

# STATE OF NEW YORK

4478

2017-2018 Regular Sessions

## IN ASSEMBLY

February 2, 2017

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 § 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:

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

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(a) The initial determination that a patient lacks capacity shall be subject to a concurring determination, independently made by a health or social services practitioner. A concurring determination shall include an assessment of the cause and extent of the patient's incapacity and the likelihood that the patient will regain decision-making capacity, and shall be included in the patient's medical record. Hospitals shall adopt written policies identifying the training and credentials of health or social services practitioners qualified to provide concurring determinations of incapacity conducted for hospital patients.

(b) If an attending physician of a patient in a general hospital or mental hygiene facility determines that a patient lacks capacity because of mental illness, ~~[the attending physician who makes the determination must be, or must consult, for the purpose of confirming the determination, with a qualified psychiatrist]~~ either such physician or the concurring practitioner must have the following qualifications: a physician licensed to practice medicine in New York state, who is a diplomate or eligible to be certified by the American Board of Psychiatry and Neurology or who is certified by the American Osteopathic Board of Neurology and Psychiatry or is eligible to be certified by that board. A record of such consultation shall be included in the patient's medical record.

(c) If the attending physician determines that a patient lacks capacity because of a developmental disability, ~~[the attending physician who makes the determination must be, or must consult, for the purpose of confirming the determination, with]~~ either such physician or the concurring practitioner must have the following qualifications: either (i) for a patient in a hospital, a health or social services practitioner qualified by training or experience to make such determination in accordance with the written policies adopted by the hospital; or (ii) for a patient in any setting, a physician 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 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 who has been appointed as a patient's agent shall not make the determination of the patient's capacity to make health care decisions.]~~

§ 3. Subdivision 3 of section 2994-c of the public health law, as added by chapter 8 of the laws of 2010, paragraph (b) as amended by chapter 167 of the laws of 2011, subparagraph (ii) of paragraph (c) as amended by section 8 of part J of chapter 56 of the laws of 2012, is amended to read as follows:

3. Concurring determinations for life-sustaining treatment decisions. For a decision to withdraw or withhold life-sustaining treatment, then the following shall apply: (a) An initial determination that a patient lacks decision-making capacity shall be subject to a concurring determination, independently made, ~~[where required by this subdivision]~~ by a health or social services practitioner employed or otherwise formally affiliated with the hospital. A concurring determination shall include an assessment of the cause and extent of the patient's incapacity and

1 the likelihood that the patient will regain decision-making capacity,  
2 and shall be included in the patient's medical record. Hospitals shall  
3 adopt written policies identifying the training and credentials of  
4 health or social services practitioners qualified to provide concurring  
5 determinations of incapacity.

6 (b) ~~[(i) In a residential health care facility, a health or social~~  
7 ~~services practitioner employed by or otherwise formally affiliated with~~  
8 ~~the facility must independently determine whether an adult patient lacks~~  
9 ~~decision-making capacity.~~

10 ~~[(ii) In a general hospital a health or social services practitioner~~  
11 ~~employed by or otherwise formally affiliated with the facility must~~  
12 ~~independently determine whether an adult patient lacks decision making~~  
13 ~~capacity if the surrogate's decision concerns the withdrawal or with-~~  
14 ~~holding of life-sustaining treatment.~~

15 ~~[(iii)]~~ With respect to decisions regarding hospice care for a patient  
16 in a general hospital or residential health care facility, the health or  
17 social services practitioner must be employed by or otherwise formally  
18 affiliated with the general hospital or residential health care facili-  
19 ty.

20 (c) (i) If the attending physician makes an initial determination that  
21 a patient lacks decision-making capacity because of mental illness,  
22 either such physician or the concurring practitioner must have the  
23 following qualifications~~[ , or another physician with the following qual-~~  
24 ~~ifications must independently determine whether the patient lacks deci-~~  
25 ~~sion-making capacity]~~: a physician licensed to practice medicine in New  
26 York state, who is a diplomate or eligible to be certified by the Ameri-  
27 can Board of Psychiatry and Neurology or who is certified by the Ameri-  
28 can Osteopathic Board of Neurology and Psychiatry or is eligible to be  
29 certified by that board. A record of such consultation shall be included  
30 in the patient's medical record.

31 (ii) If the attending physician makes an initial determination that a  
32 patient lacks decision-making capacity because of a developmental disa-  
33 bility, either such physician or the concurring practitioner must have  
34 the following qualifications~~[ , or another professional with the follow-~~  
35 ~~ing qualifications must independently determine whether the patient~~  
36 ~~lacks decision-making capacity]~~: either (A) a health or social services  
37 practitioner qualified by training or experience to make such determi-  
38 nation in accordance with the written policies adopted by the hospital,  
39 or (B) a physician or clinical psychologist who either is employed by a  
40 developmental disabilities services office named in section 13.17 of the  
41 mental hygiene law, or who has been employed for a minimum of two years  
42 to render care and service in a facility operated or licensed by the  
43 office for people with developmental disabilities, or has been approved  
44 by the commissioner of developmental disabilities in accordance with  
45 regulations promulgated by such commissioner. Such regulations shall  
46 require that a physician or clinical psychologist possess specialized  
47 training or three years experience in treating developmental disabili-  
48 ties. A record of such consultation shall be included in the patient's  
49 medical record.

50 (d) If an attending physician has determined that the patient lacks  
51 decision-making capacity and if the health or social services practi-  
52 tioner consulted for a concurring determination disagrees with the  
53 attending physician's determination, the matter shall be referred to the  
54 ethics review committee if it cannot otherwise be resolved.

55 § 4. Subdivisions 3 and 4 of section 2994-cc of the public health law,  
56 subdivision 3 as added by chapter 8 of the laws of 2010 and subdivision

4 as amended by section 131 of subpart B of part C of chapter 62 of the laws of 2011, are amended to read as follows:

3. Consent by a surrogate shall be governed by article twenty-nine-CC of this chapter, except that~~[(a) a second determination of capacity shall be made by a health or social services practitioner, and (b)]~~ the authority of the ethics review committee set forth in article twenty-nine-CC of this chapter shall apply only to nonhospital orders issued in a hospital or hospice.

4. (a) When the concurrence of a second ~~[physician]~~ health or social services practitioner is sought to fulfill the requirements for the issuance of a nonhospital order not to resuscitate for patients in a correctional facility, such second ~~[physician]~~ health or social services practitioner shall be selected by the chief medical officer of the department of corrections and community supervision or his or her designee.

(b) When the concurrence of a second ~~[physician]~~ health or social services practitioner is sought to fulfill the requirements for the issuance of a nonhospital order not to resuscitate for ~~[hospice and]~~ home care patients, such second ~~[physician]~~ health or social services practitioner shall be selected ~~[by the hospice medical director or hospice nurse coordinator designated by the medical director or]~~ by the home care services agency director of patient care services~~[, as appropriate to the patient]~~.

§ 5. Paragraph (a) of subdivision 4 of section 1750-b of the surrogate's court procedure act, as amended by chapter 198 of the laws of 2016, is amended to read as follows:

(a) The attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law, ~~[must confirm]~~ shall initially determine to a reasonable degree of medical certainty that the person who is intellectually disabled lacks capacity to make health care decisions. The determination thereof shall be included in the person who is intellectually disabled's medical record, and shall contain such attending physician's opinion regarding the cause and nature of the person who is intellectually disabled's incapacity as well as its extent and probable duration. The attending physician who makes ~~[the confirmation]~~ such initial determination shall consult with another physician, or a licensed psychologist, to further confirm the person who is intellectually disabled's lack of capacity. ~~[The]~~ If the attending physician makes an initial determination that a patient lacks capacity to make health care decisions because of intellectual disability, then the attending physician ~~[who makes the confirmation,]~~ or the physician or licensed psychologist with whom the attending physician consults~~[,]~~ either (i) for a patient in a general hospital, residential health care facility or hospice, must [(i)] be qualified by training or experience to make such determination, in accordance with policies adopted by the general hospital, residential health care facility or hospice; or (ii) for a patient in any setting, must (A) be employed by a developmental disabilities services office named in section 13.17 of the mental hygiene law or employed by the office for people with developmental disabilities to provide treatment and care to people with developmental disabilities, or ~~[(iii)]~~ (B) have been employed for a minimum of two years to render care and service in a facility or program operated, licensed or authorized by the office for people with developmental disabilities, or ~~[(iii)]~~ (C) have been approved by the commissioner of the office for people with developmental disabilities in accordance with regulations promulgated by such commissioner. Such regulations shall

1 require that a physician or licensed psychologist possess specialized  
2 training or three years experience in treating intellectual disability.  
3 A record of such consultation shall be included in the person who is  
4 intellectually disabled's medical record.

5 § 6. Subdivision 4 of section 2982 of the public health law, as  
6 amended by chapter 370 of the laws of 1991, is amended to read as  
7 follows:

8 4. Priority over other surrogates. Health care decisions by an agent  
9 on a principal's behalf pursuant to this article shall have priority  
10 over decisions by any other person, except as otherwise provided in the  
11 health care proxy or in subdivision [~~five~~] ~~six~~ of section two thousand  
12 nine hundred eighty-three of this article.

13 § 7. Subdivision 2 of section 2984 of the public health law, as added  
14 by chapter 752 of the laws of 1990, is amended to read as follows:

15 2. A health care provider shall comply with health care decisions made  
16 by an agent in good faith under a health care proxy to the same extent  
17 as if such decisions had been made by the principal, subject to any  
18 limitations in the health care proxy and pursuant to the provisions of  
19 subdivision [~~five~~] ~~six~~ of section two thousand nine hundred eighty-three  
20 of this article.

21 § 8. Paragraph (b) of subdivision 7 of section 2983 of the public  
22 health law, as added by chapter 752 of the laws of 1990 and such subdi-  
23 vision as renumbered by section one of this act, is amended to read as  
24 follows:

25 (b) The notice requirements set forth in subdivision [~~three~~] ~~four~~ of  
26 this section shall not apply to the confirmation required by this subdi-  
27 vision.

28 § 9. This act shall take effect on the ninetieth day after it shall  
29 have become a law, provided that the amendments to article 29-C of the  
30 public health law made by section two of this act shall apply to the  
31 decisions made pursuant to health care proxies created prior to the  
32 effective date of this act as well as those created thereafter.