

# STATE OF NEW YORK

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2894

2023-2024 Regular Sessions

## IN SENATE

January 25, 2023

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Introduced by Sen. RIVERA -- read twice and ordered printed, and when printed to be committed 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12 In 2010, the former DNR law was superseded by the Family Health Care  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 "FHCD") which established standards for the  
14 withdrawal or withholding of a broad range of life-sustaining treat-  
15 ments. Accordingly, the FHCD did not have a standard specifically  
16 relating to medically futile resuscitation. Similarly, Surrogate's Court  
17 Procedure Act (hereinafter "SPCA") §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 FHCD and SPCA §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.

LBD05246-01-3

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 708 of  
5 the laws of 2019, 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 practitioner determines, with the independent concurrence of  
9 another physician, nurse practitioner or physician assistant, that, to a  
10 reasonable degree of medical certainty and in accord with accepted  
11 medical standards, (A) the patient has an illness or injury which can be  
12 expected to cause death within six months, whether or not treatment is  
13 provided; or (B) the patient is permanently unconscious; ~~[ex]~~

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

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

28 § 3. Paragraph (b) of subdivision 5 of section 2994-g of the public  
29 health law, as amended by chapter 708 of the laws of 2019, is amended to  
30 read as follows:

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

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

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

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

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

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

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

5 B. permanent unconsciousness; or

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

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

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

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

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

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