SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 1890

SPONSOR: Health, Aging and Long-Term Care Committee and Senator Klein

SUBJECT: End-of-Life Care

DATE: March 28, 2000 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Carter	Wilson	HC	Favorable/CS
2.			JU	
3.			FP	
4.				
5.				

I. Summary:

Committee Substitute for Senate Bill 1890 expands hospital emergency services personnel protection from liability to all hospital personnel when they act on an order not to resuscitate that is authorized by law and clarifies that authority to recognize and act on a prehospital order not to resuscitate does not affect the authority of a physician to issue an order not to resuscitate in a facility or the authority of hospital, nursing home, assisted living facility, or hospice staff to act in accordance with such a physician order. It revises the continuing education requirements for license renewal for certain health care professionals to provide that courses in end-of-life care and palliative care may be substituted for approved courses on domestic violence, if the professional has taken a course on domestic violence within the previous 2-year period. Certain health care facilities, health care providers, and health care practitioners are required to comply with a patient's request for pain management or palliative care, when appropriate.

Requirements for designating a health care surrogate are revised so that determination of incapacity, instead of both mental and physical incapacity, is a prerequisite for such surrogate's authority to commence. The bill revises the statutory form for designation of a health care surrogate and the statutory living will form and the procedures for determining a patient's condition for purposes of withholding life-prolonging procedures. Requirements pertaining to when a proxy may authorize the withholding or withdrawing of life-prolonging procedures are modified by replacing the explicit alternative prerequisites that such a decision must be based on a written declaration or, in absence of a written declaration, that the patient have one of three specified medical conditions with cross references to provisions of law specifying procedures that health care surrogates must follow. The 18-member End-of-Life Care Workgroup is created.

This bill amends the following sections of the Florida Statutes: 395.1041, 400.142, 400.4255, 400.6095, 401.45, 455.597, 765.102, 765.203, 765.204, 765.205, 765.303, 765.305, 765.306, and 765.401, and creates s. 765.1103 and one undesignated section of law.

II. Present Situation:

Federal and state statutory and case laws provide that each legally competent adult person has the right to make decisions about the amount, duration, and type of medical treatment he or she wishes to receive, including the right to refuse or to discontinue medical treatment.[*] The State Supreme Court has recognized four state interests which may, on a case-by-case basis, override this constitutional right, with respect to health care decisions, when exercise of the right would result in the person's death: (1) preservation of life, (2) the protection of innocent third parties, (3) the prevention of suicide, and (4) maintenance of the ethical integrity of the medical profession (*Browning* at 14).

Advance Directives and Health Care Surrogates

Florida law specifically authorizes mentally capacitated individuals to plan and make health care arrangements for when they become incapacitated. Certain legal documents, known as advance directives, are required to implement such plans or arrangements. Sections 765.203 and 765.303, F.S., respectively, provide examples of two types of advance directives--a statutory suggested form for the designation of a health care surrogate and a statutory suggested form for a living will. The person executing or creating the directive is referred to as the *principal*. Directives must be witnessed. They may be written instruments or oral expressions regarding any aspect of the principal's health care and may designate a health care surrogate, serve as a living will, serve as a do-not-resuscitate order (DNRO), contain a power of attorney, or serve as some other lawfully executed instrument or expression as authorized under another state's law.

Orders Not to Resuscitate or Do-Not-Resuscitate Orders (DNROs)

In 1992, the Legislature, for the first time under Florida law, provided for recognition of do-not-resuscitate orders by emergency medical services personnel to honor the wishes of those who wanted to die at home, or in another setting other than a hospital, without being subjected to extraordinary resuscitation measures in the event of an emergency call. Subsection 401.45(3), F.S., protects emergency medical technicians (EMT) and paramedics from liability if they withhold or withdraw resuscitation or life-prolonging treatment from a patient based on a physician's order not to resuscitate. In the absence of a DNRO, emergency services personnel are under a duty to administer cardiopulmonary resuscitation (CPR).

As provided in s. 401.35(4), F.S., the Department of Health is responsible for the establishment of rules relating to the circumstances and procedures for honoring DNROs. Under the department's rule, Rule 64E-2.031, *Florida Administrative Code*, DNROs must be on a yellow-colored form entitled, "*Prehospital Do Not Resuscitate Order Form, DH 1896."* DNROs must include the signature of the person's attending physician who attests that another physician has been

[1]*Satz v. Perlmutter*, 379 So.2d 359 (Fla. 1980) (the right of a competent, but terminally ill person, to refuse medical treatment); *John F. Kennedy Memorial Hospital, Inc. v. Bludworth*, 452 So.2d 921 (Fla. 1984) (the right of an incapacitated ("incompetent") terminally ill person to refuse medical treatment); *Wons v. Public Health Trust of Dade County*, 541 So.2d 96 (Fla. 1989) (the right of a competent but not terminally ill person to refuse medical treatment); *In re Guardianship of Browning*, 568 So.2d 4 (Fla. 1990) (the right of an incapacitated, but not terminally ill, person to refuse medical treatment).

consulted and that the person has a terminal condition as well as the signature of the patient or the patient's surrogate, proxy, or guardian as properly witnessed.

Surrogate or Proxy as Decision-Maker and the Living Will

The issue of withholding life-prolonging procedures from an incompetent person and the doctrine of "substituted judgment" are addressed in *John F. Kennedy Hosp. v. Bludworth*, 452 So.2d 921 (Fla. 1984). "Substituted judgment" means that an authorized person may exercise the patient's right to refuse extraordinary life-sustaining measures by substituting his or her judgment for what he or she believes the terminally ill incompetent person, if competent, would have done under the circumstances.

If such person, while competent, had executed a living will, the living will would be persuasive evidence of the subsequently incompetent person's intention and would be given great weight by the person who substitutes his or her judgment on behalf of the terminally ill incompetent person. In *Browning*, the court held that an incompetent person's right to refuse medical treatment may be exercised by close family members, friends, and guardians based on a medical choice that the patient would have made if competent. A living will provides a presumption of clear and convincing evidence of the patient's wishes. Additional conditions that must be met by the surrogate exercising an incompetent person's right to forgo treatment include: (1) a determination that the patient does not have a reasonable probability of recovering capacity so that the right can be directly exercised by the patient (person determined to be incapacitated); and (2) any limitations or conditions expressed orally or in the living will have been carefully considered and satisfied.

Section 765.401, F.S., authorizes the appointment of a proxy, from a list of specified individuals who know the patient or is a judicially appointed guardian, to make health care decisions for a patient if the patient has not executed an advance directive, or designated a surrogate to execute an advance directive, or the designated or alternate surrogate is no longer available to make health care decisions. A proxy is required to comply with provisions of state law applicable to surrogates and to make all health care decisions on behalf of the patient based on the proxy's informed consent and his or her reasonable belief that it is the decision the patient would have made under the circumstances, except that a proxy's decision to withhold or withdraw life-prolonging procedures must either be supported by a written declaration evidencing the patient's desire for such an action or, if there is no written declaration, the patient has a terminal condition, has an end-stage condition, or is in a persistent vegetative state. When authorizing the withholding or withdrawing of life-prolong procedures, a proxy's decision must be supported by clear and convincing evidence that the decision would have been the one the patient would have chosen had the patient been competent.

Some health care providers view the living will as a self-executing document upon which an attending physician can carry out the patient's instructions without having to consult with the patient's family, guardians, or close friends. In such cases, it places the person acting for the patient in the position of "approving" the instructions of the patient, as expressed in the living will, and avoids the difficulties presented by family members who are often not emotionally able to direct that life-support be discontinued, despite an incompetent patient's clear instructions. However families and others have recourse to an expedited judicial intervening process to "swiftly

resolve claims when nonlegal means prove unsuccessful." *See* Fla. Prob. R. 5.900 (1991) On the other hand, as provided in s. 765.308, F.S., if a health care provider does not wish to carry out the treatment decisions of a patient or otherwise comply with the patient's wishes regarding life-prolonging procedures, the patient may be transferred to another health care provider.

III. Effect of Proposed Changes:

Section 1. Amends s. 395.1041, F.S., relating to the liability of hospital personnel providing emergency services and care, to remove language that restricts the immunity from liability to only hospital *emergency services* personnel who withhold or withdraw cardiopulmonary resuscitation in response to an order not to resuscitate that is authorized under s. 401.45, F.S. As amended, all hospital personnel would be authorized to act on such an order not to resuscitate and would be immune from liability. Also, language is added to clarify that authorization to recognize a prehospital order not to resuscitate that is executed pursuant to s. 401.45, F.S., does not affect the authority of a physician to issue an order not to resuscitate or the authority of hospital staff to act in accordance with such an order, as permitted by case law and statutory law.

Section 2. Amends s. 400.142, F.S., relating to orders not to resuscitate in nursing homes, to add language to clarify that authorization to recognize a prehospital order not to resuscitate that is executed pursuant to s. 401.45, F.S., does not affect the authority of a physician to issue an order not to resuscitate or the authority of nursing home staff to act in accordance with such an order, as permitted by case law and statutory law.

Section 3. Amends s. 400.4255, F.S., relating to emergency care and the use of orders not to resuscitate in assisted living facilities, to add language to clarify that authorization to recognize a prehospital order not to resuscitate that is executed pursuant to s. 401.45, F.S., does not affect the authority of a physician to issue an order not to resuscitate or the authority of staff of assisted living facilities to act in accordance with such an order, as permitted by case law and statutory law.

Section 4. Amends s. 400.6095, F.S., relating to hospice care, to add language to clarify that authorization to recognize a prehospital order not to resuscitate that is executed pursuant to s. 401.45, F.S., does not affect the authority of a physician to issue an order not to resuscitate or the authority of hospice staff to act in accordance with such an order, as permitted by case law and statutory law.

Section 5. Amends paragraph 401.45(3)(a), F.S., authorizing emergency medical technicians and paramedics to comply with an order not to resuscitate in out-of-hospital settings, to specify certain prerequisites for such orders to be valid. An out-of-hospital order, not to resuscitate, to be valid, must be: (1) on the form adopted by rule of the Department of Health; (2) signed by the patient's physician; and (3) signed by the patient or, if the patient is incapable of giving informed consent, the patient's health care surrogate or proxy, appointed under Florida law, or a court-appointed guardian, appointed under Florida law, or a person acting pursuant to a durable power of attorney, as authorized by Florida law.

Section 6. Amends s. 455.597, F.S., providing a requirement for instruction on domestic violence for certain health care professionals, to authorize such professionals to complete an end-of-life

care and palliative health care course as an alternative to a required domestic violence course if such a licensed or certificated professional has completed an approved domestic violence course in the immediately preceding biennium.

Section 7. Amends s. 765.102, F.S., providing legislative findings and intent relating to health care advance directives, to clarify legislative intent that a procedure be established to allow a person to plan for incapacity *by executing a document or orally* designating another person to direct the course of his or her medical treatment upon his or her incapacity.

This section of law is further amended to provide legislative recognition of the need for all health care professionals to rapidly increase their understanding of end-of-life care and palliative health care. It is further amended to provide legislative encouragement to professional regulatory boards to adopt appropriate standards and guidelines regarding end-of-life care and pain management and to educational institutions established to train health care professionals and allied health professionals to implement curricula to train such professionals to provide end-of-life care, including pain management and palliative care.

The Department of Elderly Affairs, the Agency for Health Care Administration, and the Department of Health are required to jointly create a campaign on end-of-life care to educate the public. The campaign should include culturally sensitive programs to improve understanding of end-of-life care issues in minority communities.

Section 8. Creates s. 765.1103, F.S., relating to pain management or palliative care, to require that certain health care facilities, health care providers, and health care practitioners comply with a capacitated patient's request or the request of an incapacitated patient's surrogate; proxy; a court-appointed guardian, if delegated authority to make medical decisions on behalf of the patient; or a representative, designated by the patient, who has authority under a durable power of attorney with authority to make medical decisions on behalf of the patient, for pain management or palliative care. Such compliance is imposed on: hospitals; nursing homes; assisted living facilities; home health agencies; hospices; intermediate, special services, and transitional living facilities; prescribed pediatric extended care centers; intermediate care facilities for developmentally disabled persons; physicians licensed under chapters 458 and 459; nurses; health maintenance organizations; and prepaid health clinics, when the patient is receiving care as an admitted patient of the facility or is a subscriber. The facilities, providers, and practitioners are further required to give a patient information concerning pain management and palliative care when he or she discusses with the attending physician or treating physician, or the physician's designee, the diagnosis, planned course of treatment, alternatives, risks, and prognosis for his or her illness, unless such discussion is medically inadvisable or impossible to give, in which case the information must be given to the patient's surrogate, proxy, guardian, or other designated representative.

Section 9. Amends s. 765.203, F.S., providing a statutorily suggested form for designating a health care surrogate, to add language to the suggested form that acknowledges the principal's understanding that the designation form will permit his or her health care surrogate to make health care decisions other than anatomical gifts when the principal has already executed an anatomical-gift declaration, as authorized by law.

Section 10. Amends s. 765.204, F.S., providing a procedure for determining whether a person continues to have the capacity to make health care decisions for himself or herself or to provide informed consent for medical care or treatment, to: (1) clarify language relating to the process for evaluating a principal's capacity, (2) clarify that the facility at which the principal is receiving care must notify a person designated by the principal to make health care decisions or give informed consent on behalf of the principal that her or his authority has commenced, (3) add cross references, and (4) change a reference to *clinical record* to *medical record.*

Section 11. Amends s. 765.205, F.S., specifying responsibilities of health care surrogates, to: (1) expand the requirement that a health care surrogate act in accordance with the principal's instructions, unless such authority has been expressly limited by the principal to apply to all areas of responsibility of a health care surrogate and delete language that limited the applicability of the restriction, (2) recognize a health care surrogate's authority to provide written consent to a physician's order not to resuscitate, and (3) change references to *clinical records* to *medical records.*

Section 12. Amends s. 765.303, F.S., providing a suggested statutory form for a living will, to: (1) replace *mentally and physically incapacitated* with *incapacitated*; (2) change *end-state* to *end-stage*; and (3) make other technical changes.

Section 13. Amends s. 765.305, F.S., providing a procedure for withholding or withdrawing medical treatment in the absence of a living will, to change one of the prerequisite determinations on which a health care surrogate must rely before authorizing withholding or withdrawing of medical treatment by replacing *mentally and physically incapacitated* with *incapacitated*. As relates to the principal's incapacity, the health care surrogate would have to be satisfied that the patient is incapacitated with no reasonable medical probability of recovery, the patient has an end-stage condition, the patient is in a persistent vegetative state, or the patient's physical condition is terminal.

Section 14. Amends s. 765.306, F.S., providing a procedure for determining a patient's condition for purposes of acting on instructions contained in a living will or in making decisions to withhold or withdraw life-prolonging procedures, to replace a requirement that the patient's attending or treating physician evaluate whether the patient may recover *mental and physical capacity* with *capacity*, among other evaluations.

Section 15. Amends s. 765.401, F.S., relating to authority of a proxy, to delete the alternative requirements that either (1) a written declaration that supports a proxy's decision to withhold or withdraw life-prolonging procedures from a patient or (2) when there no written declaration, the patient must have a terminal condition, have an end-stage condition, or be in a persistent vegetative state. Language that requires a proxy to comply with the provisions *applicable to surrogates under [chapter 765, F.S.]* is replaced with cross references to two such provisions: s. 765.205, F.S., providing responsibilities of health care surrogates and s. 765.305, F.S., providing procedures that a surrogate is required to follow before exercising an incompetent patient's right to forego treatment when such a patient has not executed a living will.

Section 16. Creates the End-of-Life Workgroup within the Department of Elderly Affairs. The workgroup is required to: (1) examine reimbursement methodologies for end-of-life care,

(2) identify end-of-life care standards that will enable all health care providers along the health-care continuum to participate in an excellent system of delivering end-of-life care, and (3) develop recommendations for incentives for appropriate end-of-life care. The 18-member workgroup is composed of the Secretary of the Department of Elderly Affairs or his or her designee; the Secretary of the Department of Health or his or her designee; the Director of Health Care Administration or his or her designee; a member of the Senate, appointed by the Senate President; a member of the House of Representatives, appointed by the Speaker of the House of Representatives; and one member each of 13 named organizations.

The workgroup is required to meet as often as necessary to carry out its duties and responsibilities. It is required to submit a report of its findings and recommendations to the Governor, the President of the Senate, and the Speaker of the House of Representatives by December 31, 2000. The Department of Elderly Affairs is required to provide staff support to the workgroup within its existing resources. Members of the workgroup must serve without compensation. The workgroup is given a 1-year existence and expires May 1, 2001.

Section 17. Provides for the act to take effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The provisions of this bill have no impact on public records or open meetings issues under the requirements of Article I, Subsections 24(a) and (b) of the Florida Constitution.

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

An indeterminate cost will result from the culturally sensitive campaign on end-of-life care to educate the public that section 7 of the bill directs the Department of Elderly Affairs, the Agency for Health Care Administration, and the Department of Health to jointly create.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.