

HOUSE No. 4329

The Commonwealth of Massachusetts

HOUSE OF REPRESENTATIVES, July 30, 2025.

The committee on The Judiciary, to whom were referred the petition (accompanied by bill, House, No. 1692) of Carole A. Fiola relative to health care decisions during periods of incapacity; and the petition (accompanied by bill, House, No. 2045) of Thomas P. Walsh relative to health care proxies, reports recommending that the accompanying bill (House, No. 4329) ought to pass.

For the committee,

MICHAEL S. DAY.

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**In the One Hundred and Ninety-Fourth General Court
(2025-2026)**

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 5 of Chapter 201D of the General Laws, as appearing in the 2022
2 Official Edition, is hereby amended by inserting after the first sentence in paragraph (3) the
3 following sentence:- The agent’s right under this paragraph may be continued, if express
4 permission is given by the principal, for up to 6 months following the death of the principal.

5 SECTION 2. The General Laws are hereby amended by inserting after chapter 201F the
6 following chapter:-

7 Chapter 201G. Surrogate Decision Making

8 Section 1. As used in this chapter the following words shall, unless the context clearly
9 requires otherwise, have the following meanings:-

10 “Attending physician”, the physician, selected by or assigned to a person, who has
11 primary responsibility for treatment and care of the person. Where more than one physician
12 shares that responsibility, any such physician may act as the attending physician.

13 "Capacity to make health care decisions", the ability to understand the nature and
14 consequences of health care decisions, including benefits, risks and alternatives to proposed
15 medical treatment, and to reach an informed decision.

16 "Incapacitated person", a person who lacks capacity to make health care decisions.

17 "Unavailable", a person is unavailable if: (i) their existence is not known; (ii) they have
18 not been able to be contacted by telephone or mail; or (iii) they lack decisional capacity, refuse to
19 serve as surrogate decision maker or fail to respond in a manner that indicates an informed
20 choice about the health care decision at issue.

21 Section 2. (a) Except as otherwise provided in this chapter, after consultation with health
22 care providers, and after full consideration of diagnosis, prognosis, benefits, risks and
23 alternatives, a person designated as surrogate decision maker pursuant to subsection (d) may
24 make health care decisions on behalf of an incapacitated person: (i) in accordance with the
25 surrogate decision maker's assessment of the person's wishes, including the person's religious
26 and moral beliefs; or (ii) if the person's wishes are unknown, in accordance with the surrogate
27 decision maker's assessment of the person's best interests. In the event an unrevoked health care
28 proxy pursuant to chapter 201D is invalid due to a technical deficiency or is not applicable to the
29 person's condition, or in the event that an operative Medical Order for Life Sustaining Treatment
30 ("MOLST") or similar medical order form, is not applicable to the person's condition, that
31 document may be used as evidence of a person's wishes.

32 (b) In determining whether a person has the capacity to make health care decisions, the
33 attending physician shall interview the person, review their medical records and, where
34 appropriate, consult with health care providers and skilled nursing or intermediate care facilities.

35 The attending physician may also interview family members, friends and other individuals
36 having recent care and custody of the person.

37 (c) When a person is determined to lack the capacity to make health care decisions, the
38 attending physician shall make a reasonable inquiry as to the availability and authority of a
39 health care proxy, guardianship or MOLST or similar medical order form. Where there is no
40 effective health care proxy or guardianship, the attending physician shall make a reasonable
41 inquiry as to the availability of a potential surrogate decision maker meeting the requirements of
42 subsection (d). For purposes of this section, a reasonable inquiry shall include, but not be limited
43 to, reviewing the person's medical records, examining their personal effects and contacting
44 family members and potential health care agents, alternate health care agents or guardians. No
45 person shall be civilly liable or subject to professional discipline for violating a person's right to
46 privacy or confidentiality as a result of making such an inquiry except for willful or wanton
47 misconduct.

48 (d) An attending physician may designate, as an incapacitated person's surrogate decision
49 maker, a competent person over 18 years of age who has exhibited special care and concern for
50 the person, who is familiar with the person's personal values, reasonably available and willing to
51 serve. Consideration may be given, in order of descending priority, for designation as surrogate
52 decision maker, to: (i) the person's spouse, unless legally separated; (ii) the person's adult child;
53 (iii) the person's parent; (iv) the person's adult sibling; and (v) any other person who satisfies the
54 requirement of this subsection. The attending physician shall require any person claiming the
55 right to act as surrogate decision maker to provide a written declaration, sworn under penalties of
56 perjury, stating facts and circumstances reasonably sufficient to establish their claimed authority,
57 which shall be recorded in the incapacitated person's medical records.

58 (e) Where there are multiple possible surrogate decision makers at the same priority level,
59 the attending physician shall, after a reasonable inquiry, designate as surrogate decision maker
60 the person who reasonably appears to be best qualified. The following criteria shall be
61 considered in determining the person best qualified to serve as the surrogate decision maker:

62 (1) whether the proposed surrogate decision maker reasonably appears better able to
63 make decisions either in accordance with the known wishes of the incapacitated person or in
64 accordance with the person's best interests;

65 (2) the proposed surrogate decision maker's regular contact with the incapacitated person
66 prior to and during the incapacitating illness, condition or treatment;

67 (3) the proposed surrogate decision maker's demonstrated care and concern for the
68 incapacitated person;

69 (4) the proposed surrogate decision maker's availability to visit the incapacitated person
70 during their illness, treatment or recovery; and

71 (5) the proposed surrogate decision maker's availability to engage in face-to-face contact
72 with health care providers for the purpose of fully participating in the decision-making process.

73 (f) The attending physician may designate as surrogate decision maker a person who is
74 ranked lower in priority if, in their judgment, that individual is best qualified, as described in
75 subsection (e), to serve as the incapacitated person's surrogate decision maker. The attending
76 physician shall document in the incapacitated person's medical records their reasons for selecting
77 a surrogate decision maker in exception to the priority order provided in subsection (d).

78 (g) The following persons may not serve as a surrogate decision maker: (i) any person
79 who is the subject of a protective order or other court order that directs them to avoid contact
80 with the incapacitated person; (ii) any person whom the incapacitated person has expressed
81 objection to; (iii) a treating health care provider of the incapacitated person; (iv) an employee of
82 a treating health care provider not related to the incapacitated person; (v) an owner, operator or
83 administrator of a health care facility serving the incapacitated person who is not related to the
84 incapacitated person; or (6) an employee of an owner, operator or administrator of a health care
85 facility serving the incapacitated person who is not related to that person. A surrogate decision
86 maker's authority shall terminate at any time upon the express objection of the incapacitated
87 person.

88 (h) After a surrogate decision maker has been designated, the name, address, telephone
89 number, and relationship of that person to the incapacitated person shall be recorded in their
90 medical record. Their authority is effective upon recordation.

91 (i) Unless the incapacitated person regains capacity to make health care decisions, a
92 surrogate decision maker designation under this section is effective only during the episode of
93 treatment or illness when the designation is made, or for 90 days, which period is shorter.

94 (j) No physician shall be required to identify a surrogate decision maker, and may, in the
95 event a surrogate decision maker has been identified, revoke the surrogacy if the surrogate
96 decision maker is unwilling or unable to act.

97 (k) Any surrogate decision maker who is revoked, terminated or becomes unavailable for
98 any reason may be replaced by applying the provisions of subsections (d) through (g) in the same
99 manner as for the initial choice of surrogate decision maker.

100 (l) In the event an individual of a higher priority to a designated surrogate decision maker
101 becomes available and willing to serve, the individual with higher priority may be designated by
102 the attending physician if such designation satisfies the requirements of this section.

103 (m) Notwithstanding any general or special law to the contrary, the surrogate decision
104 maker shall have the same right to receive any and all medical information necessary to make
105 informed decisions regarding the incapacitated person's health care, including any and all
106 confidential medical information that the incapacitated person would be entitled to receive.

107 Section 3. (a) A health care provider and employees thereof shall have the right to rely on
108 any decision or direction by the surrogate decision maker that is not clearly contrary to this
109 chapter to the same extent and with the same effect as though the decision or direction had been
110 made or given by the incapacitated person. Any person dealing with the surrogate decision
111 maker may presume in the absence of actual knowledge to the contrary that the acts of the
112 surrogate decision maker conform to the provisions of this chapter.

113 (b) A health care provider or employee thereof who relies on and carries out a surrogate
114 decision maker's direction and who acts with due care in accordance with this chapter shall not
115 be subject to any claim based on lack of personal consent or to criminal prosecution or discipline
116 for unprofessional conduct; provided, however, that nothing in this chapter shall be deemed to
117 protect a provider from liability for the provider's own negligence in the performance of the
118 provider's duties in carrying out instructions of the surrogate decision maker and nothing in this
119 chapter shall be deemed to alter the law of negligence as it applies to the acts of any surrogate
120 decision maker or provider.

121 (c) No person acting as surrogate decision maker pursuant to a designation under this
122 chapter shall be subject to criminal or civil liability for making a health care decision in good
123 faith pursuant to this chapter.

124 Section 4. The health care provider or facility caring for the incapacitated person, any
125 conservator, guardian, health care proxy, power or attorney or family member of the
126 incapacitated person, the commissioner of public health, or any other interested person may
127 commence a special proceeding in a court of competent jurisdiction with respect to any dispute
128 arising under this chapter, including, but not limited to, a proceeding to: (i) challenge a surrogate
129 decision maker's designation; (ii) have the surrogate decision maker removed on the ground that
130 they are not reasonably available, willing or competent to fulfill their obligations under this
131 chapter or is acting in bad faith; or (iii) override the surrogate decision maker's decision about
132 health care on the grounds that the decision was made in bad faith or the decision is not in
133 accordance with the standards set forth in subsection (a) of section 2. In the event of a challenge
134 to the surrogate decision makers designation, there shall be a rebuttable presumption that the
135 selection of the surrogate decision maker was valid.

136 Section 5. This chapter shall not apply to instances in which the incapacitated person has
137 an operative and unrevoked health care proxy under this chapter or has an operative MOLST or
138 similar medical order form and the person's condition falls fully within the coverage of the
139 health care proxy or medical order form. In those instances, the health care proxy or medical
140 order form shall be given effect according to its terms.