The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Rules

BILL:	CS/CS/SB 1224
INTRODUCER:	Rules Committee, Judiciary Committee, and Senator Joyner
SUBJECT:	Health Care Representatives
DATE:	April 20, 2015 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Caldwell	Cibula	JU	**Fav/CS**
2.	Looke	Stovall	HP	**Favorable**
3.	Caldwell	Phelps	RC	**Fav/CS**

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 1224 authorizes the appointment of a health care surrogate which is not conditioned upon the incapacity of the principal. It allows for the principal's health information to be shared with the surrogate prior to incapacity. The bill also allows the parents, legal custodian, or legal guardian of a minor to name a health care surrogate to act for a minor if the parents, legal custodian, or legal guardian cannot be timely contacted to make medical decisions for the minor.

II. Present Situation:

Part II of ch. 765, F.S., entitled "Health Care Surrogate," governs the designation of health care surrogates in Florida. A health care surrogate is a competent adult expressly designated by a principal to make health care decisions on behalf of the principal upon the principal's incapacity.[1] Section 765.203, F.S., provides a suggested form for the designation of a health care surrogate. If an adult fails to designate a surrogate or a designated surrogate is unwilling or unable to perform his or her duties, a health care facility may seek the appointment of a proxy[2] to serve as surrogate upon the incapacity of such person.[3] A surrogate appointed by the principal or

[1] Section 765.101(16), F.S.

[2] "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, F.S., to make health care decisions for such individual. s. 765.101(15), F.S.

[3] Sections 765.202(4) and 765.401, F.S.

by proxy, may, subject to any limitations and instructions provided by the principal, take the following actions:[4]

- Make all health care decisions[5] for the principal during the principal's incapacity;
- Consult expeditiously with appropriate health care providers to provide informed consent, including written consent where required, provided that such consent reflects the principal's wishes or the principal's best interests;
- Have access to the appropriate medical records of the principal;
- Apply for public benefits for the principal and have access to information regarding the principal's income, assets, and financial records to the extent required to make such application;
- Authorize the release of information and medical records to appropriate persons to ensure continuity of the principal's health care; and
- Authorize the admission, discharge, or transfer of the principal to or from a health care facility.[6]

The surrogate's authority to act commences upon a determination that the principle is incapacitated.[7] A determination of incapacity is required to be made by an attending physician.[8] If the physician's evaluation finds that the principal is incapacitated and the principal has designated a health care surrogate, a health care facility will notify such surrogate in writing that her or his authority under the instrument has commenced.[9] The heath care surrogate's authority continues until a determination that the principal has regained capacity. If a principal goes in and out of capacity, a redetermination of incapacity is necessary each time before a health care surrogate may make health care decisions.[10]

This process can hinder effective and timely assistance and is cumbersome. Further, some competent persons desire the assistance of a health care surrogate with the sometimes complex task of understanding health care treatments and procedures and with making health care decisions, but may not effectively empower such persons to act on their behalf due to the restriction that a health care surrogate act only for incapacitated persons.

Health Care Decisions for Minors

In general, healthcare decisions for minors are made by that minor's parent, legal custodian, or legal guardian.[11] When the minor's parent or guardian cannot be contacted in a non-emergency situation, s. 743.0645, F.S., establishes, in order of priority, the people who are authorized to

[4] Section 765.205, F.S.
[5] "Health care decision" means: 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; the decision to apply for private, public, government, or veterans' benefits to defray the cost of health care; the right of access to all records of the principal reasonably necessary for a health care surrogate to make decisions involving health care and to apply for benefits; and the decision to make an anatomical gift pursuant to part V of ch. 765, F.S.
[6] Section 765.205(1), F.S.
[7] Section 765.204(3), F.S.
[8] Section 765.204, F.S.
[9] Section 765.204(2), F.S.
[10] Section 765.204(3), F.S.
[11] See s. 743.0645(1)(c), F.S.

consent to healthcare for that minor.[12] In an emergency situation, s. 743.064, F.S., allows a physician to provide emergency medical services to a minor in a hospital or a college infirmary and allows emergency medical services personnel to provide prehospital emergency care when the minor is unable to reveal the identity of his or her parent or guardian or if such person cannot be immediately located by telephone at their residence or place of business. The minor's parent or guardian must be notified of any emergency services as soon as possible after the treatment is administered.

III. Effect of Proposed Changes:

Health Care Surrogate for an Adult

The bill creates s. 765.202(6), F.S., (**section 8**) to provide that an individual may elect to appoint a health care surrogate who may act while the individual is still competent to make healthcare decisions and to have access to the individual's health information. To that end, the bill:

- Adds a legislative finding at s. 765.102(3), F.S., (**section 3**) that some adults want a health care surrogate to assist them with making medical decisions or accessing health information.
- Provides that statutory provisions for review of the decision of a health care surrogate at s. 765.105, F.S., (**section 5**) do not apply where the individual who appointed the health care surrogate is still competent.
- Amends s. 765.204, F.S., (**section 12**) to require a health care facility to notify the surrogate upon a finding of incapacity. The notification requirement also requires notice to the attorney in fact if the health care facility knows of a durable power of attorney. The bill limits liability of the health care provider when relying upon a health care surrogate acting when the principal lacks capacity and provides that the effect of the surrogate's authority is only that of the principal. When the medical directions of the principal and surrogate conflict, the principal's decision supersedes the surrogate's decision.
- Adds that an alternate may also act where the primary surrogate is not reasonably available. Current law such as s. 765.202(3), F.S., (**section 8**) provides that an alternate health care surrogate may act where the primary surrogate is unwilling or unable to act.

Section 765.203, F.S., (**section 9**) is amended to add a suggested form for the designation of a health care surrogate and delete the current form. The information on the form includes:

- The principal's name;
- A statement that the principal designates as his or her health care surrogate;
- The name, address, and phone number of the surrogate;
- A statement relating to the healthcare surrogate who is not willing, able, or reasonably available to perform his or her duties, and an opportunity to designate an alternate health care surrogate;
- Instructions and authorization for health care that includes some fill in the blank, some required initialing, and further specific instructions and restrictions;
- Instructions and notice of how to amend or revoke the surrogate designation;
- Acknowledgements as to understanding and authority delegated;
- Signature and date, printed name and address of the principal; and

[12] The list includes, in order, a person with a power of attorney to provide consent for the minor, a stepparent, a grandparent, an adult brother or sister, and an adult aunt or uncle.

- Signature and date, printed name and address of two witnesses.

Health Care Surrogate for a Minor

The bill creates s. 765.2035, F.S., (**section 10**) to create statutory authority for a parent or legal guardian to designate a health care surrogate who may consent to medical care for a minor. The designation must be in writing and signed by two witnesses. The designated surrogate may not be a witness.

Like a surrogate for an adult, an alternate surrogate may be appointed to act if the original surrogate is not willing, able, or reasonably available to act.

In addition to regular and emergency treatment, a health care surrogate for a minor is authorized to consent to mental health treatment unless the document specifically provides otherwise. The appointment of a health care surrogate for a minor remains in place until the termination date provided in the designation (if any), the minor reaches the age of majority, or the designation is revoked.

The bill also creates a sample form for minors at s. 765.2038, F.S. (**section 11**).

The bill amends s. 743.0645, F.S., (**section 1**) the statute on other persons who may consent to medical care or treatment of a minor, to conform to the changes made in the bill. The bill also amends that statute to recognize that a power of attorney regarding consent to authorize health care for a minor, executed between July 1, 2001 and September 30, 2015, (the day before the effective date of this bill) will be recognized as authority to consent to treatment. A designation of health care surrogate or a power of attorney is deemed to include authority to consent to surgery or anesthesia unless those procedures are specifically excluded.

Other

The bill amends ss. 765.102 and 765.202, F.S., (**sections 3 and 8**) to specify that a right to consent to treatment of an individual (adult or minor) also includes the right to obtain health information regarding that individual. Section 765.101, F.S., (**section 2**) is amended to add a definition for the term "health information" to be consistent with the Health Insurance Portability and Accountability Act (known as "HIPAA"). The terms "health care," "health information," "minor's principal," "primary physician," and "reasonably available" are also added and defined. The definitions of the terms "advanced directive," "attending physician," "close personal friend," "health care decision," and "principal" are amended.

The term "surrogate" that is currently defined to mean "any competent adult expressly designated by a principal to make health care decisions" is amended to add "and receive health information. The principal may stipulate whether the authority of the surrogate to make health care decisions or to receive health information is exercisable immediately without the necessity for a determination of capacity or only upon the principal's incapacity as provided in s. 765.204." The phrase "on behalf of the principal upon the principal's incapacity" in the current definition is deleted.

The bill makes technical changes by revising references to the type of physician (i.e., attending or primary) consistent with the definitions in statutes related to advance directives, health care surrogates, pain management, palliative care, capacity, living wills, determination of patient condition, persistent vegetative state, and anatomical gifts. This change in terminology should have no practical effect.

Finally, technical and conforming changes are made throughout the bill.

The bill takes effect on October 1, 2015.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

In the bill's definition of the term "surrogate" is a statement of the delegated authority:

> The principal may stipulate whether the authority of the surrogate to make health care decisions or to receive health information is exercisable immediately without the necessity for a determination of capacity or only upon the principal's incapacity as provided in s. 765.204.

This authority does not contribute to clarifying who the surrogate is. It is substantive and would fit better in part II, relating to the health care surrogate.[13]

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 743.0645, 765.101, 765.102, 765.104, 765.105, 765.1103, 765.1105, 765.202, 765.203, 765.204, 765.205, 765.302, 765.303, 765.304, 765.306, 765.404, and 765.516.

This bill creates sections 765.2035 and 765.2038 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS/CS by Rules on April 20, 2015:
The CS adds language to the Designation of Health Care Surrogate form which provides when the principal and the surrogate's medical instructions are in material conflict, the principal's decision while possessing capacity supersedes the surrogate's decision. The CS also clarifies when a surrogate's authority commences and ends as the principal gains and loses capacity. It limits liability of the health care provider when relying upon a health care surrogate acting when the principal lacks capacity and provides that the effect of the surrogate's authority is only that of the principal. When the medical directions of the principal and surrogate conflict, the principal's decision supersedes the surrogate's decision.

CS by Judiciary on March 31, 2015:
The CS makes the following changes to the bill:

- Deletes the requirement that power of attorney documents affected by the changes in the bill must be executed before October 1, 2015.
- Reinstates the definition of "attending physician" and revises the meaning to the physician providing treatment and care of the patient while the patient receives treatment or care in a hospital defined in s. 395.002(12), F.S.
- Revises the definition of the term "close personal friend" to change the type of physician referenced from attending or treating to primary.
- Modifies the surrogate designation form to add instructions and notice of how to amend or revoke the surrogate designation.
- Adds the condition that an attending physician must notify the primary physician of his or her determination that the principal lacks capacity.

[13] *See* Office of Bill Drafting Services, The Florida Senate, *Manual for Drafting Legislation*, p. 45 (6th ed. 2009).

- Removes the caveat that even though a surrogate has been designated, self-determination of the principal is controlling and that the primary physician does not have to communication to the principal the decision made by the surrogate.

Changes the references to an attending and/or treating physician to references to a primary physician and makes other conforming changes.

B. Amendments:

None.