

**PROPOSED LEGISLATIVE REVISIONS FOR 2010
FLORIDA BAR ADVANCE DIRECTIVES AND HIPAA COMMITTEE
HEALTH CARE SURROGATE FOR A MINOR**

I. SUMMARY

The purpose of this proposal is to allow a parent, legal custodian or legal guardian of the person of a minor to designate a competent adult to serve as a surrogate to make health care decisions for the minor when the parents, legal custodian or legal guardian of the minor cannot be contacted by the health care provider.

II. CURRENT SITUATION

Under current law, when the parents, legal custodian or legal guardian of a minor cannot be contacted to give consent for medical treatment of a minor, s. 743.0645 sets forth a list of persons who have the power to consent on behalf of the minor. The person who has the first priority is a person who possesses a power of attorney to provide medical consent of the minor. However, chapter 709 that deals with powers of attorney does not have a provision authorizing a parent, legal custodian or legal guardian to execute such a power of attorney.

The situation where it most commonly occurs is when parents go on vacation and leave their children with a caregiver (grandparent, babysitter, neighbor, etc.). Attorneys routinely draft powers of attorney authorizing the caregiver to consent to medical treatment of a minor in reliance upon the words of s. 743.0645.

Designating a person to make medical decisions for a minor is a type of advance directive and should be addressed in chapter 765 "Health Care Advance Directives" and not chapter 709 "Powers of Attorney and Similar Instruments." Chapter 765 has an effective mechanism of designating surrogates as well as review of a surrogate's decisions and removal of a surrogate, if necessary, whereas chapter 709, dealing mostly with financial matters, does not have any such mechanisms.

III. EFFECT OF PROPOSED CHANGE

The effect of this proposal is to give the authority to parents, legal custodian or legal guardian of the person of a minor to designate a person in their absence to consent to the medical treatment of a minor.

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

There should be no economical impact of the private sector.

VI. CONSTITUTIONAL ISSUES

None

VII. OTHER INTERESTED PARTIES

1. Health Law Section of the Florida Bar
2. Family 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

SECTION 1

Purpose: S. 743.0645 (2)(a) is modified to allow a health care surrogate for a minor to consent to the minor's medical treatment in the absence of the parents, legal custodian or legal guardian of the person.

743.0645 Other persons who may consent to medical care or treatment of a minor.--

(1) As used in this section, the term:

(a) "Blood testing" includes Early Periodic Screening, Diagnosis, and Treatment (EPSDT) testing and other blood testing deemed necessary by documented history or symptomatology but excludes HIV testing and controlled substance testing or any other testing for which separate court order or informed consent as provided by law is required.

(b) "Medical care and treatment" includes ordinary and necessary medical and dental examination and treatment, including blood testing, preventive care including ordinary immunizations, tuberculin testing, and well-child care, but does not include surgery, general

anesthesia, provision of psychotropic medications, or other extraordinary procedures for which a separate court order, power of attorney, or informed consent as provided by law is required, except as provided in s. 39.407(3).

(c) "Person who has the power to consent as otherwise provided by law" includes a natural or adoptive parent, legal custodian, or legal guardian.

(2) Any of the following persons, in order of priority listed, may consent to the medical care or treatment of a minor who is not committed to the Department of Children and Family Services or the Department of Juvenile Justice or in their custody under chapter 39, chapter 984, or chapter 985 when, after a reasonable attempt, a person who has the power to consent as otherwise provided by law cannot be contacted by the treatment provider and actual notice to the contrary has not been given to the provider by that person:

(a) A health care surrogate designated under s. 765.2035 after September 30, 2010, or a A person who possesses a power of attorney to provide medical consent for the minor executed prior to October 1, 2010. A power of attorney executed after July 1, 2001, and prior to October 1, 2010, to provide medical consent for a minor includes the power to consent to medically necessary surgical and general anesthesia services for the minor unless such services are excluded by the individual executing the power of attorney.

(b) The stepparent.

(c) The grandparent of the minor.

(d) An adult brother or sister of the minor.

(e) An adult aunt or uncle of the minor.

There shall be maintained in the treatment provider's records of the minor documentation that a reasonable attempt was made to contact the person who has the power to consent.

(3) The Department of Children and Family Services or the Department of Juvenile Justice caseworker, juvenile probation officer, or person primarily responsible for the case management of the child, the administrator of any facility licensed by the department under s.393.067, s.394.875, or s.409.175, or the administrator of any state-operated or state-contracted delinquency residential treatment facility may consent to the medical care or treatment of any minor committed to it or in its custody under chapter 39, chapter 984, or chapter 985, when the person who has the power to consent as otherwise provided by law cannot be contacted and such person has not expressly objected to such consent. There shall be maintained in the records of the minor documentation that a reasonable attempt was made to contact the person who has the power to consent as otherwise provided by law.

(4) The medical provider shall notify the parent or other person who has the power to consent as otherwise provided by law as soon as possible after the medical care or treatment is administered pursuant to consent given under this section. The medical records shall reflect the reason consent

as otherwise provided by law was not initially obtained and shall be open for inspection by the parent or other person who has the power to consent as otherwise provided by law.

(5) The person who gives consent; a physician, dentist, nurse, or other health care professional licensed to practice in this state; or a hospital or medical facility, including, but not limited to, county health departments, shall not incur civil liability by reason of the giving of consent, examination, or rendering of treatment, provided that such consent, examination, or treatment was given or rendered as a reasonable prudent person or similar health care professional would give or render it under the same or similar circumstances.

(6) The Department of Children and Family Services and the Department of Juvenile Justice may adopt rules to implement this section.

(7) This section does not affect other statutory provisions of this state that relate to medical consent for minors.

SECTION 2

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 custodian'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).

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