

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Health Regulation Committee

BILL: SB 540

INTRODUCER: Senator Fasano

SUBJECT: Health Care Representatives

DATE: March 28, 2009 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Stovall	Wilson	HR	Pre-meeting
2.			JU	
3.				
4.				
5.				
6.				

I. Summary:

The bill establishes a health care representative as a person who may make health care decisions and receive health information on behalf of a principal without the necessity for a determination of incapacity of the principal. Designation of a health care surrogate to make medical decisions and receive health information upon a determination of the principal’s incapacity is retained in the law, which allows a principal the flexibility to determine the extent of authority to grant to another. However, if both a health care representative and a health care surrogate have been designated, the responsibilities of a health care representative supersede the responsibilities of a health care surrogate. The bill provides for duties and responsibilities of a health care representative and a sample form that may be used to designate a health care representative. The bill also conforms relevant provisions in the statutes to recognize a health care representative’s authority and conforms cross references.

This bill substantially amends the following sections of the Florida Statutes: 765.101; 765.102; 765.103; 765.104; 765.105; 765.109; 765.1103; 765.1105; 765.113; 765.202; 765.203; 765.204; 765.205; 765.304; 765.305; 765.401; 765.512; 765.522; 744.3115; 872.04; 394.4598; and 406.11.

The bill redesignates parts III through V of ch., 765 F.S., as parts IV through VI of ch. 765, F.S., respectively.

The bill creates the following sections of the Florida Statutes: 765.251; 765.252; 765.253; 765.254; and 765.255 in a new part III.

II. Present Situation:

Florida law currently provides several methods for a person to make health care decisions and in some instances access health information on behalf of another person. Generally, a determination of incapacity of the principal is required before this authority is exercisable. Because a principal may regain capacity and in some instances, especially with the elderly, may vacillate in and out of capacity, a redetermination of incapacity is frequently necessary. This process can hinder effective and timely assistance and is cumbersome. Pursuant to a durable “medical” power of attorney, under ch. 709, F.S., a person may be authorized to make health care decisions on behalf of the principal whether or not the principal has been determined to be incapacitated; however, this authorization is very general¹ and is included within provisions primarily related to financial matters.

A health care decision² includes:

- Informed consent, refusal of consent, or withdrawal of consent to any and all health care, including life-prolonging procedures and mental health treatment, unless otherwise stated in the advance directive;
- The decision to apply for private, public, government, or veterans’ benefits to defray the cost of health care;
- The right of access to all records of the principal reasonably necessary for a health care surrogate to make decisions involving health care and to apply for benefits; and
- The decision to make an anatomical gift.

Absent court approval, a health care surrogate or proxy may not provide consent for: abortion, sterilization, electroshock therapy, psychosurgery, experimental treatments that have not been approved by a federally-approved institutional review board, or voluntary admission to a mental health facility.³

Power of Attorney, Health Care Surrogate, Guardian, and Proxy

A principal may execute a power of attorney to designate another as the principal’s attorney in fact. If the authority is specifically granted in the document, the attorney-in-fact may make all health care decisions on behalf of the principal, including, but not limited to, those set forth in ch. 765, F.S., related to health care advance directives. Actions authorized by a power of attorney are valid until the principal dies, revokes the power, or is adjudicated totally or partially incapacitated. If specifically stated in the document, a durable power of attorney is not affected by subsequent incapacity of the principal. An attorney-in-fact’s authority to make health care decisions is effective upon the date of execution of the “medical” power of attorney unless specifically conditioned upon the principal’s subsequent lack of capacity.⁴

¹ Section 709.08(7)(c), F.S., provides that if such authority is specifically granted in the durable power of attorney, the attorney in fact may make all medical decisions on behalf of the principal, including, but not limited to, those set forth in ch. 765, F.S.

² s. 765.101(5), F.S.

³ s. 765.113, F.S.

⁴ ch. 709, F.S.

A health care surrogate is a competent adult expressly designated by a principle to make health care decisions on behalf of the principal upon the principal's incapacity.⁵ A determination of incapacity is required to be made by a physician. For purposes of making an anatomical gift, the term "incapacity" includes a patient who is deceased.⁶ If a principal goes in and out of capacity, a redetermination of incapacity is necessary before a health care surrogate may make health care decisions.

A guardian must be appointed by a court and must be expressly authorized to make health care decisions or designated as a plenary guardian to exercise all legal rights and powers of the ward. A court considers whether the ward has executed any valid advance health care directives when determining what, if any, authority to grant to the guardian regarding health care decisions. If after the appointment of a surrogate, a court appoints a guardian, the surrogate may continue to make health care decisions for the principal, unless the court has modified or revoked the authority of the surrogate.⁷

A proxy is a competent adult who has not been expressly designated to make health care decisions for an incapacitated principal, but who, nevertheless, is authorized by s. 765.401, F.S. to make health care decisions for such individual.⁸ Section 765.401, F.S., provides that in the absence of an advance directive, or a designated health care surrogate who is able or willing to make health care decision, health care decisions may be made for an incapacitated or developmentally disabled patient by a person who is reasonably available, in the following order of priority:

- The patient's spouse;
- An adult child, or a majority of the adult children of a patient;
- A parent of the patient;
- An adult sibling, or a majority of the adult siblings of a patient;
- An adult relative who has exhibited special care and concern for the patient, who has maintained regular contact with the patient, and who is familiar with the patient's activities, health, and religious or moral beliefs;
- A close friend of the patient; or
- A licensed clinical social worker or clinical social worker who is a graduate of a court-approved guardianship program.

HIPAA Personal Representative

The Privacy Rule implements requirements of the Health Insurance Portability and Accountability Act of 1996⁹ (HIPAA) to, among other things, address the use and disclosure of an individual's health information, called protected health information, by organizations subject to the Privacy Rule, referred to as covered entities. The Privacy Rule requires a covered entity to treat a personal representative the same as the individual, with respect to uses and disclosures of the individual's protected health information, with certain exceptions related to abuse or neglect

⁵ s. 765.101(16), F.S.

⁶ s. 765.101(8), F.S.

⁷ s. 765.205(3), F.S., and s. 744.3115, F.S.

⁸ s. 765.101(15), F.S.

⁹ Public Law 104-191.

of the individual. A personal representative is a person legally authorized to make health care decisions on an individual's behalf or to act for a deceased individual or the estate.¹⁰

III. Effect of Proposed Changes:

Section 1. Amends s. 765.101, F.S., to define additional terms and modify existing definitions used in ch. 765, F.S., related to health care advance directives. The additional terms defined include: "health care," "health care representative," and "health information." The following definitions are modified:

- "Advance directive," to include that an advance directive might designate a health care representative;
- "Health care decision," to substitute the term "health information" for "all records" and include a health care representative as one who has a right of access to health information to make health care decisions; and
- "Surrogate" to provide that a surrogate is one who may receive health information.

Section 2. Amends s. 765.102, F.S., to modify the legislative findings and intent to recognize that procedures must exist to allow a person (the principal) to designate another person to direct the course of the principal's medical treatment whether or not the principal is incapacitated.

Section 3. Amends s. 765.103, F.S., to preserve the legal status of any advance directive that was made prior to October 1, 2009.

Section 4. Amends s. 765.104, F.S., related to amending or revoking an advance directive to include a health care representative as one of the persons to whom the amendment or revocation may apply.

Section 5. Amends s. 765.105, F.S., to specify that decisions made by a health care representative are subject to review if certain conditions are alleged, similar to decisions made by a health care surrogate or proxy. The bill adds another condition that might be alleged by a patient's family member, health care facility, attending physician, or other interested person when seeking expedited judicial intervention concerning a decision made by a health care representative. This condition is that the health care representative has not kept the principal reasonably informed of, to the extent that the principal is capable of understanding, matters that he or she has performed on behalf of the principal.

Section 6. Amends s. 765.109, F.S., to extend immunity from criminal prosecution or civil liability to a health care representative for making a health care decision on a patient's behalf pursuant to this chapter, consistent with the immunity provided to a surrogate and proxy.

Section 7. Amends s. 765.1103, F.S., to authorize a health care representative to receive information concerning pain management and palliative care and request pain management or palliative care on behalf of a principal who is incapacitated.

¹⁰ 45 C.F.R. s. 164.502(g).

Section 8. Amends s. 765.1105, F.S., to require a health care provider or facility to follow the procedures specified in this section related to transferring a patient when the provider or facility refuses to comply with a health care representative's treatment decision(s) for a principal.

Section 9. Amends s. 765.113, F.S., to provide that unless the principal expressly delegates the authority to a health care representative in writing, a health care representative may not consent on behalf of the principal for an abortion, sterilization, electroshock therapy, psychosurgery, experimental treatments, voluntary admission to a mental health facility, or withholding or withdrawing life-prolonging procedures from a pregnant patient.

Section 10. Amends s. 765.202, F.S., to reiterate that the designation of a health care surrogate is effective upon a determination of the principal's incapacity and to conform a cross-reference.

Section 11. Amends s. 765.203, F.S., to modify the sample form provided in statute related to designating a health care surrogate to address the relationship between a health care representative and a health care surrogate. The responsibilities of a health care representative supersede the responsibilities of a health care surrogate.

Section 12. Amends s. 765.204, F.S., to provide that the determination of a principal's incapacity and the corresponding entry of that determination in the principal's medical record is only required if the principal has not designated a health care representative. In addition, the requirement that a health care facility notify in writing an attorney-in-fact under a durable power of attorney who has been delegated the authority to make health care decisions upon a determination of the principal's incapacity is deleted. This section is also amended to conform a cross reference.

Section 13. Amends s. 765.205, F.S., to provide that a surrogate's responsibilities arise only if a health care representative has not been designated by the principal and to conform terms used in the section.

Section 14. Redesignates parts III, IV, and V of ch. 765, F.S., to parts IV, V, and VI, of ch. 765, F.S., respectively and creates a new part III related to health care representatives as follows:

- Section 765.251, F.S., is created to name part III of ch. 765, F.S., the "Florida Health Care Representative Act;"
- Section 765.252, F.S., is created to:
 - Require that designation of a health care representative must be in writing, provide that the health care representative is authorized to make health care decisions for the principal and to receive health information on behalf of the principal, and require that a copy of the document must be provided to the health care representative. A principal who is unable to sign the instrument may, in the presence of witnesses, direct that another person sign the principal's name to the document designating the health care representative;
 - Provide that the health care representative may not be a witness to the execution of the document designating him or her as the health care representative and at least one witness may not be either the principal's spouse or blood relative;
 - Authorize a principal to explicitly designate in the same document an alternate health care representative to serve as the health care representative if the original health care representative is unwilling or unable to perform his or her duties;

- Authorize a principal to designate a separate health care representative to consent to mental health treatment on behalf of the principal when the principal is determined by a court to be incompetent to consent to that mental health treatment and a guardian advocate is appointed for the principal. Although the definition of a health care decision includes making decisions regarding mental health treatment unless stated otherwise, this section requires the court to assume that the health care representative authorized to make health care decisions is the principal's choice to make decisions regarding mental health treatment, unless the document designating the health care representative expressly states otherwise;
- Provide that the designation of a health care representative is effective as of the date executed and will remain in effect until revoked by the principal unless a termination time is stated in the document; and
- Provide that a written designation of a health care representative executed in accordance with this section establishes a rebuttable presumption of clear and convincing evidence of the principal's designation of the health care representative.

The effect of this section is to establish the durable "medical" power of attorney within ch. 765, F.S., related to health care advance directives and to provide for more specific duties and responsibilities when making health care decisions for a principal.

- Section 765.253, F.S., is created to provide a sample form for designation of a health care representative. The use of this form is not required;
- Section 765.254, F.S., is created to address issues concerning the capacity of the principal as follows:
 - Requires the form designating the health care representative to state, "This representative designation is not affected by the subsequent incapacity of the principal except as provided in chapter 765, Florida Statutes" or similar words;
 - Provides that the responsibilities of a health care representative are not affected if court proceedings are initiated to determine the principal's incapacity, unless otherwise ordered by the court; and
 - Authorizes a health care facility or health care provider to rely on the authority granted to a health care representative until the facility or provider receives notice [actual knowledge] of an amendment or revocation related to the designation of the health care representative.
- Section 765.255, F.S., is created to assign responsibilities and authority to the health care representative to act for the principal, unless limited by the designation document, to:
 - Make all health care decisions that he or she believes the principal would have made under the circumstances or, if no such indication, what he or she believes is in the principal's best interest;
 - Provide informed consent, including executing a physician's order not to resuscitate;
 - Receive or be provided access to the health information of the principal;
 - Apply for public benefits for the principal and have access to financial accounts or information necessary to make such application. A health care provider or facility is prohibited from making application for public benefits a condition of continued care if the principal, if capable, would have refused to apply;
 - Authorize the release of health information to ensure the continuity of the principal's health care; and

- o Authorize admission, discharge, or transfer of the principal to or from a health care facility or other facility or program.

A health care representative who is only given authority to receive health information, unless otherwise limited, may only receive the health information, apply for public benefits and access the applicable financial records, authorize the release of health information to ensure continuity of care, and remove or place the principal in appropriate facilities.

The health care representative must also keep the principal reasonably informed of all matters that he or she has performed, to the extent that the principal is capable of understanding this communication.

If a court appoints a guardian after a health care representative has been designated, the health care representative is authorized to continue making health care decisions for the principal unless the court modifies or revokes that authority. The court may direct the health care representative to report the principal's health care status to the guardian.

Section 15. Amends s. 765.304, F.S., to include a reference to a health care representative with respect to procedures an attending physician may follow regarding a principal's living will.

Section 16. Amends s. 765.305, F.S., to recognize that a health care representative may decide to withhold or withdraw life-prolonging procedures from the principal, unless the designation is limited in this respect in the same manner as a health care surrogate.

Section 17. Amends s. 765.401, F.S., to require that prior to resorting to the list of persons who may serve as a proxy for making health care decisions on behalf of an incapacitated or developmentally disabled person, there must not be a health care representative designated or available and to address all possibilities for a health care decision to be made by a health care surrogate or health care representative.

Section 18. Amends s. 765.512, F.S., to prohibit a health care representative from modifying, denying, or preventing a donor's anatomical gift and specifically authorize a health care representative to make an anatomical gift of all or any part of the principal's body once the principal is deceased.

Section 19. Amends s. 765.522, F.S., to require an organ, eye, or tissue recovery program to request a health care representative to make an anatomical gift of the principal's body if documentation of an anatomical gift by the principal cannot be found when the patient is a suitable candidate.

Section 20. Amends s. 744.3115, F.S., to treat a health care representative in the same manner as a health care surrogate in the section related to advance health care directives in the guardianship law.

Section 21. Amends s. 872.04, F.S., to provide that an autopsy may not be performed without the written consent by the health care representative, or if no health care representative, then existing language provides who may authorize an autopsy.

Section 22. Amends s. 394.4598, F.S., to conform a cross reference in the provisions related to a guardian advocate under mental health services.

Section 23. Amends s. 406.11, F.S., to conform a cross reference under provisions related to rulemaking by the Medical Examiners Commission.

Section 24. Provides an effective date of October 1, 2009.

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 Article VII, Section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The provisions of the bill have no impact on public records or open meetings issues under the requirements of Article I, Section 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 Article III, Subsection 19(f) of the Florida Constitution.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Establishing a health care representative who may make medical decisions and receive health information on behalf of a principal without a determination of incapacity of the principal will facilitate providing health care to the principal.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

The definition of health care representative on line 97 references 45 C.F.R. s. 164.504(g), which addresses requirements for a covered entity with multiple covered functions. This appears to be an incorrect citation. The citation should be 45 C.F.R. s. 164.502(g), which requires a covered entity to treat a personal representative as the individual.

VII. Related Issues:

1. Line 448 does not reference how many witnesses are needed when a principal is unable to sign the instrument; “two” should be inserted.
2. Line 457. It is unclear whether an alternate health care representative can ONLY be designated in the document designating the [primary] original health care representative, or whether an alternate health care representative may be designated in a separate document.
3. Line 461 uses the term “original” to describe a health care representative in the context of an alternate health care representative. This term could cause confusion if a subsequent document is executed by a principal to designate another person to serve as the health care representative. In order to avoid uncertainty, the term “primary” might be less confusing.
4. To provide for consistency throughout the statutes, a health care representative should be included in line 850 and s. 394.4597(2)(a),(b), and (d), F.S., should be added to the bill to provide for a health care representative.

VIII. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

- B. **Amendments:**

None.