Florida Medical Rights Association

Understanding Florida's Wrongful Death Act, Statute §768.21(8)

Florida Statute §768.21(8) is a little-known subsection of the Florida Wrongful Death Statute that blatantly denies survivors of unmarried adults without minor children access to a court of law with respect (only) to wrongful death claims due to medical negligence.

A Brief History of the Current Florida Wrongful Death Statute

In 1990 the FL Wrongful Death Statute 768.21 was amended in subsection 8 to include children, regardless of age, to the class of survivors (parents, spouse, minor children under 25, blood or adopted relatives dependent upon the decedent) permitted to file a Wrongful Death Action (lawsuit). This amendment formed a loophole, also known as **Florida's Free Kill Law.**

Subsection 8 states damages specified in previous sections of the law do not apply only in cases of **medical negligence** if the victim is over 25, unmarried for any reason and has no minor children. To clarify, in all cases of wrongful death (accidental shooting, erratic driving, etc) except medical negligence, the survivors of the deceased has the right to address a court of law.

The **Free Kill Law** was passed based on a nonexistent "crisis" regarding Wrongful Death Medical Malpractice lawsuits at the time. Recent studies have shown that there is currently no such crisis and it is believed that said crisis never existed.

The **Free Kill Law** provides for zero accountability in medically negligent death, thus contributing to continued and excessive medical errors. One hospital, in a response to Florida's Amendment 7 (Right to Know Act) disclosed in writing, 1063 documented medical errors in a three-month period, not including the medical error in question.*

An estimated 15 million Floridians are at a direct risk of victimization by the **Free Kill Law**. Every Floridian knows or cares for someone that meets the criteria making the **Free Kill Law's** effects much more far reaching.

Some Examples of Floridians at Risk:

- Widowed seniors.
- Unmarried, childless members of the LGBTQ community.
- Divorced/Unmarried Adults with no minor children.
- Unmarried Mentally, Physically and/or Emotionally Disabled Adults with no minor children.
- **Any person over the age of 25 who is unmarried for any reason and has no minor children is a potential Florida Free Kill victim.**

*Documentation provided upon request to FMRA

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Points to Ponder:

- A survivor of Medical Negligence may file a Medical Malpractice lawsuit; however, if they are over the age of 25, unmarried and have no minor children and do not survive or die prior to the filing or finalization of the lawsuit, their case is forfeited. Thus in the case that a physician makes an error, it is virtually **FREE** to let the patient die but potentially **COSTLY** to save them (because the living can sue). There are many cases where the survivors of victims have evidence of such, but are denied access to their only unbiased constitutional right: a court of law. This is why the term **FREE Kill** was coined.

- The **Free Kill Law** invites subpar medical practitioners into our state.

- When a victim prevails in a Wrongful Death suit, the healthcare provider is required to reimburse Medicaid, Medicare and health care insurance companies; however, under the current law, if the victim falls under the **Free Kill** criteria, there is no opportunity to prove negligence, thus denying the state reimbursement from the providers and potentially costing taxpayers millions of dollars.

- In *Mizrahi v N. Miami Medical Center* (Fla. 2000), the FL Supreme Court incorrectly ruled that subsection 8 of the Florida Wrongful Death Act limited medical insurance premium increases which was a consequence of an ongoing medical malpractice crisis. Subsequent decisions determined the medical malpractice crisis no longer exists (if it ever did). The very basis of the law is not valid, therefore making the law unconstitutional.

- In both *The Estate of McCall V. United States of America* (Fla. 2014) and *North Broward Hospital District v. Kalitan* (Fla. 2017) the Court found health insurance premiums did not decrease after the implementation of the **Free Kill** law. In *McCall* the Supreme Court noted, "There is no indication that the past medical malpractice crisis continues into the present. If the medical malpractice crisis does not continue into the present, I fail to see how a past crisis can justify the permanent exclusion of an entire class of victims from seeking compensation for pain and suffering damages due to the wrongful death of their parents as a result of medical malpractice."

- When enacting the **Free Kill** law, the Legislature relied heavily on a report provided by the Governor's Select Task Force. The report in and of itself is biased and uses ambiguous language. The Task Force report recognized there were other likely reasons for the rise in medical malpractice premiums including the stock market and normal cycle in the insurance industry that have always occurred. For the latter they had actual evidence to back the claim.

- **The Free Kill Law is clearly unconstitutional, denying a certain class of individuals equal protection under the law and deprives these classes of individuals from their right to access the courts for redress as enumerated by the Florida Constitution as well as the Equal Protection Clause of the United States Constitution.**