

**HOUSE . . . . . No. 1779**

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**The Commonwealth of Massachusetts**

PRESENTED BY:

***Christopher M. Markey***

*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:	DISTRICT/ADDRESS:	DATE ADDED:
<i>Christopher M. Markey</i>	<i>9th Bristol</i>	<i>2/17/2021</i>

**HOUSE . . . . . No. 1779**

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By Mr. Markey of Dartmouth, a petition (accompanied by bill, House, No. 1779) of Christopher M. Markey relative to health care decisions during periods of incapacity. The Judiciary.

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**The Commonwealth of Massachusetts**

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**In the One Hundred and Ninety-Second General Court  
(2021-2022)**  
\_\_\_\_\_

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. Purpose:

2           The legislature hereby finds and declares that

3           A. The Commonwealth of Massachusetts recognizes the fundamental right of an adult to  
4 determine the nature and extent of health care the individual will receive, including treatment  
5 provided during periods of incapacity. While all persons have a right to make a written directive,  
6 not all take advantage of that right, and it is the purpose of the surrogacy provisions of this  
7 chapter to ensure that health care decisions can be made in a timely manner by a person’s next of  
8 kin, friend or other qualified individual without involving court action. This chapter specifies a  
9 process to establish a surrogate decision-maker when there is no valid advance directive or a  
10 guardian, as defined in c. 190B § 5-101, to make health care decisions.

11           Section 2. Definitions

12 Chapter 201D of the General Laws is hereby amended by inserting in Section 1 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 an informed choice among the treatment  
18 matters at issue.

19 (1)(b) “Attending physician”, a licensed physician in Massachusetts selected by or  
20 assigned to the person and who has primary responsibility for treatment and care of the person. If  
21 more than one physician shares that responsibility, the physician most familiar with the person’s  
22 status and condition may act as the attending physician under this Act.

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

27 (1)(d) “Qualified individual” shall be an adult who has exhibited special care and concern  
28 for the person, who is familiar with the person’s personal values, who is reasonably available and  
29 who is willing to serve.

### 30 Section 3. Surrogate Decision Making

31 Chapter 201D of the General Laws is hereby amended by adding a new section 18,  
32 Surrogacy:

33           1. Applicability- This Section applies to “incapacitated persons” as defined in subsection  
34 2 of this Act. This Section does not apply to instances in which the person has an operative and  
35 unrevoked Health Care Proxy under this Chapter 201D, or has an operative Medical Order for  
36 Life Sustaining Treatment (“MOLST”) form and the person’s conditions falls within the  
37 coverage of the health care proxy and/or MOLST form. In those instances, the Health Care  
38 Proxy or MOLST form shall be given effect according to its terms.

39           2. Decisions concerning medical treatment on behalf of a person without decisional  
40 capacity are lawful, without resort to the courts or legal process, if a person does not have a  
41 condition subject to GL 190B Section 5-306A (Substituted Judgment) and if decisions are made  
42 in accordance with one of the following paragraphs of this subsection and otherwise meets the  
43 requirements of this Section. A surrogate decision maker appointed pursuant to this Section has  
44 authority to make decisions regarding transfers and/or admission to a nursing facility. A  
45 surrogate decision maker appointed pursuant to this Section shall not have the authority to admit  
46 or commit a patient without decisional capacity to an inpatient mental health facility as defined  
47 in the regulations of the Department of Mental Health.

48           3. Court appointed guardianship for incapacitated persons, pursuant to GL 190B, remains  
49 a valid means of establishing a medical decision-maker.

50           4. Decisions concerning medical treatment on behalf of an incapacitated person may be  
51 made by surrogates in the order of priority provided in Section 9 in consultation with the  
52 attending physician. A surrogate decision maker shall make decisions for the person conforming  
53 as closely as possible to what the person would have done or intended under the circumstances,  
54 taking into account evidence that includes, but is not limited to, the person’s philosophical,

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

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

76         6. When a person becomes an incapacitated person, the health care provider must make a  
77 reasonable inquiry as to the availability and authority of a health care proxy. When no health

78 care proxy is available, the health care provider shall make a reasonable inquiry as to the  
79 availability of possible surrogates listed in items (A) through (E) of Subsection 9. For purposes  
80 of this Section, a reasonable inquiry includes, but is not limited to, identifying a member of the  
81 person's family or other health care agent by examining the person's personal effects or medical  
82 records. If one or more family members or health care agents or alternate health care agents are  
83 identified, the health care provider shall attempt to contact them. No person shall be liable for  
84 civil damages or subject to professional discipline based on a claim of violating a person's right  
85 to confidentiality as a result of making a reasonable inquiry as to the availability of a person's  
86 family member or health care agent or alternate health care agent except for willful or wanton  
87 misconduct.

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

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

94           9. Consideration may be given, in order of descending preference for serve as a surrogate,  
95 to:

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

97           B. The person's adult child;

98           C. The person's parent;

99 D. The person's adult sibling;

100 E. Any other adult who satisfies the requirement of subdivision 7.

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

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

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

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

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

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

116 11. The attending physician may select a proposed surrogate who is ranked lower in  
117 priority if, in his or her judgment, that individual is best qualified, as described in subsection 10,  
118 to serve as the incapacitated person's surrogate. The attending physician shall document in the

119 incapacitated person's medical records his or her reasons for selecting a surrogate in exception to  
120 the priority order provided in subsection (9) of this Section.

121           12. In the event of a challenge, there shall be a rebuttable presumption that the selection  
122 of the surrogate was valid. Any person who challenges the selection shall have the burden of  
123 proving the invalidity of that selection.

124           13. The following persons may not serve as a surrogate: (i) No person who is the subject  
125 of a protective order or other court order that directs that person to avoid contact with the person  
126 shall be eligible to serve as the person's surrogate. (ii) No person shall be identified as surrogate  
127 over the express objection of the person, and a surrogacy shall terminate if at any time a person  
128 for whom a surrogate has been appointed expresses objection to the continuation of the  
129 surrogacy. (iii) A treating health care provider of the person who is incapacitated; (iv) an  
130 employee of a treating health care provider not related to the person who is incapacitated; (v) an  
131 owner, operator or administrator of a health care facility serving the person who is not related to  
132 the person who is incapacitated; or (6) any person who is an employee of an owner, operator or  
133 administrator of a health care facility serving the person who is incapacitated who is not related  
134 to that person.

135           14. Unless the principal regains health decision-making capacity, or specifies a shorter  
136 period, a surrogate designation under this Section is effective only during the episode of  
137 treatment or illness when the surrogate decision is made, or for 90 days, which period is shorter.

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



140           16. Any surrogate who becomes unavailable for any reason may be replaced by applying  
141 the provisions of Subsections 7 through 13 of this Section, in the same manner as for the initial  
142 choice of surrogate.

143           17. In the event an individual of a higher priority to an identified surrogate becomes  
144 available and willing to be the surrogate, the individual with higher priority may be identified by  
145 the attending physician if such identification satisfied the requirements of subsections 7 through  
146 13 of this Section.

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

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

151           20. Every health care provider and other person (a “reliant”) shall have the right to rely  
152 on any decision or direction by the surrogate decision maker (the “surrogate”) that is not clearly  
153 contrary to this Section, to the same extent and with the same effect as though the decision or  
154 direction had been made or given by a person with decisional capacity. Any person dealing with  
155 the surrogate may presume in the absence of actual knowledge to the contrary that the acts of the  
156 surrogate conform to the provisions of this Section. A reliant will not be protected who has  
157 actual knowledge that the surrogate is not entitled to act or that any particular action or inaction  
158 is contrary to the provision of this Section.

159           21. A health care provider (a “provider) who relies on and carries out a surrogate’s  
160 directions and who acts with due care in accordance with this Section shall not be subject to any  
161 claim based on lack of personal consent or to criminal prosecution or discipline for

162 unprofessional conduct. Nothing in this Act shall be deemed to protect a provider from liability  
163 for the provider's own negligence in the performance of the provider's duties in carrying out  
164 instructions of the surrogate, and nothing in this Act shall be deemed to alter the law of  
165 negligence as it applies to the acts of any surrogate or provider.

166           22. A surrogate who acts or fails to act with due care and in accordance with the  
167 provision of this Act shall not be subject to criminal prosecution or any claim based upon lack of  
168 surrogate authority or failure to act. The surrogate shall not be liable merely because the  
169 surrogate may benefit from the act, has individual or conflicting interest in relations to the care  
170 and affairs of the person, or acts in a different manner with respect to the person and the  
171 surrogate's own care or interests.

172           23. The health care providers, staff, and/ or facility caring for the patient without  
173 decisional capacity, the conservator, members of the patient without decisional capacity's family,  
174 a close friend of the patient without decisional capacity, or the commissioner of public health  
175 may commence a special proceeding in a court of competent jurisdiction, with respect to any  
176 dispute arising under this chapter, including, but not limited to, a proceeding to:

177           a. have the surrogate decision maker removed on the ground that the surrogate decision  
178 maker is not reasonably available, willing or competent to fulfill his or her obligations under this  
179 chapter or is acting in bad faith; or

180           b. override the surrogate decision maker's decision about health care treatment on the  
181 grounds that: the decision was made in bad faith or the decision is not in accordance with the  
182 standards set forth in section five.