

Family Health Care Decisions Act

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In this issue of *Thinking About Tomorrow* we explore the Family Health Care Decisions Act, a new law regarding family members' abilities to make health care and end of life decisions for their loved ones.

Family Health Care Decisions Act

New York has a Health Care Proxy law that allows an individual to appoint an agent to make health care decisions for them in the event they become incapable of executing such decisions. However there was no law addressing health care decisions for individuals who did not have a health care proxy. New York case law severely limited the ability of family members to withhold or withdraw life-sustaining treatment in the absence of clear convincing evidence of a patient's wishes. In 1992 the New York State Task Force on Life and the Law proposed a law addressing this issue. After 17 years of work by the Task Force, the Legislature and members of the Health Care and Legal communities, New York State enacted the Family Health Care Decisions Act ("FHCD") on February 24, 2010. The law became effective on June 1, 2010 and applies to patients in hospitals and nursing homes. The law provides a method for the selection of surrogates to make health care decisions for patients who lack capacity and have not previously appointed a health care agent. The FHCD also allows surrogates to make the decision to withdraw or withhold life-sustaining treatment for an individual, provided certain circumstances are met.



Surrogate for Decision Making

The law does not take away an individual's right to make their own health care decisions, or their right to appoint an agent under a Health Care Proxy. The law only applies to individuals who lack decision making capacity and do not already have a pre-designated agent appointed. The law provides a prioritized list of individuals who may make health care decisions for an individual in such a situation. The list of individuals who may make health care decisions are:

- (a) a Guardian appointed by the Court;
- (b) a spouse or domestic partner;
- (c) a child over the age of 18;
- (d) a parent;
- (e) a sibling over the age of 18; or
- (f) a close friend

The individual in the highest available class may serve to make health care decisions for the individual, and the person making the decisions is called a "surrogate." The surrogate must make health care decisions based on the individual's wishes, if know, or if not know, then in the individual's best interests.

End of Life Decisions

A surrogate may also make decisions regarding end of life care if certain additional requirements are met. End of life care includes the decision to withhold artificial nutrition and hydration, decisions about a respirator, and the decision to request a doctor to issue a *Do Not Resuscitate* or *Do Not Incubate* Order. First, if the individual has expressed a preference with regard to end of life care, either in writing,

or expressed orally during a hospitalization in front of two witnesses, then the individual's wishes must be carried out. If the patient's wishes are not known, a surrogate can consent to the withdrawal of life sustaining measures if (i) the patient is terminally ill or permanently unconscious, and the treatment would be an extraordinary burden or (ii) the patient has an incurable or irreversible condition and the treatment would entail such pain, suffering or other burden that it would reasonably be deemed to be inhumane or excessively burdensome.

Ethics Committees

The law requires all hospitals and nursing homes to have ethics committees to resolve disputes and provide guidance on decisions under the FHCDA. The members of the Ethics Committee must contain at least one physician, one nurse, and one other health or social service practitioner, and at least one member must not have any affiliation with the hospital or nursing home. Disputes typically arise when family members disagree about the decision to withdraw life sustaining treatment, or when a physician disagrees with a family member's decision. Most disputes are resolved through the Ethics Committee, but a dispute may be brought to Court if it cannot be resolved.

Persons with Developmental Disabilities

Health care decisions for individuals with developmental disabilities are governed by a separate law, the *Health Care Decisions Act for Person with Developmental Disabilities*, which has been in effect since March 16, 2003. The law initially only allowed Article 17-A guardians to make health care decisions for persons with developmental disabilities, but was later expanded to include Qualified Family Members, which is similar to the list of individuals under the FHCDA, but does not include domestic partners or close friends. In the absence of a Guardian or a Qualified Family Member, a surrogate decision making committee can make such decisions.

Future Changes to the Law

The Task Force will be looking at expanding the law to cover individuals in the community, not just patients in hospitals and nursing homes, and to expand coverage to patients in hospice care. Currently persons with developmental disabilities and persons with mental illness are covered by separate laws, and the Task Force will look at ways to bring these individuals under the FHCDA.

Planning for Your Health Care Decision Making

So how does the new law affect your health care decision making? While the new law provides a framework for making health care decisions if you have not appointed a health care agent, it does not take away the importance of naming your own agent and putting your wishes in writing. The best practice is to have a Health Care Proxy to name the individuals you want to make your health care decisions for you, and to have a Living Will to put in writing your wishes regarding your medical care and your end of life care. If you have questions about the FHCDA, Health Care Proxies, Living Wills or other legal issues, please contact us at 518-459-2100, 212-661-2480, toll-free 866-951-PLAN or info@pierrolaw.com and we will answer your questions.

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