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2015 Changes to Florida Health Care Surrogacy Law

On October 1, 2015, several changes and addition to the Florida Statutes, Chapter 765, Parts I and II, governing health care surrogacy took effect, providing more flexibility to people charged as health care surrogates and providing clarity to the existing statutes. Prior to the 2015 change, surrogates primarily acted similar to a power of attorney regarding health care decisions only when an individual was declared legally incapacitated. The powers of a surrogate were limited. Not only could the surrogate only make health care decisions for the principle when the principle was found legally incapacitated, the surrogate could provide informed consent when the consent reflected the principal's wishes or the principal's best interests, the surrogate could access appropriate medical records of the principal, the surrogate could apply for public benefits for the principal and access information regarding the principal's income, assets, and financial records as required to complete such an application, the surrogate could authorize release of information and medical records when necessary to ensure continuity of the principal's health care, and the surrogate could authorize the admission, discharge, or transfer of the principal to or from a health care facility.¹

Although a health care surrogate had many powers to act when a principle was incapacitated, because of the stringent language that required the principle be incapacitated in order to make a decision, many health care providers were reluctant to allow a health care surrogate to act without an adjudication of incapacity, creating problems for health care surrogates when a principal may vacillate in and out of capacity. Because of this issue, the Florida legislature revised the statutes to create a broader ability for a surrogate to be able to act.

The definition of a surrogate was amended under Florida Statute § 765.101(21)² so that a surrogate is "any competent adult expressly designated by a principal to make health care decisions and to receive health information." The amendment also allows the principal to stipulate "whether

¹ Fla. H.R. Comm. on Judiciary, HB 889 (2015) Final Bill Analysis at 3 (April 24, 2015) (available at Fla. Dep't of State, Fla. State Archives, Tallahassee, Fla.)

² See also, Fla. H.R., HB 889 (2015) Engrossed 1 (available at Fla. Dep't of State, Fla. State Archives, Tallahassee, Fla. at <https://www.flsenate.gov/Session/Bill/2015/0889/BillText/er/PDF>)

the authority of the surrogate to make health care decisions or to receive health information is exercisable immediately without the necessity for a determination of incapacity or only upon the principal's incapacity." This provision is beneficial for elderly people that may vacillate in and out of capacity so that a surrogate can make decisions despite the elderly person's temporary capacity. The 2015 statute also allows a competent adult to have a health care surrogate to assist them in making medical decisions and a principle to create a "springing" power similar to the former health care surrogacy laws, for principles that do not want to give their health care surrogates to act immediately. While Florida Statute § 765.102(3) clarifies that the intent of the legislature is to no longer require incapacity for a surrogate to be able to make a decision, Florida Statute § 765.204, provides that, when a principal has capacity, their decisions are controlling over any contrary decision by the surrogate.

Regarding the designation of health care surrogates for adults, there were many substantive changes. Florida Statute § 765.202(6) added the ability for a surrogate to receive health information or make health care decisions without the necessity for a determination of incapacity when the principal has stipulated that they have the ability to do so. Additionally, a new suggested form of designation for adults was added under Florida Statute § 765.203.

Regarding the designation of a health care surrogate for a minor, Florida Statute § 765.2035 was added. This section replaces a power of attorney's ability to make decisions for the minor with a surrogate's ability to do so. The intention of this section is for a minor's parent or guardian to give the surrogate the ability to act in an emergency situation during specific periods of time because "it is common for parents and legal guardians to go on vacation and leave their children with a caregiver, and equally common for parents and legal guardians to allow a minor to travel and stay with relatives or friends for a period of time," so parents may give this person authority to make decisions in these situations.³ Parents may create a designation that expires after a period of time or it may remain in effect until the minor reaches the age of majority or the principal revokes. In addition, a suggested designation of health care surrogate for minors was added under Florida Statute § 765.2038.

³ Fla. H.R. Comm. on Judiciary, HB 889 (2015) Final Bill Analysis at 4 (April 24, 2015) (available at Fla. Dep't of State, Fla. State Archives, Tallahassee, Fla.)

The revision to Florida Statute § 743.0645, now allows for health care surrogates to approve “surgery, general anesthesia, provision of psychotropic medication or other extraordinary procedures” for a minor when, before the revisions, these procedures could only be approved by court orders, power of attorney, or informed consent as provided by law. For minors not committed to the Department of Children and Families or the Department of Juvenile Justice, when their parents or guardians cannot be contacted, a healthcare surrogate may provide consent. Prior to this revision only a power of attorney could provide consent.

Under Florida Statute § 765.105, the process for seeking the review of surrogate or proxy’s decisions is primarily the same. In particular, the family, the health care facility, or the primary physician, or any other interested person who may be effected by the decision may seek judicial intervention. However, this bill adds a new sub-section that provides an exception so that the section does not apply when the person who appointed the surrogate is not incapacitated.

Under Florida Statute § 765.204, several small changes were made involving the procedure with regard to the capacity of the principal. One major change to this section is that health care providers are not liable for relying on decisions made by a surrogate while the principal lacks capacity so that a decision made by a surrogate is effective to the same extent as a decision made by the principal. When a physician makes a determination of incapacity, the health care facility is required to notify the surrogate upon a determination of incapacity. The notification requirement requires notice to the attorney in fact if the health care facility knows of a durable power of attorney. In addition, the 2015 statute requires an attending physician’s hospital to inform a principal’s primary physician of the principal’s incapacity, if an attending physician determines the principal lacks capacity.

In summary, the revisions to the health care surrogacy laws make it easier and more practical to make decisions on behalf of a principle when the principle is only temporarily incapacitated. In addition, a principle has more flexibility in deciding how much power to give their surrogate, by allowing the declaration or designation to become effective immediately or at a later time and by allowing the principle to decide what type of decision a surrogate may make for them.