SUBJECT: CONSENT-SURROGATE DECISION MAKING Health Care Decision-Making For Patients Who Lack Capacity		
Effective Date: **9/10**	**Reviewed/Revised: 1/12**	**Next Review:** **1/14**

POLICY:

The Family Health Care Decisions Act (FHCDA) applies to treatment decisions, including decisions to withhold or withdraw life-sustaining treatment, for patients in hospitals and nursing homes in New York State who do not have the decision-making capacity to make their own health care decisions and who have not signed a health care proxy. The law allows those closest to the patient, in consultation with health care professionals, to make decisions that promote a patient's wishes and best interests.

PROCEDURE:

A. Upon patient admission or a reasonable time thereafter

1. Make reasonable efforts to
    a. Determine if patient has a health care agent, guardian or surrogate decision-maker available.
    b. Determine if prior orders exist to withdraw or withhold life-sustaining treatment and place in the medical record, including orders on MOLST.
    c. Identify any advance directives (health care proxy, living will) and place in the medical record.
2. Provide the patient, agent or surrogate with a copy of "Deciding About Health Care" provided by the New York State Department of Health.

B. Determining Patient's Decision-Making Capacity

1. **Decision-Making Capacity** – the ability to understand and appreciate the nature and consequences of health care decisions including the benefits, risks and alternatives to any proper treatment and to reach an informed decision.

2. It is presumed that all adult patients have decision-making capacity unless determined otherwise by a court order or a legal guardian has been appointed with authority to make health care decisions for the patient. Determination of incapacity is limited and specific to pending treatment decisions. Patients may be able to make some decisions and not others.

3. The attending physician makes the initial determination, to a reasonable degree of medical certainty, that the patient lacks decision-making capacity. This includes an assessment of the cause and extent of incapacity and the likelihood that the patient will regain decision-making capacity. The assessment and determination must be documented in the medical record. The attending physician must regularly confirm that

the patient continues to lack decision-making capacity for treatment decisions made after the initial determination of capacity and document same in the Progress Record.

4. For patients who are deemed to lack decision-making capacity due to mental illness, mental retardation or developmental disability, either the attending physician must have the following qualifications or an independent determination must be made by an attending physician with the following qualifications:
    i. For mental illness: physician must be licensed in NYS and be a diplomate or eligible to be certified by the American Board of Psychiatry and Neurology or by the American Osteopathic Board of Neurology and Psychiatry.
    ii. For mental retardation or developmental disability: physician or clinical psychologist must be employed by a developmental disabilities services office named in Mental Hygiene Law section 13.17 or employed for a minimum of two years to provide care and services in a facility operated by the NYS OMRDD or which has been approved by OMRDD regulations.

5. Patient must be informed of the determination of incapacity if there is any indication of the patient's ability to understand the information.

6. If the patient objects to the determination of incapacity or to the choice of a surrogate or to a health care decision made by a surrogate, the patient's decision shall prevail unless:
    i. A court has determined that the patient lacks capacity to make the pending treatment decisions or all decisions;
    ii. A court has authorized the treatment decision; or
    iii. Another legal basis exists to override the patient's treatment decision.

C. <u>Considering Patient's Prior Decisions</u>

1. A patient who has lost decision-making capacity may have made prior treatment decisions including decisions regarding life-sustaining treatment. Such prior decisions should be honored if they apply to the current treatment and patient's medical condition. Reasonable efforts should be made to notify the surrogate before implementing the decision. If the patient made a decision about the proposed health care prior to losing decision-making capacity, either expressly or in writing, the patient's decision will be honored.

2. If patient's prior wishes are too general or do not apply to the current treatment to provide an advance decision, the patient's wishes should not be relied upon by the surrogate to determine what the patient would have chosen.

3. Patients can provide advance oral decisions to withdraw or withhold life-sustaining treatment in a hospital with two adult witnesses present, one of whom must be a health or social services practitioner affiliated with Flushing Hospital Medical Center as a physician, registered nurse, nurse practitioner, physician assistant, psychologist or licensed clinical social worker.

4. If a patient has made a prior decision to withdraw or withhold life-sustaining treatment in writing or orally before two witnesses, the attending physician must inform the surrogate before carrying out the patient's wishes. If the surrogate objects, the matter will be

referred to the Ethics Review Committee.

5. Patient must be informed of the determination that the attending physician will rely on prior decisions due to patient's lack of decision-making capacity if there is any indication of the patient's ability to understand the information.

D. Choosing the Surrogate

1. A health care agent has priority over any surrogate.

2. When a patient lacks decision-making capacity, a surrogate can be chosen from the following priority class list in the following order from highest to lowest priority:
    i. Legal guardian authorized to make health care decisions under MHL Article 81;
    ii. Spouse, if not legally separated or domestic partner;
    iii. Son or daughter 18 years or older;
    iv. Parent;
    v. Brother or sister 18 years or older;
    vi. Close friend.

3. **Domestic Partner** - A domestic partner is a person at least 18 years of age who meets any one of the following standards: (a) has entered into a formal domestic partnership recognized by a local, state or national government or has registered as a domestic partner with a registry maintained by the government or an employer; (b) is covered as a domestic partner under the same employment benefits or health insurance as the patient; (c) shares a mutual intent to be a domestic partner with the patient considering all facts and circumstances including but not limited to common ownership or leasing of a home or personal property, common house holding, shared income or expenses, children in common, signs of intention to marry or to become domestic partners or the length of the relationship. The person must present a signed statement to this effect to the patient's attending physician.

4. **Close Friend** – A close friend is any person, 18 years or older, who is a friend or relative of the patient. This person must have maintained regular contact with the patient, be familiar with the patient's activities, health and religious or moral beliefs and present a signed statement to that effect to the patient's attending physician. (Please use form: Documentation of Patient's Domestic Partner or Close Friend, p8.)

5. The surrogate must be readily available, willing and competent to act.

6. Any person highest on the list can choose someone else on the list as surrogate provided that no one higher on the list than the person appointed objects.

7. An operator, administrator, employee or health care professional with privileges at the health care facility cannot act as surrogate unless related to the patient by blood, marriage, domestic partnership, adoption or a close friend whose relationship preceded admission to the facility.

8. The patient's attending physician cannot act as surrogate.

E. <u>Surrogate Decision-Making for Adult Patients</u>

1. A surrogate's authority begins when the patient is determined to lack capacity and ends if the patient regains decision-making capacity.

2. A surrogate can express decisions orally and in writing.

3. Surrogate decisions must be based on
    i. The patient's wishes including religious and moral beliefs, if known <u>or</u>
    ii. If patient's wishes are not reasonably known and cannot with reasonable diligence be ascertained, in accord with the patient's best interests. In assessing the patient's best interests, the surrogate must consider: the dignity and uniqueness of every person; the possibility and extent of preserving the patient's life; the preservation, improvement or restoration of the patient's health or functioning; the relief of the patient's suffering; other values that a reasonable person in the patient's circumstances would wish to consider.

4. Surrogate decisions must be patient-centered and made on an individual basis consistent with the patient's values, including religious and moral beliefs, to the extent reasonably possible.

5. A surrogate has a right to be informed of, among other information, the patient's diagnosis, prognosis, the nature and consequences of proposed health care and the benefits, risks and alternatives.

6. The surrogate has the right to receive medical information, including the patient's medical record, necessary to make informed decisions on behalf of the patient.

7. A surrogate can decide to withhold or withdraw life-sustaining treatment if:

    i. The surrogate determines that the treatment would be an extraordinary burden to the patient and the attending physician determines, with the independent concurrence of another physician, that, to a reasonable degree of medical certainty and in accord with accepted medical standards:
        1. the patient has an illness or injury which can be expected to cause death within six months, whether or not treatment is provided; or
        2. the patient is permanently unconscious; or

    ii. The surrogate determines that the provision of treatment would involve such pain, suffering or other burden that it would reasonably be deemed inhumane or extraordinarily burdensome under the circumstances and the attending physician determines, with the independent concurrence of another physician, that, to a reasonable degree of medical certainty and in accord with accepted medical standards:
        1. the patient has an irreversible or incurable condition.

8. The attending physician and a concurring physician must document determinations in the patient's medical record. (***2 Physicians***)

9. Life-sustaining treatment includes artificial nutrition and hydration and cardiopulmonary resuscitation.

10. The surrogate shall express a decision to withdraw or withhold life-sustaining treatment either orally to an attending physician or in writing.

11. When informed of a surrogate decision to withdraw or withhold life-sustaining treatment, the attending physician must:
    i. Review the medical basis for the decision;
    ii. Record the decision in the medical record; and
    iii. Either promptly implement the decision or promptly inform the surrogate of any objection to the decision; and
    iv. Arrange to transfer the patient to another physician, if necessary, or refer the matter to the Ethics Review Committee.

12. If the attending physician objects to a surrogate decision to withdraw or withhold artificial nutrition and hydration, the decision cannot be implemented without the approval of the Ethics Review Committee or a Court Order.

13. If the attending physician knows of objections or disagreements with the surrogate decision, the physician may refer the matter to the Ethics Review Committee if it cannot be resolved.

14. If the surrogate directs the provision of life-sustaining treatment the denial of which would be likely to result in death if not provided, and an individual health care provider or facility does not wish to provide the treatment, treatment must be provided pending transfer to another provider or facility or pending judicial review.

15. If the patient regains decision-making capacity or if the patient's condition improves, and the attending physician determines that the decision to withdraw or withhold life-sustaining treatment by a surrogate is no longer appropriate or authorized in light of the improvement in the patient's condition, he or she shall immediately:
    i. Include such determination to withdraw or withhold life-sustaining treatment in the patient's medical record; and
    ii. Cancel any orders or plans of care implementing the decision; and
    iii. Inform the person who made the decision to withdraw or withhold treatment or, if that person is not reasonably available, inform at least one person on the surrogate list highest in the order of priority listed; and
    iv. Inform the hospital staff directly responsible for the patient's care.

F. <u>Patients Without Surrogates</u>

1. If it has been established and documented that the patient lacks decision-making capacity and all reasonable efforts to identify a surrogate or locate prior advance directives are unsuccessful, the patient's attending physician is authorized to consent to routine and

major medical treatment as well as decisions to withdraw or withhold life-sustaining treatment in accordance with the patient's best interests and the following procedures:

i. **Routine Medical Treatment** – any treatment, service or procedure to diagnose or treat a patient's physical or mental condition such as the administration of medication, the extraction of bodily fluids for analysis, or dental care performed with a local anesthetic for which health care providers ordinarily do not seek specific consent from an adult patient. Routine medical treatment does not include the long-term provision of treatment such as ventilator support or a nasogastric tube but shall include such treatment when provided as part of post-operative care or in response to an acute illness and recovery is reasonably expected within one month or less.
The attending physician must document in the patient's medical record that the patient lacks decision-making capacity, no surrogate is ready, willing and available, and the medical reasons necessitating the treatment.

ii. **Major Medical Treatment** – any treatment, service or procedure to diagnose or treat the patient's physical or mental condition where: (a) general anesthetic is used; or (b) which involves any significant risk; or (c) which involves any significant invasion of bodily integrity requiring an incision, producing substantial pain, discomfort, debilitation or having a significant recovery period; or (d) which involves the use of physical restraints as defined in Department of Health regulations, except in an emergency; or (e) which involves the use of psychoactive medications except when provided as part of post-operative care or in response to an acute illness and treatment is reasonably expected to be administered over a period of 48 hours or less or when provided in an emergency.
The attending physician shall be authorized to provide major medical treatment once the physician makes a recommendation in consultation with hospital staff directly responsible for the patient's care regarding the patient's treatment and the department chair/designee independently determines that the recommendation is appropriate. Both physicians must document in the patient's medical record that the patient lacks decision-making capacity, no surrogate is ready, willing and available and the medical reasons necessitating the treatment.

2. A physician's authority to consent to treatment begins only after the patient is determined to lack capacity and ends if the patient regains capacity.

3. Under no circumstances can physicians base decisions on the financial interests of the health care facility or any health care provider.

G. Decisions To Withdraw Or Withhold Life-Sustaining Treatment For Patients Without Surrogates

1. The attending physician may make a decision to withhold or withdraw life-sustaining treatment for patients without surrogates with the independent concurrence of the department chair/designee if the attending physician determines to a reasonable degree of medical certainty:
   i. The treatment offers the patient no medical benefit because the patient will die imminently even is the treatment is provided; and

ii. The provision of treatment would violate accepted medical standards.

2. The attending physician will consult with Palliative Care to determine the patient's subsequent treatment decisions.
3. Decisions to withdraw or withhold life-sustaining treatment must be recorded in the patient's medical record by the attending physician and the department chair/designee.
4. Decisions to withdraw or withhold life-sustaining treatment in accord with accepted medical standards will be reviewed regularly by the Ethics Review Committee.

H. <u>Decisions To Withdraw Or Withhold Life-Sustaining Treatment For Minors</u>

1. Minor patients are presumed incapable of making treatment decisions unless the attending physician, in consultation with the minor's parent(s) or guardian, determines that the minor has decision-making capacity.
2. Decisions for minors must be based on the minor's best interests, taking into account the minor's wishes as appropriate.
3. If the minor has decision-making capacity, the minor's assent is required to withdraw or withhold life-sustaining treatment.
4. The parent(s) or the legal guardian of a minor are authorized to consent to withdraw or withhold life-sustaining treatment under the same standards and criteria that apply to decisions for adult patients.
5. In the case of a minor without a parent or guardian authorized to consent to withdraw or withhold life-sustaining treatment, a hospital administrator, attending physician or other can be appointed by the Court as a health care guardian to make the decision.
6. An emancipated minor is a minor who is the parent of a child and/or is 16 years or older and is living independently from his or her parents. For such a minor, the attending physician determines if the minor has decision-making capacity and, if so, he or she can consent to withdraw or withhold life-sustaining treatment if:
    i. The decision meets the standards for decisions for adults as determined by the Ethics Review Committee and the attending physician; and
    ii. The Ethics Review Committee approves the decision.

I. <u>Revocation Of Consent To Withdraw Or Withhold Life-Sustaining Treatment</u>

1. A patient, surrogate or parent or guardian of a minor patient may, at any time, revoke his or her consent to withdraw or withhold life-sustaining treatment by informing an attending physician or any member of the medical or nursing staff.
2. An attending physician informed of the revocation shall immediately (a) record the revocation in the patient's medical record; (b) cancel any orders implementing the decision to withdraw or withhold life-sustaining treatment; and (c) notify the hospital staff directly responsible for the patient's care of the revocation and cancellation of orders.
3. Any member of the medical or nursing staff informed by the patient, surrogate, or parent or guardian of a minor of a revocation of the decision to withdraw or withhold life-sustaining treatment shall immediately inform the attending physician.

J. <u>Objections By Health Care Professionals</u>

1. Individual health care providers are not required to honor treatment decisions made by an adult patient in advance, by a surrogate, or by the parent or guardian of a minor patient if:
    i. the decision is contrary to the individual provider's sincerely held beliefs or sincerely held moral convictions and
    ii. the individual health care provider promptly informs the facility and person who

made the treatment decision of the refusal to honor the decision. The facility must promptly transfer the patient to another individual health care provider willing to honor the decision.

K. Ethics Review Committee- ***See FHMC Ethics Review Committee Policy***

Proposed note from a close friend:

I, _____, am 18 years of age or older and am a
(print first and last name)

friend, or relative of the patient, _____.
(patient's name)

I have known the patient for _____ years during which I have maintained such regular contact with the patient as to be familiar with the patient's activities, health, and religious or moral beliefs so as to be able to make health care decisions.

_____ _____
Signature **Date**