

Surrogate's Court Procedure § 1750-b

§ 1750-b. Health care decisions for mentally retarded persons

1. Scope of authority. Unless specifically prohibited by the court after consideration of the determination, if any, regarding a mentally retarded person's capacity to make health care decisions, which is required by section seventeen hundred fifty of this article, the guardian of such person appointed pursuant to section seventeen hundred fifty of this article shall have the authority to make any and all health care decisions, as defined by subdivision six of section twenty-nine hundred eighty of the public health law, on behalf of the mentally retarded person that such person could make if such person had capacity. Such decisions may include decisions to withhold or withdraw life-sustaining treatment, as defined in subdivision (e) of section 81.29 of the mental hygiene law. The provisions of this article are not intended to permit or promote suicide, assisted suicide or euthanasia; accordingly, nothing in this section shall be construed to permit a guardian to consent to any act or omission to which the mentally retarded persons could not consent if such person had capacity.

2. Decision-making standard. (a) The guardian shall base all advocacy and health care decision-making solely and exclusively on the best interests of the mentally retarded person and, when reasonably known or ascertainable with reasonable diligence, on the mentally retarded person's wishes, including moral and religious beliefs.

(b) An assessment of the mentally retarded person's best interests shall include consideration of:

- (i) the dignity and uniqueness of every person;
- (ii) the preservation, improvement or restoration of the mentally retarded person's health;
- (iii) the relief of the mentally retarded person's suffering by means of palliative care and pain management;
- (iv) the unique nature of artificially provided nutrition or hydration, and the effect it may have on the mentally retarded person; and
- (v) the entire medical condition of the person.

(c) No health care decision shall be influenced in any way by:

- (i) a presumption that persons with mental retardation are not entitled to the full and equal rights, equal protection, respect, medical care and dignity afforded to persons without mental retardation or developmental disabilities; or
- (ii) financial considerations of the guardian, a health care provider or any other party.

3. Right to receive information. Subject to the provisions of sections 33.13 and 33.16 of the mental hygiene law, the guardian shall have the right to receive all medical information and medical and clinical records necessary to make informed decisions regarding the mentally retarded person's health care.

4. Life-sustaining treatment. The guardian shall have the affirmative obligation to advocate for the full and efficacious provision of health care, including life-sustaining treatment as defined in subdivision (e) of section 81.29 of the mental hygiene law. In the event that a guardian makes a decision to withdraw or withhold life-sustaining treatment from a mentally retarded person:

(a) The attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law, must confirm to a reasonable degree of medical certainty that the mentally retarded person

lacks capacity to make health care decisions. The determination thereof shall be included in the mentally retarded person's medical record, and shall contain such attending physician's opinion regarding the cause and nature of the mentally retarded person's incapacity as well as its extent and probable duration. The attending physician who makes the confirmation shall consult with another physician, or a licensed psychologist, to further confirm the mentally retarded person's lack of capacity. The attending physician who makes the confirmation, or the physician or licensed psychologist with whom the attending physician consults, must (i) be employed by a developmental disabilities services office named in section 13.17 of the mental hygiene law, or (ii) have been employed for a minimum of two years to render care and service in a facility or program operated, licensed or authorized by the office of mental retardation and developmental disabilities, or (iii) have been approved by the commissioner of mental retardation and developmental disabilities in accordance with regulations promulgated by such commissioner. Such regulations shall require that a physician or licensed psychologist possess specialized training or three years experience in treating mental retardation. A record of such consultation shall be included in the mentally retarded person's medical record.

(b) The attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law, with the concurrence of another physician with whom such attending physician shall consult, must determine to a reasonable degree of medical certainty and note on the mentally retarded person's chart that:

(i) the mentally retarded person has a medical condition as follows:

A. a terminal condition, as defined in subdivision twenty-three of section twenty-nine hundred sixty-one of the public health law; or

B. permanent unconsciousness; or

C. a medical condition other than such person's mental retardation which requires life-sustaining treatment, is irreversible and which will continue indefinitely; and

(ii) the life-sustaining treatment would impose an extraordinary burden on such person, in light of:

A. such person's medical condition, other than such person's mental retardation; and

B. the expected outcome of the life-sustaining treatment, notwithstanding such person's mental retardation; and

(iii) in the case of a decision to withdraw or withhold artificially provided nutrition or hydration:

A. there is no reasonable hope of maintaining life; or

B. the artificially provided nutrition or hydration poses an extraordinary burden.

(c) The guardian shall express a decision to withhold or withdraw life-sustaining treatment either:

(i) in writing, dated and signed in the presence of one witness eighteen years of age or older who shall sign the decision, and presented to the attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law; or

(ii) orally, to two persons eighteen years of age or older, at least one of whom is the mentally retarded person's attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law.

(d) The attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law, who is provided with the decision of a guardian shall include the decision in the mentally retarded person's medical chart, and shall either:

(i) promptly issue an order to withhold or withdraw life-sustaining treatment from the mentally retarded person, and inform the staff responsible for such person's care, if any, of the order; or

(ii) promptly object to such decision, in accordance with subdivision five of this section.

(e) At least forty-eight hours prior to the implementation of a decision to withdraw life-sustaining treatment, or at the earliest possible time prior to the implementation of a decision to withhold life-sustaining treatment, the attending physician shall notify:

(i) the mentally retarded person, except if the attending physician determines, in writing and in consultation with another physician or a licensed psychologist, that, to a reasonable degree of medical certainty, the person would suffer immediate and severe injury from such notification. The attending physician who makes the confirmation, or the physician or licensed psychologist with whom the attending physician consults, shall:

A. be employed by a developmental disabilities services office named in section 13.17 of the mental hygiene law, or

B. have been employed for a minimum of two years to render care and service in a facility operated, licensed or authorized by the office of mental retardation and developmental disabilities, or

C. have been approved by the commissioner of mental retardation and developmental disabilities in accordance with regulations promulgated by such commissioner. Such regulations shall require that a physician or licensed psychologist possess specialized training or three years experience in treating mental retardation. A record of such consultation shall be included in the mentally retarded person's medical record;

(ii) if the person is in or was transferred from a residential facility operated, licensed or authorized by the office of mental retardation and developmental disabilities, the chief executive officer of the agency or organization operating such facility and the mental hygiene legal service; and

(iii) if the person is not in and was not transferred from such a facility or program, the commissioner of mental retardation and developmental disabilities, or his or her designee.

5. Objection to health care decision. (a) Suspension. A health care decision made pursuant to subdivision four of this section shall be suspended, pending judicial review, except if the suspension would in reasonable medical judgment be likely to result in the death of the mentally retarded person, in the event of an objection to that decision at any time by:

(i) the mentally retarded person on whose behalf such decision was made; or

(ii) a parent or adult sibling who either resides with or has maintained substantial and continuous contact with the mentally retarded person; or

(iii) the attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law; or

(iv) any other health care practitioner providing services to the mentally retarded person, who is licensed pursuant to article one hundred thirty-one, one hundred thirty-one-B, one hundred thirty-two, one hundred thirty-three, one hundred thirty-six, one hundred thirty-nine, one hundred forty-one, one hundred forty-three, one hundred forty-four, one hundred fifty-three, one hundred fifty-four, one hundred fifty-six, one hundred fifty-nine or one hundred sixty-four of the education law; or

(v) the chief executive officer identified in subparagraph (ii) of

paragraph (e) of subdivision four of this section; or

(vi) if the person is in or was transferred from a residential facility or program operated, approved or licensed by the office of mental retardation and developmental disabilities, the mental hygiene legal service; or

(vii) if the person is not in and was not transferred from such a facility or program, the commissioner of mental retardation and developmental disabilities, or his or her designee.

(b) Form of objection. Such objection shall occur orally or in writing.

(c) Notification. In the event of the suspension of a health care decision pursuant to this subdivision, the objecting party shall promptly notify the guardian and the other parties identified in paragraph (a) of this subdivision, and the attending physician shall record such suspension in the mentally retarded person's medical chart.

6. Special proceeding authorized. The guardian, the attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law, the chief executive officer identified in subparagraph (ii) of paragraph (e) of subdivision four of this section, the mental hygiene legal service (if the person is in or was transferred from a residential facility or program operated, approved or licensed by the office of mental retardation and developmental disabilities) or the commissioner of mental retardation and developmental disabilities or his or her designee (if the person is not in and was not transferred from such a facility or program) may commence a special proceeding in a court of competent jurisdiction with respect to any dispute arising under this section, including objecting to the withdrawal or withholding of life-sustaining treatment because such withdrawal or withholding is not in accord with the criteria set forth in this section.

7. Provider's obligations. (a) A health care provider shall comply with the health care decisions made by a guardian in good faith pursuant to this section, to the same extent as if such decisions had been made by the mentally retarded person, if such person had capacity.

(b) Notwithstanding paragraph (a) of this subdivision, nothing in this section shall be construed to require a private hospital to honor a guardian's health care decision that the hospital would not honor if the decision had been made by the mentally retarded person, if such person had capacity, because the decision is contrary to a formally adopted written policy of the hospital expressly based on religious beliefs or sincerely held moral convictions central to the hospital's operating principles, and the hospital would be permitted by law to refuse to honor the decision if made by such person, provided:

(i) the hospital has informed the guardian of such policy prior to or upon admission, if reasonably possible; and

(ii) the mentally retarded person is transferred promptly to another hospital that is reasonably accessible under the circumstances and is willing to honor the guardian's decision. If the guardian is unable or unwilling to arrange such a transfer, the hospital's refusal to honor the decision of the guardian shall constitute an objection pursuant to subdivision five of this section.

(c) Notwithstanding paragraph (a) of this subdivision, nothing in this section shall be construed to require an individual health care provider to honor a guardian's health care decision that the individual would not honor if the decision had been made by the mentally retarded person, if such person had capacity, because the decision is contrary to the individual's religious beliefs or sincerely held moral convictions,

provided the individual health care provider promptly informs the guardian and the facility, if any, of his or her refusal to honor the guardian's decision. In such event, the facility shall promptly transfer responsibility for the mentally retarded person to another individual health care provider willing to honor the guardian's decision. The individual health care provider shall cooperate in facilitating such transfer of the patient.

(d) Notwithstanding the provisions of any other paragraph of this subdivision, if a guardian directs the provision of life-sustaining treatment, the denial of which in reasonable medical judgment would be likely to result in the death of the mentally retarded person, a hospital or individual health care provider that does not wish to provide such treatment shall nonetheless comply with the guardian's decision pending either transfer of the mentally retarded person to a willing hospital or individual health care provider, or judicial review.

(e) Nothing in this section shall affect or diminish the authority of a surrogate decision-making panel to render decisions regarding major medical treatment pursuant to article eighty of the mental hygiene law.

8. Immunity. (a) Provider immunity. No health care provider or employee thereof shall be subjected to criminal or civil liability, or be deemed to have engaged in unprofessional conduct, for honoring reasonably and in good faith a health care decision by a guardian, or for other actions taken reasonably and in good faith pursuant to this section.

(b) Guardian immunity. No guardian shall be subjected to criminal or civil liability for making a health care decision reasonably and in good faith pursuant to this section.