

SENATE No. 853

The Commonwealth of Massachusetts

PRESENTED BY:

Thomas P. Kennedy

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act improving medical decision making.

PETITION OF:

NAME:

Thomas P. Kennedy

DISTRICT/ADDRESS:

Second Plymouth and Bristol

SENATE No. 853

By Mr. Kennedy, a petition (accompanied by bill, Senate, No. 853) of Thomas P. Kennedy for legislation to improve medical decision making. The Judiciary.

The Commonwealth of Massachusetts

**In the One Hundred and Eighty-Ninth General Court
(2015-2016)**

An Act improving medical decision making.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 Section 1.

2 Purpose:

3 The Legislature hereby finds and declares that:

4 A. Patients have a fundamental right to make decisions relating to their medical treatment
5 when they have decisional capacity, and a right to have medical decisions efficiently made by a
6 surrogate decision maker when necessary.

7 B. Laws concerning medical decision-making for incapacitated persons lacking a valid
8 health care proxy should maximize patient protection while also ensuring that surrogate decision
9 makers can be appointed efficiently and consistently so as to minimize extraneous delay in
10 medical decisions and unnecessary burdens to patients’ families and caregivers.

11 Section 2. Definitions

12 Chapter 190B of the General Laws is hereby amended by inserting in section 5-101, the
13 following:

14 (1)(a) "Available", that a person is not "unavailable". A person is unavailable if (i) the
15 person's existence is not known, or (ii) the person has not been able to be contacted by telephone
16 or mail, or (iii) the person lacks decisional capacity, refuses to accept the office of surrogate, or
17 is unwilling to respond in a manner that indicates a choice among the treatment matters at issue.

18 (1)(b) "Attending physician", a licensed physician in Massachusetts selected by or
19 assigned to the patient and who has primary responsibility for treatment and care of the patient.
20 If more than one physician shares that responsibility, any of those physicians may act as the
21 attending physician under this Act.

22 (1)(c) "Close friend" means any person 18 years of age or older who has exhibited
23 special care and concern for the patient and who presents an affidavit to the attending physician
24 stating that he or she (i) is a close friend of the patient, (ii) is willing and able to become
25 involved in the patient's health care, and (iii) has maintained such regular contact with the patient
26 as to be familiar with the patient's activities, health, and religious and moral beliefs. The affidavit
27 must also state facts and circumstances that demonstrate that familiarity.

28 Section 3. Surrogate Decision Making

29 Chapter 190B of the General Laws is hereby amended by adding a new section 5-314 the
30 following:-

31 (1) Applicability- This Section applies to "incapacitated persons" as defined in
32 section 5-101 of this chapter. This Section does not apply to instances in which the patient has an

33 operative and unrevoked Health Care Proxy under Chapter 201D of these laws, or has an
34 operative Medical Order for Life Sustaining Treatment (“MOLST”) form and the patient's
35 condition falls within the coverage of the health care proxy and/or MOST form. In those
36 instances, the health care proxy or MOLST form, as the case may be, shall be given effect
37 according to its terms.

38 (2) Decisions concerning medical treatment on behalf of a patient without decisional
39 capacity are lawful, without resort to the courts or legal process, if the patient does not have a
40 condition subject to Section 5-306A (Substituted Judgment) and if decisions are made in
41 accordance with one of the following paragraphs in this subsection and otherwise meet the
42 requirements of this Section:

43 (3) Court appointed guardianship for incapacitated persons, as outlined in Section 5-
44 301 et seq. of this chapter, is still a valid, alternative means of establishing a medical decision-
45 maker.

46 (4) Decisions concerning medical treatment on behalf of an incapacitated patient who
47 lacks decisional capacity may be made in consultation with the attending physician, by
48 surrogates in the order or priority provided in Section 5. A surrogate decision maker shall make
49 decisions for the adult patient conforming as closely as possible to what the patient would have
50 done or intended under the circumstances, taking into account evidence that includes, but is not
51 limited to, the patient’s personal, philosophical, religious and moral beliefs and ethical values
52 relative to the purposes of life, sickness, medical procedures, suffering, and death. Where
53 possible, the surrogate shall determine how the patient would have weighed the burdens and
54 benefits of initiating or continuing life-sustaining treatment against the burdens and benefits of

55 treatment. In the event an unrevoked health care proxy is no longer valid due to a technical
56 deficiency or is not applicable to the patient's condition, that document may be used as evidence
57 of a patient's wishes. If the adult patient's wishes are unknown and remain unknown after
58 reasonable efforts to discern them or if the patient is a minor, the decision shall be made on the
59 basis of the patient's best interests as determined by the surrogate decision maker. In determining
60 the patient's best interests, the surrogate shall weigh the burdens on and benefits to the patient of
61 initiating or continuing life-sustaining treatment against the burdens and benefits of that
62 treatment and shall take into account any other information, including the views of family and
63 friends, that the surrogate decision maker believes the patient would have considered if able to
64 act for herself or himself.

65 (5) When a patient becomes an incapacitated patient, the health care provider must
66 make a reasonable inquiry as to the availability and authority of a health care proxy. When no
67 health care proxy is available, the health care provider must make a reasonable inquiry as to the
68 availability of possible surrogates listed in items (1) through (4) of subsection 5. For purposes of
69 this Section, a reasonable inquiry includes, but is not limited to, identifying a member of the
70 patient's family or other health care agent by examining the patient's personal effects or medical
71 records. If a family member or other health care agent is identified, an attempt to contact that
72 person by telephone must be made within 24 hours after a determination by the provider that the
73 patient lacks decisional capacity. No person shall be liable for civil damages or subject to
74 professional discipline based on a claim of violating a patient's right to confidentiality as a result
75 of making a reasonable inquiry as to the availability of a patient's family member or health care
76 agent, except for willful or wanton misconduct.

77 (6) The surrogate decision makers, as identified by the attending physician, are then
78 authorized to make decisions for incapacitated patients and do not have condition subject to
79 Section 5-306A (Substituted Judgment):

- 80 (1) the patient's guardian;
- 81 (2) the patient's spouse;
- 82 (3) any adult son or daughter of the patient;
- 83 (4) either parent of the patient;
- 84 (5) any adult brother or sister of the patient;
- 85 (6) any adult grandchild of the patient;
- 86 (7) a close friend of the patient;
- 87 (8) the patient's guardian of the estate.

88 (7) The health care provider shall have the right to rely on any of the above
89 surrogates if the provider believes after reasonable inquiry that neither a health care proxy nor a
90 surrogate of higher priority is available.

91 a. Where there are multiple surrogate decision makers at the same priority level in
92 the hierarchy, it shall be the responsibility of those surrogates to make reasonable efforts to reach
93 a consensus as to their decision on behalf of the patient regarding the forgoing of life-sustaining
94 treatment. If 2 or more surrogates who are in the same category and have equal priority indicate
95 to the attending physician that they disagree about the health care matter at issue, a majority of
96 the available persons in that category (or the parent with custodial rights) shall control, unless the

97 minority (or the parent without custodial rights) initiates guardianship proceedings in accordance
98 with Section 5-303 under this Chapter. No health care provider or other person is required to
99 seek appointment of a guardian.

100 b. After a surrogate has been identified, the name, address, telephone number, and
101 relationship of that person to the patient shall be recorded in the patient's medical record.

102 c. Any surrogate who becomes unavailable for any reason may be replaced by
103 applying the provisions of Section 5-302 in the same manner as for the initial choice of
104 surrogate.

105 d. In the event an individual of a higher priority to an identified surrogate becomes
106 available and willing to be the surrogate, the individual with higher priority may be identified as
107 the surrogate.

108 e. The surrogate decision maker shall have the same right as the patient to receive
109 medical information and medical records and to consent to disclosure.

110 f. Any surrogate shall have the authority to make decisions for the patient until
111 removed by the incapacitated patient, appointment of a guardian of the person, or the patient's
112 death.

113 (8) Every health care provider and other person (a "reliant") shall have the right to
114 rely on any decision or direction by the surrogate decision maker (the "surrogate") that is not
115 clearly contrary to this Chapter, to the same extent and with the same effect as though the
116 decision or direction had been made or given by a patient with decisional capacity. Any person
117 dealing with the surrogate may presume in the absence of actual knowledge to the contrary that

118 the acts of the surrogate conform to the provisions of this Act. A reliant will not be protected
119 who has actual knowledge that the surrogate is not entitled to act or that any particular action or
120 inaction is contrary to the provisions of this Act.

121 a. A health care provider (a "provider") who relies on and carries out a surrogate's
122 directions and who acts with due care and in accordance with this Act shall not be subject to any
123 claim based on lack of patient consent or to criminal prosecution or discipline for unprofessional
124 conduct. Nothing in this Act shall be deemed to protect a provider from liability for the
125 provider's own negligence in the performance of the provider's duties in carrying out any
126 instructions of the surrogate, and nothing in this Act shall be deemed to alter the law of
127 negligence as it applies to the acts of any surrogate or provider.

128 b. A surrogate who acts or fails to act with due care and in accordance with the
129 provisions of this Act shall not be subject to criminal prosecution or any claim based upon lack
130 of surrogate authority or failure to act. The surrogate shall not be liable merely because the
131 surrogate may benefit from the act, has individual or conflicting interests in relation to the care
132 and affairs of the patient, or acts in a different manner with respect to the patient and the
133 surrogate's own care or interests.