STATE OF NEW YORK

7713

IN SENATE

February 9, 2018

Introduced by Sen. HANNON -- 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 authorizing nurse practitioners to witness a health care proxy, act as a health care agent and determine competency of the principal of such a proxy

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 2980 of the public health law is amended by adding a new subdivision 2-a to read as follows:

2-a. "Attending nurse practitioner" means the nurse practitioner, selected by or assigned to a patient, who has primary responsibility for the treatment and care of the patient. Where more than one nurse practitioner shares such responsibility, or where a nurse practitioner is acting on the attending nurse practitioner's behalf, any such nurse practitioner may act as the attending nurse practitioner pursuant to this article.

§ 2. Subdivisions 2, 3 and 6 of section 2981 of the public health law, as added by chapter 752 of the laws of 1990, paragraph (b) of subdivision 2 as amended by chapter 23 of the laws of 1994 and paragraph (c) of subdivision 2 as amended by section 6 of part J of chapter 56 of the laws of 2012, are amended to read as follows:

2. Health care proxy; execution; witnesses. (a) A competent adult may appoint a health care agent by a health care proxy, signed and dated by the adult in the presence of two adult witnesses who shall also sign the proxy. Another person may sign and date the health care proxy 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 proxy. The witnesses shall state that the principal appeared to execute the proxy willingly and free from duress. The person appointed as agent shall not act as witness to execution of the health care proxy.

(b) 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

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

LBD14616-01-8

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 **or qualified psychiatric nurse practitioner**.

(c) For persons who reside in a mental hygiene facility operated or licensed by the office for people with 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**, nurse practitioner** or clinical psychologist who either is employed by a developmental disabilities services office 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 for people with developmental disabilities, or has been approved by the commissioner of developmental disabilities in accordance with regulations approved by the commissioner. Such regulations shall require that a physician**, nurse practitioner** or clinical psychologist possess specialized training or three years experience in treating developmental disabilities.

3. Restrictions on who may be and limitations on a health care agent. (a) An operator, administrator or employee of a hospital may not be appointed as a health care agent by any person who, at the time of the appointment, is a patient or resident of, or has applied for admission to, such hospital.

(b) The restriction in paragraph (a) of this subdivision shall not apply to:

(i) an operator, administrator or employee of a hospital who is related to the principal by blood, marriage or adoption; or

(ii) a physician **or nurse practitioner**, subject to the limitation set forth in paragraph (c) of this subdivision, except that no physician **or nurse practitioner** affiliated with a mental hygiene facility or a psychiatric unit of a general hospital may serve as agent for a principal residing in or being treated by such facility or unit unless the physician is related to the principal by blood, marriage or adoption.

(c) If a physician **or nurse practitioner** is appointed agent, the physician **or nurse practitioner** shall not act as the patient's attending physician **or attending nurse practitioner** after the authority under the health care proxy commences, unless the physician **or nurse practitioner** declines the appointment as agent at or before such time.

(d) No person who is not the spouse, child, parent, brother, sister or grandparent of the principal, or is the issue of, or married to, such person, shall be appointed as a health care agent if, at the time of appointment, he or she is presently appointed health care agent for ten principals.

6. Alternate agent. (a) A competent adult may designate an alternate agent in the health care proxy to serve in place of the agent when:

(i) the attending physician **or attending nurse practitioner** has determined in a writing signed by the physician **or nurse practitioner** (A) that the person appointed as agent is not reasonably available, willing and competent to serve as agent, and (B) that such person is not expected to become reasonably available, willing and competent to make a timely decision given the patient's medical circumstances;

(ii) the agent is disqualified from acting on the principal's behalf pursuant to subdivision three of this section or subdivision two of section two thousand nine hundred ninety-two of this article, or

(iii) under conditions set forth in the proxy.

(b) If, after an alternate agent's authority commences, the person appointed as agent becomes available, willing and competent to serve as agent:

(i) the authority of the alternate agent shall cease and the authority of the agent shall commence; and

(ii) the attending physician **or attending nurse practitioner** shall record the change in agent and the reasons therefor in the principal's medical record.

§ 3. Section 2983 of the public health law, as added by chapter 752 of the laws of 1990, paragraph (b) of subdivision 1 as amended by chapter 23 of the laws of 1994 and paragraph (c) of subdivision 1 as amended by section 7 of part J of chapter 56 of the laws of 2012, is amended to read as follows:

§ 2983. Determination of lack of capacity to make health care decisions for the purpose of empowering agent. 1. Determination by attending physician **or attending nurse practitioner**. (a) A determination that a principal lacks capacity to make health care decisions shall be made by the attending physician **or attending nurse practitioner** to a reasonable degree of medical certainty. The determination shall be made in writing and shall contain such attending physician's **or attending nurse practitioner's** opinion regarding the cause and nature of the principal's incapacity as well as its extent and probable duration. The determination shall be included in the patient's medical record. For a decision to withdraw or withhold life-sustaining treatment, the attending physician **or attending nurse practitioner** who makes the determination that a principal lacks capacity to make health care decisions must consult with another physician **or nurse practitioner** to confirm such determination. Such consultation shall also be included within the patient's medical record.

(b) If an attending physician **or attending nurse practitioner** of a patient in a general hospital or mental hygiene facility determines that a patient lacks capacity because of mental illness, the attending physician **or attending nurse practitioner** who makes the determination must be, or must consult, for the purpose of confirming the determination, with a qualified psychiatrist **or qualified psychiatric nurse practitioner**. A record of such consultation shall be included in the patient's medical record.

(c) If the attending physician **or attending nurse practitioner** determines that a patient lacks capacity because of a developmental disability, the attending physician **or attending nurse practitioner** who makes the determination must be, or must consult, for the purpose of confirming the determination, with a physician**, nurse practitioner** or clinical psychologist who either is employed by a developmental disabilities services office 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 for people with developmental disabilities, or has been approved by the commissioner of developmental disabilities in accordance with regulations promulgated by such commissioner. Such regulations shall require that a physician**, nurse practitioner** or clinical psychologist possess specialized training or three years experience in treating developmental disabilities. A record of such consultation shall be included in the patient's medical record.

(d) A physician **or nurse practitioner** who has been appointed as a patient's agent shall not make the determination of the patient's capacity to make health care decisions.

2. Request for a determination. If requested by the agent, an attending physician **or attending nurse practitioner** shall make a determination regarding the principal's capacity to make health care decisions for the purposes of this article.

3. Notice of determination. Notice of a determination that a principal lacks capacity to make health care decisions shall promptly be given: (a) to the principal, orally and in writing, where there is any indication of the principal's ability to comprehend such notice; (b) to the agent; (c) if the principal is in or is transferred from a mental hygiene facility, to the facility director; and (d) to the conservator for, or committee of, the principal.

4. Limited purpose of determination. A determination made pursuant to this section that a principal lacks capacity to make health care decisions shall not be construed as a finding that the patient lacks capacity for any other purpose.

5. Priority of principal's decision. Notwithstanding a determination pursuant to this section that the principal lacks capacity to make health care decisions, where a principal objects to the determination of incapacity or to a health care decision made by an agent, the principal's objection or decision shall prevail unless the principal is determined by a court of competent jurisdiction to lack capacity to make health care decisions.

6. Confirmation of lack of capacity. (a) The attending physician **or attending nurse practitioner** shall confirm the principal's continued incapacity before complying with an agent's health care decisions, other than those decisions made at or about the time of the initial determination made pursuant to subdivision one of this section. The confirmation shall be stated in writing and shall be included in the principal's medical record.

(b) The notice requirements set forth in subdivision three of this section shall not apply to the confirmation required by this subdivision.

7. Effect of recovery of capacity. In the event the attending physician **or attending nurse practitioner** determines that the principal has regained capacity, the authority of the agent shall cease, but shall recommence if the principal subsequently loses capacity as determined pursuant to this section.

§ 4. Subdivision 2 of section 2985 of the public health law, as added by chapter 752 of the laws of 1990, is amended to read as follows:

2. Duty to record revocation. (a) A physician **or nurse practitioner** who is informed of or provided with a revocation of a health care proxy 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 pursuant to this section shall immediately notify a physician **or nurse practitioner** of such revocation.

§ 5. This act shall take effect on the same date and in the same manner as chapter 430 of the laws of 2017 takes effect; provided that, effective immediately, any rules and regulations necessary to implement the provisions of this act on its effective date are authorized and directed to be amended, repealed and/or promulgated on or before such date.