

9648

I N A S S E M B L Y

May 14, 2014

Introduced by M. of A. GOTTFRIED -- read once and referred to the
Committee on Health

AN ACT to amend the public health law and the surrogate's court procedure act, in relation to restoring medical futility as a basis for both surrogate consent to a do not resuscitate order and for a do not resuscitate order for a patient without a surrogate

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

1 Section 1. Legislative findings. Under New York's former do not resus-
2 cite (hereinafter "DNR") law, article 29-B of the public health law, a
3 surrogate could consent to a DNR order if the patient met any one of
4 four clinical criteria, one of which was a finding by two physicians
5 that resuscitation was "medically futile," which was defined to mean
6 that resuscitation "will be unsuccessful in restoring cardiac and
7 respiratory function or that the patient will experience repeated arrest
8 in a short time period before death occurs." The former DNR law also
9 allowed a DNR order to be entered for a patient who did not have a
10 surrogate on that basis. That law applied to all patients, including
11 developmentally disabled patients.

12 In 2010, the former DNR law was superseded by the Family Health Care
13 Decisions Act (hereinafter "FHCD") which established standards for the
14 withdrawal or withholding of a broad range of life-sustaining treat-
15 ments. Accordingly, the FHCD did not have a standard specifically
16 relating to medically futile resuscitation. Similarly, Surrogate's Court
17 Procedure Act (hereinafter "SCPA") S1750-b does not have a standard
18 specifically relating to medically futile resuscitation for develop-
19 mentally disabled patients.

20 The legislature finds that the broader FHCD and SCPA S1750-b stand-
21 ards are difficult to apply to situations in which resuscitation would
22 be medically futile. Accordingly, this bill restores the former DNR
23 law's medical futility standard as an alternative basis for writing a
24 DNR order under the FHCD and under SCPA S1750-b.

25 S 2. Subparagraphs (i) and (ii) of paragraph (a) of subdivision 5 of
26 section 2994-d of the public health law, as added by chapter 8 of the

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

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1 laws of 2010, are amended and a new subparagraph (iii) is added to read
2 as follows:

3 (i) Treatment would be an extraordinary burden to the patient and an
4 attending physician determines, with the independent concurrence of
5 another physician, that, to a reasonable degree of medical certainty and
6 in accord with accepted medical standards, (A) the patient has an
7 illness or injury which can be expected to cause death within six
8 months, whether or not treatment is provided; or (B) the patient is
9 permanently unconscious; [or]

10 (ii) The provision of treatment would involve such pain, suffering or
11 other burden that it would reasonably be deemed inhumane or extraor-
12 dinarily burdensome under the circumstances and the patient has an irre-
13 versible or incurable condition, as determined by an attending physician
14 with the independent concurrence of another physician to a reasonable
15 degree of medical certainty and in accord with accepted medical stand-
16 ards[.]; OR

17 (III) WITH RESPECT TO A DECISION TO ENTER AN ORDER NOT TO RESUSCITATE,
18 AN ATTENDING PHYSICIAN DETERMINES, WITH THE INDEPENDENT CONCURRENCE OF A
19 SECOND PHYSICIAN, TO A REASONABLE DEGREE OF MEDICAL CERTAINTY, THAT IN
20 THE EVENT OF A CARDIAC OR RESPIRATORY ARREST, RESUSCITATION WOULD BE
21 UNSUCCESSFUL IN RESTORING CARDIAC AND RESPIRATORY FUNCTION OR THAT THE
22 PATIENT WILL EXPERIENCE REPEATED ARREST IN A SHORT TIME PERIOD BEFORE
23 DEATH OCCURS.

24 S 3. Paragraph (b) of subdivision 5 of section 2994-g of the public
25 health law, as added by chapter 8 of the laws of 2010, is amended to
26 read as follows:

27 (b) If the attending physician, with independent concurrence of a
28 second physician designated by the hospital, determines to a reasonable
29 degree of medical certainty that:

30 (i) (A) life-sustaining treatment offers the patient no medical bene-
31 fit because the patient will die imminently, even if the treatment is
32 provided; and

33 [(ii)] (B) the provision of life-sustaining treatment would violate
34 accepted medical standards, then such treatment may be withdrawn or
35 withheld from an adult patient who has been determined to lack deci-
36 sion-making capacity pursuant to section twenty-nine hundred ninety-
37 four-c of this article, without judicial approval. This paragraph shall
38 not apply to any treatment necessary to alleviate pain or discomfort; OR

39 (II) IN THE EVENT OF CARDIAC OR RESPIRATORY ARREST, RESUSCITATION WILL
40 BE UNSUCCESSFUL IN RESTORING CARDIAC AND RESPIRATORY FUNCTION OR THAT
41 THE PATIENT WILL EXPERIENCE REPEATED ARREST IN A SHORT TIME PERIOD
42 BEFORE DEATH OCCURS, THEN AN ORDER NOT TO RESUSCITATE MAY BE ENTERED FOR
43 AN ADULT PATIENT WHO HAS BEEN DETERMINED TO LACK DECISION-MAKING CAPACI-
44 TY PURSUANT TO SECTION TWENTY-NINE HUNDRED NINETY-FOUR-C OF THIS ARTI-
45 CLE, WITHOUT JUDICIAL APPROVAL.

46 S 4. Subparagraphs (i) and (ii) of paragraph (b) of subdivision 4 of
47 section 1750-b of the surrogate's court procedure act, as added by chap-
48 ter 500 of the laws of 2002, are amended to read as follows:

49 (i) the mentally retarded person has a medical condition as follows:

50 A. a terminal condition, [as defined in subdivision twenty-three of
51 section twenty-nine hundred sixty-one of the public health law] WHICH
52 SHALL MEAN AN ILLNESS OR INJURY FROM WHICH THERE IS NO RECOVERY, AND
53 WHICH CAN REASONABLY BE EXPECTED TO CAUSE DEATH WITHIN ONE YEAR; or

54 B. permanent unconsciousness; or

1 C. a medical condition other than such person's mental retardation
2 which requires life-sustaining treatment, is irreversible and which will
3 continue indefinitely; [and] OR

4 D. IN THE CASE OF A DECISION TO ENTER AN ORDER NOT TO RESUSCITATE,
5 THAT IN THE EVENT OF CARDIAC OR RESPIRATORY ARREST SUCH RESUSCITATION
6 WOULD BE UNSUCCESSFUL IN RESTORING CARDIAC AND RESPIRATORY FUNCTION OR
7 THAT THE PATIENT WILL EXPERIENCE REPEATED ARREST IN A SHORT TIME PERIOD
8 BEFORE DEATH OCCURS; AND

9 (ii) EXCEPT IN THE CASE OF A DECISION TO ENTER AN ORDER NOT TO RESUS-
10 CITIZE BASED ON CLAUSE D OF SUBPARAGRAPH (I) OF THIS PARAGRAPH, the
11 life-sustaining treatment would impose an extraordinary burden on such
12 person, in light of:

13 A. such person's medical condition, other than such person's mental
14 retardation; and

15 B. the expected outcome of the life-sustaining treatment, notwith-
16 standing such person's mental retardation; and

17 S 5. Subdivision 4 of section 1750-b of the surrogate's court proce-
18 dure act is amended by adding new paragraph (f) to read as follows:

19 (F) IN THE CASE OF A PERSON FOR WHOM "GUARDIAN" MEANS A SURROGATE
20 DECISION-MAKING COMMITTEE PURSUANT TO THIS SECTION, AN ORDER NOT TO
21 RESUSCITATE MAY BE ENTERED, WITHOUT REVIEW OR APPROVAL BY SUCH COMMIT-
22 TEE, IF THE ATTENDING PHYSICIAN DETERMINES, WITH THE INDEPENDENT CONCUR-
23 RENCE OF A SECOND PHYSICIAN, TO A REASONABLE DEGREE OF MEDICAL CERTAIN-
24 TY, THAT IN THE EVENT OF A CARDIAC OR RESPIRATORY ARREST RESUSCITATION
25 WOULD BE UNSUCCESSFUL IN RESTORING CARDIAC AND RESPIRATORY FUNCTION OR
26 THAT THE PATIENT WILL EXPERIENCE REPEATED ARREST IN A SHORT TIME PERIOD
27 BEFORE DEATH OCCURS.

28 S 6. This act shall take effect on the ninetieth day after it shall
29 have become a law.