

STATE OF NEW YORK

7713--A

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 -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

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
23 the adult in the presence of two adult witnesses who shall also sign the
24 proxy. Another person may sign and date the health care proxy for the
25 adult if the adult is unable to do so, at the adult's direction and in

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

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1 the adult's presence, and in the presence of two adult witnesses who
2 shall sign the proxy. The witnesses shall state that the principal
3 appeared to execute the proxy willingly and free from duress. The person
4 appointed as agent shall not act as witness to execution of the health
5 care proxy.

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

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

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

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

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

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

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

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

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

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

53 (i) the attending physician or attending nurse practitioner has deter-
54 mined in a writing signed by the physician or nurse practitioner (A)
55 that the person appointed as agent is not reasonably available, willing
56 and competent to serve as agent, and (B) that such person is not

1 expected to become reasonably available, willing and competent to make a
2 timely decision given the patient's medical circumstances;

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

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

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

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

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

15 § 3. Section 2983 of the public health law, as added by chapter 752 of
16 the laws of 1990, paragraph (b) of subdivision 1 as amended by chapter
17 23 of the laws of 1994 and paragraph (c) of subdivision 1 as amended by
18 section 7 of part J of chapter 56 of the laws of 2012, is amended to
19 read as follows:

20 § 2983. Determination of lack of capacity to make health care deci-
21 sions for the purpose of empowering agent. 1. Determination by attend-
22 ing physician or attending nurse practitioner. (a) A determination that
23 a principal lacks capacity to make health care decisions shall be made
24 by the attending physician or attending nurse practitioner to a reason-
25 able degree of medical certainty. The determination shall be made in
26 writing and shall contain such attending physician's or attending nurse
27 practitioner's opinion regarding the cause and nature of the principal's
28 incapacity as well as its extent and probable duration. The determi-
29 nation shall be included in the patient's medical record. For a decision
30 to withdraw or withhold life-sustaining treatment, the attending physi-
31 cian or attending nurse practitioner who makes the determination that a
32 principal lacks capacity to make health care decisions must consult with
33 another physician or nurse practitioner to confirm such determination.
34 Such consultation shall also be included within the patient's medical
35 record.

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

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

1 record of such consultation shall be included in the patient's medical
2 record.

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

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

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

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

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

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

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

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

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

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

50 (b) Any member of the staff of a health care provider informed of or
51 provided with a revocation of a health care proxy pursuant to this
52 section shall immediately notify a physician or nurse practitioner of
53 such revocation.

54 § 5. This act shall take effect on the same date and in the same
55 manner as chapter 430 of the laws of 2017 takes effect; provided that,
56 effective immediately, any rules and regulations necessary to implement

1 the provisions of this act on its effective date are authorized and
2 directed to be amended, repealed and/or promulgated on or before such
3 date.