



Health Care Law Information Memo

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THE FAMILY HEALTH CARE DECISIONS ACT

Introduction

On March 16, 2010, New York Governor David A. Paterson signed into law the Family Health Care Decisions Act (the "Act"), which took effect immediately. The Act allows family members and close friends to make health care decisions, including decisions to withhold or withdraw life-sustaining treatment, on behalf of patients who lack decision-making capacity and who have not prepared advance health care directives. The Act applies to general hospitals and residential health care facilities, such as nursing homes. It does not apply to mental hygiene facilities, the psychiatric units of general hospitals, or outpatient settings such as clinics or doctors' offices. When it is determined that a patient lacks decision-making capacity, the Act provides for the selection of a surrogate from a list of individuals ranked in order of priority, including family members, domestic partners and close friends.

Determining Lack of Decision Making-Capacity

The Act adopts the same definition of "capacity to make health care decisions" set out in the Health Care Agent and Proxy Act (Public Health Law Section 2980) for determining whether a patient has decision-making capacity. Pursuant to the Act, "decision-making capacity" means the ability to understand and appreciate the nature and consequences of the proposed health care, including the benefits, risks and alternatives to the proposed health care, and to reach an informed decision. The Act requires that the attending physician make the initial determination that an adult patient lacks decision-making capacity to a reasonable degree of medical certainty.

The attending physician, as defined by the Act, is the physician selected or assigned by hospital policy who has primary responsibility for the treatment and care of the patient. Where more than one physician shares responsibility, or where a physician is acting on the attending physician's behalf, any such physician may act as an attending physician pursuant to the Act. The determination must include an assessment of the cause and extent of the patient's incapacity and is subject to an independent concurring determination in certain circumstances. Assuming the patient lacks decision-making capacity, the Act directs the selection of a surrogate from a list of individuals ranked in order of priority.

Potential Surrogates and Medical Decisions

The potential surrogates, listed in order of priority, are as follows: (1) Court-appointed guardian; (2) Spouse, if not legally separated from the patient, or domestic partner; (3) Adult son or daughter; (4) Parent; (5) Adult brother or sister; and (6) Close relative or friend. The Act defines an adult as a person who is 18 years or older, or who has married, and contains a detailed definition of domestic partner. If the patient objects to the determination of incapacity or to the choice of surrogate, or to a health care decision made by a surrogate, the patient's oral objection controls unless a court determines that the patient lacks decision-making capacity or another legal basis exists for overriding the patient's decision. Furthermore, if an adult patient has already made a decision about the health care either orally or in writing, the physician need not seek the consent of a surrogate.

The surrogate has all the powers the patient would have in making his or her own medical decisions, including the decision to withhold or withdraw life-sustaining treatment. The Act directs that the surrogate make decisions in accordance with the patient's wishes, and take into account the patient's religious and moral beliefs. If the patient's wishes are not reasonably known and cannot be ascertained, the Act requires that the surrogate make decisions in accordance with the patient's best interests.

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Decisions to Withhold or Withdraw Life-Sustaining Treatment

Decisions to withhold or withdraw life-sustaining treatment are governed by additional standards under the Act. A surrogate may withhold or withdraw life-sustaining treatment for a patient if the patient will die within six months or is permanently unconscious, as determined by two independent physicians, and treatment would be an extraordinary burden to the patient. A surrogate may also withhold or withdraw life-sustaining treatment if the patient has an irreversible condition, as determined by two independent physicians, and treatment would involve such pain, suffering, or other burden that it would be inhumane or extraordinarily burdensome to provide treatment under the circumstances. Providing nutrition and hydration orally, without reliance on medical treatment, is not considered health care under the Act and is not subject to the Act.

Individuals with Mental Retardation/Developmental Disabilities

Under the Act, individuals with mental retardation or developmental disabilities are within the class of individuals for whom health care surrogates may be appointed if the individual has decision-making capacity and does not reside in a mental hygiene facility. Health care decisions for those individuals could be made under Article 80 or 81 of the Mental Hygiene Law. For example, if there is a guardian (appointed in the Surrogate's Court) for someone with developmental disabilities, then decisions for that individual are governed by the New York guardianship law.

Conclusion

Even with the passage of the Act, New York residents are still strongly encouraged to prepare a health care proxy, which allows an agent to make health care decisions on behalf of a patient if he or she later loses decision-making capacity. The proxy form can be tailored to give the agent as much as or as little authority as the patient desires, and the agent must make decisions in accordance with the patient's wishes or best interests.

In the event an advance health care directive is not prepared, the Act reduces the uncertainty that caregivers face when a patient can no longer make decisions, and assures that the best interests of the patient are respected. Most importantly, the Act allows a decision to be made, ending the New York State requirement of continuing care without regard to the patient's wishes or best interests.

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