

Memorandum in Opposition

ELDER LAW SECTION

Elder # 5

May 15, 2013

S. 4922

By: Senator Savino

A. 619

By: M. of A. Rosenthal

Senate Committee: Health

Assembly Committee: Health

Effective Date: 90th day after becoming law

AN ACT to amend the public health law, in relation to witnesses to a health care proxy and to amend the penal law, in relation to the crime of forgery in the second degree.

LAW AND SECTION REFERRED TO: Paragraph (a) of subdivision 2 of section 2981 of the public health law.

THE ELDER LAW SECTION OPPOSES THIS LEGISLATION

The Elder Law Section of the New York State Bar Association opposes this bill, which amends Section 2981(2)(a) of the Public Health Law to require that only one adult witness be present at the signing of the Health Care Proxy, with the exception of persons residing in a mental hygiene facility licensed by the State, who will be required to sign Health Care Proxies in the presence of two adult witnesses. The Elder Law Section opposes the bill for the following reasons:

A Health Care Proxy is an important legal document which grants an agent the authority to make health care decisions regarding a person's medical care, including the possibility of withholding artificial nutrition and hydration. The execution requirements of a document as important as the Health Care Proxy that grants authority over a person's medical care should be held to a higher standard. A Last Will and Testament which disposes of assets requires two witnesses and a Power of Attorney form requires that a Notary Public acknowledge the principal's signature and, if gift giving powers are granted, then two witnesses must also sign the Power of Attorney. The execution of a Health Care Proxy which grants authority over a person's medical care and treatment, including decisions which could result in death, should be held to a higher standard than requiring just one witness.

This bill would provide added protection for those persons residing in mental health facilities operated and licensed by New York State by requiring the Health Care Proxy to be signed in the presence of two witnesses. Unfortunately, there are many other people with dementia or other incapacities who are vulnerable to exploitation, yet do not fall within this carved out exception. The requirement of two witnesses for the execution of the Health Care Proxy is because it is an appropriate safeguard to ensure that the person signing the Health Care Proxy is competent and knowingly understands and willingly signs the document.

The justification for the bill states that the amendment would “streamline” the process of completing a Health Care Proxy form. We believe that the goal of streamlining the execution process is inappropriate and misguided. There is no empirical evidence to demonstrate that the requirement of one witness instead of two witnesses will simplify the execution process or increase the number of people executing Health Care Proxies.

For the reasons stated above, the Elder Law Section of the New York State Bar Association **OPPOSES** this bill, which would require that only one adult witness be present at the signing of a Health Care Proxy.

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