

GUARDIANSHIP & DECISION MAKING IN NEW YORK (compiled by offices of BrandowLaw as of Nov. 1, 2018)

	Supported Decision-Making	Family Health Care Decisions Act	Health Care Proxy	Power of Attorney	SCPA 17-A	Article 81
How Authority is secured	<ul style="list-style-type: none"> • Voluntarily • Persons with intellectual (ID) or developmental disabilities (DD) may choose to designate supporters in a written supported decision-making agreement • Persons with ID or DD may use the help of a “facilitation” program like SDMNY to make their agreements 	<ul style="list-style-type: none"> • Private hospitals and individual health care providers are not required to honor decisions made by surrogates pursuant to FHCDA • Surrogate’s authority shall commence upon a determination, made pursuant to this article, that the adult patient lacks decision-making capacity 	<ul style="list-style-type: none"> • “Competent” adult signs HCP which is witnessed by 2 witnesses 	<ul style="list-style-type: none"> • Adult with “capacity” signs and dates the POA; has their signature notarized and the agent(s) sign the POA before a notary. 	<ul style="list-style-type: none"> • Proceeding in Surrogate’s Court based upon certification of 2 doctors that the Ward is either intellectually or developmentally disabled (before age 22 except for TBI) • Jurisdictional hearing always held. Full hearing only when no parent(s); those who object, or in the Court’s discretion 	<ul style="list-style-type: none"> • Functional assessment of the actual abilities of the alleged incapacitated person (“AIP”), at least 18 years old at time of petition filing, for both property and personal management • A hearing must be held and the IP must attend
Standard to secure Authority	<ul style="list-style-type: none"> • Persons with ID or DD must choose to receive support in one or more decision-making areas • Supporter designations arise from the persons’ with ID or DD own choice, either alone or in consultation with other(s), such as a facilitator, if participating in a facilitation program <p align="center">http://sdmny.org/</p>	<ul style="list-style-type: none"> • This law ONLY applies to patients in hospitals and nursing homes who have lost the capacity to make medical treatment decisions and who have not appointed an agent under a health care proxy • Allows a patient’s family member or close friend to make health care decisions for a patient who is in a hospital or nursing home and did not leave prior instructions or sign a health care proxy <p align="center">http://wnylc.com/health/entry/142/</p>	<ul style="list-style-type: none"> • Person is “competent” enough to understand that they: <ol style="list-style-type: none"> 1. have delegated authority to make health care decisions to another person; 2. have expressed a desire that the other person exercise the decision-making authority; 3. know that the decisions to be made relate to their health care <p align="center">www.nysba.org/Healthcareproxy/</p>	<ul style="list-style-type: none"> • Person has the “capacity” to understand 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 <p align="center">https://www.nysba.org/CustomTemplates/Content.aspx?id=6554</p>	<ul style="list-style-type: none"> • Ward is incapable of managing themselves or their affairs by reason of “intellectual disability” or “developmental disability” and such condition is permanent in nature or likely to continue indefinitely <p align="center">http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=55826</p>	<ul style="list-style-type: none"> • AIP is unable to provide for personal or property management; assessment proves incapacity • Petitioner must prove by clear and convincing evidence that the AIP has functional limitations necessitating the need for a guardian • Guardian must take a guardianship class before becoming appointed <p align="center">http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=55826</p>

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Authority to make health care decisions	<ul style="list-style-type: none"> • Persons with ID or DD make their own health care decisions with support from those they choose to be involved in supported decision-making 	<ul style="list-style-type: none"> • Surrogate has authority to make any and all health care decisions on the adult patient’s behalf that the patient could make 	<ul style="list-style-type: none"> • Agent has authority to make health care decisions as described in the HCP 	<ul style="list-style-type: none"> • With proper health care authority, a POA may make health care decisions 	<ul style="list-style-type: none"> • If 2 MDs or 1 MD/Psychologist certify that the Ward lacks “capacity to make health care decisions,” the Court may grant that authority to make health care decisions to the guardian 	<ul style="list-style-type: none"> • Guardianship Judgment must specifically define the authority of the Guardian and said Judgment can be tailored to the specific needs of the AIP
Scope of Authority	<ul style="list-style-type: none"> • Supports may include gathering information, helping persons with ID or DD evaluate the information and understand consequences of a decision, communicating decisions to third parties, and supporting them in taking responsibility for their decisions 	<ul style="list-style-type: none"> • Surrogate must make health care decisions in accordance with the patient’s wishes and/or patient’s best interests • Surrogate’s assessment of the patient’s wishes and best interests shall be patient-centered 	<ul style="list-style-type: none"> • Agent has the authority to make any and all health care decisions on the principal’s behalf • Considered the “personal representative” of the Person under HIPAA, granted full access to the Person’s “protected health information” • Can modify or restrict the agent’s authority to make health care decisions. • Wishes, instructions or limitations will constitute evidence of the principal’s wishes for purposes of governing the decisions of the agent and are often included as part of the written text of the HCP to serve the function of a “living will” 	<ul style="list-style-type: none"> • Authority to make financial, tax, insurance and banking transactions as well as business dealings and involvement with any type of dispute, litigation or property • Generally, the principal will sign a “durable” POA which means that it will not be revoked or terminated by the subsequent “incapacity” of the principal • If a Statutory Short Form POA is used, financial institutions doing business in New York cannot reject the form without “reasonable cause” 	<ul style="list-style-type: none"> • Very broad, covers most decisions that are made by a parent for a child, such as financial and health care decisions • There is no statutory guidance as to the extent of this power • Guardian has the authority to make any and all health care decisions on behalf of the Ward, which may include end of life decisions (NY CLS SCPA §1750-b) • Guardian is considered the “personal representative” of the Ward under HIPAA and is granted full access to the Ward’s “protected health information” 	<ul style="list-style-type: none"> • Requires more refined determination linking functional incapacity, appreciation of danger, and danger itself • Directed primarily at adults who have lost or diminished capacity due to advanced age or mental illness • Anticipates closely tailored guardianships, granting guardian, whether of the person or property, no more power than is absolutely necessary under the circumstances of the case • Broader approach than 17-A and greater flexibility, providing for more independence for the AIP • Not based on a medical condition or diagnosis

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Standard to exercise Authority	<ul style="list-style-type: none"> Persons with ID or DD choose (1) the areas in <i>which</i> they want support, (2) <i>who</i> they want to be their Supporters, (3) <i>what</i> kinds of support they want to receive, and (4) <i>how</i> they want to receive them 	<ul style="list-style-type: none"> Surrogate shall express a decision to withdraw or withhold life-sustaining treatment either orally to an attending physician or in writing Surrogate has the right to receive medical information and medical records necessary to make informed decisions about the patient's health care 	<ul style="list-style-type: none"> Before making a health care decision, the agent must consult with an appropriate health care professional The agent must make health care decisions: <ol style="list-style-type: none"> in accordance with the principal's wishes, including the principal's religious and moral beliefs <i>or</i> in accordance with the principal's "best interests" 	<ul style="list-style-type: none"> Agent must observe the standard of care that would be observed by a "prudent person" dealing with property of another Agent is in a fiduciary relationship with principal and has the duty: <ol style="list-style-type: none"> to act as directed by instructions from the principal in the "best interest" of the principal Agent must avoid conflict of interest and must not commingle principal's money/property with his or her own 	Guardian must base all advocacy and health care decision-making solely and exclusively: <ol style="list-style-type: none"> on the "best interests" of the Ward when reasonably known or ascertainable with reasonable diligence, on the Ward's wishes, including moral and religious beliefs 	<ul style="list-style-type: none"> Guardianship Judgment must specifically define the authority of the Guardian Judgment can be tailored to the specific needs of the AIP Include the AIP as much as possible in decision-making
Commencement of Authority	<ul style="list-style-type: none"> From date of execution of agreement. [<i>N.B. No statutory authority in New York State for supported decision-making agreements, i.e. may not recognized by hospitals, financial institutions.</i>] Some institutions, like schools, provider agencies, or OPWDD, may honor such agreements 	<ul style="list-style-type: none"> Surrogate's authority will commence upon a determination that the adult patient lacks decision-making capacity and upon identification of a surrogate pursuant to FHCDA 	<ul style="list-style-type: none"> Agent's authority commences upon the written finding of the attending physician that the principal lacked "capacity to make health care decisions" 	<ul style="list-style-type: none"> Agent's authority commences on the date the POA is signed by both the principal and agent 	<ul style="list-style-type: none"> Guardian's authority to act commences on the date of the Court Order and continues until the death of the Ward, the resignation or death of the Guardian, or if the termination is ordered by the Court 	<ul style="list-style-type: none"> Once appointed Guardian, the Guardian is required to take a Guardianship class. The Guardian is also required to file an Initial Report within 90 days of appointment; thereafter an annual report must be filed with the Court

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Termination of Authority	<ul style="list-style-type: none"> Persons with ID or DD always have the right to change what is in the agreement and who his or her Supporters are 	<ul style="list-style-type: none"> If patient has regained decision-making capacity, the authority of the surrogate shall cease 	<ul style="list-style-type: none"> Agent’s authority continues until the principal revokes the HCP, executes a new HCP, or upon the death of the agent or the principal 	<ul style="list-style-type: none"> POA remains valid until the death of the principal or the agent or until the principal revokes the POA 	<ul style="list-style-type: none"> Surrogate’s Court retains general jurisdiction over the WARD for whom a Guardian has been appointed, even after the date of the Order of appointment. Court may modify, dissolve or otherwise amend the Order granting Guardianship, or it may discharge a Guardian and name a successor Guardian 	<ul style="list-style-type: none"> Guardian may be removed if the Court determines that the Guardian fails to comply with a court order, is guilty of misconduct, or for any other just cause The court appointing a Guardian may allow the Guardian to resign or may suspend the powers of the Guardian

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