

STATE OF NEW YORK

7713--B

Cal. No. 981

IN SENATE

February 9, 2018

Introduced by Sens. HANNON, AKSHAR, AVELLA, HELMING, ROBACH, VALESKY -- read twice and ordered printed, and when printed to be committed to the Committee on Health -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- reported favorably from said committee, ordered to first report, amended on first report, ordered to a second report and ordered reprinted, retaining its place in the order of second report

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:

1 Section 1. Section 2980 of the public health law is amended by adding
2 three new subdivisions 2-a, 2-b and 2-c to read as follows:

3 2-a. "Nurse practitioner" means a nurse practitioner certified under
4 section sixty-nine hundred ten of the education law, practicing within
5 his or her scope of practice.

6 2-b. "Psychiatric nurse practitioner" means a nurse practitioner
7 certified by the department of education as a psychiatric nurse practi-
8 tioner.

9 2-c. "Attending nurse practitioner" means the nurse practitioner,
10 selected by or assigned to a patient, who has primary responsibility for
11 the treatment and care of the patient. Where more than one nurse practi-
12 tioner shares such responsibility, or where a nurse practitioner is
13 acting on the attending nurse practitioner's behalf, any such nurse
14 practitioner may act as the attending nurse practitioner pursuant to
15 this article.

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

21 2. Health care proxy; execution; witnesses. (a) A competent adult may
22 appoint a health care agent by a health care proxy, signed and dated by

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

LBD14616-05-8

1 the adult in the presence of two adult witnesses who shall also sign the
2 proxy. Another person may sign and date the health care proxy for the
3 adult if the adult is unable to do so, at the adult's direction and in
4 the adult's presence, and in the presence of two adult witnesses who
5 shall sign the proxy. The witnesses shall state that the principal
6 appeared to execute the proxy willingly and free from duress. The person
7 appointed as agent shall not act as witness to execution of the health
8 care proxy.

9 (b) For persons who reside in a mental hygiene facility operated or
10 licensed by the office of mental health, at least one witness shall be
11 an individual who is not affiliated with the facility and, if the mental
12 hygiene facility is also a hospital as defined in subdivision ten of
13 section 1.03 of the mental hygiene law, at least one witness shall be a
14 qualified psychiatrist or psychiatric nurse practitioner.

15 (c) For persons who reside in a mental hygiene facility operated or
16 licensed by the office for people with developmental disabilities, at
17 least one witness shall be an individual who is not affiliated with the
18 facility and at least one witness shall be a physician, nurse practi-
19 tioner or clinical psychologist who either is employed by a develop-
20 mental disabilities services office named in section 13.17 of the mental
21 hygiene law or who has been employed for a minimum of two years to
22 render care and service in a facility operated or licensed by the office
23 for people with developmental disabilities, or has been approved by the
24 commissioner of developmental disabilities in accordance with regu-
25 lations approved by the commissioner. Such regulations shall require
26 that a physician, nurse practitioner or clinical psychologist possess
27 specialized training or three years experience in treating developmental
28 disabilities.

29 3. Restrictions on who may be and limitations on a health care agent.

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

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

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

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

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

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

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

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

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

10 (iii) under conditions set forth in the proxy.

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

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

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

19 § 3. Section 2983 of the public health law, as added by chapter 752 of
20 the laws of 1990, paragraph (b) of subdivision 1 as amended by chapter
21 23 of the laws of 1994 and paragraph (c) of subdivision 1 as amended by
22 section 7 of part J of chapter 56 of the laws of 2012, is amended to
23 read as follows:

24 § 2983. Determination of lack of capacity to make health care deci-
25 sions for the purpose of empowering agent. 1. Determination by attend-
26 ing physician or attending nurse practitioner. (a) A determination that
27 a principal lacks capacity to make health care decisions shall be made
28 by the attending physician or attending nurse practitioner to a reason-
29 able degree of medical certainty. The determination shall be made in
30 writing and shall contain such attending physician's or attending nurse
31 practitioner's opinion regarding the cause and nature of the principal's
32 incapacity as well as its extent and probable duration. The determi-
33 nation shall be included in the patient's medical record. For a decision
34 to withdraw or withhold life-sustaining treatment, the attending physi-
35 cian or attending nurse practitioner who makes the determination that a
36 principal lacks capacity to make health care decisions must consult with
37 another physician or nurse practitioner to confirm such determination.
38 Such consultation shall also be included within the patient's medical
39 record.

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

47 (c) If the attending physician or attending nurse practitioner deter-
48 mines that a patient lacks capacity because of a developmental disabili-
49 ty, the attending physician or attending nurse practitioner who makes
50 the determination must be, or must consult, for the purpose of confirm-
51 ing the determination, with a physician, nurse practitioner or clinical
52 psychologist who either is employed by a developmental disabilities
53 services office named in section 13.17 of the mental hygiene law, or who
54 has been employed for a minimum of two years to render care and service
55 in a facility operated or licensed by the office for people with devel-
56 opmental disabilities, or has been approved by the commissioner of

1 developmental disabilities in accordance with regulations promulgated by
2 such commissioner. Such regulations shall require that a physician,
3 nurse practitioner or clinical psychologist possess specialized training
4 or three years experience in treating developmental disabilities. A
5 record of such consultation shall be included in the patient's medical
6 record.

7 (d) A physician or nurse practitioner who has been appointed as a
8 patient's agent shall not make the determination of the patient's capac-
9 ity to make health care decisions.

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

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

21 4. Limited purpose of determination. A determination made pursuant to
22 this section that a principal lacks capacity to make health care deci-
23 sions shall not be construed as a finding that the patient lacks capaci-
24 ty for any other purpose.

25 5. Priority of principal's decision. Notwithstanding a determination
26 pursuant to this section that the principal lacks capacity to make
27 health care decisions, where a principal objects to the determination of
28 incapacity or to a health care decision made by an agent, the princi-
29 pal's objection or decision shall prevail unless the principal is deter-
30 mined by a court of competent jurisdiction to lack capacity to make
31 health care decisions.

32 6. Confirmation of lack of capacity. (a) The attending physician or
33 attending nurse practitioner shall confirm the principal's continued
34 incapacity before complying with an agent's health care decisions, other
35 than those decisions made at or about the time of the initial determi-
36 nation made pursuant to subdivision one of this section. The confirma-
37 tion shall be stated in writing and shall be included in the principal's
38 medical record.

39 (b) The notice requirements set forth in subdivision three of this
40 section shall not apply to the confirmation required by this subdivi-
41 sion.

42 7. Effect of recovery of capacity. In the event the attending physi-
43 cian or attending nurse practitioner determines that the principal has
44 regained capacity, the authority of the agent shall cease, but shall
45 recommence if the principal subsequently loses capacity as determined
46 pursuant to this section.

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

49 2. Duty to record revocation. (a) A physician or nurse practitioner
50 who is informed of or provided with a revocation of a health care proxy
51 shall immediately (i) record the revocation in the principal's medical
52 record and (ii) notify the agent and the medical staff responsible for
53 the principal's care of the revocation.

54 (b) Any member of the staff of a health care provider informed of or
55 provided with a revocation of a health care proxy pursuant to this

1 section shall immediately notify a physician or nurse practitioner of
2 such revocation.

3 § 5. This act shall take effect on the ninetieth day after it shall
4 have become a law. Effective immediately, any rules and regulations
5 necessary to implement the provisions of this act on its effective date
6 are authorized and directed to be amended, repealed and/or promulgated
7 on or before such date.