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I N   S E N A T E

May 1, 2014

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Introduced by Sen. HANNON -- read twice and ordered printed, and when printed to be committed to the Committee on Health

AN ACT to amend the public health law and the surrogate's court procedure act, in relation to conforming and improving the process for determining incapacity

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1     Section 1. Subdivisions 2, 3, 4, 5, 6 and 7 of section 2983 of the  
2     public health law are renumbered subdivisions 3, 4, 5, 6, 7 and 8.  
3     S 2. Subdivision 1 of section 2983 of the public health law, as added  
4     by chapter 752 of the laws of 1990, paragraph (b) as amended by chapter  
5     23 of the laws of 1994 and paragraph (c) as amended by section 7 of part  
6     J of chapter 56 of the laws of 2012, is amended to read as follows:  
7     1. [Determination] INITIAL DETERMINATION by attending physician. [(a)  
8     A] AN INITIAL determination that a principal lacks capacity to make  
9     health care decisions shall be made by the attending physician to a  
10    reasonable degree of medical certainty. The determination shall be made  
11    in writing and shall contain such attending physician's opinion regard-  
12    ing the cause and nature of the principal's incapacity as well as its  
13    extent and probable duration. The determination shall be included in the  
14    patient's medical record. [For a decision to withdraw or withhold life-  
15    sustaining treatment, the attending physician who makes the determi-  
16    nation that a principal lacks capacity to make health care decisions  
17    must consult with another physician to confirm such determination. Such  
18    consultation shall also be included within the patient's medical record]  
19    A PHYSICIAN WHO HAS BEEN APPOINTED AS A PATIENT'S AGENT SHALL NOT MAKE  
20    THE DETERMINATION OF THE PATIENT'S CAPACITY TO MAKE HEALTH CARE DECI-  
21    SIONS.  
22    2. CONCURRING DETERMINATIONS FOR LIFE-SUSTAINING TREATMENT DECISIONS.  
23    FOR A DECISION TO WITHDRAW OR WITHHOLD LIFE-SUSTAINING TREATMENT, THE  
24    FOLLOWING SHALL APPLY:  
25    (A) THE INITIAL DETERMINATION THAT A PATIENT LACKS CAPACITY SHALL BE  
26    SUBJECT TO A CONCURRING DETERMINATION, INDEPENDENTLY MADE BY A HEALTH OR  
27    SOCIAL SERVICES PRACTITIONER. A CONCURRING DETERMINATION SHALL INCLUDE

EXPLANATION--Matter in *ITALICS* (underscored) is new; matter in brackets  
[ ] is old law to be omitted.

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1 AN ASSESSMENT OF THE CAUSE AND EXTENT OF THE PATIENT'S INCAPACITY AND  
2 THE LIKELIHOOD THAT THE PATIENT WILL REGAIN DECISION-MAKING CAPACITY,  
3 AND SHALL BE INCLUDED IN THE PATIENT'S MEDICAL RECORD. HOSPITALS SHALL  
4 ADOPT WRITTEN POLICIES IDENTIFYING THE TRAINING AND CREDENTIALS OF  
5 HEALTH OR SOCIAL SERVICES PRACTITIONERS QUALIFIED TO PROVIDE CONCURRING  
6 DETERMINATIONS OF INCAPACITY CONDUCTED FOR HOSPITAL PATIENTS.

7 (b) If an attending physician of a patient in a general hospital or  
8 mental hygiene facility determines that a patient lacks capacity because  
9 of mental illness, [the attending physician who makes the determination  
10 must be, or must consult, for the purpose of confirming the determi-  
11 nation, with a qualified psychiatrist] EITHER SUCH PHYSICIAN OR THE  
12 CONCURRING PRACTITIONER MUST HAVE THE FOLLOWING QUALIFICATIONS: A PHYSI-  
13 CIAN LICENSED TO PRACTICE MEDICINE IN NEW YORK STATE, WHO IS A DIPLOMATE  
14 OR ELIGIBLE TO BE CERTIFIED BY THE AMERICAN BOARD OF PSYCHIATRY AND  
15 NEUROLOGY OR WHO IS CERTIFIED BY THE AMERICAN OSTEOPATHIC BOARD OF  
16 NEUROLOGY AND PSYCHIATRY OR IS ELIGIBLE TO BE CERTIFIED BY THAT BOARD. A  
17 record of such consultation shall be included in the patient's medical  
18 record.

19 (c) If the attending physician determines that a patient lacks capaci-  
20 ty because of a developmental disability, [the attending physician who  
21 makes the determination must be, or must consult, for the purpose of  
22 confirming the determination, with] EITHER SUCH PHYSICIAN OR THE CONCUR-  
23 RING PRACTITIONER MUST HAVE THE FOLLOWING QUALIFICATIONS: EITHER (I)  
24 FOR A PATIENT IN A HOSPITAL, A HEALTH OR SOCIAL SERVICES PRACTITIONER  
25 QUALIFIED BY TRAINING OR EXPERIENCE TO MAKE SUCH DETERMINATION IN  
26 ACCORDANCE WITH THE WRITTEN POLICIES ADOPTED BY THE HOSPITAL; OR (II)  
27 FOR A PATIENT IN ANY SETTING, a physician or clinical psychologist who  
28 either is employed by a developmental disabilities services office named  
29 in section 13.17 of the mental hygiene law, or who has been employed for  
30 a minimum of two years to render care and service in a facility operated  
31 or licensed by the office for people with developmental disabilities, or  
32 has been approved by the commissioner of developmental disabilities in  
33 accordance with regulations promulgated by such commissioner. Such regu-  
34 lations shall require that a physician or clinical psychologist possess  
35 specialized training or three years experience in treating developmental  
36 disabilities. A record of such consultation shall be included in the  
37 patient's medical record.

38 [(d) A physician who has been appointed as a patient's agent shall not  
39 make the determination of the patient's capacity to make health care  
40 decisions.]

41 S 3. Subdivision 3 of section 2994-c of the public health law, as  
42 added by chapter 8 of the laws of 2010, paragraph (b) as amended by  
43 chapter 167 of the laws of 2011, subparagraph (ii) of paragraph (c) as  
44 amended by section 8 of part J of chapter 56 of the laws of 2012, is  
45 amended to read as follows:

46 3. Concurring determinations FOR LIFE-SUSTAINING TREATMENT DECISIONS.  
47 FOR A DECISION TO WITHDRAW OR WITHHOLD LIFE-SUSTAINING TREATMENT, THEN  
48 THE FOLLOWING SHALL APPLY: (a) An initial determination that a patient  
49 lacks decision-making capacity shall be subject to a concurring determi-  
50 nation, independently made, [where required by this subdivision] BY A  
51 HEALTH OR SOCIAL SERVICES PRACTITIONER EMPLOYED OR OTHERWISE FORMALLY  
52 AFFILIATED WITH THE HOSPITAL. A concurring determination shall include  
53 an assessment of the cause and extent of the patient's incapacity and  
54 the likelihood that the patient will regain decision-making capacity,  
55 and shall be included in the patient's medical record. Hospitals shall  
56 adopt written policies identifying the training and credentials of

1 health or social services practitioners qualified to provide concurring  
2 determinations of incapacity.

3 (b) [(i) In a residential health care facility, a health or social  
4 services practitioner employed by or otherwise formally affiliated with  
5 the facility must independently determine whether an adult patient lacks  
6 decision-making capacity.

7 (ii) In a general hospital a health or social services practitioner  
8 employed by or otherwise formally affiliated with the facility must  
9 independently determine whether an adult patient lacks decision-making  
10 capacity if the surrogate's decision concerns the withdrawal or with-  
11 holding of life-sustaining treatment.

12 (iii)] With respect to decisions regarding hospice care for a patient  
13 in a general hospital or residential health care facility, the health or  
14 social services practitioner must be employed by or otherwise formally  
15 affiliated with the general hospital or residential health care facili-  
16 ty.

17 (c) (i) If the attending physician makes an initial determination that  
18 a patient lacks decision-making capacity because of mental illness,  
19 either such physician OR THE CONCURRING PRACTITIONER must have the  
20 following qualifications[, or another physician with the following qual-  
21 ifications must independently determine whether the patient lacks deci-  
22 sion-making capacity]: a physician licensed to practice medicine in New  
23 York state, who is a diplomate or eligible to be certified by the Ameri-  
24 can Board of Psychiatry and Neurology or who is certified by the Ameri-  
25 can Osteopathic Board of Neurology and Psychiatry or is eligible to be  
26 certified by that board. A record of such consultation shall be included  
27 in the patient's medical record.

28 (ii) If the attending physician makes an initial determination that a  
29 patient lacks decision-making capacity because of a developmental disa-  
30 bility, either such physician OR THE CONCURRING PRACTITIONER must have  
31 the following qualifications[, or another professional with the follow-  
32 ing qualifications must independently determine whether the patient  
33 lacks decision-making capacity]: EITHER (A) A HEALTH OR SOCIAL SERVICES  
34 PRACTITIONER QUALIFIED BY TRAINING OR EXPERIENCE TO MAKE SUCH DETERMI-  
35 NATION IN ACCORDANCE WITH THE WRITTEN POLICIES ADOPTED BY THE HOSPITAL,  
36 OR (B) a physician or clinical psychologist who either is employed by a  
37 developmental disabilities services office named in section 13.17 of the  
38 mental hygiene law, or who has been employed for a minimum of two years  
39 to render care and service in a facility operated or licensed by the  
40 office for people with developmental disabilities, or has been approved  
41 by the commissioner of developmental disabilities in accordance with  
42 regulations promulgated by such commissioner. Such regulations shall  
43 require that a physician or clinical psychologist possess specialized  
44 training or three years experience in treating developmental disabili-  
45 ties. A record of such consultation shall be included in the patient's  
46 medical record.

47 (d) If an attending physician has determined that the patient lacks  
48 decision-making capacity and if the health or social services practi-  
49 tioner consulted for a concurring determination disagrees with the  
50 attending physician's determination, the matter shall be referred to the  
51 ethics review committee if it cannot otherwise be resolved.

52 S 4. Subdivisions 3 and 4 of section 2994-cc of the public health law,  
53 subdivision 3 as added by chapter 8 of the laws of 2010 and subdivision  
54 4 as amended by section 131 of subpart B of part C of chapter 62 of the  
55 laws of 2011, are amended to read as follows:

1 3. Consent by a surrogate shall be governed by article twenty-nine-CC  
2 of this chapter, except that[: (a) a second determination of capacity  
3 shall be made by a health or social services practitioner; and (b)] the  
4 authority of the ethics review committee set forth in article  
5 twenty-nine-CC of this chapter shall apply only to nonhospital orders  
6 issued in a hospital OR HOSPICE.

7 4. (a) When the concurrence of a second [physician] HEALTH OR SOCIAL  
8 SERVICES PRACTITIONER is sought to fulfill the requirements for the  
9 issuance of a nonhospital order not to resuscitate for patients in a  
10 correctional facility, such second [physician] HEALTH OR SOCIAL SERVICES  
11 PRACTITIONER shall be selected by the chief medical officer of the  
12 department of corrections and community supervision or his or her desig-  
13 nee.

14 (b) When the concurrence of a second [physician] HEALTH OR SOCIAL  
15 SERVICES PRACTITIONER is sought to fulfill the requirements for the  
16 issuance of a nonhospital order not to resuscitate for [hospice and]  
17 home care patients, such second [physician] HEALTH OR SOCIAL SERVICES  
18 PRACTITIONER shall be selected [by the hospice medical director or  
19 hospice nurse coordinator designated by the medical director or] by the  
20 home care services agency director of patient care services[, as appro-  
21 priate to the patient].

22 S 5. Paragraph (a) of subdivision 4 of section 1750-b of the surro-  
23 gate's court procedure act, as added by chapter 500 of the laws of 2002,  
24 subparagraph (i) as amended by section 18 of part J of chapter 56 of the  
25 laws of 2012, is amended to read as follows:

26 (a) The attending physician, as defined in subdivision two of section  
27 twenty-nine hundred eighty of the public health law, [must confirm]  
28 SHALL INITIALLY DETERMINE to a reasonable degree of medical certainty  
29 that the [mentally retarded] DEVELOPMENTALLY DISABLED person lacks  
30 capacity to make health care decisions. The determination thereof shall  
31 be included in the [mentally retarded] DEVELOPMENTALLY DISABLED person's  
32 medical record, and shall contain such attending physician's opinion  
33 regarding the cause and nature of the [mentally retarded] DEVELOP-  
34 MENTALLY DISABLED person's incapacity as well as its extent and probable  
35 duration. The attending physician who makes [the confirmation] SUCH  
36 INITIAL DETERMINATION shall consult with another physician, or a  
37 licensed psychologist, to further confirm the [mentally retarded] DEVEL-  
38 OPMENTALLY DISABLED person's lack of capacity. [The] IF THE ATTENDING  
39 PHYSICIAN MAKES AN INITIAL DETERMINATION THAT A PATIENT LACKS CAPACITY  
40 TO MAKE HEALTH CARE DECISIONS BECAUSE OF DEVELOPMENTAL DISABILITY, THEN  
41 THE attending physician [who makes the confirmation,] or the physician  
42 or licensed psychologist with whom the attending physician consults[,]  
43 EITHER (I) FOR A PATIENT IN A GENERAL HOSPITAL, RESIDENTIAL HEALTH CARE  
44 FACILITY OR HOSPICE, must [(i)] BE QUALIFIED BY TRAINING OR EXPERIENCE  
45 TO MAKE SUCH DETERMINATION, IN ACCORDANCE WITH POLICIES ADOPTED BY THE  
46 GENERAL HOSPITAL, RESIDENTIAL HEALTH CARE FACILITY OR HOSPICE; OR (II)  
47 FOR A PATIENT IN ANY SETTING, MUST (A) be employed by a developmental  
48 disabilities services office named in section 13.17 of the mental  
49 hygiene law or employed by the office for people with developmental  
50 disabilities to provide treatment and care to people with developmental  
51 disabilities, or [(ii)] (B) have been employed for a minimum of two  
52 years to render care and service in a facility or program operated,  
53 licensed or authorized by the office [of mental retardation and] FOR  
54 PEOPLE WITH developmental disabilities, or [(iii)] (C) have been  
55 approved by the commissioner of [mental retardation and] developmental  
56 disabilities in accordance with regulations promulgated by such commis-

1 sioner. Such regulations shall require that a physician or licensed  
2 psychologist possess specialized training or three years experience in  
3 treating [mental retardation] DEVELOPMENTAL DISABILITIES. A record of  
4 such consultation shall be included in the [mentally retarded] DEVELOP-  
5 MENTALLY DISABLED person's medical record.

6 S 6. Subdivision 4 of section 2982 of the public health law, as  
7 amended by chapter 370 of the laws of 1991, is amended to read as  
8 follows:

9 4. Priority over other surrogates. Health care decisions by an agent  
10 on a principal's behalf pursuant to this article shall have priority  
11 over decisions by any other person, except as otherwise provided in the  
12 health care proxy or in subdivision [five] SIX of section two thousand  
13 nine hundred eighty-three of this article.

14 S 7. Subdivision 2 of section 2984 of the public health law, as added  
15 by chapter 752 of the laws of 1990, is amended to read as follows:

16 2. A health care provider shall comply with health care decisions made  
17 by an agent in good faith under a health care proxy to the same extent  
18 as if such decisions had been made by the principal, subject to any  
19 limitations in the health care proxy and pursuant to the provisions of  
20 subdivision [five] SIX of section two thousand nine hundred eighty-three  
21 of this article.

22 S 8. Paragraph (b) of subdivision 7 of section 2983 of the public  
23 health law, as added by chapter 752 of the laws of 1990 and such subdi-  
24 vision as renumbered by section one of this act, is amended to read as  
25 follows:

26 (b) The notice requirements set forth in subdivision [three] FOUR of  
27 this section shall not apply to the confirmation required by this subdi-  
28 vision.

29 S 9. This act shall take effect on the ninetieth day after it shall  
30 have become a law, provided that the amendments to article 29-C of the  
31 public health law made by section two of this act shall apply to the  
32 decisions made pursuant to health care proxies created prior to the  
33 effective date of this act as well as those created thereafter.