**Surrogate Decision Making for Incapable Adult Patients**

**Who are Intellectually Disabled**

**A Chart of Applicable Laws and Regulations***Updated December 2020*

|  |  |  |  |
| --- | --- | --- | --- |
|  | ***Follow the rules in the first row***  ***that applies:*** | **Decisions in Hospitals and Nursing Homes** | |
|  |  | **A**  **Consent to treatment** | **B**  **Decision to withdraw or withhold  life-sustaining treatment (including**  **entering a DNR Order)** |
| 1 | **Patient, previously when**  **capable, left prior written or oral directions** | Follow patient’s prior oral or written directions[[1]](#endnote-1) | Follow:  (i) patient’s prior written directions, or  (ii) patient’s prior oral directions if made during hospitalization before two  witnesses[[2]](#endnote-2) |
| 2\* | **Patient, previously when**  **capable, appointed health care**  **agent\*** | Health care agent  decides per PHL 29-C[[3]](#endnote-3) | Health care agent decides per PHL 29-C[[4]](#endnote-4) |
| 3\* | **Patient has a court-appointed**  **guardian per SCPA Art. 17-A\*** | Guardian decides per  SCPA §1750-b[[5]](#endnote-5) | Guardian with health care decision-making authority decides per SCPA §1750-b[[6]](#endnote-6) |
| 4\* | **Patient resides in community**  **(and not an OPWDD-licensed**  **residence) and has involved**  **family\*** | Surrogate decides per  FHCDA[[7]](#endnote-7) | Involved family member decides per SCPA §1750-b.[[8]](#endnote-8) The prioritized list of qualified  family member is set forth in 14 NYCRR §633.10(a)(7)(iv)(c). Note—A domestic partner or close friend would not qualify.[[9]](#endnote-9) |
| 5\* | **Patient resides in community**  **(and not an OPWDD-licensed**  **residence) but has no involved**  **family\*** | Surrogate Decision  Making Committee  (SDMC) decides per  MHL Art. 80[[10]](#endnote-10) | SDMC decides per SCPA §1750-b[[11]](#endnote-11) |
| 6\* | **Patient resides in OPWDD licensed or operated facility, is**  **temporarily in a hospital or NH,**  **and has involved family\*** | Involved family  member decides per  14 NYCRR §633.11[[12]](#endnote-12) | Involved family member decides per SCPA  §1750-b. The prioritized list of qualified  family member is set forth in 14 NYCRR  §633.11(a)(7)(iv)(c).[[13]](#endnote-13) Note—A domestic  partner or close friend would not qualify. |
| 7\* | **Patient resides in OPWDD licensed or operated facility, is**  **temporarily in the hospital or**  **NH, but has no involved family\*** | SDMC decides per  14 NYCRR §633.11 | SDMC decides per SCPA §1750-b.[[14]](#endnote-14) |

\* Applies only if no row above it applies.

Endnotes

1. It would seem that the designation of a surrogate (whether under SCPA §1750-b, 10 NYCRR §633.11 or the FHCDA) is not necessary if the incapable person, previously when capable, personally consented to the treatment. [↑](#endnote-ref-1)
2. It would seem that the designation of a surrogate (whether under SCPA §1750-b, 10 NYCRR §633.11 or the FHCDA) is not necessary if the incapable person, previously when capable, left clear and convincing evidence of a wish to forgo treatment under the circumstances presented. The FHCDA, in PHL §2994-d.3(a)(ii), provides rules as to the type of evidence that would suffice. [↑](#endnote-ref-2)
3. NY PHL §2982. [↑](#endnote-ref-3)
4. NY PHL §2982. [↑](#endnote-ref-4)
5. NY SCPA §1750-b.1. [↑](#endnote-ref-5)
6. NY SCPA §1750-b.1. [↑](#endnote-ref-6)
7. NY SCPA §1750-b is inapplicable because its non-court process for authorizing an involved family member, Consumer Advisory Board or SDMC to act as a “guardian” is limited to decisions to withdraw or withhold life-sustaining treatment. See §1750-b.1(a). When a health care decision for the patient cannot be made pursuant to the SCPA or Mental Hygiene Law or regulations, the FHCDA becomes applicable. NY PHL §2994-b.4. Accordingly, the FHCDA becomes applicable, and a FHCDA surrogate can consent to such treatment per PHL §2994-d. [↑](#endnote-ref-7)
8. NY SCPA §1750-b(a) applies because its non-court process for authorizing a family member to act as guardian applies to decisions to withdraw or withhold life-sustaining treatment. See §1750-b.1(a). Qualified family members are identified in 14 NYCRR §§633.11(a)(7)(iv)(c). [↑](#endnote-ref-8)
9. The OPWDD surrogate list promulgated pursuant to NY SCPA §1750-b(a) does not provide for the authorizing of a “close friend” to act as “guardian.” See 14 NYCRR §633.10(a)(7)(iv)(c). However, NY SCPA §1750-b.1(a) provides that when no other surrogate is available, the MHL Article 80 SDMC may act as guardian for purposes of making the withdrawal or withholding of treatment decision. [↑](#endnote-ref-9)
10. Most patients with developmental disabilities and who do not a have a guardian or family will qualify for decisions by an SDMC. See MHL §80.3(b).3 (definition of “patient in need of surrogate decision-making”). Moreover, once a person is eligible for decisions by an SDMC, the person remains eligible regardless of a change in residential status. MHL §80.03(b). As a result, the FHCDA provisions on consent for patients without surrogate generally are not applicable. See §2994-b.3(c). In the relatively rare event where SDMC lacks jurisdiction for a patient, the FHCDA would apply. [↑](#endnote-ref-10)
11. Per NY SCPA §1750-b.1(a), when no other surrogate is available, the MHL Article 80 SDMC may act as guardian for purposes of making the withdrawal or withholding of treatment decision. [↑](#endnote-ref-11)
12. 14 NYCRR §633.11 provides surrogate decision-making rules for persons who are “residents of a facility operated or certified by OPWDD.” Such persons, when hospitalized, are still residents of OPWDD facilities and subject to this regulation. [↑](#endnote-ref-12)
13. 14 NYCRR §633.10 implements SCPA 1750-b for residents of OPWDD-licensed and operated facilities. [↑](#endnote-ref-13)
14. See n.8 [↑](#endnote-ref-14)