

SENATE No. 978

The Commonwealth of Massachusetts

PRESENTED BY:

Cynthia Stone Creem

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:

Cynthia Stone Creem

DISTRICT/ADDRESS:

First Middlesex and Norfolk

SENATE No. 978

By Ms. Creem, a petition (accompanied by bill, Senate, No. 978) of Cynthia Stone Creem for legislation to improve medical decision making. The Judiciary.

The Commonwealth of Massachusetts

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

10 SECTION 2. Chapter 201D of the General Laws is hereby amended by inserting in
11 Section 1 the following definitions:

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

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

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

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

28 SECTION 3. Chapter 201D of the General Laws is hereby amended by adding after
29 section 17 the following new section:-

30 Section 18: Surrogate Decision Making

31 1. Applicability- This Section applies to “incapacitated persons” as defined in subsection
32 2 of this Act. This Section does not apply to instances in which the person has an operative and

33 unrevoked Health Care Proxy under this Chapter 201D, or has an operative Medical Order for
34 Life Sustaining Treatment (“MOLST”) form and the person’s conditions falls within the
35 coverage of the health care proxy and/or MOLST form. In those instances, the Health Care
36 Proxy or MOLST form shall be given effect according to its terms.

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

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

48 4. Decisions concerning medical treatment on behalf of an incapacitated person may be
49 made by surrogates in the order of priority provided in Section 9 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. In
61 determining the person's best interests, the surrogate shall weigh the burdens on and benefits to
62 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 5. 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 6. When a person becomes an incapacitated person, the health care provider must make a
75 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 items (A) through (E) of Subsection 9. For purposes

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

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

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

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

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

95 B. The person's adult child;

96 C. The person's parent;

97 D. The person's adult sibling;

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

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

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

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

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

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

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

114 11. The attending physician may select a proposed surrogate who is ranked lower in
115 priority if, in his or her judgment, that individual is best qualified, as described in subsection 10,
116 to serve as the incapacitated person's surrogate. The attending physician shall document in the
117 incapacitated person's medical records his or her reasons for selecting a surrogate in exception to
118 the priority order provided in subsection (9) of this Section.

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

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

133 14. 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 15. Any surrogate who becomes unavailable for any reason may be replaced by applying
136 the provisions of Subsections 7 through 12 of this Section, in the same manner as for the initial
137 choice of surrogate.

138 16. In the event an individual of a higher priority to an identified surrogate becomes
139 available and willing to be the surrogate, the individual with higher priority may be identified by

140 the attending physician if such identification satisfied the requirements of subsections 7 through
141 12 of this Section.

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

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

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

154 20. A health care provider (a “provider) who relies on and carries out a surrogate’s
155 directions and who acts with due care in accordance with this Section shall not be subject to any
156 claim based on lack of personal consent or to criminal prosecution or discipline for
157 unprofessional conduct. Nothing in this Act shall be deemed to protect a provider from liability
158 for the provider’s own negligence in the performance of the provider’s duties in carrying out
159 instructions of the surrogate, and nothing in this Act shall be deemed to alter the law of
160 negligence as it applies to the acts of any surrogate or provider.

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

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

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

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