

HOUSE No. 4593

The Commonwealth of Massachusetts

HOUSE OF REPRESENTATIVES, June 11, 2018.

The committee on the Judiciary to whom was referred the petition (accompanied by bill, House, No. 3093) of Christopher M. Markey relative to health care decisions during periods of incapacity, reports recommending that the accompanying bill (House, No. 4593) ought to pass.

For the committee,

CLAIRE D.CRONIN.

The Commonwealth of Massachusetts

**In the One Hundred and Ninetieth General Court
(2017-2018)**

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. Section 1 of chapter 201D of the General Laws, as so appearing in the
2 2016 Official Edition, is hereby amended by striking out the definition of "Attending physician"
3 and inserting in place thereof the following definition:-

“Attending physician”, a licensed physician in Massachusetts selected by or assigned to the patient or person and who has primary responsibility for treatment and care of the patient or person. If more than one physician shares that responsibility, the physician most familiar with the patient’s or the person’s status and condition may act as the attending physician.

8 SECTION 2. Said section 1 of said chapter 201D, as so appearing, is hereby further
9 amended by inserting after the definition of "attending physician" the following definition:-

10 “Available”, a person who is not unavailable.

11 SECTION 3. Said section 1 of said chapter 201D, as so appearing, is hereby further
12 amended by inserting after the definition of "Health care proxy" the following definition:-

13 “Incapacitated person”, a person is incapacitated for decision-making regarding his or her
14 health care if the person is unable to understand the nature and consequences of proposed
15 medical treatment, including its risks and benefits, or is unable to express a preference regarding
16 the treatment.

17 SECTION 4. Said section 1 of said chapter 201D, as so appearing, is hereby further
18 amended by inserting after the definition of “Principal” the following 2 definitions:-

19 “Surrogate decision-maker” or “surrogate” means an adult individual who has health care
20 decision-making capacity, is available upon reasonable inquiry, is willing to make health care
21 decisions on behalf of a person who lacks health care decision-making capacity and is identified
22 by the attending physician as the person who is to make those decisions in accordance with the
23 provisions of this chapter.

24 “Unavailable”, a person is unavailable if (i) the person’s existence is not known, or (ii)
25 the person has not been able to be contacted by telephone or mail, or (iii) the person lacks
26 decisional capacity, refuses to accept the office of surrogate, or is unwilling to respond in a
27 manner that indicates an informed choice among the treatment matters at issue.

28 SECTION 5. Section 17 of said chapter 201D, as so appearing, is hereby amended by
29 inserting after the word “under”, in line 5, the following words:- sections one through seventeen
30 of

31 SECTION 6. Chapter 201D of the General Laws is hereby amended by inserting after
32 section 17 the following section:-

33 Section 18. (a) This section applies to incapacitated persons as defined in this chapter.
34 This section does not apply to instances in which the person has an operative and unrevoked
35 health care proxy under this chapter, or has an operative medical order for life sustaining
36 treatment form and the person's conditions falls within the coverage of the health care proxy or
37 the medical order for life sustaining treatment form. In those instances, the health care proxy or
38 medical order for life sustaining treatment form shall be given effect according to its terms.

39 (b) Decisions concerning medical treatment on behalf of a person without decisional
40 capacity are presumed to be lawful, without court order or judicial involvement, if a person does
41 not have a condition subject to section 5-306A of chapter 190B, and if decisions are made in
42 accordance with this section. A surrogate decision maker appointed pursuant to this section has
43 authority to make decisions regarding transfers or an admission to a nursing facility. A surrogate
44 decision maker appointed pursuant to this section shall not have the authority to admit or commit
45 a person without decisional capacity to an inpatient mental health facility.

46 Nothing in this section shall affect the ability of a court to appoint a guardian pursuant to
47 chapter 190B to make medical decisions on behalf of an incapacitated person.

48 (c) Decisions concerning medical treatment on behalf of an incapacitated person may be
49 made by surrogates in the order of priority provided in subsection (g) in consultation with the
50 attending physician. A surrogate decision maker shall make decisions for the person conforming
51 as closely as possible to what the person would have done or intended under the circumstances,
52 taking into account evidence that includes, but is not limited to, the person's philosophical,
53 religious and moral beliefs and ethical values relative to the purpose of life, sickness, medical
54 procedures, suffering and death. Where possible, the surrogate shall determine how the person

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

66 (d) For purposes of this section, a person lacks capacity to make a decision regarding his
67 or her health care if the person is unable to understand the nature and consequences of a
68 proposed medical treatment, including its risks and benefits, or is unable to express a preference
69 regarding the treatment To make the determination regarding capacity, the physician shall
70 interview the person, review the person's medical records and consult with skilled nursing or
71 intermediate care facilities as appropriate. The physician may also interview individuals having
72 recent care and custody of the person, as well as family members and friends of the person, if
73 any have been identified.

74 (e) When a person becomes an incapacitated person, the health care provider must make
75 a reasonable inquiry as to the availability and authority of a health care proxy. When no health
76 care proxy is available, the health care provider shall make a reasonable inquiry as to the
77 availability of possible surrogates listed in subsection (g). A reasonable inquiry includes, but is

78 not limited to, identifying a member of the person's family or other health care agent by
79 examining the person's personal effects or medical records. If one or more family members or
80 health care agents or alternate health care agents are identified, the health care provider shall
81 attempt to contact them. No person shall be liable for civil damages or subject to professional
82 discipline based on a claim of violating a person's right to confidentiality as a result of making a
83 reasonable inquiry as to the availability of a person's family member or health care agent or
84 alternate health care agent except for willful or wanton misconduct.

85 (f) The person's surrogate shall be an adult who has exhibited special care and concern
86 for the person, who is familiar with the person's personal values, who is reasonably available,
87 and who is willing to serve.

88 A health care provider shall require an individual claiming the right to act as surrogate for
89 the person to provide a written declaration under penalty of perjury, stating facts and
90 circumstance reasonably sufficient to establish the claimed authority.

91 (g) Consideration may be given, in order of descending preference for service as a
92 surrogate, to:

93 A. The person's spouse, unless legally separated;

94 B. The person's adult child;

95 C. The person's parent;

96 D. The person's adult sibling;

97 E. Any other adult who satisfies the requirement of subsection (f).

98 (h) Where there are multiple possible surrogate decision makers at the same priority
99 level, the attending physician or the advanced practice nurse practitioner shall, after a reasonable
100 inquiry, select as the surrogate the person who reasonably appears to be best qualified. The
101 following criteria shall be considered in the determination of the person best qualified to serve as
102 the surrogate:

103 a. Whether the proposed surrogate reasonably appears to be better able to make decisions
104 either in accordance with the known wishes of the person or in accordance with the person's best
105 interests;

106 b. The proposed surrogate's regular contact with the person prior to and during the
107 incapacitating illness;

108 c. The proposed surrogate's demonstrated care and concern;

109 d. The proposed surrogate's availability to visit the incapacitated person during his or her
110 illness; and

111 e. The proposed surrogate's availability to engage in face-to-face contact with health care
112 providers for the purpose of fully participating in the decision-making process

113 (i) The attending physician may select a proposed surrogate who is ranked lower in
114 priority if, in his or her judgment, that individual is best qualified, as described in subsection (h),
115 to serve as the incapacitated person's surrogate. The attending physician shall document in the
116 incapacitated person's medical records his or her reasons for selecting a surrogate in exception to
117 the priority order provided in subsection (g).

118 (j) The following persons may not serve as a surrogate:

119 (i) a person who is the subject of a protective order or other court order that directs that
120 person to avoid contact with the incapacitated person;

121 (ii) a person whom the incapacitated person expressly objects to at any time;

122 (iii) a treating health care provider of the person who is incapacitated;

123 (iv) an employee of a treating health care provider not related to the person who is
124 incapacitated;

125 (v) an owner, operator or administrator of a health care facility serving the person who is
126 not related to the person who is incapacitated; or

127 (vi) any person who is an employee of an owner, operator or administrator of a health
128 care facility serving the person who is incapacitated who is not related to that person.

129 (k) Unless the principal regains health decision-making capacity, or specifies a shorter
130 period, a surrogate designation under this section is effective only during the episode of
131 treatment or illness when the surrogate decision is made, or for 90 days, whichever period is
132 shorter.

133 (l) After a surrogate has been identified, the name, address, telephone number, and
134 relationship of that person to the person shall be recorded in the person's medical record.

135 Any surrogate who becomes unavailable for any reason may be replaced by applying the
136 provisions of subsections (f) through (j), in the same manner as for the initial choice of surrogate.

137 In the event an individual of a higher priority to an identified surrogate becomes available
138 and willing to be the surrogate, the individual with higher priority may be identified by the
139 attending physician if such identification satisfied the requirements of subsections (f) through (j).

140 The surrogate decision maker shall have the same right as the person to receive medical
141 information and medical records and consent to disclosure.

142 No physician shall be required to identify a surrogate, and may, in the event a surrogate
143 has been identified, revoke the surrogacy if the surrogate is unwilling or unable to act.

144 (m) No health care provider or employee thereof shall be subject to criminal or civil
145 liability or be deemed to have engaged in unprofessional conduct, for carrying out in good faith a
146 health care decision by a surrogate.

147 No person acting as a surrogate shall be subject to criminal or civil liability for making a
148 health care decision in good faith pursuant to this section.

149 (n) The health care provider, staff or facility caring for the person without decisional
150 capacity, the conservator, members of the person without decisional capacity's family, a close
151 friend of the person without decisional capacity, or the commissioner of public health may
152 commence a special proceeding in a court of competent jurisdiction, with respect to any dispute
153 arising under this chapter, including, but not limited to, a proceeding to:

154 (i) have the surrogate decision maker removed on the ground that the surrogate decision
155 maker is not reasonably available, willing or competent to fulfill his or her obligations under this
156 chapter or is acting in bad faith; or

157 (ii) override the surrogate decision maker's decision about health care treatment on the
158 grounds that: the decision was made in bad faith or the decision is not in accordance with the
159 standards set forth in section five of this chapter.