

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.)

Prepared By: Judiciary Committee

BILL: CS/SB 804

SPONSOR: Judiciary Committee and Senator Webster

SUBJECT: Suspension of Artificially Provided Sustenance or Hydration

DATE: March 16, 2005

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Brown</u>	<u>Maclure</u>	<u>JU</u>	Fav/CS
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This committee substitute prohibits the suspension of artificially provided sustenance or hydration from a person in a persistent vegetative state in the following situation:

- Suspension is only for the purpose of ending life,
- A conflict exists regarding suspension between certain parties statutorily delineated as potential proxies, and
- No written living will, advance directive, or designation of surrogate authorizing suspension of life-prolonging procedures exists.

This committee substitute has remedial application; applies to every living person on its effective date, which is upon becoming a law; and is intended to apply to situations in which a person is in a persistent vegetative state on or after the effective date of the act.

This committee substitute creates section 765.405, Florida Statutes.

II. Present Situation:

Background on Informed Consent and Advance Directives

The right to refuse treatment is considered by the courts to be grounded in the common law right to informed consent. Without valid consent, medical treatment may be considered to constitute a battery.¹ This judicial principle of patient self-determination was first asserted in 1914, in the

¹ Charles M. Key and Gary D. Miller, *The Tennessee Health Care Decisions Act A Major Advance In the Law Of Critical Care Decision Making*, 40-AUG Tenn. B.J. 25, 26 (2004).

case of *Schloendorff v. Society of New York Hospital* as: “Every human being of adult years and sound mind has a right to determine what shall be done with his own body.”² The right to refuse medical treatment is also linked to an implied right of privacy based on the liberty interest provided under the due process clause of the U.S. Constitution.

In the 20th century, as technology advanced, medical physicians were placed in a difficult position in having to decide whether to withhold life-sustaining treatment without clear direction from a dying patient. To aid in this dilemma, the medical community began to openly encourage advance directives in the 1970’s.³ Ideally, a person will specify conditions in advance under which he or she would want to refuse treatment through a written document. These wishes are generally known as advance directives. Living wills are considered to be a written form of an advance directive, and provide guidance to health care providers about the life-prolonging measures that a person would or would not want.⁴ In situations where a person is incapacitated and no living will exists, courts have created the concept of “substituted judgment,” to indicate the ability of another party, variably identified by the courts as a guardian, proxy, surrogate, family member, or the court itself, to make health care decisions based on what the patient would have wanted.

The 1976 case of *In the Matter of Karen Quinlan* involved a father/guardian who sought removal of life support for his daughter, who was in a persistent vegetative state and did not have a living will or advance directive.⁵ The New Jersey Supreme Court held that although the U.S. Constitution does not contain an explicit right of privacy, courts have acknowledged its existence through the penumbra of specific guarantees under the Bill of Rights.⁶ After recognizing the patient’s right of privacy, the court balanced the likelihood of the patient’s cognitive recovery with the extent of bodily invasion required by the life support.⁷ Here, the court determined that the patient’s interests did authorize the removal of life support.⁸ In so doing, the court relied upon the consensus reached by the following parties that no reasonable probability of medical recovery exists: the guardian and family, an attending physician, and a hospital ethics committee where the patient was located.⁹ The court encouraged continued participation by hospital medical ethics committees in decision-making in these situations.¹⁰

In the first right-to-die case to be decided by the U.S. Supreme Court, *Cruzan v. Director, Missouri Department of Health*, the court upheld a state statute requiring a clear and convincing showing of a patient’s intent to have life support withheld or withdrawn.¹¹ As in *Quinlan*, the patient was in a persistent vegetative state, did not have a living will, and had no reasonable chance of cognitive recovery.¹² While the right of self-determination through the patient’s liberty

² 211 N.Y. 125, 129 (N.Y.C.O.A. 1914).

³ Lainie Rutkow, *Dying to Live: The Effect of the Patient Self-Determination Act on Hospice Care*, 7 N.Y.U.J. Legis. & Pub. Pol’y 393, 406 (2004).

⁴ *Id.* at 406.

⁵ 355 A.2d 647 (N.J. 1976).

⁶ *Id.* at 663.

⁷ *Id.* at 664.

⁸ *Id.* at 666.

⁹ *Id.* at 671-672.

¹⁰ *Id.* at 669.

¹¹ 497 U.S. 261 (1990).

¹² *Id.* at 266, 267.

interest is provided in the due process clause of the U.S. Constitution, the court indicated, adopting procedural safeguards furthers a proper state interest, such as requiring a showing of clear and convincing evidence regarding a patient's wishes.¹³ Here, the court upheld the lower court finding that a patient's prior observations that "she would not wish to continue her life if sick or injured unless she could live at least halfway normally"¹⁴ did not rise to the level of clear and convincing evidence that the patient would want withdrawal of hydration and nutrition.¹⁵

Although the Florida Supreme Court case of *In re Guardianship of Browning v. Herbert* involved a person who had executed a written living will containing directives for removal of life-prolonging procedures, including nutrition and hydration,¹⁶ the court additionally indicated the same rights for a person who had orally expressed life-prolonging wishes and is now incapacitated.¹⁷ Oral evidence is subject to a clear and convincing showing, however.¹⁸ As the state constitution contains an express right of privacy,¹⁹ the court stipulated, the government must demonstrate a compelling state interest to justify interference with this liberty interest.²⁰ The court rendered legally meaningless any distinction between artificially provided sustenance and hydration and other life-sustaining measures.²¹

Statutory Authority on Advance Directives and End-Stage Decisions

Definitions and General Provisions

Chapter 765, F.S., addresses health care advance directives. Section 765.101, F.S., provides the following definitions:

- Advance directive: A directive in which instructions are given by a principal or in which the principal's desires are expressed about any aspect of health care, including designation of a health care surrogate, living will, or an anatomical gift; can be written or oral, but if in writing it must be witnessed.²²
- Living will: A witnessed written document or a witnessed oral statement made by the principal expressing the principal's instructions regarding life-prolonging procedures.²³
- Health care decision: Includes informed consent, refusal of consent, or withdrawal of consent to any and all health care, including life-prolonging procedures.²⁴
- Life-prolonging procedure: Sustains, restores, or supplants a spontaneous vital function, through any medical procedure, treatment, or intervention, including artificially provided sustenance and hydration.²⁵

¹³ *Id.* at 262, 273.

¹⁴ *Id.* at 261.

¹⁵ *Id.* at 263.

¹⁶ 568 So.2d 4, 8 (Fla. 1990).

¹⁷ *Id.* at 15.

¹⁸ *Id.* at 16.

¹⁹ Article I, Section 23 of the State Constitution provides: "Right of Privacy.—Every natural person has the right to be let alone and free from governmental intrusion into the person's private life...."

²⁰ *Id.* at 9-10.

²¹ *Id.* at 11-12.

²² s. 765.101(1), F.S.

²³ s. 765.101(11), F.S.

²⁴ s. 765.101(5), F.S.

- Persistent vegetative state: A permanent and irreversible condition of unconsciousness marked by the absence of voluntary action or cognitive behavior of any kind and an inability to communicate or interact purposefully with the environment.²⁶
- Proxy: A competent adult who has not been expressly designated to make health care decisions for an incapacitated person but is statutorily granted authority to do so.²⁷
- Surrogate: Any competent adult who is expressly designated by a principal to make health care decisions for the principal upon the principal's incapacity.²⁸

The Florida Statutes provide that the Legislature recognizes that every competent adult has the fundamental right of self-determination regarding health care decisions, including the right to choose or refuse medical treatment. This right is balanced, however, with the societal interest in protecting human life and preserving ethical standards in the medical profession.²⁹ The Legislature additionally recognizes the right of a competent adult to make an advance directive instructing that a physician provide, withhold, or withdraw life-prolonging procedures, or designate another to decide in the event of incapacitation.³⁰

Chapter 765, F.S., clarifies that these provisions are not intended to impede existing rights regarding a person's right to consent or refuse to consent to medical treatment, including all rights that a patient has under common law, federal and state constitutions and other statutes.³¹

Advance directives executed in other states are recognized in Florida.³²

Living Wills

A sample living will is provided in statute.³³ The sample form authorizes the withholding or withdrawal of life-prolonging procedures when they would only serve to artificially prolong the process of dying, where the principal suffers from a terminal or end-stage condition, or is in a persistent vegetative state and a medical determination has been made that there is no reasonable medical probability of recovery.³⁴ The sample also provides for designation of a surrogate.

A living will may be executed by any competent adult and, as stated in the sample form, may direct the providing, withholding, or withdrawal of life-prolonging procedures should the person have a terminal or end-stage condition, or is in a persistent vegetative state. To be valid, a living will must be signed by the principal with two subscribing witnesses present, one of whom is not a spouse or blood relative.³⁵ If the principal is unable to sign the living will, a witness is authorized to subscribe the principal's signature in the principal's presence and at the principal's

²⁵ s. 765.101(10), F.S.

²⁶ s. 765.101(12), F.S.

²⁷ s. 765.101(15), F.S.

²⁸ s. 765.101(16), F.S.

²⁹ s. 765.102(1), F.S.

³⁰ s. 765.102(3), F.S.

³¹ s. 765.106, F.S.

³² s. 765.112, F.S.

³³ s. 765.303, F.S.

³⁴ s. 765.303(1), F.S.

³⁵ s. 765.302(1), F.S.

direction.³⁶ It is the principal's responsibility to notify attending and treating physicians that a living will exists.³⁷ If the principal is incapacitated, any other person may notify the physician or health care facility regarding the living will.³⁸

Once executed, a living will establishes a rebuttable presumption of clear and convincing evidence of the principal's wishes.³⁹

Where a surrogate is not designated, an attending physician is authorized to proceed as is directed in the living will. Before so proceeding, it must be determined that:

- The principal does not have a reasonable medical probability of recovering capacity so that the right is directly exercisable by the principal;
- The principal has a terminal condition, an end-stage condition, or is in a persistent vegetative state; and
- Limitations or conditions expressed orally or through a written declaration are carefully considered and satisfied.⁴⁰

In making a determination, the patient's attending or treating physician and at least one other consulting physician must separately examine the patient and record written and signed findings in the patient's medical record.⁴¹

Surrogates vs. Proxies

Surrogates are identified in writing by the person for whom they will serve; therefore, a surrogate is chosen by the principal. A proxy, in contrast, is statutorily designated, in order of priority, in the absence of a surrogate.

In addition to the surrogate designation provided on the sample living will form, a separate sample surrogate designation form is provided in statute.⁴² To designate a surrogate, the principal must execute a written document specifically naming the surrogate, signed with two subscribing adult witnesses present. Where a principal is unable to sign, the principal may direct with witnesses present that another person sign the principal's name.⁴³ However, the person designated as surrogate is not permitted to act as witness to the execution of the document designating the health care surrogate. At least one witness must not be the principal's spouse or blood relative.⁴⁴ An alternate surrogate may also be named in the document designating a surrogate.⁴⁵ A proper written designation of a surrogate creates a rebuttable presumption of clear and convincing evidence of the principal's designation of surrogate.⁴⁶

³⁶ s. 765.302(1), F.S.

³⁷ s. 765.302(2), F.S.

³⁸ *Id.*

³⁹ s. 765.302(3), F.S.

⁴⁰ s. 765.304(2), F.S.

⁴¹ s. 765.306, F.S.

⁴² s. 765.203, F.S.

⁴³ s. 765.202(1), F.S.

⁴⁴ s. 765.202(2), F.S.

⁴⁵ s. 765.202(3), F.S.

⁴⁶ s. 765.202(7), F.S.

A principal is presumed to be capable of making health care decisions unless determined to be incapacitated.⁴⁷ Where capacity is in question, the attending physician is required to evaluate the principal's capacity, and if the physician finds that the principal lacks capacity, record this finding in the principal's medical record. If a question regarding capacity remains, another physician shall evaluate the principal, and if in agreement, record a similar finding of incapacity. If the principal has designated a health care surrogate or durable power of attorney, the facility shall notify them in writing that the instrument has commenced.⁴⁸ If a principal regains capacity, the surrogate's authority ceases.⁴⁹

In the event that neither the designated surrogate nor the alternate surrogate is willing or able to serve, the health care facility may seek the appointment of a proxy.⁵⁰

Florida law identifies specific surrogate powers and responsibilities, which authorize the surrogate to do the following:

- Act for the principal and make all health care decisions for the principal during the principal's incapacity;
- Consult promptly with health care providers to provide informed consent, and make only the health care decisions that he or she believes the principal would have made if capable, and where there is no indication, consider the patient's best interest in deciding that proposed treatments are to be withheld or that treatments currently in effect are to be withdrawn;
- Provide written consent whenever required, including a physician's order not to resuscitate;
- Be provided access to the principal's medical records, as appropriate;
- Apply for public benefits for the principal, and have access to financial records in applying for benefits; and
- Authorize release of information and medical records to appropriate persons to ensure continuity of health care and authorize the admission, discharge, or transfer of the principal to or from a health care facility or long-term care facilities.⁵¹

If a court appoints a guardian after the appointment of a surrogate, the surrogate shall continue to make health care decisions for the principal, unless modified or revoked by the court.⁵²

When there is no living will, a health care surrogate designated by the patient may make the decision to withhold or withdraw life-prolonging procedures, unless the designation actually limits the surrogate's authority to consent to withhold or withdrawal of life-prolonging procedures.⁵³ Before exercising the patient's right to forego treatment, the surrogate must be satisfied that:

⁴⁷ s. 765.204(1), F.S.

⁴⁸ s. 765.204(2), F.S.

⁴⁹ s. 765.204(3), F.S.

⁵⁰ s. 765.202(4), F.S.

⁵¹ s. 765.205(1) and (2), F.S.

⁵² s. 765.205(3), F.S.

⁵³ s. 765.305(1), F.S.

- A reasonable medical probability of recovering capacity does not exist; and
- The patient has an end-stage or terminal condition, or is in a persistent vegetative state.⁵⁴

In the event that there is no advance directive, a patient has not designated a surrogate to execute an advance directive, or the designated or alternative surrogate is not available to serve, the statutes provide a proxy list in priority order, for the purpose of making health care decisions for the patient.⁵⁵ In order of priority, acceptable proxies are as follows:

- Judicially appointed guardian or guardian advocate;
- Patient's spouse;
- Adult child of the patient;
- Parent of the patient;
- Adult sibling of the patient, or if there are more than one, a majority of siblings reasonably available for consultation;
- Adult relative of the patient who has shown special care and concern for the patient and maintained regular contact and is familiar with the patient's activities, health, and religious or moral beliefs;
- Close friend of the patient; or
- Licensed clinical social worker.⁵⁶

A proxy's decision to withhold or withdraw life-prolonging procedures must be supported by clear and convincing evidence that the decision would have been the one that the patient would have chosen if competent, or, if there is no indication of what the patient would have chosen, that the decision is in the patient's best interest.⁵⁷

Judicial Review of a Surrogate or Proxy Decision

A patient's family, the health care facility, the attending physician, or any other interested person who may reasonably be expected to be directly affected by the surrogate or proxy's decision may seek judicial review under the probate rules if the person believes:

- The surrogate or proxy's decision is not consistent with the patient's known desires or provisions relating to statutory authority;
- The advance directive is ambiguous, or the patient changed his or her mind after execution of the advance directive;
- The surrogate or proxy was improperly designated or appointed, no longer effective or has been revoked;
- The surrogate or proxy has failed to discharge duties, or is otherwise incapable of discharging duties;
- The surrogate or proxy has abused powers; or

⁵⁴ s. 765.305(2), F.S.

⁵⁵ s. 765.401(1), F.S.

⁵⁶ s. 765.401(1), F.S.

⁵⁷ s. 765.401(3), F.S.

The patient has sufficient capacity to make his or her own health care decisions.⁵⁸

Judicially Appointed Guardian for a Person in a Persistent Vegetative State

Absent an advance directive or other indications by a person in a persistent vegetative state, as determined by an attending physician, and where no family or friends are available or willing to serve as proxy, life-prolonging procedures may be withheld or withdrawn as follows:

- Where a guardian is judicially appointed who represents the person's best interest with authority to consent to medical treatment; and
- Where the guardian and the attending physician, in consultation with the medical ethics committee of the facility where the person is located, conclude that the condition is permanent and no reasonable medical probability for recovery exists, and that withholding or withdrawal is in the best interest of the patient.⁵⁹

III. Effect of Proposed Changes:

Under the committee substitute, artificially provided sustenance or hydration may not be suspended from a person who is in a persistent vegetative state if the following apply:

- The purpose of the suspension is only to end the person's life;
- A conflict exists about the decision to suspend artificially provided sustenance or hydration between certain parties statutorily listed as acceptable proxies, which are: judicially appointed guardian, the patient's spouse, an adult child of a patient, a patient's parent, an adult sibling of the patient, or an adult relative of the patient who has demonstrated special care and concern and maintained frequent contact; and
- No written advance directive, written living will, or written designation of a surrogate has been executed which authorizes the removal of life-prolonging procedures.

Standing is granted to the following parties to file a petition at any time with the court of competent jurisdiction to prevent the suspension of artificially provided sustenance or hydration: a judicially appointed guardian, the patient's spouse, an adult child of a patient, a patient's parent, an adult sibling of the patient, or an adult relative of the patient.

The provisions of this committee substitute are remedial and apply to every living person on the effective date of this act, which is upon becoming a law. Additionally, it is the intent of the Legislature and state policy to apply this provision to situations in which a person is in a persistent vegetative state on or after the effective date of the committee substitute.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

⁵⁸ s. 765.105, F.S.

⁵⁹ s. 765.404, F.S.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

In *In re Guardianship of Browning*, the Florida Supreme Court stated that oral expressions carry the same validity as written statements, subject to a clear and convincing showing. The committee substitute in its current form does not explicitly permit consideration of oral statements. A right of privacy question may potentially be asserted based on the lack of such a provision. If so, the court may require the state to demonstrate a compelling state interest for the law.

Section 765.102, F.S., provides:

Every competent adult has the fundamental right of self-determination regarding decisions pertaining to his or her own health, including the right to choose or refuse medical treatment.

Additionally, the right of privacy is an express, fundamental right as provided in the state constitution.

A potential constitutional question may arise due to application of this act to persons who are currently in a persistent vegetative state and in the situation described in the committee substitute, as an interference with fundamental rights. A presumption against retroactive application is established where a provision involves substantive, rather than procedural or remedial law.⁶⁰ As previously stated by the Florida Supreme Court:

Even when the Legislature does expressly state that a statute is to have retroactive application, this Court has refused to apply a statute retroactively if the statute impairs vested rights, creates new obligations, or imposes new penalties.⁶¹

The test for retroactivity is whether the new statutory provision attaches new legal consequences to events completed before its enactment.⁶²

The case of *Rusiecki v. Jackson-Curtis, M.D.* involved a right of privacy challenge based on a provision requiring the release of medical records.⁶³ The circuit court equated those

⁶⁰ *R.A.M. of South Florida v. WCI Communities, Inc.*, 869 So.2d 1210, 1216 (Fla. 2d DCA 2004).

⁶¹ *State Farm Mutual Automobile Insurance Company v. Laforet*, 658 So.2d 55, 61 (Fla. 1995).

⁶² *R.A.M. of South Florida v. WCI Communities, Inc.*, *supra* note 60, at 1221.

⁶³ 2005 WL 408133 (Fla.Cir.Ct., 6th Cir.)

privacy rights with vested rights, and therefore a violation of due process to apply a substantive provision retroactively.⁶⁴ It is unclear whether a court would apply the same analysis to a case involving privacy rights related to medical decisions.

For additional discussion of constitutional issues, see the Present Situation section of this staff analysis.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

There may be a fiscal impact on the courts due to new filings authorized under this committee substitute.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

⁶⁴ *Id.* at *6.

VIII. Summary of Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
