



# ALBANY LAW SCHOOL

## GOVERNMENT LAW CENTER

### EXPLAINER

## Healthcare Proxies: Appointing People with the Power to Make Healthcare Decisions for Others

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*The Government Law Center's explainers concisely map out the law that applies to important questions of public policy. January 27, 2020.*

### Introduction

Competent adults have the right to decide what medical treatment they want.<sup>1</sup> While a physician might believe a certain treatment is desirable or necessary, the law does not permit the physician to override the patient's wishes. The physician has a duty not only to defer to the patient's choice, but to facilitate that choice by informing the patient of the important risks of, and plausible alternatives to, a proposed treatment.<sup>2</sup> The patient should make a decision only after the physician has given the patient enough information about the proposed treatment to give informed consent.<sup>3</sup>

The law describes informed consent as making a knowledgeable evaluation based on the health-care professional's disclosure of alternatives to the treatment and the "reasonably foreseeable risks and benefits involved."<sup>4</sup> The need for informed consent

is underscored by the fact that all healthcare institutions serving Medicare or Medicaid patients are required to inform adult patients of their rights under state law to make decisions about their medical care.<sup>5</sup>

While the discussion of treatment information between physician and patient may seem relatively straightforward, difficulties arise when patients are rendered temporarily or permanently incapable of processing relevant information, or are unable to communicate a decision because of physical conditions such as quadriplegia or paralysis.

Over the past several years, the New York Legislature has adopted rules that allow third parties—surrogate decision makers—to consent or refuse treatment decisions on behalf of incapable patients.

### RESOURCES

The statute governing healthcare proxies can be found in Article 29-C of new York's Public Health Law, available at <https://www.nysenate.gov/legislation/laws/PBH/A29-C>.

One rule enables an adult, called the principal, to authorize in writing a person, called the agent or proxy, to make healthcare decisions for them in the event the principal loses decision-making capacity.<sup>6</sup>

“Healthcare” here includes treatments for both physical and mental conditions.<sup>7</sup> Although some states authorize the creation of a different kind of document, called a psychiatric advanced directive, to cover surrogate decision-making for mental illness,<sup>8</sup> it is not necessary to do so in New York.

## RESOURCES

The federal Substance Abuse and Mental Health Services Administration (SAMSHA) has more information on mental illness and advanced directives. [https://www.samhsa.gov/sites/default/files/a\\_practical\\_guide\\_to\\_psychiatric\\_advance\\_directives.pdf](https://www.samhsa.gov/sites/default/files/a_practical_guide_to_psychiatric_advance_directives.pdf)

## Appointing a Healthcare Agent

Anyone 18 years of age or older may appoint a healthcare agent.<sup>9</sup> Every adult is presumed competent for this purpose unless a court has judged the person incompetent.<sup>10</sup>

A valid proxy must include the name of the adult who creates the proxy (the principal), the name of the healthcare agent, and a statement that the principal intends the agent to make healthcare decisions for them.<sup>11</sup> The proxy must be signed and dated by the principal and two witnesses who are

not the appointed agent.<sup>12</sup> Another person may sign and date the healthcare proxy for an adult unable to do so, so long as the document is signed at the adult’s direction, in their presence, and in the presence of two adult witnesses who also sign the proxy.<sup>13</sup> Unless the proxy provides for its expiration at a specified time,<sup>14</sup> it remains in effect until the principal revokes it or regains capacity.<sup>15</sup>

## RESOURCES

The New York State Department of Health website has more information on health care proxies as well as a downloadable form: [https://www.health.ny.gov/professionals/patients/health\\_care\\_proxy/](https://www.health.ny.gov/professionals/patients/health_care_proxy/)

## Optional Elements of a Proxy

The proxy may also include a statement of the principal’s treatment wishes, limitations on the agent’s authority, the designation of an alternate agent, an expiration date or description of circumstances that trigger expiration, and the signature of the healthcare agent. These particulars are optional; not including them does not affect the legality of the proxy.<sup>16</sup>

## The Agent

The agent must be over the age of 18; however, a person under 18 who is married or has a child can act as an agent.<sup>17</sup> An individual who is already the healthcare agent of 10 or more principals may not be appointed, unless he or she is a relative of the principal.<sup>18</sup>

The operator, administrator, or employee of a hospital cannot act as the agent unless they are related to the principal.<sup>19</sup> A physician or nurse practitioner who accepts the appointment as the patient's agent cannot act as the patient's attending physician or nurse practitioner.<sup>20</sup> The legislature was concerned that the potential conflict of interest between the role of agent and that of administrator or physician was problematic.<sup>21</sup> Administrators could be subject to institutional pressures and unwilling make choices that thwarted the facility's policies or interests.<sup>22</sup> "A physician's professional ethos may overwhelm a patient's preferences. Equally important, a physician may have an immediate financial interest in the provision or withholding of treatment."<sup>23</sup>

The agent's authority commences when a determination is made by the patient's attending physician or attending nurse practitioner that the principal lacks capacity to make healthcare decisions,<sup>24</sup> and ceases if the principal revokes the proxy or regains capacity.<sup>25</sup>

Some advocates have suggested that there should be an exception to the requirement that a patient be determined to be incapacitated before the proxy takes effect. Under this exception, the proxy would take effect immediately in order to allow frail and debilitated patients to have the support of an agent in making decisions.<sup>26</sup> New York courts have not recognized such an exception.<sup>27</sup> However, legislative consideration has been given to creating an exception.<sup>28</sup> In 2008, the New York Legislature enacted and the governor signed

the Simplified Advance Health Care Directive Law ("Act Now"), authorizing the Office of People with Developmental Disabilities (OPWDD) to develop a demonstration project using healthcare proxies that take effect immediately for individuals with developmental disabilities.<sup>29</sup> The demonstration project has yet to be implemented. In the meantime, the requirement that a determination of a principal's incapacity trigger an agent's authority remains the law.

"Capacity to make healthcare decisions" means the "ability to understand and appreciate the nature and consequences of healthcare decisions, including the benefits and risk of, and alternatives to, any proposed healthcare, and to reach an informed decision."<sup>30</sup> A determination that the principal lacks capacity to make healthcare decisions is made by the attending physician or attending nurse practitioner.<sup>31</sup> The determination must be in writing, and must contain the opinion of the attending physician or nurse practitioner regarding the cause and nature of the principal's lack of capacity, its extent and probable duration.<sup>32</sup> If the agent requests that the attending physician or nurse practitioner determine whether the principal has capacity, they must do so.<sup>33</sup>

Once the determination of the lack of capacity is made, notice must be given to the principal (if they are believed to be able to understand such information) and to the agent.<sup>34</sup> If the principal objects to the determination or to a decision of the agent, that objection prevails until there is a court

order stating that the principal lacks capacity to make healthcare decisions.<sup>35</sup>

## **Rights and Duties of an Agent**

The agent has authority to make any healthcare decisions that the principal could make, subject to any express limitations in the proxy.<sup>36</sup> The agent must make decisions in accordance with the principal's wishes, including their religious and moral beliefs.<sup>37</sup> If the principal's wishes are not reasonably known, and cannot be ascertained with reasonable diligence, the agent must act in accordance with the principal's best interests.<sup>38</sup> Healthcare decisions by an agent have priority over decisions by any other person, unless the proxy otherwise provides or the principal objects.<sup>39</sup>

An interested party, including a provider, may commence a special proceeding to challenge the validity of the proxy or an agent's decision, or to request removal of an agent who is unwilling, incompetent, or not acting in good faith.<sup>40</sup> An agent who acts in good faith is immune from criminal and civil liability.<sup>41</sup>

## **Obligations of the Healthcare Provider**

The statute also confers immunity from criminal and civil liability on providers who comply with the agent's decisions<sup>42</sup>

A healthcare provider is obligated to comply with healthcare decisions made by the agent in good faith, to the same extent as if made by the principal.<sup>43</sup> Private facilities or individual providers may refuse to comply with a decision (of the principal or the

agent) that is contrary to an individual provider's religious beliefs or sincerely held moral convictions, or contrary to a formal policy of the facility or provider which is expressly based on religious beliefs or sincerely held moral convictions.<sup>44</sup> A facility which is refusing to comply in good faith with the agent's wishes should arrange for the patient's transfer to another hospital that is reasonably accessible and willing to honor the agent's decision.<sup>45</sup> If an individual healthcare provider refuses to honor the agent's decision, the facility must arrange for the transfer of the patient's care to another provider.<sup>46</sup>

## **Reciprocity**

A healthcare proxy or similar instrument executed in another state or jurisdiction in accordance with its laws will be "considered validly executed" as a New York healthcare proxy.<sup>47</sup> A New York healthcare proxy may not enjoy reciprocity in other states.

## **Relationship Between Health Care Proxies and Living Wills**

A living will is a document in which a competent adult sets out instructions regarding end-of-life medical treatment in the event the individual becomes unable to communicate instructions. Living wills do not appoint an agent to carry out those wishes. New York is one of few states that does not recognize living wills by statute;<sup>48</sup> however, New York courts have consistently recognized the validity of living wills.<sup>49</sup>

Most living-will statutes limit the effectiveness of the document in several ways: they can only be created by a person

who is “terminally ill”; they do not designate another person to make decisions; they do not address disagreements among family members; and their instructions can be ignored by health care providers with impunity.<sup>50</sup>

As noted earlier, creating a health care proxy or a living will is not obligatory, but anyone planning for their potential incapacity may execute one or both. In the event someone executes both a health care proxy and a living will, the two documents can be interpreted in tandem, guiding an agent appointed in the health care proxy with instructions contained in the living will. If a person relies on a living will without appointing a health care agent, ambiguous instructions in the living will may create problems of interpretation for medical staff. That possibility suggests that a living will alone may not fulfill the patient’s intent.<sup>51</sup>

## RESOURCES

Charles Sabatino, *Can My Advance Directives Travel Across State Lines? An Essay on Portability*, 38 BiFocal (October 2016), <https://www.americanbar.org/content/dam/aba/publications/bifocal/bifocalseptember-october2016.pdf>.

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## Endnotes

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<sup>1</sup> See, e.g., *Schloendorff v. Society of New York Hospital*, 211 N.Y. 125, 129-30 (1914).

<sup>2</sup> N.Y. PUB. HEALTH LAW § 2805-d.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> 42 U.S.C. §§ 1395cc(f), 1396a(w).

<sup>6</sup> N.Y. PUB. HEALTH LAW § 2981.

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<sup>7</sup> N.Y. PUB. HEALTH LAW § 2980(4). In order to make decisions about nutrition and hydration as a medical treatment, the agent would have to know the patient's wishes, or be able to learn what they were. N.Y. PUB. HEALTH LAW § 2982(2).

<sup>8</sup> See Ronnie Blau, et al., *Psychiatric Advance Directives: A New York Perspective*, 22 NYSBA Health Law Journal 25 (Spring 2017); see also N.Y. Men. Hyg. Law § 9.60 (Assisted Outpatient Treatment). The Assisted Outpatient Treatment statute (Kendra's Law) provides that an individual who has executed a healthcare proxy may nevertheless be the subject of a petition for assisted outpatient treatment. N.Y. Men. Hyg. Law § 9.60(d). However, the physician designing the treatment plan under the statute must consider any directions included in the healthcare proxy. N.Y. Men. Hyg. Law § 9.60 (i)(2).

<sup>9</sup> N.Y. PUB. HEALTH LAW § 2980(1). A person under 18 who is married or has a child can appoint an agent, just as they can consent to medical treatment for themselves. N.Y. PUB. HEALTH LAW § 2504(1). See also N.Y. MEN. HYG. LAW § 22.11(a).

<sup>10</sup> N.Y. PUB. HEALTH LAW § 2981(1).

<sup>11</sup> N.Y. PUB. HEALTH LAW § 2981(5).

<sup>12</sup> N.Y. PUB. HEALTH LAW § 2981(2).

<sup>13</sup> N.Y. PUB. HEALTH LAW § 2981(2).

<sup>14</sup> N.Y. PUB. HEALTH LAW § 2981(5)(c).

<sup>15</sup> N.Y. PUB. HEALTH LAW § § 2981(5)(c), 2983(7).

<sup>16</sup> N.Y. PUB. HEALTH LAW § 2981(5)(b).

<sup>17</sup> N.Y. PUB. HEALTH LAW § 2980(1),(5). See note 9 *supra*. The statute does not permit the appointment of multiple agents to act either jointly or separately. However, the principal can appoint an alternate agent. An alternate agent's authority commences when: 1) the attending physician has determined that the agent is "not reasonably available, willing and competent to serve as agent," and the agent is not "expected to become reasonably available, willing and competent to make a timely decision given the patient's medical circumstances"; (2) the agent is removed by court order,<sup>1</sup> or (3) conditions described in the proxy occur. N.Y. PUB. HEALTH LAW § 2981(1); N.Y. PUB. HEALTH LAW § 2983(7).

<sup>18</sup> N.Y. PUB. HEALTH LAW § 2981(3)(d).

<sup>19</sup> N.Y. PUB. HEALTH LAW § 2981(3).

<sup>20</sup> N.Y. PUB. HEALTH LAW § 2981(3).

<sup>21</sup> The New York State Task Force on Life and The Law, *Life Sustaining Treatment, Making Choice and Appointing a Health Care Agent* 126 (July 1987), available at [https://www.health.ny.gov/regulations/task\\_force/reports\\_publications/docs/life-sustaining\\_reatment.pdf](https://www.health.ny.gov/regulations/task_force/reports_publications/docs/life-sustaining_reatment.pdf).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> N.Y. PUB. HEALTH LAW §§ 2981(4), 2983.

<sup>25</sup> N.Y. PUB. HEALTH LAW § 2983(7).

<sup>26</sup> The New York State Task Force on Life and The Law, *Life Sustaining Treatment, Making Choice and Appointing a Health Care Agent* 141-44 (July 1987 (minority report) available at [https://www.health.ny.gov/regulations/task\\_force/reports\\_publications/docs/life-sustaining\\_reatment.pdf](https://www.health.ny.gov/regulations/task_force/reports_publications/docs/life-sustaining_reatment.pdf).

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<sup>27</sup> See *Stein v. County of Nassau*, 642 F.Supp.2d 135 (E.D.N.Y., 2009), *aff'd in part, vacated in part, and remanded*, *Stein v. Bathelson*, 419 Fed.Appx. 67 (2<sup>nd</sup> Cir. 2011) (The plaintiff in *Stein* sued as her husband's healthcare agent and executor of his estate, claiming that the EMTs violated her constitutional rights and those of her husband when they ignored her wishes to have her husband taken to the hospital of her choice. The plaintiff argued that the EMTs should have followed her directions because she was acting pursuant to her husband's healthcare proxy.).

<sup>28</sup> Paul Kietzman, *Why Not "Act Now": Can a Simpler Healthcare Proxy Advance the Goal of Supported Decision-Making?*, 22 NYSBA Health Law Journal 90 (Spring 2017).

<sup>29</sup> 2008 N.Y. Laws, ch. 210.

<sup>30</sup> N.Y. PUB. HEALTH LAW § 2980(3).

<sup>31</sup> N.Y. PUB. HEALTH LAW § 2983(1).

<sup>32</sup> N.Y. PUB. HEALTH LAW § 2983(1)(A).

<sup>33</sup> N.Y. PUB. HEALTH LAW § 2983(2).

<sup>34</sup> N.Y. PUB. HEALTH LAW § 2983(3).

<sup>35</sup> N.Y. PUB. HEALTH LAW § 2983(5).

<sup>36</sup> N.Y. PUB. HEALTH LAW § 2982(1).

<sup>37</sup> N.Y. PUB. HEALTH LAW § 2982(2)(a).

<sup>38</sup> N.Y. PUB. HEALTH LAW § 2982(2)(b).

<sup>39</sup> N.Y. PUB. HEALTH LAW § 2982(4).

<sup>40</sup> N.Y. PUB. HEALTH LAW § 2992.

<sup>41</sup> N.Y. PUB. HEALTH LAW § 2986(2).

<sup>42</sup> N.Y. PUB. HEALTH LAW § 2986(1).

<sup>43</sup> N.Y. PUB. HEALTH LAW § 2984(2)(subject to limitations in the statute or in the document).

<sup>44</sup> N.Y. PUB. HEALTH LAW § § 2984(3), (4).

<sup>45</sup> N.Y. PUB. HEALTH LAW § 2984(3).

<sup>46</sup> N.Y. PUB. HEALTH LAW § 2984(4).

<sup>47</sup> N.Y. PUB. HEALTH LAW § 2990.

<sup>48</sup> Vincent J. Russo, Marvin Rachlin, N.Y. ELDER LAW PRACTICE § 7:29 (2018 ed.).

<sup>49</sup> See, e.g., *In re Westchester County Medical Center (O'Connor)*, 72 N.Y.2d 517, (1988); *Saunders v. State*, 129 Misc.2d 45, 492 N.Y.S.2d 510 (1988).

<sup>50</sup> Health care decision-making—Living wills—Limitations of living wills, N.Y. Prac. Series, Trusts and Estates Practice in New York (2018).

<sup>51</sup> Wendy H. Sheinberg, *In Matters of Life and Death: Do Our Clients Truly Give Informed Consent?*, 71-FEB N.Y. St. B.J. 36 (1999).

