

SENATE No. 783

The Commonwealth of Massachusetts

PRESENTED BY:

William N. Brownsberger

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:

William N. Brownsberger

DISTRICT/ADDRESS:

Second Suffolk and Middlesex

SENATE No. 783

By Mr. Brownsberger, a petition (accompanied by bill, Senate, No. 783) of William N. Brownsberger for legislation to improve medical decision making. The Judiciary.

[SIMILAR MATTER FILED IN PREVIOUS SESSION
SEE SENATE, NO. 853 OF 2015-2016.]

The Commonwealth of Massachusetts

**In the One Hundred and Ninetieth General Court
(2017-2018)**

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
4 adult to determine the nature and extent of health care the individual will receive, including
5 treatment provided during periods of incapacity. While all persons have a right to make a
6 written directive, not all take advantage of that right, and it is the purpose of the surrogacy
7 provisions of this chapter to ensure that health care decisions can be made in a timely manner by
8 a person’s next of kin, friend or other qualified individual without involving court action. This
9 chapter specifies a process to establish a surrogate decision-maker when there is no valid
10 advance directive or a 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
35 subsection 2 of this Act. This Section does not apply to instances in which the person has an
36 operative and unrevoked Health Care Proxy under this Chapter 201D, or has an operative
37 Medical Order for Life Sustaining Treatment (“MOLST”) form and the person’s conditions falls
38 within the coverage of the health care proxy and/or MOLST form. In those instances, the Health
39 Care 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,
50 remains a valid means of establishing a medical decision-maker.

51 4. Decisions concerning medical treatment on behalf of an incapacitated person may
52 be 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
70 his 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
78 make a reasonable inquiry as to the availability and authority of a health care proxy. When no
79 health 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
90 concern for the person, who is familiar with the person's personal values, who is reasonably
91 available, and who is willing to serve.

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

95 9. Consideration may be given, in order of descending preference for serve as a
96 surrogate, 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 10. Where there are multiple possible surrogate decision makers at the same priority
103 level, the attending physician or the advanced practice nurse practitioner shall, after a reasonable
104 inquiry, select as the surrogate the person who reasonably appears to be best qualified. The
105 following criteria shall be considered in the determination of the person best qualified to serve as
106 the surrogate:
- 107 a. Whether the proposed surrogate reasonably appears to be better able to make
108 decisions either in accordance with the known wishes of the person or in accordance with the
109 person's best interests;
- 110 b. The proposed surrogate's regular contact with the person prior to and during the
111 incapacitating illness;
- 112 c. The proposed surrogate's demonstrated care and concern;
- 113 d. The proposed surrogate's availability to visit the incapacitated person during his
114 or her illness; and
- 115 e. The proposed surrogate's availability to engage in face-to-face contact with health
116 care providers for the purpose of fully participating in the decision-making process

117

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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