An Analysis of H.701

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These comments respond to the introduction of House Bill 701 (H701). H701, like its precursor S692 (prefiled in November, 2003 and withdrawn from committee on April 16, 2004), is a misguided example of extreme overreaction to political pressure stemming from one case involving participants who have been tremendously successful in using the media and elected officials to serve their own ends. The title of the proposed act demonstrates its roots, for it was designed to incite emotions and create an image of a healthy person wasting away, in a condition which many people associate with great pain, although research indicates that in fact unmanageable suffering is not involved and "lack of hydration . . . may even have an analgesic effect."[1] The bill should be defeated because it infringes on the constitutional rights of Floridians and because it especially would work to the detriment of persons of lower education and socio-economic class as they attempt to exercise their constitutional right to refuse medical treatment.

The Presumption Established by H701

H701 would establish an entire new section of chapter 765 of the Florida Statutes, separating out medically supplied nutrition and hydration from all other types of medical treatment and making it practically impossible for a patient to refuse medically supplied nutrition and hydration. In so doing, it seeks to establish a presumption against the refusal of medically supplied nutrition and hydration. Such a presumption is directly contrary to established caselaw in both the Florida and the United States Supreme Courts that medically supplied nutrition and hydration does not stand in a class by itself but rather is a form of medical treatment constituting exactly the sort of invasive procedure that all persons in this country, under both the common law and the constitution, may refuse.[2]

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1 James L. Bernat, et al., *Patient Refusal of Hydration and Nutrition,* 153 Arch. Int. Med. 2723, 2725-26 (1993).

2 *See, e.g., Cruzan v. Missouri Dept. of Health*, 497 U.S. 261, 288-89 (Cruzan, J., concurring); *In re Browning*, 568 So. 2d 4, 11 nn.5, 6 (Fla. 1990); Fla. Const. Art. I, sec. 23.

The courts in *Cruzan* and *Browning*, like those in virtually every jurisdiction in this country, have recognized that medically supplied nutrition and hydration constitutes a medical procedure that can be refused like other life-sustaining medical procedures.[3] This is because, even though, as a technical matter, a body deprived of artificial nutrition and hydration eventually will cease functioning because of lack of fuel, or more certainly lack of fluids, it is not the discontinuation of the medical procedure that causes the cessation of functioning. Instead, it is the condition of the patient that makes it impossible for that patient to receive nutrition or hydration through other than a medical procedure involving bodily invasion. Refraining from using highly technical medical procedures to take over when the body itself cannot perform functions on its own is the entire gist of the right to refuse treatment. It is the same as turning off a respirator when the body cannot breathe on its own; it constitutes removal of a mechanical way of taking over for a bodily function the body can no longer perform on its own. The ability to refuse this medical treatment cannot be subjected to insurmountable barriers, and the establishment of the presumption set forth in proposed section 765.603(1) is the beginning of the erection of such barriers.

To make matters worse, in addition to establishing a presumption that infringes upon patients' constitutional rights in the first instance, H701 then would permit that presumption to be overridden only in the most unlikely of circumstances. Specifically, H701 would permit withholding or withdrawal of nutrition and hydration in only three instances. In this sense, the bill is fatally flawed, for, even collectively, the exceptions could apply to such a small number of cases that the statute essentially would establish an irrebuttable presumption against the refusal of medically supplied nutrition and hydration.

The First Situation to Which the Presumption Would Not Apply

The first situation to which H701 would not apply the presumption that medically supplied nutrition and hydration must be provided to incompetent persons (set forth in proposed section 765.604(1)) is when "[i]n reasonable medical judgment[,] (a) the provision of nutrition or hydration is not medically possible; (b) the provision of nutrition or hydration would hasten death; or (c) the medical condition of the incompetent person is such that provision of nutrition or hydration would not contribute to sustaining the incompetent person's life or provide comfort to the incompetent person." The number of instances in which this exception would apply to safeguard a patient's constitutional right to be free of invasive medical procedures is vanishingly small, especially under seemingly all-encompassing subsection (c).

The Second Situation to Which the Presumption Would Not Apply

Second, H701 would not require administration of medically supplied nutrition and hydration to incompetent persons who have executed written advance directives "specifically authoriz[ing] the withholding or withdrawal of nutrition or hydration, to the

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3 Alan Meisel & Kathy L. Cerminara, *The Right to Die: The Law of End-of-Life Decisionmaking* ' 6.03[G] (3d ed. Aspen 2004).

extent that the authorization applies." The last phrase is unclear, so it remains uncertain what, if anything, that phrase adds to the meaning of the bill. More important, however, is the unrealistic expectation that many patients will have executed advance directives. Advance directives undoubtedly are valuable and constitute the best evidence of what a patient would have or would not have wanted done once that patient becomes incompetent to make medical decisions. To require that an advance directive be executed in order for those who know the patient to prevent that patient's being subjected to unwanted medical treatment, however, is to deprive the vast majority of the public of their bodily integrity. In the late 1980s and early 1990s, estimates of the percentage of the population that had executed advance directives varied between about 9 percent and about 20 percent.[4] Despite the passage of the Patient Self-Determination Act in 1990 and the implementation of advance directive statutes in every state in the Union, there is no indication that the number of patients executing advance directives has increased in any appreciable degree.[5] Thus, proposed section 765.604(2) would not protect anywhere near the number of people who truly do not want to undergo medical administration of nutrition and hydration from being subjected to that treatment regardless of their desires.

Requiring execution of advance directives is not only impracticable because so many people shy away from executing them, but it is also unfair to the most underprivileged segment of society. For the upper-class or higher-middle-class person, failure to execute an advance directive is likely due to a general reluctance to deal with and to discuss death. Persons in those socio-economic classes, and with the amount of education usually enjoyed by those classes, likely have read about advance directives and their importance. They also likely have attorneys, and even may have engaged in some level of estate planning. In those contexts, they may have learned about and been faced with the thought of executing advance directives, yet the overall desire each of us has to postpone the unpleasant thought of dying may keep them from acting upon what they have learned. Those persons at least have a fighting chance of coming within the second exception H701 would make to the presumption that medically supplied nutrition and hydration must be administered; in contrast, persons in lower socio-economic classes, or with lesser amounts of education, have nearly no chance. Persons in these classes in all likelihood do not have attorneys; they may or may not have read or heard about advance directives; if they have attorneys, it is not likely they are engaging in estate planning or other contemplation of what will happen near the end of their lives with those attorneys. While it is true that one need not have an attorney to execute an advance directive, if a person is aware of what advance directives are and wishes to address the issue, he or she still does not necessarily understand how to go about doing that or have access to the

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4 *See Cruzan*, 297 U.S. at 289-90 (O'Connor, J., concurring), and 297 U.S. at 323 (Brennan, J., dissenting).
5 *See* Kathy L. Cerminara, *Eliciting Patient Preferences in Today's Health Care System*, 4 J. Psychol., Pub. Pol'y & L. 688, 690 (1998). *Compare Cruzan*, 497 U.S. at 289-90 *with* Floyd Angus & Robert Burakoff, *The Percutaneous Endoscopic Gastrostomy Tube: Medical and Ethical Issues in Placement*, 98 AM. J. GASTROENTEROLOGY 272, 272 (2003) (noting that 70 percent of deaths in hospital and health care facilities "are preceded by a decision to stop or withhold some form of care"). *See generally* Angela Fagerlin & Carl E. Schneider, *The Failure of the Living Will*, 34 Hastings Center Report 30, 32 (March-April 2004) ("People widely say they want a living will . . . . Despite this, and despite decades of urging, most Americans lack them."); Carol Krohm & Scott Summers, *Advance Health Care Directives: A Handbook for Professionals* 46-47 (American Bar Association 2002).

forms or to computers from which to print out the forms.[6] To require execution of an advance directive to authorize withholding or withdrawal of invasively supplied artificial nutrition and hydration in the cases of such persons unfairly impacts them based upon socio-economic reasons that should not matter a bit in the realm of medical decisionmaking.

The Third Situation to Which the Presumption Would Not Apply

Finally, H701 would exempt from the presumption of administration of medically supplied nutrition and nutrition persons who, as shown by clear and convincing evidence, "when competent, gave express and informed consent to withdrawing or withholding nutrition or hydration in the applicable circumstances." On the surface, this seems like a reiteration of current caselaw providing that the patients' wishes be demonstrated by clear and convincing evidence. If that indeed were the point of this provision, then proposed section 765.604(3) would be unremarkable. In reality, however, because of the cramped definition provided for "express and informed consent" under proposed section 765.602(1), this exception from the presumption would in fact apply to no one. The definition of "express and informed consent" requires that the patient, at the time of making the decision, have a "general understanding" of "the proposed treatment or procedure for which consent is sought," "the medical condition of the person for whom consent for the proposed treatment or procedure is sought," "any medically acceptable alternative treatment or procedure," and "the substantial risks and hazards inherent if the proposed treatment or procedure is carried out and if the proposed treatment or procedure is not carried out." No one can know those things in advance. By definition, an advance directive (with the term including both oral statements and written documents such as living wills and health care surrogate designations) is

> a kind of anticipatory and contingent decisionmaking. At the time it is made, the declarant is often (though not always) in good health. The time at which the directive is to go into effect cannot be specified . . . The decision is usually made in fairly general terms because the precise kind of medical treatment cannot be specified without making the advance directive so specific that it runs the risk of failing to apply to various possible situations.[7]

Under H701, even assuming that a patient was one of the few people who feel comfortable discussing the subject, and assuming that in those discussions that patient thought to explicitly specify what he or she wished to have happen in the event medically supplied nutrition and hydration were required, no prior statement could permit a proxy, surrogate or court to authorize withholding or withdrawal of medically supplied nutrition and hydration in accordance with that patient's wishes unless that patient also had magically foreseen his or her precise future condition and treatment, as well as the state of medical technology.

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6 *See generally* Krohm & Summers, *supra* note 5, at 46-49, 56-59.
7 Meisel & Cerminara, *supra* note 3, at 7-21.

Summary

The final section of H701 reveals the motivation behind this amendment to current Florida law regarding decisionmaking at the end of life. By providing that "[t]his act shall apply prospectively in litigation pending on the effective date of this act and shall supersede any court order issued under the law in effect before the effective date of this act to the extent that the court order conflicts with this act," the sponsors of this bill reveal that they are most concerned about the recent case of Terri Schiavo, which remains pending in the courts. Having been told that 2003-418 was unconstitutional, the sponsors of H701 present this bill as an attempt to once again legislatively overrule the result of years of litigation. A legislature has the power to revise statutes after the courts reach judicial decisions with which it does not agree, but that legislature must act within the constitution in doing so. H701 is an attempt to deprive a segment of Florida's citizens of their constitutional rights to bodily integrity and self-determination merely because they have not memorialized their wishes in writing.