

## Memorandum in Support with Modifications Elder Law Section

Elder #3

May 10, 2011

A. 7343

By: M. of A. Gottfried  
Assembly Committee: Health  
Effective Date: 90<sup>th</sup> day after it shall have  
become a law

**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 coordinating amendments regarding health care agents and proxies, amending provisions relating to health care decisions for people with developmental disabilities; and to repeal article 29-B of the public health law relating to orders not to resuscitate for residents of mental hygiene facilities

**LAW AND SECTION REFERRED TO:** Article 29-B of the public health law.

### **THE ELDER LAW SECTION SUPPORTS THIS LEGISLATION WITH MODIFICATIONS**

The Elder Law Section of the New York State Bar Association **SUPPORTS** Assembly Bill A.7343, the Surrogate Decision-Making Improvements Act (hereafter "SDMIA"), with the following **MODIFICATIONS**:

1. The Health Care Proxy Form should be amended to clarify that the agent can act in the principal's best interests if the principal's wishes are not reasonably known and cannot with reasonable diligence be ascertained. Accordingly, Public Health Law subdivision 5.(d) of § 2981 should be amended as follows:

"(d) A health care proxy may, but need not, be in the following form:

#### Health Care Proxy

I (name of principal) hereby appoint (name, home address and telephone number of agent) as my health care agent to make any and all health care decisions for me, except to the extent I state otherwise.

This health care proxy shall take effect in the event I become unable to make my own health care decisions.

NOTE: Although not necessary, and neither encouraged nor discouraged, you may wish to state instructions or wishes, and limit your agent's authority. ~~Unless your agent knows your wishes about artificial nutrition and hydration, your agent will not have authority to decide about artificial nutrition and hydration.~~ If your wishes are not reasonably known, and cannot with reasonable diligence be ascertained, then your agent

shall make health care decisions in accordance with your best interests. If you choose to state instructions, wishes, or limits, please do so below:

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I direct my agent to make health care decisions in accordance with my wishes and instructions as stated above or as otherwise known to him or her. I also direct my agent to abide by any limitations on his or her authority as stated above or as otherwise known to him or her.

In the event the person I appoint above is unable, unwilling or unavailable to act as my health care agent, I hereby appoint (name, home address and telephone number of alternate agent) as my health care agent.

I understand that, unless I revoke it, this proxy will remain in effect indefinitely or until the date or occurrence of the condition I have stated below:

(Please complete the following if you do NOT want this health care proxy to in effect indefinitely):

This proxy shall expire: (Specify date or condition)

Signature:

Address:

Date:

I declare that the person who signed or asked another to sign this document is personally known to me and appears to be of sound mind and acted willingly and free from duress. He or she signed (or asked another to sign for him or her) this document in my presence and person signed in my presence. I am not the person appointed as agent by this document.

Witness:

Address:

Witness:

Address:"

2. The Elder Law Section proposes further amendments to the Public Health Law §2981, §2982 and §2983 in relation to the authority of the agent to act outside of a hospital setting to make decisions regarding the transport of the principal to a particular medical setting when the principal is unconscious or unresponsive and there is no major medical trauma.

Many senior citizens and legal practitioners believe that a properly prepared and executed health care proxy can be used immediately when the need arises. In particular, many legal practitioners and seniors believe that the health care agent's authority to act is comprehensive in all settings, including outside of a hospital or other medical health facility. However, a federal court decision in Stein vs. County of Nassau, et al (Eastern District, (06-cv-5522-JS-WDW) 7/23/09) outlined, inter alia, the limitations on the authority of the health care agent to make decisions, including the decision to transport the principal to a particular hospital or other medical institutional setting, when the decision is made outside of a hospital setting. The federal court held that if the principal

is nonresponsive and not in major medical trauma, the health care proxy is valid outside of a hospital and institution **but that PHL section 2982 imposes restrictions on the agent's health care decision making authority. Specifically, that there is a procedural requirement that the agent first consult with one of listed professionals in the statute before a health care decision, including transport to a particular medical facility, may be made.**

The following specific changes to the Public Health Law are proposed:

(a) Amend subdivision 4 of § 2981 as follows: “Commencement of agent's authority. The agent's authority shall commence upon a determination, made pursuant to subdivision one of section two thousand nine hundred eighty-three of this article, that the principal lacks capacity to make health care decisions or if the principal is not found within a hospital, mental hygiene facility or residential health care facility and is in an unconscious or unresponsive state.”

(b) Amend subdivision 2 of § 2982 as follows: “2. Decision-making standard. After consultation with a licensed physician, registered nurse, physician assistant, licensed psychologist, licensed master social worker, or a licensed clinical social worker, the agent shall make health care decisions: (a) in accordance with the principal's wishes, including the principal's religious and moral beliefs; or (b) if the principal's wishes are not reasonably known and cannot with reasonable diligence be ascertained, in accordance with the principal's best interests; ~~provided, however, that if the principal's wishes regarding the administration of artificial nutrition and hydration are not reasonably known and cannot with reasonable diligence be ascertained, the agent shall not have the authority to make decisions regarding these measures. Where the principal is unconscious or unresponsive and is not found within a hospital, mental hygiene facility or a residential health care facility, the agent shall make decisions limited to placement in a hospital, mental hygiene facility, residential health care facility or to the choice of health care provider pursuant to § 2982.2(a) and (b) without consultation with a licensed physician, registered nurse, licensed psychologist, licensed master social worker, or a licensed clinical social worker.~~”

(c) Amend subdivision 1(a) of § 2983 as follows: “1. [Determination] Initial determination by attending physician. (a) An initial determination that a principal lacks capacity to make health care decisions shall be made by the attending physician to a reasonable degree of medical certainty. The determination shall be made in writing and shall contain such attending physician's opinion regarding the cause and nature of the principal's incapacity as well as its extent and probably duration. The determination shall be included in the patient's medical record. ~~For a decision to withdraw or withhold life sustaining treatment, the attending physician who makes the determination that a principal lacks capacity to make health care decisions must consult with another physician to confirm such determination. Such consultation shall also be included within the patient's medical record. A physician who has been appointed as a patient's agent shall not make the determination of the patient's capacity to make health care decisions. No determination by the physician shall be required where the principal is found outside of a hospital, mental hygiene facility or residential health care facility and the principal is unconscious or unresponsive as there shall be a presumption of incapacity for the limited purpose of empowering the health care agent to make health care decisions in regard to the principal's placement in a hospital, mental hygiene facility, residential health care facility or choosing a health care provider.~~

For the foregoing reasons, the Elder Law Section **SUPPORTS THIS LEGISLATION WITH MODIFICATIONS.**<sup>1</sup>

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<sup>1</sup> The subject modifications were approved by the Association's Executive Committee on April 1, 2011.