

# Family Health Care Decisions Act (FHCDCA)

- Public Health Law Article 29-CC
- Added by L. 2010, Ch. 8
- Applies to general hospitals and residential health care facilities (nursing homes)
- Went into effect on June 1, 2010

# FHCDA Amended PHL Article 29-B: Orders Not to Resuscitate

- Article 29-B has 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 provides definite procedures for consent to and issuing DNR orders.

# PHL Article 29-B before FHCD A

- Everyone is presumed to consent to CPR in an emergency, but DNR orders can be issued in any setting for:
  - adults with capacity who consent
  - adults without capacity when a surrogate from the surrogate list is available and consents
  - adult patients without capacity for whom no surrogate is available if CPR would be “medically futile.”
- There is a “standard form” for nonhospital DNR orders (DOH-3474), as well as an “alternative form” (Medical Orders for Life-Sustaining Treatment or MOLST) for nonhospital DNR and DNI orders.

# Article 29-B before FHCD A: Adults With Capacity

- An adult with capacity can consent to a DNR order prior to losing capacity.
- Consent may be:
  - In writing in the presence of 2 witnesses
  - Orally in the presence of 2 witnesses, one of whom is a physician affiliated with the facility
- “therapeutic exception” to the rule that patient consent is required

# Article 29-B before FHCD A: Surrogate Decision-Making for Adults Without Capacity

- There's a surrogate decision-making list, with “spouse” at the top of the list (unless there's a SCPA Article 17-A or MHL Article 81 guardian).
- Surrogate consent to a DNR order is based on “patient's wishes,” or if they're unknown, “best interests.”
- Certain clinical criteria must be met, to be discussed on a later slide.

# Article 29-B before FHCDCA: Adults Without Capacity for Whom No Surrogate is Available

- A facility can put a DNR order in place even where no surrogate is available.
- The clinical requirement is that “resuscitation would be medically futile,” which is discussed on a later slide.

# Article 29-B before FHCD A: Nonhospital DNR orders

- A patient may have a nonhospital DNR order using a simple one-page “standard form” (DOH-3474 form)
- Use of an “alternative form,” which may also include a do not intubate (DNI) order, must be approved by the Commissioner. The Medical Orders for Life-Sustaining Treatment (MOLST) form was approved.

# FHCD A Changes

- Now Article 29-B only applies to DNR orders issued in certain “mental hygiene facilities” licensed by the Office of Mental Health (OMH) or Office for People with Developmental Disabilities (OPWDD).
- 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.
- A new Article 29-CCC contains provisions for nonhospital DNR orders, which are similar to the provisions that were previously in Article 29-B.



# FHCDA Applicability

- Applies to patients of general hospitals and residents of nursing homes
- Applies only to “health care,” not providing nutrition or hydration orally (eating and drinking)
- Not applicable if:
  - a health care agent under a health care proxy has authority to make decisions
  - a SCPA Article 17-A guardian (§ 1750-b) 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 §§ 633.10, 633.11 (OPWDD 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 withhold or withdraw 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 FHCDCA

- Patients are presumed to have medical decision-making capacity unless a physician, with the concurrence of another health or social service practitioner (registered professional nurse, nurse practitioner, physician, physician assistant, psychologist or licensed clinical social worker), 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 FHODA

- 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

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

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

# Withholding or Withdrawing Life-Sustaining Treatment for Minor Patients Under FHCD A

- Parent/guardian must use same clinical criteria as surrogate (see previous two slides)
- Minor with capacity can object
- Notification of non-custodial parent
- “Emancipated minors” with capacity make their own decisions, including any minor “sixteen years of age or older and living independently from his or her parents or guardian”
- Law provides another exception to the rule in PHL § 2504(1)



# PHL § 2504(1)

- Maternal and Child Health: general provisions
- Any person who is 18 or older, or is the parent of a child or has married, may give effective consent for health care.
- Under FHCDA, “emancipated minors” in a general hospital or nursing home may also consent to decisions to withhold or withdraw life-sustaining treatment.

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

- Routine medical treatment: attending physician can decide
- Major medical treatment: 2<sup>nd</sup> physician must concur (note: includes an HIV test)
- Decisions to withhold or withdraw life-sustaining treatment, which again include DNR orders, only if clinical criteria on next slide are met

# Health Care Decision-Making for Patients for Whom No Surrogate is Available under FHCDA: Withholding or Withdrawing 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

# Decision-Making Clinical Criteria for DNR Orders for Patients for Whom No Surrogate is Available: FHCDA vs. Article 29-B

## FHCDA

Patient will die imminently, even if the treatment is provided

## Article 29-B

CPR would be medically futile, meaning that CPR will be unsuccessful in restoring cardiac and respiratory function or that the patient will experience repeated arrest in a short time period before death occurs.

# Ethics Review Committees

- Must consider and respond to health care issues raised by anyone connected with the case, including when anyone on surrogate list objects to surrogate's decision
- Makes recommendations where health or social services practitioner consulted for a concurring determination regarding capacity disagrees with physician's determination
- Determinations are advisory and nonbinding, except for three situations on next slide

## When Ethics Review Committee Determinations are Binding

- A surrogate decides to withhold or withdraw life-sustaining treatment (other than CPR) from a patient in a nursing home. The patient is not expected to die within six months and is not permanently unconscious. In this situation, the ethics review committee must agree that the patient has a condition that can't be reversed or cured, and that the provision of life-sustaining treatment would involve such pain, suffering or other burden that it would reasonably be deemed inhumane or extraordinarily burdensome under the circumstances.
- A surrogate decides to withhold or withdraw artificial nutrition and hydration from a patient in a hospital. The attending physician objects. The patient is not expected to die within six months and is not permanently unconscious. In this situation, the ethics review committee must agree that the patient has a condition that can't be reversed or cured, and that artificial nutrition and hydration would involve such pain, suffering or other burden that it would reasonably be deemed inhumane or extraordinarily burdensome under the circumstances.
- In a hospital or nursing home, an ethics review committee must approve the decision of an unmarried, emancipated minor to withhold or withdraw life-sustaining treatment without the consent of a parent or guardian.

# DOH statement under FHCDA

- Hospitals should distribute the revised version of DOH publication 1449, "Your Rights as a Hospital Patient in New York State," which in any version revised May 2010 or later includes the section "Deciding About Health Care: A Guide for Patients and Families."
- Nursing Homes should distribute DOH publication 1503, "Deciding About Health Care: A Guide for Patients and Families."
- Both are available on the DOH website.

# 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
- Standard one-page form can still be used (DOH-3474)
- Department has authorized use of a new “alternative form” (MOLST form) that complies with FHCDA (DOH-5003)



# “Standard Form” (DOH-3474)

**State of New York  
Department of Health**

**Nonhospital Order Not to Resuscitate  
(DNR Order)**

Person's Name \_\_\_\_\_

Date of Birth \_\_ / \_\_ / \_\_

Do not resuscitate the person named above.

Physician's Signature \_\_\_\_\_

Print Name \_\_\_\_\_

License Number \_\_\_\_\_

Date \_\_ / \_\_ / \_\_

It is the responsibility of the physician to determine, at least every 90 days, whether this order continues to be appropriate, and to indicate this by a note in the person's medical chart. The issuance of a new form is NOT required, and under the law this order should be considered valid unless it is known that it has been revoked. This order remains valid and must be followed, even if it has not been reviewed within the 90-day period.

DOH-3474 (4/95)

# “Alternative Form” (DOH-5003) MOLST (page 1 of 4)

NEW YORK STATE DEPARTMENT OF HEALTH  
Medical Orders for Life-Sustaining Treatment (MOLST)

**THE PATIENT KEEPS THE ORIGINAL MOLST FORM DURING TRAVEL TO DIFFERENT CARE SETTINGS, THE PHYSICIAN KEEPS A COPY.**

LAST NAME, FIRST NAME, MIDDLE INITIAL OF PATIENT \_\_\_\_\_  
ADDRESS \_\_\_\_\_  
CITY OR TOWN \_\_\_\_\_  
DATE OF BIRTH (MM/DD/YYYY) \_\_\_\_\_  Male  Female MOLST NUMBER (SEE IS FOR AN MOLST FORM)

**Do-Not-Resuscitate (DNR) and Other Life-Sustaining Treatment (LST)**  
This is a medical order form that tells others the patient's wishes for life-sustaining treatment. A health care professional must complete or change the MOLST form based on the patient's current medical condition, values, wishes and MOLST instructions. If the patient is unable to make medical decisions, the orders should reflect patient wishes, as best understood by the health care agent or surrogate. A physician must sign the MOLST form. All health care professionals must follow these medical orders as the patient moves from one location to another, unless a physician examines the patient, reviews the orders and changes them. MOLST is generally for patients with serious health conditions. The patient or other decision-maker should work with the physician and consider asking the physician to fill out a MOLST form if the patient:  
• Wants to avoid or receive any or all life-sustaining treatment.  
• Resides in a long-term care facility or requires long-term care services.  
• Might die within the next year.  
If the patient has a developmental disability and does not have ability to decide, the doctor must follow special procedures and attach the appropriate legal requirements checklist.

**SECTION A** Resuscitation Instructions When the Patient Has No Pulse and/or Is Not Breathing

Check one:

CPR Order: Allow Full Cardio-Pulmonary Resuscitation  
CPR involves artificial breathing and forceful pressure on the chest to try to restart the heart. It usually involves electric shock (defibrillation) and a plastic tube down the throat into the windpipe to assist breathing (intubation). It means that all medical treatments will be done to prolong life when the heart stops or breathing stops, including being placed on a breathing machine and being transferred to the hospital.

DNR Order: Do Not Allow CPR Resuscitation (Allow Natural Death)  
This means do not begin CPR, as defined above, to make the heart or breathing start again if either stops.

**SECTION B** Consent for Resuscitation Instructions (Section A)

The patient can make a decision about resuscitation if he or she has the ability to decide about resuscitation. If the patient does NOT have the ability to decide about resuscitation and has a health care proxy, the health care agent makes this decision. If there is no health care proxy, another person will decide, chosen from a list based on NYS law.

SIGNATURE \_\_\_\_\_  Check if verbal consent (Leave signature line blank) DATE/TIME \_\_\_\_\_

PRINT NAME OF DECISION-MAKER \_\_\_\_\_

PRINT BEST WITNESS NAME \_\_\_\_\_ PRINT SECOND WITNESS NAME \_\_\_\_\_  
Who made the decision?  Patient  Health Care Agent  Public Health Law Surrogate  Minor's Parent/Guardian  §1750-3 Surrogate

**SECTION C** Physician Signature for Sections A and B

PHYSICIAN SIGNATURE \_\_\_\_\_ PRINT PHYSICIAN NAME \_\_\_\_\_ DATE/TIME \_\_\_\_\_

PHYSICIAN LICENSE NUMBER \_\_\_\_\_ PHYSICIAN PROVIDER NUMBER \_\_\_\_\_

**SECTION D** Advance Directives

Check all advance directives known to have been completed:  
 Health Care Proxy  Living Will  Organ Donation  Documentation of Oral Advance Directive

DOH-5003 (6/16) Page 1 of 4 ASAP permit disclosure of MOLST to other health care professionals & electronic registry as necessary for treatment.

# “Alternative Form” (DOH-5003)

## MOLST

- Medical Orders for Life-Sustaining Treatment
- Bright pink form
- May include Do Not Intubate (DNI) order in addition to DNR order

# Nonhospital Orders

- EMS personnel may disregard orders if:
  - They believe in good faith that consent to the order has been revoked, or that the order has been cancelled; or
  - Family members or others on the scene, excluding such personnel, object to the order and physical confrontation appears likely; and
- Hospital emergency services physicians may direct that the order be disregarded if other significant and exceptional medical circumstances warrant disregarding the order.

# DOH Letters/Policies

- <http://www.nysba.org/Content/NavigationMenu/PublicResources/FamilyHealthCareDecisionsActInformationCenter/DearCEO.pdf>
- [http://www.nyhealth.gov/professionals/nursing\\_home\\_administrator/dal\\_10-04\\_family\\_health\\_care\\_decisions\\_act.htm](http://www.nyhealth.gov/professionals/nursing_home_administrator/dal_10-04_family_health_care_decisions_act.htm)
- <http://www.nyhealth.gov/nysdoh/ems/policy/10-05.htm>

# Additional Information

- <http://www.health.ny.gov/publications/1503.pdf>
- [http://www.health.ny.gov/diseases/aids/regulations/fhcda/letter\\_to\\_providers.htm](http://www.health.ny.gov/diseases/aids/regulations/fhcda/letter_to_providers.htm)
- [http://www.health.ny.gov/diseases/aids/regulations/fhcda/ai\\_fact\\_sheet.htm](http://www.health.ny.gov/diseases/aids/regulations/fhcda/ai_fact_sheet.htm)
- [http://www.nysba.org/Content/NavigationMenu/PublicResources/FamilyHealthCareDecisionsActInformationCenter/FAQ\\_HTML.htm](http://www.nysba.org/Content/NavigationMenu/PublicResources/FamilyHealthCareDecisionsActInformationCenter/FAQ_HTML.htm)
- [http://www.omr.state.ny.us/health/images/hp\\_fhcda\\_memo.pdf](http://www.omr.state.ny.us/health/images/hp_fhcda_memo.pdf)