

CHAMBER ACTION

1 The Health Care Regulation Committee recommends the following:

2
3 **Council/Committee Substitute**

4 Remove the entire bill and insert:

5 A bill to be entitled

6 An act relating to the withholding or withdrawal of
7 nutrition or hydration from incompetent persons; creating
8 part VI of ch. 765, F.S.; providing a part title;
9 providing guaranteed protections and presumptions;
10 providing definitions; declaring that an incompetent
11 person is presumed to have directed health care providers
12 to provide the necessary nutrition and hydration to
13 sustain life; prohibiting a court, proxy, or surrogate
14 from withholding or withdrawing nutrition or hydration
15 except under specified circumstances; providing that the
16 presumption to provide nutrition and hydration is
17 inapplicable under certain circumstances; amending ss.
18 765.106, 765.107, 765.204, 765.305, 765.401, and 765.404,
19 F.S.; conforming provisions to changes made by the act;
20 prohibiting an inference of incapacity due to a person's
21 developmental disability; requiring a guardian to have
22 spent a specified amount of time with a patient or ward
23 before seeking to have nutrition or hydration withheld

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24 | from the patient or ward; creating s. 765.405, F.S.;

25 | providing for limitations on authority to apply the

26 | provisions of ch. 765, F.S.; providing for the act to

27 | apply to pending litigation and to apply retroactively;

28 | providing an effective date.

29 |

30 | WHEREAS, every individual is endowed by his or her Creator

31 | with an unalienable right to life, and

32 | WHEREAS, the state has a high duty and responsibility to

33 | protect human life, without which no liberty or other interest

34 | can be enjoyed, and

35 | WHEREAS, a competent individual has a fundamental liberty

36 | interest in directing his or her own medical treatment,

37 | including the refusal of life-prolonging treatment, and

38 | WHEREAS, an incompetent individual retains his or her

39 | liberty interest in directing his or her own medical treatment,

40 | including the refusal of life-prolonging treatment, and

41 | WHEREAS, the state has a strong interest in the prevention

42 | of homicide, euthanasia, and suicide, and

43 | WHEREAS, the state has a strong interest in maintaining the

44 | ethical integrity of the medical profession and of the

45 | judiciary, and

46 | WHEREAS, the state has a strong interest in maintaining the

47 | neutrality of the medical profession and the judiciary with

48 | respect to the values of medical patients and incompetents, and

49 | WHEREAS, the state has a strong interest in ensuring that

50 | guardians, health care surrogates, and health care proxies

51 | exercise their duties and responsibilities exclusively in the

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52 | interests of any incapacitated patient for whom they are charged
53 | by law to act, and

54 | WHEREAS, the state has a strong interest in ensuring that
55 | medical treatment decisions do not cause preventable deaths, and

56 | WHEREAS, the liberty interest of the individual in
57 | directing his or her own medical treatment, including the
58 | refusal of life-prolonging treatment, can overcome the state's
59 | interest in ensuring that medical treatment decisions do not
60 | cause preventable deaths, but such refusal also constitutes a
61 | waiver of the individual's right to life, and

62 | WHEREAS, the waiver of the right to life constitutes a most
63 | fundamental exercise of human autonomy of obvious and
64 | overwhelming finality, and

65 | WHEREAS, in light of a natural duty of each person to
66 | protect and sustain human life, preventable starvation and
67 | dehydration are not natural results of an inability to swallow
68 | voluntarily when the body is reasonably capable of receiving and
69 | processing nutrition and hydration introduced through minimally
70 | sophisticated, nonintravenous means, and

71 | WHEREAS, the Legislature has determined that the
72 | withholding of food and water, even from animals, constitutes
73 | inhumane treatment, and

74 | WHEREAS, the decision to discontinue hydration and
75 | nutrition of a patient constitutes a decision to terminate life
76 | and is comparable to other decisions to terminate important
77 | rights, and

78 | WHEREAS, a waiver of such a fundamental right ought to be
79 | knowing, express, and informed, and

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80 WHEREAS, the state may repose judgment on these matters
81 exclusively on the patient, and

82 WHEREAS, the state has an interest to maintain social order
83 through enforcement of law and to protect the lives of those who
84 wish to live no matter what their circumstances from the actions
85 or decisions of others to terminate life, and

86 WHEREAS, the state has a strong interest in protecting
87 against mistake or fraud and otherwise guarding against
88 potential abuses in determining the desires of an incompetent
89 patient when a refusal of life-prolonging treatment is asserted,
90 and

91 WHEREAS, a withholding or withdrawal of nutrition or
92 hydration, intended to cause death by starvation or dehydration,
93 once fully completed, seriously implicates the state's interest
94 in preventing suicide, homicide, and euthanasia, and

95 WHEREAS, the point at which life becomes "worthless," and
96 the point at which the means necessary to preserve it become
97 "extraordinary" or "inappropriate," are set forth in neither the
98 Constitution of the United States nor the Constitution of the
99 State of Florida, and

100 WHEREAS, the state can protect the right to life of
101 incapacitated persons and prevent homicide, suicide, and
102 euthanasia by ensuring that any exercise of an incapacitated
103 person's right to refuse nutrition and hydration is not
104 reasonably questionable, and

105 WHEREAS, the present governing law has allowed
106 circumstances in which decisions to starve or dehydrate a person
107 to death have been and are reasonably being questioned, and

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108 WHEREAS, the Legislature is the branch of government most
109 capable of receiving public input and vested with the
110 responsibility to resolve broad public policy questions, and

111 WHEREAS, the Legislature has received uncountable e-mails,
112 letters, telephone calls, and other public input over the past
113 16 months during which a great public interest has prevailed
114 regarding the quality of present law governing starvation and
115 dehydration of incompetent persons, and

116 WHEREAS, the Legislature concludes that it is better to err
117 on the side of life even though no general rule can work
118 faultlessly and though regulations intended to protect from
119 fraud or mistake may in some cases frustrate the effectuation of
120 possible, but not fully expressed, desires of an incompetent
121 individual, and

122 WHEREAS, Floridians with severe physical and mental
123 disabilities, who are particularly vulnerable to being devalued
124 as burdens on society, should not be devalued and deemed
125 worthless, and

126 WHEREAS, it is the intent of the Legislature to safeguard
127 the personal element of the right to refuse nutrition and
128 hydration and to ensure that any action of a guardian,
129 surrogate, or proxy conforms as best it may to the wishes
130 expressed by the person while competent by imposing heightened
131 evidentiary requirements, establishing procedural safeguards
132 that will reduce the opportunity for error, and limiting
133 consideration of evidence to the prior expressed wishes of the
134 person including a clearly expressed desire that the decision to

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135 terminate life-sustaining treatment be made by a designated
136 surrogate, and

137 WHEREAS, it is further the intent of the Legislature that
138 the risk of an erroneous decision respecting the starvation or
139 dehydration of an incapacitated person be on those seeking to
140 terminate life-sustaining treatment, and

141 WHEREAS, it is the further intent of the Legislature to
142 decline to make judgments about the "quality" of life that a
143 particular individual may enjoy and to hereby assert an
144 unqualified interest in the preservation of human life from
145 decisions intended to cause starvation and dehydration except
146 when a person has clearly expressed an informed consent to or
147 appointed a surrogate authorized to consent to the withholding
148 or withdrawal of nutrition and hydration necessary to sustain
149 life, NOW, THEREFORE,

150

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

152

153 Section 1. Part VI of chapter 765, Florida Statutes,
154 consisting of sections 765.601, 765.6011, 765.602, 765.603, and
155 765.604, is created to read:

156 765.601 Part title.--This part may be cited as the
157 "Starvation and Dehydration of Incompetent Persons Prevention
158 Act."

159 765.6011 Scope.--Every living person is guaranteed the
160 protections and presumptions provided by this part.

161 765.602 Definitions.--As used in this part, the term:

162 (1) "Express and informed consent" means consent
 163 voluntarily given with sufficient knowledge of the subject
 164 matter involved to enable the person giving consent to make a
 165 knowing and understanding decision without any element of force,
 166 fraud, deceit, duress, or other form of constraint or coercion.
 167 Sufficient knowledge of the subject matter involved includes a
 168 general understanding of:

169 (a) The proposed treatment or procedure for which consent
 170 is sought.

171 (b) The medical condition of the person for whom consent
 172 for the proposed treatment or procedure is sought.

173 (c) Any medically acceptable alternative treatment or
 174 procedure.

175 (d) The substantial risks and hazards inherent if the
 176 proposed treatment or procedure is carried out and if the
 177 proposed treatment or procedure is not carried out.

178 (2) "Nutrition" means sustenance administered by way of
 179 the gastrointestinal tract.

180 (3) "Reasonable medical judgment" means a medical judgment
 181 that would be made by a reasonably prudent physician who is
 182 knowledgeable about the case and the treatment possibilities
 183 with respect to the medical conditions involved.

184 765.603 Presumption of nutrition and hydration sufficient
 185 to sustain life.--

186 (1) Each incompetent person shall be presumed to have
 187 directed his or her health care providers to supply him or her
 188 with the nutrition and hydration necessary to sustain life.

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

193 765.604 Presumption of nutrition and hydration; when
 194 inapplicable.--The presumption in s. 765.603 does not apply if:

195 (1) In reasonable medical judgment:

196 (a) The provision of nutrition or hydration is not
 197 medically possible;

198 (b) The provision of nutrition or hydration would hasten
 199 death;

200 (c) The medical condition of the incompetent person is
 201 such that provision of nutrition or hydration:

202 1. Would itself cause severe, intractable, or significant
 203 long-lasting pain to the incompetent person;

204 2. Would itself cause significant medical harm to the
 205 incompetent person; or

206 3. Would not contribute to sustaining the incompetent
 207 person's life or provide comfort to the incompetent person; or

208 (d) In the reasonable medical judgment of the incompetent
 209 person's attending physician and a second consulting physician:

210 1. Death is imminent;

211 2. Even with the use of medical treatment, the incompetent
 212 person will die within a reasonably short period of time of a
 213 terminal illness or injury; and

214 3. It is not the purpose of withdrawing or withholding
 215 nutrition or hydration to cause death by starvation or
 216 dehydration.

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217 (2) The incompetent person has executed a written advance
 218 directive executed in another state in accordance with s.
 219 765.112, executed a designation of a health care surrogate
 220 prepared in accordance with s. 765.202, or executed a written
 221 living will prepared in accordance with s. 765.302, any of which
 222 authorizes the withholding or withdrawal of nutrition or
 223 hydration, to the extent that the authorization applies; or

224 (3) There is clear and convincing evidence that the
 225 incompetent person, when competent, expressly authorized
 226 withdrawing or withholding nutrition or hydration in applicable
 227 circumstances.

228 Section 2. Section 765.106, Florida Statutes, is amended
 229 to read:

230 765.106 Preservation of existing rights.--The provisions
 231 of this chapter are cumulative to the existing law regarding an
 232 individual's right to consent, or refuse to consent, to medical
 233 treatment and do not impair any existing rights or
 234 responsibilities which a health care provider, a patient,
 235 including a minor, competent or incompetent person, or a
 236 patient's family may have under the common law, Federal
 237 Constitution, State Constitution, or statutes of this state;
 238 however, this section may not be construed to authorize a
 239 violation of part VI.

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

242 765.107 Construction.--

243 (1) This chapter shall not be construed to repeal by
 244 implication any provision of s. 766.103, the Florida Medical

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245 Consent Law. For all purposes, the Florida Medical Consent Law
 246 shall be considered an alternative to provisions of this
 247 section; however, this section may not be construed to authorize
 248 a violation of part VI.

249 Section 4. Section 765.204, Florida Statutes, is amended
 250 to read:

251 765.204 Capacity of principal; procedure.--

252 (1) A principal is presumed to be capable of making health
 253 care decisions for herself or himself unless she or he is
 254 determined to be incapacitated. Incapacity may not be inferred
 255 from the person's voluntary or involuntary hospitalization for
 256 mental illness or from her or his mental retardation or
 257 developmental disability.

258 (2) If a principal's capacity to make health care
 259 decisions for herself or himself or provide informed consent is
 260 in question, the attending physician shall evaluate the
 261 principal's capacity and, if the physician concludes that the
 262 principal lacks capacity, enter that evaluation in the
 263 principal's medical record. If the attending physician has a
 264 question as to whether the principal lacks capacity, another
 265 physician shall also evaluate the principal's capacity, and if
 266 the second physician agrees that the principal lacks the
 267 capacity to make health care decisions or provide informed
 268 consent, the health care facility shall enter both physician's
 269 evaluations in the principal's medical record. If the principal
 270 has designated a health care surrogate or has delegated
 271 authority to make health care decisions to an attorney in fact
 272 under a durable power of attorney, the facility shall notify

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273 | such surrogate or attorney in fact in writing that her or his
274 | authority under the instrument has commenced, as provided in
275 | chapter 709 or s. 765.203.

276 | (3) The surrogate's authority shall commence upon a
277 | determination under subsection (2) that the principal lacks
278 | capacity, and the ~~such~~ authority shall remain in effect until a
279 | determination that the principal has regained ~~such~~ capacity.
280 | Upon commencement of the surrogate's authority, a surrogate who
281 | is not the principal's spouse shall notify the principal's
282 | spouse or adult children of the principal's designation of the
283 | surrogate. If ~~In the event~~ the attending physician determines
284 | that the principal has regained capacity, the authority of the
285 | surrogate shall cease, but shall recommence if the principal
286 | subsequently loses capacity as determined under ~~pursuant to~~ this
287 | section.

288 | (4) A determination made under ~~pursuant to~~ this section
289 | that a principal lacks capacity to make health care decisions
290 | shall not be construed as a finding that a principal lacks
291 | capacity for any other purpose.

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

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

297 | 765.305 Procedure in absence of a living will.--

298 | (1) In the absence of a living will, the decision to
299 | withhold or withdraw life-prolonging procedures from a patient
300 | may be made by a health care surrogate designated by the patient

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301 under ~~pursuant to~~ part II unless the designation limits the
 302 surrogate's authority to consent to the withholding or
 303 withdrawal of life-prolonging procedures or unless the
 304 surrogate's authority is limited by part VI.

305 Section 6. Section 765.401, Florida Statutes, is amended
 306 to read:

307 765.401 The proxy.--

308 (1) If an incapacitated or developmentally disabled
 309 patient has not executed an advance directive, or designated a
 310 surrogate to execute an advance directive, or the designated or
 311 alternate surrogate is no longer available to make health care
 312 decisions, health care decisions may be made for the patient by
 313 any of the following individuals, in the following order of
 314 priority, if no individual in a prior class is reasonably
 315 available, willing, or competent to act:

316 (a) The judicially appointed guardian of the patient or
 317 the guardian advocate of the person having a developmental
 318 disability as defined in s. 393.063, who has been authorized to
 319 consent to medical treatment, if such guardian has previously
 320 been appointed; however, this paragraph shall not be construed
 321 to require such appointment before a treatment decision can be
 322 made under this subsection;

323 (b) The patient's spouse;

324 (c) An adult child of the patient, or if the patient has
 325 more than one adult child, a majority of the adult children who
 326 are reasonably available for consultation;

327 (d) A parent of the patient;

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328 (e) The adult sibling of the patient or, if the patient
329 has more than one sibling, a majority of the adult siblings who
330 are reasonably available for consultation;

331 (f) An adult relative of the patient who has exhibited
332 special care and concern for the patient and who has maintained
333 regular contact with the patient and who is familiar with the
334 patient's activities, health, and religious or moral beliefs; ~~or~~

335 (g) A close friend of the patient; or—

336 (h) A clinical social worker licensed pursuant to chapter
337 491, or who is a graduate of a court-approved guardianship
338 program. Such a proxy must be selected by the provider's
339 bioethics committee and must not be employed by the provider. If
340 the provider does not have a bioethics committee, then the ~~such~~
341 a proxy may be chosen through an arrangement with the bioethics
342 committee of another provider. The proxy will be notified that,
343 upon request, the provider shall make available a second
344 physician, not involved in the patient's care to assist the
345 proxy in evaluating treatment. Decisions to withhold or withdraw
346 life-prolonging procedures shall ~~will~~ be reviewed by the
347 ~~facility's~~ bioethics committee involved in the proxy's
348 selection. Documentation of efforts to locate proxies from prior
349 classes shall ~~must~~ be recorded in the patient record.

350 (2) Any health care decision made under this part must be
351 based on the proxy's informed consent and on the decision the
352 proxy reasonably believes the patient would have made under the
353 circumstances. If there is no indication of what the patient
354 would have chosen, the proxy may consider the patient's best
355 interest in deciding that proposed treatments are to be withheld

356 or that treatments currently in effect are to be withdrawn. Any
 357 decision concerning the withholding or withdrawal of nutrition
 358 or hydration must comply with part VI.

359 (3) Before exercising the incapacitated patient's rights
 360 to select or decline health care, the proxy must comply with ~~the~~
 361 ~~provisions of~~ ss. 765.205 and 765.305, except that a proxy's
 362 decision to withhold or withdraw life-prolonging procedures must
 363 be supported by clear and convincing evidence that the decision
 364 would have been the one the patient would have chosen had the
 365 patient been competent or, if there is no indication of what the
 366 patient would have chosen, that the decision is in the patient's
 367 best interest. Any decision concerning the withholding or
 368 withdrawal of nutrition or hydration must comply with part VI.

369 (4) Nothing in this section shall be construed to preempt
 370 the designation of persons who may consent to the medical care
 371 or treatment of minors established under ~~pursuant to~~ s.
 372 743.0645.

373 (5) No incompetent person living in this state on the date
 374 of enactment of this act shall have nutrition or hydration
 375 withheld from him or her pursuant to this section by a guardian
 376 pursuant to chapter 744 or other proxy until the guardian or
 377 proxy has been present with the ward or patient for a minimum of
 378 2 hours per week over a 12-week period or for an average of 10
 379 hours each month over a 3-month period either:

380 (a) Before a decision is made under this section for
 381 removal of nutrition and hydration; or

382 (b) Before nutrition and hydration is actually removed
 383 from the patient or ward.

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384 Section 7. Section 765.404, Florida Statutes, is amended
385 to read:

386 765.404 Persistent vegetative state.--For persons in a
387 persistent vegetative state, as determined by the attending
388 physician in accordance with currently accepted medical
389 standards, who have no advance directive and for whom there is
390 no evidence indicating what the person would have wanted under
391 such conditions, and for whom, after a reasonably diligent
392 inquiry, no family or friends are available or willing to serve
393 as a proxy to make health care decisions for them, life-
394 prolonging procedures may be withheld or withdrawn under the
395 following conditions:

396 (1) The person has a judicially appointed guardian
397 representing his or her best interest with authority to consent
398 to medical treatment.~~;~~~~and~~

399 (2) The guardian and the person's attending physician, in
400 consultation with the medical ethics committee of the facility
401 where the patient is located, conclude that the condition is
402 permanent and that there is no reasonable medical probability
403 for recovery and that withholding or withdrawing life-prolonging
404 procedures is in the best interest of the patient. If there is
405 no medical ethics committee at the facility, the facility must
406 have an arrangement with the medical ethics committee of another
407 facility or with a community-based ethics committee approved by
408 the Florida Bioethics ~~Bio-ethics~~ Network. The ethics committee
409 shall review the case with the guardian, in consultation with
410 the person's attending physician, to determine whether the
411 condition is permanent and there is no reasonable medical

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412 | probability for recovery. The individual committee members and
 413 | the facility associated with an ethics committee shall not be
 414 | held liable in any civil action related to the performance of
 415 | any duties required in this subsection.

416 |
 417 | Any decision concerning the withholding or withdrawal of
 418 | nutrition or hydration must comply with part VI.

419 | Section 8. Section 765.405, Florida Statutes, is created
 420 | to read:

421 | 765.405 Limitation on authority to withhold or withdraw
 422 | nutrition or hydration.--

423 | (1) This section shall control over any inconsistent
 424 | provision of law. A decision to withhold or withdraw nutrition
 425 | or hydration from a person who is in a persistent vegetative
 426 | state shall not be made by a guardian who has engaged in conduct
 427 | prohibited under s. 744.446 or by a proxy or surrogate who is
 428 | the person's spouse and who has engaged in conduct prohibited
 429 | for guardians under s. 744.446.

430 | (2) Guardians, surrogates, and proxies may not avoid their
 431 | legal responsibility to make health care decisions by
 432 | petitioning a court to make such decisions. No judge acting in a
 433 | judicial capacity may make any decision to withhold or withdraw
 434 | nutrition or hydration from a person who is in a persistent
 435 | vegetative state. Any such petition is contrary to the public
 436 | policy of this state set forth in s. 744.309(1)(b). It is the
 437 | intent of the Legislature that judges serve as unbiased judges
 438 | to hear petitions of proper parties questioning decisions of
 439 | guardians, surrogates, or proxies under various statutory

440 actions authorized in the applicable statutes but that any
 441 decision to withhold or withdraw nutrition or hydration from a
 442 patient in a persistent vegetative state not be made by any
 443 court or state officer acting in an official capacity, but only
 444 by a private guardian, surrogate, or proxy acting under the
 445 authority of the Florida Statutes subject to jurisdiction of the
 446 guardianship court as provided for the case by the Florida
 447 Statutes.

448 (3) It is further the intent of the Legislature that the
 449 Florida Statutes provide the exclusive legal basis for end-of-
 450 life health care decisions in this state and that this chapter
 451 shall constitute and occupy the entire body of law regulating
 452 such decisions. It is the intent of the Legislature that in
 453 every case in which withholding or withdrawal of nutrition and
 454 hydration is not specifically authorized by statute, the public
 455 policy and law of this state prohibit such withholding or
 456 withdrawal if death by dehydration or starvation likely will
 457 result.

458 (4) Nothing in this section shall be construed to create a
 459 cause of action against any proxy, surrogate, guardian, or
 460 health care provider for making any decision prior the effective
 461 date of this act pursuant to the Florida Statutes or to any
 462 court order.

463 Section 9. The provisions of this act are remedial and are
 464 applicable to every living person on the effective date of this
 465 act, shall be applicable in any proceeding relating to
 466 withdrawal or withholding of hydration or nutrition from an
 467 incompetent patient pending on the effective date of this act,

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468 and shall, upon the petition of any interested party, regulate
469 withdrawal or withholding of hydration or nutrition from any
470 person living on the effective date of this act. In order to
471 ensure that no person is starved or dehydrated in a manner that
472 violates the protections afforded by this act, the provisions of
473 this act shall apply retroactively to any health care decision
474 made but not executed prior to the effective date of this act
475 with respect to any person living on the effective date of this
476 act.

477 Section 10. This act shall take effect upon becoming a
478 law.