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ARTICLE 29-C

HEALTH CARE AGENTS AND PROXIES

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S 2980. Definitions. The following words or phrases, used in this article, shall have the following meanings, unless the context otherwise requires:

1. "Adult" means any person who is eighteen years of age or older, or is the parent of a child, or has married.
2. "Attending physician" means the physician, selected by or assigned to a patient, who has primary responsibility for the treatment and care of the patient. Where more than one physician shares such responsibility, or where a physician is acting on the attending physician`s behalf, any such physician may act as the attending physician pursuant to this article.
3. "Capacity to make health care decisions" means the ability to understand and appreciate the nature and consequences of health care decisions, including the benefits and risks of and alternatives to any proposed health care, and to reach an informed decision.
4. "Health care" means any treatment, service or procedure to diagnose or treat an individual`s physical or mental condition.
5. "Health care agent" or "agent" means an adult to whom authority to make health care decisions is delegated under a health care proxy.
6. "Health care decision" means any decision to consent or refuse to consent to health care.
7. "Health care provider" means an individual or facility licensed, certified, or otherwise authorized or permitted by law to administer health care in the ordinary course of business or professional practice.
8. "Health care proxy" means a document delegating the authority to

make health care decisions, executed in accordance with the requirements of this article.

9. "Hospital" means a general hospital as defined in subdivision ten of section two thousand eight hundred one of this chapter and a residential health care facility as defined in subdivision three of section two thousand eight hundred one of this chapter, and a mental hygiene facility as defined in subdivision ten of this section and a hospice as defined in subdivision one of section four thousand two of this chapter.

10. "Mental hygiene facility" means a residential facility, excluding family care homes, operated or licensed by the office of mental health or the office of mental retardation and developmental disabilities.

11. "Mental illness" means a mental illness as defined in subdivision twenty of section 1.03 of the mental hygiene law, provided, however, that mental illness shall not include dementia, such as alzheimer`s disease or other disorders related to dementia.

12. "Principal" means a person who has executed a health care proxy.

13. "Reasonably available" means that a person to be contacted can be contacted with diligent efforts by an attending physician or another person acting on behalf of the attending physician or the hospital.

14. "Residential health care facility" means a residential health care facility as defined in subdivision three of section two thousand eight hundred one of this chapter.

15. "Qualified psychiatrist" means, for the purposes of this article, a physician licensed to practice medicine in New York state who: (a) is a diplomate of the American Board of Psychiatry and Neurology or is eligible to be certified by that board; or (b) is certified by the American Osteopathic Board of Neurology and Psychiatry or is eligible to be certified by that board.

S 2981. Appointment of health care agent; health care proxy. 1. Authority to appoint agent; presumption of competence. (a) A competent adult may appoint a health care agent in accordance with the terms of this article.

(b) For the purposes of this section, every adult shall be presumed competent to appoint a health care agent unless such person has been adjudged incompetent or otherwise adjudged not competent to appoint a health care agent, or unless a committee or guardian of the person has been appointed for the adult pursuant to article seventy-eight of the mental hygiene law or article seventeen-A of the surrogate`s court procedure act.

2. Health care proxy; execution; witnesses. (a) A competent adult may appoint a health care agent by a health care proxy, signed and dated by the adult in the presence of two adult witnesses who shall also sign the proxy. Another person may sign and date the health care proxy for the adult if the adult is unable to do so, at the adult`s direction and in the adult`s presence, and in the presence of two adult witnesses who shall sign the proxy. The witnesses shall state that the principal appeared to execute the proxy willingly and free from duress. The person

appointed as agent shall not act as witness to execution of the health care proxy.

(b) For persons who reside in a mental hygiene facility operated or

licensed by the office of mental health, at least one witness shall be an individual who is not affiliated with the facility and, if the mental hygiene facility is also a hospital as defined in subdivision ten of section 1.03 of the mental hygiene law, at least one witness shall be a qualified psychiatrist.

(c) For persons who reside in a mental hygiene facility operated or licensed by the office of mental retardation and developmental disabilities, at least one witness shall be an individual who is not affiliated with the facility and at least one witness shall be a physician or clinical psychologist who either is employed by a school named in section 13.17 of the mental hygiene law or who has been employed for a minimum of two years to render care and service in a facility operated or licensed by the office of mental retardation and developmental disabilities, or who has been approved by the commissioner of mental retardation and developmental disabilities in accordance with regulations approved by the commissioner. Such regulations shall require that a physician or clinical psychologist possess specialized training or three years experience in treating developmental disabilities.

3. Restrictions on who may be and limitations on a health care agent.

(a) An operator, administrator or employee of a hospital may not be appointed as a health care agent by any person who, at the time of the appointment, is a patient or resident of, or has applied for admission to, such hospital.

(b) The restriction in paragraph (a) of this subdivision shall not apply to:

(i) an operator, administrator or employee of a hospital who is related to the principal by blood, marriage or adoption; or

(ii) a physician, subject to the limitation set forth in paragraph (c)

of this subdivision, except that no physician affiliated with a mental hygiene facility or a psychiatric unit of a general hospital may serve as agent for a principal residing in or being treated by such facility or unit unless the physician is related to the principal by blood, marriage or adoption.

(c) If a physician is appointed agent, the physician shall not act as the patient's attending physician after the authority under the health care proxy commences, unless the physician declines the appointment as agent at or before such time.

(d) No person who is not the spouse, child, parent, brother, sister or grandparent of the principal, or is the issue of, or married to, such person, shall be appointed as a health care agent if, at the time of appointment, he or she is presently appointed health care agent for ten principals.

4. Commencement of agent's authority. The agent's authority shall commence upon a determination, made pursuant to subdivision one of section two thousand nine hundred eighty-three of this article, that the principal lacks capacity to make health care decisions.

5. Contents and form of health care proxy. (a) The health care proxy shall:

(i) identify the principal and agent; and

(ii) indicate that the principal intends the agent to have authority to make health care decisions on the principal's behalf.

(b) The health care proxy may include the principal's wishes or instructions about health care decisions, and limitations upon the agent's authority.

(c) The health care proxy may provide that it expires upon a specified date or upon the occurrence of a certain condition. If no such date or condition is set forth in the proxy, the proxy shall remain in effect until revoked. If, prior to the expiration of a proxy, the authority of the agent has commenced, the proxy shall not expire while the principal lacks capacity.

(d) A health care proxy may, but need not, be in the following 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:

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:

(e) The health care proxy shall not be executed on a form or other writing that also includes the execution of a power of attorney, provided, however, that nothing in this paragraph shall invalidate a delegation of the authority to make health care decisions executed prior to the enactment of this article.

(f) A health care proxy may include the principal's wishes or instructions regarding organ and tissue donation. Failure to state wishes or instructions shall not be construed to imply a wish not to donate.

6. Alternate agent. (a) A competent adult may designate an alternate agent in the health care proxy to serve in place of the agent when:

(i) the attending physician has determined in a writing signed by the physician (A) that the person appointed as agent is not reasonably available, willing and competent to serve as agent, and (B) that such person is not expected to become reasonably available, willing and competent to make a timely decision given the patient's medical circumstances;

(ii) the agent is disqualified from acting on the principal's behalf pursuant to subdivision three of this section or subdivision two of section two thousand nine hundred ninety-two of this article, or

(iii) under conditions set forth in the proxy.

(b) If, after an alternate agent's authority commences, the person appointed as agent becomes available, willing and competent to serve as agent:

(i) the authority of the alternate agent shall cease and the authority of the agent shall commence; and

(ii) the attending physician shall record the change in agent and the reasons therefor in the principal's medical record.

S 2982. Rights and duties of agent. 1. Scope of authority. Subject to any express limitations in the health care proxy, an agent shall have the authority to make any and all health care decisions on the principal's behalf that the principal could make. Such authority shall be subject to the provisions of section twenty-nine hundred eighty-nine of this article.

2. Decision-making standard. After consultation with a licensed physician, registered nurse, licensed clinical psychologist or certified

social worker, the agent shall make health care decisions: (a) in accordance with the principal's wishes, including the principal's religious and moral beliefs; or (b) if the principal's wishes are not reasonably known and cannot with reasonable diligence be ascertained, in accordance with the principal's best interests; provided, however, that if the principal's wishes regarding the administration of artificial nutrition and hydration are not reasonably known and cannot with reasonable diligence be ascertained, the agent shall not have the authority to make decisions regarding these measures.

3. Right to receive information. Notwithstanding any law to the contrary, the agent shall have the right to receive medical information and medical and clinical records necessary to make informed decisions regarding the principal's health care.

4. Priority over other surrogates. Health care decisions by an agent on a principal's behalf pursuant to this article shall have priority

over decisions by any other person, except as otherwise provided in the health care proxy or in subdivision five of section two thousand nine hundred eighty-three of this article.

S 2983. Determination of lack of capacity to make health care decisions for the purpose of empowering agent. 1. Determination by attending physician. (a) A determination that a principal lacks capacity to make health care decisions shall be made by the attending physician to a reasonable degree of medical certainty. The determination shall be made in writing and shall contain such attending physician's opinion regarding the cause and nature of the principal's incapacity as well as its extent and probable duration. The determination shall be included in the patient's medical record. For a decision to withdraw or withhold life-sustaining treatment, the attending physician who makes the determination that a principal lacks capacity to make health care decisions must consult with another physician to confirm such determination. Such consultation shall also be included within the patient's medical record.

(b) If an attending physician of a patient in a general hospital or mental hygiene facility determines that a patient lacks capacity because of mental illness, the attending physician who makes the determination must be, or must consult, for the purpose of confirming the determination, with a qualified psychiatrist. A record of such consultation shall be included in the patient's medical record.

(c) If the attending physician determines that a patient lacks capacity because of a developmental disability, the attending physician who makes the determination must be, or must consult, for the purpose of confirming the determination, with a physician or clinical psychologist who either is employed by a school named in section 13.17 of the mental hygiene law, or who has been employed for a minimum of two years to render care and service in a facility operated or licensed by the office of mental retardation and developmental disabilities, or who has been approved by the commissioner of mental retardation and developmental disabilities in accordance with regulations promulgated by such commissioner. Such regulations shall require that a physician or clinical psychologist possess specialized training or three years experience in treating developmental disabilities. A record of such consultation shall be included in the patient's medical record.

(d) A physician who has been appointed as a patient's agent shall not make the determination of the patient's capacity to make health care decisions.

2. Request for a determination. If requested by the agent, an attending physician shall make a determination regarding the principal's capacity to make health care decisions for the purposes of this article.

3. Notice of determination. Notice of a determination that a principal lacks capacity to make health care decisions shall promptly be given: (a) to the principal, orally and in writing, where there is any indication of the principal's ability to comprehend such notice; (b) to the agent; (c) if the principal is in or is transferred from a mental

hygiene facility, to the facility director; and (d) to the conservator for, or committee of, the principal.

4. Limited purpose of determination. A determination made pursuant to this section that a principal lacks capacity to make health care decisions shall not be construed as a finding that the patient lacks capacity for any other purpose.

5. Priority of principal's decision. Notwithstanding a determination pursuant to this section that the principal lacks capacity to make health care decisions, where a principal objects to the determination of incapacity or to a health care decision made by an agent, the principal's objection or decision shall prevail unless the principal is determined by a court of competent jurisdiction to lack capacity to make health care decisions.

6. Confirmation of lack of capacity. (a) The attending physician shall confirm the principal's continued incapacity before complying with an agent's health care decisions, other than those decisions made at or about the time of the initial determination made pursuant to subdivision one of this section. The confirmation shall be stated in writing and shall be included in the principal's medical record.

(b) The notice requirements set forth in subdivision three of this section shall not apply to the confirmation required by this subdivision.

7. Effect of recovery of capacity. In the event the attending physician determines that the principal has regained capacity, the authority of the agent shall cease, but shall recommence if the principal subsequently loses capacity as determined pursuant to this section.

S 2984. Provider's obligations. 1. A health care provider who is provided with a health care proxy shall arrange for the proxy or a copy thereof to be inserted in the principal's medical record if the health care proxy has not been included in such record.

2. A health care provider shall comply with health care decisions made by an agent in good faith under a health care proxy to the same extent as if such decisions had been made by the principal, subject to any limitations in the health care proxy and pursuant to the provisions of subdivision five of section two thousand nine hundred eighty-three of this article.

3. Notwithstanding subdivision two of this section, nothing in this article shall be construed to require a private hospital to honor an agent's health care decision that the hospital would not honor if the decision had been made by the principal because the decision is contrary to a formally adopted policy of the hospital that is expressly based on religious beliefs or sincerely held moral convictions central to the facility's operating principles and the hospital would be permitted by law to refuse to honor the decision if made by the principal, provided:

(a) the hospital has informed the patient or the health care agent of such policy prior to or upon admission, if reasonably possible; and

(b) the patient is transferred promptly to another hospital that is reasonably accessible under the circumstances and is willing to honor the agent's decision. If the agent is unable or unwilling to arrange

such a transfer, the hospital may intervene to facilitate such a transfer. If such a transfer is not effected, the hospital shall seek judicial relief or honor the agent's decision.

4. Notwithstanding subdivision two of this section, nothing in this article shall be construed to require an individual as a health care provider to honor an agent's health care decision that the individual would not honor if the decision had been made by the principal because the decision is contrary to the individual's religious beliefs or sincerely held moral convictions, provided the individual health care provider promptly informs the health care agent and the hospital of his or her refusal to honor the agent's decision. In such event, the hospital shall promptly transfer responsibility for the patient to another individual health care provider willing to honor the agent's decision. The individual health care provider shall cooperate in facilitating such transfer of the patient.

S 2985. Revocation. 1. Means of revoking proxy. (a) A competent adult may revoke a health care proxy by notifying the agent or a health care provider orally or in writing or by any other act evidencing a specific intent to revoke the proxy.

(b) For the purposes of this section, every adult shall be presumed competent unless determined otherwise pursuant to court order.

(c) A health care proxy shall also be revoked upon execution by the principal of a subsequent health care proxy.

(d) The creation by the principal of written wishes or instructions about health care, or limitations upon the agent's authority, shall not revoke a health care proxy unless such wishes, instructions or limitations expressly provide otherwise. Such wishes, instructions or limitations shall constitute evidence of the principal's wishes for purposes of subdivision two of section two thousand nine hundred eighty-two of this article.

(e) The appointment of the principal's spouse as health care agent shall be revoked upon the divorce or legal separation of the principal and spouse, unless the principal specifies otherwise.

2. Duty to record revocation. (a) A physician who is informed of or provided with a revocation of a health care proxy shall immediately (i) record the revocation in the principal's medical record and (ii) notify the agent and the medical staff responsible for the principal's care of the revocation.

(b) Any member of the staff of a health care provider informed of or provided with a revocation of a health care proxy pursuant to this section shall immediately notify a physician of such revocation.

S 2986. Immunity. 1. Provider immunity. No health care provider or employee thereof shall be subjected to criminal or civil liability, or be deemed to have engaged in unprofessional conduct, for honoring in good faith a health care decision by an agent, or for other actions taken in good faith pursuant to this article.

2. Agent immunity. No person acting as agent pursuant to a health care proxy shall be subjected to criminal or civil liability for making a health care decision in good faith pursuant to this article.

S 2987. Liability for health care costs. Liability for the cost of health care provided pursuant to an agent's decision shall be the same as if the health care were provided pursuant to the principal's decision.

S 2988. Requiring or prohibiting execution of proxy. No person may require or prohibit the execution of a health care proxy by an individual as a condition for providing health care services or insurance to such individual.

S 2989. Effect on other rights. 1. A competent adult's failure to appoint a health care agent or to provide the agent with specific health care instructions pursuant to this article shall create no presumptions regarding the adult's wishes about health care.

2. Nothing in this article creates, expands, diminishes, impairs or supersedes any authority that a principal may have under law to make or express decisions, wishes or instructions regarding health care, including decisions about life sustaining treatment, whether or not expressed in a health care proxy.

3. This article is not intended to permit or promote suicide, assisted suicide, or euthanasia; accordingly, nothing herein shall be construed to permit an agent to consent to any act or omission to which the principal could not consent under law.

S 2990. Proxies executed in other states. A health care proxy or similar instrument executed in another state or jurisdiction in compliance with the law of that state or jurisdiction shall be considered validly executed for purposes of this article.

S 2991. Creation and use of proxies in residential health care and mental hygiene facilities. 1. Residential health care facilities and mental hygiene facilities shall establish procedures:

(a) to provide information to adult residents about their right to create a health care proxy under this article;

(b) to educate adult residents about the authority delegated under a health care proxy, what a proxy may include or omit, and how a proxy is created and revoked;

(c) to help ensure that each resident who creates a proxy while residing at the facility does so voluntarily.

2. Such procedures shall be established in accordance with regulations issued by the commissioners of health, mental health, and mental retardation and developmental disabilities for facilities subject to their respective regulatory authorities.

S 2992. Special proceeding authorized. The health care provider, the conservator for, or committee of the principal, members of the principal's family, a close friend of the principal as defined in subdivision five of section two thousand nine hundred sixty-one of this chapter, or the commissioner of health, mental health, or mental retardation and developmental disabilities may commence a special proceeding pursuant to article four of the civil practice law and rules, in a court of competent jurisdiction, with respect to any dispute arising under this article, including, but not limited to, a proceeding to:

1. determine the validity of the health care proxy;

2. have the agent removed on the ground that the agent (a) is not reasonably available, willing and competent to fulfill his or her

obligations under this article or (b) is acting in bad faith; or

3. override the agent`s decision about health care treatment on the grounds that: (a) the decision was made in bad faith or (b) the decision

is not in accordance with the standards set forth in subdivision one or two of section two thousand nine hundred eighty-two of this article.

S 2993. Regulations. The commissioner of health, in consultation with the commissioners of the office of mental health and the office of mental retardation and developmental disabilities, shall establish such regulations as may be necessary for the implementation of this article, subject to the provisions of subdivision two of section two thousand nine hundred ninety-one of this article.

S 2994. Rights to be publicized. The commissioner of health shall prepare a statement summarizing the rights, duties and requirements of this article and shall require that a copy of such statement:

1. Be furnished to patients or their families at or prior to the time of admission to a hospital, and to each member of the hospital`s staff; and

2. Be posted in a public place in each hospital.

The statement of rights required by this section may be included in any other statement of patients` rights required by other provisions of this chapter.