STATE OF NEW YORK

2894

2023-2024 Regular Sessions

IN SENATE

January 25, 2023

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:

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

In 2010, the former DNR law was superseded by the Family Health Care Decisions Act (hereinafter "FHCDA") which established standards for the withdrawal or withholding of a broad range of life-sustaining treatments. Accordingly, the FHCDA did not have a standard specifically relating to medically futile resuscitation. Similarly, Surrogate's Court Procedure Act (hereinafter "SPCA") §1750-b does not have a standard specifically relating to medically futile resuscitation for developmentally disabled patients.

The legislature finds that the broader FHCDA and SPCA §1750-b standards are difficult to apply to situations in which resuscitation would 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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law's medical futility standard as an alternative basis for writing a DNR order under the FHCDA and under SCPA §1750-b.

§ 2. Subparagraphs (i) and (ii) of paragraph (a) of subdivision 5 of section 2994-d of the public health law, as amended by chapter 708 of the laws of 2019, are amended and a new subparagraph (iii) is added to read as follows:

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

(ii) The provision of treatment would involve such pain, suffering or other burden that it would reasonably be deemed inhumane or extraordinarily burdensome under the circumstances and the patient has an irreversible or incurable condition, as determined by an attending practitioner with the independent concurrence of another physician, nurse practitioner or physician assistant to a reasonable degree of medical certainty and in accord with accepted medical standards[~~.~~]**; or**

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

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

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

(i) **(A)** life-sustaining treatment offers the patient no medical benefit because the patient will die imminently, even if the treatment is provided; and

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

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

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

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

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

B. permanent unconsciousness; or

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

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

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

A. such person's medical condition, other than such person's intellectual disability; and

B. the expected outcome of the life-sustaining treatment, notwithstanding such person's intellectual disability; and

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