

**PROPOSED LEGISLATIVE REVISIONS FOR 2010  
FLORIDA BAR ADVANCE DIRECTIVES AND HIPAA COMMITTEE**

**I. SUMMARY**

The purpose of this proposal is to afford Floridians with more flexibility and protection in designating those they want to help them make medical decisions and to have access to health care information so that the proper medical decisions can be made.

**II. CURRENT SITUATION**

The current situation as to this proposal is:

Chapter 765, Fla. Stat., “Health Care Advance Directives” is the chapter that governs our law on health care surrogates and living wills. It sets forth the responsibilities and duties of a surrogate who has been designated to make medical decisions for a principal, as well as protection of the principal from those surrogates who are not acting in the principal’s best interest by a mechanism of review and removal, if necessary.

Currently, under Chapter 765 a designated health care surrogate’s authority to make health care decisions and to receive health information on behalf of a principal commences only after a determination of the principal’s incapacity under a procedure set forth in § 765.204, Fla. Stat. A subsequent determination of regained capacity of the principal suspends the surrogate’s authority, until a new determination of incapacity is made, and so forth. In addition, under Chapter 765 a health care surrogate does not have the authority to access health information on behalf of the principal without a determination of the principal’s incapacity.

§709.08, Fla. Stat., “Durable power of attorney” sets forth Florida’s law on powers of attorney and deals almost exclusively with a principal delegating authority to an agent in matters of finances and real property, tangible and intangible personal property. In 1974, the statute adopted the Uniform Durable Power of Attorney Act of 1974. Despite the financial purpose of §709.08, §709.08(7)(c) allows a principal to authorize an agent to make all health care decisions on behalf of the principal without the necessity of a determination of incapacity. However, unlike a surrogate designated under Chapter 765, there are no safeguards of review and removal for an agent making medical decisions on behalf of a principal under §709.08. The writer suspects, but has not thoroughly researched, that §709.08(7)(c) was one of Florida’s first attempts to address the area of delegating to an agent medical decisions for the principal. Chapter 765 was first adopted in 1992, and §709.08(7)(c) and Chapter 765 have been in conflict ever since.

### **III. EFFECT OF PROPOSED CHANGE**

The effect of this proposal is to give Floridians three choices in designating health care surrogates who would make medical decisions and have access to health care information, as well as better safeguard the principal than under current law.

Choice 1. The first choice is our present law under Chapter 765 whereby the principal wants to have the surrogate make medical decisions and have access to health care information only upon a determination of the principal's incapacity. This would be the default provision. A principal would have to elect in writing to have choices 2 and 3 below apply. A proxy who has been appointed for a principal who has not designated a surrogate would be governed under choice 1.

Choice 2. The second choice allows the principal to affirmatively elect in writing to grant authority to the surrogate access to health care information without the determination of incapacity but limiting the surrogate's authority to make health care decisions until after a determination of incapacity of the principal. This would allow the informed surrogate to better discuss with the principal important medical decisions.

Choice 3. The third choice allows the principal to affirmatively elect in writing to authorize the surrogate to have access to health information and to make medical decisions on behalf of the principal without the necessity of an incapacity determination. This would allow the surrogate to either help make or make medical decisions for a principal who experiences capacity and incapacity on a frequent basis. Our present law under Chapter 765 contemplates a hospital setting where a doctor examines the patient for incapacity, and if it is not clear, a second doctor is brought in for an additional opinion. It also contemplates a more or less permanent incapacity since the mechanism for the determination of incapacity is cumbersome at best for a patient who has "good days" and "bad days." As a practical matter, some principals would prefer help in making medical decisions whether he or she is having a good or bad day. The proposed changes clearly state that an individual has the absolute right to make medical decisions while having capacity to do so.

Choice 3 is already the law in Florida under §709.08(7)(c). The proposed changes would place Choice 3 under Chapter 765 with its review and safeguards.

Lastly, the proposed changes expand the definition of health care information to comply with the Privacy Rule of HIPAA and to allow a designated health care surrogate to have access to all health information of a principal needed to make health care decisions on behalf of the principal and to assess the principal's ability to function in relevant situations.

### **IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS**

There should be no fiscal impact on state and local governments.

**V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR**

None, other than the possible reduction in medical costs and legal fees.

**VI. CONSTITUTIONAL ISSUES**

None

**VII. OTHER INTERESTED PARTIES**

1. Health Law Section of the Florida Bar
2. Elder Law Section of the Florida Bar
3. Durable Power of Attorney Committee of the RPPTL Section of the Florida Bar

The chairs of each of the above-referenced committees were provided copies of the proposed legislation.

**VIII. SECTION-BY-SECTION ANALYSIS OF PROPOSED CHANGES**

**The 2009 Florida Statutes**

**CHAPTER 765**

**HEALTH CARE ADVANCE DIRECTIVES**

**PART I**

**GENERAL PROVISIONS (ss. 765.101 -765.113)**

**PART II**

**HEALTH CARE SURROGATE (ss. 765.201- 765.205)**

**PART III**

**LIFE-PROLONGING PROCEDURES**

**PART IV**

**ABSENCE OF ADVANCE DIRECTIVE**

**PART V**

**ANATOMICAL GIFTS**

**PART I**

**GENERAL PROVISIONS**

**765.101 Definitions.**

**765.102 Legislative findings and intent.**

**765.103 Existing advance directives.**

**765.104 Amendment of revocation.**

**765.105 Review of surrogate or proxy's decision.**

**765.106 Preservation of existing rights.**

**765.107 Construction.**

**765.108 Effect with respect to insurance.**

**765.109 Immunity from liability; weight of proof; presumption.**

**765.110 Health care facilities and providers; discipline.**

**765.1103 Pain management and palliative care.**

**765.1105 Transfer of a patient.**

**765.1115 Falsification forgery, or willful concealment, cancellation, or destruction of directive or revocation or amendment; penalties.**

**765.112 Recognition of advance directive executed in another state.**

**765.113 Restrictions on providing consent.**

## SECTION 1

**Purpose:** The definition section of chapter 765 is modified to add the terms “health care” and “health information” and to integrate those terms where appropriate. The present definition section of chapter 765 does not define medical records even though medical records are an essential aspect of the duties of a health care surrogate and proxy.

The definition of “Attending physician” is changed to “Primary physician” for two reasons. First, the new definition allows the principal to designate a physician he or she wants to determine incapacity. Second, “Primary physician” is the term used under the Uniform Health-Care Decisions Act, some of which formed the proposed changes to Chapter 765.

Also added to the definitions is the concept of “reasonably available.” Under present Chapter 765, a principal could designate a surrogate and an alternate surrogate. The authority of the alternate surrogate commences if the original surrogate is “unwilling or unable to perform his or her duties.” The “unwilling or unable” criteria could take time to the detriment of the principal. Under the proposed changes the alternate surrogate would assume his or her duties if the original surrogate is “not willing, able or reasonably available.” The meaning of “reasonably available” is defined in the definitional section below.

### **765.101 Definitions as used in this chapter:**

(1) “Advance directive” means a witnessed written document or oral statement in which instructions are given by a principal or in which the principal’s desires are expressed concerning any aspect of the principal’s health care or health information, and includes, but is not limited to, the designation of a health care surrogate, a living will or an anatomical gift made pursuant to part V of this chapter.

(2) “Primary ~~Attending~~ physician” means a physician designated by an individual or the individual’s surrogate, proxy, or attorney in fact under a durable power of attorney executed prior to October 1, 2010, as provided in chapter 709, to have primary responsibility for the individual’s health care or, in the absence of a designation or if the designated physician is not reasonably available, a physician who undertakes the responsibility ~~the primary physician who has responsibility for the treatment and care of the patient.~~

(3) “Close personal friend” means any person 18 years of age or older who has exhibited special care and concern for the patient, and who presents an affidavit to the health care facility or to the attending or treating physician stating that he or she is a friend of the patient; is willing and able to become involved in the patient’s health care; and has maintained such regular contact with the patient so as to be familiar with the patient’s activities, health, and religious or moral beliefs.

(4) “End-stage condition” means an irreversible condition that is caused by injury, disease, or

illness which has resulted in progressively severe and permanent deterioration, and which, to reasonable degree of medical probability, treatment of the condition would be ineffective.

(5) "Health care" means care, services, or supplies related to the health of an individual and includes, but is not limited to, preventive, diagnostic, therapeutic, rehabilitative, maintenance, or palliative care, and counseling, service, assessment, or procedure with respect to the individual's physical or mental condition or functional status or that affect the structure or function of the individual's body.

(6) ~~(5)~~ "Health care decision" means:

(a) 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.

(b) The decision to apply for private, public, government, or veterans' benefits to defray the cost of health care.

(c) The right of access to health information ~~all records~~ of the principal reasonably necessary for a health care surrogate or proxy to make decisions involving health care and to apply for benefits.

(d) The decision to make an anatomical gift pursuant to part V of this chapter.

(7) ~~(6)~~ "Health care facility" means a hospital, nursing home, hospice, home health agency, or health maintenance organization licensed in this state, or any facility subject to part 1 of chapter 394.

(8) ~~(7)~~ "Health care provider" or "provider" means any person licensed, certified, or otherwise authorized by law to administer health care in the ordinary course of business or practice of a profession.

(9) "Health information" means any information, whether oral or recorded in any form or medium, as defined from time to time in 45 C.F.R. s. 164.502(g) and the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936, that:

(a) 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

(b) Relates to the past, present, or future physical or mental health or condition of the principal; the provision of health care to the principal; or the past, present, or future payment for the

provision of health care to the principal.

(10) ~~(8)~~ “Incapacity” or “incompetent” means the patient is physically or mentally unable to communicate a willful and knowing health care decision. For the purposes of making an anatomical gift, the term also includes a patient who is deceased.

(11) ~~(9)~~ “Informed consent” means consent voluntarily given by a person after a sufficient explanation and disclosure of the subject matter involved to enable that person to have a general understanding of the treatment or procedure and the medically acceptable alternatives, including the substantial risks and hazards inherent in the proposed treatment or procedures, and to make a knowing health care decision without coercion or undue influence.

(12) ~~(10)~~ “Life-prolonging procedure” means any medical procedure, treatment, or intervention, including artificially provided sustenance and hydration, which sustains, restores or supplants a spontaneous vital function, The term does not include the administration of medication or performance of medical procedure, when such medication or procedure is deemed necessary to provide comfort care or to alleviate pain.

(13) ~~(11)~~ “Living will” or “declaration” means:

(a) A witnessed document in writing, voluntarily executed by the principal in accordance with s. 765.302 or

(b) A witnessed oral statement made by the principal expressing the principal’s instructions concerning life-prolonging procedures.

(14) ~~(12)~~ “Persistent vegetative state” means a permanent and irreversible condition of unconsciousness in which there is:

(a) The absence of voluntary action or cognitive behavior of any kind.

(b) An inability to communicate or interact purposefully with the environment.

(15) ~~(13)~~ “Physician” means a person licensed pursuant to chapter 458 or chapter 459.

(16) ~~(14)~~ “Principal” means a competent adult executing an advance directive and on whose behalf health care decisions are to be made or health care information is to be received, or both.

(17) ~~(15)~~ “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 to make health care decisions for such individual.

(18) “Reasonably available” means readily able to be contacted without undue effort and willing and able to act in a timely manner considering the urgency of the principal’s health-care needs.

~~(19)~~ ~~(16)~~ “Surrogate” means any competent adult expressly designated by a principal to make health care decisions and to receive health information. The principal may stipulate whether the authority of the surrogate is exercisable immediately without the necessity for a determination of incapacity or only upon the principal’s incapacity as set forth in s. 765.204 on behalf of the principal upon the principal’s incapacity.

~~(20)~~ ~~(17)~~ “Terminal condition” means a condition caused by injury, disease, or illness from which there is no reasonable medical probability of recovery and which, without treatment, can be expected to cause death.

## SECTION 2

**Purpose:** In light of this proposal that a principal can designate a surrogate to make health care decisions for him or her and to receive health care information without the necessity of a determination of incapacity, a legislative intent section has been added.

### **765.102 Legislative findings and intent.--**

(1) The Legislature finds that 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. This right is subject to certain interests of society, such as the protection of human life and the preservation of ethical standards in the medical profession.

(2) To ensure that such right is not lost or diminished by virtue of later physical or mental incapacity, the Legislature intends that a procedure be established to allow a person to plan for incapacity by executing a document or orally designating another person to direct the course of his or her health care or receive his or her health information, or both, medical treatment upon his or her incapacity. Such procedure should be less expensive and less restrictive than guardianship and permit a previously incapacitated person to exercise his or her full right to make health care decisions as soon as the capacity to make such decisions has been regained.

(3) The Legislature also recognizes that some competent adults may want to have immediate assistance in making health care decisions or accessing health information, or both, without a determination of incapacity. The Legislature intends that a procedure be established to allow a person to designate a surrogate to make health care decisions or receive health information, or both, without the necessity for a determination of incapacity under this chapter.

~~(4)~~ ~~(3)~~ The Legislature recognizes that for some the administration of life-prolonging medical procedures may result in only a precarious and burdensome existence. In order to ensure that the rights and intentions of a person may be respected even after he or she is no longer able to participate actively in decisions concerning himself or herself, and to encourage communication among such patient, his or her family, and his or her physician, the Legislature declares that the laws

of this state recognize the right of a competent adult to make an advance directive instructing his or her physician to provide, withhold, or withdraw life-prolonging procedures, or to designate another to make the health care treatment decision for him or her in the event that such person should become incapacitated and unable to personally direct his or her health medical care.

~~(5)~~ (4) The Legislature recognizes the need for all health care professionals to rapidly increase their understanding of end-of-life and palliative care. Therefore, the Legislature encourages the professional regulatory boards to adopt appropriate standards and guidelines regarding end-of-life care and pain management and encourages educational institutions established to train health care professionals and allied health professionals to implement curricula to train such professionals to provide end-of-life care, including pain management and palliative care.

~~(6)~~ (5) For purposes of this chapter:

(a) Palliative care is the comprehensive management of the physical, psychological, social, spiritual, and existential needs of patients. Palliative care is especially suited to the care of persons, who have incurable, progressive illnesses.

(b) Palliative care must include:

1. An opportunity to discuss and plan for end-of-life care.
2. Assurance that physical and mental suffering will be carefully attended to.
3. Assurance that preferences for withholding and withdrawing life-sustaining interventions will be honored.
4. Assurance that the personal goals of the dying person will be addressed.
5. Assurance that the dignity of the dying person will be a priority.
6. Assurance that health care provider will not abandon the dying person.
7. Assurance that the burden to family and others will be addressed.
8. Assurance that advance directives for care will be respected regardless of the location of care.
9. Assurance that organizational mechanisms are in place to evaluate the availability and quality of end-of-life, palliative, and hospice care services, including the evaluation of administrative and regulatory barriers.
10. Assurance that necessary health care services will be provided and that relevant reimbursement policies are available.

11. Assurance that the goals expressed in subparagraphs 1.10. will be accomplished in a culturally appropriate manner.

(7) ~~(6)~~ The Department of Elderly Affairs, the Agency for Health Care Administration, and the Department of Health shall jointly create a campaign on end-of-life care for purposes of educating the public. This campaign should include culturally sensitive programs to improve understanding of end-of-life care issues in minority communities.

### SECTION 3

**Purpose:** To provide for an effective date prior to which valid advance directives will be recognized.

**765.103 Existing advance directives.** – Any advance directive made prior to ~~October 1, 1999,~~ \_\_\_\_\_, shall be given effect as executed, provided such directive was legally effective when written.

### SECTION 4

**Purpose:** Words not needed are taken out.

#### **765.104 Amendment or revocation.--**

(1) An advance directive ~~or designation of surrogate~~ may be amended or revoked at any time by a competent principal:

(a) By means of a signed, dated writing;

(b) By means of the physical cancellation or destruction of the advance directive by the principal or by another in the principal's presence and at the principal's directions;

(c) By means of an oral expression of intent to amend or revoke; or

(d) By means of a subsequently executed advance directive that is materially different from a previously executed advance directive.

(2) Unless otherwise provided in the advance directive or in an order of dissolution or annulment or marriage, the dissolution or annulment of marriage of the principal revokes the designation of the principal's former spouse as a surrogate.

(3) Any such amendment or revocation will be effective when it is communicated to the surrogate, health care provider or health care facility. No civil or criminal liability shall be imposed upon any knowledge of such amendment or revocation.

(4) Any patient for whom a ~~medical~~ proxy has been recognized under s. 765.401 and for whom any previous legal disability that precluded the patient's ability to consent is removed may amend or revoke the recognition of the ~~medical~~ proxy and any uncompleted decision made by that proxy. The amendment or revocation takes effect when it is communicated to the proxy, the health care provider, or the health care facility in writing or, if communicated orally, in the presence of a third person.

## SECTION 5

**Purpose:** Integrates the term "primary physician." The proposal adds subsection (7) because a principal with capacity can review the surrogate's actions and remove a surrogate who is acting not in accordance with the principal's best interest.

**765.105 Review of surrogate or proxy's decision.**— The patient's family, the health care facility, or the ~~primary attending~~ physician, or any other interested person who may reasonably be expected to be directly affected by the surrogate or proxy's decision concerning any health care decision may seek expedited judicial intervention pursuant to rule 5.900 of the Florida Probate Rules, if that person believes:

(1) The surrogate or proxy's decision is not in accord with the patient's known desires or the provisions of this chapter;

(2) The advance directive is ambiguous, or the patient has changed his or her mind after execution of the advance directive;

(3) The surrogate or proxy was improperly designated or appointed, or the designation of the surrogate is no longer effective or has been revoked;

(4) The surrogate or proxy has failed to discharge duties, or incapacity or illness renders the surrogate or proxy incapable of discharging duties;

(5) The surrogate or proxy has abused his or her powers or;

(6) The patient has sufficient capacity to make his or her own health care decisions.

(7) The provisions of this section do not apply to a principal who is not incapacitated and who has designated a surrogate who has immediate authority to make health care decisions or receive health information, or both, on behalf of the principal.

## SECTION 6

**Purpose:** No change to present law.

**765.106 Preservation of existing rights.**—The provisions of this chapter are cumulative to the

existing law regarding an individual's right to consent, or refuse to consent, to medical treatment and do not impair any existing rights or responsibilities which a health care provider, a patient, including a minor, competent or incompetent person, or a patient's family may have under the common law, Federal Constitution, State Constitution, or statutes of this state.

## **SECTION 7**

**Purpose:** No change to present law.

### **765.107 Construction--**

(1) This chapter shall not be construed to repeal by implication any provision of s. 766.103, the Florida Medical Consent Law. For all purposes, the Florida Medical Consent Law shall be considered an alternative to provisions of this section.

(2) Procedures provided in this chapter permitting the withholding of withdrawal of life-prolonging procedures do not apply to a person who never had capacity to designate a health care surrogate or execute a living will.

**765.108 Effect with respect to insurance.**—The making of an advance directive pursuant to the provisions of this chapter shall not affect the sale, procurement, or issuance of any policy of life insurance, nor shall such making of an advance directive be deemed to modify the terms of an existing policy of life insurance. No policy of life insurance will be legally impaired or invalidated by the withholding or withdrawal of life-prolonging procedures from an insured patient in accordance with the provisions of this chapter, nor by any other treatment decision made according to this chapter, notwithstanding any term of the policy to the contrary. A person shall not be required to make an advance directive as a condition for being insured for, or receiving, health care services.

### **765.109 Immunity from liability; weight of proof; presumption.--**

(1) A health care facility, provider, or other person who acts under the direction of a health care facility or provider is not subject to criminal prosecution or civil liability, and will not be deemed to have engaged in unprofessional conduct, as a result of carrying out a health care decision made in accordance with the provisions of this chapter. The surrogate or proxy who makes a health care decision on a patient's behalf, pursuant to this chapter, is not subject to criminal prosecution or civil liability for such action.

(2) The provisions of this section shall apply unless it is shown by a preponderance of the evidence that the person authorizing or effectuating a health care decision did not, in good faith, comply with the provisions of this chapter.

### **765.110 Health care facilities and providers; discipline.--**

(1) A health care facility, pursuant to Pub. L. No. 101-508, ss. 4206 and 4751, shall provide to each patient written information concerning the individual's rights concerning advance directives and the health care facility's policies respecting the implementation of such rights, and shall document in the patient's medical records whether or not the individual has executed an advance directive.

(2) A health care provider or health care facility may not require a patient to execute an advance directive or to execute a new advance directive using the facility's or provider's forms. The patient's advance directives shall travel with the patient as part of the patient's medical record.

(3) A health care provider or health care facility shall be subject to professional discipline and revocation of license or certification, and a fine of not more than \$1,000 per incident, or both, if the health care provider or health care facility, as a condition of treatment or admission, requires an individual to execute or waive an advance directive.

(4) The Department of Elderly affairs for hospices and, in consultation with the Department of Elderly Affairs, the Department of Health for health care providers; the Agency for Health Care Administration for hospitals, nursing homes, home health agencies, and health maintenance organizations; and the Department of Children and Family Services for facilities subject to part I of chapter 394 shall adopt rules to implement the provisions of the section.

## SECTION 8

**Purpose:** Integrates the term "primary physician" and limits the authority of an attorney in fact to powers of attorney signed before the effective date of the proposed changes.

### **765.1103 Pain management and palliative care.--**

(1) A patient shall be given information concerning pain management and palliative care when he or she discusses with the primary attending or treating physician, or such physician's designee, the diagnosis, planned course of treatment, alternatives, risks, or prognosis for his or her illness. If the patient is incapacitated, the information shall be given to the patient's health care surrogate, proxy, court-appointed guardian as provided in chapter 744, or attorney in fact under a durable power of attorney as provided in chapter 709 executed prior to October 1, 2010. The court-appointed guardian or attorney in fact under a durable power of attorney as provided in chapter 709 executed prior to October 1, 2010 must have been delegated authority to make health care decisions on behalf of the patient.

(2) Health care providers and practitioners regulated under chapter 458, chapter 459, or chapter 464 must, as appropriate, comply with a request for pain management or palliative care from a patient under their care or, for an incapacitated patient under their care, from a surrogate, proxy, guardian, or other representative permitted to make health care decisions for the incapacitated patient. Facilities regulated under chapter 395 or chapter 400 must comply with the pain management or palliative care measures ordered by the patient's physician.

## SECTION 9

**Purpose:** No change to present law except it adds the word “proxy” where appropriate.

### **765.1105 Transfer of a patient.--**

(1) A health care provider or facility that refuses to comply with a patient’s advance directive, or the treatment decision of his or her surrogate or proxy, shall make reasonable efforts to transfer the patient to another health care provider or facility that will comply with the directive or treatment decision. This chapter does not require a health care provider or facility to commit any act which is contrary to the provider’s or facility’s moral or ethical beliefs, if the patient:

(a) Is not in an emergency condition; and

(b) Has received written information upon admission informing the patient of the policies of the health care provider or facility regarding such moral or ethical beliefs.

(2) A health care provider or facility that is unwilling to carry out the wishes of the patient or the treatment decision of his or her surrogate or proxy because of moral or ethical beliefs must within 7 days either:

(a) Transfer the patient to another health care provider or facility. The health care provider or facility shall pay the costs for transporting the patient to another health care provider or facility; or

(b) If the patient has not been transferred, carry out the wishes of the patient or the patient’s surrogate or proxy, unless the provisions of s. 765.105 apply.

## SECTION 10

**Purpose:** No change to present law.

### **765.1115 Falsification, forgery, or willful concealment, cancellation, or destruction of directive or revocation or amendment; penalties.--**

(1) Any person who willfully conceals, cancels, defaces, obliterates, or damages an advance directive without the principal’s consent or who falsifies or forges the revocation or amendment of

an advance directive of another, and who thereby causes life-prolonging procedures to be utilized in contravention of the previously expressed intent of the principal, commits a felony of the third degree, punishable as provided in s. 775.082, or s. 775.083, or s. 775.084.

(2) Any person who falsifies or forges the advance directive of another or who willfully conceals or withholds personal knowledge of the revocation of an advance directive, with the intent to cause a withholding or withdrawal of life-prolonging procedures contrary to the wishes of the principal, and who thereby because of such act directly causes life-prolonging procedures to be withheld or withdrawn and death to be hastened, commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

**765.112 Recognition of advance directive executed in another state.**—An advance directive executed in another state in compliance with the law of that state or of this state is validly executed for the purposes of this chapter.

**765.113 Restrictions on providing consent.**—Unless the principal expressly delegates such authority to the surrogate in writing, or a surrogate or proxy has sought and received court approval pursuant to rule 5.900 of the Florida Probate Rules, a surrogate or proxy may not provide consent for:

(1) Abortion, sterilization, electroshock therapy, psychosurgery, experimental treatment that have not been approved by a federally approved institutional review board in accordance with 45 C.F.R. part 46 or 21 C.F. R. part 56, or voluntary admission to a mental health facility.

(2) Withholding or withdrawing life-prolonging procedures from a pregnant patient prior to viability as defined in s. 390.0111 (4).

## **PART II**

### **HEALTH CARE SURROGATE**

765.201 Short title.

765.202 Designation of a health care surrogate.

765.203 Suggested form of designation.

765.2035 Designation of health care surrogate for a minor.

765.204 Capacity of principal; procedure.

765.205 Responsibility of the surrogate.

## SECTION 11

**Purpose:** No change to present law.

**765.201 Short title.**– Sections 765.202-765.205 may be cited as the ‘Florida Health Care Surrogate Act.’”

## SECTION 12

**Purpose:** The proposal integrates the term “reasonably available.”

### **765.202 Designation of a health care surrogate.--**

(1) A written document designating a surrogate to make health care decisions for a principal or receive health information on behalf of a principal, or both, shall be signed by the principal in the presence of two subscribing adult witnesses. A principal unable to sign the instrument may, in the presence of witnesses, direct that another person sign the principal’s name as required herein. An exact copy of the instrument shall be provided to the surrogate.

(2) The person designated as surrogate shall not act as witness to the execution of the document designating the health care surrogate. At least one person who acts as a witness shall be neither the principal’s spouse nor blood relative.

(3) A document designation a health care surrogate may also designate an alternate surrogate provided the designation is explicit. The alternate surrogate may assume his or her duties as surrogate for the principal if the original surrogate is not willing, able or reasonably available ~~unwilling or unable~~ to perform his or her duties. The principal’s failure to designate an alternate surrogate shall not invalidate the designation of a surrogate.

(4) If neither the designated surrogate nor the designated alternate surrogate is not willing, able or reasonably available ~~able or willing~~ to make health care decisions on behalf of the principal and in accordance with the principal’s instructions, the health care facility may seek the appointment of a proxy pursuant to part IV.

(5) A principal may designate a separate surrogate to consent to mental health treatment in the event that the principal is determined by a court to be incompetent to consent to mental health treatment

and a guardian advocate is appointed as provided under s. 394.4598. However, unless the document designating the health care surrogate expressly states otherwise, the court shall assume that the health care surrogate authorized to make health care decisions under this chapter is also the principal's choice to make decisions regarding mental health treatment.

(6) Unless the document states a time of termination, the designation shall remain in effect until revoked by the principal.

(7) A written designation of a health care surrogate executed pursuant to this section establishes a rebuttable presumption of clear and convincing evidence of the principal's designation of the surrogate.

### SECTION 13

**Purpose:** The proposal changes the suggested form to comply with the proposed changes. The entire suggested form in essence has been changed.

765.203 Suggested form of designation. -- A written designation of a health care surrogate executed pursuant to this chapter may, but need not be, in the following form:

#### PART 1

#### DESIGNATION OF HEALTH CARE SURROGATE

I, [(name)\_\_\_\_(Last)\_\_\_\_(First)\_\_\_\_(Middle Initial)], hereby designate as my health care surrogate under s. 765.202, Florida 358 Statutes:

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

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

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

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

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

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

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

#### PART 2 INSTRUCTIONS FOR HEALTH CARE

I authorize my health care surrogate to:

(Initials) 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:

(Initials) 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 veteran's 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.

4. Decide to make an anatomical gift pursuant to part VI of chapter 765, Florida Statutes.

(Initials) Specific instructions and restrictions:

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

I further affirm that this designation is not being made as a condition of treatment or admission to a health care facility.

I will notify and send a copy of this document to the following persons other than my health care surrogate, so they may know who my health care surrogate is.

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

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

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

My health care surrogate shall make health-care decisions for me in accordance with this designation, any additional instructions I give in this form, and my other wishes to the extent known to my surrogate and not inconsistent with this designation. To the extent my wishes are unknown, my surrogate shall make health-care decisions for me in accordance with what my surrogate determines to be in my best interest. In determining my best interest, my surrogate shall consider my personal values to the extent known to my surrogate.

(If you do not agree with any of the optional choices above and wish to write your own, or if you wish to add to the instructions you have given above, you may do so here.) I direct that:

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(Add additional sheets if needed.)

PART 3  
PRIMARY PHYSICIAN

(OPTIONAL)

I designate the following physician as my primary physician:

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(Name of physician)

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(Address)	(City)	(State)	(Zip Code)
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(Phone)

Optional: If the physician I have designated above is not willing, able or reasonably available to act as my primary physician, I designate the following physician as my primary physician:

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(Name of physician)

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(Address)	(City)	(State)	(Zip Code)
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(Phone)

A copy of this form has the same effect as the original.

A designation of a health care surrogate shall contain, directly above the signature line, a statement in all capital letters in at least 14-point boldfaced type in substantially the following form:

**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 MAKE HEALTH CARE DECISIONS FOR ME TAKES EFFECT IMMEDIATELY.**

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

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)

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(date)

(date)

**NOTICE TO PHYSICIANS, HEALTH CARE PROVIDERS,  
AND HEALTH CARE FACILITIES**

If the principal has designated a health care surrogate or has delegated authority to make health care decisions to an attorney in fact under a durable power of attorney executed prior to October 1, 2010, as provided in chapter 709, and has stipulated that the authority of the surrogate or attorney in fact is to commence immediately, the fundamental right of self determination of every competent adult regarding his or her health care decisions shall be controlling. Before implementing a health care decision made for the principal, the primary physician, another physician, a health care provider, or a health care facility, if possible, must promptly communicate to the principal the decision made and the identity of the person making the decision.

**SECTION 14**

**Purpose:** A new section is added to chapter 765 to allow a parent or other legal guardian to designate a surrogate to give medical consent for a minor in the parent or the legal guardian's absence. For example, a caretaker being designated as a surrogate for emergency medical treatment while the parents are on vacation and cannot be timely contacted.

**765.2035. Designation of a health care surrogate for a minor**

(1) A natural guardian as defined in s. 744.301 (1), legal custodian or legal guardian of the person of a minor may designate a competent adult to serve as a surrogate to make health care decisions for the minor. Such designation shall be made by a written document which shall be signed by the designator in the presence of two subscribing adult witnesses. If a designator is unable to sign the instrument, such designator may, in the presence of witnesses, direct that another person sign the designator's name as required herein. An exact copy of the instrument shall be provided to the surrogate.

(2) The person designated as surrogate shall not act as witness to the execution of the document designating the health care surrogate.

(3) A document designating a health care surrogate may also designate an alternate surrogate provided the designation is explicit. The alternate surrogate may assume his or her duties as surrogate if the original surrogate is not willing, able, or reasonably available to perform his or her duties. The designator's failure to designate an alternate surrogate shall not invalidate the designation.

(4) If neither the designated surrogate nor the designated alternate surrogate is willing, able, or

reasonably available to make health care decisions for the minor on behalf of the designator and in accordance with the designator's instructions, the health care facility may seek the appointment of a proxy pursuant to part IV.

(5) A natural guardian as defined in s. 744.301 (1), legal custodian or legal guardian of the person of a minor may designate a separate surrogate consent to mental health treatment for a minor. However, unless the document designating the health care surrogate expressly states otherwise, the court shall assume that the health care surrogate authorized to make health care decisions for a minor under this chapter is also the designator's choice to make decisions regarding mental health treatment for the minor.

(6) Unless the document states a time of termination, the designation shall remain in effect until revoked by the designator. An otherwise valid designation of a surrogate for a minor shall not be invalid solely because it was made before the birth of the minor.

(7) A written designation of a health care surrogate executed pursuant to this section establishes a rebuttable presumption of clear and convincing evidence of the designator's designation of the surrogate and becomes effective pursuant to s. 743.0645(2)(a).

## SECTION 15

**Purpose:** Integrates the term “primary physician” and requires the surrogate of an immediately effective designation to be informed of a determination of incapacity of the principal.

### **765.204 Capacity of principal: procedure.--**

(1) A principal is presumed to be capable to make health care decisions for herself or himself unless she or he is determined to be incapacitated. Incapacity may not be inferred from the person's voluntary or involuntary hospitalization for mental illness or from her or his mental retardation.

(2) If a principal's capacity to make health care decisions for herself or himself or provide informed consent is in question, the primary attending physician shall evaluate the principal's capacity and, if the physician concludes that the principal lacks capacity, enter that evaluation in the principal's medical record. If the primary attending physician has a question as to whether the principal lacks capacity, another physician shall also evaluate the principal's capacity, and if the second physician agrees that the principal lacks the capacity to make health care decisions or provide informed consent, the health care facility shall enter both physicians' evaluations in the principal's medical record. If the principal had designated a health care surrogate or has delegated authority to make health care decisions to an attorney in fact under a durable power of attorney executed prior to October 1, 2010, the health care facility shall notify such surrogate or attorney in fact in writing that her or his authority under the instrument has commenced, as provided in chapter 709 or s. 765.203.

(3) The surrogate's authority shall commence upon a determination under subsection (2) that the

principal lacks capacity, and such authority shall remain in effect until a determination that the principal has regained such capacity. Upon commencement of the surrogate's authority, a surrogate who is not the principal's spouse shall notify the principal's spouse or adult children of the principal's designation of the surrogate. In the event the primary attending physician determines that the principal has regained capacity, the authority of the surrogate shall cease, but shall recommence if the principal subsequently loses capacity as determined pursuant to this section.

(4) Notwithstanding the provisions of subsections(2) and (3) of this section, if the principal has designated a health care surrogate or has delegated authority to make health care decisions to an attorney in fact under a durable power of attorney executed prior to October 1, 2010, as provided in chapter 709, and has stipulated that the authority of the surrogate or attorney in fact is to commence immediately, the health care facility shall notify such surrogate or attorney in fact in writing when a determination of incapacity has been entered into the principal's medical record.

~~(5)~~ (4) A determination made pursuant to this section that a principal lacks capacity to make health care decisions shall not be construed as a finding that a principal lacks capacity for any other purpose.

~~(6)~~ (5) In the event the surrogate is required to consent to withholding or withdrawing life-prolonging procedures, the provisions of part III shall apply.

## SECTION 16

**Purpose:** The proposal provides that a principal with capacity be informed immediately about any health care decision made by a surrogate on behalf of the principal.

### **765.205 Responsibility of the surrogate.--**

(1) The surrogate, in accordance with the principal's instructions, unless such authority had been expressly limited by the principal, shall:

(a) Have authority to act for the principal and to make all health care decisions for the principal during the principal's incapacity.

(b) Consult expeditiously with appropriate health care providers to provide informed consent, and make only health care decisions for the principal which he or she believes the principal would have made under the circumstances if the principal were capable of making such decisions. If there is no indication of what the principal would have chosen, the surrogate may 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.

(c) Provide written consent using an appropriate form whenever consent is required, including a physician's order not to resuscitate.

(d) Be provided access to the appropriate health information ~~medical records~~ of the principal.

(e) Apply for public benefits, such as Medicare and Medicaid, for the principal and have access to information regarding the principal's income and assets and banking and financial records to the extent required to make application. A health care provider or facility may not, however, make such application a condition of continued care if the principal, if capable, would have refused to apply.

(2) The surrogate may authorize the release of health information ~~and medical records~~ to appropriate persons to ensure the continuity of the principal's health care and may authorize the admission, discharge, or transfer of the principal to or from a health care facility or other facility or program licensed under chapter 400 or chapter 429.

(3) Notwithstanding the provisions of subsections (1) and (2) of this section, if the principal has designated a health care surrogate or has delegated authority to make health care decisions to an attorney in fact under a durable power of attorney executed prior to October 1, 2010, as provided in chapter 709, and has stipulated that the authority of the surrogate or attorney in fact is to commence immediately, the fundamental right of self determination of every competent adult regarding his or her health care decisions shall be controlling. Before implementing a health care decision made for the principal who is not incapacitated, the primary physician, another physician, a health care provider, or a health care facility, as defined in this chapter, if possible, must promptly communicate to the principal the decision made and the identity of the person making the decision.

~~(4)~~ (3) If, after the appointment of a surrogate, a court appoints a guardian, the surrogate shall continue to make health care decisions for the principal, unless the court has modified or revoked the authority of the surrogate pursuant to s. 744.3115. The surrogate may be directed by the court to report the principal's health care status to the guardian.

## SECTION 17

**Purpose:** There are no changes to Part III of Chapter 765.

## PART III

### LIFE-PROLONGING PROCEDURES

## SECTION 18

**Purpose:** There are no changes to Part IV of Chapter 765.

## PART IV

### ABSENCE OF ADVANCE DIRECTIVE

## **SECTION 19**

**Purpose:** There are no changes to Part V of Chapter 765.

### **PART V**

#### **ANATOMICAL GIFTS**

9/8/09