

By Senator Wise

5-1186-05

See HB 701

1 A bill to be entitled

2 An act relating to the withholding or

3 withdrawal of nutrition or hydration from

4 incompetent persons; creating part VI of ch.

5 765, F.S.; providing a part title; providing

6 definitions; declaring that an incompetent

7 person is presumed to have directed health care

8 providers to provide the necessary nutrition

9 and hydration to sustain life; prohibiting a

10 court, proxy, or surrogate from withholding or

11 withdrawing nutrition or hydration except under

12 specified circumstances; providing that the

13 presumption to provide nutrition and hydration

14 is inapplicable under certain circumstances;

15 amending ss. 765.106, 765.107, 765.204,

16 765.305, 765.401, and 765.404, F.S.; conforming

17 provisions to changes made by the act;

18 prohibiting an inference of incapacity due to a

19 person's developmental disability; providing

20 for the act to apply to pending litigation;

21 declaring that the act supersedes existing

22 court orders otherwise applicable on or after

23 the effective date of the act; providing an

24 effective date.

26 Be It Enacted by the Legislature of the State of Florida:

28 Section 1. Part VI of chapter 765, Florida Statutes,

29 consisting of sections 765.601, 765.602, 765.603, and 765.604,

30 is created to read:

1 765.601 Part title.--This part may be cited as the
2 "Starvation and Dehydration of Persons with Disabilities
3 Prevention Act."
4 765.602 Definitions.--As used in this part, the term:
5 (1) "Express and informed consent" means consent
6 voluntarily given with sufficient knowledge of the subject
7 matter involved to enable the person giving consent to make a
8 knowing and understanding decision without any element of
9 force, fraud, deceit, duress, or other form of constraint or
10 coercion. Sufficient knowledge of the subject matter involved
11 includes a general understanding of:
12 (a) The proposed treatment or procedure for which
13 consent is sought.
14 (b) The medical condition of the person for whom
15 consent for the proposed treatment or procedure is sought.
16 (c) Any medically acceptable alternative treatment or
17 procedure.
18 (d) The substantial risks and hazards inherent if the
19 proposed treatment or procedure is carried out and if the
20 proposed treatment or procedure is not carried out.
21 (2) "Nutrition" means sustenance administered by way
22 of the gastrointestinal tract.
23 (3) "Reasonable medical judgment" means a medical
24 judgment that would be made by a reasonably prudent physician
25 who is knowledgeable about the case and the treatment
26 possibilities with respect to the medical conditions involved.
27 765.603 Presumption of nutrition and hydration
28 sufficient to sustain life.--
29 (1) Each incompetent person shall be presumed to have
30 directed his or her health care providers to supply him or her
31 with the nutrition and hydration necessary to sustain life.

1 (2) A proxy, surrogate, or court may not decide on
2 behalf of an incompetent person to withhold or withdraw
3 hydration or nutrition from that person except in the
4 circumstances and under the conditions specifically provided
5 in s. 765.604.

6 765.604 Presumption of nutrition and hydration; when
7 inapplicable.--The presumption in s. 765.603 does not apply
8 if:

9 (1) In reasonable medical judgment:

10 (a) The provision of nutrition or hydration is not
11 medically possible;

12 (b) The provision of nutrition or hydration would
13 hasten death; or

14 (c) The medical condition of the incompetent person is
15 such that provision of nutrition or hydration would not
16 contribute to sustaining the incompetent person's life or
17 provide comfort to the incompetent person;

18 (2) The incompetent person has executed a written
19 advance directive executed in another state in accordance with
20 s. 765.112, executed a designation of a health care surrogate
21 prepared in accordance with s. 765.202, or executed a written
22 living will prepared in accordance with s. 765.302, any of
23 which specifically authorizes the withholding or withdrawal of
24 nutrition or hydration, to the extent that the authorization
25 applies; or

26 (3) There is clear and convincing evidence that the
27 incompetent person, when competent, gave express and informed
28 consent to withdrawing or withholding nutrition or hydration
29 in the applicable circumstances.

30 Section 2. Section 765.106, Florida Statutes, is
31 amended to read:

1 765.106 Preservation of existing rights.--The
2 provisions of this chapter are cumulative to the existing law
3 regarding an individual's right to consent, or refuse to
4 consent, to medical treatment and do not impair any existing
5 rights or responsibilities which a health care provider, a
6 patient, including a minor, competent or incompetent person,
7 or a patient's family may have under the common law, Federal
8 Constitution, State Constitution, or statutes of this state;
9 however, this section may not be construed to authorize a
10 violation of part VI.

11 Section 3. Subsection (1) of section 765.107, Florida
12 Statutes, is amended to read:

13 765.107 Construction.--

14 (1) This chapter shall not be construed to repeal by
15 implication any provision of s. 766.103, the Florida Medical
16 Consent Law. For all purposes, the Florida Medical Consent Law
17 shall be considered an alternative to provisions of this
18 section; however, this section may not be construed to
19 authorize a violation of part VI.

20 Section 4. Section 765.204, Florida Statutes, is
21 amended to read:

22 765.204 Capacity of principal; procedure.--

23 (1) A principal is presumed to be capable of making
24 health care decisions for herself or himself unless she or he
25 is determined to be incapacitated. Incapacity may not be
26 inferred from the person's voluntary or involuntary
27 hospitalization for mental illness or from her or his mental
28 retardation or developmental disability.

29 (2) If a principal's capacity to make health care
30 decisions for herself or himself or provide informed consent
31 is in question, the attending physician shall evaluate the

1 principal's capacity and, if the physician concludes that the
2 principal lacks capacity, enter that evaluation in the
3 principal's medical record. If the attending physician has a
4 question as to whether the principal lacks capacity, another
5 physician shall also evaluate the principal's capacity, and if
6 the second physician agrees that the principal lacks the
7 capacity to make health care decisions or provide informed
8 consent, the health care facility shall enter both physician's
9 evaluations in the principal's medical record. If the
10 principal has designated a health care surrogate or has
11 delegated authority to make health care decisions to an
12 attorney in fact under a durable power of attorney, the
13 facility shall notify such surrogate or attorney in fact in
14 writing that her or his authority under the instrument has
15 commenced, as provided in chapter 709 or s. 765.203.

16 (3) The surrogate's authority shall commence upon a
17 determination under subsection (2) that the principal lacks
18 capacity, and the ~~such~~ authority shall remain in effect until
19 a determination that the principal has regained ~~such~~ capacity.
20 Upon commencement of the surrogate's authority, a surrogate
21 who is not the principal's spouse shall notify the principal's
22 spouse or adult children of the principal's designation of the
23 surrogate. ~~If in the event~~ the attending physician determines
24 that the principal has regained capacity, the authority of the
25 surrogate shall cease, but shall recommence if the principal
26 subsequently loses capacity as determined under ~~pursuant to~~
27 this section.

28 (4) A determination made under ~~pursuant to~~ this
29 section that a principal lacks capacity to make health care
30 decisions shall not be construed as a finding that a principal
31 lacks capacity for any other purpose.

1 (5) In the event the surrogate is required to consent
2 to withholding or withdrawing life-prolonging procedures, the
3 provisions of parts ~~part~~ III and VI shall apply.

4 Section 5. Subsection (1) of section 765.305, Florida
5 Statutes, is amended to read:

6 765.305 Procedure in absence of a living will.--

7 (1) In the absence of a living will, the decision to
8 withhold or withdraw life-prolonging procedures from a patient
9 may be made by a health care surrogate designated by the
10 patient under ~~pursuant to~~ part II unless the designation
11 limits the surrogate's authority to consent to the withholding
12 or withdrawal of life-prolonging procedures or unless the
13 surrogate's authority is limited by part VI.

14 Section 6. Section 765.401, Florida Statutes, is
15 amended to read:

16 765.401 The proxy.--

17 (1) If an incapacitated or developmentally disabled
18 patient has not executed an advance directive, or designated a
19 surrogate to execute an advance directive, or the designated
20 or alternate surrogate is no longer available to make health
21 care decisions, health care decisions may be made for the
22 patient by any of the following individuals, in the following
23 order of priority, if no individual in a prior class is
24 reasonably available, willing, or competent to act:

25 (a) The judicially appointed guardian of the patient
26 or the guardian advocate of the person having a developmental
27 disability as defined in s. 393.063, who has been authorized
28 to consent to medical treatment, if such guardian has
29 previously been appointed; however, this paragraph shall not
30 be construed to require such appointment before a treatment
31 decision can be made under this subsection;

- 1 (b) The patient's spouse;
- 2 (c) An adult child of the patient, or if the patient
3 has more than one adult child, a majority of the adult
4 children who are reasonably available for consultation;
- 5 (d) A parent of the patient;
- 6 (e) The adult sibling of the patient or, if the
7 patient has more than one sibling, a majority of the adult
8 siblings who are reasonably available for consultation;
- 9 (f) An adult relative of the patient who has exhibited
10 special care and concern for the patient and who has
11 maintained regular contact with the patient and who is
12 familiar with the patient's activities, health, and religious
13 or moral beliefs; ~~or~~
- 14 (g) A close friend of the patient; or-
- 15 (h) A clinical social worker licensed pursuant to
16 chapter 491, or who is a graduate of a court-approved
17 guardianship program. Such a proxy must be selected by the
18 provider's bioethics committee and must not be employed by the
19 provider. If the provider does not have a bioethics committee,
20 then the ~~such a~~ proxy may be chosen through an arrangement
21 with the bioethics committee of another provider. The proxy
22 will be notified that, upon request, the provider shall make
23 available a second physician, not involved in the patient's
24 care to assist the proxy in evaluating treatment. Decisions to
25 withhold or withdraw life-prolonging procedures shall ~~will~~ be
26 reviewed by the ~~facility's~~ bioethics committee involved in the
27 proxy's selection. Documentation of efforts to locate proxies
28 from prior classes shall ~~must~~ be recorded in the patient
29 record.
- 30 (2) Any health care decision made under this part must
31 be based on the proxy's informed consent and on the decision

1 | the proxy reasonably believes the patient would have made
2 | under the circumstances. If there is no indication of what the
3 | patient would have chosen, the proxy may consider the
4 | patient's best interest in deciding that proposed treatments
5 | are to be withheld or that treatments currently in effect are
6 | to be withdrawn. Any decision concerning the withholding or
7 | withdrawal of nutrition or hydration must comply with part VI.

8 | (3) Before exercising the incapacitated patient's
9 | rights to select or decline health care, the proxy must comply
10 | with ~~the provisions of~~ ss. 765.205 and 765.305, except that a
11 | proxy's decision to withhold or withdraw life-prolonging
12 | procedures must be supported by clear and convincing evidence
13 | that the decision would have been the one the patient would
14 | have chosen had the patient been competent or, if there is no
15 | indication of what the patient would have chosen, that the
16 | decision is in the patient's best interest. Any decision
17 | concerning the withholding or withdrawal of nutrition or
18 | hydration must comply with part VI.

19 | (4) Nothing in this section shall be construed to
20 | preempt the designation of persons who may consent to the
21 | medical care or treatment of minors established under ~~pursuant~~
22 | ~~to~~ s. 743.0645.

23 | Section 7. Section 765.404, Florida Statutes, is
24 | amended to read:

25 | 765.404 Persistent vegetative state.--For persons in a
26 | persistent vegetative state, as determined by the attending
27 | physician in accordance with currently accepted medical
28 | standards, who have no advance directive and for whom there is
29 | no evidence indicating what the person would have wanted under
30 | such conditions, and for whom, after a reasonably diligent
31 | inquiry, no family or friends are available or willing to

1 | serve as a proxy to make health care decisions for them,
2 | life-prolonging procedures may be withheld or withdrawn under
3 | the following conditions:

4 | (1) The person has a judicially appointed guardian
5 | representing his or her best interest with authority to
6 | consent to medical treatment, ~~and~~

7 | (2) The guardian and the person's attending physician,
8 | in consultation with the medical ethics committee of the
9 | facility where the patient is located, conclude that the
10 | condition is permanent and that there is no reasonable medical
11 | probability for recovery and that withholding or withdrawing
12 | life-prolonging procedures is in the best interest of the
13 | patient. If there is no medical ethics committee at the
14 | facility, the facility must have an arrangement with the
15 | medical ethics committee of another facility or with a
16 | community-based ethics committee approved by the Florida
17 | Bioethics ~~Bio-ethics~~ Network. The ethics committee shall
18 | review the case with the guardian, in consultation with the
19 | person's attending physician, to determine whether the
20 | condition is permanent and there is no reasonable medical
21 | probability for recovery. The individual committee members and
22 | the facility associated with an ethics committee shall not be
23 | held liable in any civil action related to the performance of
24 | any duties required in this subsection.

25 |
26 | Any decision concerning the withholding or withdrawal of
27 | nutrition or hydration must comply with part VI.

28 | Section 8. This act shall apply prospectively in
29 | litigation pending on the effective date of this act and shall
30 | supersede any court order issued under the law in effect
31 | before the effective date of this act to the extent that the

1 court order conflicts with this act and would otherwise be
2 applied on or after the effective date of this act. This act
3 shall apply with respect to every person living on or after
4 the effective date of this act.

5 Section 9. This act shall take effect upon becoming
6 law.

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