

Surrogate Decision-Making for Persons Who Lack Capacity –

Rights and Remedies



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This presentation reflects the views of the author, and
not necessarily those of St. Peter's Health Partners

Surrogate Decision-Making



1. The General Patient Population

- The Family Health Care Decisions Act
- The Surrogate Decision-Making Improvement Act

2. People w Developmental Disabilities

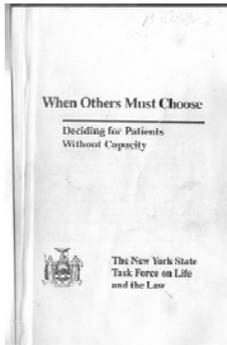
- The Health Care Decisions Act for Mentally Retarded Persons
- Surrogate Decision Making Committees

3. People w Mental Illness

- OMH Regulations

4. Reconciling surrogate decision-making laws and regulations.

1. The General Patient Population



FHCDA - Background

- 1992 - Task Force Report
- 1993 - Bill Introduced
- 1993 to 2010 - Advocacy
- March 2010 - Enacted



1. The General Patient Population

FHCDA - Key Provisions

1. Applicability
2. Determining Incapacity
3. Surrogate Decisions
 - a. Identifying the Surrogate
 - b. Decision-making Standard
 - c. Clinical determinations
4. Patients w/o a Surrogate
5. Oversight
6. Conflict Resolution
 - a. Ethics review committees
 - b. Judicial proceedings

PUBLIC HEALTH LAW § 2994-b

ARTICLE 28-C—FAMILY HEALTH CARE DECISIONS ACT

Section
2994-a. Definitions.
2994-b. Application; priority of advance directives; surrogate decision-making; best and reasonable.
2994-c. Determination of incapacity.
2994-d. Health care decisions for adult patients by surrogate.
2994-e. Decisions about life-sustaining treatment for minor patients.
2994-f. Obligations of attending physician.
2994-g. Health care decisions for adult patients without surrogates.
2994-h. Specific policies for end-of-life care.
2994-i. Reversal of orders.
2994-j. Implementation and review of decisions.
2994-k. Institutional transfer.
2994-l. Ethics review committees.
2994-m. Consensus objection.
2994-n. Inquests.
2994-o. Liability for health care costs.
2994-p. Effect on other rights.
2994-q. Errors preceding authorized court orders; health care decisions for minor patients.
2994-r. Penalties.
2994-s. Repeal.
2994-t. Rights to be published.

§ 2994-a. Definitions

The following words or phrases, used in this article, shall have the following meanings, unless the context otherwise requires:

1. "Adult" means any person who is eighteen years of age or older or has married.
2. "Attending physician" means a physician, selected by or assigned to a patient pursuant to hospital policy, who has primary responsibility for the treatment and care of the patient. Where more than one physician shares such responsibility, or where a physician is acting on the attending physician's behalf, any such physician may act as an attending physician pursuant to this article.
3. "Cardiopulmonary resuscitation" means measures, as specified in regulations promulgated by the commissioner, to restore cardiac function or to support ventilation in the event of a cardiac or respiratory arrest. Cardiopulmonary resuscitation shall not include measures to improve ventilation and cardiac function in the absence of an arrest.

2. Decisions for People with Developmental Disabilities

The Health Care Decisions Act for Mentally Retarded Persons SCPA §1750-b

1. Applicability
2. Determining Incapacity
3. Surrogate Decisions
 - a. Identifying the Surrogate
 - b. Decision-making Standard
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§ 1750-b. Health care decisions for mentally retarded persons

1. Scope of authority. Unless specifically prohibited by the court after consideration of the determination, if any, regarding a mentally retarded person's capacity to make health care decisions, which is required by section seventeen hundred fifty of this article, the guardian of such person appointed pursuant to section seventeen hundred fifty of this article shall have the authority to make any and all health care decisions, as defined by subdivision six of section twenty-nine hundred eighty of the public health law, on behalf of the mentally retarded person that such person could make if such person had capacity. Such decisions may include decisions to withhold or withdraw life-sustaining treatment. For purposes of this section, "life-sustaining treatment" means medical treatment, including cardiopulmonary resuscitation and nutrition and hydration provided by means of medical treatment, which is sustaining life functions and without which, according to reasonable medical judgment, the patient will die within a relatively short time period. Cardiopulmonary resuscitation is presumed to be life-sustaining treatment without the necessity of a medical judgment by an attending physician. The provisions of this article are not intended to permit or promote suicide, assisted suicide or euthanasia; accordingly, nothing in this section shall be construed to permit a guardian to consent to any act or omission to which the mentally retarded person could not consent if such person had capacity.

(a) For the purposes of making a decision to withhold or withdraw life-sustaining treatment pursuant to this section, in the case of a person for whom no guardian has been appointed pursuant to section seventeen hundred fifty or seventeen hundred

2. Decisions for People with Developmental Disabilities

Surrogate Decision Making Committees MHL Art. 80

1. Applicability
2. Procedure
3. SDMC Decisions
 - a. Consent to Treatment
 - b. Life-Sustaining Treatment Decisions



Background

New York State SDMC Regulations
MHL Article 80
History and Development
Voluntary Provision

Background

Persons with mental disabilities who reside or once resided in facilities or programs licensed, operated, or funded by the New York State Department of Mental Hygiene sometimes require major medical and dental treatment. In some instances, they lack the capacity to make an informed decision for the proposed major medical treatment.

Additionally, in many cases, they don't have a family member or guardian who is legally authorized and willing to make the important decision on their behalf.

When a true medical emergency exists, New York State law allows physicians to provide these individuals emergency treatment without waiting for consent. If the proposed major medical procedure is not of an emergency nature, and there is no one authorized and willing to provide informed consent or refuse treatment on behalf of the patient, the option to obtaining a court order for treatment. That process is sometimes expensive, impersonal and time-consuming, and often results in a delay in obtaining needed medical services for the patient.

Surrogate Decision-Making Committees (SDMC) are an alternative approach to the court system for obtaining an informed decision about major medical treatment and are intended to provide a quicker, more easily accessible, consistent and personalized decision on behalf

3. Decisions for People with Mental Illness

Settings:

- A. People with mental illness in the community
- B. People with mental illness in:
 - 1) psychiatric hospitals
 - 2) psychiatric units of general hospitals
 - 3) Med/surg units of general hospitals who have not been discharged from psych hospitals or units.

Decisions

- A. Surgery – 14 NYCRR §27.9.
- B. Psychotropic medication 14 NYCRR §527.8
- C. Life-Sustaining Treatment
 - 1) DNR orders – PHL Art 29-B
 - 2) Other LST decisions

4. Reconciling Surrogate Decision-Making Laws and Regs

The “Carve Out”:

In a hospital or nursing home, if a patient lacks capacity, the FHCDL will not apply if:

- The patient has a court-appointed SCPA 17-A guardian
- The decision *could* be made by a surrogate or SDMC per SCPA §1750-b.
- The decision *could* be made per the Mental Hygiene Law or OPWDD regs.

PUBLIC HEALTH LAW § 2994-b

ARTICLE 29-C—FAMILY HEALTH CARE DECISIONS ACT

Section
 2994-a. Definitions.
 2994-b. Application; priority of advance directives; surrogate decision-making law and regulations.
 2994-c. Determination of incapacity.
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 2994-h. Specific policies for end-of-life care.
 2994-i. Revocation of consent.
 2994-j. Implementation and review of decisions.
 2994-k. Institutional transfer.
 2994-l. Ethics review committees.
 2994-m. Consensus objectives.
 2994-n. Immunity.
 2994-o. Liability for health care costs.
 2994-p. Effect on other rights.
 2994-q. Federal preemption authorized; court orders; health care guardian for other states.
 2994-r. Short title.
 2994-s. Repeal.
 2994-t. Rights to be published.

§ 2994-a. Definitions

The following words or phrases, used in this article, shall have the following meanings, unless the context otherwise requires:

1. "Adult" means any person who is eighteen years of age or older or has married.
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4. Reconciling Surrogate Decision-Making Laws and Regs

The "Carve Out":

In a hospital or nursing home, if a patient has a developmental disability and lacks capacity, the FHCDA will not apply if:

- The patient has a court-appointed SCPA 17-A guardian
- The decision could be made by a surrogate or SDMC per SCPA §1750-b.
- The decision could be made per the Mental Hygiene Law or OPWDD regs.

Example 1

- Adult w develop'l disability
- Lives with family
- Lacks capacity
- **Has 17-A guardian.**

Admitted to hospital and needs bypass surgery.

SCPA Art. 17-A applies – Guardian makes the decision.

4. Reconciling Surrogate Decision-Making Laws and Regs

The "Carve Out":

In a hospital or nursing home, if a patient has a developmental disability and lacks capacity, the FHCDA will not apply if:

- The patient has a court-appointed SCPA 17-A guardian
- The decision could be made by a surrogate or SDMC per SCPA §1750-b.
- The decision could be made per the Mental Hygiene Law or OPWDD regs.

Example 2

- Adult w develop'l disability
- Lives with family
- Lacks capacity
- **No 17-A guardian.**

Admitted to hospital and needs bypass surgery.

FHCDA applies – Close relative makes the decision.

4. Reconciling Surrogate Decision-Making Laws and Regs

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In a hospital or nursing home, if a patient has a developmental disability and lacks capacity, the FHCDA will not apply if:

- The patient has a court-appointed SCPA 17-A guardian
- The decision could be made by a surrogate or SDMC per SCPA §1750-b.
- The decision could be made per the Mental Hygiene Law or OPWDD regs.

Example 3

- Adult w develop'l disability
- Lives with family
- Lacks capacity
- **No 17-A guardian**

Admitted to hospital; issue is whether to enter DNR order.

SCPA Art. 1750-b applies –

- Involved family member makes the decision.
- MHLS gets notice.

4. Reconciling Surrogate Decision-Making Laws and Regs

When an incapable patient with a developmental disabilities is admitted to a hospital or nursing home, it is very difficult for health care personnel to figure out which law or regulation applies.

Reconciling the Family Health Care Decisions Act
 Surrogate Decision Making for Incapable Adult Patients with Developmental Disabilities:
 A Chart of Applicable Laws and Regulations

	Situations in Hospitals and Nursing Homes	
	A	B
	Consent for treatment	Decision to withdraw or withhold life-sustaining treatment (including entering a code status)
1 Patient, previously when capable, still gives written or oral directions	Follow patient's prior oral or written directions*	Follow patient's prior written directions or oral patient's prior oral directions or made during hospitalization before now in hospital*
2 Patient, previously when capable, appointed health care agent*	Health care agent decision per FHL 2142*	Health care agent decision per FHL 2142*
3 Patient has a court-appointed guardian per SCPA Art. 17A4*	Guardian decision per SCPA §17A42*	Guardian decision per SCPA §17A42*
4 Patient resides in community facility and is OPWDD licensed resident and has interested family*	Surrogate decision per FHL 2142*	Interested family member decision per SCPA §17A42* (If prohibited by OPWDD policy, consider decision in FHL 2142, which governs in these kinds of situations.)
5 Patient resides in community facility and is OPWDD licensed resident but has no interested family*	Surrogate decision per FHL 2142*	None decision per FHL 2142*
6 Patient resides in OPWDD licensed or approved facility in accordance with FHL 2142 and has interested family*	Interested family member decision per FHL 2142*	Interested family member decision per FHL 2142* (The provisions of OPWDD policy, which govern in these kinds of situations, do not apply.)
7 Patient resides in OPWDD licensed or approved facility, in compliance with the request in FHL 2142 and has interested family*	SDMC decision per FHL 2142*	None decision per FHL 2142*

* Applies only if no other above it applies.

4. Reconciling Surrogate Decision-Making Laws and Regs

The Legislature directed the NYS Task Force on Life and the Law to consider amending the FHCDA:

“to incorporate procedures, standards and practices for decisions about the withdrawal or withholding of life-sustaining treatment from patients with mental illness or mental retardation or developmental disabilities, and from patients residing in mental health facilities.”

4. Reconciling Surrogate Decision-Making Laws and Regs

The Legislature directed the NYS Task Force on Life and the Law to:

- Form a 12-person special advisory committee
- Composition
 - 6 Task Force members
 - 3 persons selected by the OMH
 - 3 persons selected by OPWDD
- Have the committee solicit comments from a broad range of interested persons.

4. The Surrogate Decision-Making Improvement Act

1. Repeal PHL Art. 29-B - DNR in MH Facilities
2. Determining incapacity: Special qualifications re developmental disabilities or mental illness would be limited to life-sustaining treatment cases, where the patient lacks capacity as a result of the developmental disability or mental illness
3. Confirm the right of develop'ly disabled persons who have capacity make advance directives

STATE OF NEW YORK
2011-2012 REGULAR SESSION
IN ASSEMBLY
April 29, 2011

Introduced by M. of A. GOTTFRID -- read once and referred to the Committee on Health

AN ACT to amend the public health law and the surrogate's court procedure act, in relation to orders not to resuscitate for residents of mental hygiene facilities; making technical, clarifying and nonsubstantive amendments regarding health care orders and orders, including provisions relating to health care facilities for people with developmental disabilities; and to amend article 29-B of the public health law relating to orders not to resuscitate for residents of mental hygiene facilities

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. ARTICLE 29-B of the public health law is REPEALED.

§ 2. Subsections 4 and 5 of section 29-B of the public health law, subdivision 4 as added by chapter 712 of the laws of 1997, subdivision 11 as amended by chapter 15 of the laws of 1997, are amended and a new subdivision 4-a is added to read as follows:

4. "Health care means any treatment, service or procedure to diagnose or treat an individual's physical or mental condition. EXCEPT WHERE SHOWN OR INDICATED OTHERWISE, WITHOUT REFERENCE TO MEDICAL TREATMENT, IT DOES NOT INCLUDE HEALTH CARE UNDER THIS ARTICLE AND IS NOT SUBJECT TO THIS ARTICLE.

4-a. "Mental hygiene facility" means a residential facility, including family care homes, operated or licensed by the office of mental health or the office of health services and for people with developmental disabilities.

REPEALMENT--Article 29-B (articles 29-B) is now vacant in Senate and Assembly and law to be omitted. SEC. 29-B

4. The Surrogate Decision-Making Improvement Act

7. Specify medical futility as a basis for a DNR order
8. Eliminate need for SDMC in medical futility DNR cases
9. Modify role of MHLS when it receives notice of a DNR order:
 - If attending provides MHLS with support for the order, then MHLS cannot halt the order without asserting a procedural or clinical reason.

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