

## **The Family Health Care Decisions Act**

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### **What is the Family Health Care Decisions Act?**

The Family Health Care Decisions Act (FHCDA) was signed into law by Governor Patterson on March 16, 2010. It allows family members to make health care decisions, including decisions about the withholding or withdrawal of life-sustaining treatment, on behalf patients who lose their ability to make such decisions and have not prepared an advance directive regarding their wishes.

### **To whom does the FHCDA apply to?**

The FHCDA applies only to those individuals in a hospital or a nursing home setting.

### **Why does the FHCDA only apply in hospitals or nursing homes?**

The NYS legislature wanted to introduce this law in institutional settings where there would be greater oversight and safeguards for individuals. There is currently a study being made to expand the FHCDA to other settings.

### **When does the FHCDA come into play for an individual?**

The individual's attending physician must first make a reasonable effort to determine whether a patient has a health care agent before seeking the appointment of a "Surrogate" under the FHCDA. The attending physician is also required to make an initial determination whether a patient lacks individual decision-making capacity to a reasonable degree of medical certainty before a Surrogate is appointed.

### **Is the Surrogate a court appointed position?**

No. It is a person in the highest category on the surrogate list who is available, willing and competent to make decisions for the incapacitated patient and is identified where there is no health care agent.

### **What if the attending physician determines that an individual lacks capacity?**

If it is determined that a patient lacks capacity, then a concurring determination must be made:

- a. If the patient resides in a residential health care facility, a health or social services practitioner must independently determine whether an adult patient lacks decision-making capacity.
- b. If the patient resides in a hospital, a health or social services practitioner employed or otherwise formally affiliated with the facility must independently determine whether an adult patient lacks decision-making capacity if the Surrogate's decision concerns withdrawal or withholding of life sustaining treatment.

### **Who is entitled to Notice of the appointment of a Surrogate?**

- a. The patient
- b. At least one (1) person on the surrogate list highest in order of priority

- c. If the patient was transferred from a mental hygiene facility, the director of the mental hygiene facility and the mental hygiene legal service.

### **Who can be appointed as the Surrogate?**

The order or priority for the appointment of a Surrogate under the FHCDA is as follows:

- a. A court-appointed guardian authorized to make medical decisions under Article 81 of the Mental Hygiene Law;
- b. The spouse, if not legally separated from the patient, or their domestic partner;
- c. A son or daughter eighteen (18) years of age or older;
- d. A parent;
- e. A brother or sister eighteen (18) years of age or older;
- f. A close friend.

### **Is a Surrogate the same as a health care agent?**

A Surrogate, once identified, has all the authority that a health care agent would have under a health care proxy document but they ARE NOT called a health care agent.

### **When the highest category is an adult son or daughter and there is more than one such person, are they all Surrogates?**

No. The FHCDA states that "one person" from the list is the Surrogate. While the FHCDA does not specify who identifies the Surrogate when more than one person is in the highest category, it necessarily will be the responsibility of the hospital or nursing home to identify the surrogate.

### **What if someone lower down on the surrogate list objects to the decision of the Surrogate concerning medical treatment for the individual?**

The hospital or nursing home should first try to resolve the dispute informally. If it cannot be resolved informally, the hospital will then refer the matter to their Ethics Committee. If the higher priority person insists upon the provision of life-sustaining treatment, the hospital cannot discontinue such treatment without a court order.

If the Surrogate directs the withdrawal or withholding of treatment but a lower priority person insists upon the provision of treatment, the hospital generally will seek a court order before withdrawing or withholding such treatment.

### **What powers does a Surrogate have?**

A Surrogate appointed under the FHCDA will have all powers that an individual has to make concerning their own medical decisions, including the decision to withhold or withdraw life-sustaining treatment. Further, the Surrogate's decisions should be in accord with the patient's wishes, including religious and moral beliefs. If the patient's wishes cannot be reasonably determined, the Surrogate must make decisions in accord with the patient's best interest.

### **Is the Surrogate considered the "personal representative" of the patient under the Health Insurance Portability and Accountability Act (HIPAA)?**

Yes. If the patient lacks capacity and the Surrogate is empowered to make health care decisions for the patient, then the Surrogate is a "personal representative" under HIPAA.

**Since the FHCDA allows the appointment of a Surrogate to make medical decisions for me, do I still need to have a health care proxy document?**

Yes. The FHCDA is supposed to be a default to those who have not prepared a health care proxy document, now lack capacity and are in a hospital or a nursing home. You should still have a health care proxy document.

**Can a Surrogate consent to donation of a patient's organs after death?**

No, not by virtue of being the Surrogate. Consent to organ donation is governed by NYS's Uniform Anatomical Gift Act, not the FHCDA.

**Does the FHCDA give the Surrogate access to the patient's medical records?**

Yes. The FHCDA gives the Surrogate "the right to receive medical information and medical records necessary to make informed decisions about the patient's health care." Like a health care agent under a health care proxy, the Surrogate has this right only after it has been determined that the patient lacks capacity and the Surrogate's authority to make health care decisions has commenced.

**Can a Surrogate apply for Medicaid on behalf of an incapable patient?**

Yes. Federal Medicaid regulations allow a written application from "the applicant, an authorized representative or if the applicant is incompetent or incapacitated, someone acting responsibly for the applicant."