



March 19, 2018

Sent via Email: Carlos.Beruff@flcrc.gov

The Honorable Carlos Beruff
The Capitol
400 S. Monroe St.
Tallahassee, FL 32399

Dear Chairman Beruff:

I write in opposition to Committee Substitute for Commissioner Proposal 88 (Proposal 88) and ask the Commission to vote against the proposal, as well as the recently filed substitute strike-all amendment and Commissioner Stemberger's amendment to same. Under Proposal 88, Article I of the Florida Constitution would be amended to add a new section entitled "Nursing Home and Assisted Living Facility Residents' Bill of Rights." In its last and only committee stop, the Declaration of Rights Committee, Commissioner Gainey offered an amendment to Proposal 88 which was adopted. As amended, Proposal 88 passed the committee by a vote of 5-2. On March 14, 2018, Commissioner Heuchan filed a strike-all amendment, and Commissioner Lee also filed a minor amendment which would define the terms "nursing home" and "assisted living facility" in the amendment. On March 16, 2018, Commissioner Heuchan filed a substitute strike-all amendment, followed by additional amendments proposed by Commissioners Lee and Stemberger. Proposal 88 has been placed on the Special Order Calendar, scheduled for March 19, 2018.

As proposed to be amended in the latest strike-all amendment, Proposal 88 would give the residents of nursing home facilities and assisted living facilities "[i]n addition to any other rights provided by state and federal law," the right to be "treated courteously, fairly, and with the fullest measure of dignity by the facilities' owners, operators, employees, professionals, and contractors." The proposal, if the strike-all amendment is adopted, would specifically define that right to include, among other things:

- The right to adequate and appropriate health care and treatment, including, but not limited to, the right to be treated without physical or chemical restraints.
- The right to be free from mental and physical abuse, neglect, and financial exploitation.
- The right to use technology and communication devices for the purpose of virtual visitation and electronic monitoring.
- The right to know the identities of all persons or entities who own, operate, manage, or otherwise control the facilities.

- The right to safe living conditions which shall include, but not be limited to, written and updated disaster preparedness plans, readily available alternative power sources, and protection against unfair discharge or transfer.
- The right to self-determination, which shall include, but not be limited to, the ability to manage one's money, make complaints without fear of recrimination, involve family and friends in care, and participate in activities.
- The right to access courts and a jury system that allows for a speedy trial and relief and remedies for loss, injury, and damages "caused to residents by the abuse, negligence, neglect, exploitation, or violation of residents' rights by [those] who care for residents at such facilities." These remedies include "a civil cause of action against any perpetrator" and the right to "recover actual and punitive damages for such abuse, neglect, or exploitation." Commissioner Stemberger's proposed amendment would clarify that the cause of action would be "as provided by general law."
- The right to be cared for in facilities that have sufficient financial resources or liability insurance to provide just compensation to residents for any injury or damage they suffer as the result of abuse, negligence, neglect, or the like from those who care for them at such facilities.

Both Proposal 88 currently and as proposed to be amended by the substitute strike-all amendment make clear that these rights do not dissolve upon the resident's death or incapacity, at which time the resident's heirs, family, or other legal representatives may assert these rights. Furthermore, facilities would be prohibited from asking or requiring residents to waive any of these rights.

Although the protection of some of our state's most vulnerable residents is an important goal, Proposal 88 is unnecessary. There is already a robust federal and state regulatory scheme which protects the rights of this population. Indeed, most if not all of the rights enumerated in Proposal 88 in its current form and in the strike-all amendment are already granted by federal and state law. Proposal 88 will replace that longstanding regulatory framework with a set of rights that, given their placement within the state constitution, will be difficult to adjust when necessary by the legislative and executive branches. No state has implemented such rights for nursing home residents and assisted living facility residents through a state constitution.

Importantly, Florida law currently grants similar bills of rights to both nursing home and assisted living facility residents. Specifically, under section 400.022, Florida Statutes, nursing home residents are granted numerous broad rights, including but not limited to:

- The right to be treated courteously, fairly, and with the fullest measure of dignity.
- The right to be free from mental and physical abuse, corporal punishment, extended involuntary seclusion, and from physical and chemical restraints, except those restraints authorized in writing by a physician for a specified and limited period of time or as are necessitated by an emergency.

- The right to civil and religious liberties, including knowledge of available choices and the right to independent personal decisions, which will not be infringed upon, and the right to encouragement and assistance from the staff of the facility in the fullest possible exercise of these rights.
- The right to private and uncensored communication.
- The right to visitation by any person providing health, social, legal, or other services and the right to deny or withdraw consent at any time.
- The facility must allow representatives of the State Long-Term Care Ombudsman Program to examine a resident's clinical records with the resident's permission.
- The right to present grievances and recommend changes in policies and services free from restraint, interference, coercion, discrimination, or reprisal.
- The right to examine the results of the most recent inspection of the facility conducted by a federal or state agency and any plan of correction in effect with respect to the facility.
- The right to receive adequate and appropriate health care and protective and support services, including social services, mental health services, planned recreational activities, and therapeutic and rehabilitative services consistent with the resident care plan.
- The right to have privacy in treatment and in caring for personal needs.
- The right to privacy of the resident's body shall be maintained during, but not limited to, toileting, bathing, and other activities of personal hygiene, except as needed for resident safety or assistance.

Similarly, section 429.28, Florida Statutes, grants a number of broad rights to residents of assisted living facilities, including but not limited to:

- The right to exercise civil and legal rights, benefits, and privileges.
- The right to live in a safe and decent living environment, free from abuse and neglect.
- The right to be treated with consideration and respect and with due recognition of personal dignity, individuality, and the need for privacy.
- Unrestricted private communication, including access to a telephone and visiting with any person of his or her choice.
- Freedom to participate in and benefit from community services and activities and to achieve the highest possible level of independence, autonomy, and interaction with the community.
- The right to access adequate and appropriate health care consistent with established and recognized standards within the community.

- The right to present grievances and recommend changes in policies and services free from restraint, interference, coercion, discrimination, or reprisal.

These are all in addition to federal regulations which impose vigorous requirements on facilities that participate in Medicare and Medicaid. In order to participate in Medicare and Medicaid, nursing homes must ensure compliance with certain enumerated rights for residents, set forth in 42 C.F.R. § 483.10 among other provisions, including the right to a “dignified existence, self-determination, and communication with and access to persons and services inside and outside the facility.” In addition:

- A facility must treat each resident with respect and dignity and care for each resident in a manner and in an environment that promotes maintenance or enhancement of his or her quality of life, recognizing each resident’s individuality.
- A facility must provide equal access to quality care regardless of diagnosis, severity of condition, or payment source.

These federal laws also ensure that residents are free to exercise any and all other rights and privileges to which they are entitled, “free of interference, coercion, discrimination, and reprisal from the facility.”

Proposal 88 appears aimed, at least in part, to counter legislation enacted in 2014 to limit the cause of action granted to nursing home residents in section 400.023, Florida Statutes. However, it remains that the rights described above may be meaningfully enforced under current law. Florida law still authorizes a nursing home resident to sue a facility for negligence or a violation of the residents’ rights, and the resident may recover injunctive relief, damages, costs, and at least some attorneys’ fees. Although section 400.023, Florida Statutes, provides an “exclusive” cause of action, it does not preclude theories of recovery not arising out of negligence which are otherwise available to a resident. Further, any suspected violation of the residents’ rights constitutes grounds for action by the Agency for Health Care Administration against the facility’s license.

That the Legislature deemed it necessary to (and did) revise the statutory cause of action granted to nursing home residents in 2014 underscores another important point. The 2014 legislative reforms were meant to curb abuse of nursing home litigation—notably by the use of such suits to go after passive investors only loosely tied to the nursing home—and to restore some balance in litigation so that nursing homes would have the incentive to invest in Florida. Given this litigation landscape in 2014, the Legislature thought it necessary to address the scope of the cause of action granted in section 400.023, Florida Statutes, and enacted legislation accordingly. A future Legislature may decide to widen the scope of the cause of action and enact legislation accordingly. By placing these broad, amorphous rights directly into the state constitution, any policy judgments regarding the nursing home and assisted living facility industry will be removed from the legislative and executive branches and placed in the hands of the judicial branch to decide on a case-by-case basis. Once a body of judicial case law is built, defining and enforcing those rights, that case law will be difficult to modify even by courts, as courts are bound to follow prior precedent under the doctrine of stare decisis.

This is the case even if the proposal—as proposed to be amended by the strike-all amendment—does not state explicitly that it is self-executing. And this is the case even if Commissioner Stemberger’s amendment to the substitute strike-all amendment is adopted, as the amendment’s current language would still cement in the constitution a “civil cause of action against any perpetrator” for “actual and punitive damages for such abuse, neglect, or exploitation,” even if that cause of action must be further “provided by general law.”

In effect, Proposal 88 would wipe away the current regulatory framework for nursing homes and assisted living facilities, which is the product of more than 30 years of meaningful work by both the federal and state governments to ensure these vulnerable citizens have quality care and access to the services they need. Statutory legislation and agency rules are better tools for addressing such a highly-regulated industry, particularly where state policy will often be required to react to federal policy given the industry’s heavy reliance on Medicare and Medicaid. The Legislature and executive branch can react to changed circumstances with relative ease through legislation and rule. With fundamental rights wholly defined by courts and a body of case law insulated from change due to the doctrine of stare decisis, there is no way to effect real change—even when it is sorely needed.

Although Proposal 88 in its current and proposed incarnation is well-meaning, it is unnecessary. A constitutional amendment is a near permanent action, and should be used in only those instances in which there is a strong reason to believe that the political branches of government will fail to bring about the desired policy without prompting. Florida’s legislative and executive branches—as well as the federal government—already have enacted numerous comprehensive measures designed to protect Florida’s nursing home and assisted living facility residents. Indeed, no other state has placed the rights of nursing home residents and assisted living facility residents in a state constitution, choosing instead to provide those rights by regulation or rule. For these reasons, the Institute opposes Proposal 88 and asks the Commission to vote no on the strike-all amendment and the proposal.

If you have any questions or comments, please do not hesitate to contact me.

Respectfully,

A handwritten signature in blue ink, appearing to read "Will Large", with a large, stylized flourish above the name.

William W. Large
President

cc: Jeff Woodburn
William N. Spicola
Brecht Heuchan
John Stemberger