

Advance Directives for Essential Workers

This is an informational brochure and not specific legal advice

LIZZIE L. JOHNSON, ESQ.
Managing Attorney, Older Adult Programs
Community Legal Services of Mid-Florida, Inc.
Lizziej@clsmf.org | (407) 322-8983



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COMMUNITY LEGAL SERVICES: Service Area

Brevard

Citrus

Flagler

Hernando

Lake

Marion

Osceola

Orange

Putnam

Seminole

Sumter

Volusia

3

COMMUNITY LEGAL SERVICES: What We do

Elder Law

Veterans Benefits

Consumer

Home Preservation

Family Law

Children's Rights

Housing / Rental Counseling

Fair Housing

Public Benefits

Estate Planning

Medical Legal Partnership

Probate

Population by Age Category		
All Ages	20,798,816	100.0%
Under 18	4,230,910	20.3%
Under 60	15,293,216	73.5%
18-59	11,062,306	53.2%
60+	5,505,600	26.5%
65+	4,129,854	19.9%
70+	2,894,487	13.9%
75+	1,861,836	9.0%
80+	1,090,057	5.2%
85+	561,273	2.7%

Source: Office of Economic and Demographic Research (EDR), 2017

Population by Gender		
Male	2,500,346	45.4%
Female	3,005,254	54.6%

Source: EDR, 2017

English Proficiency	
With Limited English Proficiency ¹	467,396

Source: DOEA calculations based on EDR and 2011-2015 American Community Survey (ACS) Special Tabulation on Aging tabulated for AoA

Population by Race and Ethnicity		
White	4,791,394	87.0%
Black	589,657	10.7%
Other Minorities	124,549	2.3%
Total Hispanic	870,707	15.8%
White	812,786	14.8%
Non-White	57,921	1.1%
Total Non-Hispanic	4,634,893	84.2%
Total Racial and Hispanic Minorities ²	1,526,992	27.7%

Source: EDR, 2017

Financial Status		%
Below Poverty Guideline	600,597	10.9%
Below 125% of Poverty Guideline	876,740	15.9%
Minority Below Poverty Guideline	293,021	5.3%
Minority Below 125% of Poverty Guideline	411,139	7.5%

Source: DOEA calculations based on EDR and 2011-15 ACS data

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Health Care Planning: Anatomical Gifts Living Wills Designations of Healthcare Surrogate Healthcare Proxy

6

Objectives: Be Able to Answer Common Questions regarding Advance Directives

- ✓ What is a Living Will?
- ✓ What is a Designation of Health Care Surrogate?
- ✓ What is a Healthcare Proxy
- ✓ Who can be a health surrogate?
- ✓ What is the difference between a DNR and a Living Will?
- ✓ How can I revoke a Living Will or Designation of Healthcare Surrogate?
- ✓ What are the alternatives to advanced directives?

HEALTH CARE ADVANCE DIRECTIVES

Fla. Stat.
Chapter 765

PART I

GENERAL PROVISIONS(ss. 765.101-765.113)

PART II

HEALTH CARE SURROGATE(ss. 765.201-765.205)

PART III

LIFE-PROLONGING PROCEDURES(ss. 765.301-765.309)

PART IV

ABSENCE OF ADVANCE DIRECTIVE(ss. 765.401,
765.404)

PART V

ANATOMICAL GIFTS(ss. 765.510-765.547)

8 | Legislative Findings and Intent (*Fla. Stat. §765.102*)

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.
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, 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. A procedure 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.



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9 | Legislative Findings and Intent (*Fla. Stat. §765.102*)

4. Recognizes that for some the administration of life-prolonging medical procedures may result in only a precarious and burdensome existence . . . **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 decision for him or her in the event that such person should become incapacitated and unable to personally direct his or her health care.
4. Recognizes the need for all health care professionals to rapidly increase their understanding of end-of-life and palliative care.



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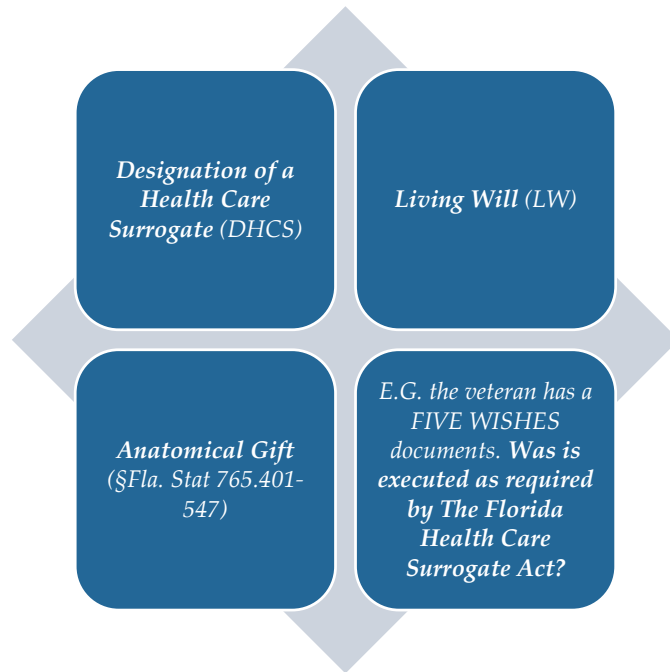
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Legislative Findings and Intent – Palliative Care (*Fla. Stat. §765.102(6)*)



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. 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 providers 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.



What are Advance Directives?

The Florida Health Care Surrogate Act
(Fla. Stat. §765.202 – 205)

A *witnessed* written document or oral statement in which the Principal provided instructions relating to his/her health care and health information desires ~ Fla. Stat. §765.101

12 **Terminology: *Health Care Decision*** (*Fla. Stat. §765.101(6)*)



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 health information of the principal reasonably necessary for a health care surrogate or proxy to make decisions involving health care and to apply for benefits.



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

13 **Terminology: *Incapacity or Incompetent*** (*Fla. Stat. §765.101(10)*)

The patient is physically or mentally unable to communicate a willful and knowing health care decision.

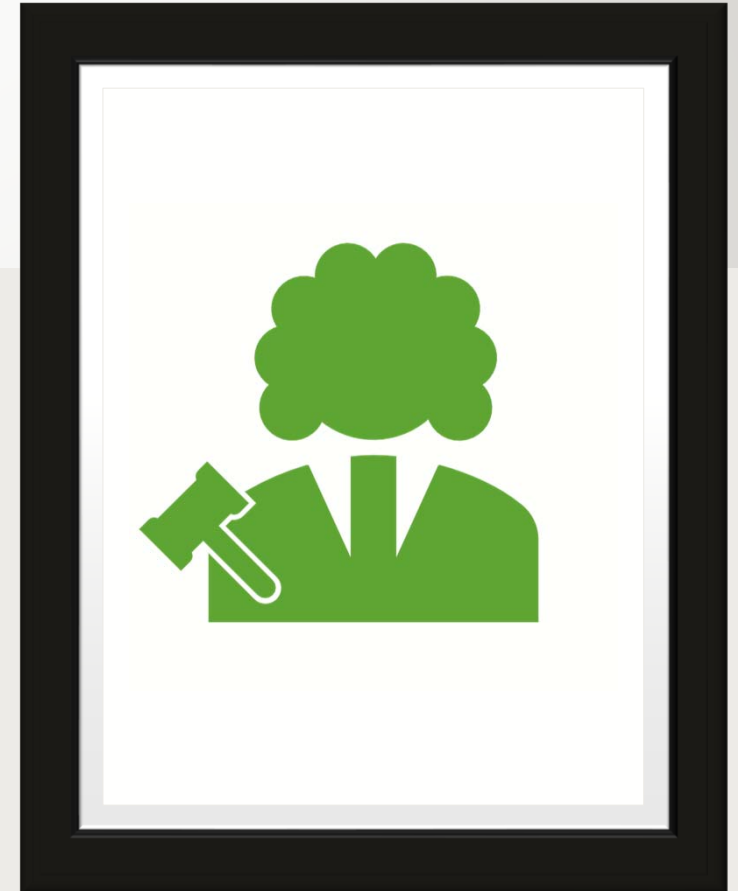
For the purposes of making an anatomical gift, the term also includes a patient who is deceased.

14

Terminology: *Informed Consent* (*Fla. Stat. §765.101(11)*)

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.

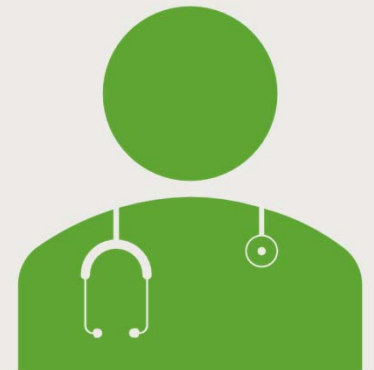
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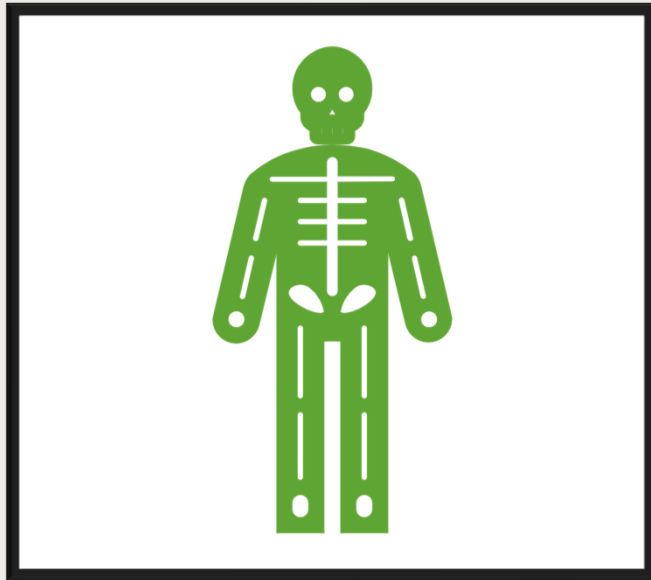
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Terminology: *Life-Prolonging Procedure* (*Fla. Stat. §765.101(12)*)

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.



16 | Terminology: *End-Stage Condition* (*Fla. Stat. §765.101(4)*)



An irreversible condition that is caused by injury, disease, or illness which has resulted in progressively severe and permanent deterioration, and which, to a reasonable degree of medical probability, treatment of the condition would be ineffective.

Terminology:
*Terminal
Condition*
(*Fla. Stat.*
§765.101(22))

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.

18

Terminology: *Persistent Vegetative State* (*Fla. Stat. §765.101(15)*)

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.



19 **Terminology: *Surrogate*** (*Fla. Stat. §765.101(21)*)

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 to make health care decisions or to receive health information is exercisable immediately without the necessity for a determination of incapacity or only upon the principal's incapacity as provided in s. 765.204.

20 | **Terminology: *Anatomical Gifts*** (*Fla. Stat. §765.511(2)*)

Anatomical gift” or “gift” means a donation of all or part of a human body to take effect after the donor’s death and to be used for transplantation, therapy, research, or education.



21 | Terminology: *Proxy* (*Fla. Stat. §765.101(19)*)

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.



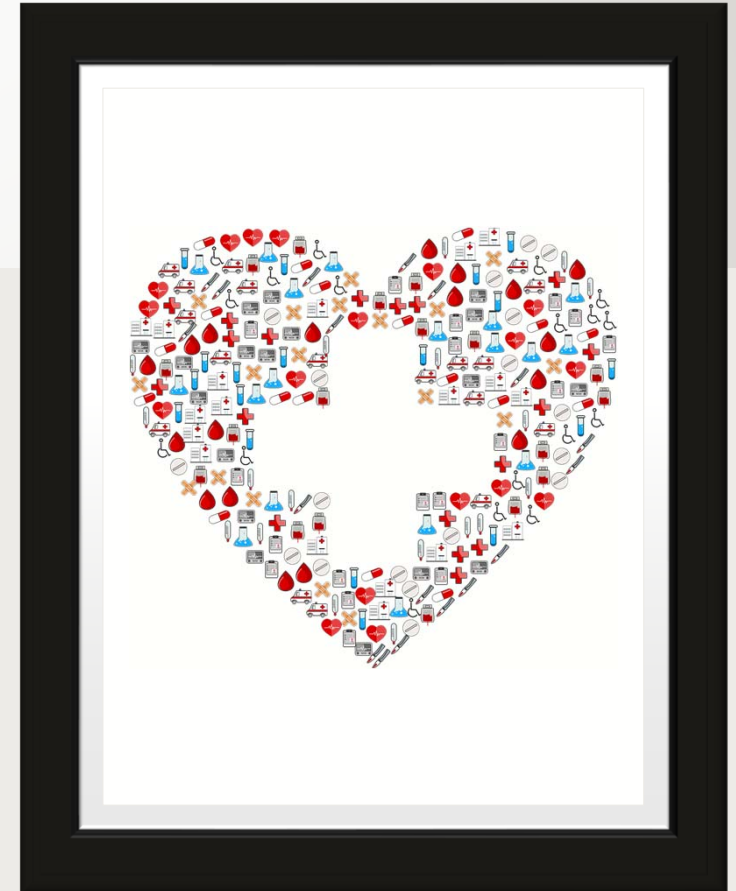
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Medical Proxy (*Fla. Stat. §765.401*)

Without a written advance directive, a **healthcare proxy** will be appointed. The Statutory priority is below

1. Judicially appointed guardian;
2. Spouse;
3. Adult child;
4. Parent;
5. Adult sibling;
6. Adult Relative (*regular contact, special care, etc.*);
7. Close Friend; or
8. Clinical Social Worker or graduate of a court-approved guardianship program.

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Designation of Health Care Surrogate (DHCS) (*Fla. Stat. §765.202*)

Suggested form of a Health Care Surrogate, Florida Statute Section 765.201

Designation of Health Care Surrogate

Name _____

In the event I have been determined to be incapacitated to provide informed consent for medical treatment and surgical and diagnostic procedures, I wish to designate, as my surrogate for health care decisions:

Name _____
 Street Address _____
 City _____ State _____ Zip _____
 Phone _____

If my surrogate is unwilling or unable to perform his or her duties, I wish to designate as my alternate surrogate:

Name _____
 Street Address _____
 City _____ State _____ Zip _____
 Phone _____

I fully understand that this designation will permit my designee to make health care decisions and to provide, withhold, or withdraw consent on my behalf, or apply for public benefits or clarify the use of health care, and to authorize my admission to or transfer from a health care facility.

Additional instructions (optional): _____

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 surrogate, so they may know who my surrogate is:

Name _____
 Name _____
 Signed _____

Witnesses
 1. _____
 2. _____

At least one witness must not be a husband or wife or a blood relative of the principal.

This form offered as a courtesy of The Florida Bar and the Florida Medical Association

02/04

A written document
designating a surrogate to
make the Principal's health
care decisions and/or receive
health information.

Signed by the Principal in the
presence of two (2) witnesses.
(At least one witness cannot be
related by blood or a spouse.) No
notary is required – but may be a
good idea.

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 must be given
to the health care surrogate.

24 | DHCS: *Additional Considerations* (*Fla. Stat. §765.202*)

If neither the designated surrogate nor the alternate surrogate is willing, able, or reasonably available to make health care decisions on behalf of the principal and in accordance with the principal's instructions, a Proxy maybe Appointed.

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.

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.

A principal may stipulate in the document that the authority of the surrogate to receive health information and/or make health care decisions, is exercisable immediately without the necessity for a determination of incapacity as provided in s. 765.204.

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

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.

25

DHCS: *Suggested Form for Adults; and Minors* (*Fla. Stat. §765.203; §765.2038*)

- The statutory language is a starting point, NOT the ending point.
- The form should be tailored to each client's needs and wishes.
- As attorneys, we have an ethical duty to guide our clients and provide sound counsel.

Health Care Proxy

(1) I, _____
hereby appoint _____
(name, home address and telephone number)

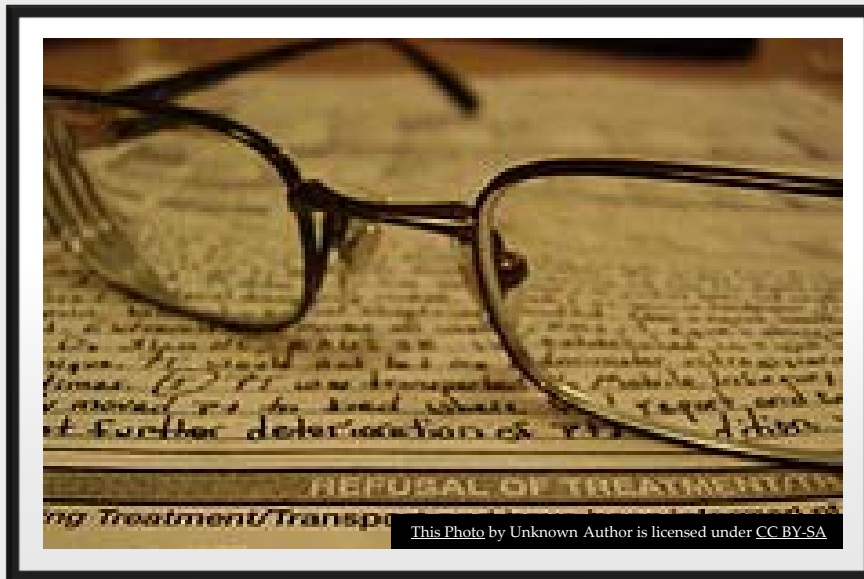
as my health care agent to make any and all health care decisions for me, except to the extent that I state otherwise. This proxy shall take effect when and if I become unable to make my own health care decisions.

(2) Optional instructions: I direct my agent to make health care decisions in accord with my wishes and limitations as stated below, or as he or she otherwise knows. (Attach additional instructions on separate sheet.)

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Living Will: *Life Prolonging Procedure Act of Florida* (*Fla. Stat. §765.301-309*)



Any *competent adult*

Written declaration directing the *providing or withdrawal of life-prolonging procedures*

In the event that the person has (or is in)

1. A **terminal condition**,
2. An **end-stage condition**, or
3. A **persistent vegetative state**

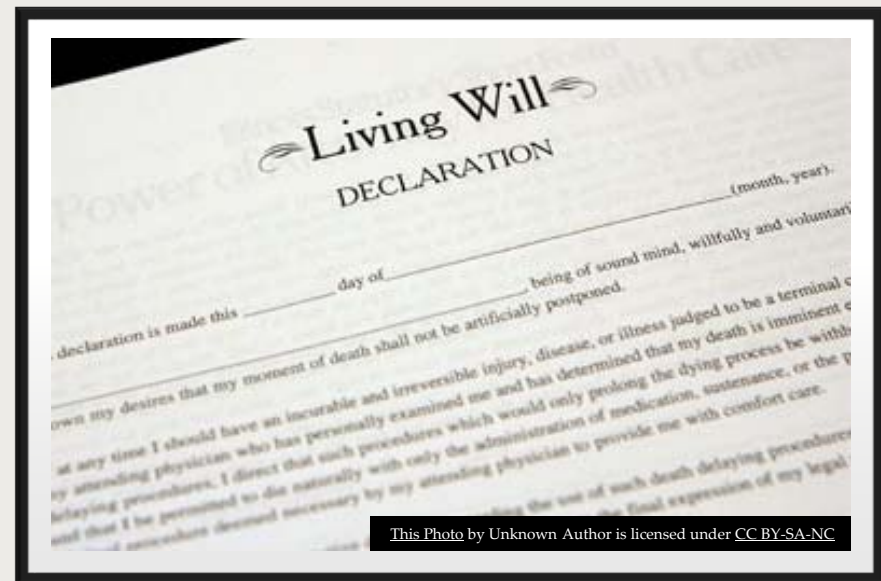
Signed by the Principal in the presence of *two (2) witnesses*. (At least one witness cannot be related by blood or a spouse.) No notary is required – but may be a good idea.

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.

27 | LW: *Suggested Form* (*Fla. Stat. §765.303*)

- The statutory language is a starting point, NOT the ending point.
- The form should be tailored to each client's needs and wishes.
- As attorneys, we have an ethical duty to guide our clients and provide sound counsel.

Note: The principal's failure to designate a surrogate shall not invalidate the living will.



FIVE WISHES®

MY WISH FOR:

The Person I Want to Make Care Decisions for Me when I Can't

The Kind of Medical Treatment I Want or Don't Want

How Comfortable I Want to Be

How I Want People to Treat Me

What I Want My Loved Ones to Know

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A living will, executed pursuant to this section, establishes a rebuttable presumption of clear and convincing evidence of the principal's wishes. S.765.302(3)

This document may be considered an advanced directive IF it strictly follows the law.

Upon review, I often find the form non-compliant (e.g. not executed, no witnesses, incomplete, wholly blank, etc.)

29 LW: Procedure for Living Will Invocation (Fla. Stat. §765.304)

The principal *does not have a reasonable medical probability of recovering capacity* so that the right could be exercised directly by the principal.

The principal *has a terminal condition, has an end-stage condition, or is in a persistent vegetative state.*

Any limitations or conditions expressed orally or in a written declaration have been carefully considered and satisfied.

30

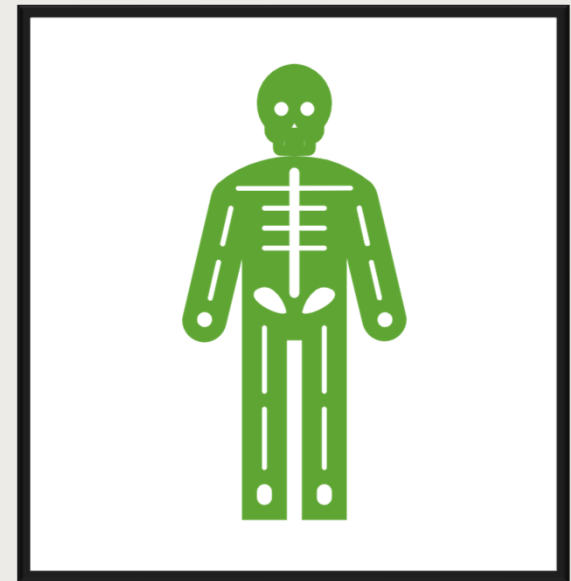
LW: Determination of Patient's Condition Must be Documented!!! (Fla. Stat. §765.306)

In determining whether the patient has a terminal condition, has an end-stage condition, or is in a persistent vegetative state or may recover capacity, or whether a medical condition or limitation referred to in an advance directive exists, the patient's primary physician and at least one other consulting physician must separately examine the patient.

The findings of each [physician] must be documented in the patient's medical record and signed by each examining physician before life-prolonging procedures may be withheld or withdrawn.

31 | **Anatomical Gifts** (*Fla. Stat. §765.510-547*)

Anatomical gift” or “gift” means a donation of all or part of a human body to take effect after the donor’s death and to be used for transplantation, therapy, research, or education.



32

Anatomical Gifts: *Legislative Declaration* (*Fla. Stat. §765.510*)

Because of the rapid medical progress in the fields of tissue and organ preservation, transplantation of tissue, and tissue culture, and because it is in the public interest to aid the medical developments in these fields, the Legislature in enacting this part intends to encourage and aid the development of reconstructive medicine and surgery and the development of medical research by facilitating premortem and postmortem authorizations for donations of tissue and organs. It is the purpose of this part to regulate the gift of a body or parts of a body, the gift to be made after the death of a donor.



33 | **Anatomical Gifts: *The Devise*** (*Fla. Stat. §765.514*)

1. Expressing the wish in a Last Will & Testament
2. Expressing the wish in an advance directive
3. Expressing the wish in a written document signed & witnessed by two prescribing witnesses in the donor's presence.
4. Signing an organ and tissue donor card
5. Registering online with the donor registry [FL]
6. Signifying an intent to donate one's driver license or Id card issued by the DMV. *Revocation, suspension, expiration, or cancellation of the license or Id card does not invalidate the gift.*



34

Anatomical Gifts: *Legislative Declaration* *(Fla. Stat. §765.510)*

Because of the rapid medical progress in the fields of tissue and organ preservation, transplantation of tissue, and tissue culture, and because it is in the public interest to aid the medical developments in these fields, the Legislature in enacting this part intends to encourage and aid the development of reconstructive medicine and surgery and the development of medical research by facilitating premortem and postmortem authorizations for donations of tissue and organs. It is the purpose of this part to regulate the gift of a body or parts of a body, the gift to be made after the death of a donor.



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Anatomical Gifts: TIPS

(Fla. Stat. §765.510-547)

- Review the Client's DL to confirm whether DMV has such a designation.
- The client may need to revoke the designation **(in writing)** if it appears in error or they no longer want said gift.
- Refer the client to the Anatomical Gift Statutes for a list of one's rights



36

Health Surrogate Responsibilities, *unless Limited by the Principal* (Fla. Stat. §765.205)

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

Consult with appropriate health care providers to provide informed consent

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. **

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

Received access to the Principal's appropriate health information; and release health information for continuity of care.

Apply for public benefits (e. g. Medicare) 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, make such application a condition of continued care if the principal, if capable, would have refused to apply.

37 | Health Surrogates: *Restrictions on Consent* (*Fla. Stat. §765.113*)

Unless the principal *expressly* delegates such authority to the surrogate in writing, or by court order (see Fla. Prob. Rule 5.900), a surrogate or proxy may not provide consent for:

- (1) Abortion, sterilization, electroshock therapy, psychosurgery, experimental treatments 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).





The Principal is presumed to have capacity to make his/her own health care decisions
UNLESS incapacitated.



Incapacity may not be inferred from the person's voluntary or involuntary hospitalization for mental illness or from her or his intellectual disability.



Physician can evaluate the Principal to determine if they have capacity.



Each physician or health care provider must clearly communicate to a principal with decision-making capacity the treatment plan and any change to the treatment plan prior to implementation of the plan or the change to the plan.

38 Advance Directives: Required Legal Capacity *Fla. Stat. §765.204)*

39

Health Surrogates: *Immunity from Liability* (*Fla. Stat. §765.109*)



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.



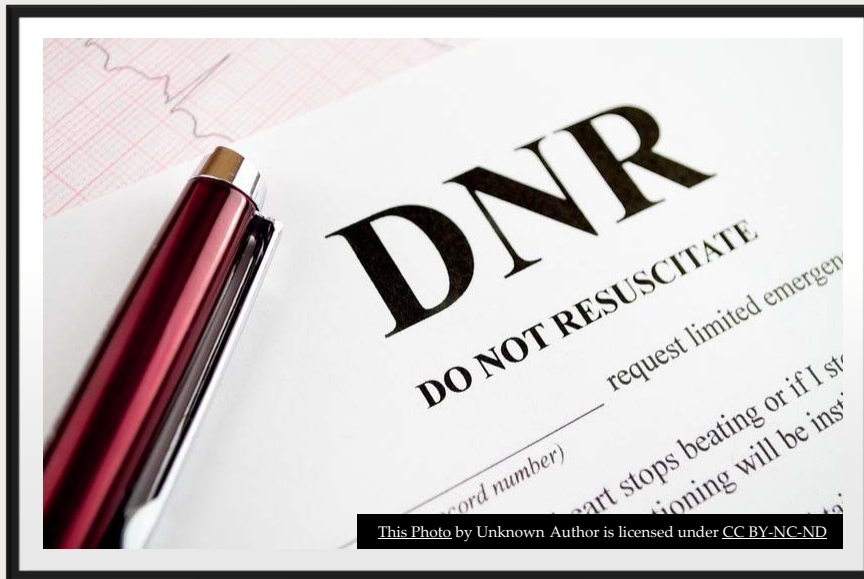
The surrogate or proxy who makes a health care decision on a patient's behalf, pursuant to this chapter, is not subject to criminal prosecution or civil liability for such action



Must establish 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.

40

Do Not Resuscitate Order: *It is NOT an Advance Directive*



A Do Not Resuscitate Order (DNRO) is not an advance directive!

Under Florida, a Do Not Resuscitate Order must be issued by a Physician in *strict* compliance with Florida law!!!

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Advance Health Care Planning Alternatives

The following documents are limited to the purpose for which they are designed and *may* limit the decision-making powers for a health surrogate:



Power of Attorney
(*Limited, General or Durable*)



Anatomical Gift



Appointment of a court appointed guardian advocate or legal guardian to make the Principals health care decisions



DNRO



Appointment of a Medical Proxy

Advance Directives: Mental Health Concerns

- ✓ Access mental health records
- ✓ Consent (or refuse) medications, dosage limits, etc.
- ✓ Consent (or refuse) psychiatric treatment
- ✓ Designation of treatment setting
- ✓ Designate choice of physician
- ✓ Preferences regarding the *use of physical restraints, seclusion, chemical sedation*
- ✓ Consent (or refuse) experimental treatments
- ✓ Consent (or refuse) nonpharmacological modalities (e.g. electroconvulsive therapy)
- ✓ Preference for a lengthier hospital stay VS aggressive treatment

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Preservation of Existing Rights

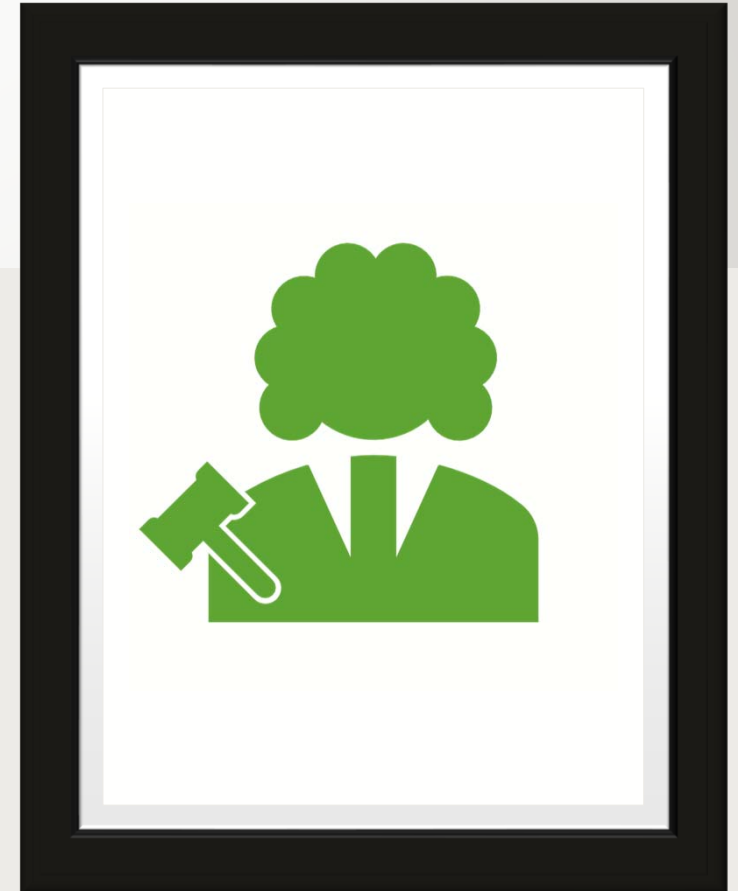
(Fla. Stat. §765.106)

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.

44 | Existing Advance Directives (*Fla. Stat. §765.103*)

Any advance directive made prior to October 1, 1999, shall be given effect as executed, provided such directive was legally effective when written.

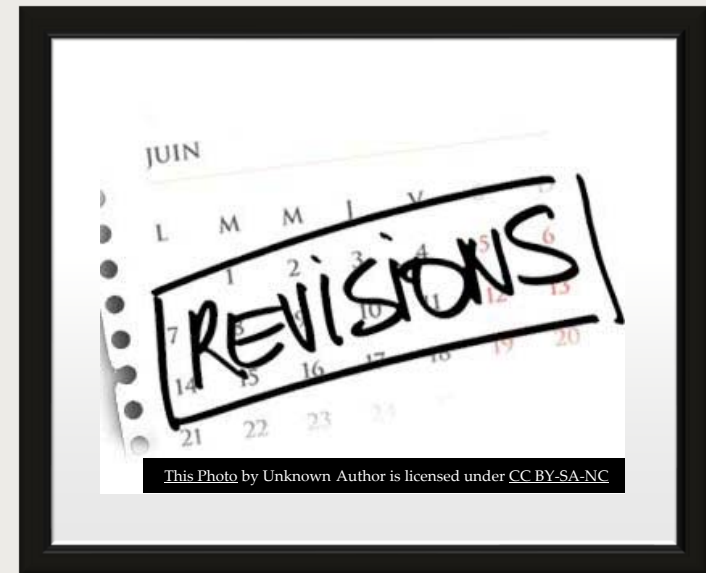
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Advance Directives: *Amendment or Revocation* (*Fla. Stat. §765.104*)

1. Executing a new documents
2. Physical destruction of the document by the Principal (or at his/her instruction)
3. Oral amendment or revocation
4. Divorce/Annulment to the agent, unless the document states otherwise.



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Advance Directives: *Termination*

⚙️ The Principal revokes it

👤 The Health Surrogate disavows

🚫 There is NO alternate agent

📄 Divorce, unless the document states otherwise

⚖️ By Court Order (revocation, modification , or suspension) s. 765.205(3)

🪦 The Principal dies

Practitioner's Tips: Things to discuss with clients during prior to execution

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What conditions activate the Living Will?



What Conditions active the Designation of Health Care Surrogate?



Who the primary and alternate agents are?



How is the Living Will modified or revoked?



How is the Designation of Health Care Surrogate modified or revoked?



What is the *difference* between a DNR and an Advance Directive?



Who should receive copies of the Advance Directives?