

HOUSE No. 1664

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>1/19/2023</i>

HOUSE No. 1664

By Representative Markey of Dartmouth, a petition (accompanied by bill, House, No. 1664) of Christopher M. Markey relative to health care decisions during periods of incapacity. The Judiciary.

[SIMILAR MATTER FILED IN PREVIOUS SESSION
SEE HOUSE, NO. 1779 OF 2021-2022.]

The Commonwealth of Massachusetts

**In the One Hundred and Ninety-Third General Court
(2023-2024)**

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.