Chapter 765 Revisited: Florida's New Advance Directives Law

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FLORIDA’S NEW ADVANCE DIRECTIVES LAW

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CHAPTER 765 REVISITED: FLORIDA'S NEW ADVANCE DIRECTIVES LAW

META CALDER*

\[\textit{Dying is personal. And it is profound. For many, the thought of an ignoble end, steeped in decay, is abhorrent. A quiet, proud death, bodily integrity intact, is a matter of extreme consequence.}^{1}\]

\[\textbf{During} \textit{the 1992 session, the Florida Legislature again revisited its approach to the regulation of substituted health care decision making for incapacitated patients, including the decision not to administer life-prolonging procedures to terminally ill patients. This was the result of several events, including the September 1990 decision by the Florida Supreme Court in} \textit{In re Guardianship of Browning}.^{2} \textit{This Article seeks to trace the evolution of the 1992 statute by chronologically examining the interplay between the Florida court decisions that recognize a fundamental individual right to control medical treatment decisions and the legislative response to those decisions. It does not seek to critically analyze legalistic, philosophic, or ethical doctrines except to examine how judicial perspectives and statutory law play out against each other.}

\[\text{Florida is unique in that, in 1969, it was the first state to attempt \textit{"death with dignity"} legislation.}^{3} \text{However, that early initiative was lost and it was not until 1984 that the state finally passed the Life-Prolonging Procedure Act.}^{4} \text{This was four years after the Florida Supreme Court recognized a constitutionally based privacy right of self-determination over health care decisions in} \textit{Satz v. Perlmutter},^{5} \text{and only days before the court issued its opinion in} \textit{John F. Kennedy} \]

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The author wishes to extend special thanks to Warren Wilson, Legislative Intern, 1991-92, and Mike Hansen, Staff Director, Committee on Health Care, Florida House of Representatives.

2. 568 So. 2d 4 (Fla. 1990).
4. Ch. 84-58, 1984 Fla. Laws 136 (codified at FLA. STAT. ch. 765 (Supp. 1984)).
5. 379 So. 2d 359 (Fla. 1980).
Memorial Hospital, Inc. v. Bludworth, extending that right to incompetent, as well as competent, persons. Following the passage of the Life-Prolonging Procedure Act, the Legislature then spent more than half a decade debating whether the right to refuse life-prolonging treatment also applied to the administration of artificial sustenance. The Florida Supreme Court’s 1990 opinion in Browning made clear that artificial nutrition and hydration could be refused along with all other medical treatment. The 1992 legislation, incorporating all forms of advance directives in a single chapter, is in many ways a significant advance; however, it still trails the judicial vision and will require further refinement.

I. FLORIDA BEFORE BROWNING

Florida began its odyssey with “right to die” legislation in the late sixties. Given the existing social milieu that prided itself on questioning social taboos and championing the individual over entrenched institutional values, it would be expected that the explosion in medical technology and the questionable practice and cost of prolonging life past the point of meaningful existence would lead to a renewed interest in euthanasia and patient’s rights. Missing was the firm legal rationale that allowed both the medical profession and the courts to permit what was logically the only merciful alternative in hopeless situations—allowing the patient to die naturally. Legal, medical, and ethical writers became immersed in the process of evolving a rationale for permitting physicians, in certain defined circumstances, to allow their patients to die without doing everything medically possible. By the 1950s, the Catholic church had begun to differentiate between “ordinary” and “extraordinary” means of prolonging life, 6. 452 So. 2d 921 (Fla. 1984). House Bill 127 passed both the House and Senate on May 17, 1984, and was signed by the Governor on May 29, 1984. Bludworth was handed down on May 25, 1984.

7. See infra Part I.D.

8. In re Guardianship of Browning, 568 So. 2d 4, 11 n.6 (Fla. 1990).


12. This distinction has been significant in the development of a procedure for permitting the withdrawal of medical treatment in hopeless cases. See Sheryl L. Havens, Comment, In re Living Will, 5 Nova L.J. 445, 452-54 (1981) (discussing this distinction). Havens writes: “Ordinary treatment is usually described as treatment that offers a reasonable benefit without excessive pain, expense or inconvenience. Extraordinary treatment is treatment that offers no reasonable benefit and cannot be used without excessive pain, expense or inconvenience.” Id. at
finding the latter not morally obligatory.\footnote{13} The medical profession was still resistant; physicians were reluctant to surrender their established domain over such decisions. They argued that such choices should be left where they were—safely in the hands of those who knew best.\footnote{14} The problem was that the decisions were not always made, or they were made inconsistently, based either on the physician's fear of liability or on the physician's personal views of a doctor's duty to keep patients alive, rather than on the patient's decision to forego extraordinary treatment when the prognosis was obviously hopeless.\footnote{15} There was something fundamentally wrong about surrendering personal control over what is really a person's last great adventure, thus denying the individual the opportunity to face his or her final act with dignity.

A. Representative Walter Sackett and the Right To Die with Dignity

Florida's struggle with "right to die" legislation started where it finally ended, in the Florida Constitution.\footnote{16} Then-Representative Walter W. Sackett,\footnote{17} a physician and surgeon from Miami, led the state's—and the country's—first stabs at legislation permitting terminally ill patients to forego the technological advances of modern medicine. This came in the late 1960s in the form of a proposed amendment that added a right "to be permitted to die with dignity" to the enumerated

\footnote{452 n.17. Naturally, what is ordinary or extraordinary will vary from patient to patient and as medical science progresses. Id. at 454. See also In re Quinlan, 355 A.2d 647, 667-68 (N.J. 1976); Kaplan, supra note 3, at 51, 61-63, 83-86. In recent years this distinction has largely been abandoned. See President's Comm'n for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Deciding To Forego Life-Sustaining Treatment: A Report on the Ethical Medical, and Legal Issues in Treatment Decisions 82-89 (1983) [hereinafter President's Comm'n]. The Florida Supreme Court abandoned the distinction in In re Guardianship of Browning, 568 So. 2d 4, 11 n.6 (Fla. 1990).}

\footnote{13. See Quinlan, 355 A.2d at 658, for a discussion of Pope Pius's address to anesthesiologists on November 24, 1957. See also Havens, supra note 12, at 453 n.25; Pius Gives View on Saving Dying; Tells When Doctors May Give Up, N.Y. Times, Nov. 25, 1957, at A1, A20.}


\footnote{16. Ultimately, the Florida Supreme Court grounded the right to refuse medical treatment in article I, § 23 of the Florida Constitution. See In re Guardianship of Browning, 568 So. 2d 4, 10 (Fla. 1990).}

\footnote{17. Dem., Miami, 1966-1976. Representative Sackett developed a national reputation as a pioneer in the area of "death with dignity" legislation.}
declaration of rights listed in article I, section 2 of the Florida Constitution. 18

Unable to move the resolution 19 out of committee, Sackett changed tactics in 1970 20 by offering legislation 21 based on a legislatively recognized right to "die with dignity." 22 Sackett's bill permitted any person, with the same formalities required for the execution of a will, to execute a document directing "that his life shall not be prolonged beyond the point of a meaningful existence." 23 To be effective, the document was to be recorded with the clerk of the circuit court. In the event the person was unable to make the decision, the choice could be made by the spouse or immediate kin of the incapacitated patient, or, if no kin was available, by three physicians with the approval of a circuit judge, if the three physicians agreed that prolonging life was meaningless. 24 This was a distinctive and controversial aspect of Sackett's bill because it meant that the patient might not have participated in the decision to cease further medical treatment; thus, it theoretically allowed the withdrawal of life-prolonging treatment of the profoundly handicapped, minors, and other incompetents if the family or physicians concluded that continued life was pointless. 25

Although the 1970 bill died, it was offered again in 1971 26 and 1972. 27

18. All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to be permitted to die with dignity, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition, and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race or religion.


House Joint Resolution 2575 (1976) (offered by Representatives Richard Hodes, Democrat, Tampa, 1966-1984, and Sackett) also contained a series of "whereas" clauses that pointed out that the extreme cost associated with uselessly prolonging life results in the inability to provide needed systems to those who could be saved. HJR 2575 (1976) at 1.

20. Coincidentally, this also followed Luis Kutner's revolutionary article, Due Process of Euthanasia: The Living Will, A Proposal, 44 IND. L.J. 539 (1969), proposing a document, or living will, that would express a person's desires about the administration of extraordinary medical procedures that serve only to prolong the process of dying.


23. Id. at 2.

24. Id. The 1971 and 1972 versions of the bill, introduced as House Bill 68 and House Bill 2614, respectively, deleted the provision requiring circuit judge approval.

25. See infra text accompanying notes 39-44.


27. Fla. HB 2614 (1972). Representative Sackett also offered a resolution in 1972, Florida
In 1972 a committee substitute for Sackett's bill was placed on the calendar. In addition, the power to execute a document was restricted to persons eighteen or older who had been declared terminally ill by two physicians. The document could only be acted upon if the person had been adjudged incompetent by a court. The provision permitting the immediate family or three physicians to make the decision was removed. Immunity from liability for physicians acting in good faith and without negligence, when they relied on such documents, was added. Persons who participated in the execution of the document were deemed not to be assisting another in committing suicide. Finally, a provision was added establishing a revocation procedure.

Sackett came closest to success in 1973 when Florida House Bill 407 passed the House. The bill retained all the provisions of the 1972 bill except the requirement that a court adjudicate a person incompetent. Representative Sackett continued to offer "death with dignity Resolution 2830, which proposed that then-Governor Askew create a commission to study and make recommendations concerning various issues related to the process of death: a definition of death, intrauterine death, euthanasia, death with dignity, capital punishment, and suicide. The resolution died in committee. Fl. Leg., History of Legislation, 1972 Regular Session, History of House Bills at 180, HR 2830.


29. "As used in this act terminal illness means any illness that would result in natural expiration of life regardless of the use or discontinuance of medical treatment to sustain the life processes." Fl. CS for HB 2614 § 1 (1972). This definition was extremely narrow and would not have permitted the withdrawal of treatment from a person such as Karen Ann Quinlan or Nancy Cruzan whose life could be indefinitely sustained through the administration of artificial life-sustaining procedures. See Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841 (1990); In re Quinlan, 355 A.2d 647 (N.J. 1976).

30. Fl. CS for HB 2614 (1972).

31. Id.

32. Id.

33. Id.

34. Id.

35. Id. Two people had to witness the revocation.

36. Fl. HB 407 (1973). An amended version of House Bill 407 was passed by the House and was referred to the Senate Committee on Judiciary, where it remained upon adjournment. A companion bill, Senate Bill 253 (1973), was filed by Senator Ralph Poston, Democrat, Miami, 1966-1978. Reported favorably with amendment by the Senate Committee on Health and Rehabilitation Services, it died on calendar. Fl. Leg., History of Legislation, 1973 Regular Session, History of Senate Bills at 72, SB 253. As of 1975, this was the only bill of this type in the country to have passed an entire branch of the Legislature. Kaplan, supra note 3, at 56.

37. In addition, for the first time Sackett's bill did not include the provision basing the legislation on a right to die with dignity.

Although the original bill filed in 1973 revived the 1970 provision permitting the immediate family or three physicians to make the decision in the event the terminally ill person was unable to execute a document directing that medical treatment be discontinued, this addition was
bills” through 1976, when he left the Legislature.38 Because Representative Sackett’s vision included discontinuing the medical treatment of the severely handicapped, as well as the terminally ill,39 his pioneering attempts to adopt “death with dignity” legislation were strongly resisted by the Florida Association of Retarded Citizens,40 the Florida Catholic Conference,41 and the Florida Medical Association.42 This conflict highlighted one of the most serious defects in these early legislative attempts. Sackett’s bills could have permitted the patient’s family or physician to conclude that a patient’s life was not worth living in the absence of the individual’s express direction.43 It was therefore conceptually difficult to avoid fears that decisions to withdraw treatment would be based on a belief that a person would be better off dead, rather than based on the individual’s choice to forego further

amended out on the floor and was not included in the version sent to the Senate. FLA. H.R. JOUR. 580 (Reg. Sess. 1973).

38. Florida House Bill 239 (1975) and Florida House Bill 3703 (1976) each contained a new provision guaranteeing immunity to medical facilities as well as to physicians who participated in the execution of a document directing that medical treatment be discontinued. The provisions required that the person executing a document be at least 18 years old and terminally ill, stated that cooperation did not imply facilitation of suicide, and included a procedure for revocation. Senate Bill 513 (1976), an identical companion bill to House Bill 3703, was filed by Senator Julian Lane, Democrat, Tampa, 1967-1976.

An identical bill, Florida House Bill 374, was offered in 1977 by Representative Donald Hazelton, Democrat, West Palm Beach, 1970-1978. Hazelton briefly took up the gauntlet after Sackett left the House.

Representative Hazelton offered an altered version of Sackett’s bill in 1978, Florida House Bill 8, which included a “declaration” form to be filed with the clerk of the county at least 30 days before the cessation of extraordinary treatment. Interestingly, the request to withdraw life-sustaining mechanisms was tied to “extensive brain damage.” Id. Also included for the first time was a provision providing that the making and carrying out of a directive would not impair the terms of an existing life insurance policy. Id.


42. See Recommendations of the Judicial Council, supra note 14; Evans, supra note 14.

43. See supra note 24 and accompanying text.
treatment. The future judicial doctrine of substituted judgment, even with all of its flaws, served the important function of placing the locus of decision making within the individual rather than in the state, family, or public opinion.44

Also missing in these bills and resolutions was a legal or constitutional rationale recognizing a personal right to control medical treatment decisions in terminal situations. Without that support, the ability to enforce a person’s desire that life-sustaining procedures not be administered—versus the opposing interests of the state or family—was left in doubt. Subsequent court proceedings that placed decisions to forego life-prolonging procedures within the domain of the constitutional right to privacy and/or the common law doctrine requiring “informed consent” to medical treatment provided that legitimacy.45

B. Quinlan, Saikewicz, Perlmutter, and California

On March 31, 1976, the New Jersey Supreme Court decided In re Quinlan.46 For the first time, a state supreme court based the right to forego extraordinary life-prolonging procedures on a constitutionally based right to privacy.47 The court recognized that although the State had an interest in “the preservation and sanctity of human life and defense of the right of the physician to administer medical treatment according to his best judgment,”48 the State’s interest “weakens and the individual’s right to privacy grows as the degree of bodily invasion increases and the prognosis dims.”49

Remarkably, the court held that because of the inability to discern Karen Quinlan’s choice in whether to disconnect her respirator, that

44. In re Guardianship of Browning, 568 So. 2d 4, 13 (Fla. 1990).
45. See infra notes 46-137 and accompanying text.
46. 355 A.2d 647 (N.J. 1976). Karen Ann Quinlan was left in a chronic persistent vegetative state from using a combination of drugs and alcohol. Assured that there was no hope of her recovering competency, her father, Joseph Quinlan, a devout Catholic, sought to be appointed Karen’s guardian with the express power to authorize the discontinuance of all extraordinary medical procedures. Id. at 653-56.
47. While the United States Supreme Court had recognized an individual privacy right with regard to contraception, Griswold v. Connecticut, 381 U.S. 479 (1965), and abortion, Roe v. Wade, 410 U.S. 113 (1973), this was the first time a court directly associated the privacy right with a terminally ill person’s decision to be allowed to die naturally. For a more thorough discussion of the evolution of the constitutional right to privacy in “right to die” cases see Developments in the Law—Medical Technology and the Law, VI. The Right To Refuse Medical Treatment, 103 HARV. L. REV. 1643, 1661-76 (1990) [hereinafter Right To Refuse].
48. Quinlan, 355 A.2d at 663.
49. Id. at 664.
right could be "asserted in her behalf by her guardian." The court reasoned that if the decision to terminate a noncognitive, vegetative existence "is regarded as a valuable incident of her right of privacy . . . then it should not be discarded solely on the basis that her condition prevents her conscious exercise of the choice." Thus, the only way to prevent the destruction of the right "is to permit the guardian and family of Karen to render their best judgment . . . as to whether she would exercise it in these circumstances." The court explained that this decision should be accepted by society because the overwhelming majority "would . . . in similar circumstances, exercise such a choice in the same way for themselves or for those closest to them." Finally, the court directed that such decisions should be kept within the patient-doctor-family relationship, subject to review by a hospital "ethics committee" or the like, rather than requiring a cumbersome court procedure.

A year and a half later, the Massachusetts Supreme Judicial Court held in Superintendent of Belchertown State School v. Saikewicz that a court-appointed guardian with the authority to make health care decisions for a ward of the state could decide to forego chemotherapy treatments for a terminally ill and profoundly retarded patient. Joseph Saikewicz, an elderly, longtime resident of a state facility, was suffering from leukemia. It had been estimated that, even with the administration of chemotherapy, an uncomfortable and frightening procedure, Mr. Saikewicz would at best live an additional year. Elaborating on Quinlan, the Saikewicz court held that there is both a common-law right to be free from a nonconsensual bodily invasion, as expressed in the doctrine of "informed consent," and a constitutional recognition of a right of privacy that permits a person to refuse unwanted medical treatment. The court held that this right extended

50. Id.; see also Laurence H. Tribe, American Constitutional Law § 15-11, at 1368 n.25 (2d ed. 1988) (questioning whether someone who is irreversibly comatose has constitutional rights).
52. Id.
53. Id.
54. Id. at 668-69.
56. Id. at 420-21.
57. Id. at 424. Emerging from the law of medical malpractice, the doctrine of "informed consent" holds that every adult of sound mind has the right to determine what should be done with his or her own body. Thus, he or she would have the right to agree to refuse medical treatment. See Luis Kutner, Euthanasia: Due Process for Death with Dignity; The Living Will, 54 Ind. L.J. 201, 206-20 (1979).
58. Saikewicz, 370 N.E.2d at 424.
to an "incompetent, as well as a competent, patient because the value of human dignity extends to both."59

The court then explored the doctrine of "substituted judgment" as a means of exercising an incompetent's right to make decisions affecting his bodily integrity.60 The test is essentially subjective, although the court recognized that it could be difficult to avoid applying an objective reasonable person standard in cases where the person had never been competent. The decision maker must make the decision that the patient, if competent, would choose if the patient imagined him- or herself incompetent in that manner.61

Significantly, the court elaborated upon the State's interests that may overcome this individual right:62 (1) the preservation of life; (2) the protection of the interests of innocent third parties; (3) the prevention of suicide;63 and (4) maintaining the ethical integrity of the medical profession.64 These four interests have become the standard against which most state courts, including Florida's, measure the individual's privacy decision to decline life-prolonging procedures. Unlike Quinlan, the Saikewicz court rejected "entrusting the decision whether to continue artificial life support to the patient's guardian, family, attending doctors, and hospital 'ethics committee.'"65 The court did not view the judicial resolution of such decisions as representing a gratuitous encroachment on the domain of the medical profession. Instead,

59. Id. at 427.
60. Id. at 430-32. Although the doctrine of "substituted judgment" has been subject to much criticism, see, e.g., Louise Harmon, Falling Off the Vine: Legal Fictions and the Doctrine of Substituted Judgment, 100 YALE L.J. 1 (1990), it is still the most widely accepted judicial standard. See Right To Refuse, supra note 47, at 1646. The version presented in Saikewicz is the most extreme form of the standard. Id. at 1648.
61. As the court stated:
   In short, the decision in cases such as this should be that which would be made by the incompetent person, if that person were competent, but taking into account the present and future incompetency of the individual as one of the factors which would necessarily enter into the decision-making process of the competent person. Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E. 2d 417, 431 (Mass. 1977).
   The court concluded that if Mr. Saikewicz were suddenly competent and had to decide what he would do if he were incompetent he would decide to forego chemotherapy under the circumstances. Id.
62. Id. at 425.
63. Some have argued that this interest is incorporated within the state's more general interest in the preservation of life. See Right To Refuse, supra note 47, at 1668.
64. Whether the state has an obligation to protect the "ethical integrity of the medical profession" has been questioned. Even if it could be argued that the state has such an interest, it would mean that the patient's choice is subservient to medical judgment. See Robert M. Byrn, Compulsory Lifesaving Treatment for the Competent Adult, 44 FORDHAM L. REV. 1, 29-33 (1975). But see Right To Refuse, supra note 47, at 1669 (arguing that society has an interest in maintaining the integrity of the profession).
65. 370 N.E.2d at 434.
the court concluded that the detachment of the judicial branch was needed to make the kind of decisions called for in these circumstances.66

Less than a year later, in Satz v. Perlmutter, the Fourth District Court of Appeal handed down the first Florida appellate decision addressing the termination of life-prolonging procedures for dying patients.67 The court held that Abe Perlmutter, a competent, terminally ill, seventy-three-year-old man suffering from Lou Gehrig’s disease, had the right to direct that a mechanical respirator be removed even though his death would result within an hour.68 After carefully reviewing the four state interests presented in Saikewicz, the court concluded that none were compelling enough to interfere with Mr. Perlmutter’s expressed desire to have his respirator removed.69 The court refused to wait for legislative action and postpone consideration of the right of a person to discontinue life-prolonging procedures because these procedures involved the patient’s constitutional right of privacy.70 However, the court limited its holding to terminally ill competent patients.71

The Florida Supreme Court adopted the Fourth District Court’s opinion in 198072 with the caveat that it not reach beyond the facts of the case.73 The court made a special plea that, given the complexity of the issue and the variety of interests, the Legislature address the “death with dignity” issue.74 Like the district court, the Florida Supreme Court observed that “[l]egislative inaction cannot serve to close the doors of the courtrooms of this state to its citizens who assert cognizable constitutional rights.”75 The court warned that in the absence of legislative direction it would be obligated to proceed on a

66. Id. at 435.
67. 362 So. 2d 160 (Fla. 4th DCA 1978) (affirming Perlmutter v. Florida Medical Ctr., 47 Fla. Supp. 190 (Fla. 17th Cir. Ct. 1978), which directed that the hospital not interfere with Mr. Perlmutter’s exercise of the right of privacy).
68. Id. at 161-62.
69. Id. at 162-64.
70. Id. at 164. The court noted that the Legislature had failed to adopt suitable legislation despite more than a dozen attempts. Id.
72. Satz v. Perlmutter, 379 So. 2d 359 (Fla. 1980).
73. Id. at 360.
74. Id.
75. Id.
case-by-case basis. Despite such pleas, it would be four more years before the Legislature would finally enact legislation.

Before the Quinlan decision, right-to-die legislation had been introduced in only five states, including Florida. After Quinlan, seventeen such bills were introduced. By 1978 eight states had enacted right-to-die legislation. The first state to pass such a bill was California. Not surprisingly, California's legislation became the model for a new legislative initiative in Florida. Introduced by Florida Representatives Roberta Fox and Virginia Rosen in 1979, 1980, 1981, and 1982, the "Natural Death Act" proposal was more comprehensive than anything that had been presented during the Sackett era. Although none of the bills became law, a review of the provisions highlights the evolution of key issues in Florida's long legislative experience with attempts to enact statutory procedures for withholding life-prolonging procedures from terminally ill patients.

A definition section was added that included definitions for "life-sustaining procedure" and "terminal condition." The definitions

76. Id. at 361.
77. See infra note 138 and accompanying text.
78. HUMPHRY & WICKETT, supra note 10, at 108.
79. Id.
85. Fla. HB 463 (1980). An identical Senate companion, Florida Senate Bill 446 (1980), was introduced by Senator Paul Steinberg, Democrat, North Miami Beach, 1978-1982. Senate Bill 446 was reported favorably by the Senate Committee on Health and Rehabilitative Services, withdrawn from Senate Committee on Judiciary, but died in Florida Senate Committee on Rules and Calendar. FLA. LEGIS., HISTORY OF LEGISLATION, 1980 REGULAR SESSION, HISTORY OF SENATE BILLS at 131, SB 446.
86. Fla. HB 574 (1981). As in 1980, a Senate companion, Senate Bill 149 (1981), identical to the 1979 and 1980 House and Senate bills, was introduced by Senator Steinberg. However, it died in Florida Senate Committee on Health and Rehabilitative Services. FLA. LEGIS., HISTORY OF LEGISLATION, 1981 REGULAR SESSION, HISTORY OF SENATE BILLS at 53, SB 149.
87. Fla. HB 841 (1982). Only Representative Rosen sponsored the 1982 bill because Representative Fox had been elected to the Florida Senate. As in 1980 and 1981, a Senate companion, Florida Senate Bill 72 (1982), was introduced by Senator Steinberg. Reported unfavorably by Senate Committee on Health and Rehabilitative Services, it died in committee. FLA. S. JOUR. 328 (Reg. Sess. 1982).
88. No similar legislation was proposed in 1983.
89. "Life-sustaining procedure" means any medical procedure or intervention which utilizes mechanical or other artificial means to sustain, restore or supplant a vital func-
and the "directive form" made it clear that the proposal would apply only to situations where the patient was terminally ill and death was imminent (or expected to occur), whether or not such procedures were utilized. A procedure for executing a directive was provided. The directive would be effective for five years and would be suspended if the patient was found to be pregnant. The directive would be "conclusively presumed" to express the wishes of the patient if the patient had been certified by two physicians to be afflicted with a terminal condition prior to executing the directive. However, there was no ob-

- The phrase "comfort care" was also added in 1980 as an exception to the definition of life-sustaining procedures. CS for HB 463, § 2(3) (1980) ("Life-sustaining procedure" shall not include the administration of medication or the performance of any medical procedure deemed necessary to alleviate pain.) See also HB 574 (1981); HB 841 (1982).

- House Bill 574 (1981) and House Bill 841 (1982) inserted the word "extraordinary" before "life-sustaining."

- "Terminal condition" means an incurable condition caused by injury, disease, or illness, which, regardless of the application of life-sustaining procedures, would, within reasonable medical judgment, produce death and when the application of life-sustaining procedures serves only to postpone the moment of death of the patient." HB 740, § 2(6) (1979).

- This definition was deleted from the 1980, 1981, and 1982 versions of the House bill. It remained in the Senate bills, but in a modified form in the 1982 bill. Definitions were also included for "attending physician," "directive," "physician," and "qualified patient." See id. § 2(1), (2), (4), (5).

- The definition of "qualified patient" was that a patient had been certified by two physicians to be terminally ill. Id. § 2(5).

- This would have excluded coverage for those patients, such as Karen Ann Quinlan, whose lives could be sustained indefinitely.

As at least one author has observed, the California legislation "might most accurately be described as a broad declaration of a patient's right to stop treatment under very limited circumstances . . . ." Redleaf et al., supra note 80, at 919.

- Only an adult could execute a directive. Id. § 3(1).

- This was revoked in the Committee Substitute for House Bill 463 (1980), but reinstated in House Bill 574 (1981) and shortened to four years. House Bill 841 (1982) again removed any restriction.

- See Fla. HB 740, § 3(2)(c) (1979), and all subsequent versions of the bill.

- The California statute and the 1979 and 1980 House bills required the patient to wait a minimum of 14 days. This was removed from the 1981 and 1982 bills. Provisions taken from the California Act that declared that a directive executed before a person became terminally ill could be considered by the physician merely "as evidence" of the patient's wishes and not obligatory were amended out of the House bills in 1980.
ligation for a physician to effectuate the directive,96 and there was no provision for decision making in the absence of a directive.97

Two other significant provisions were also included. First, the proposal was to be cumulative. In other words, nothing in the proposal could impair or supersede any legal right or responsibility that a person may have with regard to the administration of life-sustaining procedures.98 Second, nothing in the proposal was to be construed to permit mercy killing or any affirmative act that may end life, other than to permit the natural process of dying.99 Thus, a distinction was made between active and passive euthanasia. In addition, the proposal included a mandatory directive form,100 a procedure for the revocation of a directive,101 a provision providing immunity from liability for physicians acting in accordance with the directive,102 a suicide disclaimer,103 a provision insuring that life insurance policies were not compromised by either the execution or carrying out of a directive,104 and a provision providing criminal penalties for any person who conceals or falsifies the directive of another.105

96. Id. "No physician, and no licensed health care professional acting under the direction of a physician, shall be criminally or civilly liable for failing to effectuate the directive of the qualified patient pursuant to this subsection." Id.

A "transfer clause" in the California statute that attributed unprofessional conduct to a physician who fails to make arrangements for a qualified patient to be transferred to another physician who would effectuate the directive was deleted in the Committee Substitute for House Bill 463 (1980). Although the clause was put back in House Bill 574 (1981), it was again amended out in committee. It was included in Senate Bill 72 (1982).

Interestingly, in 1982, Senate Bill 326, introduced by Senator Don Childers, Democrat, West Palm Beach, 1974–1990, proposed to add a new subsection to chapter 395, Florida Statutes. Section 395.0653 would have made clear that a physician's refusal to perform abortions or euthanasia could not be used to deny the physician hospital staff membership or clinical privileges. The bill passed the Senate unanimously but died in the Florida House Committee on Health and Rehabilitative Services. Fla. Legis., History of Legislation, 1982 Regular Session, History of Senate Bills at 112, SB 326.

97. Except for a provision added to Committee Substitute for House Bill 463 § 7(4) in 1980 that provided that the act created "no presumption concerning the intention of an individual who has not executed a declaration to consent to the use or withholding of life-sustaining procedures in the event of a terminal condition."

98. Fla. HB 740, § 10 (1979), and subsequent versions of the bill.

99. Id. § 12.

100. Id. § 3. Part of the procedure included the requirement that the directive be signed in the presence of two witnesses.

Section 4 of the bill added the crippling caveat that the directive would have no force or effect if the declarant was a patient in a nursing home unless one of the witnesses was "a member of the appropriate district nursing home ombudsman committee as provided in" § 400.307, Florida Statutes. Id. § 4.

101. Id. § 5.

102. Id. § 7.

103. Id. § 9(1).

104. Id. § 9(2).

105. Id. § 11.
Regrettably, Florida remained unable to move ahead in the area of natural death legislation, despite the fact that by 1983 thirteen states had enacted natural death acts and despite the pleas of the Florida Supreme Court in *Perlmutter*. In 1983, however, after the Fourth District Court's decision in *John F. Kennedy Memorial Hospital, Inc. v. Bludworth* raised the possibility that all decisions to withhold life-support would have to be judicially reviewed, health care facilities, seeking to avoid the expense of maintaining terminally ill patients indefinitely, or, conversely, the need to obtain court approval for each decision to withdraw treatment, placed increasing pressure on the Legislature to provide a procedure for the recognition of living wills that did not require judicial intervention.

C. Section 23, Bludworth, Barry, and the Life-Prolonging Procedure Act

In *John F. Kennedy Memorial Hospital, Inc. v. Bludworth*, the Fourth District Court of Appeal held that both incompetent and competent terminally ill patients had the right to direct that artificial life-sustaining procedures be removed. In *Bludworth* the patient, Francis Landy, lapsed into a coma within a few days after being admitted to a hospital. Landy’s wife, who had been appointed guardian, asked the hospital to remove all artificial life support on the basis of a “living will” Landy executed in 1975.

Given the holding in *Perlmutter* that recognized a competent person’s right to refuse medical treatment, the 4th DCA concluded that the right to refuse medical treatment extended to the comatose patient. As in *Perlmutter*, the court asserted that, given the fundamental nature of the privacy right, it was duty-bound to implement that right and the concomitant right to die with dignity despite the lack of legislative action. What concerned the court was how the right was to be exercised when the patient was incompetent and what safeguards would be required: a court-appointed guardian, the consensus of close relatives, confirmation by a medical ethics committee, court review,
or some combination? The court, concluding that the interests of a comatose patient required greater scrutiny than those of a competent patient, imposed the requirement that a guardian be appointed and that any decision to withdraw life-prolonging procedures be reviewed by a court in an expedited hearing. A duly proved "living will" would be admissible as evidence on the issue of the patient's present intent. The court then certified this question to the Florida Supreme Court:

In the case of a comatose and terminally ill individual who has executed a so-called "living" or "mercy" will, it is [sic] necessary that a court appointed guardian of this person obtain the approval of a court of competent jurisdiction before terminating extraordinary life support systems in order for consenting family members, the attending physicians, and the hospital and its administrators to be relieved of civil and criminal liability.

Before the Florida Supreme Court's 1984 review of Bludworth, the Second District Court of Appeal contributed another key piece to Florida's evolving doctrine. In In re Guardianship of Barry, the court considered whether the parents of a severely handicapped and terminally ill infant could direct that life support systems be removed so that their child could be permitted to die naturally. Medical examination indicated that without the respirator, the child would die within an hour, while he might live anywhere from one to five years with the ventilator.

113. Id. at 612-20.

114. Id. at 619-20. The court also added the requirement that the comatose patient be certified in writing as "terminal" by two physicians. "Terminal condition" was defined as:

[An] incurable physical state caused by injury, disease, or illness which, regardless of the application of "life-sustaining procedures," would produce death with a reasonable degree of medical probability, and where the application of life-sustaining procedures serves only or primarily to postpone the moment of the patient's medicolegal death.

Id. at 619.

"Life-sustaining procedures" were defined as:

[Medical procedures which utilize mechanical or other artificial means to sustain, restore, or supplant a vital function, which serve only or primarily to prolong the moment of death, and where, in the judgment of the attending and consulting physicians, as reflected in the patient's medical records, death is imminent if such procedures are not utilized.

Id.

115. Id. at 620. For a well-written discussion of the pros and cons of judicial review of decisions to withdraw life-support from incompetent patients, see Stratos, supra note 106.


117. 445 So. 2d 365 (Fla. 2d DCA 1984).

118. Id. at 370.
After noting that *Perlmutter* failed to elicit a legislative response, the *Barry* court observed that the 1980 adoption of article I, section 23 of the *Florida Constitution* provided an express right of privacy that did not require a person to be competent to exercise that right.\(^{119}\) Agreeing with the Fourth District Court of Appeal in *Bludworth*, the Second District Court of Appeal also concluded that such right would be empty if it did not extend to the incompetent as well as the competent.\(^{120}\) What remained problematic was the vehicle that permitted the exercise of this right in the absence of evidence of the infant’s intent. To this effect the court examined the doctrine of “substituted judgment.”\(^{121}\) As explained by the court, “[u]nder this doctrine the court substitutes its judgment for what it finds the patient, if competent, would have done.”\(^ {122}\) However, because this case involved a child rather than an adult, the decision of the parents, supported by medical evidence, needed to guide the court’s order.\(^ {123}\) The court could envision “no state interest great enough to compel the parents to continue to submit their child to a life support system in this instance.”\(^{124}\) Unlike the Fourth District Court in *Bludworth*, the Second District Court held that judicial review of decisions made within the privacy of the family relationship and based on competent medical advice was not necessary.\(^ {125}\) However, when the family chose judicial review, the court required “clear and convincing” evidence that the child suffered from an irreversible defect from which there was no reasonable medical probability of recovery.\(^ {126}\)

119. Id. This was the first time a Florida court tied the right to refuse medical treatment to the 1980 addition to the constitution. See *Fla. Const.* art I, § 23 (“Right of Privacy.—Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. . . .”).

120. *Barry*, 445 So. 2d at 370 (discussing *John F. Kennedy Memorial Hosp., Inc. v. Bludworth*, 432 So. 2d 611 (Fla. 4th DCA 1983), *rev’d in part*, 452 So. 2d 921 (Fla. 1984)).

121. Id.

122. Id. at 370-71.

123. Id. at 371. At a minimum, the court held that such diagnosis should be confirmed by at least two physicians. Id. at 372.

124. Id. at 371. The evidentiary standard used here is closer to the *In re Quinlan*, 355 A.2d 647 (N.J. 1976), decision than to Superintendent of Belchertown State School v. Saikewicz, 370 N.E. 2d 417 (Mass. 1977). This standard permits the interjection of the patient’s “best interest” when there is no way to realistically access what the patient would have wanted. See *Right To Refuse, supra* note 47, at 1669.

125. *In re Guardianship of Barry*, 445 So. 2d 365, 372 (Fla. 2d DCA 1984). However, the court was quick to add that judicial intervention must always be available if necessary. Id.

126. Id. Despite the clear direction from the Second District Court of Appeal in *Barry*, the refusal of Tampa General Hospital (located in the same judicial district) to withdraw life support from a terminally ill child led to the introduction of bills during the 1988 and 1989 legislative session. See *Fla. HB 626 (1988) & Fla. HB 609 (1988)*, and *Fla. HB 302 (1989) & Fla. SB 502 (1989)*. After a grossly handicapped daughter was born two months prematurely to Barbara and
After evaluating the approach of both the Fourth and Second District Courts, the Florida Supreme Court partially reversed Bludworth, holding that a court proceeding was cumbersome and unnecessary.\textsuperscript{127} The court agreed that there was no difference between the privacy right of a competent and an incompetent terminally ill patient to direct the discontinuance of extraordinary artificial support systems.\textsuperscript{128} The court then focused on the means by which the incompetent’s right may be exercised: “The question is who will exercise this right and what parameters will limit them in the exercise of this right.”\textsuperscript{129} Reviewing the approaches in In re Quinlan,\textsuperscript{130} In re Colyer,\textsuperscript{131} and In re Guardianship of Barry,\textsuperscript{132} the court held “that the right of a patient, who is in an irreversibly comatose and essentially vegetative state, to refuse extraordinary life-sustaining measures, may be exercised either by his or her close family members or by a guardian of the person of the patient appointed by the court.”\textsuperscript{133} The court required, however,

Alan Muller, everyone agreed that the child was terminally ill and that life support should be discontinued. However, because of liability fears of the hospital, the 19-year-old parents were forced to borrow money to hire a lawyer to obtain a court order to disconnect the respirator. After personally viewing the child, the judge granted the parents’ request. Tampa General presented the parents with a medical bill for more than $1 million. Fla. H.R. Comm. on Health Care, Subcomm. on Health Practices, tape recording of proceedings (Apr. 19, 1988) (discussion of HB 626) (available at Fla. Dep’t of State, Div. of Archives, Tallahassee, Fla.); Fla. H.R. Comm. on Health Care, tape recording of proceedings (Apr. 26, 1988) (discussion of HB 626) (available at Fla. Dep’t of State, Div. of Archives, Tallahassee, Fla.).

The bills sought to permit a parent or guardian of a terminally ill child to execute a declaration on the minor’s behalf which directed that life-prolonging procedures could be withheld or withdrawn if two physicians certified that the child was terminally ill. This was felt to be necessary because chapter 765 applied only to a decision not to administer life support to adults. All four bills were unsuccessful, though Committee Substitute for House Bill 626 made it as far as the floor of the House where it was defeated 61-50. FLA. H.R. Joug. 722 (Reg. Sess. 1988).

John F. Kennedy Memorial Hosp., Inc. v. Bludworth, 452 So. 2d 921 (Fla. 1984) was decided. For a critical review of the court’s decision see Berry, supra note 41.

\textsuperscript{127} John F. Kennedy Memorial Hosp., Inc. v. Bludworth, 452 So. 2d 921 (Fla. 1984).

\textsuperscript{128} Bludworth, 452 So. 2d at 923.

\textsuperscript{129} Id. at 924-25.

\textsuperscript{130} 355 A.2d 647 (N.J. 1976). The Quinlan court generally rejected the requirement of court approval and held that the decision to discontinue life support was to be made by the family in consultation with the attending physician and a hospital ethics committee. See supra notes 46-54 and accompanying text.

\textsuperscript{131} 660 P.2d 738 (Wash. 1983). In Colyer the patient was incompetent following massive brain damage and was being kept alive by life-support systems. The court held that the decision to withdraw life-sustaining procedures was controlled by the patient-doctor-family relationship. However, the court found that a guardian must be appointed to exercise the incompetent’s right to refuse such treatment. Id. at 746.

\textsuperscript{132} 445 So. 2d 365 (Fla. 2d DCA 1984). The Barry court held that the parents of a young child could make the decision not to continue life support if their decision was supported by competent medical advice. Id. at 372. However, judicial resort should always be available. See supra note 125 and accompanying text.

\textsuperscript{133} John F. Kennedy Memorial Hosp., Inc. v. Bludworth, 452 So. 2d 921, 926 (Fla. 1984). The court made clear that there was no necessity to appoint a guardian if family was available.
that before a close family member or guardian exercised the patient’s right, three physicians must certify that there was no reasonable prospect of the patient’s regaining competency and that the patient’s life was being artificially sustained. Borrowing from *Barry*, the Florida Supreme Court adopted the doctrine of “substituted judgment” and held that “close family members or legal guardians [may] substitute their judgment for what they believe the terminally ill incompetent persons, if competent, would have done under these circumstances.” The court stated that a “living will” would provide persuasive evidence of the incompetent’s intent and should be given great weight by the decision maker. Finally, as in *Barry*, the court held that although judicial approval is not required, judicial review must be available upon request.

After the district court decisions in *Bludworth* and *Barry*, but days before the Florida Supreme Court’s reversal in *Bludworth*, the Florida Legislature enacted the “Life-Prolonging Procedure Act of Florida.” Introduced in the House by Representatives Byron Combee and Beverly Burns, the Act was modeled after Virginia’s 1983 Natural Death Act. Although the Act contained many

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134. The primary treating physician must certify that the patient is in a permanent vegetative state and that there is no reasonable prospect that the patient will regain cognitive brain function and that his existence is being sustained only through the use of extraordinary life-sustaining measures. This certification should be concurred in by at least two other physicians with specialties relevant to the patient’s condition.

135. This represents the Florida Supreme Court’s adoption of the “substituted judgment” standard. This is a relatively pure and simple expression of the standard.

136. Id. While this may seem to undermine the enforcement authority of a living will, it actually provides greater flexibility because it implies that there are other forms of expressed patient intent (such as oral statements) which will also be given weight. It also avoids the implication that the absence of a living will means that the patient wants life-prolonging procedures to be administered. What is therefore legally enforceable is the person’s wishes with regard to the administration of life support as evidenced by the living will, not the living will itself.

137. Id. at 926-27. The court also held that participating medical personnel or family members need only act in good faith. To be liable, the burden will be upon the challenger. *Id.* at 926.


provisions found in earlier bills, it differed in several significant ways. An intent section was included that recognized a person’s fundamental right to control decisions relating to medical care. It was clear that life-prolonging procedures could be withdrawn without judicial involvement provided that the patient “qualified.” While the Act no longer contained the condition that a person must be expected to die regardless of the application of life-prolonging procedures before life-sustaining procedures could be withdrawn, the Act still required that death be “imminent.” A “declaration” directing that life-prolonging procedures not be administered could be either written or oral. The statutory declaration form was no longer “required”

143. Provisions from previous bills included revocation of a declaration, physician immunity from liability for withdrawing or withholding life-prolonging procedures in accordance with a patient’s declaration, criminal penalties for concealing or falsifying another’s declaration, prohibiting mercy killing, excepting suicide from the act, providing that this act shall not affect sale or impairment of life insurance contracts, providing that nothing in the act shall impair existing rights or responsibilities, declaring that the failure to make a declaration shall not give rise to a presumption of the declarant’s intent one way or another, and providing that a declaration shall have no effect during the course of pregnancy. Ch. 84-58, 1984 Fla. Laws 136.

144. Id. § 2 (codified at Fla. Stat. § 765.02 (Supp. 1984)).

145. “‘Qualified patient’ means a patient who has made a declaration in accordance with this act and been diagnosed and certified in writing by the attending physician, and by one other physician who has examined the patient, to be afflicted with a terminal condition.” Id. § 3(5) (codified at Fla. Stat. § 765.03(5) (Supp. 1984)).

This conflicted with the three-physician requirement contained in John F. Kennedy Memorial Hospital, Inc. v. Bludworth, 452 So. 2d 921, 926 (Fla. 1984).

146. The statute defined “terminal condition” as “a condition caused by injury, disease, or illness from which, to a reasonable degree of medical certainty, there can be no recovery and which makes death imminent.” Fla. Stat. § 765.03(6) (Supp. 1984).

This definition would not allow for the supreme court’s holding in Bludworth that permitted life-prolonging procedures to be withdrawn from comatose patients in essentially vegetative states where death was not necessarily imminent. Bludworth, 452 So. 2d at 926. Nor does it avoid the problem of determining how long is “imminent.” See Berry, supra note 41, at 632. See also In re Guardianship of Browning, 568 So. 2d 4 (Fla. 1990) (discussion of term “imminent”).

147. The word “declaration” was substituted for “directive,” and “life-prolonging” for “life-sustaining.” Compare Fla. Stat. § 765.03 (2)-(3) (Supp. 1984) with Fla. HB 740 § 2(2)-(3) (1979).

148. However, the witnessed oral statement had to have been “made by the declarant subsequent to the time he is diagnosed as suffering from a terminal condition and in accordance with the provisions of section 4.” Ch. 84-58, § 3(2)(a), 1984 Fla. Laws 136, 137 (codified at Fla. Stat. § 765.03(2)(b) (Supp. 1984)).

The nature of an oral declaration has been subject to much confusion. The original bill stated that: “An oral declaration may be made by a competent adult in the presence of a physician and two witnesses by any nonwritten means of communication at any time subsequent to the diagnosis of a terminal condition.” Fla. HB 127 § 4 (1984). However, the Committee Substitute for House Bill 127 struck that sentence and inserted: “If the declarant is physically unable to sign the written declaration, his declaration may be given orally, in which event one of the witnesses shall subscribe the declarant’s signature in the declarant’s presence and by his direction.”

The original version described a proper procedure for an oral declaration. However, as amended, it no longer made sense. Instead, it required a written declaration, orally agreed to by
but "suggested," thus allowing for other earlier or alternative forms of living wills, as well as living wills containing additional instructions.149

Most importantly, the Act allowed the guardian or family of an incompetent, terminally ill adult patient who had not executed a declaration, in consultation and written agreement with the attending physician, to decide to withhold or withdraw life-prolonging procedures.150 Both the consultation and treatment decision had to be witnessed by two persons, and the order of priority for the selection of a family member was provided.151 This provision and the provision that the execution of a living will is presumed to be voluntary152 avoided the judicial review imposed by the lower court in Bludworth, and anticipated the Florida Supreme Court’s holding. A "pregnancy" exception also was included such that any decision to refuse life support would be suspended if the patient was found to be pregnant.153

A "transfer clause" was provided that placed an obligation on an attending physician to transfer the patient to another physician if the attending physician could not comply with the decision to refuse life support by the declarant and signed by another. The amendment essentially nullified any provision for oral declarations.

It also made confusing the provision in section 4(2) which stated:

An attending physician who is so notified shall promptly make the declaration or a copy of the declaration, if written, a part of the declarant’s medical records. If the declaration is oral, the physician shall likewise promptly make the fact of such declaration a part of the patient’s medical record.

Ch. 84-58, § 4(2), 1984 Fla. Laws 136-37. This last sentence was meaningless because the oral declaration was really a written declaration. This result has ramifications for the holding in In re Guardianship of Browning, 568 So. 2d 4 (Fla. 1990), which acknowledges oral declarations, and the 1992 revision of chapter 765.

149. FLA. STAT. § 765.05 (Supp. 1984).
150. Id. § 765.07. This only applies to adults. Thus the parents in Barry would not have been permitted under this statute to withdraw life-prolonging procedures if it were not for the "cumulative" provision. See id. § 765.15; see also Stratos, supra note 106, at 175-76.
152. Id. § 765.10.
153. Id. § 765.08. The original bill, Florida House Bill 127 (1984), did not contain a pregnancy provision. However, Committee Substitute for House Bill 127, § 12(2) said that the act "shall not apply to any pregnant women when, in the opinion of her physician, the fetus is viable." This was changed in the second Committee Substitute for House Bill 127, § 12(2), which is the version that became law. The revision said, "The declaration of a qualified patient, or the written agreement for a patient qualified under section 7, diagnosed as pregnant by the attending physician shall have no effect during the course of the pregnancy." Ch. 84-58, § 12(2), 1984 Fla. Laws 136, 140 (codified at FLA. STAT. § 765.08 (Supp. 1984)).

This provision, as passed, is subject to constitutional challenge because it nullifies the choice to terminate life-prolonging procedures even when the fetus is not viable, and would appear to create a different standard for competent and incompetent pregnant patients. See Berry, supra note 41, at 633-34; Stratos, supra note 106, at 175.
support. 154 Although the Act implies that an individual’s written directive would be followed if it meets statutory guidelines, and that any facility or physician complying with a living will in good faith is immune from liability, 155 there was no provision requiring that a person’s desires, as expressed in a properly executed living will, be honored. 156

The insertion of the word “sustenance” into the definition of “life-prolonging procedures” was of considerable importance. 157 Added in committee, “life-prolonging procedure” was defined to exclude “the provision of sustenance or the administration of medication or performance of any medical procedure deemed necessary to provide comfort care or to alleviate pain.” 158 This single phrase was the cause of extensive legislative debate for the next six years. 159

154. FLA. STAT. § 765.09 (Supp. 1984) (“An attending physician who refuses to comply with the declaration of a qualified patient or the treatment decision of a person designated to make the decision by the declarant in his declaration or pursuant to section 7 shall make a reasonable effort to transfer the patient to another physician.”). It is unclear what is meant by “reasonable effort.”

155. Id. § 765.10.

156. Without an enforcement mechanism “[t]he statute is primarily a policy statement that recognizes an adult’s right to control his medical care, subject to certain interest of society.” Rebecca Morgan, Florida Law and Feeding Tubes—The Right of Removal, 17 STETSON L. REV. 109, 113 (1987).

157. FLA. STAT. § 765.03 (Supp. 1984). The statute says:

“Life-prolonging procedure” means any medical procedure, treatment or intervention which:

(a) Utilizes mechanical or other artificial means to sustain, restore, or supplant a spontaneous vital function; and

(b) When applied to a patient in a terminal condition, would serve only to prolong the dying process.

“Life-prolonging procedure” shall not include the provision of sustenance or the administration of medication or performance of any medical procedure deemed necessary to provide comfort care or to alleviate pain.

158. Compare HB 127 with CS for HB 127 (1984). This provision was added at the request of the Florida Catholic Conference which was concerned, among other things, about the California case of Elizabeth Bouvia. See Letter from Thomas A. Horkan, Jr., Florida Catholic Conference, to Fla. H.R. Comm. on HRS (Apr. 25, 1984) (reviewing CS for CS for HB 127 and SB 343 (1984)) (available at Fla. Dept’ of State, Div. of Archives, Tallahassee, Fla.). See also discussion in Berry, supra note 41, at 632-33; Sidney M. Goetz, My View—Lobbyists Prolong ‘Living Will’ Battles, ST. PETERSBURG TIMES, July 27, 1988, at 2; Senate Passes Bills on ‘Living Will,’ FINGERPRINTING, PALM BEACH POST, May 18, 1984, at A16.

Elizabeth Bouvia was a severely handicapped, but mentally competent, quadriplegic who suffered from cerebral palsy and arthritis. Bouvia v. Superior Court, 225 Cal. Rptr. 297 (Cal. Ct. App. 1986). Unable even to feed herself and in constant pain, Ms. Bouvia stopped eating, hoping to starve to death. The hospital inserted an nasogastric tube over her objections for the purpose of keeping her alive through involuntary forced feeding. Ultimately, the California Court of Appeal, Second District, found for Ms. Bouvia, holding that she had the right to refuse any medical treatment, including artificial nourishment or hydration. Id. at 306.

159. See infra notes 170-80 and accompanying text.
D. Artificial Nutrition and Hydration

The question of the administration of artificial nutrition and hydration has always been more of a legislative than a judicial issue. This would be expected because legislatures are by their very nature more responsive to emotional issues, and the withdrawal of "food and water" carries connotations not shared by the removal of sophisticated medical procedures and treatments (respirators, cardiopulmonary resuscitation, kidney dialysis, chemotherapy, ventilators, etc.). As a consequence, certain jurisdictions have statutorily made sustenance an exception from medical procedures that can be withdrawn from terminally ill patients. Courts, on the other hand, have by and large refused to classify artificial sustenance differently from any other form of medical procedure being administered to a patient who is terminally ill or in a persistent vegetative state. Florida was no exception. When Florida finally passed its Life-Prolonging Procedure Act, artificial sustenance was distinguished from other permissibly withheld life-prolonging procedures.

Despite the statutory prohibition in chapter 765 against the removal of sustenance, in 1986 the Second District Court of Appeal held in Corbett v. D'Alessandro that the express right of privacy specifically articulated in article I, section 23 of the Florida Constitution permitted the withdrawal of sustenance from a patient with no reasonable prospect of regaining cognitive brain function. Following a massive brain hemorrhage, Helen Corbett had been left in a persistent vegetative state, maintained solely by an artificial feeding tube that kept her physically alive for over three years. Mrs. Corbett had not left a living will.

Drawing on its prior holding in Barry, the Second District Court held that the right of privacy extended to incompetents even if they are unable to exercise the right themselves and had not previously stated their wishes. Consequently, terminally ill incompetents whose lives are sustained through the use of extraordinary artificial means

162. See supra notes 157-58 and accompanying text.
163. 487 So. 2d 368, 370 (Fla. 2d DCA), rev. denied, 492 So. 2d 1331 (Fla. 1986).
165. Corbett, 487 So. 2d at 370.
have the same right to refuse life-prolonging procedures as terminally ill competent persons. The court saw no reason to differentiate between categories of extraordinary procedures. In order to avoid both the "sustenance" prohibition in chapter 765 and having to hold the statute unconstitutional, the court relied upon section 765.15, Florida Statutes. This section provided that chapter 765 is "cumulative to the existing law," and does not impair any existing rights a patient may have under the common law or statutes of the state. The court construed this section to incorporate any constitutional rights assigned to the patient. The Florida Supreme Court denied review, allowing the district court's opinion to stand.

From 1985 until 1990, bills were continuously offered to amend chapter 765 to permit artificial sustenance to be withdrawn as a life-prolonging procedure in hopeless cases. Proponents of the existing statute maintained that artificial nutrition was correctly categorized as providing comfort care and was therefore not a permissibly withheld life-prolonging procedure. Opponents argued that the administration of artificial nutrition was invasive, frequently uncomfortable, even painful, and should not be distinguished from other forms of life-prolonging procedures which serve only to prolong the process of dying. The latter position was supported by the American Medical Association's Council on Ethical and Judicial Affairs. Because of the way the word "sustenance" had been placed in the statute, there was a question about whether all sustenance was exempt or only sustenance that provided comfort or alleviated pain. As a result, the main thrust of the proposed bills between 1985 and 1988 focused on

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166. Id. at 371.
172. See Issue Report #34, supra note 171.
174. See In re Guardianship of Browning, 543 So. 2d 258, 264 (Fla. 2d DCA 1989) (rejecting this argument); Morgan, supra note 156, at 131. See also Staff Analyses for PCB 87-01 (precursor to Fla. HB 1387 (1987), Fla. H.R. Comm. on Heath Care); Fla. HB 406 (1988), Fla. H.R. Comm. on Heath Care; CS for SB 898 (1987), Fla. S. Comm. on HRS.
distinguishing between sustenance as comfort care and sustenance as a life-prolonging procedure in order to permit sustenance that was not comfort care to be withdrawn.\textsuperscript{175}

The implementation of a policy in 1986 by the Florida Department of Health and Rehabilitative Services that required the administration of artificial sustenance to all nursing home patients who were unable to take nutrition orally added to the pressure for reform. Because the department regulated nursing homes under chapter 400, \textit{Florida Statutes}, it interpreted the definition of life-prolonging procedures found in chapter 765 to require nursing homes to administer nutrition and

\textsuperscript{175} In 1985, Florida House Bill 357 (by Representatives Elizabeth Metcalf, Democrat, Coral Gables, 1982-1988; Irma Rochlin, Democrat, Hallandale, 1984-88; and others) and its identical companion, Senate Bill 1060 (by Senator Bob Johnson, Republican, Sarasota, House 1970-1976, 1982-1984, Senate, 1984-1992) were introduced. The bills distinguished between artificial feeding, which would be considered a life-prolonging procedure which could be withdrawn, and oral feeding, which was not a life-prolonging procedure and therefore could not be withheld. Neither made it out of committee. FLA. H.R. JOUR. 245 (Reg. Sess. 1985); FLA. S. JOUR. 213 (Reg. Sess. 1985). The Committee Substitute for House Bill 357 required the agreement of three physicians before the artificial nutrition could be withdrawn or withheld.

In 1986, the same bill was introduced as House Bill 670 (by Representatives Combee; Arthur Grindle, Republican, Altamonte Springs, 1982-1992; Metcalf; Alzo Reddick, Democrat, Orlando; and Rochlin) and its identical companion, Senate Bill 1248 (by Senator Johnson). While the House bill was reported favorably with amendments, the Senate bill died in committee. FLA. LEGIS., HISTORY OF LEGISLATION, 1986 REGULAR SESSION, HISTORY OF HOUSE BILLS at 293, HB 670; Id., HISTORY OF SENATE BILLS at 187, SB 1248. The amendment to the House bill required the agreement of two physicians that the administration of artificial nutrition met the definition of life-prolonging procedure before sustenance could be withdrawn, and that the patient specify in a separate statement in the living will the desire to have sustenance withdrawn. Fla. HB 1270 (1986).

In 1987 the Florida House Committee on Health Care sponsored Florida House Bill 1387, which was introduced in the Senate as Senate Bill 898 (by Senator Jack Gordon, Democrat, Miami Beach, 1972-1992). Though recast, the bill still focused on the distinction between sustenance as a life-prolonging procedure, and sustenance as a form of comfort care. The House bill carried the caveat that written directives executed before October 1, 1987, shall not be presumed to authorize the withholding of sustenance unless expressly stated. (House Bill 1387 was read a second time, but failed to reach a third reading. FLA. LEGIS., HISTORY OF LEGISLATION, 1987 REGULAR SESSION, HISTORY OF HOUSE BILLS at 388, HB 1387. Senate Bill 898 died in committee. Id., HISTORY OF SENATE BILLS at 150, SB 898.)

In 1988 the Florida House Committee on Health Care sponsored the same bill as House Bill 406. The Committee Substitute for House Bill 406 amended the definition for "life-prolonging procedures" to remove any reference to "sustenance" and removed the requirement that the withdrawal of sustenance be expressly requested in the declaration. The Senate bill, Senate Bill 501 (by Senator Pat Frank, Democrat, Tampa, 1978-1988), which mirrored the Committee Substitute for House Bill 406, was voted out of committee with amendments. The first Senate amendment removed the requirement that the patient have a declaration before sustenance could be removed. The other amendment required each physician to provide a statement that the provision of sustenance was not necessary to provide comfort care or alleviate pain. Both bills died on Calendar. FLA. LEGIS., FINAL LEGISLATIVE BILL INFORMATION, 1988 REGULAR SESSION, HISTORY OF HOUSE BILLS at 278, HB 406; Id., HISTORY OF SENATE BILLS at 103, SB 501.
hydration regardless of physician or family desires.\textsuperscript{176} Refusal to allow the nursing home to provide sustenance to a resident would result in the resident being discharged from the facility.\textsuperscript{177} This harsh policy was softened in 1988 when Rule 10D-29.110, \textit{Florida Administrative Code}, which regulated the dietary procedures of nursing homes, was amended to permit a nursing home facility to forego the administration of artificial nutrition and hydration under certain very narrow circumstances.\textsuperscript{178}

In 1989, partly as a result of the impending Florida court review of \textit{In re Guardianship of Browning},\textsuperscript{179} the Legislature passed a bill permitting the withdrawal of artificial nutrition and hydration under certain carefully defined circumstances.\textsuperscript{180} In 1986 Estelle Browning suffered a massive stroke at age eighty-six, and sustained brain damage that was major, permanent, and irreversible.\textsuperscript{181} Unable to swallow, a gastric tube was inserted.\textsuperscript{182} In 1988, nearly two years after her stroke, Mrs. Browning’s guardian, Doris Herbert, petitioned to terminate all artificial life support, including artificial sustenance, on the basis of a living will that Mrs. Browning had executed in 1985\textsuperscript{183} which requested that all life-prolonging procedures be withheld or withdrawn if her condition was diagnosed as terminal and incurable, and

\begin{thebibliography}{183}
\bibitem{176} Department of Health and Rehabilitative Servs., OPLC Policy Letter #5-86 (Apr. 2, 1986).
\bibitem{177} Id.
\bibitem{178} \textit{Fla. Admin. Code Ann.} r. 10D-29.110(5)-(6) (1988). If the patient was incompetent, artificial sustenance could be avoided if the resident was an adult with a terminal condition as certified by two physicians and it could be shown that artificially administered nutrition or hydration would cause harm or pain, and the family concurred. The rule required that hydration or nutrition be provided if two physicians determined that death would result from dehydration or starvation rather than from the underlying terminal illness or injury. Id. If the patient were competent, he or she would be permitted to refuse both oral and artificial sustenance if two physicians diagnosed his condition as terminal. Id.
\bibitem{179} Senate Bill 738, introduced in 1988 by Senator Gordon, sought to do by statute what HRS did by rule in 1988. The bill was an amendment to § 765.03, \textit{Florida Statutes}, removing the words “sustenance” and “imminent” from the definition of terminal condition. Fla. SB 738 (1988) (proposed amendment to Fla. Stat § 765.03). The bill died in committee. \textit{Fla. Legis., Final Legislative Bill Information, 1988 Regular Session, History of Senate Bills} at 134, SB 738.
\bibitem{180} The pertinent sections of the administrative rule were repealed in 1991 as the result of \textit{In re Guardianship of Browning}, 568 So. 2d 4 (Fla. 1990), which made no distinction between sustenance and other permissibly withdrawn forms of medical treatment. 17 Fla. Admin. Weekly 1957 (May 3, 1991).
\bibitem{179} 543 So. 2d 258 (Fla. 2d DCA 1989), \textit{aff’d}, 568 So. 2d 4 (Fla. 1990).
\bibitem{180} The 1989 bills, Florida House Bills 494 & 1084, were approved by the Legislature but vetoed by Governor Martinez.
\bibitem{181} \textit{Browning}, 543 So. 2d at 261.
\bibitem{182} Id.
\bibitem{183} Id. at 262.

if death was imminent.184 In addition, Mrs. Browning’s will specifically indicated her desire that nutrition and hydration not be provided.185 Relying upon chapter 765, the Life-Prolonging Procedure Act,186 the trial court denied the petition to terminate life-prolonging procedures, ruling that death was not “imminent” as long as Mrs. Browning continued to receive food and hydration. The trial court was not asked to and did not consider constitutional remedies.187

The Second District Court had already addressed the issue of withdrawing artificial sustenance in *Corbett v. D’Alessandro* and concluded that artificially administered sustenance was indistinguishable from other life-prolonging procedures.188 But *Browning* presented two additional issues189 that the Second District Court had not had to confront in *Corbett* and that had not been addressed by the Florida Supreme Court in *Bludworth*.190 First, although Mrs. Browning was incompetent, she showed indications of cognition and was therefore not in a persistent vegetative state.191 The *Bludworth* court had specifically held that a guardian or family member could act on the patient’s behalf only when the patient had been certified by a doctor to be in a permanent vegetative state.192 Second, Mrs. Browning’s condition was not necessarily “terminal” because her life could theoretically be prolonged indefinitely as long as artificial nutrition was provided.193

Like the trial court, the Second District Court also looked at the statutory scheme provided by chapter 765 and concluded that no statutory remedy was available.194 The court based this conclusion on the statutory exclusion of sustenance from the category of life-prolonging procedures that could be withdrawn, as well as the statutory definition of terminal condition which was defined to mean that death was imminent.195

184. *Id.* at 275.
185. *Id.* at 262, 275.
187. *In re Guardianship of Browning*, 543 So. 2d 258, 261, 278 (Fla. 2d DCA 1989), aff’d, 568 So. 2d 4 (Fla. 1990).
188. 487 So. 2d 368, 371 (Fla. 2d DCA 1986).
189. *Browning*, 543 So. 2d at 261.
191. *Browning*, 543 So. 2d at 261.
192. *Bludworth*, 452 So. 2d at 926 (“However, before either a close family member or legal guardian may exercise the patient’s right, the primary treating physician must certify that the patient is in a permanent vegetative state and that there is no reasonable prospect that the patient will regain cognitive brain function.”).
193. *In Bludworth*, Mr. Landy’s death was being prolonged rather than postponed by the administration of extraordinary medical procedures. *Id.* at 922-23.
194. *In re Guardianship of Browning*, 543 So. 2d 258, 263 (Fla. 2d DCA 1989), aff’d, 568 So. 2d 4 (Fla. 1990).
195. *Id.* The court considered three possible constructions of the word “imminent.” Was the
As in Corbett, the court found recourse in section 765.15, Florida Statutes, which provided that the provisions of the chapter 765 were cumulative and thus could accommodate any additional rights that Mrs. Browning enjoyed under the statute, common law, or constitution. The court held therefore that a remedy must be available because under article I, section 23 of the Florida Constitution, Florida constitutionally recognizes a right of self-determination that extends to the medical decisions of incompetent as well as competent patients. When the person is incompetent the decision must be delegated to a surrogate decision maker. The court then spent the major part of its opinion discussing the factors the surrogate should consider and how the surrogate should carry out this responsibility to avoid judicial intervention. These factors include the severity of the medical condition; the competency of the patient; the decision that the patient, if competent, would make; and the state’s interests.

In looking at the first factor, the court recognized that the surrogate must depend on available medical evidence and certificates from the patient’s treating physicians as to the patient’s medical condition. As to the second factor, the court refused to require that the patient be in a permanent vegetative state before a surrogate can make a decision on the patient’s behalf. It was sufficient that the patient was no longer sufficiently competent to exercise her right of self-determination and was not expected to regain competency. Third, as in Barry, the court held that the surrogate is obligated to make the decision that the patient would have made under the doctrine of “substituted judgment.” Finally, the court acknowledged the state’s interest by requiring the surrogate to support his or her decision with clear and

The evaluation of the “imminence” of death to be made (1) with the continuation of all medical treatment, (2) without the administration of life-prolonging procedures, or (3) without any medical treatment except comfort care? Id. at 265. The court rejected the first, concluding that there would be no need to create a procedure since death would almost inevitably occur before the withdrawal of life-support took place. Id. The third was equally unacceptable because the withdrawal of certain procedures, such as food and water, would result in death even though the patient’s condition was not necessarily fatal. Id. The court thus settled on the second interpretation as the only reasonable interpretation. Id.

This construction of the word “imminent” is significant because it can accommodate the withdrawal of treatment from patients whose conditions are irreversible yet whose biological life can be sustained indefinitely (e.g., Karen Quinlan, Nancy Cruzan, and Estelle Browning).

196. Id. at 265.
197. Id. at 266-67.
198. Id. at 267.
199. Id. at 267-73.
200. Id. at 271-73.
201. Id. at 271.
202. Id. at 272.
203. Id.
convincing evidence.\textsuperscript{204} Having established a procedure for a surrogate to exercise an incompetent patient’s constitutional right of self-determination, the court affirmed the trial court’s holding without prejudice to the guardian to file a renewed petition in light of the court’s scheme.\textsuperscript{205} It also made a plea that the Legislature give serious consideration to the issues raised by the opinion and certified to the Florida Supreme Court the question of whether an incompetent patient who is not suffering from a terminal condition may exercise his or her right of self-determination and forego sustenance.\textsuperscript{206}

As the result of the district court opinion in \textit{Browning}, the 1989 bill passed by the Legislature that permitted the withholding or withdrawal of artificial sustenance had a different emphasis than earlier bills. The earlier bills had primarily sought to distinguish sustenance as comfort care from sustenance as a life-prolonging procedure.\textsuperscript{207}

\begin{itemize}
\item \textsuperscript{204} Id. at 273.
\item \textsuperscript{205} Id. at 274.
\item \textsuperscript{206} Id.
\item \textsuperscript{207} Fla. CS for HB 494 & HB 1084 (1989).
\end{itemize}

Florida House Bill 494 (1989) (by Representatives Jack Tobin, Democrat, Margate) and Senate Bill 392 (1989) (by Senator Gordon), were similar versions of Senate Bill 501 (1988) with the addition of the amendment removing the requirement that the patient have executed a declaration. Florida House Bill 1084 (1989) (by Representative Peter Wallace, Democrat, St. Petersburg) and Florida Senate Bill 669 (1989) (by Senator Jeanne Malchon, Democrat, St. Petersburg, 1982-1992), however, had some new provisions.

The definition of “terminal condition” was altered to mean “an incurable or irreversible condition that, without the administration of life-sustaining treatment, will, in the opinion of the attending physician, result in death within a relatively short time.” Fla. HB 1084 & Fla. SB 669 (1989). As pointed out by the district court in \textit{Browning}, this definition removes ambiguity and hinges the meaning of “terminal” on the administration of life-prolonging procedures and would permit the withdrawal of sustenance from a person like Estelle Browning who was not in a persistent vegetative state, or like Helen Corbett who was in a persistent vegetative state but who could live indefinitely with the administration of sustenance. In re Guardianship of Browning, 568 So. 2d 4 (Fla. 1990).

Florida House Bill 1084 (1989) and Florida Senate Bill 669 (1989) also amended the declaration form to permit a patient to opt for or against the administration of sustenance. Section 765.05, Florida Statutes, was further amended to make clear that before sustenance could be withheld a patient must expressly request in their declaration that sustenance not be administered. If the patient had not executed a declaration then sustenance could be withheld only if two physicians affirmed in writing that the patient is terminal, and that the procedure for administering sustenance would be invasive, painful, and medically ineffective. The bills also added a new provision permitting the recognition of living wills executed in other states.

Combining the House and Senate bills, Committee Substitute for House Bills 494 & 1084 (1989) and Committee Substitute for Senate Bills 392 & 669 (1989) dropped the redefinition of “terminal condition,” but kept the addition to the declaration form, the conditions that must be met before life support could be withdrawn if the patient had not executed a declaration, and the provision permitting declarations from other jurisdictions to be recognized in Florida. Committee Substitutes for House Bills 494 & 1084 were passed by the House, substituted for Committee Substitutes for Senate Bills 392 & 669, and were passed by the Senate, but vetoed by the Governor. FLA. H.R. JOUR. 416 (Reg. Sess. 1989).
First, the 1989 bill amended the definition of “life-prolonging procedure” to permit sustenance to be included as a life-prolonging procedure. Second, it amended the declaration form to permit a person to opt not to have artificial nutrition and hydration administered. Third, the bill created a new section that provided the circumstances under which sustenance may be withheld or withdrawn as a life-prolonging procedure. Under the new section, sustenance could be withheld or withdrawn if two physicians documented that it qualified as a life-prolonging procedure (versus comfort care), a guardian or relatives provide consent, and the patient had executed a declaration authorizing such a decision. Moreover, if the patient had not executed a declaration, sustenance could still be refused if it could be shown that artificially administered nutrition and hydration would cause harm or be medically ineffective. Finally, a provision allowing the recognition of declarations executed in other jurisdictions was also included.

Under pressure from the Florida Catholic Conference and Florida Right to Life, which both argued that the bill represented an inevitable step toward euthanasia, and following his own personal conviction, Governor Bob Martinez vetoed the bill. Reportedly, no other legislative issue in the 1989 session drew as many letters to the Governor. Martinez explained in his veto message that the bill was premature because the Browning decision was then before the Florida Supreme Court.

The Legislature tried again in 1990, and House Bill 513, as amended, became law without the Governor’s signature on June 30, 1990. The bill amended the 1989 legislation to provide that a declaration authorizing the withholding or withdrawal of sustenance must be signed by two physicians who documented that the sustenance qualified as a life-prolonging procedure, a guardian or relatives provided consent, and the patient executed a declaration authorizing such a decision.

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209. Id. § 2.
210. Id. § 3.
211. Id.
212. Id.
213. Id. § 4.
216. “I am concerned that the Legislature has prematurely entered this arena without the complete constitutional guidance from the State Supreme Court on this most complex issue and upon the fundamental issue of each individual’s constitutional right to privacy as guaranteed by Florida’s Constitution in Article I, Section 23.” Veto message from Bob Martinez, Gov., to Jim Smith, Secretary of State (July 3, 1989) (CS for HB 494 & HB 1084) (available at Fla. Dep’t of State, Div. of Archives, Tallahassee, Fla.). Ironically, Martinez was correct. The Florida Supreme Court’s decision in Browning made both the 1989 legislation and 1990 Act unconstitutional.
217. Florida House Bill 513 (1990) (by Representative Susan Guber, Democrat, Miami, 1986-
Without doubt, the United States Supreme Court decision in *Cruzan v. Director, Missouri Department of Health*, hand[ed down on June 25, 1990, was a factor keeping the Governor from vetoing the bill a second time. The *Cruzan* court drew no distinction between providing food and water and other forms of medical treatment.

While chapter 90-223, Florida Laws, allowed the withdrawal of sustenance, it could only be done under severely restricted circumstances. First, the Act amended the definition of "life-prolonging procedure" to permit sustenance to be included as a life-prolonging procedure as well as a form of comfort care. Second, it amended the declaration form to permit a person to opt to forego nutrition and hydration. Third, a new section was added to chapter 765 to provide both the circumstances and procedures for permitting sustenance to be with-
held or withdrawn. The patient must have expressly authorized the withholding or withdrawal of nutrition or hydration in a declaration, and two physicians must document in the patient’s record that the provision of sustenance is a life-prolonging procedure and that death is imminent. However, a patient’s next of kin retained the right to suspend the decision to refuse sustenance for a reasonable length of time. Further, a caveat was added to provide that the ability to suspend the decision was not to be interpreted to permit relatives to grant approval for withholding or withdrawing sustenance if the patient had not expressly directed that it be withheld in a living will. Finally, the chapter contained the provision permitting recognition of declarations executed in another state.

Both the United States Supreme Court’s June 1990 decision in Cruzan and the Florida Supreme Court’s September 1990 decision in Browning made clear that the restrictions placed on a decision to withdraw sustenance in the new legislation were unconstitutional. Under Cruzan, a person had a Fourteenth Amendment liberty interest in refusing medical treatment including artificial sustenance. Under article I, section 23 of the Florida Constitution, a person had a fundamental privacy right to refuse all medical treatment. If sustenance was a medical procedure that could be withdrawn—as almost all the courts including the United States Supreme Court agreed—close relatives of the patient could not order the administration of artificial sustenance against the patient’s wishes, and it was not necessary for the patient to specifically request that sustenance be withheld since sustenance was not distinguishable from other medical procedures. In the meantime a new and potentially more effective method for delegating health care decision making was under way.

II. HEALTH CARE SURROGACY AND THE DURABLE POWER OF ATTORNEY

In March 1983, the President’s Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research,

223. Id. § 3 (codified at Fla. Stat. § 765.075 (Supp. 1990)).
224. Id.
225. Id.
226. Id. This section was added as a concession in the hopes that Governor Martinez would not veto the bill again. Phil Willon, House Panel Approves Modified ‘Right To Die’ Bill for Terminally Ill, TAMPA TRIB., Apr. 6, 1990, at 12B.
published its influential *Deciding To Forego Life-Sustaining Treatment: A Report on the Ethical, Medical and Legal Issues in Treatment Decisions*. The comprehensive report included the recommendation that persons execute "advance directives" designating a surrogate to make medical treatment decisions in the event of the person's incapacity. The Commission saw a need for creating a procedure for substitute decision making that was not only less cumbersome and costly than legal guardianship, but also had more legal enforceability than "instructive" directives such as living wills.

Noting that forty-two states had enacted "durable power of attorney" statutes, the Commission suggested that these statutes should be used to provide a legal foundation for advance directives. Although traditionally used in the area of property management, the Commission members felt that the language of these statutes could accommodate control over medical treatment. Advance directives appointing another to make health care decisions have the potential to control a far broader range of cases with firmer legal effect than declarations or living wills which are narrowly directed toward requesting that life support be withheld.

The concept of health care surrogacy also received a boost from Justice Sandra Day O'Connor in her concurring opinion in *Cruzan.* The majority opinion was clear that a state was not obligated to honor without question a surrogate's exercise of a person's constitutionally based right to refuse medical treatment. However, it did not address whether a state might be required to defer to the decision of a surrogate when a patient had expressed a desire that the decision be made by that individual. Without elaborating, Justice O'Connor strongly

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231. *Id.* at 131. The Commission distinguished between "instructive directives" and "proxy directives." The first specifies the type of care a person wants, while the second specifies a surrogate to make decisions if the person is unable to do so. A "living will" is an instructive directive, while a durable power of attorney is a proxy directive. *Id.* at 136. Unlike durable powers of attorney, which have legal and statutory recognition, an instructive directive has an uncertain legal effect because it is unclear who is to interpret and carry out the instructions and what will be their accompanying liability. The most effective course seems to be to combine the two by including special directions in a proxy directive.
232. *Id.* at 137. A power of attorney is a document executed by a "principal" which confers upon another, "the attorney-in-fact," the authority to perform certain acts on the principal's behalf. The power may be limited to only a specific act, or it may confer a general authority to act on behalf of the principal on all matters. Because the power of attorney becomes inoperative upon the principal's incapacity, many states have recognized durable powers permitting the attorney in fact to continue to act after the principal's incapacity.
233. *Id.*
235. *Id.* at 2852.
suggested that a state may be constitutionally obligated to honor the treatment selections of a surrogate appointed by an individual to make such decisions on behalf of the incompetent person. She noted that delegating the authority to a family member, by means of a durable power of attorney, or by designating another to carry out the intent of a living will, is becoming a common method of planning for the future and may become a valuable additional safeguard for permitting a patient to direct his medical care.

In 1990, just before the *Cruzan* decision, the Legislature enacted chapter 90-232, Laws of Florida, which permitted the designation of a health care surrogate with the authority to make health care decisions upon a patient's incapacity. Because of a desire to avoid the legal connotation and accompanying belief that one needed to hire a lawyer to execute a power of attorney, the portion of the Act that created a procedure for the designation of a health care surrogate made no reference to the durable power of attorney statute although it was conceptually very similar. A different portion of the Act, however, amended section 709.08, *Florida Statutes*, to expressly permit a durable power to extend to medical care decisions.

Unlike that for the Life-Prolonging Procedure Act, the main initiative for chapter 745, which regulates health care surrogacy, came from the Florida Senate and Senator Jeanne Malchon. At the time the first "surrogacy" bill was introduced, there was an increasing need on the part of medical institutions and facilities to find a solution to providing medical treatment for Florida's growing population of incompetent patients with no families, without having to go through the cumbersome, time-consuming, and expensive process of having a guardian appointed by a court. In addition, there was also a need to

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236. *Id.* at 2857 (O'Connor, J., concurring).
237. *Id.*; see also *In re Guardianship of Browning*, 568 So. 2d 4, 15 n.14 (1990).
238. Ch. 90-232, §§ 11-23, 1990 Fla. Laws 1729 (codified at *FLA. STAT.* ch. 745 (Supp. 1990)).
239. *Id.* § 24 (amending *FLA. STAT.* § 709.08(1)).
240. The early bills proposing the adoption of a Florida Surrogacy Act were based on drafts by Dale J. Hyland, a constituent of Senator Malchon who was instrumental in promoting Florida's adoption of a surrogacy act. See Dale J. Hyland, Unpublished Discussion Draft (July 1985) (available at Fla. Dep't of State, Div. of Archives, Tallahassee, Fla.). This draft served as a model for Florida Senate Bill 307 (1987), the first health care surrogacy bill.
241. The following represented possible methods of substitute decision-making:
Chapter 744, *Florida Statutes* (1987), provided for the court appointment of a guardian of the person which could include the ability to make all health care decisions.
Section 744.312, *Florida Statutes* (1987), provided a mechanism for the principal to appoint another to act as guardian whether related to the person or not. The designation must be witnessed by two persons and signed by the principal. The court, when petitioned, must give weight
have someone who could apply for public benefits for indigent, incompetent residents of hospitals and nursing homes.

Health care surrogacy bills were introduced in 1987, 1988, and 1989 to this designation.

Section 394.467(3)(c), Florida Statutes (1987), provided for the court appointment of a guardian advocate to consent to mental health treatment (The Baker Act).

Section 393.12, Florida Statutes (1987), provided for the court appointment of a guardian advocate for a developmentally disabled person.

Chapter 400, part I, Florida Statutes (1987), allowed the resident of a nursing home or the resident's guardian to designate a "resident designee" to be the resident's "representative for a specific, limited purpose."

Section 394.459, Florida Statutes (1987), provided for the appointment of a representative of the patient "to receive notice of proceedings for and during hospitalizations and to take actions for and on behalf of the patient." The representative could be a spouse, adult child, parent, adult next of kin, adult friend, Human Rights Advocacy Committee, or the Department of Health and Rehabilitative Services.

Section 709.08, Florida Statutes (1987), allowed for the appointment of a durable power of attorney, however, it was limited to close family members, and could be revoked upon an adjudication of incompetency. At the time it was unclear whether this section could be used to consent solely to medical treatment.

Section 765.07, Florida Statutes (1987), provided for the recognition of living wills, or the appointment of a relative or guardian to make the decision to terminate life-prolonging procedures in consultation with the patient's physician, when there was no living will and the patient was incompetent and terminally ill. Court approval was not required. The Florida Supreme Court decision in John F. Kennedy Memorial Hospital, Inc. v. Bludworth, 452 So. 2d 121 (Fla. 1984), also recognized this procedure and extended it to patients in a persistent vegetative state.

Section 768.46, Florida Statutes (1987) (medical consent), permits certain health care practitioners to provide medical treatment without the patient's consent provided that the practitioner acts within accepted standards of practice, and that a reasonable patient, from the information provided, would have undergone the procedure had he been advised.


The 1987 and 1989 bills were identical. Definitions were provided for the following phrases: physician, incompetent to consent, express and informed consent, health care surrogate, substituted judgment, and department (HRS). Fla. SB 307, § 3 (1987); Fla. SB 159, § 3 (1988); & Fla. HB 1158, § 3 (1988). Two physicians were required to concur in a patient's incompetency before a "health care surrogate" could assume authority to make treatment decisions during the patient's incompetency. Fla. SB 307, § 4 (1987); Fla. SB 159, § 4 (1988); & HB 1158, § 4 (1988). The patient's competency was to be reviewed every 30 days. Fla. SB 307, § 7 (1987); Fla. SB 159, § 7 (1988); & Fla. HB 1158, § 7 (1988). The hospital or nursing home was obligated to ascertain at the time of admission whether a surrogate had been appointed. Where the patient had not designated a surrogate one could be selected from the patient's family or friends, or from a list of qualified candidates who had no potential conflict of interest. Fla. SB 307, § 5 (1987); Fla. SB 159, § 5 (1988); & Fla. HB 1158, § 5 (1988). The surrogate was to use the doctrine of "substituted judgment" when making decisions on behalf of the patient and would have the ability to consent, in writing, to medical treatment; have access to the patient's medical records; authorize the release of the records, make application for public benefits; and authorize the transfer and admission of a patient to a facility. Fla. SB 307, § 6 (1987); Fla. SB 159, § 6 (1988); & Fla. HB 1158, § 6 (1989). Health care providers were required to provide the surrogate with sufficient information to make an informed treatment choice. Fla. SB 307, § 7 (1987); Fla. SB 159, § 7 (1988); & Fla. HB 1158, § 7 (1988). The surrogate was forbidden from providing consent to

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1989 before the Health Care Surrogacy Act was adopted in 1990. Part of the initial resistance to the act was due to the ongoing review and rewrite of chapter 744, the Guardianship Act. It was felt that abortion, sterilization, electroshock treatment, psychosurgery, experimental treatments, termination of life-support, and voluntary admission to a psychiatric facility. Fla. SB 307, § 8 (1987); Fla. SB 159, § 8 (1988); Fla. HB 1158, § 8 (1988).


The 1989 version of the bill was more sophisticated than earlier versions. Definitions were added for health care, health care decision, and health care provider. CS for SB 900 (1989) & CS for HB 1135 § 2 (1989). A procedure for the written, witnessed designation of a surrogate was added. Neither the treating health care provider, an employee or relative, an employee of the facility or relative of the operator of the facility in which the patient resided, or a guardian of the property of the person, were permitted to act as the patient's surrogate. CS for SB 900, § 3 (1989) & CS for HB § 3 (1989). A section was added which declared that a patient was presumed to be competent to make decisions unless shown otherwise. Incapacity was not to be inferred from hospitalization for mental illness, nor mental retardation. CS for SB 900 § 4 (1989) & CS for HB § 4 (1989). Instead of a determination of incompetency by two physicians, a committee consisting of the attending physician, a psychiatrist or psychologist, and a responsible citizen were to evaluate the patient, and a determination of the patient's condition was to be stated in a written report placed in the patient's record. CS for SB 900 i.e., § 5 (1989) & CS for HB i.e., § 5 (1989). Unlike earlier bills, the surrogate was to have authority to refuse consent to the administration of life-prolonging procedures per chapter 765, unless the patient had authorized another to make such decisions. In addition, the surrogate was to have authority over later-appointed guardians in matters concerning health care unless a court removed this power. CS for SB 900 i.e., § 6 (1989) & CS for HB i.e., § 6 (1989). A section was added providing a procedure for the revocation of the designation of a surrogate. CS for SB 900, § 9 (1989) & CS for HB, § 9 (1989).

All designations of surrogacy were to expire seven years after the date of execution unless the patient was incompetent. CS for SB 900 i.e., § 10 (1989) & CS for HB i.e., § 10 (1989). A section was added which prohibited a facility from requiring the designation of a surrogate as a condition of admission or treatment. CS for SB 900, § 11 (1989) & CS for HB, § 11 (1989). A new section providing immunity for health care providers and facilities for the treatment decisions of surrogates was added. CS for SB 900 i.e., § 12 (1989) & CS for HB, § 12 (1989).

Noticeably missing from the committee substitutes to both the Senate and House bills was the section permitting the designation of a surrogate where none had been appointed by the patient. A provision forbidding a parent or legal guardian from withholding emergency medical treatment to a minor based on religious beliefs was added to the committee substitutes for House Bill 1135. Fla. CS for HB 1135 § 14 (1989).

Senate Bill 900 was voted favorably by the Senate Committee on Health Care as a committee substitute, but died in the Senate Committee Judiciary. House Bill 1135 was passed out favorably as a committee substitute by the House Committee on Health Care, but died on the calendar. Fla. LEGIS., FINAL LEGISLATIVE BILL INFORMATION, REGULAR SESSION 1989, HISTORY OF SENATE BILLS at 156, SB 900; Id., HISTORY OF HOUSE BILLS at 411, HB 1135.

245. Ch. 90-232, 1990 Fla. Laws 1279 (codified at Fla. STAT. § 709.08 (Supp. 1990)).

246. Ch. 89-96, 1989 Fla. Laws 173. The review and subsequent amendment of Florida's guardianship statutes was the result of an in-depth analysis by the Study Commission on Guardianship Law, created by chapter 88-268, Laws of Florida. The 15-member commission included Florida Supreme Court Justice Rosemary Barkett, Senators Weinstein and Fred Dudley, Republican, Cape Coral, and Representatives John Cosgrove, Democrat, Miami, and Ronald Glickman, Democrat, Tampa, as well as other members of the academic, judicial, and professional
the need for health care surrogacy would be met by the revision of that chapter.247 Further, there were also serious reservations over the fact that a health care surrogate, unlike a guardian, would not have to answer to a higher authority unless challenged.248 However, following the 1989 rewrite of chapter 744, it was clear that the increasing need for a more efficient process, permitting another to apply for public benefits and to make health care decisions for incompetent patients, still had not been addressed.249

Sections 11 through 23 of chapter 90-232250 created a procedure that permitted a competent adult to designate a surrogate to make health care decisions when he or she became incompetent. The designation must be in writing, signed and witnessed by two persons.251 The designation could remain effective for up to seven years (or longer if the patient remained incapacitated).252 A health care facility was obligated to ascertain whether a surrogate had been designated,253 but could not require an individual to designate a surrogate as a condition of treatment.254 Certain restrictions were placed on who could act as a surro-

247. See Letter from Dale Hyland to Senator Malchon (Jan. 8, 1990) (available at Fla. Dep’t of State, Div. of Archives, Tallahassee, Fla.) (disagreeing with Senator Weinstein’s belief that the creation of the an “emergency temporary guardian” under the 1989 revision of chapter 744 would fill the need for the designation of a health care surrogate).

248. See Memorandum from Brent Taylor, Chairman, Disability Law Committee of The Florida Bar, to Bunny Stanfield, Analyst, Committee on Health Care (Apr. 5, 1989) (available at Fla. Dep’t of State, Div. of Archives, Tallahassee, Fla.).

249. See Robert C. Waters, Florida Durable Power of Attorney: The Need for Reform, 17 FLA. ST. U. L. REV. 520 (1990). The 1989 guardianship legislation created “emergency temporary guardianships” and “preneed guardianships.” The emergency guardian could represent an alleged incapacitated person until such time as a permanent guardian could be appointed by the court. FLA. STAT. § 744.3031 (1989). The preneed guardian could be designated by a competent adult in the presence of two witnesses to serve in the event of the declarant’s incapacity. In a proceeding for incapacity such a declaration serves as a rebuttable presumption that the preneed guardian is qualified to serve as guardian. Id. § 744.3045 (1989).

250. Codified at FLA. STAT. §§ 744.41-.52 (Supp. 1990). Committee Substitute for Senate Bill 748 (1990) originally only addressed the surrogacy issue. However, after passage by the Senate, the House amended the bill to incorporate Committee Substitute for House Bill 2981 (1990), which addressed aspects of Medicaid, and Committee Substitute for House Bill 2833 (1990), which broadened the durable power of attorney statute. The bill passed the Senate as amended. FLA. S. JOUR. 941 (Reg. Sess. 1990).

251. Ch. 90-232, § 13, 1990 Fla. Laws 1729 (codified at FLA. STAT. § 745.42(2) (Supp. 1990)) (“The designation must be in writing and signed by the person in the presence of two attesting witnesses, one of who must not be his spouse, a blood relative, an heir to his estate, or responsible for paying his health care costs.”).

252. Id. § 20, 1990 Fla. Laws at 1748 (codified at FLA. STAT. § 745.49 (Supp. 1990)).

253. Id. § 13(3), 1990 Fla. Laws at 1746 (codified at FLA. STAT. § 745.42 (Supp. 1990)).

254. Id. § 21, 1990 Fla. Laws at 1749 (codified at FLA. STAT. § 745.50 (Supp. 1990)). This probably creates a conflict with § 13(4), which requires a facility to seek a designation when a surrogate dies or becomes incapable of acting.
gate in order to avoid potential conflicts of interest.255

Of particular significance was the creation of a procedure for the designation of a surrogate by the facility if a surrogate had not been designated or the designated surrogate was unable to act.256 This was a new creature because it was outside the concept of a durable power of attorney and, unlike a guardian, not subject to court supervision (unless the selected surrogate is a guardian). As a check, chapter 90-232 included a provision that permitted interested parties to challenge the surrogate’s decision or authority to act.257

If the patient’s capacity was in question, the attending physician and another consulting physician were to evaluate the patient and document in the patient’s record that the patient lacks capacity.258 The patient’s incapacity was to be reviewed at least every thirty days by the attending physician and the surrogate.259 This provision is significant because the assumption of the surrogate’s authority does not depend upon a court’s adjudication of incompetency. Likewise, the termination of that authority does not depend upon a court to remove an adjudication of incompetency. The patient may, therefore, immediately resume responsibility for making health care decisions, and the surrogate must immediately surrender authority, without a court determination.

Upon the determination of the patient’s incapacity and the assumption of the surrogate’s authority, the surrogate had final authority to make health care decisions for the patient.260 Such decisions must be in the best interests of the patient and must also be the decision which the surrogate believes the patient would choose if the patient were ca-

255. Id. § 13, 1990 Fla. Laws at 1746 (codified at Fla. Stat. § 745.42 (Supp. 1990)). An individual could not serve as a surrogate if he was the treating health care provider or an employee or relative of the provider, the operator or employee of the facility or a relative of the operator or employee, or a guardian of the property of the patient but not of the person of the patient.

This problem became especially acute after the passage of the Patient Self-Determination Act and the resulting emphasis on executing advance directives. This is part of the reason for deleting the restriction in the new Advance Directives Act, chapter 92-199 (1992).

256. Ch. 90-232, § 15, 1990 Fla. Laws 1729 (codified at Fla. Stat. § 745.44 (Supp. 1990)). The surrogate was to be selected from a prioritized list of persons: (1) a guardian with authority to make health care decisions if one has been appointed; (2) the patient’s spouse; (3) an adult child of the patient; (4) the parents of the patient; (5) a guardian appointed by the court. Id.

257. Id. § 18, 1990 Fla. Laws at 1748 (codified at Fla. Stat. § 745.47 (Supp. 1990)).


259. Id. § 19, 1990 Fla. Laws at 1748 (codified at Fla. Stat. § 745.48 (Supp. 1990)).

260. Id. § 16, 1990 Fla. Laws at 1747 (codified at Fla. Stat. § 745.45 (1)(a) (Supp. 1990)).
pable of making the decision. This includes the ability to provide informed consent, to have access to the patient’s clinical records and the authority to release such records, to apply for public benefits and to have access to information regarding the patient’s assets to the extent necessary to apply for benefits, and to authorize the transfer and admission of a patient from a facility. The health care provider was obligated to provide sufficient information in order to permit the surrogate to make an informed decision. On the other hand, a surrogate could not provide consent for abortion, sterilization, electroshock therapy, psychosurgery, unapproved experimental treatments, voluntary admission to a mental health facility, or the withholding or withdrawal of life-prolonging procedures, unless the patient expressly authorized the surrogate to make such decisions in a written declaration. This last prohibition negated one of the original motivations for the creation of surrogacy statutes—giving legal authority for a surrogate to authorize the withholding of life-sustaining procedures. In addition, this prohibition conflicted with the provisions in section 765.02, which stated that the Legislature recognized the right of a competent adult to designate another to make the decision to withhold or withdraw life-prolonging procedures, and section 765.07, which permitted a guardian or family member, in consultation with the physician to make the decision to withhold life support in the

261. Id. § 16, 1990 Fla. Laws at 1747 (codified at Fla. Stat. § 745.45(1)(b) (Supp. 1990)) ("The health care surrogate shall . . . [e]xpeditiously consult with appropriate health care providers to provide informed consent in the best interest of the patient and make health care decisions for the patient which he believes the patient would have made under the circumstances if the patient were capable of making such decisions.").

This confuses the so-called “best interests” standard and the “substituted judgment” standard. The former is an objective standard, while the latter is a subjective standard. It is possible to reconcile the two by requiring a “substituted judgment standard” if possible; otherwise by requiring a “best interest” standard. See President's Comm'n, supra note 12, at 132-36. Before the 1990 version of the bill all previous versions had exclusively applied a substituted judgment standard. The Florida Supreme Court in both Bludworth and Browning had exclusively relied on a “substituted judgment” standard with regard to the decision to refuse life-prolonging procedures. In re Guardianship of Browning, 568 So. 2d 4 (Fla. 1990); John F. Kennedy Memorial Hosp., Inc. v. Bludworth, 452 So. 2d 921 (Fla. 1984). In Barry, the second district permitted a “best interests” standard when it was realistically impossible to determine the incompetent patient’s wishes. In re Guardianship of Barry, 445 So. 2d 365, 370 (Fla. 2d DCA 1984). In contrast, both guardianship and power of attorney law generally require an objective “best interests” standard. See, e.g., Fla. Stat. §§ 744.361(7), .441(2) (Supp. 1990).

This double standard was carried over into the new Advance Directives Act, ch. 92-199, § 3, 1992 Fla. Laws 1839, 1844 (to be codified at Fla. Stat. § 765.205(1)(b)).


263. Id. § 21, 1990 Fla. Laws at 1748-49 (codified at Fla. Stat. § 745.50 (Supp. 1990)).

264. Id. § 17, 1990 Fla. Laws at 1747-48 (codified at Fla. Stat. § 745.46 (Supp. 1990)).

265. See supra notes 231-37 and accompanying text.
absence of a living will. Most importantly, the prohibition was probably unconstitutional given the Florida Supreme Court's decision in *Bludworth*, which held that the guardian or relatives of the patient had the authority to exercise an incompetent patient's right to refuse life-prolonging procedures.

The health care surrogate was to retain the ability to make health care decisions even after the appointment of a guardian of the property unless the court removed that power. The health care facility or provider was absolved from any liability arising from the treatment decision of a surrogate. Further, the surrogates were absolved from liability as long as their treatment decisions were made in accordance with the patient's instructions or based on decisions which the surrogate reasonably believed the patient would have made.

The initial motivation for amending Florida's durable power of attorney statute had little to do with creating a procedure for designating a health care surrogate. Because Florida was the only state to restrict the assignment of a durable power to a relative of the principal, the main impetus of proposals seeking to amend section 709.08, *Florida Statutes*, was to overcome this restriction. A statute permitting the assignment of a durable power to someone other than a relative was particularly desirable in Florida because of the large population of elderly residents without family who wanted to be able to direct control over their affairs prior to a court adjudication of incompetency and subsequent appointment of a guardian. Despite numerous attempts to get out from under this "family" limitation, success was not achieved until 1990 when Representative Mary Hawkins took up the banner.

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266. *See also* Fl. Stat. § 744.3215(4)(f) (Supp. 1990) (a limited guardian to seek court approval prior to consenting to the termination of life support).

267. The *Browning* decision clearly made this provision unconstitutional when it created the proxy procedure. *In re Guardianship of Browning*, 568 So. 2d 4, 13 (Fla. 1990).


269. Id. § 22, 1990 Fla. Laws at 1749 (codified at Fl. Stat. § 745.51 (Supp. 1990)). Note that this does not make allowances for decisions made by the surrogate in the patient's best interests. *See supra* note 261.


271. Waters, *supra* note 249, at 521. The original statute, enacted in 1974, restricted the assignment to a spouse, parent or child. This was broadened in 1977 to include brothers and sisters, in 1983 to include nieces and nephews, and again in 1988 to all persons related by lineal consanguinity, whether natural or adopted. *Id.*

272. *Id.*


Included in the Committee Substitute for Representative Hawkins' bill was a section amending section 709.08, Florida Statutes, to expressly permit a power of attorney to "include the authority for the attorney-in-fact to arrange for and consent to medical, therapeutical, and surgical procedures for the principal, including the administration of drugs." This section made clear that the authority of an attorney-in-fact could extend to decisions over medical treatment. Although one district court had held that a durable power grants the same authority as a guardian, which could include the ability to make medical decisions, there was no case precedent expressly extending the durable power to health care decisions. Although the new wording removed any ambiguity, it also implied that any authority over medical treatment must now be expressly delegated.

Unfortunately, the durable power in Florida law is subject to several restrictions that seriously limit its usefulness as a vehicle for permitting the designation of a surrogate without having to go through the appointment of a guardian. The Florida statute is revoked by an adjudication of incompetency, and is suspended when a petition to determine competency is filed. Thus, anyone who disagrees with the exercise of the durable power can nullify the power simply by filing a petition for involuntary guardianship. This also means that under Florida's statute a durable power, unlike a health care surrogacy, can never co-exist with guardianship.


276. See Waters, supra note 249, at 524 (discussing In re Estate of Schriver, 441 So. 2d 1105 (Fla. 5th DCA 1983)).

277. Fla. STAT. §709.08(2) (1991). (However, subsection (4) permits the continuation of the durable power during adjudications for incompetency if an emergency arises and a court grants permission.)

278. See Waters, supra note 249, at 532.
III. **Cruzan and the Patient Self-Determination Act**

On December 6, 1989, the United States Supreme Court heard oral argument on the issue of the withdrawal of life-sustaining treatment from a terminally ill patient in the case of *Cruzan v. Director, Missouri Department of Health*. Following paramedic resuscitation after an automobile accident in 1983, Nancy Cruzan was left in a persistent vegetative state, oblivious to her environment. Able to breathe on her own, she received nutrition and hydration through a gastronomy tube. Realizing after four years that there was no hope for their daughter, and that with continued medical treatment she could continue to live another thirty years, her family sought to have the tube removed. A trial court decision granting the parents' request was overturned by the Missouri Supreme Court, which held that the family had failed to provide clear and convincing evidence that Nancy Cruzan would have wanted to have the tube removed.

The United States Supreme Court, acknowledging a fundamental right to control decisions relating to one's own body, grounded the right to refuse unwanted medical treatment, including artificially administered hydration and nutrition, in the Fourteenth Amendment liberty clause rather than a right of privacy. However, the Court held that a "liberty" interest in being free from unwanted medical treatment could be subject to state procedural safeguards when that right was exercised by a surrogate on behalf of an incompetent. Because the state's interference was legitimately based on its interest in the protection and preservation of human life, which is also protected under the Fourteenth Amendment, and because the consequences of a decision to forego treatment are usually not subject to correction, the

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280. *Id.* at 2844-45.
281. *Id.* at 2845.
284. *Id.*
285. *Id.* at 2851.
286. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.
288. *Id.* at 2851-52.
Court upheld Missouri's requirement that evidence of a person's desire that life-sustaining procedures be withdrawn meet a "clear and convincing" standard of proof.289

On June 26, 1990, the day after the *Cruzan* decision, a congressional task force set about redrafting pending legislation290 to require providers that receive Medicare and Medicaid to inform patients about state laws regulating decisions about medical treatment in order to encourage patients to document in advance what kind of treatment they would want.291 Attached to the Omnibus Budget Reconciliation Act of 1990,292 the Patient Self-Determination Act became law in November 1990 and took effect on December 1, 1991.293

The new law294 requires hospitals, nursing homes, hospices, home health agencies, and health maintenance organizations to provide written information to each adult patient of the patient's legal rights under state law (both statutory and judicial) to make decisions concerning medical care, including the right to refuse treatment, and of the institution's policies respecting the implementation of such rights.295 The institution must also document in the patient's medical record whether the patient has executed an advance directive, ensure compliance with state law regarding advance directives, and not condition the provision of care on whether or not the patient has executed an advance directive.296 An advance directive meant any written instruction, including a living will or durable power of attorney, by an individual which related to the provision of care when the individual is incapacitated. In addition, the institution is required (either individually or with others) to provide for staff and community education on advance directives. The federal law was careful to accommodate state laws that allow for objection to advance directives by providers who,

289. *Id.* at 2852-55.


296. *Id.*
on the basis of conscience, cannot implement an advance directive.\textsuperscript{297}

The implementation of the Federal Patient Self-Determination Act added yet another impetus, in addition to the confusion caused by section 709.08, \textit{Florida Statutes} (durable power of attorney) and chapter 745 (health care surrogacy), the \textit{Browning} decision, and chapter 765 (life-prolonging procedures), for revising Florida's varied advance directive statutes.

IV. \textit{Wons} and \textit{Browning}

The Florida Supreme Court's 1989 opinion in \textit{Wons v. Public Health Trust of Dade County}\textsuperscript{298} added an important last ingredient to Florida's understanding of the right of self-determination as it applied to decisions concerning medical treatment. Earlier, in \textit{Satz v. Perlmuter}, the court had held that a competent, terminally ill patient had the right to refuse medical treatment.\textsuperscript{299} The \textit{Wons} decision expanded the right to refuse medical treatment beyond persons who were terminally ill. The court held that the state must be able to sustain a heavy burden demonstrating a compelling state interest in order to outweigh the individual's constitutional right of privacy and religious freedom as it applied to decisions regarding medical treatment choices regardless of an individual's prospect of recovery.\textsuperscript{300}

Norma Wons, a Jehovah's Witness and thirty-eight-year-old mother of two minor children ages twelve and fourteen, was suffering from extreme blood loss due to uterine bleeding.\textsuperscript{301} After she refused a blood transfusion, the hospital obtained a court order permitting the hospital to administer the transfusion. Except for the likely possibility of a recurrence of her condition, the blood transfusion promised to restore Mrs. Wons to normal health.\textsuperscript{302} The Third District Court of Appeal reversed, holding that even the state's interest in protecting

\textsuperscript{297.  Id. However, it did not require states to make allowances for such objection. "Nothing in this section shall be construed to prohibit the application of a State law which allows for an objection on the basis of conscience for any health care provider or any agent of such provider which as a matter of conscience cannot implement an advance directive." \textit{Id.} § 1396a(w)(3).}

\textsuperscript{298.  541 So. 2d 96 (Fla. 1989), aff'd 500 So. 2d 679 (Fla. 3d DCA 1987). Although Wons was decided before the Second District decision in \textit{Browning}, it played a significant role only in the supreme court's decision. The Second District appeared to feel that \textit{Wons} would be important if the patient's religious or ethical beliefs played a role in the decision to refuse medical treatment. \textit{In re Guardianship of Browning}, 543 So. 2d 258, 262 (Fla. 2d DCA 1989), \textit{aff'd}, 568 So. 2d 4 (Fla. 1990).}

\textsuperscript{299.  379 So. 2d 359 (Fla. 1980).}

\textsuperscript{300.  Wons, 541 So. 2d at 98.}

\textsuperscript{301.  \textit{Wons v. Public Health Trust of Dade County}, 500 So. 2d 679, 680-81 (Fla. 3d DCA 1987), \textit{aff'd}, 541 So. 2d 96 (Fla. 1989).}

\textsuperscript{302.  Id.}
innocent third parties (the children) did not outweigh Mrs. Wons' deeply held and constitutionally protected religious belief that blood transfusions were sinful.\textsuperscript{303} Citing \textit{Perlmutter}, which held that a competent terminally ill patient had a constitutional right to refuse medical treatment,\textsuperscript{304} the court reviewed the four state interests that could serve as grounds for overcoming an individual's privacy right.\textsuperscript{305} Relying on its reasoning in \textit{St. Mary's Hospital v. Ramsey}, which also considered the right of a Jehovah's Witness to refuse a blood transfusion, the Third District Court rejected any interest that the state had in the preservation of life, the prevention of suicide, or the maintenance of medical integrity.\textsuperscript{306} The \textit{Ramsey} court had concluded that the state’s interest in the preservation of life must give way to a competent, sick adult’s right to “refuse a transfusion regardless of whether his refusal to do so arises from fear of adverse reaction, religious belief, recalcitrance or cost.”\textsuperscript{307} The \textit{Ramsey} court also found that the state’s argument for preventing suicide inapplicable since the patient did not want to die.\textsuperscript{308} Finally, the state's interest in preserving the ethical integrity of the medical profession was held to be inapplicable because medical ethics recognize a patient’s right to refuse medical treatment.\textsuperscript{309} The court also noted that medical personnel who accede to the patient’s wishes in refusing medical assistance in these circumstances cannot be held criminally or civilly liable for their conduct.\textsuperscript{310} Only the protection of the two minor children gave the \textit{Wons} court pause. However, after being assured that the children would be provided for by other members of the family, the court concluded that the state cannot mandate a two-parent family if the children will not be abandoned.\textsuperscript{311} The Florida Supreme Court approved the district court opinion, holding that preference for a two-parent family could not override Mrs. Wons' constitutional rights of privacy and religious freedom.\textsuperscript{312} Both the Third District Court and the supreme court took

\begin{thebibliography}{99}
\bibitem{303} \textit{Id.} at 687.
\bibitem{304} \textit{Satz v. Perlmutter}, 379 So. 2d 359, 360 (Fla. 1980).
\bibitem{305} \textit{Wons}, 500 So. 2d at 684-85.
\bibitem{306} \textit{Id.} at 685-87 (citing \textit{St. Mary's Hospital v. Ramsey}, 465 So. 2d 666 (Fla. 4th DCA 1985), \textit{aff'd}, 541 So. 2d 96 (Fla. 1989)).
\bibitem{307} \textit{Ramsey}, 465 So. 2d at 668.
\bibitem{308} \textit{Id.} at 669.
\bibitem{309} \textit{Id.} The fact that these three state interests were rejected under these circumstances make it hard to imagine a situation where the state could triumph unless it could be shown that a mentally and physically competent individual wished to commit suicide.\textsuperscript{310} \textit{Id.}
\bibitem{311} \textit{Wons v. Public Health Trust of Dade County}, 500 So. 2d 679, 688 (Fla. 3d DCA 1987), \textit{aff'd}, 541 So. 2d 96 (Fla. 1989).
\bibitem{312} 541 So. 2d 96, 97 (Fla. 1989).
\end{thebibliography}
the position that the four interests were in the nature of factors to be used in balancing the societal interests against fundamental individual rights. The burden was therefore placed on the hospital to commence court proceedings in order to contest a competent patient's refusal of treatment.

In *In re Guardianship of Browning*, the Second District Court of Appeal had certified the following question to the Florida Supreme Court: "Whether the guardian of a patient who is incompetent but not in a permanent vegetative state and who suffers from an incurable, but not terminal condition, may exercise the patient's right of self-determination to forego sustenance provided artificially by a nasogastric tube?" The Florida Supreme Court answered affirmatively, holding that a guardian or otherwise-designated surrogate may refuse medical treatment (including artificially administered sustenance), without court intervention, on behalf of and in conformity with the previously expressed wishes of a now permanently incompetent patient (who was not necessarily in a persistent vegetative state, or terminally ill).

More broadly, the Florida Supreme Court held that because Florida recognizes a "right of privacy" or self-determination, a person has the right to make choices pertaining to one's health—including the right to refuse medical treatment. This right is triggered not only when a person has certain religious convictions, or when a person is in a certain physical condition (such as in a persistent vegetative state or where death is imminent), or as to certain types of medical treatment (life-prolonging procedures), but at all times unless the state is able to demonstrate a compelling interest that overcomes that right. Further, that right is not extinguished upon incompetency, but continues and may be exercised by a designated surrogate or otherwise appointed person whose decision must be based on the choice that the patient would have made if the patient had been competent to direct the course of his or her medical treatment.

The court found, as had the district court, that chapter 765 did not apply to Mrs. Browning's situation because sustenance had been excluded from the category of permissibly withheld life-prolonging pro-

313. *Id.* at 97; Wons v. Public Health Trust of Dade County, 500 So. 2d 679, 687 (Fla. 3d DCA 1987).
314. *Wons*, 541 So. 2d at 98.
315. 543 So. 2d 258, 274 (Fla. 2d DCA 1989), aff'd, 568 So. 2d 4 (Fla. 1990).
316. *Browning*, 568 So. 2d at 17.
317. *Id.* at 9-12.
318. *Id.* at 9-10, 13-14.
319. *Id.* at 13.
Having jettisoned any statutory restrictions, the court explored Mrs. Browning’s constitutional right of self-determination. Beginning with article I, section 23 of the Florida Constitution, the court stated once again “that everyone has a fundamental right to the sole control of his or her person.” Applying Wons, the court held that this applies to choices about health care and includes the right to refuse medical treatment, regardless of medical condition or the type of medical procedure. In an important footnote, the court stated that it saw no reason to qualify a person’s right of self-determination “on the basis of the denomination of a medical procedure as major or minor, ordinary or extraordinary, life-prolonging, life-maintaining, life-sustaining, or otherwise.” Thus, the court went further than simply holding artificial nutrition and hydration to be included within the category of medical procedures that may be refused. Instead, it held that, since all medical treatment may be refused, artificial sustenance may be refused.

Relying on Bludworth, the court held that this right is not extinguished upon a person’s incompetency but continues unabated. However, the court limited the reach of its holding to a specific class of incompetents by pointing out that “[t]his opinion addresses only those persons who are mentally and physically incapacitated and are being sustained by artificial means. We do not address those who are mentally incapacitated but physically are in good health.”

This distinction excluded that category of persons who are mentally incompetent but whose physical health can be restored with appropriate medical treatment, as well as mentally handicapped persons. The ex-}

320. Id. at 9 n.5.
321. Id. at 9-12.
322. Id. at 10.
323. Id. at 10-11.
324. Id. at 11 n.6.
325. We conclude that a competent person has the constitutional right to choose or refuse medical treatment, and that right extends to all relevant decisions concerning one’s health. Courts overwhelmingly have held that a person may refuse or remove artificial life-support, whether supplying oxygen by a mechanical respirator or supplying food and water through a feeding tube. We agree and find no significant legal distinction between these artificial means of life-support.
326. Id. at 11-12 (citations omitted).
327. Id. at 12.
328. Id. at 12 n.10 (emphasis added).
329. There may be a problem with how an Alzheimer’s, or other similarly situated, patient fits into this criteria. An Alzheimer’s patient’s condition is caused by a physical degeneration of the brain which manifests itself initially not by physical disability but by a loss of mental capacity. During the beginning parts of the disease the person remains physically competent and you
exercise of an incompetent individual’s right to refuse medical treatment was also limited to instances where the patient was not expected to regain competency. The court avoided measuring incompetency in terms of some medically defined physical condition, i.e., comatose or persistent vegetative state. It was sufficient that "the patient was unable to personally or directly exercise the right to refuse medical treatment." There was no requirement that there be a threshold determination of whether death is imminent or whether the patient is terminally ill.

The court then directed, as in Bludworth, that once it is clear that the patient cannot direct the course of his or her own medical treatment, a surrogate is authorized to make those decisions for the patient. A surrogate could include a guardian, a relative or even a close friend. As before, the court directed that the surrogate was to operate according to the doctrine of substituted judgment. Because self-determination is a question of individual freedom, it is not subject to anyone else's idea of the choice the patient should make or what is in the patient’s best interest. Thus in situations where the patient was unable to make a decision, the substitute decision maker must make the choice that the patient would have made. In other words, if a patient had left instructions, such as a living will, the surrogate is obligated to carry out those instructions. Under this scheme, the instructions do not operate independently. Instead, they operate through a

would not expect that medical treatment should be withheld. However, a point may be reached where the Alzheimer's patient refuses to eat. Should artificial nutrition be administered if the person is otherwise physically competent but ultimate physical degeneration is inevitable?

329. "Before exercising the incompetent's right to forego treatment, the surrogate must satisfy the following conditions: . . . 2. The surrogate must be assured that the patient does not have a reasonable probability of recovering competency so that the right could be exercised directly by the patient . . . ." In re Guardianship of Browning, 568 So. 2d 4, 15 (Fla. 1990).

330. Id. at 13.

331. It would appear that the surrogate could decline any medical treatment (life-prolonging or otherwise) for a hopelessly incapacitated patient, not just the medical procedures that are artificially sustaining the patient. Thus the surrogate would be able to refuse antibiotics to treat the pneumonia of a hopelessly incompetent patient.

332. Id. at 13.

333. Id. at 13, 15 n.15. This opinion adds "friends" to the category of persons (guardians and relatives) that may serve as surrogates. Cf. John F. Kennedy Memorial Hosp., Inc. v. Bludworth, 452 So. 2d 921, 926 (Fla. 1984).

334. In re Guardianship of Browning, 568 So. 2d 4, 13 (Fla. 1990).

335. Id. As stated before, the fact of the locus of the choice to discontinue medical treatment in the individual is extremely significant in distinguishing a society which respects this choice from one that permits genocide. While it is possible that this may be abused, it sets up a structure where the measure of its abuse is not whether the state went too far in deciding whose life is worth living, but who made the choice, the individual or the state. See supra note 44 and accompanying text.
surrogate because there must be a "decision maker" to determine that the conditions expressed in the instructions have been met before there can be a decision to refuse medical treatment.\textsuperscript{336}

As before, the court opted to avoid judicial involvement in what is essentially a private family decision unless called upon to do so.\textsuperscript{337} As a consequence, the court imposed various restrictions and obligations on the decision maker depending on the nature of the instructions that the patient left.\textsuperscript{338} The court considered two types of instructions: an oral declaration or written living will directing that life-prolonging procedures not be administered, or a written designation of a "proxy"\textsuperscript{339} to make health care decisions for the patient, including the

\textsuperscript{336} Some have proposed that a living will is "self-executing" and therefore there is no need to have a surrogate appointed to carry out the instructions found in a living will. The use of the word "may" in \textit{Browning}, 568 So.2d at 15 & n.15, is cited as evidence of this position. Text: "In instances when a patient has left instructions, the patient may designate, orally or in writing, the decision-maker who is to carry out those instructions; but the patient need not do so." \textit{Id.} at 15. [The reader is then directed to footnote 15.]

Footnote 15: "As we noted earlier, when a decision-maker has not been designated, a close family member or friend may carry out the patient's instructions." \textit{Id.} at 15 n.15.

The self-executing proponents argue that the words "need not do so" and "may" mean that it is discretionary whether or not a surrogate is appointed. The author believes that "need not do so" means that the living will is not invalidated because a surrogate has not been appointed, and that one may be appointed from among the group of close family member, friend, or guardian. The word "may" is used only to give discretion as to who is selected as the surrogate.

Both \textit{Browning} and \textit{Bludworth} make clear that the wishes of the incompetent patient are to be carried out by a surrogate decision maker who is obligated to carry out the patient's instructions expressed either orally or in writing. \textit{Browning}, 568 So. 2d 4; \textit{Bludworth}, 452 So. 2d 921. The entire structure of the \textit{Browning} opinion assumes the designation of a surrogate; for example, including the procedure that a surrogate is to follow when carrying out the instructions of a patient. \textit{Browning}, 568 So. 2d at 15.

\textsuperscript{337} \textit{Browning}, 568 So. 2d at 15.

\textsuperscript{338} \textit{Id.} at 14-16.

\textsuperscript{339} The court has inadvertently caused a great deal of confusion in its use of the words "surrogate" and "proxy." The word "surrogate" is used to mean persons who have been designated to carry out a person's specific instructions with regard to the administration of life-sustaining procedures either in an oral declaration or a written living will. \textit{Id.} at 15.

The word "proxy," on the other hand, is used to refer to a person specifically designated by the individual to make health care decisions when no specific instructions have been given. \textit{Id.}

The court is using the word "proxy" the way "surrogate" is commonly used in most articles on the subject and in most surrogacy statutes including chapter 745, \textit{Florida Statutes} (1991). In addition, most living will statutes (including Florida's at the time of the \textit{Browning} decision) do not provide for the designation of a surrogate to carry out the instructions of the declarant as presented in the living will. \textit{In re Guardianship of Browning}, 568 So. 2d 4, 13 (Fla. 1990).

In drafting the present statute, it was decided to use the word "surrogate" to apply to both surrogates and proxies as used by the court. This was done for several reasons: first, because it was believed that this would cause less confusion since the word "surrogate" had already been used this way in Florida in chapter 745, and second, because the modern drift is to see a living will as nothing more than a specific instruction to a surrogate. The word "proxy" was instead reserved for situations where the patient has neither left written instructions nor designated a surrogate to make health care decisions on his behalf. See ch. 92-199, § 5, 1992 Fla. Laws 1839 (to be codified at \textit{Fla. Stat.} § 765.401).
decision to forego medical treatment.\textsuperscript{340} When the incompetent patient has executed a living will or has made an oral declaration expressing instructions as to the application of medical treatment, a surrogate, either designated by the patient (orally or in writing), or appointed from amongst the patient's family or friends, must satisfy certain conditions before the decision is made to forego medical treatment.\textsuperscript{341} The surrogate must be satisfied that (1) the oral or written declaration is reliable,\textsuperscript{342} (2) the patient is unlikely to recover sufficient competency to make the decision themselves, and (3) any conditions in the declaration have been considered and satisfied.\textsuperscript{343} Further, the surrogate must be able to support with clear and convincing evidence that the decision to forego medical treatment is the one the patient would have made.\textsuperscript{344} Because the court awards the presumption of clear and convincing evidence to written instructions, this is no problem when there is a living will. While oral statements may amount to clear and convincing evidence, they do not carry the presumption that written evidence does.\textsuperscript{345} However, by giving express recognition to oral, as well as written declarations, the court avoids the implication that the failure to execute a living will means that a patient does not wish life support to be withheld. Further, it gives a surrogate the authority to act on the basis of other expressions of the patient's intent in addition to a written living will.

The court's assignment of an evidentiary role to living wills is significant. The legal status of living wills has always been uncertain.\textsuperscript{346} What is legally enforceable, indeed constitutionally required, is that a person's desires with respect to the administration of certain medical treatment be respected. A living will serves as the best evidence of that intent when the person is unable to personally direct the course of medical care. By placing the living will on an evidentiary continuum, the court is not only assigning a legal status to living wills but at the

\textsuperscript{340} Browning, 568 So. 2d at 15. The court found support for this idea in Justice O'Connor's concurring opinion in Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841, 2857 (1990) (O'Connor, J., concurring). See Browning, 568 So. 2d at 15 n.14.

The Browning court did not address the situation where the patient has left neither written nor oral instructions nor designated another to make the decision for the patient (i.e., In re Guardianship of Barry, 445 So. 2d 365 (Fla. 2d DCA 1984); Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417 (Mass. 1977)).

\textsuperscript{341} Browning, 568 So. 2d at 15.

\textsuperscript{342} This requirement is unnecessary for written declarations because the court assigns a presumption that a written declaration has the status of clear and convincing evidence. Id. at 15.

\textsuperscript{343} Id. at 15.

\textsuperscript{344} Id.

\textsuperscript{345} Id. at 16.

\textsuperscript{346} See MEISEL, supra note 161, § 10.7.
same time is creating a place for other evidence of a person’s intent, such as an oral declaration.\textsuperscript{347}

A proxy, who must be designated in writing, must be satisfied that (1) the written proxy designation is reliable,\textsuperscript{348} and (2) the patient is unlikely to recover competency and therefore will be unable to make the decision for him- or herself.\textsuperscript{349} A written designation of a proxy provides a presumption of clear and convincing evidence of the proxy’s designation.\textsuperscript{350}

In determining the patient’s incompetency or whether a specific medical condition exists, the surrogate or proxy must obtain certificates (affidavits, sworn statements, or depositions) from the patient’s primary physician and at least two other physicians with specialties relevant to the patient’s condition.\textsuperscript{351} Such certificates provide a rebuttable presumption of both the patient’s incompetency and that the proscribed conditions exist.\textsuperscript{352}

As before, the court left itself open to resolve questions about the patient’s instructions or wishes, or challenges to the surrogate/proxy’s decision to refuse medical treatment.\textsuperscript{353} To facilitate this process, the court asked the Probate and Guardianship Committee of The Florida Bar to develop a rule establishing a procedure for expedited judicial intervention in these type of situations.\textsuperscript{354}

The court approached Mrs. Browning’s living will as a particular set of instructions and conditions that were to be discharged by the decision maker, which in this case was Mrs. Herbert, the court-appointed guardian.\textsuperscript{355} The court noted that while Mrs. Browning could have simply stated that “she wanted to refuse any and all efforts to artificially prolong her life,” her wishes were conditional: Mrs. Browning’s living will required that her condition be “terminal” and her death

\textsuperscript{347} This perspective would make unnecessary the requirements in chapter 92-199, § 2, 1992 Florida Laws 1495 (to be codified at Fla. Stat. §§ 765.103 & 765.112), which expressly give recognition to advance directives executed prior to the effective date of the Act or which are executed in other jurisdictions. Such advance directives would have automatic legal status as evidence of a person’s intent regardless of when or where they were executed.

\textsuperscript{348} For the same reasons stated in note 342, supra, this should be unnecessary because the court has already assigned a presumption of clear and convincing evidence to a written designation of a proxy.

\textsuperscript{349} In re Guardianship of Browning, 568 So. 2d 4, 15-16 (Fla. 1990).

\textsuperscript{350} Id. at 16.

\textsuperscript{351} Id.

\textsuperscript{352} Id.

\textsuperscript{353} Id.

\textsuperscript{354} Id. at 16 n.17. Florida Probate Rule 5.900 was adopted by the supreme court on August 22, 1991. In re Amendments to the Fla. Probate Rules, 584 So. 2d 964, 992 (Fla. 1991).

\textsuperscript{355} In re Guardianship of Browning, 568 So. 2d 4, 17 (Fla. 1990).
"imminent." 356 Because there was no hope that Mrs. Browning would recover, the court concluded that the "terminal" condition was met. 357 And because death would result following the removal of the nasogastric tube, death could be considered "imminent." 358

Relative to the statutory scheme presented in chapter 765 at the time of the Browning decision, the court has bypassed the more troublesome provisions in the Life-Prolonging Procedures Act. First, by eliminating the requirement that the patient be terminally ill, the court avoids the quagmire implicit in a determination of imminence of death. Second, by focusing on the right to refuse all medical treatment, the court not only avoids having to distinguish artificial nutrition and hydration from other life-support procedures, but also having to distinguish life-prolonging procedures from other forms of medical treatment. Third, the court avoids the need for physiologically based definitions and demonstrations of incompetency (e.g., persistent vegetative state, brain dead) by instead permitting a surrogate to assume authority to refuse medical treatment when the patient is unable to personally direct or communicate medical decisions and unlikely to regain that ability. Fourth, the court incorporates the concept of a surrogate into the living will framework to act as the incompetent person's agent in executing the person's instructions as expressed in the living will or other written or oral declaration. Finally, the court defines the legal role of living wills by placing them on an evidentiary continuum, so that properly executed living wills provide clear and convincing evidence of a person's wishes with respect to medical treatment in situations where the person is no longer able to direct his or her medical care.

V. THE 1992 ACT, CHAPTER 92-199

The needs to combine chapters 745 and 765 and section 709.08 and to create consistency with chapter 744, plus the new federal mandate of the Patient Self-Determination Act, and the Florida Supreme Court's opinion in Browning were the main issues that needed to be addressed by the Legislature. This was not accomplished until the 1992 session. Although there were some attempts to deal with the

356. Id. at 16-17.
357. Id. at 17.
358. Id. This definition of "imminent" is identical to the one preferred by the district court when it selected the second definition of terminal to mean a condition such that the patient would die without the administration of life-support. See In re Guardianship of Browning, 543 So. 2d 258, 265 (Fla. 2d DCA 1989), aff'd, 568 So. 2d 4 (Fla. 1990). The court is now free to apply it because the court's holding, unlike the statute, does not distinguish artificial sustenance from any other medical procedure.
overlap between chapter 745 and section 709.08, the Browning decision was the main focus of the 1991 session. And like the later 1992 effort, controversy centered around the definition of “terminal condition” and pressure to create a so-called “conscience clause.”

The Supreme Court in Browning had held that a surrogate, as the lawfully appointed or designated decision maker, had the authority, within the limits expressed by the patient, to refuse all medical treatment for a patient who was both physically and mentally incompetent, sustained by artificial means, and certified by three doctors as highly unlikely to regain competency. Nothing else was required. Chapter 765 (1989), on the other hand, required that before life-prolonging procedures could be withheld or withdrawn the patient had to be in a terminal condition, which meant that death was imminent. In addition, the 1990 legislation regulating the withholding of artificial sustenance provided that artificial nutrition and hydration could only be withdrawn if the patient had expressly requested it in a living will and the patient’s relatives offered no objection.

Despite the above, the Legislature found itself heavily embroiled in precisely the controversy the Browning opinion had circumvented. Looking first at the 1991 session, House Bill 1039 started out by creating two categories of conditions that would permit withholding or withdrawing life support: a “terminal condi-


There was also a provision in Florida Senate Bill 2136 (1991), which repealed the provision in Section 709.08 expressly permitting a durable power of attorney to apply to medical treatment.

360. Despite intense effort, no bills addressing this issue were passed in the 1991 session.

361. Also controversial during the 1991 session was the addition of “close personal friend” to the category of potential decision makers as had been permitted by the Browning decision. In re Guardianship of Browning, 568 So. 2d 4, 13, 15 n.15 (Fla. 1990). This provision was successfully removed by Representative Keith Arnold, Democrat, Fort Myers, during House consideration. FLA. H.R. JOUR. 457 (Reg. Sess. 1991).

362. “Today we hold that, without prior judicial approval, a surrogate or proxy, as provided here, may exercise the constitutional right of privacy for one who has become incompetent and who, while competent, expressed his or her wishes orally or in writing.” Browning, 568 So. 2d at 17.


364. Id. § 765.03(6) (“Terminal condition” means a condition caused by injury, disease, or illness from which, to a reasonable degree of medical certainty, there can be no recovery and which makes death imminent.).

365. Id. § 765.075 (Supp. 1990).

366. Florida House Bill 1039, § 6 (1991), proposed amending § 765.07(1), Florida Statutes (1989), to read: “Life-prolonging procedures may be withheld or withdrawn from an adult patient with a terminal condition or in a persistent vegetative state . . . .”
tion" 367 and a "persistent vegetative state." 368 The Committee Substitute combined the two so the definition of "terminal condition" included a "persistent vegetative state." 369 However, the modified definition also contained a new category: "incurable affliction." The fear was this would permit withholding treatment from patients with "incurable afflictions" that would result in death without treatment but could be functionally cured with treatment (i.e., asthma, diabetes, blood transfusions, etc.). 370 What the Legislature overlooked was the additional requirement in Browning that the patient be both physically and mentally incapacitated and not expected to recover. Provided that the patient was not suffering from some other uncorrectable condition, application of medication for asthma, insulin for diabetes, or a blood transfusion for Norma Wons would restore physical competency and withholding such treatment from mentally incompetent patients would not be permitted. 371

The Senate bill, on the other hand, simply replaced the phrase "makes death imminent" in the definition of "terminal condition"

367. Terminal condition means a condition of incurable affliction caused by injury, disease, or illness from which, to a reasonable degree of medical certainty, there can be no recovery and in which the application of life-prolonging procedures will not, within a reasonable degree of medical certainty, alter or reverse the patient's deterioration. Fla. HB 1039, § 3 (1991).

Note the addition of the term "incurable affliction." This term seems to have been taken from In re Guardianship of Browning, 568 So. 2d 4, 14 (Fla. 1990), where it is mentioned several times. Note also the substitution of "makes death imminent" with "alter or reverse the patient's deterioration." The Committee Substitute for House Bill 1039 struck the old definition and focused only on these two new additions.

368. "Persistent vegetative state means the absence of cognitive behavior and the inability to communicate or interact purposefully, determined within a reasonable degree of medical certainty to be permanent and irreversible." Fla. HB 1039, § 3 (1991).

Although there was a certain progress in being able to terminate the life support of persons in a persistent vegetative state, it was ironic that this definition still could not accommodate a person such as Mrs. Browning who was neither comatose nor in a persistent vegetative state, and whose life was theoretically indefinitely sustainable.

369. "[T]erminal condition" means any of the following from which, to a reasonable degree of medical certainty, there can be no recovery, as determined in writing by the attending physician and one other physician with a specialty relevant to the patient's condition, and includes:

(a) An incurable affliction;
(b) A persistent vegetative state; or
(c) A degenerative condition which causes death.


370. Fla. H.R. Comm. on Health Care, Subcomm. on Health Standards, tape recording of proceedings (Mar. 12, 1991) (on file with comm.) (discussing the definition of terminal condition in HB 1039).

371. See supra notes 327-29 and accompanying text.
with "will result in the patient's death." A separate definition identical to House Bill 1039 was included for "persistent vegetative state." The battle continued on the floor of the House and Senate. On the House floor, Representative Susan Guber offered a "strike everything after the enacting clause" amendment to the House bill which, although it otherwise closely resembled the Senate bill, contained an abbreviated definition of the House version for "terminal condition." Short-lived, a definition for terminal condition identical to the Senate's was subsequently adopted, including the addition of a separate definition for "persistent vegetative state." Upon Senate consideration and after passage by the House, the definitions were altered again, this time incorporating the Senate Committee Substitute alternative which defined "terminal condition" to include a "persistent vegetative state."

The second major area of controversy, the "conscience clause,"
sought to allow health care providers or facilities to avoid carrying out instructions to withdraw or withhold life-prolonging procedures on the basis of moral or ethical beliefs. The justification for the provision was the section in the Federal Patient Self-Determination Act which made allowances for state laws that permitted objection to implementing an advance directive on the basis of conscience.\textsuperscript{382} If the provider refused a request to discontinue treatment because of the provider's belief that such decisions were "morally" wrong, such a clause could potentially permit a provider to obstruct a person's constitutional right to direct that medical treatment not be administered. The constitutional issue would not be implicated, however, where there was a legitimate concern that a decision was made for the convenience of the decision maker instead of in conformity with the patient's instructions or where statutorily or judicially imposed procedures were not being followed.

Section 765.09, \textit{Florida Statutes} (1989), permitted the attending physician of a terminally ill patient to transfer the patient to another physician. However, there was no statutory obligation for the physician to carry out the patient's instruction as expressed in a living will.\textsuperscript{383} Before floor discussion, neither the House nor the Senate bill proposed significant amendments to this section other than to permit the surrogate to transfer a patient in order to comply with the patient's instruction.\textsuperscript{384} Because of the potential to thwart the patient's instructions, a House floor amendment was proposed and adopted that required the health care provider to carry out the instructions of the patient if all transfer efforts failed.\textsuperscript{385} In addition, any transfer

\begin{itemize}
  \item 382. "Nothing in subsections (a) and (b) shall be construed to prohibit the application of a State law which allows for an objection on the basis of conscience for any health care provider or any agent of such provider which, as a matter of conscience, cannot implement an advance directive." Act of Nov. 5, 1991, Pub. L. No. 101-508, § 4206, 104 Stat. 1388-116.
  \item 383. "An attending physician who refuses to comply with the declaration of a qualified patient, or the treatment decision of a person designated to make the decision by the declarant in his declaration or pursuant to s. 765.07, shall make a reasonable effort to transfer the patient to another physician." \textit{Fla. Stat.} § 765.09 (1991). While there may have been no statutory obligation, there was clearly a constitutional obligation.
  \item 384. See \textit{Fla. SB} 2136 (1991), \textit{CS} for \textit{SB} 2136, second \textit{CS} for \textit{SB} 2136, and Rep. Guber's floor amendment to \textit{CS} for \textit{HB} 1039.
  \item 385. Nothing contained in this chapter is intended to require any provider of medical care to commit any act which is against his moral or ethical beliefs. In the event that a health care provider cannot carry out the wishes of the declarant in accordance with this section, he shall make reasonable effort to transfer the patient to another health care provider. If efforts to provide for transfer fail the health care provider shall carry
expenses were to be borne by the health care provider. Upon Senate consideration, Senator Malchon's "strike everything after the enacting clause" amendment to the House bill essentially contained the version passed by the House. However, an amendment to Senator Malchon's amendment was proposed and adopted by the Senate which basically returned the section to its original provision.

The proposed 1991 legislation also sought to incorporate the *Browning* holding that "sustenance" was no longer to be differentiated from other life-prolonging procedures by repealing section 765.075 and amending the definition of life-prolonging procedure to remove all references to the word "sustenance." No effort was made, however, to repeal or alter the definition for life-prolonging procedures to conform to the court's holding, which permitted a surrogate to refuse all medical treatment for patients in a permanently incapacitated condition. Nor was the 1990 addition to the living will form that required the declarant to expressly elect not to have artificial nutrition and hydration administered removed from the living will form. Indeed, the Committee Substitute for House Bill 1039 elaborated upon that election by adding the additional option to have, or not have, nutrition and hydration withheld only when death was imminent.

out the wishes of the declarant pursuant to the decision of the Florida Supreme Court in the case of Florida versus Doris F. Herbert, case number 74-174, dated September 13, 1990. All expenses relating to such transfer shall be born by the health care provider.


386. *Id.*

387. This chapter does not require any provider of medical care to commit any act that is against his moral or ethical beliefs. If a health care provider or health care facility cannot carry out the wishes of the declarant in accordance with this chapter, the provider or the facility shall make reasonable efforts to transfer the declarant to another health care provider or health care facility. If efforts to provide for transfer fail, the health care provider shall carry out the wishes of the declarant. All expenses directly relating to such transfer shall be borne by the health care provider or health care facility whose refusal to comply with the declarant's wishes necessitates the transfer.


388. Taken from Florida Senate Bill 2136 (1991). "A health care surrogate appointed under chapter 745 may transfer the patient as provided in s. 745.45(2). A health care surrogate or any other health care designee may transfer as necessary to comply with the patient's expressed instructions regarding withholding or withdrawing of life-prolonging procedures." *FLA. S. JOUR.* 943 (Reg. Sess. 1991).


390. All versions of the section now read as it had when first proposed in 1984, before sustenance had been inserted: "The phrase 'life-prolonging procedure' does not include the administration of medication or performance of any medical procedure deemed necessary to provide comfort care or to alleviate pain." *Id.* § 1, 1990 Fla. Laws at 1644.


392. Fla. CS for HB 1039, § 4 (1991). This highlights a current controversy in the practice of
In addition to these concerns, the 1991 Legislature was unified in its decision to maintain the two-physician,\textsuperscript{393} rather than the \textit{Bludworth} and \textit{Browning} three-physician, certification of the patient's condition.\textsuperscript{394} Given all the other restrictions placed on the decision to withhold life-support, it was considered unnecessarily burdensome and costly to both the family and facility to be required to obtain the written certification of three rather than two physicians.\textsuperscript{395} Because the 1991 legislative effort failed to clear both chambers, ultimate resolution was left to the 1992 session.

The House 1992 legislative effort was the combined endeavor of the House Committee on Health Care, chaired by Representative Elaine Bloom,\textsuperscript{396} which focused on life-prolonging procedures and living wills; the House Judiciary Committee, which focused on health care surrogacy and guardianship considerations; and the Health Law Section of The Florida Bar, which contributed a format for combining the parts. The Senate effort was centered in the Health and Rehabilitative Services Committee and Senator Malchon.\textsuperscript{397}

designing living wills. Should they be as general as possible—simply expressing the patient's intent that heroic measures not be imposed, allowing a person to die naturally? Or should a living will contain great detail, specifically naming each medical procedure that a person may or may not want performed? The latter carries the danger of not being able to accommodate new or unlisted procedures by implying that if a person has not named a form of treatment then they must not object to it. The designation of a health care surrogate to make just such decisions avoids this problem.

\textsuperscript{393} "Qualified patient' means a patient who has made a declaration in accordance with ss. 765.01-765.15 and who has been diagnosed and certified in writing by the attending physician, and by one other physician who has examined the patient, to be afflicted with a terminal condition." \textsc{Fla. Stat.} § 765.03(5) (Supp. 1990).

The resolution of this conflict depends on whether three physicians are required to insure that the patient's constitutional right of self-determination is protected. If not, then the determination of number of physicians would be a procedural issue within the domain of the Legislature, subject to other practical concerns in addition to the protection of the patient. \textit{See In re Guardianship of Browning,} 543 So. 2d 258, 270 ( Fla. 2d DCA 1989), \textit{aff'd,} 568 So. 2d 4 (Fla. 1990).

\textsuperscript{394} \textit{Browning,} 568 So. 2d at 16. \textit{See also} \textsc{Fla. CS for HB 1039, §§ 3, 6 (1991) & SB 2136, § 22 (1991)}.

\textsuperscript{395} \textsc{Fla. H.R. Comm. on Health Care, Subcomm. on Health Standards}, tape recording of proceedings (Mar. 12, 1991) (on file with comm.) (comm. discussion of HB 1039).

\textsuperscript{396} Dem., Miami Beach.

\textsuperscript{397} Florida Senate Bill 1096 was a massive rewrite of chapters 745 and 765. Florida House Bill 1311, by Representative Mary Brennan, Democrat, Pinellas Park, a House companion to Senate Bill 1096, was filed but never taken up by the Health Care Committee. Florida Senate Bill 2414 by Senator John A. Grant, Republican, Tampa, was The Florida Bar draft. After journeying through the Senate Health and Rehabilitative Services Committee, both bills were combined in the Senate Judiciary Committee as Committee Substitutes for Committee Substitute for Committee Substitute for Senate Bill 1096 and Senate Bill 2414. House Bill 1851 was substituted for Committee Substitutes for Committee Substitute for Senate Bill 1096 and Senate Bill 2413 on the Senate floor. \textsc{Fla. S. JouR.} 877 (Reg. Sess. 1992).
Initially, the House Health Care Committee, like the Senate Health and Rehabilitative Services Committee in 1991 and 1992, examined both chapter 745 and chapter 765 with an emphasis only on incorporating the *Browning* decision into the present statutory framework. However, due to considerable interest on the part of The Florida Bar, the Florida Hospital Association, and the Florida Catholic Conference, an increased emphasis was placed on combining the various sections and chapters for the purpose of creating a unified approach toward advance directives. Chapters 765 and 745 were then divided between the Health Care and Judiciary Committees. The Health Care Committee focused exclusively on revising life-prolonging procedures to create consistency with *Browning*; the Judiciary Committee took up Representative Peggy Simone's House Bill 39, which repealed chapter 745, health care surrogacy, and created in its place a durable power of attorney for health care within chapter 709. The Health Care Committee's House Bill 1851, first taken up on the floor on January 30, 1992, addressed only the revision of chapter 765, life-prolonging procedures. House Bill 1851 was then combined with House Bill 39 within the format provided by The Florida Bar and adopted as a floor amendment to House Bill 1851 on a third reading. This was the version sent to the Senate.

The Florida Bar's draft of the bill would have repealed chapter 745, renamed chapter 765 "Advance Directives," and divided chapter 745 into four parts. The first part applied to general provisions, including a statement of intent and definitions. The second part applied to durable power of attorney procedures. The third part regulated the execution and enforcement of living wills. The fourth part provided a procedure for appointing a "proxy" to make health care decisions for an incompetent patient in the absence of a living will or the appointment of a surrogate.


399. Fla. H.R. Comm. on Health Care, Subcomm. on Health Standards, tape recording of proceedings (Sept. 12, 1991) (on file with comm.) (discussing PCB HB 92-01). Florida Hospice, Inc. and the Florida Association of Homes for the Aging also contributed to this legislative initiative.

400. These changes were incorporated into Florida House Bill 1851 (1992).

401. See FLA. STAT. § ch. 745.


405. See supra note 398.
Regardless of the approach the same issues continued to dominate the dialogue, i.e., the definition of "terminal condition," and the "conscience clause." Other controversial issues included withholding or withdrawing life-prolonging procedures from terminally ill pregnant patients, as well as the ability of a surrogate to give consent to abortion, sterilization, electroshock therapy, psychosurgery, or experimental treatments.

Probably the best definition of "terminal condition," in the sense that it was truest to the Browning decision, was the definition proposed during the September 1991 meeting of the House Health Care Committee's Subcommittee on Health Standards.\(^4\) This definition focused on the requirement that the patient be both mentally and physically incapacitated and unlikely to recover competency. The subsequent definition that was incorporated into House Bill 1851, and remained the House proposal until the final days of the legislative session, focused on the requirement that the patient's life was being artificially sustained by defining terminal to mean that a person would die without the administration of life-prolonging procedures.\(^4\) This latter definition was similar to the definition suggested by the district court's Browning decision\(^4\) and the Florida Supreme Court's construction of the terms in Mrs. Browning's living will.\(^4\) Combined with the requirement that the designated decision maker determine that the patient was unlikely to recover competency, this was believed to satisfy the restrictions in Browning. Both definitions avoided having to address the "imminent death" issue and had the advantage of being able to incorporate a person in a persistent vegetative state or a semi-cognitive state such as Mrs. Browning without having to specifically define the physical condition.

\(^{406}\) "'Terminal Condition' means a condition in which a person is mentally and physically incompetent and is caused by injury, disease, or illness from which, to a reasonable degree of medical certainty, there can be no recovery." Fla. H.R. Comm. on Health Care, PCB 92-01, § 11 (draft of Sept. 20, 1991).

\(^{407}\) "'Terminal condition' means a condition caused by injury, disease, or illness from which there is no reasonable medical probability of recovery and where death would result following the withholding or withdrawal of life-prolonging procedures." Fla. HB 1851, § 3 (1992).

Note the replacement of the term "reasonable degree of medical certainty" with "no reasonable medical probability." The latter phrase is used throughout the Browning decision and was felt to avoid the awkwardness of the former with the same effect. This phrase was exchanged throughout the statute.

\(^{408}\) In re Guardianship of Browning, 543 So. 2d 258, 264-65 (Fla. 2d DCA 1989), aff'd, 568 So. 2d 4 (Fla. 1990); see also supra notes 187, 195, and accompanying text.

\(^{409}\) Browning, 568 So. 2d 4; see also supra notes 356-58 and accompanying text.
As before, this definition was unsatisfactory to the Florida Catholic Conference, which still feared that this would permit medical treatment to be withheld from diabetics or other persons suffering from potentially treatable conditions. Even with the now-included Browning provision that the patient must be physician-certified to be permanently incompetent, and the additional limitation that the surrogate could only consent to the withholding or withdrawal of life-prolonging procedures which were defined as procedures that served only to prolong the process of dying, the definition was still not acceptable.

The definition for terminal condition proposed by The Florida Bar was almost identical to the last version of 1991's House Bill 1039. This was the version which defined terminal condition to mean both a condition which would “inevitably result in death” and a “persistent

410. See Letter from Tom Horkan, Florida Catholic Conference, to Representative Elaine Bloom, Florida House of Representatives (Jan. 6, 1992) (discussing House Bill 1191) (The House bill was mistakenly filed in Representative Bloom's name rather than in the Health Care Committee's name so it had to be withdrawn and was refiled as House Bill 1851.).

While the Catholic Church is not opposed to withholding or withdrawing life-prolonging procedures in hopeless cases or where the procedures are unduly burdensome, the Florida Catholic Conference would prefer that decisions to withhold life-prolonging treatment be made on a case-by-case basis rather than in conformity with formulas or definitions provided by statute. Such formulas or definitions do not necessarily conform to the Catholic emphasis on the preservation of life over sometimes conflicting individual's wishes (i.e., Elizabeth Bouvia). For example, the church still remains wedded to the distinction between “ordinary” and “extraordinary” treatment and that death be “imminent” before medical efforts can be abandoned. The differentiation between “ordinary” and “extraordinary” highlights the permissibility of withdrawing only medical treatment which is clearly more of a burden on the patient than a benefit. The requirement that death be “imminent” ensures that the patient's death is the inevitable result of his or her illness rather than of any affirmative act. Consequently, court opinions and statutes which abandon such distinctions permitting a surrogate to refuse medical treatment once a threshold state of permanent mental and physical incapacity is reached would be unacceptable. See FLORIDA CATHOLIC CONFERENCE, LIFE, DEATH & THE TREATMENT OF DYING PATIENTS—A PASTORAL STATEMENT OF THE CATHOLIC BISHOPS OF FLORIDA (Apr. 27, 1989); see also Peter Steinfels, Bishops Warn Against Withdrawing Life Supports, N.Y. TIMES, Apr. 3, 1992, at A10 (discussing the church's concern over withdrawing food and liquid from irreversibly unconscious patients except when such procedures are obviously futile and burdensome).

411. “Life-prolonging procedure” means any medical procedure, treatment, or intervention which:

(a) Utilize mechanical or other artificial means to sustain, restore, or supplant a spontaneous vital function and

(b) When applied to a patient in a terminal condition, serves only to prolong the process of dying.

FLA. STAT. § 765.03(3) (1991). Although this same definition of “life-prolonging procedure” is incorporated into chapter 92-199, it is inconsistent with the Browning decision which permits the surrogate of a permanently incompetent patient to refuse all medical treatment, not just life-prolonging procedures.
vegetative state." The Senate definition, which is basically the definition that prevailed, was similar with the addition of a physiological description of a persistent vegetative state. As noted, these definitions still would not have permitted the termination of medical treatment from someone such as Estelle Browning who was neither comatose nor in a persistent vegetative state.

Although first efforts to amend the House definition of terminal condition on the House floor were unsuccessful, the bill ultimately sent to the Senate contained the Senate definition. Because the amendment offered by Representative John Cosgrove left out the word "and" between the conditions defining a "persistent vegetative state," a second opportunity was offered to clean up the definition to remove redundancy and make the terminology consistent with the rest of House Bill 1851.

Ironically, following the Senate rejection of Senator Fred Dudley's amendment to reinsert the word "imminent" into the definition of

412. "Terminal Condition" means a condition caused by injury, disease, or illness, from which, to a reasonable degree of medical certainty, there can be no recovery and which will inevitably result in death, or a persistent vegetative state.

"Persistent vegetative state" means a condition which causes, within a reasonable degree of medical certainty, the absence of cognitive behavior and inability to communicate or interact purposefully with the environment, and which is, to a reasonable degree of medical certainty, permanent and irreversible.


413. "Terminal Condition" means:

(a) A condition caused by injury, disease, or illness from which within a reasonable degree of medical certainty, there can be no recovery and which reasonably can be expected to cause death; or

(b) A persistent vegetative state characterized by a permanent and irreversible condition of unconsciousness in which, within a reasonable degree of medical certainty, there is:

1. The absence of voluntary action or cognitive behavior of any kind; and

2. An inability to communicate or interact purposefully with the environment.

Fla. CS to CS for SB 1096 & SB 2414, § 3 (1992).

414. See supra note 411.

415. Representative Arnold offered an amendment that defined "terminal condition" as "a condition caused by injury, disease or illness from which, to a reasonable degree of medical certainty, there can be no recovery and which makes death inevitable." FLA. H.R. JOUR. 181 (Reg. Sess. 1992). This definition was flawed because life itself is a condition that will inevitably result in death.


417. Cosgrove was a member of the Study Commission that earlier examined Florida's guardianship statues. See supra note 246.

418. FLA. S. JOUR. 878 (Reg. Sess. 1992). This primarily involved the substitution of "no reasonable probability of recovery" for "reasonable degree of medical certainty." See supra note 407.
"terminal condition," a subsequent amendment by Senator Dudley, inserting "without treatment," was adopted and included in the bill signed by the Governor. The definition of "terminal condition" now means a condition "... from which there is no reasonable probability of recovery and which, without treatment, can be expected to cause death ..." This definition is broader than the House version, which was tied to conditions that would result in death following the withholding or withdrawal of life-prolonging types of treatment rather than simply treatment.

Before the final amendment, the proposed transfer provision or "conscience clause" of the proposed committee bill was similar to House Bill 1039 (1991). It permitted a health care provider to transfer a patient and to pay the cost of transfer, but it ultimately required the provider to carry out the wishes of the patient if transfer efforts failed. This was not satisfactory to the Florida Catholic Conference, which wanted more consideration to be given to the policies of the provider or facility. As before, this was based on the provision in the Federal Patient Self-Determination Act that allowed accommodation to differing state policies on this issue. To accommodate these concerns, a different version was incorporated into House Bill 1851 that

420. Id. at 900.
421. The definition now reads:

"Terminal condition" means:

(a) A condition caused by injury, disease, or illness from which there is no reasonable probability of recovery and which, without treatment, can be expected to cause death; or

(b) A persistent vegetative state characterized by a permanent and irreversible condition of unconsciousness in which there is:

1. The absence of voluntary action or cognitive behavior of any kind; and
2. An inability to communicate or interact purposefully with the environment.

Ch. 92-199, § 2, 1992 Fla. Laws 1839 (to be codified at FLA. STAT. § 765.101(17)).

This is the opposite of the early definitions of terminal condition that defined terminal condition to mean conditions where death would result regardless of treatment. See supra notes 29 and 89.
423. If a health care provider or health care facility cannot carry out the wishes of the declarant in accordance with this chapter, the provider or the facility shall make reasonable efforts to transfer the declarant to another health care provider or health care facility. If all reasonable efforts to provide for transfer fail, the health care provider shall carry out the wishes of the declarant. All expenses directly relating to such transfer shall be borne by the health care provider or health care facility whose refusal to comply with the declarant's wishes necessitates the transfer.

borrowed heavily from the Bar draft version. The Bar version did not require the physician or facility to carry out the wishes of the patient as long as the patient was not in an emergency situation and had received prior notice of the facility's policies, and did not require the provider or facility to pay the costs of transfer.\textsuperscript{425} While the House version acknowledged the moral and ethical beliefs of a physician or facility, it still required the facility to carry out the patient's wishes if the patient had not been transferred within seven days. However, the facility was not required to pay the costs of transfer if the patient had been advised of the facility's policies prior to admission and the patient had had the opportunity to select another physician or facility.\textsuperscript{426}

425. An attending or treating physician who refuses to comply with the declaration of a qualified patient or the treatment decision of a surrogate under this chapter or any other person lawfully authorized to make such decisions, shall make a reasonable effort to transfer the patient to another physician or health care facility. Nothing contained in this chapter is intended to require any health care provider or facility to commit any act which is contrary to his moral or ethical beliefs concerning life-prolonging procedures, providing the patient (a) is not in an emergency condition, and (b) has received the written information upon admission informing the patient of the written policies of the provider or facility regarding such moral or ethical beliefs.

(2) A health care provider or facility unable to carry out the wishes of the patient because of such moral or ethical beliefs shall make every reasonable effort to transfer the patient to another provider or facility, or may bring an expedited judicial intervention concerning life-prolonging procedures under the Florida Probate Rules. Nothing herein shall be construed to require a provider or facility to bear the costs of transfer or an expedited judicial intervention.


426. (1) Nothing contained in this chapter is intended to require any physician or health care facility, or other person who acts under the direction of a physician or health care facility, to commit any act which is contrary to his or her moral or ethical beliefs concerning life-prolonging procedures, provided that prior to or upon admission of the patient to a health care facility:

(a) The patient or surrogate received information in writing, informing the patient of the policies of the physician or health care facility regarding such moral or ethical beliefs; and

(b) The patient or surrogate had the opportunity to select another physician or health care facility.

(2) An attending physician or health care facility which because of moral or ethical beliefs who refuses to comply with the declaration of a patient made pursuant to s. 765.04, or the treatment decision of a surrogate lawfully authorized to make such decisions, shall make a reasonable effort to transfer the patient to another physician or health care facility.

(3) Nothing in this section shall be construed to require a physician or health care
As in the definition of terminal condition, a modified Senate version ultimately prevailed. 427

It will be recalled that there was ambiguity over the grounds upon which a physician or facility could refuse to carry out instructions to withhold life-prolonging procedures. 428 Representative Keith Arnold offered a floor amendment to the "conscience clause" which would have permitted an "expedited judicial proceeding" to temporarily stall the requirement that the decision to forego treatment be carried out within seven days if transfer arrangements failed. 429 This essentially meant that every time a provider objected to carrying out a patient's instructions the provider had recourse to judicial intervention. A substitute amendment, which prevailed, put judicial intervention back into the role envisioned by the Browning court by permitting an expedited proceeding only if the provisions of section 765.0702 applied. 430 Section 765.0702 basically permitted any interested party to judicially challenge the treatment decision of a surrogate only if the surrogate's decision was not in conformity with the requirements of law. 431

When Senator Malchon's floor amendment to House Bill 1851 substituted the Senate version of the "conscience clause" for the House's version, it did not contain the provision restricting judicial interven-

facility to bear the costs of transfer, provided that the patient was informed of the policies of the physician or health care facility concerning moral or ethical beliefs regarding the administration of life-prolonging procedures and the patient or surrogate had a reasonable opportunity to select another physician or health care facility.

(4) If the patient has not been transferred within 7 days following the surrogate's decision to withdraw or withhold life-prolonging procedures, the attending physician or the health care facility shall carry out the wishes of the patient or surrogate.


It was believed that the requirement that the patient have the opportunity to select another facility would cover both emergency situations and situations where, given a particular geographic area, there was no real choice in selecting a facility.

428. See supra notes 381-83 and accompanying text.
429. FLA. H.R. JOUR. 180 (Reg. Sess. 1992). The sentence in House Bill 1851, § 13 would have read:

(4) If the patient has not been transferred within 7 days following the surrogate's decision to withdraw or withhold life-prolonging procedures, and no expedited judicial proceeding has been instituted to review the matter, then the attending physician or the health care facility shall carry out the wishes of the patient or surrogate. Id.

430. FLA. H.R. JOUR. 180 (Reg. Sess. 1992). The subsection now read:

(4) If the patient has not been transferred within 7 days following the surrogate's decision to withdraw or withhold life-prolonging procedures, the attending physician or the health care facility shall carry out the wishes of the patient or surrogate unless the provisions of s. 765.0702 apply.

Section 765.0702 of House Bill 1851 became § 765.105 of House Bill 1851 (First Engrossed).
tion to statutory violations. A last-minute amendment corrected this. Unfortunately, the Senate substitute did not correct for differences in terminology between the House and Senate bills. Alas, while the House bill’s conscience clause spoke to the beliefs of both physicians and facilities, the Senate bill spoke only to health care providers. While the Senate definition for health care providers included both physicians and facilities, the House bill’s definition for provider meant only persons, not facilities. Facilities thus were no longer covered by the transfer clause, a result no one desired. Representative Bloom attempted to call attention to the inadvertent nature of the error by reading into the record of the House a statement clarifying legislative intent to apply this provision to both persons and facilities.

A final major source of controversy involved chapter 765’s prohibition against the withdrawal of life-prolonging procedures from a pregnant patient. This provision had been interpreted to mean that an incompetent, terminally ill pregnant patient had fewer rights than a competent, terminally ill pregnant patient who could, at least before viability, choose to refuse medical treatment. Upon second reading, Representative Guber successfully offered amendments removing those provisions from House Bill 1851. The “Advance Directives” floor amendment to House Bill 1851, which rewrote chapter 765, did not include the pregnancy restriction. It also deleted restrictions on the surrogate’s ability to provide consent for abortion, sterilization, electroshock treatment, psychosurgery, and experimental treatments which have not been recommended by a federally approved institu-

433. Id. at 882.
434. "'Health care provider' or 'provider' means any person licensed, certified, or otherwise authorized by law to administer health care in the ordinary course of business or practice of a profession." Ch. 92-199, § 2, 1992 Fla. Laws 1839, 1840. The Senate bill, on the other hand, defined a health care provider to include both persons and facilities. Fla. CS for CS for SB 1096 & SB 2414, § 3 (1992).
436. "The declaration of a qualified patient, or the written agreement for a patient qualified under s. 765.07, which patient has been diagnosed as pregnant by the attending physician, shall have no effect during the course of the pregnancy." Fla. Stat. § 765.08 (1991).
437. This issue has been festering since Roe v. Wade, 410 U.S. 113 (1973), and is potentially even more compelling since the Florida Supreme Court’s decision in In re T.W., 551 So. 2d 1186 (Fla. 1989). See Stratos, supra note 106, at 175.
438. Fla. H.R. Jour. 182 (Reg. Sess. 1992) (one amendment was left pending in order to keep the bill on unfinished business so that the redrafted “advance directives” version of House Bill 1851 could be amended onto the bill).
tional review board. Attempts to reinsert a modified form of those restrictions plus the pregnancy prohibition were unsuccessful on the House floor, but were amended onto the Senate amendment to the House bill. The Senate version reinserted the prior restrictions but permitted them to be overcome upon the express instructions of the patient. Upon reconsideration, the House approved a modification of this provision to permit court intervention as well as the patient's express instructions.

In addition to these more controversial sections, House Bill 1851 also contained the evidentiary presumptions suggested by the Browning court. Thus, presumptions of clear and convincing evidence were attached to a written declaration, a written designation of a health

439. Cf. Fla. Stat. § 745.46 (1991) (denying a surrogate this authority). The restriction forbidding a health care surrogate to provide consent for the withholding or withdrawal of life-prolonging procedures was also eliminated but this was not contested because the Browning decision made clear that a surrogate could have this authority.

Note that § 744.3215(4), Florida Statutes (1991), prevents a guardian from consenting to these same procedures without first obtaining court approval.

440. Fla. H.R. Jour. 608 (Reg. Sess. 1992). The proposed insertions were proposed as follows:
Section 765.113 Restrictions on surrogate providing consent. — Unless the principal expressly delegates such authority to the surrogate in writing, a surrogate or proxy may not provide consent for abortion, sterilization, electroshock therapy, psychosurgery, experimental treatments or therapy, or voluntary admission to a mental health facility.
Section 765.114 Pregnancy. — A health care provider treating or caring for a patient who is diagnosed as pregnant shall not honor any consents or instructions related to withholding or withdrawing life-prolonging procedures while the pregnancy continues, unless done before viability as defined in s. 340.001(5), and unless the patient has expressly authorized such withholding or withdrawal.

Id.

441. Fla. S. Jour. 882 (Reg. Sess. 1992). The language was identical to the proposed House amendment. See supra note 410.

442. Fla. H.R. Jour. 1828 (Reg. Sess. 1992). The following language was inserted:
Section 765.113 Restrictions on providing consent. — Unless the principal expressly delegates such authority to the surrogate in writing, or a surrogate or proxy has sought and received court approval pursuant to rule 5.900 of the Florida Probate Rules, a surrogate or proxy may not provide consent for:
(1) Abortion, sterilization, electroshock therapy, psychosurgery, experimental treatments that have not been recommended by a federally approved institutional review board in accordance with 45 C.F.R., part 46, 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. 390.001(5).

Following Senate concurrence to this amendment, the bill had passed both houses of the legislature. Fla. S. Jour. 1743 (Reg. Sess. 1992); Fla. H.R. Jour. 1828 (Reg. Sess. 1992); Fla. S. Jour. 1809 (Reg. Sess. 1992).

care surrogate, and the sworn physician statements certifying a patient's condition. This last provision was modified in response to pressures to reduce the requirement that physicians provide sworn statements. The provision now assigns the rebuttable presumption to the physicians' signed documentation in the patient's medical record. As in 1991, the decision was again made to require two—instead of three—physicians to certify the patient's condition. In addition, the Browning requirement that the consulting physicians have a specialty relevant to the patient's condition was also dropped because this was also seen as both costly and burdensome to the facility as well as to the family.

More significantly, the bill tried to incorporate the surrogacy procedure that was required by both the Bludworth and Browning courts. In those decisions, the court required that there be a decision maker to be sure that the conditions set forth by the patient had occurred, insuring that the patient's wishes were being carried out. The surrogate was, in effect, the executor of the patient's living "will." In the absence of an express designation by the patient, or prior appointment of a guardian, the court permitted a surrogate to be selected from the patient's family or close friends to carry out a patient's written or oral declaration, or for a designated surrogate to make the decision if so instructed by the patient. In the absence of family or friends, the bill required a court-appointed guardian to make the decision. This statutory scheme was strongly opposed by both the Florida Hospital

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444. Id. § 3 (1992), Ch. 92-199, § 3, 1992 Fla. Laws at 1844 (to be codified at Fla. Stat. § 765.202(6)).
445. Id. § 3 (1992), Ch. 92-199, § 3, 1992 Fla. Laws at 1846 (to be codified at Fla. Stat. § 765.204(2)).
446. See, e.g., Letter to Representative Elaine Bloom from Mary E. Early, Director of Public Policy, Florida Association of Homes for the Aging (Mar. 5, 1992) ("The House bill also requires physicians to provide a sworn statement regarding the medical condition of a patient. Given concern over liability, this requirement will probably make it more difficult for a nursing home or hospital to execute a patient's living will."); Letter to Senators Grant, Dudley, Langley, Malchon, and Weinstein, from R. Andrew Rock, Health Law Section of The Florida Bar (Mar. 4, 1992) (proposing that the findings of the physicians be documented in the patient's record).
448. Fla. HB 1851, § 3 (1992), Ch. 92-199, § 3, 1992 Fla. Laws 1839, 1846 (to be codified at Fla. Stat. § 765.204(3)). See supra note 145.
449. In re Guardianship of Browning, 568 So. 2d 4, 16 (Fla. 1990).
452. See supra notes 332-36 and accompanying text.
453. See supra notes 332-36 and accompanying text.
Association and the Health Law Section of The Florida Bar, which
preferred the arrangement in the original statute that left unsaid who
was to interpret the provisions of a person's living will. In other
words, if a patient had executed a living will but had not designated a
surrogate to carry out the instructions contained within the declara-
tion, the facility could carry out the instruction without seeking the
designation of a surrogate.

This position was seen as presenting several problems. First, it es-
entially made the health care provider or facility the decision maker,
because the provider or facility, instead of the family, friend, or
 guardian, would be determining whether the conditions stated in the
declaration exist. Further, as decision maker, the provider or facility
had a potential conflict of interest. On the one hand, if the patient
was indigent and expensive, there is no question that it would be to
the hospital's advantage to conclude, perhaps prematurely, that the
patient was terminal. On the other hand, a wealthy patient could be
seen as financially profitable to the facility. Second, there would be
no requirement for the facility to defer to or even consult with the
patient's family. The ability of a hospital or other facility to bypass
the family was inherently offensive.

Arguments that a surrogate could unconstitutionally come between
the patient and his instructions as expressed in a living will were over-
come by the fact that the surrogate was obligated under the doctrine
of substituted judgment to carry out the patient's wishes. This doc-
trine was incorporated by the statute's requirement that the surrogate
was obligated to see to it that "[b]efore proceeding in accordance with
the principal's living will, the surrogate or proxy must be satisfied
that: . . . any limitations or conditions expressed orally or in a written
declaration have been carefully considered and satisfied." In addi-
tion, the failure to follow the patient's instruction was grounds for a

454. See Letter from Rock, supra note 446 (stating that a living will must be "self-execut-
ing").
455. The Florida Bar's proposal stated that:
The failure of an adult patient who has executed a declaration to designate a surrogate
to carry out his wishes concerning life-prolonging procedures shall not affect the de-
claration. Life-prolonging procedures may be withheld or withdrawn as directed by a
declarant in a declaration regardless of whether a surrogate has been designated.
Final Draft, Florida Bar, Health Law Section, § 28.
456. Note the Study Commission on Guardianship Law recommended that a guardian not be
the health care provider to the ward unless the court specifically finds that there is no conflict of
interest: STUDY COMMISSION ON GUARDIANSHIP LAW, ST404 COMMISSION ON GUARDIANSHIP LAW,
REPORT AND RECOMMENDATIONS OF THE STUDY COMMISSION ON GUARDIANSHIP LAW 33 (Mar. 1,
1989).
457. See supra notes 332-36 and accompanying text for discussion of substituted judgments.
458. Ch. 92-199, § 4, 1992 Fla. Laws 1839, 1847 (to be codified at Fla. STAT. § 765.304(2)).
legal challenge under section 765.105.\textsuperscript{459} A compromise was struck permitting the facility to assume the role of decision maker if no one else was available.\textsuperscript{460}

A section was also created within part III that outlined the procedure a designated surrogate was to follow in the absence of a living will. The \textit{Browning} decision had been somewhat unclear as to whether or not the surrogate/proxy must be directly instructed to make the decision to withhold medical treatment in terminal situations or whether he could make this decision if he had simply been designated to make all health care decisions.\textsuperscript{461} The new Act assumed the latter, unless the patient expressly directed otherwise.\textsuperscript{462} The health care surrogacy section was essentially a streamlining of chapter 745 with an emphasis placed on permitting the health care surrogate to make all health care decisions unless expressly instructed otherwise.\textsuperscript{463} The restrictions on who could serve as a surrogate were eliminated,\textsuperscript{464} as was the requirement that the patient’s competency be reviewed every thirty days,\textsuperscript{465} and that a surrogacy designation automatically expires after seven years (unless the patient was incapable of giving informed consent at the time of expiration).\textsuperscript{466} Added was a

\begin{footnotes}
\item[459] \textit{Id.} § 2, 1992 Fla. Laws at 1839 (to be codified at \textit{FLA. STAT.} § 765.105).
\item[460] \textit{Id.} § 4, 1992 Fla. Laws at 1847 (to be codified at \textit{FLA. STAT.} § 765.304(1)). This still does not overcome the potential conflict of interest on the part of the facility.
\item[461] \textit{In re Guardianship of Browning}, 568 So. 2d 4, 15 (Fla. 1990). While the text of the opinion implies that the surrogate was to be given a specific instruction to make the decision to forego further medical treatment, footnote 14’s reference to Justice O’Connor’s opinion in \textit{Cruzan} suggests otherwise. \textit{See} \textit{Cruzan v. Director, Mo. Dept’ of Health}, 110 S. Ct. 2841, 2857 (1990) (O’Connor, J., concurring). Frankly, it is illogical to imagine that a person would specifically delegate to another the authority to decide whether or not to withhold medical treatment in terminal situations without also expressing whether they would want such treatment administered. It is far more likely that a person would simply delegate to a trusted other the authority to make all health care decisions with the additional instruction that should the person be permanently incapacitated, no additional efforts are to be employed.
\item[462] Ch. 92-199, § 4, 1992 Fla. Laws 1839, 1847 (to be codified at \textit{FLA. STAT.} § 765.305(1)).
\item[463] “The surrogate shall: Have authority to act for the principal and to make all health care decisions for the principal in matters regarding the principal’s health care during the principal’s incapacity, in accordance with the principal’s instructions, unless such authority has been expressly limited by the principal.” \textit{Id.} § 3, 1992 Fla. Laws at 1844 (to be codified at \textit{FLA. STAT.} § 765.205(1)(a)).
\item[465] Former \textit{FLA. STAT.} § 745.48(2) (1991).
\end{footnotes}
provision permitting the designation of an alternate surrogate,467 and a suggested form for the written designation of a surrogate.468 Although Representative Simone's bill and the Bar Draft originally intended to drop the health care surrogacy format and create a durable power of attorney for health care, it remained in the surrogacy form for the same reasons that chapter 745 had been cast in a surrogacy format—to avoid the possible impression that a person would have to seek legal assistance in drafting a durable power of attorney for health care. Most importantly, section 709.08, Florida Statutes, was amended to direct that a durable power of attorney with authority to make health care decisions was regulated by the new revised chapter 765.469

Some of the conflicts with guardianship law were also addressed. Chapter 745 had permitted a designated surrogate's authority to continue after the court appointment of a guardian of the patient's estate unless the court removes such power;470 this provision is still within the surrogacy sections.471 In addition, chapter 744 was amended to direct a court, upon the appointment of a guardian, to address the issue of any pre-existing advance directives of the ward, the continued effect of those directives, and the authority of a guardian to act on behalf of a ward with respect to those directives.472

Probably the most innovative and yet potentially the most problematic provision in the new law is part IV, which provides a procedure for the appointment of a proxy to make health care decisions for an incapacitated patient in the absence of an advance directive.473 This section originated as a blend of sections 745.44(2) and 765.07, Florida Statutes. Section 745.44(2) permitted a health care facility to appoint a surrogate when one had not been designated by the patient. The facility was obligated to follow a certain order in the selection: a guardian if one had been appointed, the patient's spouse, the patient's adult child, or the patient's parent. If none were available the facility, was to petition the court to appoint a guardian. As suggested before,474 this was outside the legal framework of a durable power of attorney which served only to provide a procedure for a competent

468. Id. § 3, 1992 Fla. Laws at 1845 (to be codified at Fla. Stat. § 765.203).
469. Id. § 8, 1992 Fla. Laws at 1852 (to be codified at Fla. STAT., § 709.08).
471. Ch. 92-199, § 3, 1992 Fla. Laws 1839, 1847 (to be codified at Fla. Stat. § 765.205(3)).
472. Id. §§ 6, 7, 1992 Fla. Laws at 1851 (to be codified at Fla. Stat. §§ 744.3115, .345). Still unresolved is the relationship between a plenary guardian and a surrogate unless one assumes that plenary guardianship usurps surrogacy. If so, does this unconstitutionally nullify a person's privacy right to direct medical treatment through his expressly designated surrogate?
473. Id. § 5, 1992 Fla. Laws at 1850-51 (to be codified at Fla. Stat. § 765.401).
474. See supra notes 256-57 and accompanying text.
person to designate an agent during times of incapacity. Where none had been appointed, guardianship was to take over. Thus, this section permitted a facility to avoid a court procedure seeking an appointed guardian in the area of health care decision making when one had not been designated by the patient. Section 765.07, *Florida Statutes*, permitted the decision to withhold life-prolonging procedures from a terminally ill, incompetent, adult patient who had not executed a living will, to be made by another individual in consultation with the patient’s physician. The decision makers were to be guided by the express or implied intentions of the patient.

While the *Browning* court had focused exclusively on medical decision making for permanently incapacitated individuals, the advance directives bill also wanted to address the appointment of substitute decision makers for temporarily incapacitated patients. Consequently, part III of the Act, relating to life-prolonging procedures, only provides a procedure for executing and effectuating written living wills. The evidentiary burden and procedure for effectuating oral instructions is left to part IV, as well as a means for appointing a proxy decision maker to make health care decisions in the absence of an express designation. The creation of a procedure allowing the appointment of another, who is outside court supervision, to make health care decisions for an incapacitated patient, who has neither left instructions nor personally selected a surrogate, is a powerful privilege and should be examined more closely.

In addition to the above, a section permitting emergency medical service personnel to honor a “do-not-resuscitate” order was incorporated into the bill since such an order also represented a form of “advance directive.” This section, added as an amendment by Representative Mary Brennan, probably has made more people

475. The individual was to be selected in the following order of priority: a guardian if one has been appointed, a designated surrogate, the patient’s spouse, the patient’s adult children, the patient’s parents, or the patient’s nearest living relative. This section was to operate when the patient had not executed a written declaration but had left other evidence of his wishes concerning the administration of life-support. *Fla. Stat.* § 765.07 (Supp. 1984).


477. *Id.* § 5.


479. See *Fla. H.R. Jour.* 182 (Reg. Sess. 1992). The amendment was rewritten for the latter version of *House Bill 1851*. 
happy than any other provision.\textsuperscript{480} The new "expedited judicial proceeding," requested by the Florida Supreme Court in \textit{Browning} and promulgated as Florida Probate Rule 5.900, was incorporated into new section 765.105\textsuperscript{481} which created a procedure for judicially reviewing the decision of surrogates or proxies. Finally, the federal requirements mandated by the Patient Self-Determination Act were incorporated into section 765.110.\textsuperscript{482} For better or ill, everything that anybody could think of was now contained within chapter 765.

\section*{VI. Conclusion}

Changing the way people think about things is always a difficult and painful process. The more fundamental the concepts, the more troublesome the transition. Few things are more basic than the preservation of life, yet this single subject has been subject to more attack in recent times than any other—chiefly as the result of rapid technological advancement. Generally, scientific effort is aimed toward the prolongation of life, an end desired by almost everyone. It is hardly surprising then that efforts to put on some restrictions should be met with a surprised and stubborn resistance. However, it has become increasingly obvious that the empty and undignified existence of a Karen Ann Quinlan, a Nancy Cruzan, or an Estelle Browning was not what anyone intended in the effort to extend life expectancy.

The 1992 Act and the \textit{Browning} decision are inconsistent. The Florida Supreme Court has construed the state constitution's article I, section 23 "right of privacy" to encompass an individual's authority to approve all health care unless the state is able to demonstrate a compelling interest that overcomes that right. That right does not suddenly evaporate upon a person's incompetency but continues unabated. Indeed, it would be an empty right if it did not apply to perhaps the most significant medical decision that a person may face. It then recognizes that for many, the end is not necessarily when death is imminent but when the individual has lost all physical and mental capacity and has become a hopeless burden on those around them and bearing little resemblance to the person they want remembered. The court therefore held that the person may make arrangements to direct the course of his or her medical care by leaving specific instructions which are to be carried out by another or by appointing another to make decisions for him or her during his or her incapacity. The source

\textsuperscript{480} Unfortunately, this section is being interpreted to also apply to do-not-resuscitate orders within hospitals.

\textsuperscript{481} Ch. 92-199, § 2, 1992 Fla. Laws 1839, 1842-43 (to be codified at \textsc{Fla. Stat.} § 765.105).

\textsuperscript{482} \textit{Id.} § 2, 1992 Fla. Laws at 1843-44 (to be codified at \textsc{Fla. Stat.} § 765.110).
of those instructions must be the individual, and the instructions must control the medical decision that the substitute decision maker makes on the individual’s behalf.

While the new Act also recognizes a fundamental right of self-determination regarding decisions pertaining to one’s own health, it is restricted to permitting the removal of life-prolonging procedures from terminally ill patients. In the past, the courts were able to avoid holding the statute unconstitutional by activating section 765.15, Florida Statutes (Supp. 1984), which provided that the life-prolonging procedures provision was cumulative to the existing law, not impairing existing rights which a person may have under the laws of the state. That provision was also incorporated into the 1992 Act. In addition, the new Act contains a provision declaring that the chapter “shall not be construed to render unlawful any form of substitute decisionmaking recognized either by the constitutional right of privacy or any other provision of the State or United States Constitutions.”

As explained by the Second District in Corbett when it activated the “cumulative” provision in section 765.15, Florida Statutes (Supp. 1984), to permit the withholding of sustenance from a terminally ill patient, “chapter 765 appears to have been enacted to apply in certain specified situations and was not intended to encompass the entire spectrum of instances in which these privacy rights may be exercised.” Is that how the new Act should continue to be interpreted?

In reviewing those cases where the courts applied the “cumulative” provision and avoided declaring the statute unconstitutional, it would

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483. See, e.g., In re Guardianship of Browning, 543 So. 2d 258, 265 (Fla. 2d DCA 1989) aff'd, 568 So. 2d 4 (Fla. 1990); Corbett v. D’Alessandro, 487 So. 2d 368, 370 (Fla. 2d DCA 1986). See also Browning, 568 So. 2d at 9 (Florida Supreme Court simply held that chapter 765 did not apply to Mrs. Browning’s situation).


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, including a minor, competent or incompetent person, or a patient’s family may have in regard to the withholding or withdrawal of life-prolonging procedures or any other health care decisionmaking under the common law or statutes of this state.

Id.


This chapter shall not be construed to render unlawful any form of substitute decisionmaking recognized either by the constitutional right of privacy or any other provision of the State or United States Constitution. To the extent such other forms of surrogate decisionmaking are recognized under constitutional law, they shall be deemed an alternative to this chapter.

Id.

486. Corbett, 487 So. 2d at 370.
appear that in all cases the courts were applying the statute to situations that had not been addressed before. Thus, before Corbett, the Florida Supreme Court had not specifically addressed the nature of the medical procedures that could be refused. Similarly, before Browning, Bludworth had been restricted to the withdrawal of life-prolonging procedures from incompetent patients certified to be in a permanent vegetative state. Logically, then, our statute would not be unconstitutional to the extent that it fails to accommodate situations that have not yet been addressed by the courts. In such situations, new sections 765.106 and 765.111 could operate. However, to the extent that the new Act is seen as restricting rights expressly recognized it could be seen as unconstitutional.

Without question, the new Advance Directives Act is an important achievement. Although some provisions, particularly those that are the most innovative, remain rough and in need of further refinement, on the whole, it is a significant attempt to provide a comprehensive approach to personal health care planning. From this perspective, the new Act represents increased recognition for the individual's right to maintain control over medical care during times of incapacity. Of special interest is the emerging role of health care surrogacy decisions. Although not yet fully developed, it is anticipated that this new, legally based and more flexible form of advance directive will gradually replace living wills, which will come to be seen as no more than a special set of instructions to a designated surrogate. Hopefully, Florida can remain in the forefront of this important trend.