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I N A S S E M B L Y

May 14, 2014

Introduced by M. of A. PRETLOW, 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 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.

LBD13621-02-4

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.