

# STATE OF NEW YORK

1203

2019-2020 Regular Sessions

## IN ASSEMBLY

January 14, 2019

Introduced by M. of A. GOTTFRIED, ABINANTI -- 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 restoring medical futility as a basis for both surrogate consent to a do not resuscitate order and for a do not resuscitate order for a patient without a surrogate

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

1 Section 1. Legislative findings. Under New York's former do not resus-  
2 citate (hereinafter "DNR") law, article 29-B of the public health law, a  
3 surrogate could consent to a DNR order if the patient met any one of  
4 four clinical criteria, one of which was a finding by two physicians  
5 that resuscitation was "medically futile," which was defined to mean  
6 that resuscitation "will be unsuccessful in restoring cardiac and  
7 respiratory function or that the patient will experience repeated arrest  
8 in a short time period before death occurs." The former DNR law also  
9 allowed a DNR order to be entered for a patient who did not have a  
10 surrogate on that basis. That law applied to all patients, including  
11 developmentally disabled patients.

12 In 2010, the former DNR law was superseded by the Family Health Care  
13 Decisions Act (hereinafter "FHCA") which established standards for the  
14 withdrawal or withholding of a broad range of life-sustaining treat-  
15 ments. Accordingly, the FHCA did not have a standard specifically  
16 relating to medically futile resuscitation. Similarly, Surrogate's Court  
17 Procedure Act (hereinafter "SCPA") §1750-b does not have a standard  
18 specifically relating to medically futile resuscitation for develop-  
19 mentally disabled patients.

20 The legislature finds that the broader FHCA and SCPA §1750-b stand-  
21 ards are difficult to apply to situations in which resuscitation would  
22 be medically futile. Accordingly, this bill restores the former DNR

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

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1 law's medical futility standard as an alternative basis for writing a  
2 DNR order under the FHCDA and under SCPA §1750-b.

3 § 2. Subparagraphs (i) and (ii) of paragraph (a) of subdivision 5 of  
4 section 2994-d of the public health law, as amended by chapter 430 of  
5 the laws of 2017, are amended and a new subparagraph (iii) is added to  
6 read as follows:

7 (i) Treatment would be an extraordinary burden to the patient and an  
8 attending physician or attending nurse practitioner determines, with the  
9 independent concurrence of another physician or nurse practitioner,  
10 that, to a reasonable degree of medical certainty and in accord with  
11 accepted medical standards, (A) the patient has an illness or injury  
12 which can be expected to cause death within six months, whether or not  
13 treatment is provided; or (B) the patient is permanently unconscious;  
14 [~~or~~]

15 (ii) The provision of treatment would involve such pain, suffering or  
16 other burden that it would reasonably be deemed inhumane or extraor-  
17 dinarily burdensome under the circumstances and the patient has an irre-  
18 versible or incurable condition, as determined by an attending physician  
19 or attending nurse practitioner with the independent concurrence of  
20 another physician or nurse practitioner to a reasonable degree of  
21 medical certainty and in accord with accepted medical standards[~~or~~]; or

22 (iii) With respect to a decision to enter an order not to resuscitate,  
23 an attending physician determines, with the independent concurrence of a  
24 second physician, to a reasonable degree of medical certainty, that in  
25 the event of a cardiac or respiratory arrest, resuscitation would be  
26 unsuccessful in restoring cardiac and respiratory function or that the  
27 patient will experience repeated arrest in a short time period before  
28 death occurs.

29 § 3. Paragraph (b) of subdivision 5 of section 2994-g of the public  
30 health law, as amended by chapter 430 of the laws of 2017, is amended to  
31 read as follows:

32 (b) If the attending physician or attending nurse practitioner, with  
33 independent concurrence of a second physician or nurse practitioner  
34 designated by the hospital, determines to a reasonable degree of medical  
35 certainty that:

36 (i) (A) life-sustaining treatment offers the patient no medical bene-  
37 fit because the patient will die imminently, even if the treatment is  
38 provided; and

39 [~~(ii)~~] (B) the provision of life-sustaining treatment would violate  
40 accepted medical standards, then such treatment may be withdrawn or  
41 withheld from an adult patient who has been determined to lack deci-  
42 sion-making capacity pursuant to section twenty-nine hundred ninety-  
43 four-c of this article, without judicial approval. This [~~paragraph~~]  
44 subparagraph shall not apply to any treatment necessary to alleviate  
45 pain or discomfort; or

46 (ii) in the event of cardiac or respiratory arrest, resuscitation will  
47 be unsuccessful in restoring cardiac and respiratory function or that  
48 the patient will experience repeated arrest in a short time period  
49 before death occurs, then an order not to resuscitate may be entered for  
50 an adult patient who has been determined to lack decision-making capaci-  
51 ty pursuant to section twenty-nine hundred ninety-four-c of this arti-  
52 cle, without judicial approval.

53 § 4. Subparagraphs (i) and (ii) of paragraph (b) of subdivision 4 of  
54 section 1750-b of the surrogate's court procedure act, as amended by  
55 chapter 198 of the laws of 2016, are amended to read as follows:

1 (i) the person who is intellectually disabled has a medical condition  
2 as follows:

3 A. a terminal condition[~~, as defined in subdivision twenty-three of~~  
4 ~~section twenty-nine hundred sixty-one of the public health law~~] which  
5 shall mean an illness or injury from which there is no recovery, and  
6 which can reasonably be expected to cause death within one year; or

7 B. permanent unconsciousness; or

8 C. a medical condition other than such person's intellectual disabili-  
9 ty which requires life-sustaining treatment, is irreversible and which  
10 will continue indefinitely; [~~and~~] or

11 D. in the case of a decision to enter an order not to resuscitate,  
12 that in the event of cardiac or respiratory arrest such resuscitation  
13 would be unsuccessful in restoring cardiac and respiratory function or  
14 that the patient will experience repeated arrest in a short time period  
15 before death occurs; and

16 (ii) except in the case of a decision to enter an order not to resus-  
17 cite based on clause D of subparagraph (i) of this paragraph, the  
18 life-sustaining treatment would impose an extraordinary burden on such  
19 person, in light of:

20 A. such person's medical condition, other than such person's intellec-  
21 tual disability; and

22 B. the expected outcome of the life-sustaining treatment, notwith-  
23 standing such person's intellectual disability; and

24 § 5. This act shall take effect on the ninetieth day after it shall  
25 have become a law.