

# HEALTH CARE PROXIES

**FOR INDIVIDUALS WITH INTELLECTUAL AND  
DEVELOPMENTAL DISABILITIES**

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# LEARNING OBJECTIVES

To recognize the Key Elements needed to complete a Health Care Proxy for an individual with Intellectual or Developmental Disabilities

To describe the value of a properly completed Health Care Proxy for an Individual with Intellectual or Developmental Disabilities

To recognize the value of Health Care Proxy completion for an Individual with Intellectual or Developmental Disabilities in the context of Supported Decision-Making.

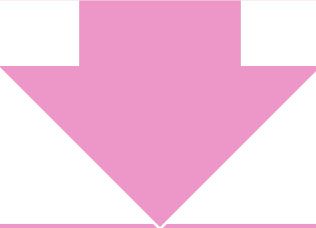
# Presumed Capacity

Every adult (a person over the age of 18 years, or the parent of a child, or who has married) who is residing either in the community or in a residential facility operated or certified by OPWDD is presumed competent unless:

The person Has a MHL Article 81 guardian

The person has a SCPA Article 17-A guardian

There is a prior Court Determination that the individual is not legally capable of appointing a Health Care Agent



Presumed Capacity: The person has the mental ability to understand that they are delegating the authority to make health care decisions to another person

# Execution of Health Care Proxy For persons with capacity residing in OPWDD operated or licensed residence or facility

Sign and date the HCP in presence of two (2) adult witnesses who also sign.

- If Individual is unable to do so, another party may sign for that person, at the person's direction and in the presence of two (2) witnesses.

Witnesses must affirm that person executed HCP willingly and free of duress.

- If any person acting as witness is of opinion that HCP is not executed willingly, they should not act as witness and should notify facility CEO or MHLS

# Witnesses to Signing of Health Care Proxy

One witness cannot be affiliated with residence or facility

One witness must be:

- Physician, nurse practitioner, physician assistant or clinical psychologist employed by Developmental Center or DDSO for at least one year
- Physician, nurse practitioner, physician assistant or clinical psychologist employed for at least 2 years to render professional care at a facility
- Physician, nurse practitioner, physician assistant or clinical psychologist who has specialized training in DD and 2 years experience treating persons with DD
- Physician, nurse practitioner, physician assistant or clinical psychologist with 3 years experience treating persons with DD

Restrictions:

- Health Care Agent cannot act as witness



## Who Can Act as Health Care Agent?

- Any person who has a relationship with the Individual
  - Who is involved and has regular contact
  - Who knows the Individual's wishes and preferences
  - Who is trusted by the Individual
- Restrictions:
  - CEO, Employee, or governing body officer of facility, or Physician affiliated with facility cannot be HC Agent, unless related by blood, marriage, or adoption
  - A physician who is appointed HC Agent cannot act as Attending Physician after authority under HCP commences, unless physician declines appointment as agent at or before such time.

# Contents of a Health Care Proxy

A health care proxy **must** include:

- Identity of the Individual and the agent; and
- Indicate that the Individual intends an agent to have authority to make health care decisions on their behalf.

A health care proxy **may** include:

- Wishes or instructions about health care decisions;
- Limitations upon an agent's authority;
- Expiration of HCP upon specific date or occurrence of specific condition;
- Appointment of an Alternate Agent.

# Wishes and Instructions

- An Individual's wishes may include but are not limited to:
  - the administration of nutrition and hydration;
  - blood transfusions;
  - artificial respiration;
  - withdrawal of life support;
  - withholding of life support;
  - DNR orders;
  - pain medication;
  - chemotherapy;
  - antibiotics.





# Rights and Duties of Health Care Agent

Subject to any express limitations, agent has the authority to make any and all health care decisions that the Individual could make

After consultation with appropriate professionals and whomever the agent considers most qualified to aid them in making an informed health care decision, agent must make health care decisions:

- **in accordance with an Individual's wishes**, including their religious and moral beliefs; or
- if wishes are not reasonably known and cannot with reasonable diligence be ascertained, **in accordance with an Individual's best interests**, provided however:
  - if wishes regarding the administration of **artificial nutrition and hydration** are not reasonably known and cannot with reasonable diligence be ascertained, **an agent does not have the authority** to make decisions regarding these measures.

Health Care Decisions by Agents have Priority over decisions of any others

# When the Agent's Authority Commences

- Authority Commences upon a Determination that Individual lacks capacity to make a health care decision
- Lack of Capacity Determination made by attending physician
  - In writing
  - Includes attending physician's opinion regarding cause and nature of incapacity and extent and probable duration
  - Attending physician must either have qualifications as listed under witness to HCP signing, or consult with professional with those qualifications
- Written Determination must be included in Clinical Record
- Notice must be given to: Individual, Agent, CEO of residence, Guardian

# Creation and Use of HCP in Residential Facilities

- Residential Providers must:
  - Provide information about right to create HCP
  - Educate Individuals about authority delegated to Agent, what a HCP may include or omit, how HCP is created or revoked
  - Ensure that Resident creating HCP does so voluntarily
  - Notify any facilities providing services to Individual of identity of Agent when Agent's authority is triggered
  - Preserve and protect best interests of Individual
  - Take appropriate steps, including notifying MHLS if in Provider's opinion:
    - HCP not validly executed;
    - Agent acting in bad faith
    - Agent not acting in accordance with Individual's wishes, or if not ascertainable, best interest.

# Other Considerations

## HCP can be revoked by a Competent Individual

- Upon notice to Agent or Provider, orally or in writing
- Presumption of Competency unless determined otherwise by Court Order
- Execution of subsequent HCP revokes earlier HCP

## Health Care Provider who has received a Health Care Proxy must:

- Include HCP in Clinical Record
- Comply with Health care decisions made by Agent in good faith

## MHLS can assist in drafting, modifying and execution of HCP

# Objections and Special Proceedings

Individual Can Object to:

- Incapacity Determination
- Agent's health care decision

Individual's Objection prevails UNLESS

Court Determination that Individual lacks capacity to make health care decision

Anyone can commence a Proceeding in Court to Challenge:

- Validity of HCP
- For Removal of Agent
- To override Agent's Decision

# Advantages of Using the HCP

- Empowers the Individual
  - Consistent with Supported Decision-Making
  - Appropriate Advanced Care Planning
  - Allows Individual to engage in Conversation about Wishes and Preferences with Agent and other trusted persons
- Identifies a trusted person as Agent
- Ensures that Agent knows of Individual's wishes and preferences
- Ensures that Agent and others act consistently with wishes and preferences, and/or best interests



# Resources

- Health Care Proxy Law:
  - <https://www.nysenate.gov/legislation/laws/PBH/2981>
- Health Care Proxy Form:
  - <https://www.health.ny.gov/publications/1430.pdf>
- Supported Decision-Making New York:
  - <https://sdmny.org/>
- Mental Hygiene Legal Service:
  - <https://www.nycourts.gov/courts/ad1/committees&programs/MHLS/index.shtml>
  - [https://www.nycourts.gov/courts/ad2/pdf/mhlsart10/mhls\\_ContactUs.pdf](https://www.nycourts.gov/courts/ad2/pdf/mhlsart10/mhls_ContactUs.pdf)
  - <https://www.nycourts.gov/ad3/mhls/index.html>
  - <https://www.nycourts.gov/courts/ad4/mhls/>
- OPWDD:
  - <https://opwdd.ny.gov/providers/health-care-decisions>
- CompassionAndSupport.org and MOLST.org:
  - <https://compassionandsupport.org/advance-care-planning/cccc/special-considerations/intellectual-developmental-disabilities/>
  - <https://molst.org/covid-19-guidance/opwdd-individuals/>