SENATE DOCKET, NO. 75 FILED ON: 1/7/2019

SENATE . . . . . No. 843

The Commonwealth of Massachusetts

PRESENTED BY:

William N. Brownsberger

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 to improve medical decision making.

PETITION OF:

NAME:	DISTRICT/ADDRESS:
William N. Brownsberger	*Second Suffolk and Middlesex*

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SENATE . . . . . No. 843

By Mr. Brownsberger, a petition (accompanied by bill, Senate, No. 843) of William N. Brownsberger for legislation to improve medical decision making. The Judiciary.

[SIMILAR MATTER FILED IN PREVIOUS SESSION
SEE SENATE, NO. *783* OF 2017-2018.]

The Commonwealth of Massachusetts

In the One Hundred and Ninety-First General Court
(2019-2020)

An Act to improve 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:

SECTION 1. Section 1 of chapter 201D of the General Laws, as so appearing in the 2016 Official Edition, is hereby amended by striking out the definition of "attending physician" 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.

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

"available", a person who is not unavailable.

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

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

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

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

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

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

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

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

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

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

(c) Decisions concerning medical treatment on behalf of an incapacitated person may be made by surrogates in the order of priority provided in subsection (g) in consultation with the attending physician. A surrogate decision maker shall make decisions for the person conforming as closely as possible to what the person would have done or intended under the circumstances, taking into account evidence that includes, but is not limited to, the person's philosophical,

religious and moral beliefs and ethical values relative to the purpose of life, sickness, medical procedures, suffering and death. Where possible, the surrogate shall determine how the person would have weighed the burdens and benefits of initiating recommended medical treatment against the burdens and benefits of refusing treatment. In the event an unrevoked health care proxy is no longer valid due to a technical deficiency or is not applicable to the person's condition, that document may be used as evidence of a person's wishes. If the person's wishes are unknown and remain unknown after reasonable efforts to discern them, the surrogate shall weigh the burdens on and benefits to the person of initiating recommended medical treatment against the burdens and benefits of refusing treatment and shall take into account any other information, including the views of family and friends, that the surrogate decision maker believes the person would have considered if able to act for herself or himself.

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

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

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

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

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

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

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

B. The person's adult child;

C. The person's parent;

D. The person's adult sibling;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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