

# THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

## CivilLITIGATION

# What to expect when the unexpected happens

Since you are reading *The Daily Record*, I will presume that you are probably one of the more responsible people in your family. You plan ahead. You already completed a Health Care Proxy. You have discussed or written your preferences for end of life treatment with your family. So, you won't need a randomly selected surrogate from your family to make decisions for you if you suddenly find yourself unconscious in the hospital.

No, the Family Health Care Decisions Act (FHCDA) is not designed for you. It is designed for your brother Butch who moved to Arizona years ago to live with his third wife and became a devoted Jehovah's Witness.

When he visits you this fall and can't resist taking your brand new Anniversary Edition Harley-Davidson out for a ride to see the fall foliage, you can bet he will be distracted by the beautiful hues of color reflecting on the lake. When the hospital calls you after he has crashed and asks you to be his surrogate, this is what you can expect.

First, you are being asked to be Butch's surrogate because he has already been declared incapacitated by two doctors at the hospital. Second, the person with a higher priority as a surrogate, his wife, is not available. Third, the hospital has no evidence of Butch's preferences for health care treatment. He has not been able to express his wishes verbally and there is nothing in writing to which they can refer. So, the hospital notifies both you and Butch of their determination that he lacks capacity and they ask you to serve as his surrogate.

Butch, as the patient, has the right to protest this determination. Let's say Butch does become semi-conscious but too delirious to make decisions. If he protests you as his surrogate, then the ethics committee of the hospital can serve as an advisory group to mediate disputes about the choices of medical care to be given to Butch.

The hospital can assemble members of its ethics committee on an emergent basis. They are trained to respond in these kinds of situations and have experience in examining difficult health care decisions.

By law, under the FHCDA, the ethics committee is interdisciplinary and composed of members likely to be able to fully explore the issues with you, Butch, his doctors and the rest of the family. This includes people who have demonstrated a commitment to patients' rights, at least one physician and one registered nurse, and at least one community member.

The most difficult decisions for a surrogate are those that (1) reflect the patient's religious beliefs with which the surrogate may disagree; (2) risk permanent disabilities for the patient (like amputations or other substantial high-risk procedures); and (3) withdraw or withhold life-sustaining treatment. Fear not. The statute has anticipated the difficulty of these decisions and has put some procedures in place to help you.

We can use two examples in Butch's case to explain.

Let's say that in addition to being unconscious after the accident, Butch has two significant physical injuries for which medical treatment must be decided. He has significant trauma to his right hand, which might require some degree of amputation, and he has some intermittent internal bleeding from a lacerated artery. The doctors recommend amputation of several fingers to prevent the onset of fatal gangrene. The doctors also recommend surgical repair of the lacerated artery. He has already lost enough blood that he needs a transfusion as soon as possible.

As Butch's surrogate, the FHCDA requires you to honor Butch's religious beliefs in making decisions about these recommendations. As a Jehovah's Witness, Butch would likely accept surgery to his hand, but he would refuse a blood transfusion, even to save his life.

The FHCDA, however, does not allow the surrogate to withhold life-sustaining treatment unless either (1) the patient is terminally ill or permanently unconscious and the life-sustaining treatment would be an extraordinary burden; or (2) the patient has an irreversible or incurable condition and the treatment would involve such pain, suffering or other burden that it would



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be inhumane or excessively burdensome under the circumstances.

So, the hand surgery, even though it would involve the loss of a few fingers is something you could authorize for Butch. The surgery on his lacerated artery and the blood transfusion is more problematic. Butch's wife could be of great assistance in helping you and the doctors determine Butch's commitment to the church's religious tenets.

The firm belief of the Jehovah's Witnesses against transfusions would likely be recognized as an extraordinary or excessive burden to Butch. You should therefore consult the doctors to help you determine whether Butch's unconsciousness is temporary or likely to be permanent.

You should also ask the doctors whether Butch has any other conditions (like a previously undiagnosed cancer) that may be terminal. These should also be taken into consideration as the surgery and blood transfusion(s) could be deemed excessive if he is otherwise terminally ill.

As you might imagine, you and Butch's wife may differ on the choices to be made on behalf of Butch. Pursuant to the FHCDA, the hospital's ethics committee can serve in an advisory function to resolve such disputes. They are also empowered to make binding decisions as to whether life-sustaining treatment be withheld.

Their binding decisions are judicially reviewable, so if you should feel strongly that Butch would want to receive life-sustaining blood products while the ethics committee has decided to withhold them, you can seek a decision by declaratory judgment to resolve this conflict.

Hopefully, as one of the more responsible people in your family you will now convince all of them to complete a health care proxy and declaration, so that none of you are faced with having to deal with this difficult process.

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