

**The Association of the Bar of the City of New York
42 West 44th Street
New York, New York 10036-6689**

COMMITTEE ON TRUSTS, ESTATES AND SURROGATE'S COURTS

PROPOSAL FOR AMENDMENT TO LEGISLATION

INTRODUCTION

The Committee on Trusts, Estates and Surrogate's Courts of the New York City Bar Association supports the proposed legislation amending of Article 29-C of the Public Health Law to expressly authorize the use of living wills and offers it suggested revisions to improve the legislation.

DISCUSSION

A. Current New York Law

New York law expressly authorizes the use of the Health Care Proxy whereby a competent adult ("Principal") can appoint an agent ("Agent") to make health care treatment decisions for the Principal in the event that he or she loses the capacity to make those decisions. The statutory requirements of a Health Care Proxy are set forth in Article 29-C of the Public Health Law. The legislative history of the Health Care Proxy statute indicates that the purpose of the legislation was not to expand a competent adult's right to make medical treatment decisions, but simply to permit such an individual to delegate his or her existing rights to a designated agent to facilitate reasonable decision-making on behalf of incapacitated patients.

As a general rule, the Agent has the authority to make health care decisions for the Principal in accordance with the Principal's wishes, if known, or, if not known, then in the Principal's best interests. There is, however, an exception to this general rule with regard to the administration of artificial nutrition and hydration. It is well established that competent adults have the right to refuse life sustaining treatment, including the administration of artificial nutrition and hydration. Matter of Fosmire v. Nicoleau, 75 N.Y.2d 876, 551 N.E.2d 77 (1990). However, Section 2982.2 of the Public Health Law provides that an Agent acting under a Health Care Proxy cannot make decisions with regard to the administration of artificial nutrition and hydration for the Principal unless the Agent specifically knows the Principal's wishes regarding these measures. This is complicated by the fact that the Public Health Law does not currently contain a procedure for establishing sufficient evidence of the Principal's wishes with

regard to the administration of artificial nutrition and hydration. Section 2985.1(d) of the Public Health Law, which deals with revocation of a Health Care Proxy, indicates that the Principal's written wishes or instructions about health care, including the administration of artificial nutrition and hydration, shall constitute sufficient evidence of his or her wishes for the purposes of Section 2982.2 of the Public Health Law. No requirements are given for such a writing.

For the declination of life sustaining treatment, including artificial nutrition and hydration, what has evolved is a "clear and convincing" evidence standard. Matter of O'Connor, 72 N.Y.2d 517, 531 N.E.2d 886 (1988). In *O'Connor* the Court of Appeals stated that this standard "requires proof sufficient to persuade the trier of fact that the patient held a firm and settled commitment to the termination of life supports under the circumstances like those presented . . . the trier of fact must be convinced, as far as is humanly possible, that the strength of the individual's beliefs and the durability of the individual's commitment to those beliefs makes a recent change of heart unlikely."¹

While New York is one of only three states that does not recognize Living Wills by statute, the potential value of a Living Will in satisfying the clear and convincing evidence requirement is well documented. As the *O'Connor* court stated, "[t]he ideal situation is one in which the patient's wishes were expressed in some form of writing, perhaps a 'living will,' while he or she was still competent. The existence of a writing suggests the author's seriousness of purpose and ensures that the court is not being asked to make a life-or-death decision based upon casual remarks."²

The NYS Department of Health Regulations provide that "[a]dvance directives like the health care proxy also allow an adult to express his or her preference regarding health care treatment, including a desire to continue or to refuse treatment and life supports. In the absence of a health care proxy, adults who express their wishes orally or in writing concerning life-sustaining treatment in a clear and convincing manner are entitled, based on decisions of both the United States Supreme Court and the New York State Court of Appeals, to have those wishes recognized."³

B. Rationale for Proposed Amendment

The proposed amendment of Article 29-C of the Public Health Law will provide a clear procedure for individuals to document their wishes concerning life sustaining medical treatment, including the administration of artificial nutrition and hydration. A properly executed Living Will would create a rebuttable presumption of a person's wishes regarding such treatment.

¹ Matter of O'Connor, 72 N.Y.2d 517 (1988), 531.

² Matter of O'Connor, 72 N.Y.2d 517 (1988), 531.

³ 10 NYCRR §400.21(a).

The proposed amendment provides adequate flexibility given the very personal nature of these decisions and does not establish a statutory form of Living Will. We agree with the choice not to create a statutory form and believe that this will encourage individuals to freely express their wishes. It seems to us that a statutory form, even an optional form, might unnecessarily constrain individuals from fully expressing their personal wishes and might create confusion at the medical provider level in cases where the optional form was not used.

To further encourage people to document their wishes the proposed amendment does not require witnesses to a Living Will. Witnesses are still required for a Health Care Proxy.

C. Suggested Revisions to the Proposed Amendment

We disagree with the proposed amendment inasmuch as it provides that a Living Will can revoke a Health Care Proxy. The Health Care Proxy requires two witnesses while the Living Will does not require any witnesses. We feel that the same formalities must be required of the Living Will if it purports to revoke a Health Care Proxy. This Committee suggests modifying the proposed legislation to provide that a Living Will that purports to revoke a Health Care Proxy must be signed and dated by the principal in the presence of two adult witnesses who shall sign at the end of the Living Will.

We also suggest revising proposed Section 2982.5 to read as follows:

“Notwithstanding any provision in this Article to the contrary, in the event a declarant has executed both a health care proxy and a living will, the decisions by the health care agent duly designated under this chapter regarding medical treatment including the providing, withholding, or withdrawal of life-sustaining treatment or artificially provided nutrition or hydration, shall take precedence over a living will of a declarant, unless a the ~~Living Will~~ Health Care Proxy specifically provides otherwise.”

We feel that this change will reduce administrative burdens to health care providers that might otherwise require proof the presence or absence of a Living Will.

CONCLUSION

In light of the foregoing, we support amending Section 29-C of the Public Health Law to acknowledge that Living Wills are statutorily recognized and valid in New York, that they constitute evidence of a person’s health care treatment decisions, including the administration of artificial nutrition and hydration, and to set forth the execution requirements for Living Wills. We do, however, disagree with allowing a Living Will to revoke a Health Care Proxy without requiring the same formalities of execution with respect to both instruments. In addition, we recommend that any direction

by the Principal that a Living Will should take precedence over a Health Care Proxy be contained in the Health Care Proxy rather than in the Living Will.

March 21, 2006
New York, New York

Respectfully Submitted,

David J. McCabe
Chair, Committee on Trusts, Estates and
Surrogate's Courts

Committee:

Alan Halperin
Ann Lesk
Anne Bederka
Arlene Harris
Barbara Levitan
Carole M. Bass*
Daniel Timins
David J. McCabe
Donald Magnetti
Elise Yablonski
Emily F. Johnson
Eric P. Beveridge
Eve Markewich
Gary Freidman
Howard Neuthaler
Ian W. MacLean
James L. Kronenberg
Janine Racanelli
Jeffrey Schwartz
Joseph Samulski
Karen Schiele
Lee Caney
Lee Shapiro
Leo Beitner
Magdalen Gaynor
Mark Smith
Maureen Bateman
Millie Kalik*
Mimi Friday
Peter Schram
Richard Bowler

Robert Benjamin
Ronald Weiss
S. Jeanne Hall
Seth Slotkin
Thomas Gannon

[* Denote Sub-Committee Members]

17555625\V-2