

Have You Revised Your Health Care Surrogate Forms?

A Look Back at the October 2015 Revisions to the Florida Health Care Surrogate Act

Effective October 1, 2015, the Florida Legislature adopted sweeping revisions to the Florida Health Care Surrogates Act.¹ These changes require practitioners to revise their designation of health care surrogate forms and spend additional time with their clients when executing them. At this point, it is unclear if new forms and extended explanations have become the norm in practice. Having lived with the changes for over a year now, however, it is appropriate to look back at revisions to the act and discuss how to incorporate the changes into our practice.

Background

In the 2015 legislative session, Florida adopted new health care surrogacy initiatives (modifications to the act) that provide greater flexibility and more choices in drafting and implementing Florida designations of health care surrogates.² The significant changes can be summarized as follows:

1) The act adds legislative finding that “some competent adults may want to receive immediate assistance in making health care decisions or accessing health information, or both, without a determination of incapacity.” Further finding “[t]he [L]egislature intends a procedure be established to allow a person to designate a surrogate to make health care decisions or receive health information, or both, without the necessity for a determination of incapacity under this chapter.”³

2) To facilitate the legislative findings, a Florida resident client may now execute a presently exercisable designation of health care surrogate

form (sometimes referred to as a “durable” health care surrogate form), granting one or more surrogates the power to make health care decisions and give health care instructions even while the client has capacity.⁴

3) Relatedly, the changes to the act include directions that if a client possesses capacity, any health care decisions the client makes (verbally or in writing) will supersede any instructions or decisions made by the surrogate(s) in material conflict.⁵

4) The act defines “health information” and provides the surrogate express access to such health information (a move to align with the Health Insurance Portability and Accountability Act — HIPAA).⁶

5) A Florida resident client may now grant to a health care surrogate authority to receive health information immediately, even while the client has capacity.

6) The act also codifies the ability of parents to name health care surrogates for their minor children, which is an extremely helpful tool for those who may be traveling without their children, for example.⁷

7) The act adds an exclusion for a client who is not incapacitated and who has designated a surrogate with immediate authority to make health care decisions or to access health information, or both, from the expedited judicial intervention procedures pursuant to Fla. Prob. R. 5.900.⁸

8) The act now requires health care facilities to notify the surrogate upon a determination of incapacity even if the health care surrogate is immediately exercisable. The facilities are also required to notify any attorneys-

in-fact in writing if the health care facilities know of any durable powers of attorney that authorize the attorney-in-fact to make health care decisions.⁹

9) The act also now requires the hospital in which any attending physician made a determination of incapacity to inform the client’s principal or primary physician of the determination of incapacity.¹⁰

Changes to Designations of Health Care Surrogates

As a result of the revisions to the act, after October 1, 2015, a Florida client may designate a surrogate to make health care decisions even if the client is not determined to be incapacitated (*i.e.*, the client may execute a “durable health care surrogate”). As noted, however, if the client has capacity, the act indicates the client’s decisions are to be controlling over those of the surrogate if the directions materially conflict.

Further, even with a durable health care surrogate in place, a treating physician still must communicate treatment plans and/or changes in treatment plans to a client with capacity.¹¹

The act provides that a client with capacity may amend or revoke a durable health care surrogate in a variety of ways, including a written amendment, a written revocation, destroying the designation, and even oral/verbal expressions of intent to amend or revoke.¹² Thus, as the act allows for broader and more sweeping (and immediately effective) grants of authority, it is important to note that it is relatively easy to revoke a prior health care surrogate form, including a “durable” health care surrogate, if

a client should become displeased with how it is working. Thus, under most circumstances, practitioners should clearly state in their designation of health care surrogate forms that all prior health care surrogate designations are revoked (similar to language found traditionally at the beginning of most wills).

Note, the new opportunity to create a durable health care surrogate is *optional*. A client may still create an “old fashioned” designation of health care surrogate that becomes operative only upon a finding of incapacity. In fact, many clients may still prefer that approach.

Therefore, the option to choose between a traditional surrogate form (triggered on the client’s incapacity) and a durable surrogate form (presently exercisable) should now be clearly delineated in our forms and should be clearly explained to clients.

To make the new options available and to better demonstrate the choices to clients, it is wise for all planners to modify their Florida designations of health care surrogate forms. The

forms need revisions to clearly offer the two key options (to give surrogates presently exercisable health care decision-making authority or access to health information, or both) and to include initialing in boxes to indicate if the client intends to create a durable health care surrogate or a traditional health care surrogate that only begins upon incapacity. As noted below, the new exemplary, statutory forms call for initialing both health care decisions and access to health information.

These new statutory provisions became effective October 1, 2015, so we all should have already reviewed and revised our forms. Note, the new statutes do not invalidate existing Florida designation of health care surrogate forms.

A result of the new act is most practitioners now need to spend more time with clients explaining their health care surrogate forms and highlighting these choices prior to execution. In practice, it may now be said that many lawyers spend more time with clients explaining and executing their durable

powers of attorney and designations of health care surrogates than explaining and signing wills and trusts.

While there are no general principals or rules of thumb as to when clients will prefer durable health care surrogates or traditional health care surrogates, after a year of practice, it appears that many married couples — particularly those in long-term first marriages and those who are older — are more comfortable with and desire creating durable health care surrogates. These clients have sometimes said they already go to the doctor together or something to that effect. It would be interesting for practitioners to share their experiences with the new statutes, as it would help us all to hear the experiences of others with the new forms.

New Exemplary Form Designation of Health Care Surrogate (With Options to Make Durable)

Pursuant to new §765.203, a written designation of a health care surro-

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gate executed pursuant to F.S. Ch. 765 may, but need not be, in the following form:

DESIGNATION OF HEALTH CARE SURROGATE

I, (name), designate as my health care surrogate under s. 765.202, Florida Statutes:

Name: (name of health care surrogate)
 Address: (address)
 Phone: (telephone)

If my health care surrogate is not willing, able, or reasonably available to perform his or her duties, I designate as my alternate health care surrogate:

Name: (name of alternate health care surrogate)
 Address: (address)
 Phone: (telephone)

INSTRUCTIONS FOR HEALTH CARE

I authorize my health care surrogate to: (Initial here) Receive any of my health information, whether oral or recorded in any form or medium, that:

1. Is created or received by a health care provider, health care facility, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and

2. Relates to my past, present, or future physical or mental health or condition; the provision of health care to me; or the past, present, or future payment for the provision of health care to me.

I further authorize my health care surrogate to:

(Initial here) Make all health care decisions for me, which means he or she has the authority to:

1. Provide informed consent, refusal of consent, or withdrawal of consent to any and all of my health care, including life-prolonging procedures.

2. Apply on my behalf for private, public, government, or veterans' benefits to defray the cost of health care.

3. Access my health information reasonably necessary for the health care surrogate to make decisions involving my health care and to apply for benefits for me.

4. Decide to make an anatomical gift pursuant to part V of chapter 765, Florida Statutes.

(Initial here) Specific instructions and restrictions:

While I have decision-making capac-

ity, my wishes are controlling and my physicians and health care providers must clearly communicate to me the treatment plan or any change to the treatment plan prior to its implementation.

To the extent I am capable of understanding, my health care surrogate shall keep me reasonably informed of all decisions that he or she has made on my behalf and matters concerning me.

THIS HEALTH CARE SURROGATE DESIGNATION IS NOT AFFECTED BY MY SUBSEQUENT INCAPACITY EXCEPT AS PROVIDED IN CHAPTER 765, FLORIDA STATUTES.

PURSUANT TO SECTION 765.104, FLORIDA STATUTES, I UNDERSTAND THAT I MAY, AT ANY TIME WHILE I RETAIN MY CAPACITY, REVOKE OR AMEND THIS DESIGNATION BY:

(1) SIGNING A WRITTEN AND DATED INSTRUMENT WHICH EXPRESSES MY INTENT TO AMEND OR REVOKE THIS DESIGNATION;

(2) PHYSICALLY DESTROYING THIS DESIGNATION THROUGH MY OWN ACTION OR BY THAT OF ANOTHER PERSON IN MY PRESENCE AND UNDER MY DIRECTION;

(3) VERBALLY EXPRESSING MY INTENTION TO AMEND OR REVOKE THIS DESIGNATION; OR

(4) SIGNING A NEW DESIGNATION THAT IS MATERIALLY DIFFERENT FROM THIS DESIGNATION.

MY HEALTH CARE SURROGATE'S AUTHORITY BECOMES EFFECTIVE WHEN MY PRIMARY PHYSICIAN DETERMINES THAT I AM UNABLE TO MAKE MY OWN HEALTH CARE DECISIONS UNLESS I INITIAL EITHER OR BOTH OF THE FOLLOWING BOXES:

IF I INITIAL THIS BOX [], MY HEALTH CARE SURROGATE'S AUTHORITY TO RECEIVE MY HEALTH INFORMATION TAKES EFFECT IMMEDIATELY.

IF I INITIAL THIS BOX [], MY HEALTH CARE SURROGATE'S AUTHORITY TO MAKE HEALTH CARE DECISIONS FOR ME TAKES EFFECT IMMEDIATELY. PURSUANT TO SECTION 765.204(3), FLORIDA STATUTES, ANY INSTRUCTIONS OR HEALTH CARE DECISIONS I MAKE, EITHER VERBALLY OR IN WRITING, WHILE I POSSESS CAPACITY SHALL SUPERSEDE ANY INSTRUCTIONS OR HEALTH CARE

DECISIONS MADE BY MY SURROGATE THAT ARE IN MATERIAL CONFLICT WITH THOSE MADE BY ME.

SIGNATURES: Sign and date the form here:

(date) (sign your name)
(address) (print your name)
(city) (state)

SIGNATURES OF WITNESSES:

First witness	Second witness
<u>(print name)</u>	<u>(print name)</u>
<u>(address)</u>	<u>(address)</u>
<u>(city)</u> <u>(state)</u>	<u>(city)</u> <u>(state)</u>
<u>(witness signature)</u>	<u>(witness signature)</u>
<u>(date)</u>	<u>(date)</u>

The New Designation of Health Care Surrogate Form for Minors

With respect to parents and guardians desiring to delegate decision-making authority for their minor children, a very helpful (and wanted) change to the statutes was added. For example, many clients are parents who travel without their minor children or have minor children who travel with other adults. Often, those clients wish to empower whoever is watching the minors with written authority to make health decisions in case a minor child gets injured, for example. Previously, there was no clarity under Florida law as to how a parent or guardian could delegate that authority to a third party.

House Bill 889 added F.S. §765.2035, providing a statutory framework for parents and guardians to name health care surrogates for minors in case they are unavailable to provide informed consent themselves.¹³ As noted, these statutory provisions will be particularly helpful for parents who travel without their minor children, for minor children who travel without their parents, and for parents with nannies (or perhaps grandparents or others) who care for their children regularly.

Pursuant to F.S. §765.2035, any natural guardian (*i.e.*, parent), legal custodian, or legal guardian of the person of a minor child may designate a surrogate to make health care decisions on behalf of the minor child. To do so, the designation must be in writing and must be signed by the natural guardian, legal custodian, or guardian in the presence of two subscribing witnesses.¹⁴

The document may also designate an alternate surrogate.¹⁵ Unless the docu-

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ment states otherwise, the designation of a health care surrogate for a minor shall remain in full force and effect until revoked by the principal.¹⁶ Interestingly, the statute also specifically permits the execution of a designation of a health care surrogate for a minor even before the child is born.¹⁷

It seems likely many clients with minor children could benefit from this new option, and it is unclear whether knowledge of the new act is widespread. These new statutory provisions became effective October 1, 2015.

New Exemplary Form Designation of Health Care Surrogate for a Minor

Pursuant to the new F.S. §765.2038, a written designation of a health care surrogate for a minor form may, but need not, be in the following form:

DESIGNATION OF HEALTH CARE SURROGATE FOR MINOR

I/We, (name/names), the [] natural guardian(s) as defined in s. 744.301(1), Florida Statutes; [] legal custodian(s); [] legal guardian(s) [check one] of the following minor(s): (name); (name); (name), pursuant to s. 765.2035, Florida Statutes, designate the following person to act as my/our surrogate for health care decisions for such minor(s) in the event that I/we am/are not able or reasonably available to provide consent for medical treatment and surgical and diagnostic procedures:

Name: (name)
Address: (address)
Zip Code: (zip code)
Phone: (telephone)

If my/our designated health care surrogate for a minor is not willing, able, or reasonably available to perform his or her duties, I/we designate the following person as my/our alternate health care surrogate for a minor:

Name: (name)
Address: (address)
Zip Code: (zip code)
Phone: (telephone)

I/We authorize and request all physicians, hospitals, or other providers of medical services to follow the instructions of my/our surrogate or alternate surrogate, as the case may be, at any time and under any circumstances whatsoever, with regard to medical treatment and surgical and diagnostic procedures for a minor, provided the medical care and treatment of any minor is on the advice of a licensed physician.

I/We fully understand that this designation will permit my/our designee to make health care decisions for a minor and to provide, withhold, or withdraw consent on my/our behalf, to apply for public benefits to defray the cost of health care, and to authorize the admission or transfer of

Unless the document states otherwise, the designation of a health care surrogate for a minor shall remain in full force and effect until revoked by the principal.

a minor to or from a health care facility.

I/We will notify and send a copy of this document to the following person(s) other than my/our surrogate, so that they may know the identity of my/our surrogate:

Name: (name)
Name: (name)
Signed: (signature)
Date: (date)
WITNESSES:
1. (witness)
2. (witness)

Conclusion

As a result of the October 2015 sweeping modifications to the act, all trusts and estates practitioners should have revised (or should be revising) their designation of health care surrogate forms to permit initialing to make the forms durable. Practitioners should also now be comfortable offering designation of health care surrogate for a minor forms to clients properly situated. The new health care surrogate forms are probably more complex than older health care surrogate forms and may entail more effort for practitioners; however, they offer significant new ways for clients to empower their surrogates. While we are all working through the new statutes and the new forms, it would be helpful if there were more discussion of our health care surrogate forms and experiences with clients executing them. □

¹ House Bill 889 and Senate Bill 1224 passed during the 2015 regular session of the Florida Legislature.

² *Id.*

³ FLA. STAT. §765.102(3) (2015).

⁴ FLA. STAT. §765.101(21) (2015) (defining "surrogate"); FLA. STAT. §765.202(6) (2015) (describing designations of health care surrogate forms); FLA. STAT. §765.203 (2015) (offering a suggested form).

⁵ FLA. STAT. §765.204(1) (2015) ("While a principal has decision-making capacity, the principal's wishes are controlling."); FLA. STAT. §765.203 (2015) (suggested form).

⁶ FLA. STAT. §765.101(9) (2015).

⁷ FLA. STAT. §765.2035 (2015).

⁸ FLA. STAT. §765.105(2) (2015).

⁹ FLA. STAT. §765.204(4) (2015).

¹⁰ FLA. STAT. §765.204(2) (2015).

¹¹ FLA. STAT. §765.204(1) (2015).

¹² FLA. STAT. §765.104 (2015).

¹³ FLA. STAT. §765.2035(6) (2015).

¹⁴ FLA. STAT. §765.2035(1) (2015) also permits for alternative execution when a principal is unable to sign.

¹⁵ FLA. STAT. §765.2035(3) (2015).

¹⁶ FLA. STAT. §765.2035(6) (2015).

¹⁷ *Id.*

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This column is submitted on behalf of the Real Property, Probate and Trust Law Section, Deborah Packer Goodall, chair, and Doug Christy and Jeff Goethe, editors.

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