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

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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:

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

In 2010, the former DNR law was superseded by the Family Health Care Decisions Act (hereinafter "FHCDA") which established standards for the withdrawal or withholding of a broad range of life-sustaining treatments. Accordingly, the FHCDA did not have a standard specifically relating to medically futile resuscitation. Similarly, Surrogate's Court Procedure Act (hereinafter "SPCA") S1750-b does not have a standard specifically relating to medically futile resuscitation for developmentally disabled patients.

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

S 2. Subparagraphs (i) and (ii) of paragraph (a) of subdivision 5 of 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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laws of 2010, are amended and a new subparagraph (iii) is added to read as follows:

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

(ii) The provision of treatment would involve such pain, suffering or other burden that it would reasonably be deemed inhumane or extraordinarily burdensome under the circumstances and the patient has an irreversible or incurable condition, as determined by an attending physician with the independent concurrence of another physician to a reasonable degree of medical certainty and in accord with accepted medical standards[.]; OR

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

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

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

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

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

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

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

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

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

B. permanent unconsciousness; or

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

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

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

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

B. the expected outcome of the life-sustaining treatment, notwithstanding such person's mental retardation; and

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

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

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