

1 A bill to be entitled
2 An act relating to the withholding or withdrawal of
3 nutrition or hydration from incompetent persons; creating
4 part VI of ch. 765, F.S.; providing a part title;
5 providing definitions; declaring that an incompetent
6 person is presumed to have directed health care providers
7 to provide the necessary nutrition and hydration to
8 sustain life; prohibiting a court, proxy, or surrogate
9 from withholding or withdrawing nutrition or hydration
10 except under specified circumstances; providing that the
11 presumption to provide nutrition and hydration is
12 inapplicable under certain circumstances; amending ss.
13 765.106, 765.107, 765.204, 765.305, 765.401, and 765.404,
14 F.S.; conforming provisions to changes made by the act;
15 prohibiting an inference of incapacity due to a person's
16 developmental disability; providing for the act to apply
17 to pending litigation; declaring that the act supersedes
18 existing court orders otherwise applicable on or after the
19 effective date of the act; providing an effective date.

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

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23 Section 1. Part VI of chapter 765, Florida Statutes,
24 consisting of sections 765.601, 765.602, 765.603, and 765.604,
25 is created to read:

26 765.601 Part title.--This part may be cited as the
27 "Starvation and Dehydration of Persons with Disabilities
28 Prevention Act."

29 765.602 Definitions.--As used in this part, the term:

30 (1) "Express and informed consent" means consent
 31 voluntarily given with sufficient knowledge of the subject
 32 matter involved to enable the person giving consent to make a
 33 knowing and understanding decision without any element of force,
 34 fraud, deceit, duress, or other form of constraint or coercion.
 35 Sufficient knowledge of the subject matter involved includes a
 36 general understanding of:

37 (a) The proposed treatment or procedure for which consent
 38 is sought.

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

41 (c) Any medically acceptable alternative treatment or
 42 procedure.

43 (d) The substantial risks and hazards inherent if the
 44 proposed treatment or procedure is carried out and if the
 45 proposed treatment or procedure is not carried out.

46 (2) "Nutrition" means sustenance administered by way of
 47 the gastrointestinal tract.

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

52 765.603 Presumption of nutrition and hydration sufficient
 53 to sustain life.--

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

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

61 765.604 Presumption of nutrition and hydration; when
 62 inapplicable.--The presumption in s. 765.603 does not apply if:

63 (1) In reasonable medical judgment:

64 (a) The provision of nutrition or hydration is not
 65 medically possible;

66 (b) The provision of nutrition or hydration would hasten
 67 death; or

68 (c) The medical condition of the incompetent person is
 69 such that provision of nutrition or hydration would not
 70 contribute to sustaining the incompetent person's life or
 71 provide comfort to the incompetent person;

72 (2) The incompetent person has executed a written advance
 73 directive executed in another state in accordance with s.
 74 765.112, executed a designation of a health care surrogate
 75 prepared in accordance with s. 765.202, or executed a written
 76 living will prepared in accordance with s. 765.302, any of which
 77 specifically authorizes the withholding or withdrawal of
 78 nutrition or hydration, to the extent that the authorization
 79 applies; or

80 (3) There is clear and convincing evidence that the
 81 incompetent person, when competent, gave express and informed
 82 consent to withdrawing or withholding nutrition or hydration in
 83 the applicable circumstances.

84 Section 2. Section 765.106, Florida Statutes, is amended
 85 to read:

86 765.106 Preservation of existing rights.--The provisions
 87 of this chapter are cumulative to the existing law regarding an
 88 individual's right to consent, or refuse to consent, to medical
 89 treatment and do not impair any existing rights or
 90 responsibilities which a health care provider, a patient,
 91 including a minor, competent or incompetent person, or a
 92 patient's family may have under the common law, Federal
 93 Constitution, State Constitution, or statutes of this state;
 94 however, this section may not be construed to authorize a
 95 violation of part VI.

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

98 765.107 Construction.--

99 (1) This chapter shall not be construed to repeal by
 100 implication any provision of s. 766.103, the Florida Medical
 101 Consent Law. For all purposes, the Florida Medical Consent Law
 102 shall be considered an alternative to provisions of this
 103 section; however, this section may not be construed to authorize
 104 a violation of part VI.

105 Section 4. Section 765.204, Florida Statutes, is amended
 106 to read:

107 765.204 Capacity of principal; procedure.--

108 (1) A principal is presumed to be capable of making health
 109 care decisions for herself or himself unless she or he is
 110 determined to be incapacitated. Incapacity may not be inferred
 111 from the person's voluntary or involuntary hospitalization for

HB 0701

2005

112 mental illness or from her or his mental retardation or
113 developmental disability.

114 (2) If a principal's capacity to make health care
115 decisions for herself or himself or provide informed consent is
116 in question, the attending physician shall evaluate the
117 principal's capacity and, if the physician concludes that the
118 principal lacks capacity, enter that evaluation in the
119 principal's medical record. If the attending physician has a
120 question as to whether the principal lacks capacity, another
121 physician shall also evaluate the principal's capacity, and if
122 the second physician agrees that the principal lacks the
123 capacity to make health care decisions or provide informed
124 consent, the health care facility shall enter both physician's
125 evaluations in the principal's medical record. If the principal
126 has designated a health care surrogate or has delegated
127 authority to make health care decisions to an attorney in fact
128 under a durable power of attorney, the facility shall notify
129 such surrogate or attorney in fact in writing that her or his
130 authority under the instrument has commenced, as provided in
131 chapter 709 or s. 765.203.

132 (3) The surrogate's authority shall commence upon a
133 determination under subsection (2) that the principal lacks
134 capacity, and the ~~such~~ authority shall remain in effect until a
135 determination that the principal has regained ~~such~~ capacity.
136 Upon commencement of the surrogate's authority, a surrogate who
137 is not the principal's spouse shall notify the principal's
138 spouse or adult children of the principal's designation of the
139 surrogate. If ~~In the event~~ the attending physician determines

140 that the principal has regained capacity, the authority of the
 141 surrogate shall cease, but shall recommence if the principal
 142 subsequently loses capacity as determined under ~~pursuant to~~ this
 143 section.

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

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

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

153 765.305 Procedure in absence of a living will.--

154 (1) In the absence of a living will, the decision to
 155 withhold or withdraw life-prolonging procedures from a patient
 156 may be made by a health care surrogate designated by the patient
 157 under ~~pursuant to~~ part II unless the designation limits the
 158 surrogate's authority to consent to the withholding or
 159 withdrawal of life-prolonging procedures or unless the
 160 surrogate's authority is limited by part VI.

161 Section 6. Section 765.401, Florida Statutes, is amended
 162 to read:

163 765.401 The proxy.--

164 (1) If an incapacitated or developmentally disabled
 165 patient has not executed an advance directive, or designated a
 166 surrogate to execute an advance directive, or the designated or
 167 alternate surrogate is no longer available to make health care

168 decisions, health care decisions may be made for the patient by
 169 any of the following individuals, in the following order of
 170 priority, if no individual in a prior class is reasonably
 171 available, willing, or competent to act:

172 (a) The judicially appointed guardian of the patient or
 173 the guardian advocate of the person having a developmental
 174 disability as defined in s. 393.063, who has been authorized to
 175 consent to medical treatment, if such guardian has previously
 176 been appointed; however, this paragraph shall not be construed
 177 to require such appointment before a treatment decision can be
 178 made under this subsection;

179 (b) The patient's spouse;

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

183 (d) A parent of the patient;

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

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

191 (g) A close friend of the patient; or

192 (h) A clinical social worker licensed pursuant to chapter
 193 491, or who is a graduate of a court-approved guardianship
 194 program. Such a proxy must be selected by the provider's
 195 bioethics committee and must not be employed by the provider. If

196 the provider does not have a bioethics committee, then the ~~such~~
 197 a proxy may be chosen through an arrangement with the bioethics
 198 committee of another provider. The proxy will be notified that,
 199 upon request, the provider shall make available a second
 200 physician, not involved in the patient's care to assist the
 201 proxy in evaluating treatment. Decisions to withhold or withdraw
 202 life-prolonging procedures shall ~~will~~ be reviewed by the
 203 ~~facility's~~ bioethics committee involved in the proxy's
 204 selection. Documentation of efforts to locate proxies from prior
 205 classes shall ~~must~~ be recorded in the patient record.

206 (2) Any health care decision made under this part must be
 207 based on the proxy's informed consent and on the decision the
 208 proxy reasonably believes the patient would have made under the
 209 circumstances. If there is no indication of what the patient
 210 would have chosen, the proxy may consider the patient's best
 211 interest in deciding that proposed treatments are to be withheld
 212 or that treatments currently in effect are to be withdrawn. Any
 213 decision concerning the withholding or withdrawal of nutrition
 214 or hydration must comply with part VI.

215 (3) Before exercising the incapacitated patient's rights
 216 to select or decline health care, the proxy must comply with ~~the~~
 217 ~~provisions of~~ ss. 765.205 and 765.305, except that a proxy's
 218 decision to withhold or withdraw life-prolonging procedures must
 219 be supported by clear and convincing evidence that the decision
 220 would have been the one the patient would have chosen had the
 221 patient been competent or, if there is no indication of what the
 222 patient would have chosen, that the decision is in the patient's

223 best interest. Any decision concerning the withholding or
 224 withdrawal of nutrition or hydration must comply with part VI.

225 (4) Nothing in this section shall be construed to preempt
 226 the designation of persons who may consent to the medical care
 227 or treatment of minors established under ~~pursuant to~~ s.
 228 743.0645.

229 Section 7. Section 765.404, Florida Statutes, is amended
 230 to read:

231 765.404 Persistent vegetative state.--For persons in a
 232 persistent vegetative state, as determined by the attending
 233 physician in accordance with currently accepted medical
 234 standards, who have no advance directive and for whom there is
 235 no evidence indicating what the person would have wanted under
 236 such conditions, and for whom, after a reasonably diligent
 237 inquiry, no family or friends are available or willing to serve
 238 as a proxy to make health care decisions for them, life-
 239 prolonging procedures may be withheld or withdrawn under the
 240 following conditions:

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

244 (2) The guardian and the person's attending physician, in
 245 consultation with the medical ethics committee of the facility
 246 where the patient is located, conclude that the condition is
 247 permanent and that there is no reasonable medical probability
 248 for recovery and that withholding or withdrawing life-prolonging
 249 procedures is in the best interest of the patient. If there is
 250 no medical ethics committee at the facility, the facility must

HB 0701

2005

251 have an arrangement with the medical ethics committee of another
252 facility or with a community-based ethics committee approved by
253 the Florida Bioethics ~~Bio-ethics~~ Network. The ethics committee
254 shall review the case with the guardian, in consultation with
255 the person's attending physician, to determine whether the
256 condition is permanent and there is no reasonable medical
257 probability for recovery. The individual committee members and
258 the facility associated with an ethics committee shall not be
259 held liable in any civil action related to the performance of
260 any duties required in this subsection.

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262 Any decision concerning the withholding or withdrawal of
263 nutrition or hydration must comply with part VI.

264 Section 8. This act shall apply prospectively in
265 litigation pending on the effective date of this act and shall
266 supersede any court order issued under the law in effect before
267 the effective date of this act to the extent that the court
268 order conflicts with this act and would otherwise be applied on
269 or after the effective date of this act. This act shall apply
270 with respect to every person living on or after the effective
271 date of this act.

272 Section 9. This act shall take effect upon becoming law.