



Contact: Maria Cilenti - Director of Legislative Affairs - mcilenti@nycbar.org - (212) 382-6655

**REPORT ON LEGISLATION BY THE HEALTH LAW COMMITTEE
AND THE COMMITTEE ON BIOETHICAL ISSUES**

Surrogate Decision-Making Improvement Acts

**S.7151
A.9647**

**Sen. Hannon
M. of A. Clark**

AN ACT to amend the public health law, in relation to making technical, minor and coordinating amendments regarding health care agents and proxies, decisions under the family health care decisions act, and non-hospital orders not to resuscitate

**S.7152
A.9548**

**Sen. Hannon
M. of A. Gunther**

AN ACT to amend the public health law, in relation to orders not to resuscitate; and to repeal article 29-B of the public health law relating to orders not to resuscitate for residents of mental hygiene facilities

**S.7153
A.9671**

**Sen. Hannon
M. of A. Pretlow**

AN ACT to amend the public health law and the surrogate's court procedure act, in relation to conforming and improving the process for determining incapacity

**S.7154
A.9566-A**

**Sen. Hannon
M. of A. Rosenthal**

AN ACT to amend the public health law, in relation to the artificial nutrition and hydration decision standard

**S.7155
A.9670**

**Sen. Hannon
M. of A. Pretlow**

AN ACT to amend the public health law, in relation to disputes between a surrogate and a hospital or individual health care provider

**S.7156
A.9648**

**Sen. Hannon
M. of A. Gottfried**

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

S.7157
A.9549

Sen. Hannon
M. of A. Gunther

AN ACT to amend the surrogate's court procedure act, in relation to making technical and coordinating amendments and other improvements regarding health care decisions for persons with developmental disabilities

THESE BILLS ARE APPROVED

In 2010, the Health Law Committee and the Committee on Bioethical Issues of the New York City Bar Association (the “Association”) issued a report strongly endorsing the Family Health Care Decisions Act (the “FHCDA”) and urging its swift passage. The Committees wrote:

The Family Health Care Decisions Act is a comprehensive and thoughtful approach to health care decision making for the incapacitated patient without a health care proxy. The proposed legislation would establish a system sensitive to the clinical reality in which decision are being made. It balances the vesting of decision making authority with several safeguard provisions. Most important, it is a patient centered bill which will simultaneously provide for the best interests of the patient and the reduction of stress families face in an already painful and difficult time by giving them decision making authority and by blocking the intervention of third parties unknown to the patient in such decisions.

The FHCDA was enacted that same year (Ch. 8, Laws 2010). It has proven to be a great benefit to incapable patients, family members, health care professionals and the general public. Each day in hospitals, nursing homes and hospice programs across the state, providers turn to family members for consent to treatment – and in some instances for decisions about life-sustaining treatment – for incapable patients in accordance with the ethically sound standards and safeguards in the FHCDA.

But experience is also revealing the need for corrections and improvements in the FHCDA, as well as in New York’s several other surrogate decision-making laws (e.g., the DNR Law for Residents of Mental Hygiene Facilities¹; the Health Care Proxy Law²; the Non-Hospital DNR Law³; the Health Care Decisions Act for Mentally Retarded Persons⁴; and Surrogate

¹ NY Public Health Law Art 29-B.

² NY Public Health Law Art. 29-C.

³ NY Public Health Law Art. 29-CCC.

⁴ NY Surrogate’s Court Procedure Act Section 1750-b.

Decision-Making Committees⁵). For instance, there is a need to reconcile differences among these laws.

The seven bills that are the subject of this Report – informally known as the “Surrogate Decision-Making Improvement Acts” - strive to address those issues. Unlike the FHCDA, the SDMIAs would not make sweeping changes that broadly impact decision-making for incapable patients. Rather they would effect a series of more modest changes to improve, coordinate and clarify surrogate decision-making rules.

S.7151 (Sen. Hannon) / A.9647 (M. of A. Clark): This bill is a collection of technical or minor amendments. For example, the bill would conform the definition of “health care” in the Health Care Proxy Law to the FHCDA definition, add to the Health Care Proxy Law a definition of “health or social services practitioner,” and add “licensed master social worker” to the definition of “health or social services practitioner” in the Health Care Proxy Law and the FHCDA to be consistent with PHL Article 29-CCC. But the most pervasive amendment in the bill changes “Office of Mental Retardation and Developmental Disabilities” and its commissioner to Office for People with Development Disabilities” and its commissioner.

S.7152 (Sen. Hannon) / A.9548 (M. of A. Gunther): This bill repeals PHL Article 29-B Orders Not to Resuscitate for Residents of Mental Hygiene Facilities. Article 29-B, the successor to New York’s former DNR Law, governs DNR orders only for patients in psychiatric hospitals and units. A provision in the bill will make the FHCDA applicable to DNR orders for such patients, and eliminate the confusion created by having different DNR laws apply to different hospital patients.

S.7153 (Sen. Hannon) / A.9671 (M. of A. Pretlow): This bill conforms and improves procedures for determining a patient’s incapacity to empower a health care agent, surrogate or guardian. Most notably the bill would reduce language differences on this topic across several laws, allow a broader range of professionals to provide a concurring determination of incapacity; allow hospitals and nursing homes to prescribe the qualifications of professionals who can determine or concur in a determination that a patient lacks capacity as a result of a developmental disability. Also, the bill would the limit the requirement of securing a concurring determination of incapacity to decisions to withdrawal or withhold life-sustaining treatment.

S.7154 (Sen. Hannon) / A.9566-A (M. of A. Rosenthal): This bill would allow a health care agent to a make a decision about withdrawing or withholding artificial nutrition under the same decision-making standard that a surrogate under the FHCDA would apply: the patient’s wishes if reasonably known, or else the patient’s best interests. Currently, the Health Care Proxy Law allows the agent to make such decision only based on the patient’s wishes, if reasonably known.

S.7155 (Sen. Hannon) / A.9670 (M. of A. Pretlow): This bill clarifies that a provision which gives a FHCDA surrogate the right to insist upon life-sustaining treatment over the objection of the attending physician, was not intended to give a surrogate the right to override a patient’s

⁵ NY Mental Hygiene Law Art. 80.

clear prior decision to forgo life-sustaining treatment. Notably, the bill does not change the similar provision relating to a health care agent insistence on treatment: the agent was appointed by the patient, and his or her decision warrants a greater degree of deference.

S.7156 (Sen. Hannon) / A.9648 (M. or A. Gottfried): This bill restores one of the bases for writing a DNR order that was in New York’s DNR Law for over twenty years. It would allow a surrogate to consent to the order of two doctor’s determine 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.” If there is no surrogate it would allow the DNR order to be entered on this basis by the physicians’ determination alone. The FHCDA already includes general principles that support the entry of DNR orders under these circumstances, but experience is showing that it would be helpful and clearer to retain the specific futility rule for DNR orders.

S.7157 (Sen. Hannon) / A.9549 (M. of A. Gunther): This bill renames SCPA §1750-b as “Health Care Decisions for Persons with Developmental Disabilities,” and changes “mentally retarded person” to “developmentally disabled person” throughout. More substantively, it provides that a developmentally disabled person who is determined to have decisional capacity can make his or her own decisions relating to life-sustaining treatment, and that such person’s health care proxy can be honored. Finally, the bill provides that Mental Hygiene Legal Services (MHLS) cannot compel the suspension of a DNR order for a developmentally disabled person unless it sets forth a reason for its determination that the DNR order is invalid, and if the reason is clinical, the basis for that clinical determination. It would similarly limit the authority of a mental hygiene facility director. In doing so, the bill retains the requirement of notice of DNR orders to MHLS (as well as the longstanding requirement of notice to the facility director). But it would constrain their authority to suspend such orders routinely. This approach would restore the intended limited role for MHLS -- as an agency that will intervene when it detects evidence of an improper decision, as opposed to acting as a co-equal DNR decision-maker or as a DNR approval agency.⁶

CONCLUSION

The Committees believe that the changes proposed in the SDMIAs will achieve valuable improvements in the rules governing decision-making for incapable patients. They reflect a willingness to draw upon our growing collective knowledge and experience with the FHCDA and other surrogate decision-making laws. We urge the Legislature to pass this package of bills.

June 2014

⁶ We note that the proposed amendment to SCPA §1750-b(4)(b)(i)(A) defines a terminal condition as “an illness or injury from which there is no recovery, and which can reasonably be expected to cause death within one year.” We question why the definition uses a one-year point of reference as opposed to the six-month point of reference currently in the FHCDA.