

By Senator Wise

5-674B-04

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

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

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29           Section 1. Part VI of chapter 765, consisting of  
30          sections 765.601, 765.602, 765.603, and 765.604, Florida  
31          Statutes, is created to read:

1           765.601 Short title.--Sections 765.602-765.604 may be  
2 cited as the "Starvation and Dehydration of Persons with  
3 Disabilities Prevention Act."

4           765.602 Definitions.--As used in ss. 765.602-765.604,  
5 the term:

6           (1) "Express and informed consent" means consent  
7 voluntarily given with sufficient knowledge of the subject  
8 matter involved to enable the person giving consent to make a  
9 knowing and understanding decision without any element of  
10 force, fraud, deceit, duress, or other form of constraint or  
11 coercion. Sufficient knowledge of the subject matter involved  
12 includes a general understanding of:

13           (a) The proposed treatment or procedure for which  
14 consent is sought;

15           (b) The medical condition of the person for whom  
16 consent for the proposed treatment or procedure is sought;

17           (c) Any medically acceptable alternative treatment or  
18 procedure; and

19           (d) The substantial risks and hazards inherent if the  
20 proposed treatment or procedure is carried out and if the  
21 proposed treatment or procedure is not carried out.

22           (2) "Nutrition" means sustenance administered by way  
23 of the gastrointestinal tract.

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

28           765.603 Presumption of nutrition and hydration  
29 sufficient to sustain life.--

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

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

9           765.604 Presumption of nutrition and hydration; when  
10 inapplicable.--The presumption in s. 765.603 does not apply to  
11 the extent that:

12           (1) In reasonable medical judgment:

13           (a) The provision of nutrition or hydration is not  
14 medically possible;

15           (b) The provision of nutrition or hydration would  
16 hasten death; or

17           (c) The medical condition of the incompetent person is  
18 such that provision of nutrition or hydration would not  
19 contribute to sustaining the incompetent person's life or  
20 provide comfort to the incompetent person;

21           (2) The incompetent person has executed a written  
22 advance directive prepared in accordance with s. 765.112,  
23 executed a designation of a health care surrogate prepared in  
24 accordance with s. 765.202, or executed a written living will  
25 prepared in accordance with s. 765.302, any of which  
26 specifically authorizes the withholding or withdrawal of  
27 nutrition or hydration, to the extent that the authorization  
28 applies; or

29           (3) There is clear and convincing evidence that the  
30 incompetent person, when competent, gave express and informed  
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1 consent to withdrawing or withholding nutrition or hydration  
2 in the applicable circumstances.

3 Section 2. Section 765.106, Florida Statutes, is  
4 amended to read:

5 765.106 Preservation of existing rights.--The  
6 provisions of this chapter are cumulative to the existing law  
7 regarding an individual's right to consent, or refuse to  
8 consent, to medical treatment and do not impair any existing  
9 rights or responsibilities that ~~which~~ a health care provider,  
10 a patient, including a minor, competent or incompetent person,  
11 or a patient's family may have under the common law, Federal  
12 Constitution, State Constitution, or statutes of this state;  
13 however, this section may not be construed to authorize a  
14 violation of ss. 765.602-765.604.

15 Section 3. Section 765.107, Florida Statutes, is  
16 amended to read:

17 765.107 Construction.--

18 (1) This chapter may ~~shall~~ not be construed to repeal  
19 by implication any provision of s. 766.103, the Florida  
20 Medical Consent Law. For all purposes, the Florida Medical  
21 Consent Law shall be considered an alternative to provisions  
22 of this section; however, this section may not be construed to  
23 authorize a violation of ss. 765.602-765.604.

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

28 Section 4. Section 765.204, Florida Statutes, is  
29 amended to read:

30 765.204 Capacity of principal; procedure.--

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

7           (2) If a principal's capacity to make health care  
8 decisions for herself or himself or provide informed consent  
9 is in question, the attending physician shall evaluate the  
10 principal's capacity and, if the physician concludes that the  
11 principal lacks capacity, enter that evaluation in the  
12 principal's medical record. If the attending physician has a  
13 question as to whether the principal lacks capacity, another  
14 physician shall also evaluate the principal's capacity, and if  
15 the second physician agrees that the principal lacks the  
16 capacity to make health care decisions or provide informed  
17 consent, the health care facility shall enter both physician's  
18 evaluations in the principal's medical record. If the  
19 principal has designated a health care surrogate or has  
20 delegated authority to make health care decisions to an  
21 attorney in fact under a durable power of attorney, the  
22 facility shall notify such surrogate or attorney in fact in  
23 writing that her or his authority under the instrument has  
24 commenced, as provided in chapter 709 or s. 765.203.

25           (3) The surrogate's authority shall commence upon a  
26 determination under subsection (2) that the principal lacks  
27 capacity, and the ~~such~~ authority shall remain in effect until  
28 a determination that the principal has regained ~~such~~ capacity.  
29 Upon commencement of the surrogate's authority, a surrogate  
30 who is not the principal's spouse shall notify the principal's  
31 spouse or adult children of the principal's designation of the

1 surrogate. In the event the attending physician determines  
2 that the principal has regained capacity, the authority of the  
3 surrogate shall cease, but shall recommence if the principal  
4 subsequently loses capacity as determined under ~~pursuant to~~  
5 this section.

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

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

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

15 765.305 Procedure in absence of a living will.--

16 (1) In the absence of a living will, the decision to  
17 withhold or withdraw life-prolonging procedures from a patient  
18 may be made by a health care surrogate designated by the  
19 patient under ~~pursuant to~~ part II unless the designation  
20 limits the surrogate's authority to consent to the withholding  
21 or withdrawal of life-prolonging procedures or unless the  
22 surrogate's authority is limited by part VI.

23 Section 6. Section 765.401, Florida Statutes, is  
24 amended to read:

25 765.401 The proxy.--

26 (1) If an incapacitated or developmentally disabled  
27 patient has not executed an advance directive, or designated a  
28 surrogate to execute an advance directive, or the designated  
29 or alternate surrogate is no longer available to make health  
30 care decisions, health care decisions may be made for the  
31 patient by any of the following individuals, in the following

1 order of priority, if no individual in a prior class is  
2 reasonably available, willing, or competent to act:

3 (a) The judicially appointed guardian of the patient  
4 or the guardian advocate of the person having a developmental  
5 disability as defined in s. 393.063, who has been authorized  
6 to consent to medical treatment, if the ~~such~~ guardian has  
7 previously been appointed; however, this paragraph shall not  
8 be construed to require the ~~such~~ appointment before a  
9 treatment decision can be made under this subsection;

10 (b) The patient's spouse;

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

14 (d) A parent of the patient;

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

18 (f) An adult relative of the patient who has exhibited  
19 special care and concern for the patient and who has  
20 maintained regular contact with the patient and who is  
21 familiar with the patient's activities, health, and religious  
22 or moral beliefs; ~~or~~

23 (g) A close friend of the patient; ~~or~~

24 (h) A clinical social worker licensed under ~~pursuant~~  
25 ~~to~~ chapter 491, or who is a graduate of a court-approved  
26 guardianship program. The ~~Such a~~ proxy must be selected by the  
27 provider's bioethics committee and must not be employed by the  
28 provider. If the provider does not have a bioethics committee,  
29 then the ~~such a~~ proxy may be chosen through an arrangement  
30 with the bioethics committee of another provider. The proxy  
31 will be notified that, upon request, the provider shall make

1 available a second physician, not involved in the patient's  
2 care to assist the proxy in evaluating treatment. Decisions to  
3 withhold or withdraw life-prolonging procedures will be  
4 reviewed by the facility's bioethics committee. Documentation  
5 of efforts to locate proxies from prior classes shall ~~must~~ be  
6 recorded in the patient record.

7 (2) Any health care decision made under this part must  
8 be based on the proxy's informed consent and on the decision  
9 the proxy reasonably believes the patient would have made  
10 under the circumstances. If there is no indication of what the  
11 patient would have chosen, the proxy may consider the  
12 patient's best interest in deciding that proposed treatments  
13 are to be withheld or that treatments currently in effect are  
14 to be withdrawn. Any decision concerning the withholding or  
15 withdrawal of nutrition or hydration must comply with ss.  
16 765.602-765.604.

17 (3) Before exercising the incapacitated patient's  
18 rights to select or decline health care, the proxy must comply  
19 with ~~the provisions of~~ ss. 765.205 and 765.305, except that a  
20 proxy's decision to withhold or withdraw life-prolonging  
21 procedures must be supported by clear and convincing evidence  
22 that the decision would have been the one the patient would  
23 have chosen had the patient been competent or, if there is no  
24 indication of what the patient would have chosen, that the  
25 decision is in the patient's best interest. Any decision  
26 concerning the withholding or withdrawal of nutrition or  
27 hydration must comply with ss. 765.602-765.604.

28 (4) Nothing in this section shall be construed to  
29 preempt the designation of persons who may consent to the  
30 medical care or treatment of minors established under ~~pursuant~~  
31 ~~to~~ s. 743.0645.



1           Section 7. Section 765.404, Florida Statutes, is  
2 amended to read:

3           765.404 Persistent vegetative state.--For persons in a  
4 persistent vegetative state, as determined by the attending  
5 physician in accordance with currently accepted medical  
6 standards, who have no advance directive and for whom there is  
7 no evidence indicating what the person would have wanted under  
8 such conditions, and for whom, after a reasonably diligent  
9 inquiry, no family or friends are available or willing to  
10 serve as a proxy to make health care decisions for them,  
11 life-prolonging procedures may be withheld or withdrawn under  
12 the following conditions:

13           (1) The person has a judicially appointed guardian  
14 representing his or her best interest with authority to  
15 consent to medical treatment; and

16           (2) The guardian and the person's attending physician,  
17 in consultation with the medical ethics committee of the  
18 facility where the patient is located, conclude that the  
19 condition is permanent and that there is no reasonable medical  
20 probability for recovery and that withholding or withdrawing  
21 life-prolonging procedures is in the best interest of the  
22 patient. If there is no medical ethics committee at the  
23 facility, the facility must have an arrangement with the  
24 medical ethics committee of another facility or with a  
25 community-based ethics committee approved by the Florida  
26 Bio-ethics Network. The ethics committee shall review the case  
27 with the guardian, in consultation with the person's attending  
28 physician, to determine whether the condition is permanent and  
29 there is no reasonable medical probability for recovery. The  
30 individual committee members and the facility associated with  
31 an ethics committee shall not be held liable in any civil

1 action related to the performance of any duties required in  
2 this subsection.

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4 Any decision concerning the withholding or withdrawal of  
5 nutrition or hydration must comply with ss. 765.602-765.604.

6 Section 8. This act shall apply prospectively in  
7 litigation pending on the effective date of this act and shall  
8 supersede any court order issued under the law in effect  
9 before the effective date of this act to the extent that the  
10 court order conflicts with this act and would otherwise be  
11 applied on or after the effective date of this act. This act  
12 shall apply with respect to every person living on or after  
13 the effective date of this act.

14 Section 9. This act shall take effect upon becoming a  
15 law.

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18 SENATE SUMMARY

19 Provides definitions relating to the withholding or  
20 withdrawal of nutrition or hydration. Declares that an  
21 incompetent person is presumed to have directed his or  
22 her health care providers to supply the necessary  
23 nutrition and hydration to sustain life. Prohibits a  
24 court, proxy, or surrogate from withholding or  
25 withdrawing nutrition or hydration except under specified  
26 circumstances. Provides that the presumption to supply  
27 nutrition and hydration is inapplicable under certain  
28 circumstances. Provides for the act to apply to pending  
29 litigation and to supersede existing court orders  
30 otherwise applicable on or after the effective date of  
31 the act.