

The New York Health Care Proxy Handbook

- Make your health care wishes known to your loved ones.
- Appoint a trusted person to make health care decisions for you only if you cannot make them yourself.
- Enjoy peace of mind knowing that your health care wishes will be followed according to your instructions.

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Who Should Use This Book

You should use this book if you want to know how to prepare your own Health Care Proxy according to New York State law. If you already have a Health Care Proxy, you can use this book as a handy reference if you have questions or need more detailed information about this subject.

If you have been appointed as a health care agent for someone else, you can also use this book because it includes information about the duties and responsibilities of a health care agent.

This book will also be helpful even if you intend to have an attorney prepare your Health Care Proxy. It will provide you with valuable information before you meet with your attorney, and will also be a handy reference you can rely upon in the future.

The information in this book only applies to mentally competent adults who decide to use a Health Care Proxy or other advance planning strategies while they are capable of making their own health care decisions.

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Who Should Not Use This Book

This book specifically excludes coverage of the law which applies to individuals who lack the mental capacity to sign a Health Care Proxy due to mental incapacity or developmental disabilities.

Different laws and regulations apply in cases where someone wants to make health care decisions on behalf of a person who is mentally incapacitated, and therefore unable to create their own Health Care Proxy. Consult with an attorney if you are caring for someone who does not have the mental capacity to make their own health care decisions.

Legal Citations

Even though this book is written for a general audience, it includes legal citations which can be used if the reader wants to refer to some of the external sources cited in this book.

This book includes legal citations to certain New York State statutes, regulations, and cases.

The following is a list of abbreviations used when citing sources:

- PHL - New York Public Health Law
- MHL - New York Mental Health Law
- NYCRR - New York Code of Rules and Regulations

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Practical Advice - Keep It Simple

It's not easy for us to think about our own illness and death. It's even harder to discuss it with our loved ones. But if we want to maintain as much control as possible over our health care decisions, it's better to think about these things when we are relatively healthy and mentally competent. If we lose our mental competence, then this planning opportunity is lost and we lose control over our own health care decisions. So it's bad when we fail to think about these topics when we have the opportunity.

But overthinking these topics can be just as bad as failing to think about them at all. Either extreme presents problems. In many ways, our lives and health are unpredictable. We don't know what the future holds and we don't have all the information we think we need to do our planning. There are many variables, some known and many unknown. Overthinking these topics creates unnecessary anxiety, and often prevents a person from completing the basic steps they need to take to accomplish their planning goals. So we need to keep it simple and take a balanced approach. It should not be very difficult to prepare your Health Care Proxy. In fact, it should be relatively easy and straightforward.

Unfortunately, many people go overboard when planning for their Health Care Proxy or other advance health care directives. They engage in hyper-planning. They try to anticipate too many hypothetical medical scenarios, and then try to write specific health care instructions to cover every imaginable medical contingency. They list specific medical treatments they want, including medications, as well as those they don't want. They may even specify the length of each treatment in their instructions.

In some cases, this type of hyper-planning can actually prevent people from actually completing their Health Care Proxy because they become so bogged down in hypothetical details

that they never actually finish completing their advance directives. It just never gets done because there is always another hypothetical scenario which must be considered and possibly included in the Health Care Proxy they hope to finish someday.

In other cases, if their extensively detailed Health Care Proxy does get finished, then it may require periodic changes to reflect their changes in attitude about medical care, or the latest medical advances reported in the media. This type of hyper-planning is an anxiety inducing waste of time and energy.

This book focuses on basic and balanced planning, which is all that most people need. This process becomes much easier if you always keep the following two basic principles in mind:

1. The Health Care Proxy is **only** used if you become mentally incapacitated and unable to make your own health care decisions. As long as you are mentally competent, you make your own health care decisions about all medical treatments — even if you are terminally ill. The Health Care Proxy is only your contingency plan. So there is a very good chance that the Health Care Proxy you create will never need to be used.

2. The key to gaining peace of mind is selecting a responsible health care agent you completely trust to follow your wishes and instructions. If you completely trust your health care agent, then you will be confident that he or she will carry out your instructions.

What is a Health Care Proxy

A Health Care Proxy is a written document you use to appoint someone you trust to act as your health care agent to make health care decisions for you only if you become mentally incapable of making those decisions yourself. By planning in advance, a Health Care Proxy allows you to keep control over your own health care decisions.

The Health Care Proxy creates a principal-agent relationship between you (the principal) and another person (the health care agent). The law provides a basic framework which governs the rights and responsibilities of all parties when a validly created Health Care Proxy is in effect.

The New York statute governing Health Care Proxies is contained in Article 29-C of the Public Health Law, "Health Care Agents and Proxies," §§ 2980 through 2994.

Applies to Health Care Decisions Only

Health care means any treatment, service, or procedure to diagnose or treat an individual's physical or mental condition. (PHL §2980(4)). A health care decision means any decision to consent or refuse to consent to health care. (PHL §2980(6)).

A Health Care Proxy is not the same thing as a Power of Attorney. Its scope is limited to health care decisions only. It can't be used like a Power of Attorney to transact other business such as banking or paying bills.

When we think of mental incapacity, most of us think of cases where people are suffering from advanced Alzheimer's disease or dementia. Clearly, a Health Care Proxy would be useful in these cases. But these extreme cases are not the only ones where a Health Care Proxy is useful.

A Health Care Proxy is also useful in situations where a person becomes mentally incapacitated for other reasons, either temporarily or permanently. Common examples of temporary incapacity include unconsciousness caused by a heart attack, stroke, or accident. Many people also don't realize they will be considered temporarily incapacitated while under anesthesia during and after surgery.

So it's important to realize that a Health Care Proxy isn't just for someone who is in declining mental health or suffering from a terminal illness that has mentally incapacitated them. It also protects healthy individuals at any age who may become temporarily or permanently incapacitated due to a sudden unexpected event, such as an accident, medical emergency, or unanticipated complication from routine medical treatment. As you can see, there are a wide variety of possible situations where you would need a Health Care Proxy if you want to maintain control over your health care decisions.

Although everyone should at least consider using a Health Care Proxy, you should also know that the decision is yours to make. No family member, relative, or friend can force you to use a Health Care Proxy. No doctor, nurse, or hospital employee can force you to use a Health Care Proxy. And the law specifically prohibits any person from requiring you to sign a Health Care Proxy as a condition for providing health care services or insurance. (PHL §2988).

Why Advance Planning is the Key

Using a Health Care Proxy allows you to plan in advance. You should plan in advance because you can't sign a Health Care Proxy after you become mentally incompetent. In New York, only a mentally competent adult has the right to accept or reject medical treatment. If you are mentally competent, then you may consent or refuse to consent to health care. You can refuse treatment or stop treatment even after it has started. No spouse, other family member, relative, close friend, physician, or anyone else can force you to get medical treatment. You control your own decisions, as long as you are mentally competent.

But things change if you become mentally incompetent due to illness, injury, or disability. If you become incompetent, then someone else will make those important health care decisions for you. If you plan in advance while you are mentally competent, you can use a Health Care Proxy to designate a health care agent who will only make those decisions for you according to your wishes and instructions.

You Control the Timing

A Health Care Proxy remains in effect indefinitely unless you either revoke it, or specify a particular date or event upon which it will automatically expire. If the authority of the agent begins before the expiration date, then the Health Care Proxy won't expire while the principal lacks capacity. (PHL §2981(5)(c)).

Health Care Proxy Defined

Article 29-C of the New York Public Health Law authorizes competent adults to create a Health Care Proxy. The law specifically defines a Health Care Proxy as “a document delegating the authority to make health care decisions, executed in accordance with the requirements of this article.” (PHL §2980(8)). Health Department regulations define a Health Care Proxy as “a document created pursuant to Article 29-C of the Public Health Law which delegates the authority to another adult known as a health care agent to make health care decisions on behalf of the adult when that adult is incapacitated.” (10 NYCRR §400.21(b)(2)).

The Commissioner of Health is empowered to enact any regulations necessary to implement the Health Care Proxy Law. (PHL §2993). The regulations can be found in 10 NYCRR §400.21, “Advance Directives.”

A Health Care Proxy is not a “Living Will”

A Health Care Proxy is not the same thing as a “Living Will.” There is no statute in New York governing “Living Wills.” The Health Department regulations provide that “A living will means a document which contains specific instructions concerning an adult's wishes about the type of health care choices and treatments that an adult does or does not want to receive.” (10 NYCRR §400.21(b)(3)).

You cannot use a Living Will to designate a health care agent in New York. You must use a Health Care Proxy.

Some of the differences between a Health Care Proxy and a living will be explained later in the chapter entitled “What About a Living Will.”

A Health Care Proxy must be in writing and signed

A Health Care Proxy must be a written document signed and witnessed in accordance with the requirements of Article 29-C of the Public Health Law. Since there is no such thing as a verbal Health Care Proxy in New York, you cannot just verbally designate a health care agent.

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Basic Things to Keep in Mind

- Remember that as long as you are mentally competent, you make all your own health care decisions even if you are terminally ill. Your health care agent will **only** make your health care decisions according to your instructions if you become mentally incompetent. So you only need to think about what you would want your health care agent to do if you couldn't make your own decisions.
- You can change your instructions at any time as frequently as you want as long as you are mentally competent. So you have a lot of flexibility.
- If you're in good health, you shouldn't spend lots of time thinking about all the things that could possibly go wrong and then plan for those hypothetical scenarios. This type of hyper-planning is an anxiety producing waste of time.
- If you have been diagnosed with a serious medical condition such as advanced coronary artery disease, then you should focus on what treatments are available for that condition and plan accordingly.
- If you have a terminal illness such as advanced stage cancer, you should focus on what you want done as you near the end of your life if you become unable to decide for yourself.
- In all cases, you should decide what you would want done if you are in a condition where you lose consciousness and require life support to prolong your life. For example, would you want life support to continue if you were in a coma and there was no reasonable expectation that you would recover and regain your mental competence?

Basic Form of a Health Care Proxy

The Minimum Requirements

Public Health Law §2981 only requires that a Health Care Proxy:

1. Be in writing,
2. Identify the principal and the agent,
3. Indicate that the principal intends the agent to have authority to make health care decisions,
4. Be signed and dated by the principal in the presence of two adult witnesses, who must also sign, and state that the principal appeared to execute the proxy willingly and free from duress.

So as long as the minimum requirements are met, you can create your own Health Care Proxy from scratch. However, most people just find it much easier to use the standard Health Care Proxy Form contained in New York State Health Care Proxy law.

New York Standard Health Care Proxy Form

The statute contains a suggested standard Health Care Proxy form. (PHL §2981(5)(d)). In practice, most people use the standard form, often with some additions or modifications. Most physicians, hospitals, and other health care providers also just use a standard form based on the statutory language.

These standard forms are provided free of charge by health care providers. A standard form is also published by the New York State Department of Health.

Using the Standard Form with Modifications

Most health care providers are familiar with the standard form since it is the form most commonly used. In practice, it is usually preferable and easier to use the standard form with some modifications instead of creating your own form from scratch which no one else uses. An “unusual” or “unfamiliar” Health Care Proxy may cause unnecessary confusion and delay while your health care providers try to figure out if the “unusual” or “unfamiliar” document actually qualifies as a valid Health Care Proxy under New York law.

The next Chapter contains New York’s standard Health Care Proxy form.

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New York's Standard Form

The following form is contained in PHL §2981(5)(d)), and is commonly referred to as the standard Health Care Proxy Form, or just “the standard form”:

Health Care Proxy

I — (name of principal) — hereby appoint — (name, home address and telephone number of agent) — as my health care agent to make any and all health care decisions for me, except to the extent I state otherwise.

This health care proxy shall take effect in the event I become unable to make my own health care decisions.

NOTE: Although not necessary, and neither encouraged nor discouraged, you may wish to state instructions or wishes, and limit your agent's authority. Unless your agent knows your wishes about artificial nutrition and hydration, your agent will not have authority to decide about artificial nutrition and hydration. If you choose to state instructions, wishes, or limits, please do so below:

— (Space for instructions, wishes, or limits.) —

I direct my agent to make health care decisions in accordance with my wishes and instructions as stated above or as otherwise known to him or her. I also direct my agent to abide by any limitations on his or her authority as stated above or as otherwise known to him or her.

In the event the person I appoint above is unable, unwilling or unavailable to act as my health care agent, I hereby appoint — (name, home address and telephone number of alternate agent) — as my health care agent.

I understand that, unless I revoke it, this proxy will remain in effect indefinitely or until the date or occurrence of the condition I have stated below:

(Please complete the following if you do NOT want this Health Care Proxy to be in effect indefinitely): —

This proxy shall expire: — (Specify date or condition) —

Signature:

Address:

Date:

I declare that the person who signed or asked another to sign this document is personally known to me and appears to be of sound mind and acting willingly and free from duress. He or she signed (or asked another to sign for him or her) this document in my presence and that person signed in my presence. I am not the person appointed as agent by this document.

Witness:

Address:

Witness:

Address:

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