

# NATIONAL HEALTHCARE DECISIONS DAY 2015

FLORIDAELDER.COM PROFESSIONAL EDUCATION SERIES

YOUR ATTORNEY PRESENTERS:

GRADY H. WILLIAMS, JR., LL.M.  
ALISON E. HICKMAN, J.D.

# GRADY H. WILLIAMS, JR., LL.M., ATTORNEYS AT LAW, P.A.

1543 KINGSLEY AVENUE

SUITE 5

ORANGE PARK, FL 32073

PHONE: (904) 264-8800

FAX: (904) 264-0155

WEB: [www.FloridaElder.com](http://www.FloridaElder.com)

EMAIL: [paula@floridaelder.com](mailto:paula@floridaelder.com)

Social Media and Newsletter options are available through our website. Please join or follow us for up to date information affecting you and your family's legal planning. Not a computer or email person? Call Paula Emery monthly to check in and find out what's going on with our firm that month. We want to stay in touch with you!

# DISCLAIMER

THANK YOU FOR YOUR ATTENDANCE AT TODAY'S EDUCATIONAL EVENT. INFORMATION PROVIDED IS DEEMED RELIABLE BUT IS NOT GUARANTEED. YOUR ATTENDANCE AND PARTICIPATION IN THIS EVENT, AND ANY COMMENTS OR ANSWERS OF THE ATTORNEY PRESENTERS, DOES NOT FORM AN ATTORNEY-CLIENT RELATIONSHIP, AND DOES NOT CONSTITUTE LEGAL ADVICE PROVIDED BY AN ATTORNEY TO A CLIENT TO BE RELIED ON BY ANYONE IN ATTENDANCE. ALSO, PRIVILEGES AND DUTIES WHICH NORMALLY FLOW FROM AN ATTORNEY-CLIENT RELATIONSHIP, SUCH AS CONFIDENTIALITY AND LOYALTY, DO NOT ARISE FROM YOUR PARTICIPATION IN OR ATTENDANCE AT THIS EVENT.

WE ARE SO PLEASED THAT YOU CHOSE TO ATTEND AND LOOK FORWARD TO PRESENTING THIS MATERIAL TO YOU! THE SETTING IS INFORMAL AND RELAXED, SO FEEL FREE TO ASK QUESTIONS AND PARTICIPATE. THANK YOU, AGAIN.

# WHAT IS NATIONAL HEALTHCARE DECISIONS DAY?

“WHAT’S THE BIG DEAL ABOUT ADVANCE DIRECTIVES?”

- [www.nhdd.org](http://www.nhdd.org)
- Twitter @nhdd
- Healthcare/Legal/Religious Communities Working Together
- Advance Care Planning Emphasis
- Professional & Consumer Audiences
- Consequences of “Not Deciding”

# WHAT ARE FLORIDA ADVANCE HEALTH CARE DIRECTIVES?

ACCORDING TO THE FLORIDA STATUTES AND BEYOND

- FLORIDA STATUTES, CHAPTER 765
  - HEALTH CARE SURROGATE DESIGNATION
  - LIVING WILL
  - ANATOMICAL GIFT
- OTHER DIRECTIVES
  - HIPAA RELEASE
  - DNRO
  - PRENEED GUARDIAN DESIGNATION
  - DURABLE POWER OF ATTORNEY

# APPLICABLE LAW AND AUTHORITIES

“WHERE DO ALL OF THESE COME FROM?”

- HCS, LW, ANATOMICAL GIFT:
  - F.S. Chap. 765
- HIPAA RELEASE: 42 U.S.C. 1320d & 45 C.F.R. 160-164
- DNRO: F.S. s. 401.45(3)(a) & FAC R. 64J-2.018
- PRENEED GUARDIAN DESIGNATION: F.S. s. 744.3045
- DURABLE POWER OF ATTORNEY:
  - F.S. Chap. 709, Part II

# FLORIDA STATUTORY ADVANCE DIRECTIVES BASICS

WHAT THE LEGISLATURE HATH PROVIDED US

# FLORIDA STATUTES S. 765.101

(5) “HEALTH CARE DECISION” MEANS:

(A) INFORMED CONSENT, REFUSAL OF CONSENT, OR WITHDRAWAL OF CONSENT TO ANY AND ALL HEALTH CARE, INCLUDING LIFE-PROLONGING PROCEDURES AND MENTAL HEALTH TREATMENT, UNLESS OTHERWISE STATED IN THE ADVANCE DIRECTIVES.

(B) THE DECISION TO APPLY FOR PRIVATE, PUBLIC, GOVERNMENT, OR VETERANS’ BENEFITS TO DEFRAY THE COST OF HEALTH CARE.

(C) THE RIGHT OF ACCESS TO ALL RECORDS OF THE PRINCIPAL REASONABLY NECESSARY FOR A HEALTH CARE SURROGATE TO MAKE DECISIONS INVOLVING HEALTH CARE AND TO APPLY FOR BENEFITS.

(D) THE DECISION TO MAKE AN ANATOMICAL GIFT PURSUANT TO PART V OF THIS CHAPTER.

# FLORIDA HEALTH CARE SURROGATE ACT

- FLORIDA STATUTES CHAPTER 765, PART II, SS. 765.201 – 765.205
- EXPRESSLY AUTHORIZES A WRITTEN SURROGATE DESIGNATION FOR HEALTH CARE DECISIONS (“HCS”)
- IF UNABLE TO SIGN, YOU MAY AUTHORIZE ANOTHER TO SIGN FOR YOU
- REQUIRES 2 SUBSCRIBING ADULT WITNESSES, AT LEAST ONE OF WHOM IS NOT YOUR SPOUSE NOR A BLOOD RELATIVE
- YOU MAY NAME ONE OR MORE ALTERNATE SURROGATE(S)
- HEALTH CARE FACILITY MAY SEEK PROXY TO ACT IF NAMED SURROGATE AND ALTERNATE(S) ARE UNABLE OR UNWILLING TO ACT
- MENTAL HEALTH TREATMENT SURROGATE AUTHORIZATION MAY BE SEPARATE OR EXPRESSLY INCLUDED AS PART OF HEALTH CARE SURROGATE DESIGNATION
- HEALTH CARE FACILITY CANNOT CONDITION ADMISSION OR TREATMENT UPON HAVING A HCS OR LW
- PRACTICAL AND LEGAL COORDINATION WITH FLORIDA DURABLE POWER OF ATTORNEY AND FILED PRENEED GUARDIAN DESIGNATION HIGHLY RECOMMENDED
- PRINCIPAL MAY REVOKE, AMEND OR SUPERSEDE HCS IN LIKE FASHION

# LIFE-PROLONGING PROCEDURE ACT OF FLORIDA (“LIVING WILL”)

## WHAT IS A LIVING WILL?

- WRITTEN DECLARATION DIRECTING THE PROVIDING, WITHHOLDING, OR WITHDRAWAL OF LIFE-PROLONGING PROCEDURES IN THE EVENT THAT SUCH PERSON HAS A TERMINAL CONDITION, HAS AN END-STAGE CONDITION, OR IS IN A PERSISTENT VEGETATIVE STATE
- STATUTORY FORM PROVIDED
- ADDITIONS PERMITTED
- MAY DEFAULT TO HCS IN ABSENCE OF LIVING WILL

## REQUIREMENTS:

- SIMILAR TO HCS REQUIREMENTS
- SURROGATE NOT REQUIRED; BUT IS RECOMMENDED
- YOU OR SOMEONE FOR YOU MUST NOTIFY OF EXISTENCE
- LIVING WILL = REBUTTABLE PRESUMPTION OF CLEAR & CONVINCING EVIDENCE OF YOUR WISHES
- MAY NOT BE A CONDITION OF ADMISSION OR TREATMENT
- MAY REVOKE, AMEND OR SUPERSEDE IN LIKE FASHION

# ABSENCE OF ADVANCE DIRECTIVE

- FLORIDA STATUTES CHAPTER 765, PART IV
- “PROXY” UNDER F.S. s. 765.401
  - GUARDIAN, SPOUSE, ADULT CHILD, PARENT, ADULT SIBLING, “SPECIAL” ADULT RELATIVE, CLOSE FRIEND, THEN LICENSED CLINICAL SOCIAL WORKER
  - DECISION BASED ON PROXY’S INFORMED CONSENT AND
  - ON THE DECISION THE PROXY REASONABLY BELIEVES THE PATIENT WOULD HAVE MADE UNDER THE CIRCUMSTANCES
  - IF NO EVIDENCE AS TO THE LATTER, PROXY MAY CONSIDER THE PATIENT’S BEST INTEREST IN DECIDING THAT PROPOSED TREATMENTS ARE TO BE WITHHELD OR THAT TREATMENTS CURRENTLY IN EFFECT ARE TO BE WITHDRAWN
- MEDICAL ETHICS COMMITTEE OR STATUTORY ALTERNATIVE IF NO PROXY IS AVAILABLE AND A PERSISTENT VEGETATIVE STATE EXISTS
- GREATER POTENTIAL FOR LITIGATION ABSENT LIVING WILL OR HCS DESIGNATION

# **ADDITIONAL PROXY DECISION REQUIREMENTS**

**F.S. s. 765.401(3):**

**BEFORE EXERCISING THE INCAPACITATED PATIENT'S RIGHTS TO SELECT OR DECLINE HEALTH CARE, THE PROXY MUST COMPLY WITH THE PROVISIONS OF SS. 765.205 AND 765.305, EXCEPT THAT A PROXY'S DECISION TO WITHHOLD OR WITHDRAW LIFE-PROLONGING PROCEDURES MUST BE SUPPORTED BY CLEAR AND CONVINCING EVIDENCE THAT THE DECISION WOULD HAVE BEEN THE ONE THE PATIENT WOULD HAVE CHOSEN HAD THE PATIENT BEEN COMPETENT OR, IF THERE IS NO INDICATION OF WHAT THE PATIENT WOULD HAVE CHOSEN, THAT THE DECISION IS IN THE PATIENT'S BEST INTEREST.**

# ANATOMICAL GIFTS IN FLORIDA

## AUTHORIZATION

- GIFT OF ALL OR PART OF BODY POST-MORTEM
- DONEE MAY BE NAMED
- FLEXIBLE AND VARIED OPTIONS
- PUBLIC POLICY IS VERY MUCH PRO-GIFT

## IMPLEMENTATION

- UNIFORM DONOR CARD
- ONLINE REGISTRATION
- DRIVER'S LICENSE
- LIVING WILL OR HCS
- LAST WILL & TESTAMENT
- OTHER

# HIPAA (GENERAL MEDICAL) RELEASE

EXPANDING PRACTICAL ACCESS TO "PHI" TO FAMILIES

# HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT (“HIPAA”) BASICS

- HIPAA PRIVACY RULE BECAME EFFECTIVE IN 2003/2004
- HIPAA PRIVACY RULE PROTECTS PATIENT’S PROTECTED HEALTH INFORMATION (“PHI”) FROM BEING RELEASED EXCEPT AS AUTHORIZED BY LAW
- WRITTEN RELEASE NEEDED TO EVIDENCE PATIENT CONSENT TO CERTAIN PHI DISCLOSURES
- DOCUMENTATION OF AUTHORIZED RELEASE OF INFORMATION INSULATES PHYSICIAN OR HEALTH CARE PROVIDER FROM EXPOSURE FOR VIOLATING HIPAA PRIVACY RULE
- HIPAA RELEASE SEEKS TO AUTHORIZE TIME OF NEED AND POST-MORTEM PHI DISCLOSURE TO PATIENT’S NAMED FAMILY MEMBERS AND/OR INNER CIRCLE
- POST-MORTEM RELEASES TO FAMILY NOW MORE RELAXED UNDER AMENDED REGULATIONS (2013)
- GOAL: AVOID UNNECESSARY FORMALITIES FOR REASONABLE PHI DISCLOSURES PRIOR TO & AFTER DEATH, AS EXPRESSLY AUTHORIZED BY THE PATIENT/CLIENT

# **FLORIDA DO NOT RESUSCITATE ORDER**

HOW TO ENSURE YOU ARE NOT RESUSCITATED?

# OVERVIEW OF DNRO BASICS AND IN ACTION

## AUTHORIZATION

- **STATUTE & RULE**
- **EMS FUNCTION**
- **FL HEALTH DEPT  
FORM 1896 (YELLOW)**
- **DOCTOR'S SIGNATURE**
- **PATIENT OR AGENT'S  
SIGNATURE**

## IMPLEMENTATION

- **MUST BE ON REQUIRED  
YELLOW FORM**
- **NOTICE REQUIRED TO EMS**
- **ATTORNEYS CANNOT  
IMPLEMENT W/O DOCTOR**
- **CONSISTENT WITH LIVING  
WILL AND PALLIATIVE CARE**
- **NOT MERCY KILLING,  
EUTHANASIA OR SUICIDE**
- **DNRO MAY BE REVOKED BY  
PATIENT OR AGENT**

# FLORIDA PRENEED GUARDIAN DESIGNATION

WHO DO YOU WANT AS YOUR APPOINTED GUARDIAN?

# FLORIDA GUARDIANSHIP BASICS – F.S. CH. 744

- GUARDIAN OF THE PROPERTY (COMPARES TO DURABLE POWER OF ATTORNEY )
- GUARDIAN OF THE PERSON (COMPARES TO HCS, LW, AND HIPAA RELEASE)
- F.S. s. 744.3115 ... IF ANY ADVANCE DIRECTIVE EXISTS, THE COURT SHALL SPECIFY IN ITS ORDER AND LETTERS OF GUARDIANSHIP WHAT AUTHORITY, IF ANY, THE GUARDIAN SHALL EXERCISE OVER THE SURROGATE. PURSUANT TO THE GROUNDS LISTED IN S. 765.105, THE COURT, UPON ITS OWN MOTION, MAY, WITH NOTICE TO THE SURROGATE AND ANY OTHER APPROPRIATE PARTIES, MODIFY OR REVOKE THE AUTHORITY OF THE SURROGATE TO MAKE HEALTH CARE DECISIONS FOR THE WARD....
- F.S. s. 744.3045 ALLOWS FOR PRENEED GUARDIAN DESIGNATION
- F.S. s. 744.312(4) IF THE PERSON DESIGNATED IS QUALIFIED TO SERVE ..., THE COURT SHALL APPOINT ANY STANDBY GUARDIAN OR PRENEED GUARDIAN, UNLESS THE COURT DETERMINES THAT APPOINTING SUCH PERSON IS CONTRARY TO THE BEST INTERESTS OF THE WARD.
- LETTERS OF GUARDIANSHIP OR LETTERS OF EMERGENCY TEMPORARY GUARDIANSHIP ARE ISSUED BY PROBATE COURT (CIRCUIT JUDGE)

# FLORIDA STATUTES S. 765.105

REVIEW OF SURROGATE OR PROXY'S DECISION—THE PATIENT'S FAMILY, THE HEALTH CARE FACILITY, OR THE ATTENDING PHYSICIAN, OR ANY OTHER INTERESTED PERSON WHO MAY REASONABLY BE EXPECTED TO BE DIRECTLY AFFECTED BY THE SURROGATE OR PROXY'S DECISION CONCERNING ANY HEALTH CARE DECISION MAY SEEK EXPEDITED JUDICIAL INTERVENTION PURSUANT TO RULE 5.900 OF THE FLORIDA PROBATE RULES, IF THAT PERSON BELIEVES:

- (1) THE SURROGATE OR PROXY'S DECISION IS NOT IN ACCORD WITH THE PATIENT'S KNOWN DESIRES OR THE PROVISIONS OF THIS CHAPTER;
- (2) THE ADVANCE DIRECTIVE IS AMBIGUOUS, OR THE PATIENT HAS CHANGED HIS OR HER MIND AFTER EXECUTION OF THE ADVANCE DIRECTIVE;
- (3) THE SURROGATE OR PROXY WAS IMPROPERLY DESIGNATED OR APPOINTED, OR THE DESIGNATION OF THE SURROGATE IS NO LONGER EFFECTIVE OR HAS BEEN REVOKED;
- (4) THE SURROGATE OR PROXY HAS FAILED TO DISCHARGE DUTIES, OR INCAPACITY OR ILLNESS RENDERS THE SURROGATE OR PROXY INCAPABLE OF DISCHARGING DUTIES;
- (5) THE SURROGATE OR PROXY HAS ABUSED POWERS; OR
- (6) THE PATIENT HAS SUFFICIENT CAPACITY TO MAKE HIS OR HER OWN HEALTH CARE DECISIONS.

# FLORIDA DURABLE POWER OF ATTORNEY

WHO DO YOU TRUST? WHAT DO YOU AUTHORIZE?

# FLORIDA DURABLE POWER OF ATTORNEY

## AUTHORITY & GOALS

- F.S. CHAP. 709, PART II
- SUPERPOWERS RE GIFTING, TRUSTS, BENEFICIARIES & SURVIVORS, WAIVING RIGHTS UNDER RET. PLANS & IRAS, AND DISCLAIMERS
- IMMEDIATELY EFFECTIVE
- APPLIES TO DPOA AGENT ACTIONS & TO NEWLY SIGNED DPOAS AFTER 10/1/2011
- MAY EXPRESSLY PROVIDE FOR PLANNING SCENARIOS
- TENSION: EMPOWER AGENT; PROTECT PRINCIPAL

## APPLICATION

- POTENTIALLY MOST POWERFUL PLANNING DOCUMENT
- POWER TO PAY IS THE POWER TO COORDINATE
- MAY BE REVOKED
- SUSPENDED BY INCAPACITY COURT FILING
- DPOA IS LESS RESTRICTIVE THAN GUARDIANSHIP
- CAUTION: POWERFUL LEGAL MEDICINE. TAKE CARE!
- VITAL FOR MOST LTC ELIGIBILITY PLANNING

# LEGAL AND POLITICAL HISTORY

“NOBODY’S RIGHT IF EVERYBODY’S WRONG”

# NOTABLE LEGAL & POLITICAL DEVELOPMENTS

- 1967 CHICAGO ATTORNEY LOUIS KUTNER PROPOSES FIRST LIVING WILL
- 1968 & 1973 DR. WALTER F. SACKETT UNSUCCESSFULLY INTRODUCES FL LEGS.
- 1974 CALIFORNIA CONSIDERS AND BY 1976 ADOPTS FIRST LIVING WILL LEGS.
- THEREAFTER OTHER STATES FOLLOW WITH THEIR OWN LIVING WILL LEGISLATION
- 1976 KAREN ANN QUINLAN CASE 355 A.2d 647 (NJ SUP. CT.)
- 1989 WONS CASE 541 So.2d 96 (FL SUP. CT.)
- 1990 NANCY BETH CRUZAN CASE 497 U.S. 261 (MO. COURTS & U.S. SUP. CT.)
- 1990 ESTELLE M. BROWNING CASE 568 So.2d 4 (FL SUP. CT.)
- 1990 THE PATIENT SELF-DETERMINATION ACT 42 U.S.C. §§ 1395, *et seq.*
- 1997 GLUCKSBERG 521 U.S. 702 & QUILL 521 U.S. 793 CASES (U.S. SUP. CT.)
- 2001 – 2005 TERRI SCHIAVO CASES 403 F.3d 1289 (FL COURTS & FEDERAL COURTS)
- 2003 INITIAL HIPAA PRIVACY RULE 45 CFR Part 160 & Subparts A and E of Part 164

Sources: Attorney Elliot S. Schlissel; *Health Law – Cases, Materials and Problems*, Furrow et al.; and other publicly available resources and legally cited and reported materials.

# CONSUMER AND PUBLIC AWARENESS RESOURCES

EQUIPPING AND EMPOWERING USE OF ADVANCE DIRECTIVES

# FLORIDA CONSUMER RESOURCES

- The Florida Bar Living Will and Health Care Surrogate Forms (handouts)
- <http://www.floridahealthfinder.gov/reports-guides/advance-directives.aspx>
- [http://www.americanbar.org/groups/law\\_aging/resources/health\\_care\\_decision\\_making/consumer\\_s\\_toolkit\\_for\\_health\\_care\\_advance\\_planning.html](http://www.americanbar.org/groups/law_aging/resources/health_care_decision_making/consumer_s_toolkit_for_health_care_advance_planning.html)
- <http://www.agingwithdignity.org/>
- <http://www.caringinfo.org/i4a/pages/index.cfm?pageid=3277>
- <http://www.aarp.org/home-family/caregiving/qa-tool/>
- <http://www.nhdd.org/public-resources#where-can-i-get-an-advance-directive>
- <http://liv-will1.uslivingwillregistry.com/forms.html>
- <https://www.legaldirectives.com/index.php>
- <https://www.donatelifeflorida.org/register/>
- <http://www.coastalhealth.org/forms/DNRO-form.pdf>

# PERSONAL PLANNING ASSESSMENT

MAKING IT REAL AND MAKING IT WORK FOR YOU!

# PERSONAL PLANNING ASSESSMENT

## EXISTING

- DO YOU HAVE ADVANCE DIRECTIVE PLANNING IN PLACE?
- DO THE OTHER ADULT MEMBERS OF YOUR FAMILY HAVE ADVANCE DIRECTIVE PLANNING IN PLACE?

## UPDATED

- HEALTH CARE SURROGATE DESIGNATION
- LIVING WILL
- HIPAA RELEASE
- DPOA, PNG & OTHER

**THANK YOU FOR YOUR  
ATTENDANCE & ATTENTION**

FOLLOW UP OPPORTUNITIES AVAILABLE AFTER PROGRAM

