

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/CS/HB 889 Health Care Representatives

**SPONSOR(S):** Judiciary Committee; Health Quality Subcommittee; Civil Justice Subcommittee; Wood

**TIED BILLS:** None **IDEN./SIM. BILLS:** CS/SB 1224

| REFERENCE                      | ACTION              | ANALYST | STAFF DIRECTOR or<br>BUDGET/POLICY CHIEF |
|--------------------------------|---------------------|---------|--|
| 1) Civil Justice Subcommittee  | 13 Y, 0 N, As<br>CS | Bond    | Bond                                     |
| 2) Health Quality Subcommittee | 11 Y, 0 N, As<br>CS | McElroy | O'Callaghan                              |
| 3) Judiciary Committee         | 18 Y, 0 N, As<br>CS | Bond    | Havlicak                                 |

### SUMMARY ANALYSIS

Current law provides several methods for a person to make health care decisions, and in some instances access health information, on behalf of another person. One such method is the designation by an adult person of another adult person to act as a health care surrogate. A health care surrogate is authorized to review confidential medical information and to make health care decisions in the place of the principal. Generally, a determination of incapacity of the principal is required before the health care surrogate may act.

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 to provide ongoing authorization for the health care surrogate to act. This process can hinder effective and timely assistance and is cumbersome. Further, some competent persons desire the assistance of a health care surrogate with the sometimes complex task of understanding health care treatments and procedures and with making health care decisions.

This bill amends the health care surrogate law to allow a person to designate a health care surrogate, who may act at any time, including while an adult is still competent and able to make his or her own decisions.

This bill also creates a means for designating a health care surrogate for the benefit of a minor when the parents, legal custodian, or legal guardian of the minor cannot be timely contacted by a health care provider or are unable to provide consent for medical treatment.

The bill also creates sample forms that may be used to designate health care surrogates for adults and minors.

This bill does not appear to have a fiscal impact on state or local governments.

The effective date of the bill is October 1, 2015.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **General Background**

##### Advance Directives

Competent adults may formulate, in advance, preferences regarding a course of treatment in the event that injury or illness causes severe impairment or loss of decision-making capacity. These preferences generally should be honored by the health care team out of respect for patient autonomy. Patients may establish an advance directive by documenting their treatment preferences and goals in a living will, by designating a health care surrogate, or by using a durable power of attorney for health care to make health care decisions on their behalf.<sup>1</sup> All 50 states permit an individual to use an advance directive to express his or her wishes as to medical treatment in the event the individual becomes terminally ill or has an injury or disease making the individual unable to communicate or make medical decisions.<sup>2</sup>

Physicians should recognize the patient's proxy or surrogate as an extension of the patient, entitled to the same respect as the competent patient.<sup>3</sup> Physicians should provide advice, guidance, and support; explain that decisions should be based on substituted judgment when possible and otherwise on the best interest principle; and offer relevant medical information as well as medical opinions in a timely manner. In addition to the physician, other hospital staff or ethics committees are often helpful to providing support for the decision-makers.<sup>4</sup>

##### Health Care Surrogates

Part II of Chapter 765, F.S., entitled "Health Care Surrogate," governs the designation of health care surrogates in the State of Florida. A health care surrogate is a competent adult expressly designated by a principal to make health care decisions on behalf of the principal upon the principal's incapacity.<sup>5</sup> Section 765.203, F.S., provides a suggested form for the designation of a health care surrogate.<sup>6</sup>

If an adult fails to designate a surrogate or a designated surrogate is unwilling or unable to perform his or her duties, a health care facility may seek the appointment of a proxy<sup>7</sup> to serve as surrogate upon the incapacity of such person.<sup>8</sup> A surrogate appointed by the principal or by proxy, may, subject to any limitations and instructions provided by the principal, take the following actions:<sup>9</sup>

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<sup>1</sup> American Medical Association, Opinion 8.081, AMA Code of Medical Ethics, "Surrogate Decision Making," *available at* <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion8081.page>? (last visited on March 20, 2015).

<sup>2</sup> American Bar Association, "Living Wills, Health Care Proxies, & Advance Health Care Directives," *available at* [http://www.americanbar.org/groups/real\\_property\\_trust\\_estate/resources/estate\\_planning/living\\_wills\\_health\\_care\\_proxies\\_advance\\_health\\_care\\_directives.html](http://www.americanbar.org/groups/real_property_trust_estate/resources/estate_planning/living_wills_health_care_proxies_advance_health_care_directives.html) (last visited on March 20, 2015).

<sup>3</sup> *Supra* fn. 1.

<sup>4</sup> *Supra* fn. 1.

<sup>5</sup> s. 765.101(16), F.S.

<sup>6</sup> By law hospitals, nursing homes, home health agencies, hospices, and health maintenance organizations (HMOs) are required to provide their patients with written information, such as this pamphlet, concerning health care advance directives. The state rules that require this include rules 58A-2.0232, 59A-3.254, 59A-4.106, 59A-8.0245, and 59A-12.013, Florida Administrative Code. Agency for Health Care Administration, "Health Care Advance Directives," *available at* <http://www.floridahealthfinder.gov/reports-guides/advance-directives.aspx> (last visited on March 20, 2015).

<sup>7</sup> "Proxy" means a competent adult who has not been expressly designated to make health care decisions for a particular incapacitated individual, but who, nevertheless, is authorized pursuant to s. 765.401, F.S., to make health care decisions for such individual. s. 765.101(15), F.S.

<sup>8</sup> ss. 765.202(4) and 765.401, F.S.

<sup>9</sup> s.765.205, F.S.

- Make all health care decisions<sup>10</sup> for the principal during the principal's incapacity;
- Consult expeditiously with appropriate health care providers to provide informed consent, including written consent where required, provided that such consent reflects the principal's wishes or the principal's best interests;
- Have access to the appropriate medical records of the principal;
- Apply for public benefits for the principal and have access to information regarding the principal's income, assets, and financial records to the extent required to make such application;
- Authorize the release of information and medical records to appropriate persons to ensure continuity of the principal's health care; and
- Authorize the admission, discharge, or transfer of the principal to or from a health care facility.

The surrogate's authority to act commences upon a determination that the principle is incapacitated.<sup>11</sup> A determination of incapacity is required to be made by a physician.<sup>12</sup> If the physician evaluation finds that the principal is incapacitated and the principal has designated a health care surrogate, a health care facility will notify such surrogate in writing that her or his authority under the instrument has commenced.<sup>13</sup> The health care surrogate's authority continues until a determination that the principal has regained capacity. If a principal goes in and out of capacity, a redetermination of incapacity is necessary each time before a health care surrogate may make health care decisions.<sup>14</sup>

This process can hinder effective and timely assistance and is cumbersome. Further, some competent persons desire the assistance of a health care surrogate with the sometimes complex task of understanding health care treatments and procedures and with making health care decisions, but may not effectively empower such persons to act on their behalf due to the restriction that a health care surrogate act only for incapacitated persons.

Additionally, there is no statutory authority for a health care surrogate to be designated for a minor or for a health care facility to seek a proxy to serve as a health care surrogate for a minor when his or her parents, legal custodian, or legal guardian cannot be timely contacted by the health care provider or are unable to consent to medical treatment.

## **Effect of the Bill**

### Health Care Surrogate for an Adult

The bill creates s. 765.202(6), F.S., to provide that an individual may elect to designate a health care surrogate who may act while the individual is still competent to make health care decisions. To that end, the bill:

- Adds a legislative finding at s. 765.102(3), F.S., that some competent adults want a health care surrogate to assist them with making medical decisions.
- Provides that statutory provisions for review of the decision of a health care surrogate at s. 765.105, F.S., do not apply when the individual who appointed the health care surrogate is still competent.
- Amends s. 765.204, F.S., which relates to determinations of incapacity, to require a health care facility to notify the surrogate upon a determination of incapacity. The notification requirement requires notice to the attorney in fact if the health care facility knows of a durable power of attorney. It also requires an attending physician's hospital to inform a principal's primary

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<sup>10</sup> "Health care decision" means: 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 directives; 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 pursuant to part V of ch. 765, F.S.

<sup>11</sup> s. 765.204(3), F.S.

<sup>12</sup> s. 765.204, F.S.

<sup>13</sup> s. 765.204(2), F.S.

<sup>14</sup> s. 765.204(3), F.S.

physician of the principal's incapacity, if an attending physician determines the principal lacks capacity.

- Provides that a health care provider is not liable for relying on a decision made by a surrogate while the principal lacks capacity.
- Provides that, where the principal has capacity and the decision of the principal conflicts with a decision of the surrogate, the decision of the principal controls.
- Current law under s. 765.202(3), F.S., provides that an alternate health care surrogate may act where the primary surrogate is unwilling or unable to act. The bill adds that an alternate may also act where the primary surrogate is not reasonably available.

The bill creates a sample form for the designation of a health care surrogate for an adult under s. 765.203, F.S. (See Attachment I).

### Health Care Surrogate for a Minor

In general, a minor does not have the legal right to consent to medical care or treatment. Instead, for non-emergency treatment, a parent or legal guardian must give consent. As to emergency treatment, where the parents, legal custodian or legal guardian of a minor cannot be timely contacted to give consent for medical treatment of a minor, s. 743.0645(2), F.S., sets forth a list of people who have the power to consent on behalf of the minor. There is no general statutory authority for non-emergency medical treatment of a minor without consent of a parent or legal guardian.

It is common for parents and legal guardians to go on vacation and leave their children with a caregiver, and equally common for parents and legal guardians to allow a minor to travel and stay with relatives or friends for a period of time. Lawyers routinely draft a power of attorney authorizing caregivers to consent to medical treatment of the minor, despite there being no statutory authority for such document.

The bill creates s. 765.2035, F.S., to create statutory authority for a parent or legal guardian to designate a health care surrogate who may consent to medical care for a minor. The designation must be in writing and signed by two witnesses. The designated surrogate may not be a witness.

Like a surrogate for an adult, an alternate surrogate may be appointed to act if the original surrogate is not willing, able, or reasonably available to act.

In addition to regular and emergency treatment, a health care surrogate for a minor is authorized to consent to mental health treatment unless the document specifically provides otherwise. The appointment of a health care surrogate for a minor remains in place until the termination date provided in the designation (if any), the minor reaches the age of majority, or the designation is revoked.

The bill also creates a sample form for the designation of a health care surrogate for a minor under s. 765.2038, F.S. (See Attachment II)

The bill amends s. 743.0645, F.S., the statute on other persons who may consent to medical care or treatment of a minor, to conform. The bill also amends that statute to recognize that a power of attorney executed after July 1, 2001, which authorizes an individual to consent to health care for a minor, will be recognized as authority to consent to treatment of the minor. A designation of health care surrogate or a power of attorney is deemed to include authority to consent to surgery and/or anesthesia unless those are specifically excluded.

### Other

The bill amends ss. 765.101 and 765.202, F.S., to specify that a right to consent to treatment of an individual (adult or minor) also includes the right to obtain health information regarding that individual. The bill creates s. 765.101(8), F.S., to define the term "health information" to be consistent with the Health Insurance Portability and Accountability Act (HIPAA).

The bill removes the majority of references to “attending physician” in favor of the term “primary physician”, “evaluating physician” or simply “physician” in statutes related to advance directives, health care surrogates, pain management, palliative care, capacity, living wills, determination of patient condition, persistent vegetative state, and anatomical gifts. This change in terminology should have no practical effect.

The bill defines attending physician as the physician who has primary responsibility for the treatment and care of the patient while the patient receives such treatment or care in a hospital as defined in s. 395.002(12), F.S.

The bill provides an effective date of October 1, 2015.

**B. SECTION DIRECTORY:**

Section 1 amends s. 743.0645, F.S., regarding persons who may consent to medical care or treatment of a minor.

Section 2 amends s. 765.101, F.S., regarding definitions.

Section 3 amends s. 765.102, F.S., regarding legislative findings and intent.

Section 4 amends s. 765.104, F.S., regarding amendment or revocation.

Section 5 amends s. 765.105, F.S., regarding review of surrogate or proxy's decision.

Section 6 amends s. 765.1103, F.S., regarding pain management and palliative care.

Section 7 amends s. 765.1105, F.S., regarding transfer of a patient.

Section 8 amends s. 765.202, F.S., regarding designation of a health care surrogate.

Section 9 amends s. 765.203, F.S., regarding suggested form of designation of a health care surrogate.

Section 10 creates s. 765.2035, F.S., regarding designation of a health care surrogate for a minor.

Section 11 creates s. 765.2038, F.S., regarding the suggested form for designation of health care surrogate for a minor.

Section 12 amends s. 765.204, F.S., regarding capacity of principal and procedure for determining.

Section 13 amends s. 765.205, F.S., regarding responsibility of the surrogate.

Section 14 amends s. 765.302, F.S., regarding the procedure for making a living will and notice to physician.

Section 15 amends s. 765.303, F.S., regarding suggested form of a living will.

Section 16 amends s. 765.304, F.S., regarding procedure for living will.

Section 17 amends s. 765.306, F.S., regarding determination of patient condition.

Section 18 amends s. 765.404, F.S., regarding persistent vegetative state.

Section 19 amends s. 765.516, F.S., regarding donor amendment or revocation of anatomical gift.

Section 20 provides an effective date of October 1, 2015.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

The bill does not appear to have any impact on state revenues.

#### 2. Expenditures:

The bill does not appear to have any impact on state expenditures.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

The bill does not appear to have any impact on local government revenues.

#### 2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

### D. FISCAL COMMENTS:

None.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

#### 1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

#### 2. Other:

None.

### B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

## IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 17, 2015, the Civil Justice Subcommittee adopted three amendments and reported the bill favorably as a committee substitute. The amendments:

- Change the terms "attending physician" and "treating physician" to "primary physician."
- Remove a provision regarding conflicts between the surrogate and the patient.
- Make grammatical and style improvements.

On March 24, 2015, the Health Quality Subcommittee adopted three amendments. The amendments:

- Remove from the definition of "medical care and treatment" those extraordinary procedures for which a power of attorney, executed after July 1, 2001, is required;

- Authorize an individual with a power of attorney created after July 1, 2001, which provides medical consent for a minor, to consent to the medical care or treatment of a minor;
- Revise the suggested statutory form for designating a health care surrogate to include notice of the manner in which such designation may be revoked by a competent principal as set forth in s. 765.104, F.S.;
- Allow a primary or attending physician to evaluate the capacity of a principal if a question of capacity arises;
- Require an attending physician's hospital to inform a principal's primary physician of the principal's incapacity, if an attending physician determines the principal lacks capacity; and
- Define "attending physician" as a physician who has the primary responsibility for the treatment and care of a patient receiving treatment or care in a hospital.

On April 8, 2015, the Judiciary Committee adopted one amendment and reported the bill favorably as a committee substitute. The amendment provides that a medical provider is not liable for the decision of a surrogate, specifies that a decision of the principal takes precedence over a decision by a surrogate, and made grammatical and style changes. This analysis is drafted to the committee substitute passed by the Judiciary Committee.

# Attachment I

## DESIGNATION OF HEALTH CARE SURROGATE

I, \_\_\_\_\_, designate as my health care surrogate under s. 765.202, Florida Statutes:

Name: \_\_\_\_\_

Address: \_\_\_\_\_

Phone: \_\_\_\_\_

If my health care surrogate is not willing, able, or reasonably available to perform his or her duties, I designate as my alternate health care surrogate:

Name: \_\_\_\_\_

Address: \_\_\_\_\_

Phone: \_\_\_\_\_

### INSTRUCTIONS FOR HEALTH CARE

I authorize my health care surrogate to:

\_\_\_\_\_ (Initial here) Receive any of my health information, whether oral or recorded in any form or medium, that:

1. Is created or received by a health care provider, health care facility, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and
2. Relates to my past, present, or future physical or mental health or condition; the provision of health care to me; or the past, present, or future payment for the provision of health care to me.

I further authorize my health care surrogate to:

\_\_\_\_\_ (Initial here) Make all health care decisions for me, which means he or she has the authority to:

1. Provide informed consent, refusal of consent, or withdrawal of consent to any and all of my health care, including life-prolonging procedures.
2. Apply on my behalf for private, public, government, or veterans' benefits to defray the cost of health care.
3. Access my health information reasonably necessary for the health care surrogate to make decisions involving my health care and to apply for benefits for me.
4. Decide to make an anatomical gift pursuant to part V of chapter 765, Florida Statutes.

\_\_\_\_\_ (Initial here) Specific instructions and restrictions:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

To the extent I am capable of understanding, my health care surrogate shall keep me reasonably informed of all decisions that he or she has made on my behalf and matters concerning me.

**THIS HEALTH CARE SURROGATE DESIGNATION IS NOT AFFECTED BY MY SUBSEQUENT INCAPACITY EXCEPT AS PROVIDED IN CHAPTER 765, FLORIDA STATUTES.**

**PURSUANT TO SECTION 765.104, FLORIDA STATUTES, I UNDERSTAND THAT I MAY, AT ANY TIME WHILE I RETAIN MY CAPACITY, REVOKE OR AMEND THIS DESIGNATION BY:**

- (1) SIGNING A WRITTEN AND DATED INSTRUMENT WHICH EXPRESSES MY INTENT TO AMEND OR REVOKE THIS DESIGNATION;
- (2) PHYSICALLY DESTROYING THIS DESIGNATION THROUGH MY OWN ACTION OR BY THAT OF ANOTHER PERSON IN MY PRESENCE AND UNDER MY DIRECTION;

(3) VERBALLY EXPRESSING MY INTENTION TO AMEND OR REVOKE THIS DESIGNATION; OR

(4) SIGNING A NEW DESIGNATION THAT IS MATERIALLY DIFFERENT FROM THIS DESIGNATION.

MY HEALTH CARE SURROGATE'S AUTHORITY BECOMES EFFECTIVE WHEN MY PRIMARY PHYSICIAN DETERMINES THAT I AM UNABLE TO MAKE MY OWN HEALTH CARE DECISIONS UNLESS I INITIAL EITHER OR BOTH OF THE FOLLOWING BOXES:

IF I INITIAL THIS BOX [\_\_\_\_], MY HEALTH CARE SURROGATE'S AUTHORITY TO RECEIVE MY HEALTH INFORMATION TAKES EFFECT IMMEDIATELY.

IF I INITIAL THIS BOX [\_\_\_\_], MY HEALTH CARE SURROGATE'S AUTHORITY TO MAKE HEALTH CARE DECISIONS FOR ME TAKES EFFECT IMMEDIATELY. PURSUANT TO SECTION 765.204(3), FLORIDA STATUTES, ANY INSTRUCTIONS OR HEALTH CARE DECISIONS I MAKE, EITHER VERBALLY OR IN WRITING, WHILE I POSSESS CAPACITY SHALL SUPERCEDE ANY INSTRUCTIONS OR HEALTH CARE DECISIONS MADE BY MY SURROGATE THAT ARE IN MATERIAL CONFLICT WITH THOSE MADE BY ME.

SIGNATURES: Sign and date the form here:

|               |                       |
|---------------|-----------------------|
| date: _____   | sign your name _____  |
| address _____ | print your name _____ |
| city _____    | state _____           |

SIGNATURES OF WITNESSES:

|                        |                        |
|------------------------|------------------------|
| First witness:         | Second witness:        |
| print name _____       | print name _____       |
| address _____          | address _____          |
| city _____ state _____ | city _____ state _____ |
| _____                  | _____                  |
| signature of witness   | signature of witness   |
| date _____             | date _____             |

## Attachment II

### DESIGNATION OF HEALTH CARE SURROGATE FOR MINOR

I/We, \_\_\_\_\_ the  natural guardian(s) as defined in s. 744.301(1), Florida Statutes;  
 legal custodian(s);  legal guardian(s) [check one] of the following minor(s):

\_\_\_\_\_  
\_\_\_\_\_

pursuant to s. 765.2035, Florida Statutes, designate the following person to act as my/our surrogate for health care decisions for such minor(s) in the event that I/we am/are not able or reasonably available to provide consent for medical treatment and surgical and diagnostic procedures:

Name: \_\_\_\_\_

Address: \_\_\_\_\_

Zip Code: \_\_\_\_\_ Phone: \_\_\_\_\_

If my/our designated health care surrogate for a minor is not willing, able, or reasonably available to perform his or her duties, I/we designate the following person as my/our alternate health care surrogate for a minor:

Name: \_\_\_\_\_

Address: \_\_\_\_\_

Zip Code: \_\_\_\_\_ Phone: \_\_\_\_\_

I/We authorize and request all physicians, hospitals, or other providers of medical services to follow the instructions of my/our surrogate or alternate surrogate, as the case may be, at any time and under any circumstances whatsoever, with regard to medical treatment and surgical and diagnostic procedures for a minor, provided the medical care and treatment of any minor is on the advice of a licensed physician.

I/We fully understand that this designation will permit my/our designee to make health care decisions for a minor and to provide, withhold, or withdraw consent on my/our behalf, to apply for public benefits to defray the cost of health care, and to authorize the admission or transfer of a minor to or from a health care facility.

I/We will notify and send a copy of this document to the following person(s) other than my/our surrogate, so that they may know the identity of my/our surrogate:

Name: \_\_\_\_\_

Name: \_\_\_\_\_

Signed: \_\_\_\_\_

Date: \_\_\_\_\_

#### WITNESSES:

1. \_\_\_\_\_

2. \_\_\_\_\_