

Nassau Lawyer



THE JOURNAL OF THE NASSAU COUNTY BAR ASSOCIATION

June 2019

www.nassaubar.org

Vol. 68, No. 10

Healthcare/Intellectual Property

All in the Family: Who Has Authority to Make Health Care Decisions?

Every adult is presumed to have the capacity to make his or her own medical decisions pursuant to the New York Public Health Law,¹ unless there has been a prior court determination and/or a court appointed guardian who is authorized to make medical decisions for that individual. Capacity is defined as the ability to understand and appreciate the nature and consequences of the proposed health care, to include the benefits of and the alternatives to the care. The individual must have the ability to make an informed decision. Adults with decisional capacity have the right to consent to or refuse medical treatment even if that decision would result in harm or in the individual's death. This right to refuse medical treatment is protected by the due process clauses of the United States and New York State Constitutions.

A determination that a patient lacks capacity to make health care decisions must be made by the patient's attending physician to a degree of reasonable medical certainty. The physician must note this finding in writing in the patient's medical chart. Notice of this determination must be served both on the patient, if there is an indication that he or she can comprehend such notice, and to the Health Care Agent, if one was appointed in a Health Care Proxy. If there is no Health Care Agent appointed, then notice must be given to the person in the highest order of priority on the Surrogates list pursuant to the Family Health Care Decisions Act (FHCDA).

A Health Care Proxy is a document executed by an individual to appoint a "Health Care Agent" to make medical decisions on the individual's behalf in the event he or she is unable to make those decisions for him or herself due to incapacity. This document is only utilized in the event of such incapacity and if the individual is cognizant, the Health Care Agent will not have the authority to act. In New York, hospitals are required to provide a standard Health Care Proxy form to all patients.² However, the standard form is not always expansive and may fail to incorporate certain significant provisions. For example, in addition to allowing an Agent to make medical decisions, the Agent may also be granted the authority to obtain medical records on the patient's behalf. Many

short forms that are provided by hospitals are not compliant with the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and therefore cannot allow such an authorization.

In order to validly execute a Health Care Proxy, it must be signed and dated by a competent adult who is over the age of eighteen, and in the presence of two witnesses. The witnesses must also sign and date the document, and they cannot be the nominated Agent (or successor Agent). When appointing an Agent, the patient may not name multiple Agents to act simultaneously, but may name Agents to act in succession in the event the nominated Agent fails or refuses to act. The Health Care Proxy will stay in effect indefinitely unless and until it is revoked by the individual, which can be done in a number of ways. A subsequently executed Health Care Proxy automatically revokes the prior one. Alternatively, an individual can revoke the document by notifying the Agent and the health care provider, either orally or in writing.

An appointed Agent in a Health Care Proxy has priority to make any and all health care decisions that the patient could have made were he or she of capacity, subject to any limitations in the document itself. That being said, the individual has the ability to enumerate restrictions on his or her Agent as it relates to the patient's health care. Such limitations may include outlining specific types of medical treatments that the patient does not want, or restricting the Agent to making decisions only as it relates to life-sustaining treatment. Alternatively, these directions and limitations could be found in a patient's Living Will, which is a separate document that outlines his or her health care wishes as it relates to life-sustaining treatments. The Health Care Proxy may also be broad enough to also include decisions relating to organ and tissue donations.



Kim M. Smith



Alyssa R. Danziger

In the event there is no Health Care Proxy in place, the FHCDA allows a "Surrogate" to make medical decisions on behalf of the patient. The list of priority as to who may act as a Surrogate is as follows: legal guardian, spouse/domestic partner, adult child, parent, sibling, close friend. Pursuant to

the FHCDA, if there is no Health Care Proxy, and no one to act as the Surrogate, certain health care providers may make the patient's medical decisions, whereas the Court would be the last resort. The scope of authority of a Surrogate is subject to decision-making standards and limitations in the FHCDA but the Surrogate does have the authority to make any and all health care decisions that the patient could have made.³

The Surrogate should carry out the patient's wishes, if known, and include the patient's religious and moral beliefs.⁴ If such wishes are not known, and after reasonable due diligence, then the Surrogate shall act in the patient's "best interest." When determining a patient's "best interest," one has to consider not only the medical condition of that patient, but the dignity and uniqueness of that individual, the possibility and extent of preserving that patient's life, the relief of the patient's suffering, and the restoration or improvement of the patient's health. Additionally, if a patient has made a prior decision either orally or in writing with regards to a proposed health care, the consent of the Surrogate is not required, but it must be documented in the patient's medical record.

Furthermore, certain rules apply when incapacity is due to a developmental disability. The FHCDA does not apply to intellectually disabled individuals; instead, such decisions are governed by the Health Care Decisions Act for Persons with Intellectual Disabilities.⁵

These rules have additional requirements to that of the FHCDA in order to protect the intellectually disabled individuals which can often lead to confusion and delay. Many believe that extending the FHCDA to cover persons with intellectual disabilities, with special adaptations implemented from the Surrogate Court Procedure Act, would accomplish the public policy objective of serving the best interests of disabled individuals. In such a case, it would make it easier for health care providers to follow the legal process as it would be the same for everyone, and it would gain equal treatment under the law for persons with intellectual disabilities.

Overall, practitioners should urge their clients to consider what their wishes would be in the event of a medical emergency. While the FHCDA provides an alternative to the appointment of a Health Care Agent if there is no Health Care Proxy, the Surrogate under the FHCDA does not have all of the expansive powers that a Health Care Agent can have. This is an important distinction during a crisis that should be taking into consideration.

Kim M. Smith is a Partner of Katz, Smith & Chwat, PC, located in Melville, handling matters in elder law, trusts and estates planning and administration, and special needs planning. Kim can be contacted at Kim@ksclawgroup.com.

Alyssa R. Danziger is an Associate at Katz, Smith & Chwat, PC, located in Melville, practicing predominantly in the areas of corporate law and trusts and estates planning and administration. Alyssa can be contacted at Alyssa@ksclawgroup.com.

1. Public Health Law § 2963.

2. Public Health Law § 2991.

3. Public Health Law § 2994-d(3)(i).

4. Public Health Law § 2994-d(4).

5. SCPA § 1750-b.