicial activism is itself activism. If a prior case was based upon flawed reasoning, it is appropriate to overturn it. However, if a court ignores precedent simply because they believe they have a better approach or to reflect the changing times, this court is taking an activist view.”