

Witnesses to NY Health Care Proxy and Living Will

My son recently turned 18.

In the health care proxy section, he is naming my husband as his health care agent and me as his alternate agent. The document requires two witnesses. My daughter can be one witness. Can either my husband or I be the other witness, even though we're named as agents?

Thanks-

I can't speak to NY law specifically but it is not good idea; having an agent act as a witness is sort of like having the Grantee in a deed act as a witness, at best it's bad idea and at worst might invalidate document.

I would really try to grab someone else as a witness, I know it's tough nowadays getting witnesses but I would not have named agent as witness.

Ronald Jones, Florida

Similarly to Ronald, I am not a NY attorney

Here is a recent NYSBA pdf discussing Health Care Proxies and it says that designated agents can't serve as Witnesses.

https://nysba.org/app/uploads/2020/02/PUBS_LegalEase_Living-Wills-Healthcare-Proxy.pdf

At least in Michigan, our statute specifically prohibits family members (also defined in the statute) to serve as witnesses. It may be worthwhile to refer to New York's statute on the matter.

Josh Lowenthal

No. See this publication by the NY dept of health (bottom of page 7).

<https://health.ny.gov/publications/1430.pdf>

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Christine J. Kuntz, Pennsylvania

Not a New York lawyer. Ideally, get two non-relatives. They can witness, and how about drafting poas for the witnesses and witnessing them?

Also, recommend the attorney not be the notary. The/a firm notary can notarize.

I recommend the jurat mention 'acknowledged.'

Happy Thanksgiving to all.

Go, Longhorns!

Rob Robertson, Texas

NY practitioner here. Short answer, no. Persons named as agents cannot serve as witnesses.

However, before your son signs anything, make sure of what he's signing. The original statutory NY Health Care Proxy (<https://www.health.ny.gov/publications/1430.pdf>) has been supplanted in many NY health care facilities by the newer DOH-5003, Medical Orders for Life-Sustaining Treatment, or, more familiarly, a MOLST Form. (<https://www.health.ny.gov/forms/doh-5003.pdf>). Click on the links and compare what you have with what your son has in hand.

You / your son may wish to check with the hospital at which he is most likely to receive treatment and/or his primary health care provider as to which form is more likely to be accepted, and, upon ascertaining this, to what degree, if any, the facility / physician will honor additions / modifications / deviations from the statutory form.

As with so many things the GOSNY (Great State of NY) has made even the expression of one's wishes re end-of-life care more complicated than it ought to be.

Rod Klafehn, New York

I can't answer your question, but you've gotten several answers.

I just wanted to say "good for you !" So few parents think about getting these documents done when their children become 'adults'. Two further suggestions, if you haven't done them, a Durable Power of Attorney, and a HIPAA release so you can get medical information even if not making decisions.

Michael D. Caccavo, Vermont

In NY, the agent cannot sign as a witness.

NY Public Health Law PBH section 2981

Happy Thanksgiving!!!

Bridget E. Butler, New York

Good point, Mike about the HIPAA release , FWIW in our Fla HCS there is "check the Box option" to allow this for agent prior to principal becoming disabled. Also, I, personally, have modified my HCS form to make it explicit that surrogate is Personal Representative under HIPAA. Saves a lot of arguing with hospitals and providers.

Ronald Jones

Not licensed where you are, but generally you should get third party witnesses. Neighbors, friends, bank tellers, baristas or similar sources are available, although limited by the pandemic.

Darrell G. Stewart, Texas