S T A T E O F N E W Y O R K

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2009-2010 Regular Sessions

I N S E N A T E

February 10, 2009

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

AN ACT to amend the public health law, in relation to executing living wills and establishing a health care representative to make health care decisions when a health care agent has not been appointed or living will has not been created

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

Section 1. The article heading of article 29-C of the public health law, as added by chapter 752 of the laws of 1990, is amended to read as follows:

HEALTH CARE AGENTS [AND], PROXIES,
HEALTH CARE REPRESENTATIVES AND LIVING WILLS

S 2. Section 2980 of the public health law is amended by adding three new subdivisions 3-a, 6-a and 9-a to read as follows:

3-A. "END-STAGE MEDICAL CONDITION" MEANS AN INCURABLE AND IRREVERSIBLE MEDICAL CONDITION IN AN ADVANCED STATE CAUSED BY INJURY, DISEASE OR PHYSICAL ILLNESS THAT WILL, IN THE OPINION OF THE ATTENDING PHYSICIAN TO A REASONABLE DEGREE OF MEDICAL CERTAINTY, RESULT IN DEATH, DESPITE THE INTRODUCTION OR CONTINUATION OF MEDICAL TREATMENT. EXCEPT AS SPECIFICALLY SET FORTH IN AN ADVANCE HEALTH CARE DIRECTIVE, SUCH TERM IS NOT INTENDED TO PRECLUDE TREATMENT OF A DISEASE, ILLNESS OR PHYSICAL, MENTAL, COGNITIVE OR INTELLECTUAL CONDITION, EVEN IF INCURABLE AND IRREVERSIBLE AND REGARDLESS OF SEVERITY, IF BOTH OF THE FOLLOWING APPLY:

(A) THE PATIENT WOULD BENEFIT FROM THE MEDICAL TREATMENT, INCLUDING PALLIATIVE CARE.

(B) SUCH TREATMENT WOULD NOT MERELY PROLONG THE PROCESS OF DYING.

6-A. "HEALTH CARE REPRESENTATIVE" MEANS AN INDIVIDUAL AUTHORIZED UNDER SECTION TWENTY-NINE HUNDRED EIGHTY-TWO-A OF THIS ARTICLE TO MAKE HEALTH CARE DECISIONS FOR A PRINCIPAL.

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

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9-A. "LIVING WILL" MEANS A LEGAL DOCUMENT IN WHICH A COMPETENT ADULT STATES, IN ADVANCE OF FINAL ILLNESS OR INJURY, HIS OR HER WISHES REGARDING THE USE OF MEDICAL PROCEDURES AND EQUIPMENT DESIGNED TO EXTEND LIFE.

S 3. The public health law is amended by adding a new section 2981-a to read as follows:

S 2981-A. LIVING WILLS; EXECUTION; FORM. 1. A COMPETENT ADULT MAY EXECUTE A LIVING WILL, SIGNED AND DATED BY THE ADULT IN THE PRESENCE OF A NOTARY AND TWO ADULT WITNESSES WHO SHALL ALSO SIGN THE WILL. ANOTHER PERSON MAY SIGN AND DATE THE LIVING WILL FOR THE ADULT IF THE ADULT IS UNABLE TO DO SO, AT THE ADULT'S DIRECTION AND IN THE ADULT'S PRESENCE, AND IN THE PRESENCE OF TWO ADULT WITNESSES WHO SHALL SIGN THE WILL. THE TWO WITNESSES SHALL STATE THAT THE PRINCIPAL APPEARED TO EXECUTE THE PROXY WILLINGLY AND FREE FROM DURESS.

2. (A) FOR PERSONS WHO RESIDE IN A MENTAL HYGIENE FACILITY OPERATED OR LICENSED BY THE OFFICE OF MENTAL HEALTH, AT LEAST ONE WITNESS SHALL BE AN INDIVIDUAL WHO IS NOT AFFILIATED WITH THE FACILITY AND, IF THE MENTAL HYGIENE FACILITY IS ALSO A HOSPITAL AS DEFINED IN SUBDIVISION TEN OF SECTION 1.03 OF THE MENTAL HYGIENE LAW, AT LEAST ONE WITNESS SHALL BE A QUALIFIED PSYCHIATRIST.

(B) FOR PERSONS WHO RESIDE IN A MENTAL HYGIENE FACILITY OPERATED OR LICENSED BY THE OFFICE OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES, AT LEAST ONE WITNESS SHALL BE AN INDIVIDUAL WHO IS NOT AFFILIATED WITH THE FACILITY AND AT LEAST ONE WITNESS SHALL BE A PHYSICIAN OR CLINICAL PSYCHOLOGIST WHO EITHER IS EMPLOYED BY A SCHOOL NAMED IN SECTION 13.17 OF THE MENTAL HYGIENE LAW OR WHO HAS BEEN EMPLOYED FOR A MINIMUM OF TWO YEARS TO RENDER CARE AND SERVICE IN A FACILITY OPERATED OR LICENSED BY THE OFFICE OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES, OR WHO HAS BEEN APPROVED BY THE COMMISSIONER OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES IN ACCORDANCE WITH REGULATIONS APPROVED BY THE COMMISSIONER. SUCH REGULATIONS SHALL REQUIRE THAT A PHYSICIAN OR CLINICAL PSYCHOLOGIST POSSESS SPECIALIZED TRAINING OR THREE YEARS EXPERIENCE IN TREATING DEVELOPMENTAL DISABILITIES.

3.(A) A LIVING WILL SHALL INCLUDE: (I) THE IDENTITY OF THE PRINCIPAL; (II) THE HEALTH CARE DECISIONS OF THE PRINCIPAL IF AND WHEN THE PRINCIPAL BECOMES PERMANENTLY UNABLE TO PARTICIPATE IN SUCH FINAL HEALTH CARE DECISIONS IN THE FUTURE; (III) THE DULY NOTARIZED SIGNATURE OF THE PRINCIPAL; AND (IV) THE SIGNATURE AND STATEMENT OF TWO ADULT WITNESSES.

(B) A LIVING WILL MAY, BUT NEED NOT, BE IN THE FOLLOWING FORM:

NEW YORK LIVING WILL

I, , BEING OF SOUND MIND, MAKE THIS STATEMENT AS A DIRECTIVE TO BE FOLLOWED IF I BECOME PERMANENTLY UNABLE TO PARTICIPATE IN DECISIONS REGARDING MY MEDICAL CARE. THESE INSTRUCTIONS REFLECT MY FIRM AND SETTLED COMMITMENT TO DECLINE MEDICAL TREATMENT UNDER THE CIRCUMSTANCES INDICATED BELOW:

I DIRECT MY ATTENDING PHYSICIAN TO WITHHOLD OR WITHDRAW TREATMENT THAT MERELY PROLONGS MY DYING, IF I SHOULD BE IN AN INCURABLE OR IRREVERSIBLE MENTAL OR PHYSICAL CONDITION WITH NO REASONABLE EXPECTATION OF RECOVERY, INCLUDING BUT NOT LIMITED TO: (A) A TERMINAL CONDITION; (B) A PERMANENTLY UNCONSCIOUS CONDITION; OR (C) MINIMALLY CONSCIOUS CONDITION IN WHICH I AM PERMANENTLY UNABLE TO MAKE DECISIONS OR EXPRESS MY WISHES.

I DIRECT THAT MY TREATMENT BE LIMITED TO MEASURES TO KEEP ME COMFORTABLE AND TO RELIEVE PAIN, INCLUDING ANY PAIN THAT MIGHT OCCUR BY WITHHOLDING OR WITHDRAWING TREATMENT.

WHILE I UNDERSTAND THAT I AM NOT LEGALLY REQUIRED TO BE SPECIFIC ABOUT FUTURE TREATMENTS IF I AM IN THE CONDITION(S) DESCRIBED ABOVE I FEEL ESPECIALLY STRONGLY ABOUT THE FOLLOWING FORMS OF TREATMENT:
( ) I DO/( ) I DO NOT WANT CARDIAC RESUSCITATION. _____ INITIAL
( ) I DO/( ) I DO NOT WANT MECHANICAL RESUSCITATION. _____ INITIAL
( ) I DO/( ) I DO NOT WANT ARTIFICIAL NUTRITION AND HYDRATION. _____ INITIAL
( ) I DO/( ) I DO NOT WANT ANTIBIOTICS. _____ INITIAL
( ) I DO/( ) I DO NOT WANT MAXIMUM PAIN RELIEF, EVEN IF IT MAY HASTEN MY DEATH. _____ INITIAL OTHER DIRECTIONS:
THESE DIRECTIONS EXPRESS MY LEGAL RIGHT TO REFUSE TREATMENT, UNDER THE LAW OF NEW YORK. I INTEND MY INSTRUCTIONS TO BE CARRIED OUT, UNLESS I HAVE RESCINDED THEM IN A NEW WRITING OR BY CLEARLY INDICATING THAT I HAVE CHANGED MY MIND.
SIGNED _____ DATE _____ ADDRESS _____
I DECLARE THAT THE PERSON WHO SIGNED THIS DOCUMENT APPEARED TO EXECUTE THE LIVING WILL WILLINGLY AND FREE FROM DURESS. HE OR SHE SIGNED (OR ASKED ANOTHER TO SIGN FOR HIM OR HER) THIS DOCUMENT IN MY PRESENCE.
WITNESS 1 _____
ADDRESS _____
WITNESS 2 _____
ADDRESS _____

S 4. The public health law is amended by adding a new section 2982-a to read as follows:

S 2982-A. APPOINTMENT OF HEALTH CARE REPRESENTATIVE; RIGHTS AND DUTIES. 1. A HEALTH CARE REPRESENTATIVE MAY MAKE A HEALTH CARE DECISION FOR AN INDIVIDUAL WHOSE ATTENDING PHYSICIAN HAS DETERMINED THAT THE INDIVIDUAL IS INCOMPETENT IF:

(A) THE INDIVIDUAL IS AT LEAST EIGHTEEN YEARS OF AGE, HAS GRADUATED FROM HIGH SCHOOL, HAS MARRIED OR IS AN EMANCIPATED MINOR;

(B) (I) THE INDIVIDUAL DOES NOT HAVE A HEALTH CARE POWER OF ATTORNEY; OR

(II) THE INDIVIDUAL'S HEALTH CARE AGENT IS NOT REASONABLY AVAILABLE OR HAS INDICATED AN UNWILLINGNESS TO ACT AND NO ALTERNATE HEALTH CARE AGENT IS REASONABLY AVAILABLE; AND

(C) A GUARDIAN OF THE PERSON TO MAKE HEALTH CARE DECISIONS HAS NOT BEEN APPOINTED FOR THE INDIVIDUAL.

2. THIS SECTION APPLIES TO DECISIONS REGARDING TREATMENT, CARE, GOODS OR SERVICES THAT A CARETAKER IS OBLIGATED TO PROVIDE TO A CARE-DEPENDENT PERSON WHO HAS AN END-STAGE MEDICAL CONDITION OR IS PERMANENTLY UNCONSCIOUS.

3. THE AUTHORITY AND THE DECISION-MAKING PROCESS OF A HEALTH CARE REPRESENTATIVE SHALL BE THE SAME AS PROVIDED FOR A HEALTH CARE AGENT IN SECTION TWENTY-NINE HUNDRED EIGHTY-TWO OF THIS ARTICLE.

4. (A) AN INDIVIDUAL OF SOUND MIND MAY, BY A SIGNED WRITING OR BY PERSONALLY INFORMING THE ATTENDING PHYSICIAN OR THE HEALTH CARE PROVIDER, DESIGNATE ONE OR MORE INDIVIDUALS TO ACT AS HEALTH CARE REPRESENTATIVE. IN THE ABSENCE OF A DESIGNATION OR IF NO DESIGNEE IS REASONABLY AVAILABLE ANY MEMBER OF THE FOLLOWING CLASSES, IN DESCENDING ORDER OF PRIORITY, WHO IS REASONABLY AVAILABLE, MAY ACT AS HEALTH CARE REPRESENTATIVE:

(I) THE SPOUSE OR DOMESTIC PARTNER, UNLESS AN ACTION FOR DIVORCE IS PENDING, AND THE ADULT CHILDREN OF THE PRINCIPAL WHO ARE NOT THE CHILDREN OF THE SPOUSE.

(II) AN ADULT CHILD.

(III) A PARENT.
(IV) AN ADULT BROTHER OR SISTER.
(V) AN ADULT GRANDCHILD.
(VI) AN ADULT WHO HAS KNOWLEDGE OF THE PRINCIPAL'S PREFERENCES AND VALUES, INCLUDING, BUT NOT LIMITED TO, RELIGIOUS AND MORAL BELIEFS, TO ASSESS HOW THE PRINCIPAL WOULD MAKE HEALTH CARE DECISIONS.
(B) AN INDIVIDUAL MAY BY SIGNED WRITING, INCLUDING A HEALTH CARE POWER OF ATTORNEY, PROVIDE FOR A DIFFERENT ORDER OF PRIORITY.
(C) AN INDIVIDUAL WITH A HIGHER PRIORITY WHO IS WILLING TO ACT AS A HEALTH CARE REPRESENTATIVE MAY ASSUME THE AUTHORITY TO ACT NOTWITHSTANDING THE FACT THAT ANOTHER INDIVIDUAL HAS PREVIOUSLY ASSUMED THAT AUTHORITY.
5. AN INDIVIDUAL MAY DISQUALIFY ONE OR MORE INDIVIDUALS FROM ACTING AS HEALTH CARE REPRESENTATIVE BY A HEALTH CARE POWER OF ATTORNEY. UPON THE PETITION OF ANY MEMBER OF THE CLASSES SET FORTH IN SUBDIVISION FOUR OF THIS SECTION, THE COURT MAY DISQUALIFY FOR CAUSE SHOWN AN INDIVIDUAL OTHERWISE ELIGIBLE TO SERVE AS A HEALTH CARE REPRESENTATIVE.
6. UNLESS RELATED BY BLOOD, MARRIAGE, DOMESTIC PARTNERSHIP OR ADOPTION, A HEALTH CARE REPRESENTATIVE MAY NOT BE THE PRINCIPAL'S ATTENDING PHYSICIAN OR OTHER HEALTH CARE PROVIDER, NOR AN OWNER, OPERATOR OR EMPLOYEE OF A HEALTH CARE PROVIDER IN WHICH THE PRINCIPAL RECEIVES CARE.
7. (A) IF MORE THAN ONE MEMBER OF A CLASS ASSUMES AUTHORITY TO ACT AS A HEALTH CARE REPRESENTATIVE, THE MEMBERS DO NOT AGREE ON A HEALTH CARE DECISION AND THE ATTENDING PHYSICIAN OR HEALTH CARE PROVIDER IS SO INFORMED, THE ATTENDING PHYSICIAN OR HEALTH CARE PROVIDER MAY RELY ON THE DECISION OF A MAJORITY OF THE MEMBERS OF THAT CLASS WHO HAVE COMMUNICATED THEIR VIEWS TO THE ATTENDING PHYSICIAN OR HEALTH CARE PROVIDER.
(B) IF THE MEMBERS OF THE CLASS OF HEALTH CARE REPRESENTATIVES ARE EVENLY DIVIDED CONCERNING THE HEALTH CARE DECISION AND THE ATTENDING PHYSICIAN OR HEALTH CARE PROVIDER IS SO INFORMED, AN INDIVIDUAL HAVING A LOWER PRIORITY MAY NOT ACT AS A HEALTH CARE REPRESENTATIVE. SO LONG AS THE CLASS REMAINS EVENLY DIVIDED, NO DECISION SHALL BE DEEMED MADE UNTIL SUCH TIME AS THE PARTIES RESOLVE THEIR DISAGREEMENT. NOTWITHSTANDING SUCH DISAGREEMENT, NOTHING IN THIS SUBDIVISION SHALL BE CONSTRUED TO PRECLUDE THE ADMINISTRATION OF HEALTH CARE TREATMENT IN ACCORDANCE WITH ACCEPTED STANDARDS OF MEDICAL PRACTICE.
8. PROMPTLY UPON ASSUMING AUTHORITY TO ACT, A HEALTH CARE REPRESENTATIVE SHALL COMMUNICATE THE ASSUMPTION OF AUTHORITY TO THE MEMBERS OF THE PRINCIPAL'S FAMILY SPECIFIED IN SUBDIVISION FOUR OF THIS SECTION WHO CAN BE READILY CONTACTED.
9. (A) A PRINCIPAL OF SOUND MIND MAY COUNTERMAND ANY HEALTH CARE DECISION MADE BY THE PRINCIPAL'S HEALTH CARE REPRESENTATIVE AT ANY TIME AND IN ANY MANNER BY PERSONALLY INFORMING THE ATTENDING PHYSICIAN OR HEALTH CARE PROVIDER.
(B) REGARDLESS OF THE PRINCIPAL'S MENTAL OR PHYSICAL CAPACITY, A PRINCIPAL MAY COUNTERMAND A HEALTH CARE DECISION MADE BY THE PRINCIPAL'S HEALTH CARE REPRESENTATIVE THAT WOULD WITHHOLD OR WITHDRAW LIFE-SUSTAINING TREATMENT AT ANY TIME AND IN ANY MANNER BY PERSONALLY INFORMING THE ATTENDING PHYSICIAN.
(C) THE ATTENDING PHYSICIAN OR HEALTH CARE PROVIDER SHALL MAKE REASONABLE EFFORTS TO PROMPTLY INFORM THE HEALTH CARE REPRESENTATIVE OF A COUNTERMAND EXERCISED UNDER THIS SECTION.
(D) A COUNTERMAND EXERCISED UNDER THIS SECTION SHALL NOT AFFECT THE AUTHORITY OF THE HEALTH CARE REPRESENTATIVE TO MAKE OTHER HEALTH CARE DECISIONS.

10. A HEALTH CARE DECISION MADE BY A HEALTH CARE REPRESENTATIVE FOR A PRINCIPAL SHALL BE EFFECTIVE WITHOUT COURT APPROVAL.

11. AN ATTENDING PHYSICIAN OR HEALTH CARE PROVIDER MAY REQUIRE A PERSON CLAIMING THE RIGHT TO ACT AS HEALTH CARE REPRESENTATIVE FOR A PRINCIPAL TO PROVIDE A WRITTEN DECLARATION MADE UNDER PENALTY OF PERJURY STATING FACTS AND CIRCUMSTANCES REASONABLY SUFFICIENT TO ESTABLISH THE CLAIMED AUTHORITY.

S 5. Subdivision 1 of section 2984 of the public health law, as added by chapter 752 of the laws of 1990, is amended to read as follows:

1. A health care provider who is provided with a health care proxy OR LIVING WILL shall arrange for [the proxy or] a copy thereof to be inserted in the principal's medical record if the health care proxy OR LIVING WILL has not been included in such record.

S 6. Section 2985 of the public health law, as added by chapter 752 of the laws of 1990, is amended to read as follows:

S 2985. Revocation. 1. Means of revoking proxy OR LIVING WILL. (a) A competent adult may revoke a health care proxy OR LIVING WILL by notifying the agent or a health care provider orally or in writing or by any other act evidencing a specific intent to revoke the proxy.

(b) For the purposes of this section, every adult shall be presumed competent unless determined otherwise pursuant to court order.

(c) A health care proxy OR LIVING WILL shall also be revoked upon execution by the principal of a subsequent health care proxy OR LIVING WILL.

(d) The creation by the principal of A LIVING WILL, written wishes or instructions about health care, or limitations upon the agent's authority, shall not revoke a health care proxy unless such wishes, instructions or limitations expressly provide otherwise. Such wishes, instructions or limitations shall constitute evidence of the principal's wishes for purposes of subdivision two of section two thousand nine hundred eighty-two of this article.

(e) The appointment of the principal's spouse as health care agent shall be revoked upon the divorce or legal separation of the principal and spouse, unless the principal specifies otherwise.

2. Duty to record revocation. (a) A physician who is informed of or provided with a revocation of a health care proxy OR LIVING WILL shall immediately (i) record the revocation in the principal's medical record and (ii) notify the agent and the medical staff responsible for the principal's care of the revocation.

(b) Any member of the staff of a health care provider informed of or provided with a revocation of a health care proxy OR LIVING WILL pursuant to this section shall immediately notify a physician of such revocation.

S 7. Section 2988 of the public health law, as added by chapter 752 of the laws of 1990, is amended to read as follows:

S 2988. Requiring or prohibiting execution of proxy OR LIVING WILL. No person may require or prohibit the execution of a health care proxy OR LIVING WILL by an individual as a condition for providing health care services or insurance to such individual.

S 8. Subdivision 2 of section 2989 of the public health law, as added by chapter 752 of the laws of 1990, is amended to read as follows:

2. Nothing in this article creates, expands, diminishes, impairs or supersedes any authority that a principal may have under law to make or express decisions, wishes or instructions regarding health care, including decisions about life sustaining treatment, whether or not expressed in a health care proxy OR LIVING WILL.

S 9. Section 2990 of the public health law, as added by chapter 752 of the laws of 1990, is amended to read as follows:

S 2990. Proxies AND LIVING WILLS executed in other states. A health care proxy, LIVING WILL or similar instrument executed in another state or jurisdiction in compliance with the law of that state or jurisdiction shall be considered validly executed for purposes of this article.

S 10. The section heading and subdivision 1 of section 2991 of the public health law, as added by chapter 752 of the laws of 1990, are amended to read as follows:

Creation and use of proxies OR WILLS in residential health care and mental hygiene facilities. 1. Residential health care facilities and mental hygiene facilities shall establish procedures:

(a) to provide information to adult residents about their right to create a health care proxy AND/OR LIVING WILL under this article;

(b) to educate adult residents about the authority delegated under a health care proxy, what a proxy AND LIVING WILL may include or omit, and how a proxy AND LIVING WILL is created and revoked;

(c) to help ensure that each resident who creates a proxy AND/OR LIVING WILL while residing at the facility does so voluntarily.

S 11. Subdivisions 1 and 3 of section 2992 of the public health law, as added by chapter 752 of the laws of 1990, are amended to read as follows:

1. determine the validity of the health care proxy OR LIVING WILL;

3. override the agent's decision about health care treatment on the grounds that: (a) the decision was made in bad faith [or]; (b) the decision is not in accordance with the standards set forth in subdivision one or two of section two thousand nine hundred eighty-two of this article; OR (C) THE DECISION CONFLICTS WITH A DULY EXECUTED LIVING WILL.

S 12. This act shall take effect on the ninetieth day after it shall have become a law.