

HOUSE No. 3388

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:

Christopher M. Markey

DISTRICT/ADDRESS:

9th Bristol

HOUSE No. 3388

By Mr. Markey of Dartmouth, a petition (accompanied by bill, House, No. 3388) of Christopher M. Markey relative to health care decisions during periods of incapacity. The Judiciary.

[SIMILAR MATTER FILED IN PREVIOUS SESSION
SEE HOUSE, NO. 3093 OF 2017-2018.]

The Commonwealth of Massachusetts

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

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.
21 If more than one physician shares that responsibility, the physician most familiar with the
22 person’s 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
28 concern for the person, who is familiar with the person’s personal values, who is reasonably
29 available and who is willing to serve.

30

31 Section 3. Surrogate Decision Making

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

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

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

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

51 4. Decisions concerning medical treatment on behalf of an incapacitated person may be
52 made by surrogates in the order of priority provided in Section 9 in consultation with the
53 attending physician. A surrogate decision maker shall make decisions for the person conforming

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

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

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

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

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

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

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

98 B. The person's adult child;

- 99 C. The person's parent;
- 100 D. The person's adult sibling;
- 101 E. Any other adult who satisfies the requirement of subdivision 7.

102

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

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

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

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

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

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

118

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

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

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

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

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

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

146 17. In the event an individual of a higher priority to an identified surrogate becomes
147 available and willing to be the surrogate, the individual with higher priority may be identified by
148 the attending physician if such identification satisfied the requirements of subsections 7 through
149 13 of this Section.

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

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

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

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

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

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

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

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