



Family Health Care Decisions Act Summary

The Family Health Care Decisions Act establishes the authority of a patient’s family member or close friend to make health care decisions for the patient in cases where a patient lacks decisional capacity and did not leave prior instructions or appoint a health care agent. The family member or close friend’s decision making authority would include the authority to direct the withdrawal or withholding of life-sustaining treatment when standards set forth in the statute are satisfied.

Until this legislation was signed into law by Governor Paterson on March 16, 2010, in general, unless there was a health care agent appointed pursuant to a completed health care proxy form, there was no legal basis for a family member or friend to make health or end-of-life decisions on behalf of the patient who lacked decision making capacity. Instead, decisions to withdraw or withhold treatment could be made only where there was “clear and convincing evidence” of the patient’s wish to refuse such treatment. Moreover, when a patient lacked capacity, family members lacked clear authority even to consent to beneficial, desired treatment. While health care providers routinely, and out of necessity, accepted treatment consent from a family member or close friend for beneficial treatment, there was only thin legal support for that practice.

Summary of Key Provisions of the FHCDA

1. Applicability

- Applies to decisions in general hospitals and residential health care facilities. The term “hospital” is used to apply to these two settings.
- Does not apply to decisions for patients:
 - who have a health care agent or who have left prior treatment instructions.
 - who have a court-appointed guardian pursuant to Section 1750-a of the Surrogate’s Court Procedure Act (SCPA) or for whom decisions are governed by Section 1750-b of the SPCA.
 - for whom decisions about life-sustaining treatment may be made pursuant to OMH or OPWDD surrogate decision making regulations.

2. Determining Incapacity

- Sets forth a hospital-based process to determine that a patient lacks decisional capacity. In general, the process requires an initial determination by the attending physician, and may require a concurring determination by a “health or social services practitioner,” a broader category of professionals.
- Requires special credentials for professionals when determining that the patient lacks capacity as a result of mental retardation or mental illness.

Provides that if the patient objects to the determination of incapacity, or to the choice of a surrogate, or to a surrogate's decisions, the patient's decisions prevails unless a court finds that the patient lacks capacity, or another legal basis exists for overriding the patient's decision.

3. Decisions for Patients who Lack Capacity

• Sets forth, in order of priority, the persons who may act as a surrogate decision maker for the incapable patient, i.e.:

- an MHL Article 81 court-appointed guardian (if there is one);
- the spouse or domestic partner
- an adult son or daughter
- a parent
- a brother or sister
- a close friend (who could be another relative)

Grants the surrogate the right to receive medical information and medical records necessary to make informed decisions about the patient's health care, including diagnosis, prognosis and risks and benefits of alternative treatment options.

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.

States that health care providers do not need a surrogate's consent for a health care decision if the patient previously made the decision, either orally or in writing.

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 best interests.

Authorizes decisions to withhold or withdraw life-sustaining treatment if treatment would be an extraordinary burden to the patient and the patient is terminally ill 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 an extraordinary burden under the circumstances. Certain such decisions require ethics committee review.

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. In addition, if a minor has the capacity to decide about life-sustaining treatment, the minor's consent is required to withhold or to stop treatment.

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.