

## FAMILY HEALTH CARE DECISIONS ACT MICHELE CASSIDY, J.D., LL.M

**New York State now provides a legal mechanism for a family member or close friend to make health-care decisions for individuals in hospitals or nursing homes who become incapacitated.** (The term “hospital” is used to apply to both these two settings.) On June 1, 2010, the New York legislature enacted the Family Health Care Decisions Act (FHCDA) to enable a family member or close friend to make decisions, including the withdrawal or withholding of life-prolonging treatment when standards set forth in the statute are satisfied. Although New York has had a health-care proxy statute in effect since 1990, enabling people to appoint, in writing, surrogate health-care decision-makers, only 20 percent of individuals ever sign a health care proxy, leaving the great majority of patients without any designated person empowered to make decisions for them in the event of incapacity.

**The FHCDA outlines the procedures required to make the determination that the patient is incapacitated.** For patients in hospitals, this process involves an initial determination of lack of decision-making ability by an attending physician and a concurring determination by a health or social services practitioner. Special credentials are required for professionals when determining that a patient lacks capacity as a result of mental retardation or mental illness. If the individual objects to the determination of incapacity or to the surrogate’s decisions, the patient’s decisions prevail unless a court finds that the patient lacks capacity, or another legal basis exists for overriding the patient’s decision.

**The FHCDA also requires that hospitals establish an ethics committee to provide advice** upon request or in the event of disputes and to review certain sensitive surrogate decisions.

**Here is the hierarchy – as declared by the FHCDA – for the following individuals who can act as surrogate** (in order of priority):

- (1) Court-appointed guardian
- (2) Individual designated orally by the subsequently incapacitated individual
- (3) Spouse or domestic partner
- (4) Adult son or daughter
- (5) Parent
- (6) Adult brother or sister
- (7) Close relative or friend

**Once appointed, the surrogate possesses all the powers an individual has to make medical decisions,** including the decision to withhold or withdraw life-prolonging treatment. The surrogate is obligated to make decisions in accordance with the patient’s wishes, with consideration for the patient’s religious and moral beliefs. If the patient’s wishes are not reasonably known and cannot be ascertained, the FHCDA directs the surrogate to make decisions in accordance with the patient’s best interests.

**Decisions to withhold or withdraw life-prolonging treatment are governed by additional standards** under the FHCDA. A surrogate may withhold or withdraw life-prolonging treatment for an individual if it is determined that the individual will die within six months with or without treatment, as determined by two independent physicians, and treatment would be an extraordinary burden to the patient. A surrogate may also

withhold or withdraw life-prolonging treatment if the patient has an irreversible condition, as determined by two independent physicians, and treatment would involve such pain, suffering, or other burden that it would be inhumane or extraordinarily burdensome to provide treatment under the circumstances. Decisions to withhold or withdraw life-prolonging treatment for minors are made by the minor's parents or guardian.

**If a person becomes incapacitated without any one of the surrogates listed above, the FDCDA authorizes the attending physician to act as surrogate for routine medical treatment.** For any major medical treatment, the physician may act only upon the concurrence of another physician that such major medical treatment is necessary. A physician may withhold or withdraw life-prolonging treatment for individuals without a surrogate only upon the independent concurrence of another physician that life-prolonging treatment offers no medical benefit to the patient because it is determined that the patient will die imminently and the provision of life-prolonging treatment would violate accepted medical standards.

**Additional provisions of FHCDA include:**

- 1) Revision and/or elimination of New York's DNR (Do Not Resuscitate) Law, because DNR decisions are now governed by FHCDA.
- 2) Protection of surrogates and health care providers from civil and criminal liability for acts performed in good faith pursuant to FHCDA.
- 3) Sets forth rights and procedures for hospitals and individual health care practitioners refusing to honor health care decisions made pursuant to FHCDA for religious or moral reasons.
- 4) Authorizes article 81 guardians to act as surrogates under FHCDA for decisions in hospitals and repeals restrictions on the authority of a guardian to make life prolonging treatment decisions.