



Health Care Proxy and Determination of Capacity

What is a health care proxy and when does it become effective?

A legal document by which you appoint someone to make decisions about your health care if you lose the ability to make those decisions by yourself. The appointed person is called an “agent,” you are called the “principal.” The agent has the authority to make health care decisions if you lack the capacity to do so.

IMPORTANT: Only when you lack the capacity to make your own health care decisions is your agent given that power. It is only then that any medical professional should be listening to the agent instead of you.

How is incapacity to make health care decisions determined?

Attending physician (and no one else) shall determine that you (principal) lack capacity to make health care decisions to a reasonable degree of medical certainty;

1. The physician’s determination must be made in writing in your medical record and include the following:
 - a. Cause of your incapacity;
 - b. Nature of your incapacity;
 - c. Extent of your incapacity; and
 - d. Probable duration of your incapacity.

2. The determination must be given to you orally and in writing, in a manner you understand, provided there is any indication of your ability to understand such notice. The decision must also be provided to the agent.

What if I disagree with the determination of incapacity or a health care decision made by my health care agent?

Your objection overrules the incapacity determination and that of the agent. The health care professional will need to follow your directive, unless a court order that override’s your decision is granted.



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How can I revoke a health care proxy?

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

If it has been determined I lack the capacity to make a health care decision, may I still create a health care proxy?

Possibly, as long as you are competent. Every NYS adult is presumed competent to appoint a health care agent unless determined otherwise pursuant to a court order. As such, an individual with dementia may not have the capacity to make health care decisions, but may still have competency to make a decision to appoint a family member to make health care decisions. All that is needed is a ‘moment of clarity.’

If I have further questions or I have been declared to lack capacity, can the Center for Elder Law & Justice Help?

Yes. Contact 716-853-3087 to speak with our intake representative. The Center for Elder Law & Justice can also assist in the creation of a health care proxy.