LAWS OF NEW YORK, 2011

CHAPTER 167

AN ACT to amend the public health law, in relation to extending the provisions of the Family Health Care Decisions act to decisions regarding hospice care

Became a law July 20, 2011, with the approval of the Governor.
Passed by a majority vote, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision 18 of section 2994-a of the public health law, as added by chapter 8 of the laws of 2010 is amended, and two new subdivisions 5-a and 17-a are added to read as follows:

5-a. "Decisions regarding hospice care" means the decision to enroll or disenroll in hospice, and consent to the hospice plan of care and modifications to that plan.

17-a. "Hospice" means a hospice as defined in article forty of this chapter, without regard to where the hospice care is provided.

18. "Hospital" means a general hospital [~~or~~], a residential health care facility**, or hospice**.

§ 2. Subdivision 1 of section 2994-b of the public health law, as added by chapter 8 of the laws of 2010, is amended to read as follows:

1. This article shall apply to health care decisions regarding health care provided in a hospital [~~to~~]**, and to decisions regarding hospice care without regard to where the decision is made or where the care is provided, for** a patient who lacks decision-making capacity, except as limited by this section.

§ 3. Paragraph (b) of subdivision 3 of section 2994-c of the public health law, as added by chapter 8 of the laws of 2010, is amended to read as follows:

(b) (i) In a residential health care facility, a health or social services practitioner employed by or otherwise formally affiliated with the facility must independently determine whether an adult patient lacks decision-making capacity.

(ii) In a general hospital a health or social services practitioner employed by or otherwise formally affiliated with the facility must independently determine whether an adult patient lacks decision-making capacity if the surrogate's decision concerns the withdrawal or withholding of life-sustaining treatment.

(iii) With respect to decisions regarding hospice care for a patient in a general hospital or residential health care facility, the health or social services practitioner must be employed by or otherwise formally affiliated with the general hospital or residential health care facility.

§ 4. The opening paragraph of subdivision 5 of section 2994-d of the public health law, as added by chapter 8 of the laws of 2010, is amended to read as follows:

Decisions to withhold or withdraw life-sustaining treatment. In addition to the standards set forth in subdivision four of this section,

EXPLANATION--Matter in ***italics*** is new; matter in brackets [-] is old law to be omitted.

decisions by surrogates to withhold or withdraw life-sustaining treatment **(including decisions to accept a hospice plan of care that provides for the withdrawal or withholding of life-sustaining treatment)** shall be authorized only if the following conditions are satisfied, as applicable:

§ 5. Subparagraph (iii) of paragraph (b) of subdivision 4 of section 2994-g of the public health law, as added by chapter 8 of the laws of 2010, is amended to read as follows:

(iii) In a residential health care facility**, and for a hospice patient not in a general hospital,** the medical director of the facility **or hospice**, or a physician designated by the medical director, must independently determine that he or she concurs that the recommendation is appropriate; provided that if the medical director is the patient's attending physician, a different physician designated by the residential health care facility **or hospice** must make this independent determination. Any health or social services practitioner employed by or otherwise formally affiliated with the facility **or hospice** may provide a second opinion for decisions about physical restraints made pursuant to this subdivision.

§ 6. Subdivision 5 of section 2994-g of the public health law is amended by adding a new paragraph (c) to read as follows:

(c) With respect to a decision regarding hospice care for a patient in a general hospital or residential health care facility, the second physician must be designated by the general hospital or residential health care facility.

§ 7. Subdivision 4 of section 2994-m of the public health law is amended by adding a new paragraph (c) to read as follows:

(c) When an ethics review committee is convened to review decisions regarding hospice care for a patient in a general hospital or residential health care facility, the responsibilities of this section shall be carried out by the ethics review committee of the general hospital or residential health care facility, provided that such committee shall invite a representative from hospice to participate.

§ 8. Subdivision 13 of section 2994-aa of the public health law, as added by chapter 8 of the laws of 2010, is amended to read as follows:

13. "Nonhospital order not to resuscitate" means an order that directs emergency medical services personnel**, hospice personnel** and hospital emergency services personnel not to attempt cardiopulmonary resuscitation in the event a patient suffers cardiac or respiratory arrest.

§ 9. This act shall take effect on the sixtieth day after it shall have become a law.

The Legislature of the STATE OF NEW YORK **ss:**

Pursuant to the authority vested in us by section 70-b of the Public Officers Law, we hereby jointly certify that this slip copy of this session law was printed under our direction and, in accordance with such section, is entitled to be read into evidence.

DEAN G. SKELOS
Temporary President of the Senate

SHELDON SILVER
Speaker of the Assembly

NEW YORK STATE ASSEMBLY
MEMORANDUM IN SUPPORT OF LEGISLATION
submitted in accordance with Assembly Rule III, Sec 1(f)

BILL NUMBER: A7343A Revised July 21, 2011

SPONSOR: Gottfried

TITLE OF BILL: An act to amend the public health law, in relation to extending the provisions of the Family Health Care Decisions act to decisions regarding hospice care

PURPOSE OF GENERAL IDEA OF BILL: To authorize family members to make decisions regarding hospice care for patients who lack decision-making capacity, in accordance with the provisions of the Family Health Care Decisions Act, PHL Article 29-CC (FHCDA).

SUMMARY OF SPECIFIC PROVISIONS: Section 1 amends various subdivisions in PHL §2994-a (Definitions) to add definitions for "decisions regarding hospice care" and "hospice," and to amend the definition of "hospital" to include hospice.

Section 2 amends PHL §2994-b, subdiv, 1 to make the FHCDA apply to decisions regarding hospice care.

Section 3 amends PHL §2994-c, subdiv. 3(b) to provide that with respect to a concurring determination regarding hospice care for a patient in a general hospital or residential health care facility, the health or social services practitioner must be employed by or otherwise affiliated with the facility.

Section. 4 amends PHL §2994-d, subdiv. 5 to clarify that decisions to withdraw or withhold life-sustaining treatment include decisions to accept a hospice plan of care -that provides for the withdrawal or withholding-of life-sustaining treatment.

Section 5 amends PHL §2994-g, subdiv. 4(b)(iii) and of the public health law to require a concurring opinion with respect to decisions to provide major medical treatment for hospice patients who do not have a surrogate.

Section 6 amends PHL §2994-g, subdiv. 5 to provide that with respect to a decision to withdraw or withhold life-sustaining treatment from a hospice patient who does not have a surrogate and who is in a general hospital or residential health care facility, the second physician must be designated by the general hospital or residential health care facility.

Section 7 amends PHL §2994-m, subdiv. 4 regarding the responsibility of a hospital or residential ethics committee to review a decision regarding a hospice patient in such facility.

Section 8 amends §2994-aa, subdiv. 13 to provide that a nonhospital

order not to resuscitate also applies to hospice personnel.

Section 9 provides for the act to become effective on the sixtieth day after it shall have become a law.

JUSTIFICATION: By enacting the Family Health Care Decisions Act, Ch. 8, Laws of 2010 (the FHCDA), the Legislature significantly improved decision-making in New York for patients who lack capacity and who do not have a health care agent. Specifically, the FHCDA recognized the authority of a "surrogate" decision-maker, i.e., a close family member

or friend, to make health care decisions for the incapable patient in such cases, subject to ethically sound standards and safeguards.

While the FHCDA by its terms only applies to health care decisions regarding health care provided in a hospital or nursing home, PHL §2994-d.1, from the outset the Legislature recognized the need to consider extending the FHCDA to other settings. To that end, it directed the NYS Task Force on Life and the Law to make recommendations regarding "whether the FHCDA should be amended to apply to health care decisions in settings other than general hospital and residential health care facilities'." Ch. 8, L. 2010, §28.2.

On November 30, 2010, after hearing various views and engaging in a deliberative process, the Task Force issued an initial recommendation regarding extending the FHCDA; it recommended amending the FHCDA to provide surrogates with authority to make decisions on behalf of incapable patients regarding hospice care. See NYS Task Force on Life and the Law, "Recommendations Regarding the Extension of the Family Health Care Decisions Act to Include Hospice." (www.health.statemy.us/regulations/taskforce/docs/2010-12-22_extension_of family_health-care_decisions_act.pdf.).

AS the Task Force report explained:

The current wording of the FHCDA creates a barrier to the utilization of hospice by terminally ill individuals because the authority it bestows upon surrogates is limited to care provided in hospitals or nursing homes. The FHCDA does not permit a surrogate to elect hospice care for a loved one who is being cared for outside of a covered facility at the time of the election decision. Even when a patient is successfully enrolled in hospice, a surrogate lacks the ability to make decisions about on-going care so long as that care is to be provided outside of a covered facility, for example, where hospice care will be provided in a stand-alone hospice facility or in the home. Therefore, the ability of a patient without decision-making capacity to access hospice care will depend upon where care is currently provided or will be provided going forward. Instead, the focus should be solely on ensuring that the individual's known preferences or best interests arc honored at this crucial time.

The addition of hospice also fits well into the structure of the FHCDA as it currently stands; without requiring extensive changes. Hospices are federally certified and highly regulated at the state level. The safeguards and oversight mechanisms in the FHCDA, including the procedures for determining capacity, the procedures for end-of-life decision-making, and the requirements of ethics review committees will translate into hospice settings. Hospices have physicians and other interdisciplinary professionals on staff to fulfill the statutory

requirements in these areas, and most hospices have their own ethics committee, or have access to an ethics committee (e.g., through an affiliated institution or other agreement).

See also, Kathy McMahon, "Making the Family Health Care Decisions Act Apply to Hospice Patients," 16 NYS Bar Assn Health Law Journal 49 (Spring 2011).

This bill would implement the recommendations of the Task Force, by extending the FHCDA to authorize surrogate decisions regarding hospice care; irrespective of where the patient is being cared for.

PRIOR LEGISLATIVE HISTORY: None

FISCAL IMPLICATIONS: None.

EFFECTIVE DATE: The act will take effect on the sixtieth day after it becomes a law.