

HOUSE No. 4597

The Commonwealth of Massachusetts

HOUSE OF REPRESENTATIVES, May 6, 2024.

The committee on the Judiciary, to whom were referred the petition (accompanied by bill, Senate, No. 928) of Cynthia Stone Creem for legislation to improve medical decision making, the petition (accompanied by bill, House, No. 1489) of Carole A. Fiola, Paul A. Schmid, III and Alan Silvia relative to health care decisions during periods of incapacity and the petition (accompanied by bill, House, No. 1664) of Christopher M. Markey relative to health care decisions during periods of incapacity, reports recommending that the accompanying bill (House, No. 4597) ought to pass.

For the committee,

MICHAEL S. DAY.

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

3 Chapter 201G. Surrogate Decision Making

4 Section 1. As used in this chapter the following words shall, unless the context clearly
5 requires otherwise, have the following meanings:—

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

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

12 “Incapacitated person”, a person who lacks capacity to make health care decisions.

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

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

28 (b) In determining whether a person has the capacity to make health care decisions, the
29 attending physician shall interview the person, review their medical records and, where
30 appropriate, consult with health care providers and skilled nursing or intermediate care facilities.
31 The attending physician may also interview family members, friends and other individuals
32 having recent care and custody of the person.

33 (c) When a person is determined to lack the capacity to make health care decisions, the
34 attending physician shall make a reasonable inquiry as to the availability and authority of a

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

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

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

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

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

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

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

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

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

74 (g) The following persons may not serve as a surrogate decision maker: (i) any person
75 who is the subject of a protective order or other court order that directs them to avoid contact
76 with the incapacitated person; (ii) any person whom the incapacitated person has expressed
77 objection to; (iii) a treating health care provider of the incapacitated person; (iv) an employee of
78 a treating health care provider not related to the incapacitated person; (v) an owner, operator or

79 administrator of a health care facility serving the incapacitated person who is not related to the
80 incapacitated person; or (6) an employee of an owner, operator or administrator of a health care
81 facility serving the incapacitated person who is not related to that person. A surrogate decision
82 maker's authority shall terminate at any time upon the express objection of the incapacitated
83 person.

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

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

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

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

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

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

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

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

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

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

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