STORAGE NAME: h2429.lt
DATE: April 20, 2000

HOUSE OF REPRESENTATIVES
COMMITTEE ON
ELDER AFFAIRS & LONG TERM CARE
ANALYSIS

BILL #: HB 2429 (PCB LT 00-05)

RELATING TO: End-of-life

SPONSOR(S): Committee on Elder Affairs & Long Term Care and Representative Argenziano

TIED BILL(S): SB 1890

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:
(1) ELDER AFFAIRS & LONG TERM CARE YEAS 10 NAYS 0
(2)
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(5)

I. SUMMARY:

The bill 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. The bill revises the sample form for designation of a health care surrogate and the sample living will form. Clarifies the requirements 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. The 18-member End-of-Life Care Workgroup is created.

The bill has no fiscal impact and takes effect upon becoming a law.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

1. Less Government Yes [] No [] N/A [x]
2. Lower Taxes Yes [] No [] N/A [x]
3. Individual Freedom Yes [] No [] N/A [x]
4. Personal Responsibility Yes [] No [] N/A [x]
5. Family Empowerment Yes [] No [] N/A [x]

For any principle that received a "no" above, please explain:

B. 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

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[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).

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 (DOH) 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."*

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.

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.

C. EFFECT OF PROPOSED CHANGES:

The bill provides clarification and technical corrections to SB 2228 that passed during the 1999 Legislative session.

D. SECTION-BY-SECTION ANALYSIS:

Section 1. Amends s. 395.1041. It provides that hospital personnel are not subject to criminal prosection or civil liability if they withhold or withdraw cardiopulmonary resuscitation (CPR) in response to an order not to resuscitate that is authorized under s. 401.45, F.S. Adds language to clarify that the absence of an order not to resuscitate prepared pursuant to 401.45, F.S., does not preclude a physician from withholding or withdrawing CPR as otherwise permitted by 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 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 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 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 DOH; (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., to allow health care practitioners licensed by DOH who have completed the required training on domestic violence in the immediately preceding biennium to complete an end-of-life care and palliative health care course as an alternative to another course on domestic violence.

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 by 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 DOH are required to jointly create a campaign on end-of-life care to educate the public. The campaign is directed to 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. This section provides that a patient be given information about pain management and palliative care. When it is medically inadvisable or impossible to provide the patient with this information, the attending or treating physician must be given, when appropriate, to the patient's surrogate, proxy, guardian or other designated representative. It requires that 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.

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., related to the capacity of a person to make health care decisions or provide informed consent. This section clarifies 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) changes a *clinical record* to *medical record*.

Section 11. Amends s. 765.205, F.S., specifying responsibilities of health care surrogates, to: (1) requires 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) recognizes a health care surrogate's authority to provide written consent to a physician's order not to resuscitate, and (3) changes 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* (a scrivner's error) to *end-stage*; and (3) make other technical changes.

Section 13. Amends s. 765.305, F.S., related to foregoing medical treatment in the absence of a living will. Makes technical clarifying changes.

Section 14. Amends s. 765.306, F.S., related to determining a patient's condition. Revises the language that the physician must determine if the patient may recover "*mental and physical capacity"* with "*capacity."*

Section 15. Amends s. 765.401, F.S., relating to authority of a proxy. Clarifies that the proxy must comply with "sections 765.205, and 765.305, F.S," instead of the phrase "pertinent provisions applicable to surrogates . . . "

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 DOH 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.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

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

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

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

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

N/A

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

VII. SIGNATURES:

COMMITTEE ON ELDER AFFAIRS & LONG TERM CARE:

Prepared by:	Staff Director:
__________________________	__________________________
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