

GRAY & FELDMAN LLP

625 Panorama Trail Suite 1240 Rochester, NY 14625

tel. 585.218.8620 fax 585.218.8600 e-mail ggray@gfrllp.com website www.gfrllp.com

ARTICLE 17-A GUARDIANSHIP: ALTERNATIVES

1. Parent's right to make health care decisions.

In New York, a parent may give effective consent for medical, dental, health and hospital services for his or her child. However; the situation changes radically when your child attains age 18 and is considered an "adult" under the law. The New York statute provides that an "adult" may give effective consent for medical, dental, health and hospital services for himself or herself, and the consent of no other person is necessary. This means that if a parent wishes to maintain the right to make health care decisions for an adult child with an intellectual or developmental disability (an "I/DD"): (i) the child must sign a Health Care Proxy under Article 29-C of the Public Health Law (a "HCP") if he or she has "capacity;" or, (ii) otherwise, the parent must seek Guardianship under Article 17-A of the Surrogate's Court Procedure Act (the "SCPA") or under Article 81 of the Mental Hygiene Law (the "MHL").

2. 17-A Guardian's right to make health care decisions.

If, in an SCPA Article 17-A proceeding, the doctors certifying that a child is either "intellectually disabled" or "developmentally disabled" also make a determination that the child "lacks capacity to make health care decisions" for him/herself, then the Court will grant the 17-A Guardian the power to make such decisions on behalf of the child with I/DD, similar to the powers given an agent under a HCP. Such decisions may include decisions to withhold or withdraw life-sustaining treatment.

A parent who is a 17-A Guardian has the right to receive all medical information and medical and clinical records necessary to make informed decisions regarding the child's health care. A 17-A Guardian with authority to make health care decisions is considered a "personal representative" of the person with I/DD under HIPAA and is entitled to access "protected health information." A health care provider must comply with the health care decisions made by in good faith by a parent who is a 17-A Guardian, to the same extent as if such decisions

had been made by child if he/she had capacity.

3. Health Care Proxy.

Article 29-C of the Public Health Law (the "PHL") allows an "adult" (*i.e.*, a person who is 18 years of age or older, is married or the parent of a child) and who is "competent" to appoint a health care agent by signing HCP. Every "adult" is presumed competent to appoint a health care agent unless, among other things, an Article 17-A Guardian has been appointed for him or her. While this presumption exists, an adult with a 17-A Guardian appointed may nevertheless be deemed "competent" to appoint a health care agent if the person comprehends that he or she: (i) has delegated authority to make health care decisions to another person; (ii) has expresses a desire that the other person exercise the decision making authority; and (iii) knows that the decisions to be made relate to his or her health care. An adult may "lack capacity to make health care decisions" under SCPA Article 17-A, but still be "competent" to appoint a health care agent under Article 29-C of the PHL. "Capacity" is the ability to understand and appreciate the nature and consequences of the health care decision *itself*, including its benefits and risks. "Competence" is more general in nature and involves the ability to successfully make an appropriate decision which has an impact on the person's life.

The agent's authority to act under a HCP is triggered by a doctor's determination that the person making the HCP (called the "principal") "lacks capacity to make health care decisions." That determination must be confirmed by another health care professional.

After a determination that the principal lacks capacity to make health care decisions and upon consultation with a doctor, nurse or social worker, the health care agent must 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.

If the principal's wishes regarding the administration of artificial nutrition and hydration are not known and cannot with reasonable diligence be ascertained, the agent will not have the authority to make decisions regarding these measures.

A health care agent working under a HCP has the absolute right to receive medical information and medical and clinical records necessary to make informed decisions regarding the principal's health care.

4. Power of Attorney.

Like all other states, New York has authorized the use of a power of attorney (a "POA") by Article 5 Title 15 of the General Obligations Law (the "GOL").

If a person has "capacity" and is over the age of 18 (called the "principal"), he or she may sign a POA by which the principal designates another person (called an "agent") to act on his or her behalf on selected financial and legal matters.

"Capacity" means ability to comprehend the nature and consequences of the act of executing and granting, revoking, amending or modifying a POA, any provision in a POA, or the authority of any person to act as agent under a POA. A POA may not be executed by a person who lacks capacity and for whom an Article 17A Guardian has or will be appointed. Thus, if a parent seeks control over the financial and business affairs of a child with I/DD, the parent must *either*: (i) seek Article 17A Guardianship; or (ii) have the child sign a POA. The parent cannot seek the application of both strategies.

An agent *may not* make health care decisions for the principal under a POA. Instead, the principal must execute a HCP to designate another person to make health care decisions.

A POA is in full force and effect once the principal signs it and the on the date which the agent signs it and his/her signature is acknowledged. It is a popular misconception that a POA only has effect upon the incapacity of the principal. To the contrary, the POA is effective when it is properly executed and the agent can act upon it at any time thereafter.

The subsequent "incapacity" of a principal will

not revoke or terminate the authority of an agent who acts under a durable POA.

The State of New York has drafted a POA called a "Statutory Short Form POA" contained in section 5-1513 of the GOL. If the prescribed Statutory Short Form POA is used, financial institutions doing business in New York cannot reject the form without "reasonable cause." In other words; a financial institution must accept the Statutory Short Form POA and cannot insist upon the use of its own unique form in its dealings.

When dealing with property of the principal, an agent must observe the standard of care that would be observed by a "prudent person" dealing with property of another. The agent is in a fiduciary relationship with the principal and has the following duties: (i) to act according to any instructions from the principal or, where there are no instructions, in the "best interest" of the principal; (ii) to avoid conflicts of interest; (iii) to keep the principal's property separate and distinct; (iii) to not make gifts to him/herself without specific authorization in a POA; and (iv) to keep a record of all receipts, disbursements, and transactions entered into by the agent on behalf of the principal and to make those record and POA available to the principal or to third parties at the request of the principal.

A POA terminates upon: (i) the death of the principal; (ii) the revocation by the principal; (iii) the revocation of the power of an agent and there is no co-agent or successor agent to act; or (iv) the death, resignation or incapacity of an agent and there is no co-agent or successor agent to act. A principal may revoke a POA: (i) in accordance with its terms; or (ii) by delivering a revocation to the agent in person or by sending a signed and dated revocation to the agent's last known address. The agent must comply with the principal's revocation notwithstanding the actual or perceived incapacity of the principal unless the principal is subject to a MHL Art. 81 Guardianship.

The information contained in this brochure is provided for informational purposes only, and should not be construed as legal advice on any subject matter. No reader of its content, clients or otherwise, should act or refrain from acting on the basis of the brochure without seeking the appropriate legal advice on the particular facts and circumstances at issue. This brochure reflects a general discussion of the law of the State of New York only, and it may not, and probably does not, accurately reflect the law of any other State. Gray & Feldman LLP expressly disclaims all liability in respect to actions taken or not taken based on any or all the contents of this brochure.

© Copyright August, 2016