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EXPLAINER

“Act Now” Healthcare Proxies

By Paul Kietzman*

The Government Law Center’s explainers concisely map out the law that applies to important questions of public policy.

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Introduction

In New York, any adult may appoint a healthcare agent using a healthcare proxy.¹ The proxy authorizes the agent to make healthcare decisions for them in the event they lose decision-making capacity, or “competence.” Every adult is presumed competent to create a healthcare proxy unless a court has judged the person incompetent.²

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.³ ceases if the principal regains capacity.⁴ New York courts have not recognized an exception to the requirement of a medical determination of incapacity to trigger the agent’s authority.⁵ However, legislative consideration has been given to doing so.⁶

RESOURCES

The Office for People With Developmental Disabilities has published a booklet on health care decision-making which is available at https://opwdd.ny.gov/sites/default/files/documents/health_care_choices_brochure.pdf.

“Act Now” Legislation

In 2008, the New York State Legislature passed and the Governor signed a bill⁷ which created a Simplified Health Care Proxy demonstration project. The project was to be implemented in the system of care overseen by the Office for People With Developmental Disabilities (OPWDD). The statute provided that a healthcare proxy form would be developed (in consultation with a broad spectrum of stakeholders) and approved by OPWDD and the Department of Health (DoH), and would embody the option for the principal to check a box authorizing the appointed agent to “act now.” The New York form would be designed for simplicity, written in fifth-grade English (rather than the twelfth-grade language in the form contained in current law), profusely illustrated to help comprehension, and approved by

stakeholders, DoH, and OPWDD. OPWDD was charged by the legislation with producing a report on the project’s outcomes for the Executive and Legislature at a time of significant agency resource reductions. The report never materialized. The agency is reportedly now reconsidering the “act now” option for the residentially served developmentally disabled population.

RESOURCES

Making Health Care Decisions, A Report on the Ethical and Legal Implications of Informed Consent in the Patient-Practitioner Relationship, Volume One, is available at https://repository.library.georgetown.edu/bitstream/handle/10822/559354/making_health_care_decisions.pdf?sequence=1&isAllowed=y.

How An “Act Now” Proxy Works

The 2008 legislation once implemented would work in this way: the person (principal) checks the “act now” box on the form; at any point in time prior to the formal determination of loss of capacity by a physician the agent can make health care decisions for the person, but only “in direct consultation with the principal and the attending physician”;⁸ if the person disagrees with their agent, the person’s decision prevails; and the “consultation” underlying the decision must be summarized and recorded in their medical record. Protections in the current law relating to nutrition and hydration by means of medical treatment would remain.⁹ Also remaining would be the person’s rights to (a) fire their

agent “by any ... act evidencing a specific intent to revoke the proxy”¹⁰ and (b) have their objection to either a determination of incapacity or a decision made by the agent “prevail”¹¹ until or unless a court intervenes.

The Policy Behind “Act Now” Legislation

Both nationally and locally in New York, the possibility of “act now” proxies as an alternative to the current statutory “springing” power document has been carefully weighed. Two examples can be found. The October 1982 report of the President’s Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Making Health Care Decisions – Volume One: Report*, reads in applicable part “in the context of the present discussion, the triggering event under a directive designating a proxy would be (at the least) that the signer had become incapable of participating in decisions about his or her own care. Directives could, in theory, designate a proxy to step into the decision-making shoes of a person who remained capable of making his or her own choices but who chose not to.”¹²

The July 1987 report of the New York State Task Force on Life and the Law,¹³ entitled *Life-Sustaining Treatment – Making Decisions and Appointing a Health Care Agent*, discusses alternatives to the “springing power” document ultimately added to the Public Health Law.¹⁴ Serious consideration was given to “springing and immediate” powers, as well as an option referred to as a “consultation proxy” whereby an agent’s

authority would commence with the signing of the proxy but require the consent of the patient/principal to decisions made by the agent—much like the alternative proposed in the 2008 Chapter Law discussed above.¹⁵ The report comes down squarely on the recommendation that the springing power proxy was legally and clinically preferable.

However, the report also concludes with a “Minority Report” which reads in applicable part that the legislation proposed by the report should “give the public the option of choosing to execute either an immediate proxy or a springing proxy [which the minority members explained] by an immediate proxy, we mean not only that the appointment of the proxy should take effect at the time the proxy is executed by the patient, but also that the patient with capacity must continue to be involved in the process of making decisions for his or her own health care to the extent that he or she desires such involvement.”¹⁶ This recommendation differs to an extent from the 2008 Chapter Law, which provides essentially that any determination of loss of decision-making capacity is deferred indefinitely or at least until such time as the patient and agent disagree. As noted above, however, the healthcare proxy law provides, as it has since its initial enactment, that the principal be notified of a determination of their loss of decision-making capacity, and that notwithstanding the determination, should the principal object to either the determination itself or a resulting health care decision by the agent, “the principal’s objection or decision shall prevail” unless overruled by a court of competent jurisdiction.¹⁷

RESOURCES

The 1987 report, *Life-Sustaining Treatment – Making Decisions and Appointing a Health Care Agent*, is available at https://www.health.ny.gov/regulations/task_force/reports_publications/docs/life-sustaining_treatment.pdf.

Conclusion

Some states have already adopted an “act now” option in their health care proxy laws.¹⁸ So, in 2019, the question persists: “Why not?”—what is the argument against everyone having the opportunity to choose someone they trust to help right now and in the future without having to be deemed in writing to be incapacitated and possibly cut out of the discussion entirely?

It seems to be accepted by all parties to the discussions on healthcare decision-making that a healthcare proxy is the preferred vehicle for the making of surrogate end-of-life health care decisions. In the case of people with developmental disabilities, a valid healthcare proxy obviates: (a) the inability as provided in the guardianship law and regulations to initiate end-of-life decisions by a surrogate until the point at which the person is terminally or chronically and irreversibly ill (or permanently unconscious); (b) the need to be assessed and deemed medically to currently lack “capacity to make health care decisions”; and (c) the back and forth process involving several parties beyond the patient and their family set forth in statute.¹⁹

RESOURCES

The Uniform Health-Care Decisions Act, a model act promulgated by the National Conference of Commissioners of Uniform State Laws, offers an “act-now” option. <https://www.uniformlaws.org/committees/community-home?CommunityKey=63ac0471-5975-49b0-8a36-6a4d790a4edf>. States that have adopted this option used this model act to guide them.

Endnotes

* Paul Kietzman, Esq., is the Chair of the Government Law Center Aging and Disability Law Committee. He is Of Counsel to Barclay Damon, LLP. The former general counsel to the NYS Office for People with Developmental Disabilities (OPWDD), he has decades of experience counseling health care clients in the private and public sectors.

¹ 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).

² N.Y. PUB. HEALTH LAW § 2981(1).

³ N.Y. PUB. HEALTH LAW § 2981(4).

⁴ N.Y. PUB. HEALTH LAW § 2983(7).

⁵ *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 (2nd 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.)

⁶ 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).

⁷ 2008 N.Y. Laws, ch. 210, adding N.Y. MENTAL HYG. LAW § 3.03(e).

⁸ N.Y. MENTAL HYG. LAW § 33.03 (e)(emphasis added).

⁹ N.Y. PUB. HEALTH LAW § 2982(2).

¹⁰ N.Y. PUB. HEALTH LAW § 2985(1)(a).

¹¹ N.Y. PUB. HEALTH LAW § 2983(5).

¹² *Making Health Care Decisions – Volume One: Report* 158, n.15 (President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research 1982)(emphasis added).

¹³ https://www.health.ny.gov/regulations/task_force/. Established by Governor Mario Cuomo in 1985, this 23-member body has been composed of eminent leaders in the fields of religion, philosophy, law, medicine, nursing, and bioethics. Although its reports and positions are not deemed to be official positions of the State of New York, its workings have resulted in virtually all of the significant statutes in the State dealing with health care decision-making by surrogates, and its proceedings and those of constituent members have appeared in numerous peer-reviewed publications including the *New England Journal of Medicine*, the *Journal of the American Medical Association*, the *Hastings Center Report*, the *Journal of Clinical Ethics*, the *Journal of Law, Medicine and Ethics* and the *American Journal of Bioethics*.

¹⁴ See N.Y. PUB. HEALTH LAW § 2981.

¹⁵ *Life-Sustaining Treatment – Making Decisions and Appointing a Health Care Agent* 96, 97 (The New York State Task Force on Life and the Law 1987), available at https://www.health.ny.gov/regulations/task_force/reports_publications/docs/life-sustaining_treatment.pdf.

¹⁶ *Id.* at 141-145 (signed by five Task Force Members, including three attorneys, two of who are law school faculty members, and a Roman Catholic and Episcopal Bishop).

¹⁷ N.Y. PUB. HEALTH LAW § 2983(5).

¹⁸ See, e.g., ALASKA STAT. §13:52. 010(f); HAW. REV. STAT. §327E-3(e); ME. REV. STAT. ANN. TIT. 18, § 5-803(3); N.M STAT. ANN. § 24-7A-2(C).

¹⁹ N. Y. SURR. CT. PROC. ACT § 1750-b(4)(b), (e)(5)(6).