

# STATE OF NEW YORK

4525

2019-2020 Regular Sessions

## IN ASSEMBLY

February 4, 2019

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  
4 amended by chapter 342 of the laws of 2018, is amended to read as  
5 follows:

6 1. [~~Determination~~] Initial determination by attending physician or  
7 attending nurse practitioner. [~~(a) A~~] An initial determination that a  
8 principal lacks capacity to make health care decisions shall be made by  
9 the attending physician or attending nurse practitioner to a reasonable  
10 degree of medical certainty. The determination shall be made in writing  
11 and shall contain such attending physician's or attending nurse practi-  
12 tioner's opinion regarding the cause and nature of the principal's inca-  
13 pacity as well as its extent and probable duration. The determination  
14 shall be included in the patient's medical record. [~~For a decision to~~  
15 ~~withdraw or withhold life sustaining treatment, the attending physician~~  
16 ~~or attending nurse practitioner who makes the determination that a prin-~~  
17 ~~cipal lacks capacity to make health care decisions must consult with~~  
18 ~~another physician or nurse practitioner to confirm such determination.~~  
19 ~~Such consultation shall also be included within the patient's medical~~  
20 ~~record.~~] A physician who has been appointed as a patient's agent shall  
21 not make the determination of the patient's capacity to make health care  
22 decisions.

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

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2. Concurring determinations for life-sustaining treatment decisions.  
For a decision to withdraw or withhold life-sustaining treatment, the  
following shall apply:

(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 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 determi-~~  
~~nation, with a qualified psychiatrist~~] either such physician or the  
concurring practitioner must have the following qualifications: a physi-  
cian 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 or attending nurse practitioner deter-  
mines that a patient lacks capacity because of a developmental disabili-  
ty, [~~the attending physician or attending nurse practitioner who makes~~  
~~the determination must be, or must consult, for the purpose of confirm-~~  
~~ing the determination, with~~] either such physician, nurse practitioner  
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 determi-  
nation in accordance with the written policies adopted by the hospital;  
or (ii) for a patient in any setting, a physician, nurse practitioner or  
clinical psychologist who either is employed by a developmental disabil-  
ities 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 capac-~~  
~~ity to make health care decisions.]~~

§ 3. Subdivision 3 of section 2994-c of the public health law, as  
amended by chapter 430 of the laws of 2017, 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 determi-

1 nation, independently made, [~~where required by this subdivision~~] by a  
2 health or social services practitioner employed or otherwise formally  
3 affiliated with the hospital. A concurring determination shall include  
4 an assessment of the cause and extent of the patient's incapacity and  
5 the likelihood that the patient will regain decision-making capacity,  
6 and shall be included in the patient's medical record. Hospitals shall  
7 adopt written policies identifying the training and credentials of  
8 health or social services practitioners qualified to provide concurring  
9 determinations of incapacity.

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

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

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

24 (c) (i) If the attending physician or attending nurse practitioner  
25 makes an initial determination that a patient lacks decision-making  
26 capacity because of mental illness, either such physician or the concur-  
27 ring practitioner must have the following qualifications[~~, or another~~  
28 ~~physician with the following qualifications must independently determine~~  
29 ~~whether the patient lacks decision-making capacity~~]: a physician  
30 licensed to practice medicine in New York state, who is a diplomate or  
31 eligible to be certified by the American Board of Psychiatry and Neurol-  
32 ogy or who is certified by the American Osteopathic Board of Neurology  
33 and Psychiatry or is eligible to be certified by that board. A record of  
34 such consultation shall be included in the patient's medical record.

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

55 (d) If an attending physician or attending nurse practitioner has  
56 determined that the patient lacks decision-making capacity and if the

1 health or social services practitioner consulted for a concurring deter-  
2 mination disagrees with the attending physician's or the attending nurse  
3 practitioner's determination, the matter shall be referred to the ethics  
4 review committee if it cannot otherwise be resolved.

5 § 4. Subdivisions 3 and 4 of section 2994-cc of the public health law,  
6 as amended by chapter 430 of the laws of 2017, are amended to read as  
7 follows:

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

14 4. (a) When the concurrence of a second [~~physician or nurse practi-~~  
15 ~~titioner~~] health or social services practitioner is sought to fulfill the  
16 requirements for the issuance of a nonhospital order not to resuscitate  
17 for patients in a correctional facility, such second [~~physician or nurse~~  
18 ~~practitioner~~] health or social services practitioner shall be selected  
19 by the chief medical officer of the department of corrections and commu-  
20 nity supervision or his or her designee.

21 (b) When the concurrence of a second [~~physician or nurse practitioner~~]  
22 health or social services practitioner is sought to fulfill the require-  
23 ments for the issuance of a nonhospital order not to resuscitate for  
24 [~~hospice and~~] home care patients, such second [~~physician or nurse prac-~~  
25 ~~titioner~~] health or social services practitioner shall be selected [~~by~~  
26 ~~the hospice medical director or hospice nurse coordinator designated by~~  
27 ~~the medical director or~~] by the home care services agency director of  
28 patient care services[, ~~as appropriate to the patient~~].

29 § 5. Paragraph (a) of subdivision 4 of section 1750-b of the surro-  
30 gate's court procedure act, as amended by chapter 198 of the laws of  
31 2016, is amended to read as follows:

32 (a) The attending physician, as defined in subdivision two of section  
33 twenty-nine hundred eighty of the public health law, [~~must confirm~~]  
34 shall initially determine to a reasonable degree of medical certainty  
35 that the person who is intellectually disabled lacks capacity to make  
36 health care decisions. The determination thereof shall be included in  
37 the person who is intellectually disabled's medical record, and shall  
38 contain such attending physician's opinion regarding the cause and  
39 nature of the person who is intellectually disabled's incapacity as well  
40 as its extent and probable duration. The attending physician who makes  
41 [~~the confirmation~~] such initial determination shall consult with another  
42 physician, or a licensed psychologist, to further confirm the person who  
43 is intellectually disabled's lack of capacity. [~~The~~] If the attending  
44 physician makes an initial determination that a patient lacks capacity  
45 to make health care decisions because of intellectual disability, then  
46 the attending physician [~~who makes the confirmation,~~] or the physician  
47 or licensed psychologist with whom the attending physician  
48 consults[~~,~~]either (i) for a patient in a general hospital, residential  
49 health care facility or hospice, must [(i)] be qualified by training or  
50 experience to make such determination, in accordance with policies  
51 adopted by the general hospital, residential health care facility or  
52 hospice; or (ii) for a patient in any setting, must (A) be employed by a  
53 developmental disabilities services office named in section 13.17 of the  
54 mental hygiene law or employed by the office for people with develop-  
55 mental disabilities to provide treatment and care to people with devel-  
56 opmental disabilities, or [(ii)] (B) have been employed for a minimum of

1 two years to render care and service in a facility or program operated,  
2 licensed or authorized by the office for people with developmental disa-  
3 bilities, or [~~(iii)~~] (C) have been approved by the commissioner of the  
4 office for people with developmental disabilities in accordance with  
5 regulations promulgated by such commissioner. Such regulations shall  
6 require that a physician or licensed psychologist possess specialized  
7 training or three years experience in treating intellectual disability.  
8 A record of such consultation shall be included in the person who is  
9 intellectually disabled's medical record.

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

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

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

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

26 § 8. Paragraph (b) of subdivision 7 of section 2983 of the public  
27 health law, as amended by chapter 342 of the laws of 2018 and such  
28 subdivision as renumbered by section one of this act, is amended to read  
29 as follows:

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

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