

2039

2009-2010 Regular Sessions

I N S E N A T E

February 11, 2009

Introduced by Sen. DeFRANCISCO -- 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 health care prox-
ies and living wills

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

1 Section 1. Section 2980 of the public health law is amended by adding
2 two new subdivisions 1-a and 9-a to read as follows:
3 1-A. "ADVANCE DIRECTIVES FOR HEALTH CARE" REFERS TO A DOCUMENT OR
4 DOCUMENTS THAT (A) APPOINTS A HEALTH CARE AGENT IN A HEALTH CARE PROXY,
5 AND/OR (B) CONTAINS A LIVING WILL.
6 9-A. "LIVING WILL" MEANS A DOCUMENT WHICH EXPRESSES A PERSON'S WISHES,
7 INSTRUCTIONS AND/OR LIMITATIONS ABOUT THEIR MEDICAL CARE, INCLUDING,
8 WITHOUT LIMITATION DIRECTIONS FOR THE PROVIDING, WITHHOLDING OR WITH-
9 DRAWAL OF LIFE SUSTAINING TREATMENT AND ARTIFICIALLY PROVIDED NUTRITION
10 AND HYDRATION.
11 S 2. The section heading, subdivision 1, the subdivision heading and
12 paragraph (a) of subdivision 2, and paragraphs (d), (e) and (f) of
13 subdivision 5 of section 2981 of the public health law, as added by
14 chapter 752 of the laws of 1990, paragraph (f) of subdivision 5 as added
15 by chapter 540 of the laws of 2000, are amended to read as follows:
16 [Appointment of health care agent; health care proxy] ADVANCE DIREC-
17 TIVE FOR HEALTH CARE. 1. Authority to appoint agent; EXECUTION OF
18 LIVING WILLS; presumption of competence. (a) A competent adult may
19 [appoint a health care] EXECUTE A HEALTH CARE PROXY THAT APPOINTS A
20 HEALTH agent in accordance with the terms of this article.
21 (b) A COMPETENT ADULT MAY EXECUTE A LIVING WILL.
22 (C) For the purposes of this section, every adult shall be presumed
23 competent to appoint a health care agent AND TO EXECUTE A LIVING WILL
24 unless such person has been adjudged incompetent or otherwise adjudged
25 not competent to appoint a health care agent OR TO EXECUTE A LIVING

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

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1 WILL, or unless a committee or guardian of the person has been appointed
2 for the adult pursuant to article [seventy-eight] EIGHTY-ONE of the
3 mental hygiene law or article seventeen-A of the surrogate's court
4 procedure act.

5 [Health care proxy] ADVANCE DIRECTIVES FOR HEALTH CARE; execution;
6 witnesses. (a) A competent adult may appoint a health care agent by a
7 health care proxy, signed and dated by the adult AT THE END OF THE
8 HEALTH CARE PROXY in the presence of two adult witnesses who shall
9 [also] sign AT THE END OF the proxy. Another person may sign and date
10 the health care proxy for the adult if the adult is unable to do so, at
11 the adult's direction and in the adult's presence, and in the presence
12 of two adult witnesses who shall sign the proxy. The witnesses shall
13 state that the principal appeared to execute the HEALTH CARE proxy will-
14 ingly and free from duress. The person appointed as agent shall not act
15 as witness to execution of the [health care] proxy. A LIVING WILL WHICH
16 SATISFIES THE EXECUTION AND WITNESS REQUIREMENTS OF A HEALTH CARE PROXY
17 AS SET FORTH IN THIS PARAGRAPH SHALL CREATE A REBUTTABLE PRESUMPTION OF
18 A PERSON'S WISHES CONCERNING THEIR HEALTH CARE. NOTWITHSTANDING ANYTHING
19 TO THE CONTRARY THE WITNESS REQUIREMENTS ARE OPTIONAL AND ARE NOT MANDA-
20 TORY TO CREATE A VALID LIVING WILL.

21 (d) A health care proxy may, but need not, be in the following form:

22 Health Care Proxy

23 THIS FORM CAN BE USED TO NAME A PERSON YOU WOULD LIKE TO MAKE MEDICAL
24 OR HEALTH CARE DECISIONS FOR YOU IF YOU ARE UNABLE TO DO SO YOURSELF.
25 THIS PERSON IS CALLED A HEALTH CARE AGENT. IF A HEALTH CARE PROXY AND A
26 LIVING WILL HAVE BEEN EXECUTED, THE AGENT'S DIRECTIONS IN THE HEALTH
27 CARE PROXY SHALL TAKE PRECEDENCE OVER THE LIVING WILL.

28 1. I (name of principal) hereby appoint
29 (name, home address and telephone number of agent) as my health care
30 agent to make any and all health care decisions for me, except to the
31 extent I state otherwise.

32 2. This health care proxy shall take effect in the event I become
33 unable to make my own health care decisions.

34 3. NOTE: Although not necessary, and neither encouraged nor discour-
35 aged, you may wish to state instructions or wishes, and limit your
36 agent's authority. Unless your agent knows your wishes about artificial
37 nutrition and hydration, your agent will not have authority to decide
38 about artificial nutrition and hydration. If you choose to state
39 instructions, wishes, or limits, please do so below OR YOU MAY WISH TO
40 EXECUTE A LIVING WILL:

41 _____
42 _____
43 _____

44 I direct my agent to make health care decisions in accordance with my
45 wishes and instructions as stated above or as otherwise known to him or
46 her. I also direct my agent to abide by any limitations on his or her
47 authority as stated above or as otherwise known to him or her.

48 4. IN ADDITION TO OTHER POWERS GRANTED BY ME IN THIS DOCUMENT, MY
49 AGENT SHALL HAVE THE POWER AND AUTHORITY TO SERVE AS MY PERSONAL REPRE-
50 SENTATIVE FOR ALL PURPOSES OF THE HEALTH INSURANCE PORTABILITY AND
51 ACCOUNTABILITY ACT (HIPPA). MY AGENT IS AUTHORIZED TO EXECUTE ANY AND
52 ALL RELEASES AND OTHER DOCUMENTS NECESSARY TO OBTAIN DISCLOSURE OF MY
53 PATIENT RECORDS AND OTHER MEDICAL INFORMATION SUBJECT TO AND PROTECTED
54 UNDER HIPPA.

55 5. In the event the person I appoint above is unable, unwilling or
56 unavailable to act as my health care agent, I hereby appoint (name, home

1 address and telephone number of alternate agent) as my health care
2 agent.

3 6. ORGAN AND/OR TISSUE DONATION (OPTIONAL):

4 I HEREBY MAKE ANATOMICAL GIFTS TO BE EFFECTIVE UPON MY DEATH OF:

5 (CHECK ANY THAT APPLY)

6 ☐ ANY NEEDED ORGANS AND/OR TISSUES.

7 ☐ THE FOLLOWING ORGANS AND/OR TISSUES:

8

9

10 ☐ LIMITATIONS:

11 IF YOU DO NOT STATE YOUR WISHES OR INSTRUCTIONS ABOUT ORGAN AND/OR
12 TISSUE DONATION ON THIS FORM, IT WILL NOT BE TAKEN TO MEAN THAT YOU DO
13 NOT WISH TO MAKE A DONATION OR PREVENT A PERSON, WHO IS OTHERWISE
14 AUTHORIZED BY LAW, TO CONSENT TO A DONATION ON YOUR BEHALF.

15 7. I understand that, unless I revoke it, this proxy will remain in
16 effect indefinitely or until the date or occurrence of the condition I
17 have stated below:

18 (Please complete the following if you do NOT want this health care
19 proxy to be in effect indefinitely):

20 This proxy shall expire: (Specify date or condition)

21 Signature:

22 Address:

23 Date:

24 I declare that the person who signed or asked another to sign this
25 document is personally known to me and appears to be of sound mind and
26 acting willingly and free from duress. He or she signed (or asked another
27 to sign for him or her) this document in my presence and that person
28 signed in my presence. I am not the person appointed as agent by this
29 document.

30 Witness:

31 Address:

32 Witness:

33 Address:

34 (e) The [health care proxy] ADVANCE DIRECTIVES FOR HEALTH CARE shall
35 not be executed on a form or other writing that also includes the
36 execution of a power of attorney, provided, however, that nothing in
37 this paragraph shall invalidate a delegation of the authority to make
38 health care decisions executed prior to the enactment of this article.

39 (f) [A health care proxy] AN ADVANCE DIRECTIVE FOR HEALTH CARE may
40 include the principal's wishes or instructions regarding organ and
41 tissue donation. Failure to state wishes or instructions shall not be
42 construed to imply a wish not to donate.

43 S 3. Subdivision 2 of section 2982 of the public health law, as
44 amended by chapter 230 of the laws of 2004, is amended and a new subdivision
45 5 is added to read as follows:

46 2. Decision-making standard. After consultation with a licensed physician,
47 registered nurse, licensed psychologist, licensed master social worker,
48 or a licensed clinical social worker, the agent shall make health care
49 decisions: (a) in accordance with the principal's wishes, including the
50 principal's religious and moral beliefs; or (b) if the principal's wishes
51 are not reasonably known and cannot with reasonable diligence be ascertained,
52 in accordance with the principal's best interests; provided, however,
53 that if the principal's wishes regarding the administration of artificial
54 nutrition and hydration are not reasonably

known and cannot with reasonable diligence be ascertained, the agent shall not have the authority to make decisions regarding these measures. A LIVING WILL SHALL CONSTITUTE EVIDENCE OF A PERSON'S WISHES REGARDING THE ADMINISTRATION OF ARTIFICIAL NUTRITION AND HYDRATION: HOWEVER, A LIVING WILL SHALL NOT BE THE EXCLUSIVE MEANS FOR A PRINCIPAL TO EXPRESS THEIR WISHES REGARDING ARTIFICIAL NUTRITION AND HYDRATION AND SHALL NOT BE THE EXCLUSIVE MEANS FOR THE AGENT TO REASONABLY KNOW OR ASCERTAIN THE PRINCIPAL'S WISHES REGARDING THE ADMINISTRATION OF ARTIFICIAL NUTRITION AND HYDRATION.

5. NOTWITHSTANDING ANY PROVISION IN THIS ARTICLE TO THE CONTRARY, IN THE EVENT A DECLARANT HAS EXECUTED BOTH A HEALTH CARE PROXY AND A LIVING WILL, THE DECISIONS BY THE HEALTH CARE AGENT DULY DESIGNATED UNDER THIS ARTICLE REGARDING MEDICAL TREATMENT INCLUDING THE PROVIDING, WITHHOLDING, OR WITHDRAWAL OF LIFE-SUSTAINING TREATMENT OR ARTIFICIALLY PROVIDED NUTRITION OR HYDRATION, SHALL TAKE PRECEDENCE OVER A LIVING WILL OF A DECLARANT, UNLESS A LIVING WILL SPECIFICALLY PROVIDES OTHERWISE.

S 4. Subdivisions 1 and 2 of section 2984 of the public health law, as added by chapter 752 of the laws of 1990, are amended to read as follows:

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

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

S 5. Subdivisions 1 and 2 of section 2985 of the public health law, as added by chapter 752 of the laws of 1990, are amended to read as follows:

1. Means of revoking [proxy] ADVANCE DIRECTIVES FOR HEALTH CARE. (a) A competent adult may revoke a health care proxy 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 HEALTH CARE proxy OR LIVING WILL.

(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 shall also be revoked upon execution by the principal of a subsequent health care proxy AND A LIVING WILL SHALL ALSO BE REVOKED UPON EXECUTION BY THE PRINCIPAL OF A SUBSEQUENT LIVING WILL.

(d) The creation by the principal of A LIVING WILL OR written wishes or instructions about health care, or limitations upon the agent's authority, shall not revoke a health care proxy unless such LIVING WILL OR wishes, instructions or limitations expressly provide otherwise. Such LIVING WILL OR OTHER WRITTEN 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] AN ADVANCE DIRECTIVE FOR HEALTH CARE shall immediately (i) record the revocation in the prin-

1 cipal's medical record and (ii) notify the agent and the medical staff
2 responsible for the principal's care of the revocation.

3 (b) Any member of the staff of a health care provider informed of or
4 provided with a revocation of [a health care proxy] AN ADVANCE DIRECTIVE
5 FOR HEALTH CARE pursuant to this section shall immediately notify a
6 physician of such revocation.

7 S 6. Section 2988 of the public health law, as added by chapter 752 of
8 the laws of 1990, is amended to read as follows:

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

13 S 7. Subdivisions 1 and 2 of section 2989 of the public health law, as
14 added by chapter 752 of the laws of 1990, are amended to read as
15 follows:

16 1. A competent adult's failure to appoint a health care agent or to
17 provide the agent with specific health care instructions pursuant to
18 this article OR A COMPETENT ADULT'S FAILURE TO EXECUTE A LIVING WILL
19 shall create no presumptions regarding the adult's wishes about health
20 care.

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

26 S 8. Section 2990 of the public health law, as added by chapter 752 of
27 the laws of 1990, is amended to read as follows:

28 S 2990. Proxies AND LIVING WILLS executed in other states. A health
29 care proxy, A LIVING WILL or similar instrument executed in another
30 state or jurisdiction in compliance with the law of that state or juris-
31 diction shall be considered validly executed for purposes of this arti-
32 cle.

33 S 9. Subdivision 1 of section 2991 of the public health law, as added
34 by chapter 752 of the laws of 1990, is amended to read as follows:

35 1. Residential health care facilities and mental hygiene facilities
36 shall establish procedures:

37 (a) to provide information to adult residents about their right to
38 create [a health care proxy] AN ADVANCE DIRECTIVE FOR HEALTH CARE under
39 this article;

40 (b) to educate adult residents about the authority delegated under [a
41 health care proxy] AN ADVANCE DIRECTIVE FOR HEALTH CARE, what a proxy
42 AND/OR LIVING WILL may include or omit, and how a proxy AND/OR LIVING
43 WILL is created and revoked;

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

46 S 10. Subdivision 1 of section 2992 of the public health law, as added
47 by chapter 752 of the laws of 1990, is amended to read as follows:

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

49 S 11. This act shall take effect immediately.