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HOUSE OF REPRESENTATIVES
COMMITTEE ON
Elder Affairs & Long Term Care
ANALYSIS

BILL #: HB 249

RELATING TO: End of Life Care

SPONSOR(S): Representative Heyman & others

COMPANION BILL(S):

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:
(1) Elder Affairs & Long Term Care
(2) Health Care Services
(3) Judiciary
(4) Health & Human Services Appropriations
(5)

I. SUMMARY:

This bill amends chapter 765, F.S., relating to advance directives. It provides legislative findings that the fundamental right of self-determination, including the right to refuse treatment, provides for informed, competent, and uncoerced adults to refuse any medical treatment, including life-sustaining treatment and that such refusal may be set out in an advance directive. It provides Legislative intent that nothing in this chapter shall be construed to prevent or discourage the use of medically or pharmacologically appropriate pain control or other forms of palliative care. The bill strongly urges institutions that train health professionals to address ethical issues pertaining to end-of-life. It removes the requirement that a person be terminally ill in order to refuse life-prolonging procedures. The bill reduces from two to one the number of physicians required to determine a patient's condition prior to withholding or withdrawing life-prolonging procedures.

This bill has no direct fiscal impact on state revenues.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Terminal Illness: Grounded in Art. I, § 23 (Right of Privacy), of the Florida State Constitution, the Florida Supreme Court has held that a person's fundamental right of self-determination encompasses an inherent right to make choices about medical treatment. In a series of cases, the Court established: first, the right of a competent but terminally ill person to refuse medical treatment (*Satz v. Perlmutter*, 379 So.2d 359 (Fla. 1980)); second, the right of an incapacitated terminally ill person to refuse medical treatment (*John F. Kennedy Memorial Hospital, Inc. v. Bludworth*, 452 So.2d 921 (Fla. 1984)); third, the right of a competent but not terminally ill person to refuse medical treatment *Wons v. Public Health Trust of Dade County* (541 So.2d 96 (Fla. 1989)); and finally, the right of an incapacitated but not terminally ill person to refuse medical treatment (*In re Guardianship of Browning*, 568 So.2d 4 (Fla. 1990). As the court stated: "Our cases have recognized no basis for drawing a constitutional line between the protections afforded to competent persons and incompetent persons. Indeed, the right of privacy would be an empty right were it not to extend to competent and incompetent persons alike *(Browning* at 12)."

The Court recognized four state interests which may, on a case-by-case basis, override this constitutional right with respect to health care decisions which would result in the person's death: preservation of life, the protection of innocent third parties, the prevention of suicide, and maintenance of the ethical integrity of the medical profession (*Browning* at 14).

In cases where the person has become incapacitated, the Court established a procedure for a surrogate or proxy, acting on the basis of "substituted judgement," to exercise an incompetent patient's right to refuse treatment. Where a patient has previously expressed their wishes with respect to medical treatment, the surrogate/proxy must: (1) Determine that the patient executed any document knowingly, willingly, and without undue influence, and that the evidence of the patient's oral declaration is reliable; (2) Be assured that the patient does not have a reasonable probability of recovering competency so that the right can be exercised directly by the patient; and (3) take care to assure that any limitations expressed either orally or in the written declaration have been carefully considered and satisfied. (*Browning* at 15).

Not included was a requirement that the patient be terminally ill. The fact that Estelle Browning's living will expressed that treatment was to be discontinued when she had a "terminal condition" was instead treated by the court as a specific condition of her will (see #3 above) which must be considered. As stated by the court: "In this instance, Mrs. Browning's wishes were conditional. She indicated that her decision to refuse treatment was limited to a time when she had a 'terminal condition' from which her attending physician determined that there could be 'no recovery' and that 'death (was) imminent' (*Browning* at 17)."

Nevertheless, in instances where a person is determined to be incapacitated and unable to personally direct their medical care, Florida statute governing living wills includes a threshold requirement that life-prolonging procedures may only be withheld or withdrawn from such a patient if the patient has a terminal condition [see ss. 765.304(2)(b) and 765.305(2)(b), as well as 765.102(3), 765.302(1), 765.306, F.S.]. Further complicating this issue is the fact that a narrow clinical definition of "terminal illness" is, in reality, often applied rather than the rather broad statutory definition [see 765.101(15), F.S.]. As a result, many families and medical professionals are frustrated by an inability to discontinue life-prolonging procedures and carry out the expressed wishes of incapacitated persons.

Pain Management:

In 1994, the Florida Legislature approved s. 458.326, F.S., providing for the treatment of intractable pain. The statute permits the use of controlled substances to treat a person with intractable pain, provided the physician conforms to a standard of care that would be recognized by reasonably prudent physicians under similar conditions and circumstances. The pain provision also recognizes that the state does not condone mercy killing or euthanasia and bans the use of intractable pain treatment for such purpose.

The Legislature also provided for a pain management study commission to be administered by the Agency for Health Care Administration. The Commission issued its report in February 1997, which included such recommendations as: providing more flexibility to physicians when prescribing or treating patients for pain; and promoting the teaching of pain management as an integral component of the curricula of schools for health care professionals.

Pursuant to the legislature's interest in pain management, the Agency for Health Care Administration, in consultation with the Florida Board of Medicine and the Florida Board of Osteopathic Medicine officially endorsed practice guidelines relating to pain management through notice in the Florida Administrative Weekly on October 25, 1996.

In 1994, Florida also established a cancer pain initiative. The group is actively involved in education and increasing public awareness of the barriers to optimal cancer pain treatment.

In the 1998 session, the Legislature directed the establishment of a Panel for the Study of End-of-Life Care (Ch. 98-327, L.O.F.). Part of the mandate of the Panel is to study issues relating to: methods to ensure that pain management is a goal in each health care setting; and the identification of barriers that hinder health care professionals from providing satisfactory pain management and palliative care. The Panel was to submit an interim report by January 31, 1999, and a final report by August 1, 1999.

B. EFFECT OF PROPOSED CHANGES:

The major effect of this bill will result from removing the requirement that a person be terminally ill in order to refuse life-prolonging procedures. In addition, in determining whether a patient may recover capacity, or whether a medical condition or limitation referred to in an advance directive exists, **only** the patient's attending or treating physician must examine the patient and document the findings in the patient's medical record and sign them before life-prolonging procedures may be withheld or withdrawn.

C. APPLICATION OF PRINCIPLES:

1. <u>Less Government:</u>

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

No.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

No.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

N/A

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

Yes. The bill gives individuals greater control over end-of-life decisions.

b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

No.

5. Family Empowerment:

a. If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

N/A

(2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

N/A

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

Sections 765.101, 765.102, 765.302, 765.303, 765.304, 765.305, 765.306, F.S., are amended.

E. SECTION-BY-SECTION ANALYSIS:

Section 1. Amends s. 765.101, F.S., providing definitions for terms used in this chapter related to advance directives, to:

1. add a definition for “palliative care”; and
2. qualify the definition of “terminal condition.”

Section 2. Amends s. 765.102, F.S., relating to Legislative intent, to add language:

1. reinforcing that a person has a right to refuse any medical treatment;

2. supporting the use of pharmacological substances and palliative care to alleviate pain; and,

3. encouraging institutions that train health professionals to address ethical issues pertaining to end-of-life care.

Section 3. Amends s. 765.302, F.S., relating to making a living will, to specify that a person must be *informed* and *uncoerced* as well as competent.

Section 4. Amends s. 765.303, F.S., relating to the statutory suggested living will form, to reduce the number of physicians required to determine that a person is terminally ill from two to one, to conform to the new provisions of s. 765.306, F.S.

Section 5. Amends s. 765.304, F.S., relating to execution of a living will, to delete the requirement that a person be terminally ill for life prolonging procedures to be withdrawn or withheld..

Section 6. Amends. s. 765.305, F.S., relating to the surrogate's decision for the incompetent person to forego treatment, to delete the requirement for determining that the patient's condition is terminal.

Section 7. Amends s. 765.306, F.S., relating to determination of patient's condition, to reduce the number of physicians required to determine a patient's condition prior to withholding or withdrawing life-prolonging procedures from 2 to 1.

Section 8. Provides an effective date of October 1, 1999.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

No impact is projected.

2. Recurring Effects:

No impact is projected.

3. Long Run Effects Other Than Normal Growth:

No impact is projected.

4. Total Revenues and Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

No impact is projected.

2. Recurring Effects:

   No impact is projected.

3. Long Run Effects Other Than Normal Growth:

   No impact is projected.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

   No private sector costs are projected.

2. Direct Private Sector Benefits:

   No private sector economic benefits are projected.

3. Effects on Competition, Private Enterprise and Employment Markets:

   None is projected.

D. FISCAL COMMENTS:

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

Not applicable.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

Not applicable.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

Not applicable.

V. COMMENTS:

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

VII. SIGNATURES:

COMMITTEE ON Elder Affairs & Long Term Care:

Prepared by: Staff Director:

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