



# An Assessment of Constitution Revision Commission Proposal 88

*Nursing Home and Assisted Living Facility Patients' Bill of Rights*

MARCH 2018

Florida  
**TaxWatch**



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**David Mann**  
Chairman of the Board of Trustees

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President & Chief Executive Officer

Dear Fellow Taxpayer,

Every 20 years, a Constitution Revision Commission (Commission) is appointed to review the state Constitution, hold public hearings across the state, and recommend for voter consideration proposed changes to the Constitution. Florida is the only state with such a mechanism.

One proposed change (Proposal 88) under review by the 37-member Commission would enumerate the specific rights of residents of nursing homes and assisted living facilities in the Constitution. In this report, TaxWatch analyzes Proposal 88 to answer two questions: (1) Should the Florida Constitution be amended to include the Nursing Home and Assisted Living Facility Residents' Bill of Rights established by Proposal 88; and (2) What are the likely impacts of Proposal 88 on Florida's nursing home and assisted living facility providers and on Florida taxpayers?

TaxWatch is pleased to present Commission members and members of the voting public with an independent analysis of this important proposal.

Sincerely,

A handwritten signature in black ink that reads "Dominic M. Calabro".

Dominic M. Calabro  
President & CEO

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# Executive Summary

The Legislature and the federal government have recognized the need to prevent abuse and neglect of elderly residents in nursing homes and assisted living facilities. In addition to multiple agencies with overlapping authority regulating these facilities, the Legislature recognizes litigation as another tool for ensuring patients' protection.

The Constitution Revision Commission is considering a proposal (P88) that, if approved by the voters, would create a new section in the Constitution to establish a "bill of rights" that expands litigation for residents of nursing homes and assisted living facilities in Florida. Florida TaxWatch has undertaken an analysis of P88 to guide Commission members in their deliberations regarding P88 and its committee substitute (CS/P88), and to educate the voters should the Commission recommend CS/P88 be placed on the ballot for the November 2018 General Election.

In deciding which amendments to present to the voters, Commission members must be guided by a sense of perspective and an overall view as to the nature and purpose of a state constitution, both in relation to the structure of our federal system and in relation to the internal purposes served by the state's constitution. The Florida Constitution should, above all else, clearly define the relationship between government and those who are governed.

Matters that are ordinarily handled through the legislative process should be excluded from the Constitution. This would exclude the bills of rights for nursing home and assisted living facility residents, which currently reside in Florida law.

If the current bills of rights require amendment, then amending the Florida Statutes in which they reside is the appropriate remedy, not enumerating these rights in the Florida Constitution.

If approved by the voters, CS/P88 will essentially take away a resident's federally-protected right to arbitration. The only option for resolving disputes will be litigation. Since arbitration represents a more streamlined and less expensive means of dispute resolution, relying on litigation will generally make it more expensive and more time consuming for residents to resolve disputes.

The expanded liability reflected in CS/P88 will require nursing home and assisted living facility owners to shift resources to cover more expensive and more frequent claims of abuse, negligence, neglect, exploitation, or violation of a resident's rights by professionals and others who provide care and treatment.

Expanding the liability provisions to include passive investors and placing their non-business assets at risk will discourage risk-averse investment in, and pose additional funding challenges for, the nursing home and assisted living facility industries. Purchasing the additional liability insurance necessary to cover claims against professionals and others who provide care and treatment will drive up the costs further. These additional costs will be passed along to the residents and to Florida's taxpayers.

Should CS/P88 go before the full Constitution Revision Commission, TaxWatch recommends that the Commission reject it. Should CS/P88 make it to the November 2018 General Election ballot, TaxWatch recommends that the voters reject it.

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# Introduction

In 1968, Florida voters approved an amendment to the state Constitution that required a Constitutional Revision Commission (Commission) to convene once every 20 years to review the Constitution, hold public hearings across the state, and recommend for voter consideration proposed changes to the Constitution.

The first Commission convened in 1977-1978 and the second Commission convened in 1997-1998. The 1977-1978 Commission, chaired by Sandy D'Alemberte, placed eight proposed constitutional amendments on the Florida ballot for voter consideration. None of the proposals was passed by Florida voters; however, proposals similar to the Commission's proposed changes were adopted in later years as part of the Florida Constitution or Florida law, either by citizen ballot initiative or by legislative proposal. The 1997-1998 Commission, chaired by Dexter Douglass, placed nine proposed constitutional amendments on the Florida ballot for voter consideration. Eight were passed by Florida voters.

Membership on the Commission consists of the Attorney General of Florida, three members appointed by the Chief Justice of the Florida Supreme Court, nine members appointed by the President of the Florida Senate, nine members appointed by the Speaker of the Florida House of Representatives, and fifteen members appointed by the Governor of Florida.

The 2017-2018 Commission, chaired by Carlos Beruff, began its deliberations in March 2017, and must complete its work and submit its final recommendations to the Florida Secretary of State by May 10, 2018. The Commission's final recommendations will be placed on the ballot for the November 2018 General Election for consideration by the voters.

Florida is the only state that affords citizens an opportunity to provide input into Constitutional amendments through this unique process. Before the October 6, 2017, deadline for public submittals, 782 public proposals were submitted to the Commission for consideration. An additional 103 proposals have been filed by members of the Commission in advance of its October 31, 2017 deadline.

Currently, 37 proposals (including Proposal 88) remain under active consideration by the Commission, although additional proposals may possibly be considered under Commission rules.

## Proposal 88

One such Commission member proposal is Proposal 88 (P88), which would create a new section in the Constitution to establish a "bill of rights" for residents of nursing homes and assisted living facilities in Florida. Foremost among these rights is the residents' right to "be treated courteously, fairly, and with the fullest measure of dignity by the facilities' owners, operators, employees, professionals, and others who care for residents at such facilities." This includes an acknowledgement that residents of nursing homes and assisted living facilities have the right to adequate and appropriate health care and treatment, protection from the adverse effects caused by extreme climatic conditions and natural disasters, and that the needs and best interests of the residents should be prioritized.

P88 also enacts policies that have been outright rejected by the Legislature by expanding nursing home and assisted living facility residents' right to sue without limitations for loss, injury, and damages caused to residents and their families by the abuse, negligence, neglect, exploitation, or violation of the residents' rights by the facilities' owners, operators, employees,

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professionals, and others who provide care for the residents. Nursing homes and assisted living facilities are required to have financial resources or liability insurance sufficient to ensure that residents and their families are justly compensated for any loss, injury, or damages they may suffer. While theoretically P88 would permit the waiving of these rights, there is no expectation that residents or their families, legal representatives, or duly-appointed guardians would waive any of these rights.

P88 was referred to only one committee of reference, the Declaration of Rights Committee. Of the 103 proposals submitted by Commission members, 37 were referred to one committee of reference. The majority of Commission member projects (66) was referred to two or more committees of reference. A Committee Substitute for P88 (CS/P88) was reported favorably by the Declaration of Rights Committee on January 19, 2018, and has been placed on the Commission's calendar, on 2<sup>nd</sup> Reading.<sup>1</sup>

To aid Commission members and (if approved by the Commission) Florida voters in their consideration of CS/P88, Florida TaxWatch offers the following analysis, focused on answering the following questions:

- (1) Should the Florida Constitution be amended to include CS/P88, entitled *the Nursing Home and Assisted Living Facility Residents' Bill of Rights*?
- (2) What are the likely impacts of CS/P88 on Florida's nursing home and assisted living facility providers and on Florida taxpayers?

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<sup>1</sup> Once a proposal has been introduced and read on the Special Order Calendar, it is explained, questions are answered about the bill, and amendments are considered. This constitutes a proposal's 2nd Reading.

## A Change Worthy of the Constitution?

Whether any specific provision should or should not be included in a state's constitution is fairly debatable. There are no norms or pre-determined agreements about the provisions that should be incorporated into a state's constitution. The framers of Florida's Constitution had wide latitude, bound only by the restraints imposed by the U.S. Constitution. What should and should not be included in Florida's Constitution are matters of opinion, and honest differences of opinion are to be expected.

In deciding which amendments to present to the voters, however, Commission members must be guided by a sense of perspective and an overall view as to the nature and purpose of a state constitution, both in relation to the structure of our federal system and in relation to the internal purposes served by the state's constitution.<sup>2</sup> The Florida Constitution should, above all else, clearly define the relationship between government and those that are governed. In so doing, there are certain principles that should be clearly articulated in our constitution, including:

- A description of the branches of government, their powers, and how they work;
- A description of the limitations on the powers of government; and
- A description of the rights of citizens.

A reasonable person may assert that the delineation of the rights of nursing home and assisted living facility residents is, therefore, appropriate for inclusion in the Constitution. That same reasonable person may also assert that a precedent has been set with the inclusion of the Taxpayers' Bill of Rights (Article I, Section 25) in the Florida Constitution.

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<sup>2</sup> Paul G. Kauper, J.D., "The State Constitution: Its Nature and Purpose," Citizens Research Council of Michigan, October 1961.

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It is important to note that Article I, Section 25, crafted by the Taxation and Budget Reform Commission<sup>3</sup> in 1992, authorizes **the Legislature** (emphasis added) to prescribe and adopt **by general law** (emphasis added) a Taxpayers' Bill of Rights that, **in clear and concise language** (emphasis added), sets forth taxpayers' rights and responsibilities and government's responsibilities to deal fairly with taxpayers under the laws of this state.

It is clear from this that the Taxation and Budget Reform Commission, which recommended the inclusion of the Taxpayers' Bill of Rights as a 1992 amendment to the Constitution, intended for the specific rights of taxpayers to be determined by the Legislature and enacted as a provision of general law, and not included in the Constitution.

This is appropriate for a couple of reasons. First and foremost, it is extremely difficult to remove what is essentially a statutory provision from a constitution, once incorporated. The overall effect of incorporating what are essentially legislative matters in a state constitution is to undercut the legislative process and to limit the area of legislative responsibility and discretion.<sup>4</sup> The Legislature is essentially powerless to act when changing circumstances or unintended consequences resulting from the inclusion of what is essentially a statutory provision in the Constitution warrants immediate corrective actions. The only option is to amend the Constitution, which requires a 60 percent supermajority approval by Florida voters.

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3 The Taxation and Budget Reform Commission, established in Article XI, Section 6, Florida Constitution, meets once every 20 years to review that state's budget processes and tax structure, and to recommend amendments to the Constitution dealing with taxation or the state budgetary process.

4 Paul G. Kauper, J.D., "The State Constitution: Its Nature and Purpose," Citizens Research Council of Michigan, October 1961.

Furthermore, if all citizen rights were to be enumerated in the Constitution, the distinction between the Constitution as fundamental law (defining the framework of government and the relation of the government to the citizen) and the general laws of the state (defining rights and obligations arising out of private relationships) would be lost. Once the door is opened for enumerating and defining rights in the field of private relations, it may be expected that a number of special interest groups will be pushing for recognition of their own particular interests in the Constitution.<sup>5</sup>

The enumeration of detailed powers in the Constitution to deal with specific situations is unnecessary and should be avoided. An enumeration of detailed rights and powers is unnecessary, adds to the bulk of the instrument, and may also have the unexpected result of being an implied limitation and denial of powers not enumerated.<sup>6</sup>

In support of this, consider the following 1819 opinion of former U.S. Supreme Court Chief Justice John Marshall:<sup>7</sup>

*"A Constitution to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of a prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves..."*

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5 Ibid.

6 Ibid.

7 McCulloch v. Maryland, 17 U.S. at 408.

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Chief Justice Marshall's opinion underscores the need for the Constitution to be as brief and concise as practical. The more brief and concise the Constitution, the more likely it is to be read and understood by the average taxpayer.

CS/P88 should not be interpreted to suggest that residents of nursing homes and assisted living facilities have no specific rights. The specific rights for residents of nursing homes and assisted living facilities are enumerated in Florida law. Section 400.022, Florida Statutes, provides residents of nursing homes 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. 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 family and friends in accordance with facility policies.<sup>8</sup>

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. Residents also have the right to manage their own financial affairs.<sup>9</sup>

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8 Declaration of Rights Committee Proposal Analysis, Proposal 88, Constitution Revision Commission, January 18, 2018, retrieved from <http://flcrc.gov/Proposals/Commissioner/2017/0088/Analyses/2017p0088.pre.dr.PDF>, January 24, 2018.

9 Ibid.

Nursing home residents also have rights under federal law. Both Section 1819 of the Social Security Act [42 U.S.C. 1395i-3], which was modeled after the Florida residents' rights statute, and Section 483.10, Code of Federal Regulations, affords nursing home residents rights that 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. 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.<sup>10</sup>

The specific rights of residents of assisted living facilities are enumerated in section 429.28, Florida Statutes. Residents are afforded 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; 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.<sup>11</sup>

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10 Ibid.

11 Ibid.

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Residents are also 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 notice of relocation or termination of residency from the facility. Section 429.28, Florida Statutes, 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.<sup>12</sup>

The inclusion of bills of rights of residents of nursing homes and assisted living facilities in Florida law is consistent with how the Legislature has addressed the rights of other affected groups, including:

- Voters --- section 101.031, Florida Statutes, (Florida Voter's Bill of Rights) enumerates the specific rights of each registered voter;
- Patients --- section 381.026, Florida Statutes, (Florida Patient's Bill of Rights and Responsibilities) enumerates the specific rights of patients of licensed health care facilities and health care providers;
- Persons with developmental disabilities --- section 393.13, Florida Statutes, (The Bill of Rights of Persons with Developmental Disabilities) enumerates the specific rights of all persons with developmental disabilities;
- Insurance Policyholders' Bill of Rights --- section 626.9641, Florida Statutes, (Policyholders' Bill of Rights) enumerates the specific rights of all insurance policyholders; and

- Homeowners --- section 627.7142, Florida Statutes, (Homeowner Claims Bill of Rights) enumerates the specific rights of a personal lines residential property insurance policyholder who files a claim of loss.

CS/P88 would only move 2 of the current 22 nursing home resident rights into the Constitution (i.e., dignity, and adequate and appropriate healthcare), in addition to creating some new rights. Other rights such as religious freedom, managing one's finances and the ability to organize and participate in resident groups are omitted from CS/P88. Taxpayers should be concerned that Florida would recognize some rights in statute, others in the Constitution, and some in both. This would lead to increased litigation as the courts sort out whether some rights carry more weight than others based on their source.

Since the specific rights of nursing home and assisted living facility residents are already enumerated in Florida law, it would seem most appropriate to address any shortcomings or necessary revisions through a legislative remedy, and not a constitutional remedy.

## Likely Provider & Taxpayer Impacts

CS/P88, if approved by the voters, will have significant impacts on the nursing home and assisted living facility providers and on Florida taxpayers, including:

- A proliferation of dispute-related lawsuits;
- Expanded liability and related costs;
- Discouragement of needed passive investment; and
- Overturning actions of the Legislature.

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<sup>12</sup> Declaration of Rights Committee Proposal Analysis, Proposal 88, Constitution Revision Commission, January 18, 2018, retrieved from <http://flcrc.gov/Proposals/Commissioner/2017/0088/Analyses/2017p0088.pre.dr.PDF>, January 24, 2018.

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## Lawsuits, Lawsuits, and More Lawsuits

The Legislature and the federal government have responded to potential abuse and neglect of elderly residents in nursing homes and assisted living facilities. In addition to multiple agencies with overlapping authority to regulate these facilities, the Legislature recognizes litigation as another tool for ensuring patients' protection.

As an alternative to litigation, the Federal Arbitration Act allows and encourages arbitration as a method of resolving disputes. Federal and state statute do not prohibit arbitration in any setting, including in nursing homes and assisted living facilities. In May 2017, the U.S. Supreme Court reaffirmed, in *Kindred Nursing Centers, L.P. v. Clark, et al*, 16-32, the well-established principle that the Federal Arbitration Act preempts state laws that specifically disfavor arbitration agreements. The Court specifically overruled a Kentucky Supreme Court decision not to enforce arbitration agreements between a nursing home and residents that had been signed by family members on behalf of the residents pursuant to powers of attorney.

CS/P88 would, if put into the Constitution, swing the pendulum in the other direction by essentially taking away a resident's federally-protected right to arbitration by prohibiting a nursing home or assisted living facility from offering residents or their representatives an arbitration agreement. Arbitration is an alternative to filing a lawsuit and going to court to resolve a dispute. The parties to the dispute select an independent, disinterested third-party, who hears evidence presented by the parties and makes a (binding) decision. The major advantage of arbitration is the ability to resolve a dispute without having to spend the time and money associated

with going to court. The Federal Arbitration Act<sup>13</sup> ensures the validity and enforcement of arbitration agreements and has been consistently recognized by the U.S. Supreme Court as evidencing "a national policy favoring arbitration."<sup>14</sup> The Court has also routinely held that the Federal Arbitration Act supersedes state requirements that restrain the enforceability of mandatory arbitration agreements.<sup>15</sup>

By removing arbitration as an option for residents to solve disputes, the only remedy available to residents under CS/P88 will be litigation. Since arbitration represents a more streamlined and less expensive means of dispute resolution, relying on litigation will generally make it more expensive and more time consuming for residents to resolve disputes. Arbitration provides numerous other advantages when compared to litigation, including:

- Choice --- in a court proceeding, judges are typically assigned randomly and without input from the parties. In arbitration, however, the parties jointly decide on the arbitrator(s). This permits the selection of an arbitrator who has specialized knowledge or expertise that may be useful in resolving the dispute.
- Privacy --- the arbitration process is more private and informal than litigation. Arbitration proceedings are typically not part of the public record and may have more streamlined procedures and rules. This is advantageous for residents who want to keep the details private.

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<sup>13</sup> 9 U.S.C. § 2.

<sup>14</sup> John O. Shimabukuro and Jennifer A. Staman, "Mandatory Arbitration and the Federal Arbitration Act," Congressional Research Service, September 2017.

<sup>15</sup> *Ibid*,

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- Convenience --- because the arbitration process may begin as soon as an arbitrator is selected, arbitration is generally quicker and more convenient than litigation. Arbitration also has limited rules of evidence, so there is no discovery process, no interrogatories, no subpoenas, etc.
  - Flexibility --- although the arbitration process contains many of the same components as court trials, the arbitration process can be tailored to meet the needs of the parties.
  - Finality --- the arbitrator's decision is both final and enforceable by the courts. There are no appeals, as there are in litigation.

Vague language in CS/P88 is also likely to invite lawsuits, if for no other reason than to have the courts determine what the language means. For example, the right to be treated courteously, fairly, and with the fullest measure of dignity in the original version of CS/P88 includes the right to health care and treatment that "puts the residents' needs and best interests first." This not only exceeds the requirement to meet established standards of care, but also establishes a level of responsibility that is vague and ambiguous.

CS/P88 replaced "puts the residents' needs and best interests first" with the equally vague and ambiguous "prioritizes the residents' needs and best interests." Defining terms like "best interests" would reduce the likelihood of lawsuits; however, the provision in CS/P88 that these rights are "self-executing" and do not require "any implementing legislation or administrative rules" leaves it to the courts (and not the Legislature) to define these vague and ambiguous terms.

## *Expanded Liability and Related Costs*

CS/P88 requires nursing homes and assisted living facilities to meet vague requirements of financial resources or liability insurance sufficient to ensure that residents and their families are justly compensated for any loss, injury, and damage they suffer.

This issue was addressed by the Legislature in 2014 when it enacted a statute to assure nursing homes pay their judgments or face administrative action by the Agency for Health Care Administration. The law requires that if a nursing home does not pay a judgment or adjudicated claim, it will lose its license, without the ability to change ownership (section 400.024, Florida Statutes). Since 2014, we have found no documentation of any nursing home that has not paid a judgment or adjudicated claim. CS/P88 would supersede the actions of the Legislature.

The expanded liability reflected in CS/P88 will require nursing home and assisted living facility owners to maintain additional liability insurance to cover claims of abuse, negligence, neglect, exploitation, or violation of a resident's rights by professionals and others who provide care and treatment. Shareholders and passive investors would be wise to purchase liability insurance to protect their non-business assets as well.

The current insurance market for nursing home providers in Florida is not viable. In today's market, many insurance companies in Florida are unwilling to offer the higher limits of general and professional liability required; they simply do not want to take on the risk. That means, for many operators, high-limit liability insurance is either unavailable or unaffordable.<sup>16</sup> Most nursing homes will have to self-insure to meet this

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<sup>16</sup> Letter to Florida TaxWatch from Jeff Welch, Partner, Bouchard Insurance, March 9, 2018.

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requirement. This will, therefore, force nursing homes to shift money out of operations to fund higher amounts for claims and legal fees.

## Discouragement of Passive Investors

By expanding liability beyond those who operate a facility or provide care, CS/P88 will also likely have a chilling effect on passive investors<sup>17</sup> who are or are investing, or considering investing, in the nursing home and assisted living facility industries. Florida law currently ensures that residents can pursue lawsuits against those who are directly at fault, while protecting those who have nothing to do with the provision of care or daily operation of the facility.

Under current Florida law,<sup>18</sup> a cause of action for negligence or a violation of residents' rights which alleges direct or vicarious liability for the personal injury or death of a nursing home resident arising from such negligence or violation of rights and which seeks damages for such injury or death may be brought only against the licensee, the licensee's management or consulting company, the licensee's managing employees, and any direct caregivers, whether employees or contractors. A passive investor is not liable under Florida law.

CS/P88 would change that. As originally proposed, CS/P88 would afford nursing home residents the right to know and hold accountable all persons or entities who own or operate the facilities, *including the persons who are the owners of entities which own or operate the facilities* (emphasis added). CS/P88 amended this language to include *all persons or entities*

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17 Section 400.023(2)(c), Florida Statutes, defines a passive investor as "an individual or entity that has an interest in a facility but does not participate in the decision-making or operations of the facility."

18 Section 400.023(1), Florida Statutes.

*who either directly or indirectly own or operate the facilities.* (emphasis added). Even with this amendment, CS/P88 extends liability beyond those who own or operate the facility or who provide care and treatment to nursing home residents, thereby permitting aggrieved residents to "pierce the corporate veil."

A fundamental principle of corporate law is that shareholders in a corporation are not liable for the obligations of the enterprise beyond the capital that they contribute in exchange for their shares. Corporate obligations remain the liability of the entity and not of the shareholders, directors, or officers who own and/or act for the entity. "Piercing the corporate veil" refers to the judicially imposed exception to this principle by which courts disregard the separateness of the corporation and hold a shareholder responsible for the corporation's action as if it were the shareholder's own.<sup>19</sup> In Florida, one must typically show two things in order to pierce the corporate veil:<sup>20</sup>

- That the relevant corporation is only the alter ego or mere instrumentality of the parent corporation or its shareholder(s); and
- That the alleged parent company or shareholder(s) also engaged in improper conduct.<sup>21</sup>

Florida nursing homes and assisted living facilities depend on private investment. Private equity investors provide much of the capital to renovate, build new facilities and purchase the equipment needed to care for higher acuity residents.

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19 Robert B. Thompson, "Piercing the Corporate Veil: An Empirical Study." *Cornell Law Review*, Volume 76, Issue 5, July 1991.

20 Charles B. Jimerson and Brittany N. Snell, "The Five Most Common Ways to Pierce the Corporate Veil and Impose Personal Liability for Corporate Debts." *Iexology.com*

21 See, e.g. Legal Information Institute at the Cornell Law School, *Wex* (legal dictionary & encyclopedia). Available at [www.law.cornell.edu/wex/piercing\\_the\\_corporate\\_veil](http://www.law.cornell.edu/wex/piercing_the_corporate_veil). Retrieved on January 26, 2018.

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The possibility that alleged abuse, neglect, exploitation, or violation of a resident's rights would allow a resident to reach all of an investor's non-business assets represents a powerful deterrent for risk averse investors to invest in nursing homes and assisted living facilities. These non-business assets include the investor's home, bank account, investments, and other assets. A prospective investor, while willing to invest some assets and even considerable time and effort in a nursing home or assisted living facility venture, may be unwilling to accept the risk of losing other assets not involved in the venture.

## *Overturing Actions of the Legislature*

In addition to the overturning the legislative solution for nursing homes to pay judgements or adjudicated claims described in the previous section, CS/P88 overturns the Legislature's law-making on passive investors in nursing homes. In 2014, the Legislature passed CS/CS/SB 670 (Ch. 2014-83), which states that any claimant who alleges negligence or a violation of nursing home resident's rights for personal injury or death of a nursing home resident has a cause of action against the licensee, the licensee's management company or consulting company, the licensee's managing employees, and any direct caregivers, whether they are employees or contractors. In effect, SB 670 limits the persons who may be sued in the initial pleading to only these categories of defendants, without a preliminary hearing to determine whether there is sufficient evidence in the record or proffered by the claimant to establish a reasonable showing that the elements of liability exist for other parties.

The law further defines "passive investor." A passive investor is an individual or entity that does not participate in the decision-making or operation of a facility. A passive investor is shielded from liability in a cause of action for damages for the personal injury or death of a nursing home resident due to negligence or a violation of residents' rights. If it can be shown that the investor had a role in the control or management of the facility, then that investor can be brought into the claim. CS/P88 would undo current law and override the actions of the Legislature.

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# Conclusions

A state's constitution is, by definition, the state's fundamental law. It is judicially enforceable as the supreme law of the state, subject to federal preemption and takes precedence over statutes, laws, ordinances, and administrative rules. The purpose of a constitution as historically conceived is to establish the basic order of government. The constitution loses much of its distinctive significance as the basic and enduring instrument of government when the process of constitutional amendment or revision is used as a substitute for legislation.<sup>22</sup>

The contents of the Florida Constitution should be limited to matters that are essential or fundamental. Matters that are ordinarily handled through the legislative process should be excluded from the Constitution. This would exclude the bills of rights for nursing home and assisted living facility residents, which currently reside in Florida law. If the current bills of rights require amendment, then amending the Florida Statutes in which they reside is the appropriate remedy, not enumerating these rights in the Florida Constitution.

Taxpayers should be troubled by the self-executing provisions of CS/P88. The provision that these rights are "self-executing" and do not require "any implementing legislation or administrative rules" deprives the Legislature and executive agencies of the opportunity to define vague terms such as "residents' needs and best interests" and will ultimately leave it to the courts to define these vague terms.

If approved by the voters, CS/P88 will essentially take away a resident's federally-protected right to arbitration. The only option for resolving disputes will be litigation. This will increase the number of lawsuits, as well as the time and costs required to resolve disputes.

Expanding the liability provisions to include passive investors and placing their non-business assets at risk will discourage risk averse investment in the nursing home and assisted living facility industries. This will pose additional funding challenges to the nursing home and assisted living facility industries. In addition, purchasing the additional liability insurance necessary to cover claims against professionals and others who provide care and treatment will drive up the costs further. These additional costs will be passed along to the residents and to Florida's taxpayers.

It should be expressly clear and understood that TaxWatch does not object to a bill of rights for residents of nursing homes and assisted living facilities. TaxWatch does, however, object to the enumeration of specific rights for residents of nursing homes and assisted living facilities in the Florida Constitution.

When CS/P88 goes before the full Constitution Revision Commission, TaxWatch recommends that the Commission reject it. Should CS/P88 make it to the November 2018 general election ballot, TaxWatch recommends that the voters reject it.

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22 Paul G. Kauper, J.D., "The State Constitution: Its Nature and Purpose," Citizens Research Council of Michigan, October 1961.

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# Appendix A

## Nursing Home Residents' Bill of Rights

Section 400.022, Florida Statutes, enumerates the following rights for patients at nursing home facilities:

- Civil and religious liberties;
- Private and uncensored communication;
- Visitation by any individual providing health, social, legal, or other services and the right to deny or withdraw consent at any time;
- Present grievances and recommend changes in policies and services free from restraint, interference, coercion, discrimination, or reprisal (includes the right to have access to the ombudsmen and other advocacy groups);
- Organize and participate in resident groups;
- Participate in social, religious, and community activities that do not interfere with the rights of others;
- Examine results of recent facility inspections by federal and state agencies including the plan of correction if applicable;
- Manage his/her own financial affairs. A quarterly accounting will be furnished to resident or legal representative;
- Be fully informed, in writing and orally, of services available at the facility and of related charges for such services;
- Refuse medication and treatment and to know the consequences;
- Receive adequate and appropriate health care, protective and support services within established and recognized standards;
- Privacy in treatment and in caring for personal needs;
- Be informed of medical condition and proposed treatment and be allowed participation in planning;
- Be treated courteously, fairly, and with the fullest measure of dignity;
- Be free from mental and physical abuse, corporal punishment, extended involuntary seclusion, and from physical and chemical restraints except those ordered by resident's physician;
- Be transferred or discharged only for medical reasons, the welfare of other residents or nonpayment of a bill;
- Receive a thirty (30) day written notice of discharge or relocation, and challenge such notice;
- Choose physician and pharmacy;
- Retain and use personal clothing and possessions;
- Have copies of rules and regulations of the facility;
- Notification prior to room change; and
- Information concerning bed-hold policy for hospitalization.

# Appendix B

## Assisted Living Facilities Residents' Bill of Rights

Section 429.28, Florida Statutes, enumerates the following rights for residents in assisted living facilities:

- Live in a safe and decent living environment, free from abuse and neglect;
- Be treated with consideration, respect and with due recognition of personal dignity, individuality, and the need for privacy;
- Retain and use his/her own clothes and other personal property;
- 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;
- Participate in and benefit from community services and activities to achieve the highest possible level of independence, autonomy, and interaction with the community;
- Manage his/her own financial affairs unless the resident (or the resident's legal representative) authorizes the administrator of the facility to provide safekeeping for funds;
- Share a room with spouse if both are residents of the facility;
- Reasonable opportunity to exercise and to go outdoors at regular and frequent intervals;
- Adequate and appropriate health care consistent with established and recognized standards;
- Exercise civil and religious liberties including personal decisions. No religious beliefs, practices, nor attendance at religious services, shall be imposed on any resident;
- Forty-five (45) day notice of relocation or termination of residency except in cases of emergency;
- Present grievances and recommend changes in policies, procedures, and services to the staff of the facility without restraint, interference, coercion, discrimination, or reprisal. This right includes access to ombudsmen volunteers and advocates and the right to be a member of, to be active in, and to associate with advocacy or special interest groups; and
- Be free from physical and chemical restraints other than those prescribed by the resident's physician. The use of physical restraints shall be limited to half-bedrails and only upon the written order of the resident's physician and the consent of the resident or the resident's legal representative.

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As an independent, nonpartisan, nonprofit taxpayer research institute and government watchdog, it is the mission of Florida TaxWatch to provide the citizens of Florida and public officials with high quality, independent research and analysis of issues related to state and local government taxation, expenditures, policies, and programs. Florida TaxWatch works to improve the productivity and accountability of Florida government. Its research recommends productivity enhancements and explains the statewide impact of fiscal and economic policies and practices on citizens and businesses.

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The findings in this Report are based on the data and sources referenced. Florida TaxWatch research is conducted with every reasonable attempt to verify the accuracy and reliability of the data, and the calculations and assumptions made herein. Please feel free to contact us if you feel that this paper is factually inaccurate.

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