

**Constitution Revision Commission
Declaration Of Rights Committee
Proposal Analysis**

(This document is based on the provisions contained in the proposal as of the latest date listed below.)

Proposal #: P 88

Relating to: DECLARATION OF RIGHTS, creates new section

Introducer(s): Commissioner Heuchan

Article/Section affected: Article I, creates new section

Date: January 18, 2018

	REFERENCE	ACTION
1.	<u>DR</u>	<u>Pre-meeting</u>

I. SUMMARY:

This proposal creates a new section in Article I of the State Constitution regarding rights of residents of nursing homes and assisted living facilities. The series of rights of residents of nursing homes and assisted living facilities include, but are not limited to:

- The right to know and hold accountable all persons or entities who own or operate the facilities;
- The right of access to courts and juries without limitations for loss, injury and damages caused to residents and their families by the abuse, negligence, neglect, exploitation, or violation of residents' rights by the facilities' owners, operators, employees, professionals, and others who care for residents at such facilities;
- The right that the facilities will have the financial resources or liability insurance in order to ensure that residents and their families are justly compensated for any loss etc.

The proposal also prohibits nursing homes and assisted living facilities from soliciting, requiring, or asking residents or their guardians to waive these rights. The proposal provides that the rights granted do not dissolve upon the death or incapacity of a resident.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Florida Population

The Census Bureau reports that nearly one fifth of Florida's population is 65 years old or older as of July 2016, which is nearly a 3% jump from 2010 data.¹ That is nearly the same percentage of the population that is elderly as is under the age of 18.² The Florida Department of Elder Affairs reports that 13.6% of Florida's population is 70 years old or older.³ This includes more than half a million people who are 85 and older.⁴

"Florida is perhaps the 'oldest' state in the U.S. because of interstate migration and the aging of baby boomers who often choose Florida as their post-retirement home. The oldest old (85+) population in the state is expected to more than double between the years 1995 and 2020. In 2010, three of the top five counties in the United States having the highest percentages of the population in the age group of 65 years and over were in Florida (Sumter 43%, Charlotte 34%, and Highlands 32%)."⁵

Florida Long Term Care Facilities (Nursing Homes and Assisted Living Facilities)

There are 683 licensed nursing homes in Florida, with approximately 83,587 beds.⁶ These facilities are at 85% capacity at any given time.⁷ There are 3,089 licensed assisted living facilities in Florida, representing approximately 92,000 beds.⁸ The median annual cost of care for a semi-private room in a Florida nursing center is \$87,600.⁹ The median annual cost of care for a private room in a Florida nursing center is \$96,725.¹⁰ The median annual cost for care for a private room in a Florida assisted living facility is \$37,800.¹¹ Nearly 40 percent of long term care spending is paid for by private funds.¹²

Medicare, which covers rehabilitation services after an individual is discharged from a hospital, pays for 19 percent of all long-term care spending.¹³ Medicaid, which covers health care costs for low-income individuals, pays for approximately 60 percent of all long-term care spending.¹⁴ Accounting for about 40 percent of total expenditures on nursing centers, Medicaid's payments cover the care of more than half of all nursing home residents.¹⁵ Medicare patients have short

¹ See United States Census Bureau website: <https://www.census.gov/quickfacts/fact/table/FL/PST045216> (last visited 1/18/18).

² Id.

³ See Florida Department of Elder Affairs website: http://elderaffairs.state.fl.us/doea/pubs/stats/County_2016_projections/Counties/Florida.pdf (last viewed 1/18/2018).

⁴ Id.

⁵ See University of Florida IFAS Extension website, *The Future of Aging is Florida*, revised 7/12. <http://edis.ifas.ufl.edu/fy624> (last visited 1/18/2018)

⁶ See Florida Health Care Association website, *Facts About Long Term Care in Florida*. http://www.fhca.org/media_center/long_term_health_care_facts (last visited 1/18/18).

⁷ Id.

⁸ Id.

⁹ Id.

¹⁰ Id.

¹¹ Id.

¹² Id.

¹³ Id.

¹⁴ Id.

¹⁵ Id.

rehabilitative stays, averaging 33 days.¹⁶ Medicaid and private pay patients typically have longer stays, with a 386 day average.¹⁷ Florida has one of the lowest over-65 population to nursing home population ratio in the country.¹⁸ Nursing center expenditures account for less than 15% of the overall Medicaid budget, which is down from 19% in 2001.¹⁹

Long term care facilities in Florida support an estimated \$20.2 billion (2.7%) of Florida's economy.²⁰ These facilities contribute to nearly 259,250 jobs and support \$9.1 billion in labor income through employment of both direct caregivers and support staff, and generate over \$2.3 million in state and federal tax revenue.²¹ Long term care centers contribute to other businesses through a ripple effect, with each nursing home job resulting in additional economic activity from the employees spending their incomes at other businesses.²²

Assisted living facilities are distinct from nursing homes. In nursing homes, residents are under constant medical supervision, need assistance with day-to-day living and are not capable of independent living.²³ Assisted living residents are more independent. Residents may still drive, cook their own meals, come and go freely, have security of medical supervision, and social interaction with other residents.²⁴ Both assisted living facilities and nursing homes are regulated by Florida law.²⁵ Applicants for licensure must disclose any civil verdict or judgment involving the applicant rendered within the 10 years preceding the application, relating to medical negligence, violation of residents' rights, or wrongful death.²⁶ As a condition of licensure, the licensee agrees to provide to the agency copies of any new verdict or judgment involving the applicant, relating to such matters, within 30 days after filing with the clerk of the court.²⁷ Applicants must also provide proof of liability insurance, but there is no requirement as to the amount.²⁸ Assisted care community license applicants must also show proof of passing a fire safety inspection, and proof of passing a sanitation inspection by the county health department.²⁹

Under Florida law, "Assisted living facility" means any building or buildings, section or distinct part of a building, private home, boarding home, home for the aged, or other residential facility, whether operated for profit or not, which undertakes through its ownership or management to provide housing, meals, and one or more personal services for a period exceeding 24 hours to one or more adults who are not relatives of the owner or administrator.³⁰ "Adult family-care home" means a full-time, family-type living arrangement, in a private home, under which a person who owns or rents the home provides room, board, and personal care, on a 24-hour basis, for no more

¹⁶ Id.

¹⁷ Id.

¹⁸ Id.

¹⁹ Id.

²⁰ Id.

²¹ Id.

²² Id.

²³ The Florida Senate Interim Project Report 2001-025 *Long Term Care Affordability and Availability* on file with CRC staff.

²⁴ Id.

²⁵ F.S. 400 and F.S. 429.

²⁶ F.S. 400.071(1)(e)

²⁷ Id.

²⁸ F.S. 400.141(1)(q)

²⁹ F.S. 429.11

³⁰ F.S.429.02

than five disabled adults or frail elders who are not relatives.³¹ “Adult day care center” or “center” means any building, buildings, or part of a building, whether operated for profit or not, in which is provided through its ownership or management, for a part of a day, basic services to three or more persons who are 18 years of age or older, who are not related to the owner or operator by blood or marriage, and who require such services.³²

Long Term Care Resident Rights

Federal

Residents’ Rights are guaranteed by the Federal 1987 Nursing Home Reform Law.³³ The law requires nursing homes to “promote and protect the rights of each resident” and places a strong emphasis on individual dignity and self-determination. Nursing homes must meet federal residents’ rights requirements if they participate in Medicare or Medicaid.³⁴

The rights enumerated under federal law are broadly designed to give residents dignity and self-determination. These rights include equal access to quality care, the right to be fully informed as to health status, access to one’s own medical records, choice of attending physician, freedom from chemical or physical restraints not required by medical treatment, and the right to manage one’s own personal financial affairs.³⁵ Notably, the federal law specifies the right to be notified in advance of changes to the plan of care, the type of care to be furnished, the caregiver, the risks and benefits of the proposed care, and what charges a facility may impose against a resident’s personal funds.³⁶

The 1987 Nursing Home Reform Law does not cover assisted living facility residents.

State

Nursing Homes

Florida Statutes 400.022–400.023, known as the Nursing Home Residents’ Bill of Rights (2001), were enacted by the state government in response to the findings of the Legislature’s Task Force on Availability and Affordability of Long Term Care in 2000.³⁷

State law provides residents the right to civil and religious liberties, including knowledge of available choices and the right to independent personal decision, and the right to encouragement and assistance from the staff of the facility in the fullest possible exercise of these rights.³⁸ Residents also have the right to private and uncensored communication, including, but not limited to, receiving and sending unopened correspondence, access to a telephone, visiting with any person of the resident’s choice during visiting hours, and overnight visitation outside the facility with

³¹ F.S. 429.65(2)

³² F.S. 429.901 (1)

³³ CFR §483.10.

³⁴ Id.

³⁵ Id.

³⁶ Id.

³⁷ *The Gerontologist, The Nursing Home Problem in Florida* Vol. 43, Special Issue II, 7-11 (2003).

³⁸ F.S. 400.022

family and friends in accordance with facility policies.³⁹ There is also the right to present grievances on behalf of himself or herself or others to the staff or administrator of the facility, the right to organize and participate in resident groups in the facility and the right to have the resident's family meet in the facility with the families of other residents, the right to participate in social, religious, and community activities that do not interfere with the rights of other residents, and the right to examine, upon reasonable request, the results of the most recent inspection of the facility conducted by a federal or state agency.⁴⁰ Residents also have the right to manage their own financial affairs.⁴¹

Assisted Living Facilities

State law provides rights to residents of assisted care facilities.⁴² Every resident of a facility shall have the right to live in a safe and decent living environment, be treated with consideration and respect and with due recognition of personal dignity, retain and use his or her own clothes and other personal property in his or her immediate living quarters, have unrestricted private communication, including receiving and sending unopened correspondence, access to a telephone, and visiting with any person of his or her choice, at any time between the hours of 9 a.m. and 9 p.m. at a minimum, have freedom to participate in and benefit from community services and activities, manage his or her financial affairs, and share a room with his or her spouse if both are residents of the facility.⁴³ Residents must be afforded opportunity for regular exercise several times a week and to be outdoors at regular and frequent intervals, and be permitted to exercise civil and religious liberties, including the right to independent personal decisions. Additionally, residents shall have access to adequate and appropriate health care, and be given at least 45 days' notice of relocation or termination of residency from the facility.⁴⁴ The statute also provides that residents may present grievances and recommend changes in policies, procedures, and services to any other person without restraint, interference, coercion, discrimination, or reprisal.⁴⁵

Enforcement of Long Term Care Resident Rights

The Miami Herald conducted a yearlong investigation of abuse and neglect in over 2,800 assisted living facilities. The news story that emerged from this study was a Pulitzer finalist in 2012.⁴⁶ The state shut down 13 facilities after publication of the story, and penalized nearly 3 dozen others.⁴⁷

³⁹ Id.

⁴⁰ Id.

⁴¹ Id.

⁴² F.S. 429.28

⁴³ Id.

⁴⁴ Id.

⁴⁵ Id.

⁴⁶ *Neglected to Death, Part 1: Once Pride of Florida; Now Scenes of Neglect*, Miami Herald, 4/31/11 <http://www.miamiherald.com/news/special-reports/neglected-to-death/article1938076.html> (last visited 1/18/2018).

⁴⁷ <http://www.miaminewtimes.com/best-of/2012/arts-and-entertainment/best-miami-herald-reporters-6403061> (last visited 1/18/2018).

While there is a statutory scheme for enforcement of rights,⁴⁸ Florida has led the way in both the impact of litigation on the nursing home industry and liability premium increases.⁴⁹ Media reports detailing high-jury awards for high-profile examples of poor-quality care began to appear in the 1990s in Florida.⁵⁰ Traditionally, the major opportunity for relief through the court system for resident care issues was through malpractice law using a negligence standard, although claims could also be brought against nursing homes under various intentional tort and contract claims.⁵¹ The licensees or entities are not liable for the acts or omissions of its employees or agents or any other third party.⁵² The negligence standard limits many of the options available to plaintiffs.⁵³ The Florida Wrongful Death Act (2003) outlines one type of negligence claim, and it provides a limited remedy because of the inability of claimants to sue for the pain and suffering of deceased plaintiffs.⁵⁴ In Florida, an estimated 20% of long-term-care nursing home residents with less than 1 year in a facility have no family and therefore cannot file suits under the wrongful death statute.⁵⁵

The issue of arbitration clauses (where residents waive litigation in favor of binding arbitration) in admissions contracts has become an issue of litigation and regulatory scrutiny.⁵⁶ Proponents argue that arbitration saves nursing homes and residents litigation costs and resolves disputes faster. Opponents argue that arbitration is expensive, and that residents sign these contracts either under duress or without knowledge of the rights they are waiving. In the last six years, the Florida Supreme Court has dealt with several cases involving these agreements. In 2011, the Court held that only courts and not arbitrators can determine whether an arbitration agreement is unenforceable on public policy grounds.⁵⁷ In 2013, the Florida Supreme Court held that a nursing home arbitration agreement binds heirs in wrongful death case.⁵⁸ And in 2016, the Court held that a father is not bound by an arbitration clause between his son and the nursing home.⁵⁹

Centers for Medicare and Medicaid Services, by rule adopted on October 4, 2016, prohibited pre-dispute agreements for binding arbitration in facilities that accept Medicare and Medicaid. The nursing home industry sued to enjoin enforcement of rule, and was granted an injunction in November of that year. CMS has now proposed to revise the rule which would authorize a facility to *require* a pre-dispute binding arbitration agreement as a condition of admission.⁶⁰

⁴⁸ See F.S. 400.22-400.0238 for nursing homes and F.S. 429.28-429.298 for Assisted Living Facilities.

⁴⁹ *Factors Predicting Lawsuits Against Nursing Homes in Florida 1997-2001*, The Gerontologist. <https://academic.oup.com/gerontologist/article/44/3/339/699468> (last visited 1/18/2018).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² F.S. 415.1111

⁵³ *Factors Predicting Lawsuits Against Nursing Homes in Florida 1997-2001*, The Gerontologist. <https://academic.oup.com/gerontologist/article/44/3/339/699468> (last viewed 1/18/2018).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ See *Shotts v. OP Winter Haven, Inc.*, 86 So. 3d 456 (Fla. 2011), *Laizure v. Avante at Leesburg*, 44 So.3s 1254 (Fla. 2013), *Mendez v. Hampton Court*, 203 So.3d 146 (Fla. 2016), and letter from Long-term Care ombudsman, on file with CRC staff.

⁵⁷ *Shotts v. OP Winter Haven, Inc.*, 86 So. 3d 456 (Fla. 2011)

⁵⁸ *Laizure v. Avante at Leesburg*, 44 So.3s 1254 (Fla. 2013)

⁵⁹ *Mendez v. Hampton Court*, 203 So.3d 146 (Fla. 2016)

⁶⁰ See letter from Long-term Care ombudsman, on file with CRC staff.

B. EFFECT OF PROPOSED CHANGES:

This proposal grants a series of rights to residents of nursing homes and assisted living facilities including, but not limited to:

- The right to know and hold accountable all persons or entities who own or operate the facilities;
- The right of access to courts and juries without limitations for loss, injury and damages caused to residents and their families by the abuse, negligence, neglect, exploitation, or violation of residents' rights by the facilities' owners, operators, employees, professionals, and others who care for residents at such facilities; and
- The right that the facilities will have the financial resources or liability insurance in order to ensure that residents and their families are justly compensated for any loss etc.

The proposal also prohibits nursing homes and assisted living facilities from soliciting, requiring, or even asking residents or their guardians to waive these rights. The proposal provides that the rights granted do not dissolve upon the death or incapacity of a resident.

FISCAL IMPACT:

Indeterminate negative fiscal impact.

III. Additional Information:**A. Statement of Changes:**

(Summarizing differences between the current version and the prior version of the proposal.)

None.

B. Amendments:

None.

C. Technical Deficiencies:

None.

D. Related Issues:

None.