

The Family Health Care Decisions Act: A Summary of Key Provisions

By Robert N. Swidler

On March 16, 2010, Governor Paterson signed into law the Family Health Care Decisions Act (FHCDA).¹ The FHCDA establishes the authority of a patient's family member or close friend to make medical treatment decisions for the patient in the event the patient lacks capacity to make such decisions personally, and did not previously make such decisions or appoint a health care agent.

Key provisions of the FHCDA are summarized below. However, the new law is detailed, and this summary does not cover all its provisions.

In sum, the FHCDA:

Applicability

Applies to decisions for incapable patients in general hospitals and residential health care facilities (nursing homes).² The term "hospital" is used to apply to both those settings.³

- Does not apply to decisions for incapable patients:
 - who have a health care agent;⁴
 - who have a court-appointed guardian under SCPA 1750-b;⁵
 - for whom decisions about life-sustaining treatment may be made by a family member or close friend under SCPA 1750-b;⁶
 - for whom treatment decisions may be made pursuant to OMH or OMRDD surrogate decisionmaking regulations.⁷

Determining Incapacity

- Sets forth a hospital-based process to determine that a patient lacks decisional capacity for purposes of the FHCDA.⁸
- Requires special credentials for professionals for determining that the patient lacks capacity as a result of mental retardation or mental illness.⁹
- Requires that the patient and prospective surrogate be informed of the determination of incapacity.¹⁰
- Requires additional notifications for patients from mental hygiene facilities.¹¹
- Provides that if the patient objects to the determination of incapacity, or the choice of surrogate, or the surrogate's decision, the patient's objection prevails

unless a court find that the patient lacks capacity, or another legal basis exists for overriding the patient's decision.¹²

Decisions for Adult Patients by Surrogates

- Sets forth, in order of priority, the persons who may act as a surrogate decisionmaker for the incapable patient, i.e.:¹³
 - an MHL Article 81 court-appointed guardian (if there is one);
 - the spouse or domestic partner (as defined in the FHCDA);
 - an adult child;
 - a parent;
 - a brother or sister;
 - a close friend.
- Grants the surrogate authority to make all health care decisions for the patient that the adult patient could make for himself or herself, subject to certain standards and limitations.¹⁴
- Provides that a surrogate's consent is not required if the patient already made a decision about the proposed health care, expressed orally or in writing or, with respect to a decision to withdraw or withhold life-sustaining treatment expressed either orally during hospitalization in the presence of two witnesses or in writing.¹⁵
- Requires the surrogate to decide about treatment based on the patient's wishes, including the patient's religious and moral beliefs, or, if the patient's wishes are not reasonably known and cannot with reasonable diligence be ascertained, based on the patient's best interests.¹⁶
- Authorizes surrogate decisions to withhold or withdraw life-sustaining treatment if the treatment:
 - would be an extraordinary burden to the patient and the patient is terminally or permanently unconscious, or
 - if the patient has an irreversible or incurable condition and the treatment would involve such pain, suffering or other burden that it would

reasonably be deemed inhumane or excessively burdensome under the circumstances.¹⁷

- Inasmuch as the definition of life-sustaining treatment includes decisions about resuscitation, this standard would apply to a surrogate decision to enter a DNR order as well.¹⁸

Decisions for Minor Patients

- Authorizes the parent or guardian of a minor patient to decide about life-sustaining treatment, in accord with the same standards that apply to surrogate decisions for adults.¹⁹
- Requires the parent or guardian to make the decision in accordance with the minor's best interests, taking into account the minor's wishes as appropriate under the circumstances.²⁰
- If the attending physician determines that the minor has the capacity to decide about life-sustaining treatment, requires the minor's consent to withhold or to stop treatment.²¹
- If there is another parent who is unaware of the decision, requires an attempt to inform such parent of the decision.²²
- Allows a physician to accept a life-sustaining treatment decision by an emancipated minor without parental consent, although a decision by the minor to forgo such treatment requires ethics review committee approval.²³

Decisions for Adult Patients Without Surrogates

- Establishes a procedure for making health care decisions, other than life-sustaining treatment decisions, for adult patients who have lost decision-making capacity and have no available family member or friend to act as a surrogate.²⁴
- Requires hospitals, after a patient is admitted, to determine if the patient has a health care agent, guardian, or a person who can serve as the patient's surrogate. If the patient has no such person, and lacks capacity, the hospital must identify, to the extent practical, the patient's wishes and preferences about pending health care decisions.²⁵
- Authorizes the attending physician to decide about routine medical treatment for patients without surrogates.²⁶
- For decisions about major medical treatment, the attending physician must consult with other health care professionals directly involved with the patient's care and a second physician selected by the hospital or nursing home must concur in the decision.²⁷

- A decision to withdraw or withhold life-sustaining treatment can be made either (a) by a court, in accordance with the FHCDA surrogate decisionmaking standards, or (b) if the attending physician and a second physician determine that the treatment offers the patient no medical benefit because the patient will die imminently, even if the treatment is provided, and the provision of the treatment would violate accepted medical standards.²⁸

Other FHCDA Provisions

- Requires hospitals and nursing homes to establish or participate in an ethics review committee that meets certain standards (e.g., multidisciplinary membership).²⁹
- The committee would provide advice upon request or in the event of disputes, and review certain sensitive surrogate decisions.³⁰
- Sets forth the right of private hospitals and individual health care providers to refuse, on grounds of moral or religious conscience, to honor health care decisions made pursuant to the FHCDA, subject to limits and requirements (e.g., the facility must notify patients of its policy prior to admission, and promptly transfer responsibility for the patient to another health care professional willing to honor the decision.)³¹
- Protects surrogates, health care providers and ethics committee members from civil and criminal liability for acts performed in good faith pursuant to the FHCDA.³²
- Provides that liability for the cost of health care provided to an adult patient under the FHCDA is the same as if the patient had consented to treatment.³³
- Establishes that the FHCDA does not:
 - expand or diminish any authority an individual may have to express health care decisions for himself or herself;³⁴
 - affect existing law concerning implied consent to health care in an emergency;³⁵
 - permit or promote suicide, assisted suicide, or euthanasia;³⁶
 - diminish the duty of parents to consent to treatment for minors.³⁷
- Provides that a hospital or attending physician that refuses to honor a health care decision made by a surrogate in accord with the standards set forth in the FHCDA is not be entitled to compensation for treatment provided without the surrogate's consent, except under specified circumstances.³⁸

Resuscitation-related Provisions

- Eliminates much of New York's DNR Law as applied to hospitals, and provides for DNR decision-making in hospitals in accordance with the standards and procedures in the FHCDA.³⁹
- Creates a new PHL Article 29-CCC as a place to retain (with some modifications) existing provisions on nonhospital DNR orders.⁴⁰
- Obligates home care agency staff and hospice staff to honor nonhospital DNR orders (previously, nonhospital DNR orders were directed only to emergency medical services and hospital personnel).⁴¹
- Renames the former DNR law, PHL Article 29-B, as "Orders Not to Resuscitate for Residents of Mental Hygiene Facilities" in order to preserve existing authorization for and rules regarding DNR orders in those settings.⁴²

Health Care Proxy Law Amendments

- Amends the Health Care Proxy Law:
 - to require provider, when an agent directs the provision of life-sustaining treatment, either to provide the treatment, transfer the patient, or seek judicial review,⁴³
 - to adopt the FHCDA provisions regarding institutional and health care provider conscience provisions.⁴⁴

Conforming Amendments to MHL Article 81 and the Health Care Decisions Act (SCPA 1750-b)

- Authorizes an MHL Article 81 guardian of the person to act as a surrogate under the FHCDA for decisions in hospitals.⁴⁵
- Repeals provisions in MHL Article 81 that restrict the authority of a guardian to make life-sustaining treatment decisions.⁴⁶
- Amends the Health Care Decisions Act for Mentally Retarded Persons (SCPA 1750-b) to insert a definition of "life-sustaining treatment" (because previously it referred to a definition in MHL Article 81 which will be repealed).⁴⁷
- Amends the Health Care Decisions Act to allow the Willowbrook Consumer Advisory Board to act as the HCDA guardian for class members.⁴⁸

Task Force Special Committees

- Directs the NYS Task Force on Life and the Law to create a special committee, with half of its members appointed by OMRDD and OMH, to provide

advice on standards and procedures for surrogate decisionmaking for persons with MR/DD, and persons in mental health facilities.⁴⁹

- Directs the NYS Task Force on Life and the Law to make recommendations on extending FHCDA decisionmaking standards and procedures to other settings, such as physicians' offices and home care.⁵⁰

Effective Date

- Hospitals are required to implement the FHCDA by June 1, 2010, but effective immediately hospitals are *permitted* to adopt and follow policies that are consistent with the FHCDA standards and procedures.⁵¹

Endnotes

1. Chapter 8, Laws of 2010, adding N.Y. Public Health Law Article 29-CC ("The Family Health Care Decisions Act") and amending various other laws.
2. N.Y. Public Health Law §2994-b.1.
3. *Id.*, §2994-a.16.
4. *Id.*, §2994-b.2.
5. *Id.*, §2994-b.3(a).
6. *Id.*, §2994-b.3(b).
7. *Id.*, §2994-b.3(c).
8. *Id.*, §2994-c.
9. *Id.*, §2994-c.3(c).
10. *Id.*, §2994-c.4(a), (b).
11. *Id.*, §2994-c.4(c).
12. *Id.*, §2994-c.6.
13. *Id.*, §2994-d.1.
14. *Id.*, §2994-d.3(i).
15. *Id.*, §2994-d.3(ii).
16. *Id.*, §2994-d.4.
17. *Id.*, §2994-d.5.
18. *Id.*, §2994-a.19.
19. *Id.*, §2994-e.1.
20. *Id.*, §2994-e.2(a).
21. *Id.*, §2994-e.2(b).
22. *Id.*, §2994-e.2(c).
23. *Id.*, §2994-e.3.
24. *Id.*, §2994-g.
25. *Id.*, §2994-g.1.
26. *Id.*, §2994-g.3.
27. *Id.*, §2994-g.4.
28. *Id.*, §2994-g.5.
29. *Id.*, §2994-m.
30. *Id.*, §2994-m.2.
31. *Id.*, §2994-n.
32. *Id.*, §2994-o.
33. *Id.*, §2994-p.

34. *Id.*, §2994-q.1.
35. *Id.*, §2994-q.2.
36. *Id.*, §2994-q.3.
37. *Id.*, §2994-q.4.
38. *Id.*, §2994-s.
39. See Chapter 8, Laws of 2010, §4, which amends N.Y. Public Health Law Article 29-B the DNR law to make it applicable only to mental hygiene facilities. See also new N.Y. Public Health Law §2994-a.19, which defines “life-sustaining treatment” to include cardiopulmonary resuscitation. See also FHCDA §4, which amends N.Y. Public Health Law Article 29-B (the DNR law) to make it applicable only to mental hygiene facilities.
40. Chapter 8, Laws of 2010, §2, adding N.Y. Public Health Law Article 29-CCC Nonhospital Orders Not to Resuscitate.
41. N.Y. Public Health Law §2994-ee.
42. *See* note 39.
43. Chapter 8, Laws of 2010, §23, amending N.Y. Public Health Law §2984.3.
44. Chapter 8, Laws of 2010, §23, adding N.Y. Public Health Law §2984.5.
45. Chapter 8, Laws of 2010, §25, amending N.Y. Mental Health Law §81.22.8.
46. Chapter 8, Laws of 2010, §25, repealing N.Y. Mental Health Law §81.22.9(e).
47. Chapter 8, Laws of 2010, §27, amending N.Y. Surrogate’s Court Procedure Act §1750-b.
48. Chapter 8, Laws of 2010, §27, amending N.Y. Surrogate’s Court Procedure Act §1750-b.
49. Chapter 8, Laws of 2010, §28.1.
50. Chapter 8, Laws of 2010, §28.2.
51. Chapter 8, Laws of 2010, §29.

Robert N. Swidler is General Counsel to Northeast Health, a not-for-profit health care system in New York’s Capital Region. Mr. Swidler is also Editor of the NYS Bar Association *Health Law Journal*. Previously, Mr. Swidler was Assistant Counsel to Governor Mario M. Cuomo, Counsel to the NYS Office of Mental Health and Staff Counsel to the NYS Task Force on Life and the Law.