Florida Law Review

Volume 49 | Issue 5 Article 5

December 1997

Constitutional Law: Ending the Expansion of the Florida Privacy Amendment

Shannon Brewer

CASE COMMENT

CONSTITUTIONAL LAW: ENDING THE EXPANSION OF THE FLORIDA PRIVACY AMENDMENT

Krischer v. McIver, 697 So. 2d 97 (Fla. 1997)

*Shannon Brewer**

Respondent, a terminally ill patient with Acquired Immune Deficiency Syndrome, wanted to establish his right to obtain physician-assisted death when his expectation of a normal quality of life had ended.[1] A second respondent, the patient's physician,[2] feared prosecution if he aided the patient,[3] and joined the patient[4] in filing suit for a declaratory judgment that Florida's assisted suicide statute[5] violated the Florida privacy amendment.[6] Respondents also asserted that the statute violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.[7] The trial court granted

---

* To Jacqueline and Perry Brewer, my parents, for a lifetime of unconditional support, enthusiasm, and approval.

1. Krischer v. McIver, 697 So. 2d 97, 99-100 (Fla. 1997). The respondent had been hospitalized with hepatitis, herpes, Epstein-Barr virus, pneumonia, blindness, and other illnesses. *Id.* He was taking numerous medications, including morphine, to treat his pain. *Id.*

2. *Id.* at 99. Respondent patient was not ready to die, but wanted counseling from a physician to make that choice when he felt it was necessary. McIver v. Krischer, 4 Fla. L. Weekly Supp. 538, 539 (Fla. Cir. Ct. Jan. 31, 1997). Respondent wanted to avoid making a mistake and worsening his condition. *Id.*

3. *See Krischer*, 697 So. 2d at 99. Though Florida does not criminalize suicide, the assisted suicide statute does impose criminal liability on those who aid others in suicide. *Id.* at 100 (citing FLA. STAT. § 782.08 (1995)). The court stated that 45 states recognize the right to refuse medical treatment and also disapprove of assisted suicide. *Id.*

4. Two additional plaintiffs, Chuck Castonguay and Robert G. Cron, died prior to trial. *McIver*, 4 Fla. L. Weekly Supp. at 538. Their claims were dismissed as moot by the trial court. *Id.*

5. FLA. STAT. § 782.08 (1995) (providing that "Every person deliberately assisting another in the commission of self-murder shall be guilty of manslaughter . . . ."). Florida has no corresponding statute criminalizing suicide. *See Krischer*, 697 So. 2d at 100.

6. *McIver*, 4 Fla. L. Weekly Supp. at 538. Article 1, Section 23, of the Florida Constitution, the Florida privacy amendment, provides: "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 of access to public records and meetings as provided by law." FLA. CONST. art. I, § 23.

7. *McIver*, 4 Fla. L. Weekly Supp. at 538. The *Krischer* court stated that those issues had already been decided by two recent United States Supreme Court cases. *Krischer*, 697 So. 2d

the respondents' declaratory judgment, holding that, under the circumstances of the case, the Florida privacy amendment imparted on the respondent patient a constitutional right to end his life and to seek a physician's aid in doing so.[8] On appeal, the Fourth District Court of Appeal affirmed the trial court's conclusion, but certified to the Supreme Court of Florida the question of whether a competent, terminally-ill adult has a constitutional right to end his life with the assistance of a physician.[9] The Supreme Court of Florida accepted jurisdiction,[10] and reversing the decision of the trial court, HELD, that the privacy amendment of the Florida Constitution cannot be construed so broadly as to include a right to physician-assisted suicide.[11]

In 1980, Florida voters granted special protection to the right of privacy by adopting the Florida privacy amendment.[12] The extent of the right was not fully examined, however, until the Supreme Court of Florida decided *Winfield v. Division of Pari-Mutuel Wagering* in 1985.[13] In *Winfield*, Florida state agencies issued subpoenas for petitioners' financial records without notifying the petitioners and instructed the financial institutions not to inform the petitioners of the subpoenas.[14] In this case of first impression,[15] the court established a compelling state interest standard of review for deciding controversies that included alleged violations of the Florida privacy amendment.[16]

---

at 100 (citing Vacco v. Quill, 117 S. Ct. 2293 (1997); Washington v. Glucksberg, 117 S. Ct. 2258 (1997)).

8. *McIver*, 4 Fla. L. Weekly Supp. at 543. The decision was qualified with certain conditions. *Id.* Respondent physician would be allowed to prescribe a deadly drug and provide counseling in its use, but the prescription must be self-administered by respondent patient. *Id.* Respondents must both agree that patient was "(1) competent, (2) imminently dying, and (3) prepared to die." *Id.*

9. *Krischer*, 697 So. 2d at 99.

10. *Id.* The Florida Supreme Court accepted jurisdiction directly from the trial court because the matter was certified as one of great public importance. *Id.*; *see* FLA. CONST. art. V, § 3(b)(5).

11. *Krischer*, 697 So. 2d at 102.

12. *In re* T.W., 551 So. 2d 1186, 1191 (Fla. 1989); *see also* Satz v. Perlmutter, 379 So. 2d 359, 360-61 (Fla. 1980) (recognizing a need for legislative attention to the issue of privacy, urging the legislature to act, but responding to public need by deciding to address privacy issues on a case-by-case basis absent a decision by the legislature).

13. 477 So. 2d 544, 547 (Fla. 1985).

14. *Id.* at 546.

15. *See id.* at 547.

16. *Id.* The court determined that where a reasonable expectation of privacy exists, the State, to justify intruding into that right, must show that a compelling state interest is being served through the least intrusive means. *Id.* The court established this standard in spite of prior reluctance to do so. *See* Florida Bd. of Bar Examiners *Re*: Applicant, 443 So. 2d 71, 74 (Fla. 1983) (applying the compelling state interest standard of review to that case, but declining to

Under the facts of *Winfield*, the court found that the State intruded on petitioners' privacy rights only to protect compelling state interests, and that the State did so by utilizing the least intrusive means possible.[17] Although the United States Supreme Court had previously denied that a reasonable expectation of privacy exists in financial records,[18] the Supreme Court of Florida held that, under the Florida privacy amendment, an expectation of privacy in financial records was reasonable.[19] The decision in *Winfield* expanded the Florida privacy amendment to provide more protection for Florida citizens under the Florida Constitution than under the United States Constitution.[20]

Though the Supreme Court of Florida generally has been willing to find governmental interests sufficiently compelling to override the right of privacy in disclosure cases,[21] it has been less willing to allow government intrusion in privacy cases that involve personal decisionmaking.[22] The court emphasized the distinction between disclosure and personal decisionmaking issues in *In re T.W.*[23] In *T.W.*, a pregnant minor challenged the Florida statute requiring minors to obtain parental consent before undergoing an abortion.[24] The court held that the statute violated the minor's right to privacy.[25]

---

impose that standard on future privacy cases). Interestingly, this is the same standard of review that the United States Supreme Court uses when reviewing challenges to law that allege violations of fundamental rights. *See Winfield*, 477 So. 2d at 547 (citing Roe v. Wade, 410 U.S. 113 (1973)).

17. *Winfield*, 477 So. 2d at 548.

18. *Id.* at 547 (citing United States v. Miller, 425 U.S. 435, 442 (1976)).

19. *Id.* at 548.

20. *Id.* The court noted that the drafters of the Florida privacy amendment purposefully omitted the words "unreasonable" and "unwarranted" in conjunction with "governmental intrusion" to make the privacy right as strong as possible. *Id.*

21. *T.W.*, 551 So. 2d at 1192. The court also has noted several factual scenarios that implicated the privacy right. *Id.* (citing Barron v. Florida Freedom Newspapers, 531 So. 2d 113 (Fla. 1988) (holding that the privacy interests of parties in marriage dissolution did not warrant order sealing court records); Rasmussen v. South Fla. Blood Serv., 500 So. 2d 533 (Fla. 1987) (holding that the privacy interests of blood donors were sufficient to prevent discovery of their names in a wrongful death action where plaintiff sought to establish blood transfusion as source of AIDS infection); *Winfield*, 477 So. 2d at 547 (allowing state subpoena of financial records); *Florida Bd. of Bar Examiners*, 443 So. 2d at 71 (allowing bar application questions regarding psychiatric records)).

22. *Id.*; *see In re* Dubreuil, 629 So. 2d 819, 828 (Fla. 1993) (holding that hospital must comply with patient's wishes to refuse blood transfusion); State v. Herbert (*In re* Guardianship of Browning), 568 So. 2d 4, 17 (Fla. 1990) (allowing guardian of incompetent person to exercise the right to refuse life support systems); Public Health Trust v. Wons, 541 So. 2d 96, 98 (Fla. 1989) (holding that a patient has a privacy right in refusing a blood transfusion).

23. 551 So. 2d 1186, 1192 (Fla. 1989).

24. *See id.* at 1189.

25. *Id.* at 1196.

The *T.W.* court explained the rationale for granting more protection to privacy in personal decisionmaking cases than in disclosure cases.[26] The court stated that personal and private decisions about the body are "basic to individual dignity and autonomy" and, as such, should be protected by the Florida privacy amendment.[27] The court reasoned that these decisions are best made by the individual because the decisions involve physical, psychological, and economic factors that are unique to the individual.[28] Consequently, interests asserted by the state are seldom sufficiently compelling to overcome the privacy interest.[29] Thus, in *T.W.*, the court extended the privacy of bodily autonomy, and articulated Floridians' right to make private decisions about matters regarding whether to terminate a pregnancy and "when and how . . . one's body is to terminate its organic life."[30]

The Supreme Court of Florida further expanded the privacy right to include bodily autonomy for incompetent persons in *State v. Herbert (In re Guardianship of Browning)*.[31] The patient in *Browning* was in a vegetative state and had an incurable, but not terminal, condition.[32] The patient previously had expressed her wish to refuse any life-prolonging procedures.[33] When the patient became incompetent, her guardian attempted to have life-support systems discontinued, including nasogastric feeding.[34] The court held that the guardian of an incompetent patient may exercise the patient's right to refuse medical treatment.[35]

In reaching its decision, the *Browning* court weighed the interests of the State against the privacy interest of the patient.[36] The court evaluat-

---

26. *See id.* at 1192-93.

27. *See id.* at 1193 (quoting Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 772 (1986)).

28. *Id.*

29. *Id.*

30. *Id.* at 1192-93 (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1337-38 (2d ed. 1988)).

31. 568 So. 2d 4, 12 (Fla. 1990).

32. *Id.* at 9. The patient, Ms. Estelle Browning, had suffered a stroke that resulted in permanent brain damage. She was bedridden and required total care in a nursing home. *Id.* at 8.

33. *Id.* at 8-9. The patient had executed two living wills prior to suffering a stroke in 1986 and had orally expressed a desire to refuse any life-prolonging procedures. *Id.*

34. *Id.* at 8.

35. *Id.* at 17. The court previously had determined that a competent person had a privacy right to refuse medical treatment. *Id.* at 11 (citing *Wons*, 541 So. 2d at 96 (holding that a Jehovah's Witness could refuse an emergency blood transfusion even though death would likely result)); *see also Perlmutter*, 379 So. 2d at 360-61 (allowing the removal of a respirator even before the privacy amendment was added to the Florida Constitution).

36. *See Browning*, 568 So. 2d at 9-12, 13-14.

ed the asserted state interest in preserving life, and drew a distinction between cases where the patient can be cured and where the illness is incurable.[37] The distinction led the court to find that the State's interest in the preservation of life is not compelling when the patient's life can be prolonged, but cannot be saved.[38] The court also addressed the State's interest in maintaining the integrity of the medical profession, but found that this interest was insufficient to justify intrusion upon fundamental privacy rights.[39] The court reasoned that the patient had expressed her wishes while still competent[40] and that a right to self-determination depends on the competent patient's wishes, not what others determine may be in the patient's best interests.[41]

The Supreme Court of Florida thereby continued the steady expansion of the protection provided by the Florida privacy amendment.[42] The amendment evolved to grant considerable protection to individuals' rights in making personal and private decisions about the body.[43] Indeed, the court rarely has found the State's asserted interests compelling enough to justify intrusion into an individual's privacy in cases of personal decisionmaking.[44]

In spite of that jurisprudential trend, the instant court declined to further expand the protection of the Florida privacy amendment.[45] The *Krischer* court acknowledged that the respondent's personal decision did implicate the right of privacy, and the court announced the compelling state interest standard of review for the case.[46] The decision of the court, however, that the privacy amendment could not be construed so broadly as to include the right to assisted suicide, suggests that no reasonable expectation of privacy existed in the instant case.[47]

The State's asserted interests in *Krischer* were preserving life, preventing suicide, and maintaining the integrity of the medical

37. *Id.* at 14.

38. *Id.* (quoting Satz v. Perlmutter, 362 So. 2d 160, 162 (4th DCA 1978) (quoting Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E. 2d 417, 425-26 (Mass. 1977)), *aff'd*, 379 So. 2d 359 (Fla. 1980)). The trial court had ruled that because the patient's death was not imminent, the State's interests were compelling. *Id.* at 9.

39. *Id.* at 14 (quoting *Wons*, 541 So. 2d at 101 (Ehrlich, C.J., concurring specially)).

40. *Id.* at 13.

41. *Id.* at 10.

42. *See supra* notes 19-30 and accompanying text.

43. *See supra* notes 40-41 and accompanying text.

44. *See, e.g., T.W.*, 551 So. 2d at 1195-96.

45. *See Krischer*, 697 So. 2d at 104.

46. *Id.* at 102. The court articulated the first part of the strict scrutiny review but never addressed the least intrusive means part of the test. *See id.* at 102-04.

47. *See id.* at 104.

profession.[48] The instant court found those interests compelling.[49] The court distinguished the instant case from previous personal decisionmaking cases on the grounds that the respondent in the instant case required an affirmative act to end his life while in previous cases natural consequences were the ultimate cause of death.[50] The court found that the State's interest in preserving life became compelling where the State's interference was necessary to prevent an affirmative act against life.[51] The court stated that it also found preventing suicide and maintaining professional ethics in the medical community compelling state interests.[52]

In contrast to the majority, the dissent in the instant case found that the interests of the State were not compelling.[53] The dissent criticized the majority for its distinction between active and passive means of death.[54] According to the dissent, the majority's focus had been mistakenly placed on the means by which death occurs while the inquiry should have been directed at the patient who had reached the deathbed.[55] The dissenting opinion stated that a means-based test could only

48. *Id.* at 103. The court evaluated the four recognized legitimate interests of the State: protection of life, prevention of suicide, protection of medical ethics, and protection of innocent third parties. *Id.* at 102-04. The fourth, protection of innocent third parties, was not implicated in the instant case. *Id.* at 103 n.4.

49. *Id.* at 103. In previous personal decisionmaking cases, the court held that these same interests did not justify intrusion on patients' rights of self-determination to refuse medical treatment. *Id.* at 102.

50. *Id.* at 102-03. The court relied on a statement by the American Medical Society to explain the distinction between refusing medical treatment and assisted suicide:

> When a life-sustaining treatment is declined, the patient dies primarily because of an underlying disease. The illness is simply allowed to take its natural course. With assisted suicide, however, death is hastened by the taking of a lethal drug or other agent. . . . The inability of physicians to prevent death does not imply that physicians are free to help cause death.

Id. (quoting AMA COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, REPORT I-93-8, at 2 (1993)).

51. *Id.* at 103.

52. *Id.* The court explained that the interest in preventing suicide is compelling because legalizing assisted-suicide increases the State's difficulty in protecting persons who are depressed, mentally ill, or suffering from untreated pain. *Id.* (quoting Washington v. Glucksberg, 117 S. Ct. 2258, 2273 (1997)).

53. *Id.* at 115 (Kogan, C.J., dissenting).

54. *Id.* at 110-11 (Kogan, C.J., dissenting). Chief Justice Kogan illustrated his objection with a hypothetical patient who is conscious and voluntarily requests sedation to relieve chronic, irreversible pain. The line between active and passive death is blurred when this patient has requested no artificial feeding tubes. The patient is being sedated and allowed to starve to death. *Id.* (Kogan, C.J., dissenting).

55. *Id.* at 111 (Kogan, C.J., dissenting).

work effectively when the patient will live if the action or inaction does not occur.[56]

The Supreme Court of Florida expressed reluctance to weigh the moral arguments on the issue of physician-assisted suicide.[57] Additionally, the court refrained from infringing on the powers reserved to the legislature.[58] The court left room for legislative action on assisted suicide, stating that "a carefully crafted statute" would not necessarily be held unconstitutional.[59]

Refusing to expand protection for the right of privacy, the *Krischer* court departed from the direction the Supreme Court of Florida previously had been taking.[60] The instant court suggested the absence of a reasonable expectation of privacy in this case of personal decisionmaking—a situation where a privacy right has almost always attached before.[61] The instant court held that it would not construe the privacy amendment to include a right to assisted suicide, and sought to narrow the interpretation of the privacy amendment's reach.[62]

The former breadth of the interpretation is most noticeable in *T.W.* and *Browning*. The court stated in *T.W.* that the State's interests had never been found sufficiently compelling to justify intruding on personal decisionmaking privacy rights.[63] In the instant case, however, the court distinguished prior bodily autonomy decisions, noting that the distinction between active and passive means of death changed the evaluation of the State's interests.[64]

The instant court suggested that in cases where the means of death is passive and the patient is allowed to die of natural causes, the State's

---

56. *Id.* (Kogan, C.J., dissenting).

57. *Id.* at 104. The court discussed the concerns expressed by the New York State Task Force on Life and the Law: risks to those already compromised by poverty, historically disadvantaged social groups, old age, or depression. *Id.* at 101.

58. *Id.* at 104. The dissent also disagreed on this point. *Id.* at 111 (Kogan, C.J., dissenting). The dissent stated that the role of the court is to guarantee and protect individual rights against the majority rule. *Id.* (Kogan, C.J., dissenting); *see also Perlmutter*, 379 So. 2d at 360 (stating that legislative inaction should not tie the hands of the judiciary, which should proceed on a case-by-case basis until such time as the legislature speaks).

59. *Krischer*, 697 So. 2d at 104.

60. *See id.* at 102; *see also supra* notes 42-44 and accompanying text.

61. *Krischer*, 697 So. 2d at 104.

62. *See id.*

63. *T.W.*, 551 So. 2d at 1192; *see supra* note 18 and accompanying text.

64. *Krischer*, 697 So. 2d at 102-03. The court drew the distinction between allowing someone to die of natural causes and hastening their death with a "death producing agent." *Id.* at 103. *But see id.* at 111 (Kogan, C.J., dissenting) (stating that the means test is inapplicable to assisted suicide).

interests are less than compelling.[65] In the case of an active means of death, however, the State's interest in preserving life becomes compelling.[66] This reasoning is inconsistent with the instant court's own decision in *Browning*.[67] In *Browning*, the court distinguished between curable and incurable illnesses and found that where an illness is incurable, the State's interest in preservation of life is not compelling.[68] The instant court failed to address the issue of terminal or incurable illnesses, relying instead on the means test.[69]

Moreover, in *Browning*, the court allowed the guardian to discontinue life-support systems to a woman who was incurably ill but was not suffering from a terminal disease.[70] In contrast, the respondent in the instant case had a terminal disease.[71] To maintain consistency with *Browning* and *T.W.*, the court should have found that the distinction was properly based on the situation of the patient, not the manner of death.[72] The court should not have altered the compelling interest evaluation just to value a life that is already ending due to incurable illness.[73]

Another compelling interest in the instant case that was not addressed in conformity with the reasoning of previous cases was the interest in maintaining the ethical standards of the medical profession.[74] While the instant court stated that such an interest was compelling, its only explanation of the interest was a citation to an opinion of the American Medical Association.[75] The *Browning* court had dismissed this interest as merely legitimate, stating that protecting the ethics of a profession was less important than protecting the privacy rights of individuals.[76]

Not only did the instant court fail to adequately evaluate the State's interests, it failed to address the second prong of the compelling state

---

65. *Id.* at 102.

66. *See id.* at 103.

67. *Browning*, 568 So. 2d at 14.

68. *See id.*; *see also supra* note 32 (describing the incurable nature of Ms. Browning's illness).

69. *See Krischer*, 697 So. 2d at 102-03. *But see id.* at 111 (Kogan, C.J., dissenting) (attacking the majority's means test as illogical).

70. *Browning*, 568 So. 2d at 9, 17. The patient in *Browning* could have lived for an undeterminable number of years if her life-support systems had not been discontinued. *Id.* at 9.

71. *Krischer*, 697 So. 2d at 99.

72. *See supra* note 68 and accompanying text.

73. *See Krischer*, 697 So. 2d at 115 (Kogan, C.J., dissenting) (stating that society has no legitimate interest in saving a life which is already over).

74. *Compare Browning*, 568 So. 2d at 14 *with Krischer*, 697 So. 2d at 103.

75. *Krischer*, 697 So. 2d at 103-04.

76. *Browning*, 568 So. 2d at 14 (quoting *Wons*, 541 So. 2d at 101 (Ehrlich, C.J., concurring specially)).

interest standard of review established by the *Winfield* court, the least intrusive means test.[77] The court did not consider the possibility that a complete prohibition against assisted suicide may exceed constitutional constraints when regulation is a less intrusive means of protecting the State's asserted interests.[78] Unfortunately, however, the instant court chose not to address the question of whether the prohibition achieved the State's goals by the least intrusive means available.[79]

Apparently, the *Krischer* court did not want to decide the legality or morality of assisted suicide.[80] The court retreated from the trend it had established in earlier privacy cases[81] and halted the expansion of the protection provided by the Florida privacy amendment.[82] While the court applied a compelling state interest analysis initially, the compelling interests that allowed the assisted suicide statute to stand had been previously found less than compelling by the Supreme Court of Florida.[83] Additionally, the court ignored the second half of the compelling state interest analysis, the state's duty to curtail a privacy right only by the least intrusive means.[84] Finally, the court distanced itself from making a possible decision about the virtue of assisted suicide by deferring to the legislature.[85]

The privacy amendment may now provide less protection for the citizens of Florida. The expansion of its protection has ceased, and it is uncertain how far the scope of the privacy amendment will now reach. It is unclear whether the court will go back to expanding the privacy amendment, meaning that the *Krischer* decision is merely an attempt to avoid making a difficult moral determination, or if the protection of the privacy amendment has been stretched to its limits.

---

77. *See Winfield*, 477 So. 2d at 547.

78. *See T.W.*, 551 So. 2d at 1196. The court in *T.W.* determined that a statute that leaves no provision for any extraordinary circumstances is too restrictive to pass constitutional muster. *Id.*

79. *Krischer*, 697 So. 2d at 102-04.

80. *See id.* at 104.

81. *See supra* text accompanying notes 19-30.

82. *See Krischer*, 697 So. 2d at 104.

83. *Id.* at 115 (Kogan, C.J., dissenting).

84. *Id.* at 102-04.

85. *Id.* at 104.