SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Date: April 8, 1998 Revised: _____ _____ _____ _____

Subject: Life-prolonging Techniques

	Analyst	Staff Director	Reference	Action
1.	Munroe	Wilson	HC	Favorable/CS
2.			JU	
3.				
4.				
5.				

I. Summary:

This bill substantially amends section 401.45, Florida Statutes, to provide that life-prolonging techniques may be withheld or withdrawn from a patient by an emergency medical technician or paramedic if evidence of a living will expressing the patient's wish not to receive life-prolonging procedures is presented to the emergency medical technician or paramedic and the declaration in the living will complies with specified procedures which include: a declaration of the patient's wishes that resuscitation efforts not be initiated in the event the patient suffers respiratory or cardiac arrest; the patient's full legal name, typed or printed; an effective date which predates the date emergency medical assistance is requested; under procedures specified in ch. 765, F.S., written verification that the patient has a terminal condition by the patient's attending physician, in consultation with a second physician, both of whom are licensed medical or osteopathic physicians; signed and dated by the patient, if competent, or if the patient is incompetent, by the patient's health care surrogate or legal guardian pursuant to the requirements of ch. 765, F.S.; and signed and dated by at least two witnesses.

The bill requires the Department of Health to adopt administrative rules governing the additional grounds for withholding or withdrawing resuscitation or life-prolonging techniques from a patient. The bill revises immunity from administrative action, criminal prosecution, or civil liability for withholding or withdrawing resuscitation or life-prolonging techniques.

II. Present Situation:

Chapter 765, F.S., provides procedures and definitions for health care advance directives. "Advance directive" means a witnessed written document or oral statement in which instructions are given by a patient, or in which the patient's desires are expressed, concerning any aspect of the patient's health care, and includes the designation of a health care surrogate, a living will, or

orders not to resuscitate issued under s. 401.45, F.S. "Principal" means a competent adult executing an advance directive and on whose behalf health care decisions are to be made. "Surrogate" means any competent adult expressly designated by a principal to make health care decisions on behalf of the principal upon the principal's incapacity.

Part II, ch. 765, F.S., is the "Florida Health Care Surrogate Act" and specifies procedures for the designation of a health care surrogate. Under the act, a written document designating a surrogate to make health care decisions for a principal must be signed by the principal in the presence of two subscribing adult witnesses. If the person executing a document to designate a health care surrogate is unable to sign the instrument, that person may, in the presence of witnesses, direct another person to sign his or her name. An exact copy of the instrument must be provided to the surrogate. The person designated as surrogate may not act as witness to the execution of the document designating the health care surrogate. At least one person who acts as a witness must be neither the principal's spouse nor a blood relative. 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 for the principal if the original surrogate is unwilling or unable to perform his or her duties. The principal's failure to designate an alternate surrogate will not invalidate the designation. If neither the designated surrogate nor the alternate surrogate is 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.

Section 765.204, F.S., provides procedures for the evaluation of the principal's capacity. A principal is presumed to be capable of making 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. If a principal's capacity to make health care decisions for herself or himself or provide informed consent is in question, the attending physician must evaluate the principal's capacity. If the attending physician concludes that the principal lacks such capacity, another physician must evaluate the principal's capacity. If the second physician agrees that the principal lacks the capacity to make health care decisions or provide informed consent, the health care facility must enter both physician's evaluations in the principal's clinical record and, if the principal has designated a health care surrogate, must notify the surrogate in writing that her or his authority under the instrument has commenced. The surrogate's authority remains in effect until a determination that the principal has regained capacity. Once the surrogate's authority has commenced, a surrogate who is not the principal's spouse must notify the principal's spouse and adult children if the principal's designation of the surrogate. If the attending physician determines that the principal has regained capacity, the surrogates authority ceases, but may recommence if the principal subsequently loses capacity.

Part III, ch. 765, F.S., is the "Life-Prolonging Procedure Act of Florida." The act specifies procedures for executing a living will and providing notice to a physician. Under the act, any competent adult may execute a living will or written declaration directing the providing, withholding, or withdrawal of life prolonging procedures in the event such person suffers from a

terminal condition. Any person executing a living will must signed it in the presence of two subscribing witnesses, one of whom is neither a spouse nor a blood relative of the person making the living will. If the person executing the living will is unable to sign the living will, one of the witnesses must subscribe that person's signature in the presence and at the direction of the person executing the living will. The person who executes a living will is responsible for providing notification to her or his attending or treating physician that the living will has been made. If the person who executes a living will is physically or mentally incapacitated when admitted to a health care facility, any other person may notify the physician or health care facility of the existence of the living will. An attending or treating physician or health care facility which is so notified of a patient's living will must promptly make the living will or a copy thereof a part of the patient's medical record. A living will, executed in accordance with the requirements established in the act, establishes a rebuttable presumption of clear and convincing evidence of the wishes of the maker of the living will.

Section 765.304, F.S., provides that if a person who made a living will expressing his or her desires concerning life-prolonging procedures has not designated a surrogate to execute his or her wishes concerning life-prolonging procedures or designated a health care surrogate, the attending physician may proceed as directed by the person in the living will. If a dispute or disagreement concerning the attending physician's decision to withhold or withdraw life-prolonging procedures arises, the attending physician may not withhold or withdraw life-prolonging procedures pending review under the procedures in s. 765.105, F.S. If a review of a disputed decision is not sought within 7 days following the attending physician's decision to withhold or withdraw life-prolonging procedures, the attending physician may proceed in accordance with the patient's instructions. Before proceeding in accordance with the patient's living will, it must be determined that: the patient does not have a reasonable probability of recovering competency so that the right could be exercised directly by the patient; the patient's physical condition is terminal; and any limitations or conditions expressed orally or in a written declaration have been carefully considered and satisfied.

Section 765.105, F.S., provides a mechanism for the patient's family, the health care facility, or the 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, to seek an expedited judicial intervention, if that person believes: the surrogate or proxy's decision is not in accord with the patient's known desires or the law; the advance directive is ambiguous, or the patient has changed his or her mind after execution of the advance directive; the surrogate or proxy was improperly designated or appointed, or the designation of the surrogate is no longer effective or has been revoked; the surrogate or proxy has failed to discharge duties, or incapacity or illness renders the surrogate or proxy incapable of discharging duties; the surrogate or proxy has abused powers; or the patient has sufficient capacity to make his or her own health care decisions.

Section 765.305, F.S., provides that in the absence of a properly executed living will, the decision to withhold or withdraw life-prolonging procedures from a patient may be made by a health care surrogate designated by the patient pursuant to procedures established in law unless the

designation limits the surrogate's authority to consent to the withholding or withdrawal of life-prolonging procedures. Before exercising the incompetent patient's right to forego treatment, the surrogate must be satisfied that: the patient does not have a reasonable probability of recovering competency so that the right could be exercised by the patient; and the patient's physical condition is terminal.

Part III, ch. 401, F.S., provides for the regulation of emergency medical transportation services. Section 401.45, F.S., prohibits a licensed emergency medical transportation service from denying needed prehospital treatment or transport for an emergency medical condition, except that pursuant to s. 401.45(3), F.S., resuscitation or life-prolonging techniques may be withheld or withdrawn from a patient by an emergency medical technician or paramedic if evidence of an order not to resuscitate by the patient's physician is presented to the emergency medical technician or paramedic in a manner provided by rule of the Department of Health.
The Department of Health has adopted an administrative rule outlining procedures for prehospital "Do Not Resuscitate Orders" (DNROs) (64E-2.031, F.A.C.). Under the rule, the department has specified forms for use with DNROs: to identify the patient; declare the patient's wishes that resuscitation efforts not be initiated if the patient suffers respiratory or cardiac arrest; include a statement that the patient has a terminal condition, as determined by the patient's attending physician, in consultation with a second physician; and contain the attending physician's directive to suspend efforts to resuscitate the patient and to direct the emergency medical service personnel to provide the patient with comfort care to alleviate pain and any other medically indicated care, short of CPR.

The rule provides procedures for the execution of a DNRO form by the patient or the patient's representative. If the patient is competent, the DNRO form must be signed by the patient. If the patient is not capable of making health care decisions or giving informed consent, then the form must be signed by either the patient's surrogate, the patient's court-appointed guardian; or by proxy under ch. 765, F.S. Before signing the DNRO form, the patient's health care surrogate, guardian, or proxy must be satisfied that: the patient does not have a reasonable probability of recovering competency so that this decision could be made directly by the patient; the patient would have made a similar decision not to be resuscitated under the circumstances; and the signature of the patient or the patient's representative on the DNRO form must be made in the presence of two subscribing witnesses. If the patient is incapable of making an informed decision about providing, withholding or withdrawal of a specific medical treatment because the patient is unable to understand the nature or consequences, or is unable to make a rational evaluation of the risks and benefits, the DNRO form must be signed by the attending physician. Before signing the form, the attending physician must evaluate the patient's capacity to make health care decisions and consult with a second physician regarding the patient's incapacity to make health care decisions.

Under the rule, emergency medical services (EMS) personnel must honor the DNRO when responding to a call for assistance, if the original or a copy of a DNRO executed according to department rule is presented. After responding to a call to provide care for a patient who has a DNRO executed in accordance with the department's rule, the EMS personnel must document:

the effective date of the DNRO; information pertaining to the witness, if one is used to establish the patient's identity; the name of the attending physician who signed the DNRO; and whether the patient signed the DNRO or a health care surrogate, guardian, or proxy. The emergency medical personnel responding to the patient who has a DNRO may not initiate CPR, but may initiate comforting, pain-relieving and any other medically indicated care short of resuscitative measures. If EMS personnel are presented with an invalid DNRO or in the absence of a DNRO, they must initiate CPR and other standard life-saving techniques. Emergency medical directors are authorized by department rule to develop protocols for not resuscitating in the absence of a valid DNRO which must be followed by the EMS personnel they supervise. Under s. 765.104, F.S., a DNRO may be revoked at any time by the patient or his or her designated health care surrogate by physical cancellation or the destruction of the DNRO form or by orally expressing a contrary intent, such as requesting that resuscitation measures be initiated.

Section 401.45, F.S., provides that any emergency medical service, medical director, or emergency medical technician or paramedic who acts under the direction of a medical director is not subject to criminal prosecution or civil liability, and has not engaged in negligent or unprofessional conduct, as the result of withholding or withdrawal of resuscitation or life-prolonging techniques from a patient pursuant to s. 401.45 (3) and any department rules adopted to administer the subsection.

III. Effect of Proposed Changes:

The bill amends s. 401.45, F.S., to provide that life-prolonging techniques may be withheld or withdrawn from a patient by an emergency medical technician or paramedic if evidence of a living will expressing the patient's wish not to receive life-prolonging procedures is presented to the emergency medical technician or paramedic and the declaration in the living will complies with specified procedures which include: seperately and specifically in enhanced bold letters providing a declaration of the patient's wishes that resuscitation efforts not be initiated in the event the patient suffers respiratory or cardiac arrest; the patient's full legal name, typed or printed; an effective date which predates the date emergency medical assistance is requested; under procedures specified in ch. 765, F.S., written verification that the patient has a terminal condition by the patient's attending physician, in consultation with a second physician, both of whom are licensed medical or osteopathic physicians; signed and dated by the patient, if competent, or if the patient is incompetent, by the patient's health care surrogate or legal guardian pursuant to the requirements of ch. 765, F.S.; and signed and dated by at least two witnesses. Neither of the witnesses may be: the patient's physician or consulting physician for purposes of determining the patient's terminal condition, the patient's health care surrogate, or any employee or agent of a facility licensed under ch. 393, F.S., or of a nursing home, long-term facility, assisted living facility, home health agency, adult day care center, hospice, or other facility licensed under ch. 400, F.S., under whose care the patient is in at the time of the emergency medical services response.

The bill requires the Department of Health to adopt administrative rules governing the additional grounds for withholding or withdrawing resuscitation or life-prolonging techniques from a patient.

The bill revises immunity from administrative action, criminal prosecution, or civil liability for withholding or withdrawing resuscitation or life-prolonging techniques. Under the bill, any emergency medical technician or paramedic who acts under the direction of a medical director, or any licensed emergency medical transportation service, physician, or medical director, is not subject to criminal prosecution or civil liability, and is not subject to disciplinary action under ch. 401, ch. 455, ch. 458, or ch. 459, F.S., as a result of acting in good faith to withhold or withdraw resuscitation or life-prolonging techniques from a patient pursuant to requirements under s. 401.45(3), F.S., and any administrative rules adopted by the Department of Health to administer the subsection.

The bill provides a July 1, 1998 effective date.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The provisions of this bill have no impact on public records or open meetings issues under the requirements of Article I, subsections 24(a) and (b) of the Florida Constitution.

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, subsection 19(f) of the Florida Constitution.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Emergency medical personnel may require additional training to administer the requirements of the bill for EMS personnel to withhold or withdraw resuscitation or life-prolonging procedures when presented with evidence of the patient’s wish not to receive life-prolonging procedures as expressed by a properly executed living will pursuant to the requirements under the bill.

C. Government Sector Impact:

The Department of Health will incur costs to implement and enforce the provisions of the bill providing an additional ground under which a patient who has a terminal condition may express a wish not to receive resuscitation or life-prolonging procedures when emergency medical personnel respond to a call regarding the patient's respiratory or cardiac arrest.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.