SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/CS/SB 2156

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

SUBJECT: Health Care

DATE: April 23, 2001 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Thomas	Wilson	HC	Favorable/CS
2.	Matthews	Johnson	JU	Favorable/CS
3.				
4.				
5.				
6.				

I. Summary:

Committee Substitute for Senate Bill 2156 amends various provisions relating to health-care as follows:

- Revises continuing education requirements for licensed dentists and dental hygienists, to allow them to opt out of the required domestic violence course and the AIDS/HIV course for licensure renewal by taking a substitute course for each approved by the Board of Dentistry, provided they have taken both those courses in the immediately preceding two years,
- Redefines "end-stage condition" in chapter 765, F.S., to be a condition that has resulted in progressively severe and permanent deterioration and for which, treatment of the condition would be ineffective to a reasonable degree of medical probability,
- Defines "palliative care" in s. 765.102, F.S., to be the comprehensive management of the physical, psychological, social, spiritual and existential needs of the patient, particularly those patients with an incurable, progressive illness, and
- Amends the statutory responsibilities of health care surrogates and proxies under chapter 765, F.S. to provide that absent patient intent, the surrogate or proxy may consider the patient's best interest in deciding whether to withhold or withdraw treatment.

This bill substantially amends sections 456.031, 456.033, 765.101, 765.102, 765.205, and 765.401 of the Florida Statutes.

II. Present Situation:

Dentistry and Dental Hygiene Continuing Education

Chapter 466, Florida Statutes, governs the practice of dentistry and dental hygiene. The Board of Dentistry has adopted administrative rules specifying continuing education requirements for

dentists and dental hygienists.[1] Dentists must complete 30 hours of continuing professional education for bi-ennial licensure renewal. Dental hygienists must complete 24 hours of continuing professional education during each bi-ennial licensure renewal.

As a condition of obtaining a license, applicants for initial licensure must complete a course on domestic violence and the AIDS/HIV or their equivalent or show good cause for not completing the requirement and then be allowed six months to do so. The board may approve additional equivalent courses that may be used to satisfy the course requirements. Any person holding two or more licenses must be permitted to show proof of having taken a board-approved course on domestic violence and one on AIDS/HIV. These requirements apply for bi-ennial licensure renewal. Each licensee or certificate holder must submit confirmation of having completed the courses on forms provided by the board when submitting fees for each renewal. A professional is subject to discipline for failure to comply with the requirements to complete the required courses.

The domestic violence continuing education course must consist of information on the number of patients in that professional's practice who are likely to be victims of domestic violence and the number who are likely to be perpetrators of domestic violence, screening procedures for determining whether a patient has any history of being either a victim or a perpetuator of domestic violence, and instruction on how to provide such patients with information on, or how to refer such patients to, resources in the local community that provide legal aid, shelter, victim counseling, batterer counseling, or child protection services. In 2000, the Legislature amended s. 456.031, F.S., to provide a health care professional the option of completing an end-of-life-care and palliative health care course in lieu of a domestic violence course for licensure and licensure renewal, if the health care professional has completed a domestic violence course in the immediate preceding bi-ennium. *See* ch. 2000-295, s. 6, L.O.F.

The AIDS/HIV course must consist of education on the modes of transmission, infection control procedures, clinical management, and prevention of AIDS/ HIV. Such course must include information on current Florida law on AIDS and its impact on testing, confidentiality of testing results, treatment of patients, and any protocols and procedures applicable to HIV counseling and testing, reporting, the offering of HIV testing to pregnant women, and partner notification. In 1999, the Legislature amended s. 456.033, F.S., to provide a health care professional the option of completing an end-of-life care and palliative health care course in lieu of an AIDS/HIV course for licensure and licensure renewal, if the health care professional has completed an AIDS/HIV course in the preceding bi-ennium. *See* ch. 99-331, s. 9. L.O.F.

End-of-Life Care and Advance Directives

Federal and state statutes and case law provide that a legally competent adult 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.[2] However, the Florida

[1] Rule 64B5-12.013, F.A.C.

[2] *See, e.g., 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 Hosp., Inc. v. Bludworth*, 452 So.2d 921 (Fla. 1984) (the right of an incapacitated and 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).

Supreme Court has recognized four state interests that may override, on a case-by-case basis, a person's unlimited right to make health care decisions: the preservation of life, the protection of innocent third parties, the prevention of suicide, and maintenance of the ethical integrity of the medical profession.[3]

The concept of "substituted judgment" provides for a person to act on behalf of another person who lacks capacity to make their own health care decisions, particularly regarding consent to withhold or withdraw extraordinary life-sustaining measures on the belief that the terminally ill and incapacitated patient, while competent, would have wanted or done the same under the circumstances.[4]

Under chapter 765, F.S., a mentally capacitated person can plan and make health care arrangements for a future point when they may become incapacitated, through written instruments termed health care advance directives. The instruments may be written or oral expressions regarding any aspect of the principal's health care, including: designation of a health care surrogate, delegation of a durable power of attorney, execution of a living will, execution of a do-not-resuscitate order (DNR), or execution of some other like instrument under another state's law.

- *Health Care Surrogate and Proxy*

A person may designate in writing a health care surrogate to make health care decisions on his or her behalf. *See* ss. 765.202 and 765.203, F.S. The written designation must be witnessed by two adults and signed by the principal or alternatively, another person on behalf of the principal. A suggested form is provided in statute under s. 765.203, F.S. In the absence of an advance directive or a designated health care surrogate or the unavailability of a health care surrogate, a proxy may be appointed from a list of specified persons who know the patient or a court may appoint a guardian to make health care decisions under s. 765.401, F.S. A proxy must comply with the same provisions that a health care surrogate must. However, the proxy's decision to withhold or withdraw life-prolonging procedures must be supported by a written declaration evidencing the patient's desire for such an action. In the absence of a written declaration, the patient must have a terminal condition, have an end-stage condition, or be 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. Families and others may intervene in a decision by a surrogate, proxy or health care professional through an expedited judicial intervening process to "swiftly resolve claims when nonlegal means prove unsuccessful" under s. 765.105, F.S. *See* Fla. Prob. R. 5.900.

- *Durable Powers of Attorney*

A person may exercute a power of attorney or similar instrument conferring legal authority. See ch. 709, F.S. The power of attorney must be in writing and executed in accordance with the statutory formality associated with conveyance of real property. Florida recognizes fully the

[3] *In re Guardianship of Browning, supra.*
[4] *John F. Kennedy Memorial Hosp., Inc. v. Bludworth, supra.*

general power of attorney and the durable power of attorney. The powers delegable under a power of attorney can include, but are not limited to, unless otherwise provided in law: every act authorized and specifically enumerated in the durable power of attorney and the power to make health care decisions, if specifically granted therein, including the authority set forth in chapter 765, F.S., relating to health care advance directives under s. 709.08(7)(c)3., F.S.

- *Living Wills*

A person may execute a living will specifying the withhold or withdrawing of life-prolonging procedures in the event the person becomes incapacitated and satisfies one of the statutory conditions. *See* Part III of chapter 765, F.S. The living will serves as persuasive evidence of the subsequently incapacitated person's intent and is given great weight by the surrogate or proxy since it provides a presumption of clear and convincing evidence of the patient's wishes. Additional conditions that must be met by the surrogate exercising an incapacitated person's right to forgo treatment include: a determination that the patient does not have a reasonable probability of recovering capacity so that the right can be directly exercised by the incapacitated person, and any limitations or conditions expressed orally or in the living will.

Some health care professionals view and have acted on living wills as self-executing documents upon which an attending physician may carry out the patient's instructions without having to consult with the patient's family, guardians, or close friends. If a health care provider is unwilling to carry out the patient's living-will instructions regarding treatment, including the withdrawal or withholding of life-prolonging procedures, the health care provider may transfer the patient to another health care provider. (*See* s. 765.308, F.S.)

- *Do-Not-Resuscitate Orders*

In 1992, the Legislature provided statutory recognition of DNR orders by emergency medical services personnel to honor the wishes of those who elect to die at home, or in another non-clinical setting, without being subjected to extraordinary resuscitation measures in the event of an emergency call. Emergency medical technicians and paramedics are immune from liability when acting on a physician's DNR order under s. 401.45(3), F.S. Otherwise, emergency services personnel are under a duty to administer cardiopulmonary resuscitation as needed. The Department of Health is responsible for the establishment of rules relating to the circumstances and procedures for honoring DNR orders under s. 401.35(4), F.S. The standardized form developed by the department must be properly executed and witnessed and must include the signatures of the person's attending physician who must attest to consultation with another physician as to the person's terminal condition, and of the patient or the patient's surrogate, proxy or guardian.[5] The department, in consultation with the Department of Elderly Affairs and the Agency for Health Care Administration, has developed a standardized do-not-resuscitate identification system with devices to signify that the possessor is a patient for whom a physician has issued a DNR order under s. 401.45(c), F.S.

- *Court-Appointed Guardians*

In any guardianship proceeding, the court must determine if a person has executed a health care advance directive and/o designated a health care surrogate. *See* s. 744.3115, F.S. If a health care advance directive has been executed and a health care surrogate designated, the court can modify

[5] "Prehospital Do Not Resuscitate Order Form, DH 1896" under rule 64E-2.031, F.A.C.

or revoke the health care surrogate's authority as provided under the directive to the extent governed by chapter 765, F.S., by redelegating the authority to a guardian. If no directive was executed and no surrogate designated, the court can delegate to a guardian the power to "consent to medical and mental health treatment" on behalf of the incapacitated person under s. 744.3215(3)(f), F.S.

In the absence of a health care advance directive or designated health care surrogate, a judicially appointed guardian may, as a proxy, make health care decisions including the decision to withdraw or withhold life-prolonging procedures under ss. 765.401 and 765.404, F.S. However, if the health care decision to be made is the decision to withdraw or withhold life-prolonging procedures, such proxy's decision must be based on either:

- A written declaration, or
- Clear and convincing evidence that the decision would have been the one the patient would have chosen had the patient been competent (the patient must have a terminal condition, have an end-stage condition or be in a persistent vegetative state, for this provision to apply).

If the person is in a persistent vegetative state, there is no advance health care directive or family or friend available to act as proxy, and there is no evidence indicating what the person would have wanted under such conditions, the court-appointed guardian with express authority to consent to medical treatment may exercise the decision to withhold or withdraw life-prolonging procedures in consultation with the person's attending physician and the medical ethics committee of the applicable health care facility. The group must conclude that the condition is permanent, that there is no reasonable medical probability for recovery and that withholding or withdrawing care is in the patient's best interest. *See* s. 765.404, F.S.

End-of-Life Care Workgroup

In 2000, the Florida Legislature created the End-of-Life Care Workgroup for a 1-year term to continue the review of end-of-life care issues begun in 1999. *See* ch. 2000-295, L.O.F. Revisions to several end-of-life related provisions in this bill are based, in part, on the recommendations of the workgroup in a December, 2000, report.

III. Effect of Proposed Changes:

Section 1 amends the continuing education requirements for licensed dentists and dental hygienists in s. 456.031, F.S., to provide an option of completing a course approved by the Board of Dentistry in lieu of a domestic violence course for licensure renewal, if the licensed dentist or dental hygienist has completed a domestic violence course in the immediately preceding two years.

Section 2 amends the continuing education requirements for licensed dentists or dental hygienists in s. 456.033, F.S., to provide an option of completing a course approved by the Board of Dentistry in lieu of an AIDS/HIV course for licensure renewal, if the licensed dentist or dental hygienist has completed an AIDS/HIV course in the immediately preceding two years.

Section 3 redefines the term "end-stage condition" in s. 765.101, F.S., to be a condition that has resulted in progressively severe and permanent deterioration, and for which treatment of the condition would be ineffective to a reasonable degree of medical probability.

Section 4 defines the scope of the term "palliative care" in s. 765.102, F.S., as the comprehensive management of the physical, psychological, social, spiritual and existential needs of patients, especially suited to the care of people who have incurable, progressive illness. Palliative care must include: an opportunity to discuss and plan for end-of-life care; assurance that physical and mental suffering will be carefully attended; assurance that preferences for withholding and withdrawing life-sustaining interventions will be honored; assurance that the personal goals of the dying person will be addressed; assurance that the dignity of the dying person will be a priority; assurance that healthcare providers will not abandon the dying person; assurance that the burden to family and others will be addressed; assurance that advance directives for care will be respected; assurance that organizational mechanisms will evaluate the availability and quality of end-of-life, palliative and hospice care, including the evaluation of administrative and regulatory barriers; assurance that necessary healthcare services will be provided and reimbursement policies are available; and assurance that patient goals will be accomplished in a culturally appropriate manner.

Section 5 amends the statutory responsibilities of a health care surrogate in s. 765.205, F.S., by providing that if there is no indication of the principal's preferences, the health care surrogate may consider the patient's best interest in the decision to withhold or withdraw treatment.

Section 6 amends the statutory responsibilities of a proxy in s. 765.401, F.S., by providing that if there is no indication of the principal's preferences, the proxy may consider the patient's best interest in the decision to withhold or withdraw treatment.

Section 7 provides an effective date of July 1, 2001.

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 Art. VII, s. 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 Art. I, s. 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 Art. III, s. 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:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.