

Family Health Care Decisions Act (FHCDA)

Family Health Care Decisions Act (FHCDA)

- Part of Laws of 2010, Chapter 8, effective June 1, 2010
- FHCDA is Public Health Law (PHL) Article 29-CC.
- PHL Article 29-CC is applicable in general hospitals and residential health care facilities (nursing homes).
- Laws of 2010, Chapter 8 also repealed PHL § 2977 (Nonhospital orders not to resuscitate) and created a new PHL Article 29-CCC (Nonhospital Orders Not to Resuscitate).

Before FHCDA, PHL Article 29-B was the law for all Orders Not to Resuscitate

- Article 29-B had been the law for do not resuscitate (DNR) orders since 1987.
- A DNR order is a physician's order not to perform cardiopulmonary resuscitation (CPR) in the event of cardio or pulmonary arrest.
- Article 29-B provided definite procedures for consent to and issuing DNR orders.
- Article 29-B used to include § 2977, which was the law for nonhospital orders not to resuscitate.

FHCDA Changes

- A new article of the Public Health Law (Article 29-CC: Family Health Care Decisions Act) applies to all health care decisions for patients of general hospitals and residents of nursing homes, including DNR orders.
- Under FHCDA, a DNR order is just one type of decision to withhold or withdraw life-sustaining treatment.

FHCDA Applicability

- Applies only to "health care," not providing nutrition or hydration orally
- Applies to patients of general hospitals and residents of nursing homes but not OMH and OMRDD facilities
- Not applicable if:
 - a health care agent under a health care proxy has authority to make decisions
 - a SCPA Article 17-A guardian has authority to make decisions (for a person with a developmental disability)
 - Surrogate decision-making is provided for by MHL Article 80 and 14 NYCRR Part 710 (Surrogate Decision-Making Committees), 14 NYCRR §§ 633.11 (OMRDD facility patients), 27.9 or 527.8 (OMH facility patients)

Decisions by Adults with Capacity under FHCDA

- No "therapeutic exception" anymore
- Even if the patient lacks capacity, there is no surrogate decision-making where the patient has already made a decision about the health care prior to losing capacity:
 - in writing or orally
 - with respect to a decision to withdraw or withhold life-sustaining treatment, such oral consent must be during hospitalization in the presence of two witnesses eighteen years of age or older, at least one of whom is a health or social services practitioner affiliated with the hospital

Surrogate Decision-Making Under FHCDA

- Patients are presumed to have capacity unless a physician, with the concurrence of another health or social service practitioner at the facility acting within his or her scope of practice, determines that the patient lacks capacity. In a general hospital, the concurring determination is only required for decisions to withhold or withdraw life-sustaining treatment.
- If patients lack capacity, there is a surrogate list.

Surrogate List

- MHL Article 81 guardian
- Spouse, if not legally separated from the patient, or the domestic partner
- Adult child
- Parent
- Adult sibling
- Close friend

Surrogate Decision-Making Under FHCDA

- Decisions based on “patient’s wishes,” or if they’re unknown, “best interests”
- Special provisions for decisions to withhold or withdraw life-sustaining treatment
 - Includes DNR orders
 - Consent must be in writing or expressed orally to an attending physician

Surrogate Decision-Making Under FHCDA: Clinical Criteria for Decisions to Withhold or Withdraw Life-Sustaining Treatment

- Treatment would be an extraordinary burden to the patient and an attending physician determines, with the independent concurrence of another physician, that, to a reasonable degree of medical certainty and in accord with accepted medical standards:
 - the patient has an illness or injury which can be expected to cause death within six months, whether or not treatment is provided; or
 - the patient is permanently unconscious; or
- The provision of treatment would involve such pain, suffering or other burden that it would reasonably be deemed inhumane or extraordinarily burdensome under the circumstances and the patient has an irreversible or incurable condition, as determined by an attending physician with the independent concurrence of another physician to a reasonable degree of medical certainty and in accord with accepted medical standards
- For DNR orders, this is a change in the law, because the criteria are slightly different under Article 29-B

Surrogate Decision-Making Clinical Criteria for DNR Orders: FHCDA vs. Article 29-B FHCDA (new law)

- patient has an illness or injury which can be expected to cause death within six months, whether or not treatment is provided;
- patient is permanently unconscious; or
- The provision of treatment would involve such pain, suffering or other burden that it would reasonably be deemed inhumane or extraordinarily burdensome under the circumstances and the patient has an irreversible or incurable condition

Article 29-B (old law)

- patient has a terminal condition: an illness or injury from which there is no recovery, and which reasonably can be expected to cause death within one year;
- patient is permanently unconscious;
- resuscitation would be medically futile; or
- resuscitation would impose an extraordinary burden on the patient in light of the patient's medical condition and the expected outcome of resuscitation for the patient

Health Care Decision-Making for Patients for Whom No Surrogate is Available under FHCDA

- Different procedures for:
 - Routine medical treatment
 - Major medical treatment: 2nd physician must concur
 - Decisions to withhold or withdraw life-sustaining treatment, which again include DNR orders (see next slide)
- Change in clinical standard for DNR Orders: under Article 29-B, a DNR Order could have been put in place if CPR would have been “medically futile,” meaning that CPR would have been unsuccessful in restoring cardiac and respiratory function or that the patient would have experienced repeated arrest in a short time period before death occurred.

Health Care Decision-Making for Patients for Whom No Surrogate is Available under FHCDA: Life-Sustaining Treatment

- A Court may make a decision to withhold or withdraw life-sustaining treatment; or
- The attending physician, with independent concurrence of a second physician, determines to a reasonable degree of medical certainty that:
 - life-sustaining treatment offers the patient no medical benefit because the patient will die imminently, even if the treatment is provided; and
 - the provision of life-sustaining treatment would violate accepted medical standards

Nonhospital DNR Orders

- New Article 29-CCC clarifies that home care services agencies and hospices must honor them, as well as EMS
- Surrogates can consent to them under FHCDA rules
- Consent must be orally to the attending physician or in writing
- Department authorized use of a new “alternative form” (MOLST form) that complies with FHCDA: DOH-5033 Medical Orders for Life-Sustaining Treatment (MOLST) Form
- MOLST is a bright pink form that may include Do Not Intubate (DNI) order in addition to DNR order

MOLST Orders

- Under the statute (now PHL § 2994-dd(6)), The Department of Health “may authorize the use of . . . alternative forms for issuing a nonhospital order not to resuscitate. . . . Such alternative form or forms may also be used to issue a non-hospital do not intubate order.”
- What about other MOLST orders besides DNR and DNI?

MOLST orders in addition to DNR and DNI

- The courts have said that all individuals have a constitutional right to refuse medical treatment.
- Before a patient's right of self-determination can be enforced, however, his or her wishes must be ascertained.
- If the patient cannot presently express those wishes, they will be enforced if established by "clear and convincing evidence."