



# ECHO<sup>®</sup> MOLST: Honoring Preferences at End-of-life

## Who Determines Who Has the Right to Make End-of-life Decisions

*COVID-19: Why it Matters*



# Presenter

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The speaker has no significant financial conflicts of interest to disclose.

# Learning Objectives

- Define capacity
- Describe determination of medical decision-making capacity
- Explain NYS Public Health Law and recent changes
- Review importance in terms of COVID-19

# Capacity: Definition

- Capacity is the ability to:
  - take in information,
  - understand its meaning and
  - make an informed decision using the information
- Capacity allows us to function independently
- Capacity is not the same as competence

# Capacity: Definition

- Includes Mental Skills Used to Function in Everyday Life
  - Memory: ability to remember things
  - Language
  - Ability to use logic
  - Ability to calculate
  - Ability and “flexibility” to turn attention from 1 task to another
  - Executive functions

# Executive Functions

- Problem solving
- Planning
  - including appreciating consequences of an action
- Initiation, direction, execution of actions
- Sequencing
- Abstraction and insight
- Ability to monitor one's own behavior
- Inhibition of inappropriate behaviors
- Impact of frontal lobe function on ADLs and decisional capacity

# Capacity Determination

- Capacity is task-specific
- Patient's capacity to make different decisions can vary
  - Medical care and treatment
  - Manage money
  - Write a will
  - Continue to drive
  - Possess firearms
- Key principle
  - Assessment of the patient's ability to understand the consequences of a decision

# Advance Care Planning: Capacity is Task Specific

- Capacity to choose health care agent is different than the ability to make medical decisions
- Capacity to make medical decisions is based on the complexity of decisions
  - simple health care decisions
  - request for palliation (relief of pain and suffering)
  - complicated decisions regarding DNR and life-sustaining treatment



# Medical Decision-Making Capacity: Three Key Patient Abilities

- Ability to understand relevant information about his or her condition, the probable outcomes of the disease and potential interventions, and its meaning in terms of the:
  - disease process
  - proposed therapy and alternative therapies;
  - advantages, adverse effects and complications of each therapy
  - Possible course of the disease without intervention
- Ability to make an informed decision using the information, based on his or her beliefs and values and understand the consequences of the decision
- Ability to communicate a decision

# Cultural Differences

- Can make assessing medical decision-making more difficult
- Capacity assessment involves:
  - Abstract concepts not easily communicated in another language
  - Interpret value judgments on basis of what is considered reasonable
- **IMPORTANT:** Avoid assuming patients hold certain beliefs on the basis solely of ethnic background
  - Varying degrees of acculturation and assimilation of culture
  - Variation within an ethnic group
  - **Always** ask the patient about their personal values and beliefs!

# Capacity Assessment: Key Elements

- Detailed medical history from the patient, with attention to the patient's ability to:
  - Organize time relationships
  - Recall facts
  - Reason abstractly
- Collateral history from family, if available
- Focused physical examination
- Assess cognition, function and screen for depression
- Testing to exclude reversible conditions that may cause temporary incapacity

# Capacity Assessment: What “*Not*” To Do

- Purely base assessment on a third party’s opinion
- Simply have a conversation with the patient
- Merely use preferences expressed by patient
- Only use the MMSE score and designate a score below which the patient lacks capacity
- Consider “abnormal” answers as evidence of lack of capacity rather than recognizing the patient’s lifestyle and/or personal experience
- Disregard individual habits/behaviors which the person always had
- Use risky behavior as evidence

# Who Determines Capacity

- Under NYSPHL, a patient is presumed to have capacity until determined the patient lacks capacity
- Concurrent determination required
- **Prior to May 28, 2018**, only a physician could determine the patient's capacity to make decisions to withhold and/or withdraw life-sustaining treatment with or without the MOLST
- Special expertise required:
  - Persons with DD/ID
  - Persons with Mental Illness

# Can an NP Determine Capacity?

This table is accurate as of Feb 3, 2019.

Purpose	Initial Determination	Concurring Determination	Explanation
To empower a health care agent	Yes, as of February 3, 2019	Yes, as of February 3, 2019	<ul style="list-style-type: none"> <li>As a result of the 2018 amendment to the health care proxy law, the determination of incapacity can be by the "attending physician" or "attending nurse practitioner."</li> <li>In life-sustaining treatment cases the attending physician or nurse practitioner must consult with "another physician or nurse practitioner."</li> <li>This means the HCP Law does allow an NP to determine incapacity or provide the required concurrent determination.</li> </ul>
To empower a FHCDA surrogate	Yes, as of May 28, 2018	Yes	<ul style="list-style-type: none"> <li>The FHCDA, in PHL 2994-c, as of May 28, provides that the determination of incapacity must be by the "attending physician or attending nurse practitioner." In life-sustaining treatment cases there must be a concurring determination by a "health or social services practitioner" which includes an NP.</li> <li>This means that the FHCDA does allow an NP to determine incapacity or provide the required concurring determination.</li> </ul>
To empower a § SCPA 1750-b surrogate (decisions for patients with intellectual disabilities)	No	No	<ul style="list-style-type: none"> <li>§ SCPA 1750-b(4)(a) provides that in life-sustaining treatment cases the "attending physician" as defined in PHL 2980.2 must determine incapacity.</li> <li>The attending physician must consult with another physician or licensed psychologist. Either the attending or consult must have special qualifications relating to the treatment of persons with intellectual disabilities.</li> <li>This means that § SCPA 1750-b does not allow an NP to determine incapacity or provide the required consult.</li> </ul>

Adapted from tables created by Robert N. Swidler, V.P. Legal Services, St. Peter's Health Partners, Albany NY

# Can an PA Determine Capacity?

This table is accurate as of June 17, 2020.

Purpose	Initial Determination	Concurring Determination	Explanation
To empower a health care agent	Yes, as of June 17, 2020	Yes, as of June 17, 2020	<ul style="list-style-type: none"> <li>As a result of the 2019 amendment to the health care proxy law, the determination of incapacity can be by the attending practitioner – a physician, nurse practitioner or physician assistant.</li> <li>In life-sustaining treatment cases the attending practitioner must consult with another physician, nurse practitioner or physician assistant.</li> <li>This means the HCP Law does allow PAs to determine incapacity or provide the required concurrent determination. In cases where the patient lacks capacity due to mental illness a psychiatrist must be the concurring.</li> </ul>
To empower a FHCDA surrogate	Yes, as of June 17, 2020	Yes	<ul style="list-style-type: none"> <li>The FHCDA, in PHL 2994-c, as of June 17, provides that the determination of incapacity must be by the attending practitioner (a physician, nurse practitioner or physician assistant.) In life-sustaining treatment cases there must be a concurring determination by a "health or social services practitioner" which includes a PA.</li> <li>This means that the FHCDA does allow a PA to determine incapacity or provide the required concurring determination.</li> </ul>
To empower a § SCPA 1750-b surrogate (decisions for patients with intellectual disabilities)	No	No	<ul style="list-style-type: none"> <li>§ SCPA 1750-b(4)(a) provides that in life-sustaining treatment cases the "attending physician" as defined in PHL 2980.2 must determine incapacity.</li> <li>The attending physician must consult with another physician or licensed psychologist. Either the attending or consult must have special qualifications relating to the treatment of persons with intellectual disabilities.</li> <li>This means that § SCPA 1750-b does not allow an PA to determine incapacity or provide the required consult.</li> </ul>

Adapted from tables created by Robert N. Swidler, V.P. Legal Services, St. Peter's Health Partners, Albany NY

# Keypoints

- Capacity is the assessment of the patient's ability to understand the consequences of a decision.
- Capacity is “task specific.”
- Authority of NPs to determine capacity
  - To empower a FHCDA Surrogate, **as of** May 28, 2018
  - To empower a health care agent, **as of** February 3, 2019
- Authority of PAs to determine capacity
  - To empower a health care agent/FHCDA Surrogate, **as of** June 17, 2020
- Authority of NPs & PAs does **NOT** extend to 1750-b
  - **Only a physician can determine capacity**



# References

- COVID-19: MOLST & eMOLST Guidance  
<https://molst.org/blog/newsletter/molst-update-march-2020/>
- [Authority of Physician Assistants & Current NYS Law](#) on [MOLST.org](#)
- [Authority of Nurse Practitioners & Current NYS Law](#) on [MOLST.org](#)
- See [Up-to-date References](#) for Assessment of decision-making capacity in adults