

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Promote personal responsibility – The bill increases personal responsibility by encouraging individuals to complete advance directives and living wills that specify their wishes concerning the withholding or withdrawing of life-sustaining treatment.

B. EFFECT OF PROPOSED CHANGES:

The bill amends the definition for incapacity or incompetent person to provide that additional knowledge is required by the patient concerning consequences of medical treatment. An incompetent or incapacitated patient must be able, based on reasonable medical judgment, to understand or appreciate the nature and consequences to include benefits and reasonable alternatives to a treatment option.

The bill amends current legislative findings and intent, adding that institutional ethics committees should be a mechanism to evaluate the availability and quality of end-of-life, palliative, and hospice care services. Institutional ethics committees should be provided adequate resources and training to provide the tasks of education, policy creation or review and consultation.

The bill provides immunity from criminal prosecution, civil liability, or professional misconduct to all providers, health care facilities, or other person who makes a health care decision in accordance with an advance directive and Florida law. Currently, s. 765.109, F.S., provides similar liability coverage for all health care decisions.

The bill provides that a surrogate may not override a principal's wishes as expressed in a living will.

The bill also requires the Department of Safety and Motor Vehicles and the Agency for Health Care Administration to provide sample forms for the public at all Division of Driver Licenses office locations and on the Internet.

The bill authorizes certain individuals or business entities to act as a proxy.

The bill amends s. 765.404, F.S., to correct a typographical error of bioethics

BACKGROUND

Right to Make Decisions about Health Care

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 they wish to receive, including the right to refuse or to discontinue medical treatment.¹ The State Supreme Court has recognized four state interests which might, 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.

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). See also, *Cruzan v. Director, Missouri Department Of Health*, 497 U.S. 261, 110 S.Ct. 2841 (1990).

HOSPICE

Hospice is a centrally administered not-for-profit corporation that provides a continuum of palliative and supportive care for terminally ill patients and their family². Section 400.601(10), F.S., provides the definition within hospice provisions of a "terminally ill" patient as a person with a medical prognosis where their life expectancy is 1 year or less if the illness runs its normal course.

HEALTH CARE ADVANCE DIRECTIVES

An advance directive is a witnessed written document or oral statement in which instructions are given by a principal³ or in which the principal's desires are expressed concerning any aspect of the principal's health care, and includes, but is not limited to, the designation of a health care surrogate, a living will, or an anatomical gift made pursuant to the laws of Florida.⁴ Such directives may be made in advance through oral statements made to others or through a living will or other written directive that expresses the person's wishes.⁵ The decision is usually made in fairly general terms because the precise kind of medical treatment cannot be specified without making the advance directive so specific that it runs the risk of failing to apply to various possible situations.⁶

A patient has the right to refuse or accept medical treatment, but the advance directive must specifically state the patient's wishes. An advance directive only goes into effect when the patient is unable to make their own decisions.

Health Care Advance Directives and Pregnancy

Section 765.113, F.S., provides restrictions on providing consent for health care decisions. A principal must expressly delegate authority to a surrogate in writing, or a health care surrogate or proxy must have sought and received court approval in accordance to Florida Probate Rules. A health care surrogate or proxy may not provide consent for the withholding or withdrawing of life-prolonging procedures from a pregnant patient prior to determination of the viability of the unborn child.

Section 390.0111(4), F.S., provides the standard of medical care to be used to determine viability of a pregnancy. If a termination of pregnancy is performed during viability, no person who performs or induces the termination of pregnancy shall fail to use that degree of professional skill, care, and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted.

"Viability" is the stage of fetal development when the life of the unborn child may with a reasonable degree of medical probability be continued indefinitely outside the womb. Notwithstanding these factors, the woman's life and health shall constitute an overriding and superior consideration to the concern for the life and health of the fetus when such concerns are in conflict.⁷

Liability and Immunity

Currently, section 765.109, F.S. provides that a health care facility, provider, or other person who acts under the direction of a health care facility or provider is not subject to criminal prosecution or civil liability--as long as these individuals are deemed not to have engaged in unprofessional conduct, as a result of carrying out a health care decision the health care surrogate or proxy is not subject to criminal prosecution or civil liability. This immunity applies as long as the preponderance of evidence proves that the person authorized to make health care decision did not, in good faith, violate Florida law.

² See 400.601, F.S.

³ The *principal* is the person executing or creating the directive.

⁴ See s. 765.101, F.S.

⁵ See Part III, Ch. 765, F.S.

⁶ Meisel & Cerminara, *supra* note 3, at 7-21.

⁷ See s. 390.0111, F.S.

Absence of a Living Will and Decision to Withdraw or Withhold Life-Prolonging Treatment

In the absence of a living will, a decision to withdraw or withhold life-prolonging treatment may be made by a health care surrogate. Prior to declining health care or life-prolonging treatment the surrogate must be satisfied that there is no probability of the patient recovering or that the patient has an end-stage condition, is in a persistent vegetative state, or the condition is terminal.⁸

A competent adult may make a living will or written declaration and direct the withholding or withdrawal of life-prolonging procedures in the event that such a person is diagnosed as having one of the following conditions.⁹

- An end-stage condition, which is an irreversible condition that is caused by injury, disease, or illness that has resulted in progressively severe and permanent deterioration, and that, to a reasonable degree of medical probability, treatment of the condition would be ineffective.¹⁰
- A persistent vegetative state, which is a permanent and irreversible condition of unconsciousness in which there is an absence of voluntary action or cognitive behavior, and an inability to communicate or interact purposefully with the environment.¹¹
- A terminal condition, which is a condition caused by injury, disease, or illness from which there is no reasonable medical probability of recovery and which, without treatment, can be expected to cause death.¹²

A living will must be signed by the principal in the presence of two witnesses where one cannot be a spouse or a blood relative. In the event that a principal is unable to sign the living will, a witness may sign on the principal's behalf in accordance with existing law.

Conflicts Concerning Health Care Decisions

Section 765.305, F.S., requires that in the event of a dispute or disagreement concerning the attending physician's decision to withhold or withdraw life-prolonging procedures, the attending physician shall not withhold or withdraw life-prolonging procedures until the case is reviewed.

Executing an Advance Directive

Section 765.306, F.S., requires that in determining whether the patient has a terminal condition, has an end-stage condition, or is in a persistent vegetative state, may recover capacity or whether a medical condition or limitation referred to in an advance directive exists, the patient's attending or treating physician and at least one other consulting physician must separately examine the patient. The findings of each such examination must be documented in the patient's medical record and signed by each examining physician before life-prolonging procedures may be withheld or withdrawn.

C. SECTION DIRECTORY:

Section 1. Amends s. 765.101, F.S., to revise the definition of incapacity or incompetent within chapter 765, F.S.

Section 2. Amends s. 765.102, F.S., to revise the legislative findings and intent.

Section 3. Amends s. 765.203, F.S., to clarify a principal's statement of understanding on the suggested form of "designating of health care surrogate".

Section 4. Amends s. 765.204, F.S., to remove the requirement for written notification by health care facilities to a health care surrogate.

⁸ See s. 765.305 F.S.

⁹ See s. 765.302, F.S.

¹⁰ See s. 765.101, F.S.

¹¹ See s. 765.101, F.S.

¹² See s. 765.101, F.S.

Section 5. Amends s. 765.205, F.S., to clarify that a health care surrogate may not override a principal's wishes as expressed in a living will.

Section 6. Creates s. 765.3061, F.S., requires the Department of Highway Safety and Motor Vehicles and the Agency for Health Care Administration to provide sample forms relating to health care advance directives for the public at all office locations and on the Internet.

Section 7. Creates s. 765.3064, F.S., provides immunity from liability to a health care facility, health care provider, or other individuals acting under the direction of an executed health care advance directive.

Section 8. Amends s. 765.401, F.S., to authorize certain individuals or business entities to act as a proxy.

Section 9. Amends s. 765.404, F.S., to correct a typographical error.

Section 10. Provides an effective date of September 1, 2005.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

Indeterminate. See fiscal comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The Department of Highway Safety and Motor Vehicles estimated that it may cost approximately \$50,000 to distribute or print handouts.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to spend funds or take an action requiring the expenditure of funds. This bill does not reduce the percentage of a state tax shared with counties or municipalities. This bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Concern has been raised that the amended definition for incapacity or incompetent adds the phrase “and reasonable alternatives to a proposed treatment decision,” which may be too vague and may be interpreted differently by physicians in the course of determining mental ability by “reasonable medical judgment.”

V. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On March 9, 2004, the Health Care Regulation Committee considered the bill and adopted a strike-all amendment sponsored by Representative Homan. The Committee Substitute differs from the original bill as filed in that the Committee Substitute:

- Removes the requirement for the Department of Highway Safety and Motor Vehicles to denote on the front of the driver’s license whether an individual has executed an advance directive.
- Removes the definition of medically futile condition and all associated references throughout the bill.
- Removes the provisions to execute an advance directive on behalf of a minor who has a terminal condition or end-stage condition.
- Removes from the definition of “health care decision” the right to provide consent, make decisions, and the right to access all health information on the behalf of a minor.
- Removes provision for the withholding or withdrawal of life-sustaining treatment for pregnant patients, which is similar to current statutory language in s. 765.113(2), F.S.
- Removes the requirement for written notification by health care facilities to a health care surrogate.
- Restores current statutory language for the definition of “terminal condition.”
- Adds a statement of understanding by a principal on the suggested form of designating of health care surrogate that states “I further understand that my designee has no authority to override my expressed wishes that may exist in a valid living will.”
- Adds language to the legislative findings and intent that states “institutional ethics committees are a mechanism to evaluate the availability and quality of end-of-life, palliative, and hospice care services.” Institutional ethics committees should be provided adequate resources and training to provide the tasks of education, policy creation or review and consultation.
- Authorizes certain individuals or business entities to act as a proxy.
- Amends s. 765.404, F.S., to correct a typographical error of bioethics

The bill, as amended, was reported favorably as a committee substitute.

This analysis is drafted to the committee substitute.