

HOUSE No. 107

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. 107

By Mr. Markey of Dartmouth, a petition (accompanied by bill, House, No. 107) of Christopher M. Markey relative to medical treatment decisions on behalf of an incapacitated patients. Children, Families and Persons with Disabilities.

The Commonwealth of Massachusetts

**In the One Hundred and Eighty-Ninth General Court
(2015-2016)**

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 5-101 of chapter 190B of the General Laws, as appearing in the
2 2012 Official Edition is hereby amended by inserting the following language before the
3 definition of "claims":-

4 (1) "Attending physician", a licensed physician in Massachusetts selected by or assigned
5 to the patient and who has primary responsibility for treatment and care of the patient. If more
6 than one physician shares that responsibility, any of those physicians may act as the attending
7 physician under this Act.

8 (2) "Available", that a person is not "unavailable". A person is unavailable if (i) the
9 person's existence is not known, or (ii) the person has not been able to be contacted by telephone
10 or mail, or (iii) the person lacks decisional capacity, refuses to accept the office of surrogate, or
11 is unwilling to respond in a manner that indicates a choice among the treatment matters at issue.

12 SECTION 2. Said section 5-101 of chapter 190B, as so appearing, is hereby amended by
13 inserting the following language after the definition of "claims":-

14 (4) "Close friend" means any person 18 years of age or older who has exhibited special
15 care and concern for the patient and who presents an affidavit to the attending physician stating
16 that he or she (i) is a close friend of the patient, (ii) is willing and able to become involved in the
17 patient's health care, and (iii) has maintained such regular contact with the patient as to be
18 familiar with the patient's activities, health, and religious and moral beliefs. The affidavit must
19 also state facts and circumstances that demonstrate that familiarity.

20 SECTION 3. Said chapter 190B, as so appearing, is hereby further amended by inserting
21 after section 5-313 the following section:-

22 Section 5-314

23 [Surrogate Decision Making.]

24 The General Court hereby finds and declares that:

25

26 Patients have a fundamental right to make decisions relating to their medical treatment
27 when they have decisional capacity, and a right to have medical decisions efficiently made by a
28 surrogate decision maker when necessary. Laws concerning medical decision-making for
29 incapacitated persons lacking a valid health care proxy should maximize patient protection while
30 also ensuring that surrogate decision makers can be appointed efficiently and consistently so as
31 to minimize extraneous delay in medical decisions and unnecessary burdens to patients' families
32 and caregivers.

33 (1) Applicability- This Section applies to “incapacitated persons” as defined in
34 section 5-101 of this chapter. This Section does not apply to instances in which the patient has an
35 operative and unrevoked Health Care Proxy under Chapter 201D of these laws, or has an
36 operative Medical Order for Life Sustaining Treatment (“MOLST”) form and the patient's
37 condition falls within the coverage of the health care proxy and/or MOST form. In those
38 instances, the health care proxy or MOLST form, as the case may be, shall be given effect
39 according to its terms.

40 (2) Decisions concerning medical treatment on behalf of a patient without decisional
41 capacity are lawful, without resort to the courts or legal process, if the patient does not have a
42 condition subject to Section 5-306A (Substituted Judgment) and if decisions are made in
43 accordance with one of the following paragraphs in this subsection and otherwise meet the
44 requirements of this Section:

45 (3) Court appointed guardianship for incapacitated persons, as outlined in Section 5-
46 301 et seq. of this chapter, is still a valid, alternative means of establishing a medical decision-
47 maker.

48 (4) Decisions concerning medical treatment on behalf of an incapacitated patient who
49 lacks decisional capacity may be made in consultation with the attending physician, by
50 surrogates in the order or priority provided in Section 5. A surrogate decision maker shall make
51 decisions for the adult patient conforming as closely as possible to what the patient would have
52 done or intended under the circumstances, taking into account evidence that includes, but is not
53 limited to, the patient’s personal, philosophical, religious and moral beliefs and ethical values
54 relative to the purposes of life, sickness, medical procedures, suffering, and death. Where

55 possible, the surrogate shall determine how the patient would have weighed the burdens and
56 benefits of initiating or continuing life-sustaining treatment against the burdens and benefits of
57 treatment. In the event an unrevoked health care proxy is no longer valid due to a technical
58 deficiency or is not applicable to the patient's condition, that document may be used as evidence
59 of a patient's wishes. If the adult patient's wishes are unknown and remain unknown after
60 reasonable efforts to discern them or if the patient is a minor, the decision shall be made on the
61 basis of the patient's best interests as determined by the surrogate decision maker. In determining
62 the patient's best interests, the surrogate shall weigh the burdens on and benefits to the patient of
63 initiating or continuing life-sustaining treatment against the burdens and benefits of that
64 treatment and shall take into account any other information, including the views of family and
65 friends, that the surrogate decision maker believes the patient would have considered if able to
66 act for herself or himself.

67 (5) When a patient becomes an incapacitated patient, the health care provider must
68 make a reasonable inquiry as to the availability and authority of a health care proxy. When no
69 health care proxy is available, the health care provider must make a reasonable inquiry as to the
70 availability of possible surrogates listed in items (1) through (4) of subsection 5. For purposes of
71 this Section, a reasonable inquiry includes, but is not limited to, identifying a member of the
72 patient's family or other health care agent by examining the patient's personal effects or medical
73 records. If a family member or other health care agent is identified, an attempt to contact that
74 person by telephone must be made within 24 hours after a determination by the provider that the
75 patient lacks decisional capacity. No person shall be liable for civil damages or subject to
76 professional discipline based on a claim of violating a patient's right to confidentiality as a result

77 of making a reasonable inquiry as to the availability of a patient's family member or health care
78 agent, except for willful or wanton misconduct.

79 (6) The surrogate decision makers, as identified by the attending physician, are then
80 authorized to make decisions for incapacitated patients and do not have condition subject to
81 Section 5-306A (Substituted Judgment):

82 (1) the patient's guardian;

83 (2) the patient's spouse;

84 (3) any adult son or daughter of the patient;

85 (4) either parent of the patient;

86 (5) any adult brother or sister of the patient;

87 (6) any adult grandchild of the patient;

88 (7) a close friend of the patient;

89 (8) the patient's guardian of the estate.

90 (7) The health care provider shall have the right to rely on any of the above
91 surrogates if the provider believes after reasonable inquiry that neither a health care proxy nor a
92 surrogate of higher priority is available.

93 a. Where there are multiple surrogate decision makers at the same priority level in
94 the hierarchy, it shall be the responsibility of those surrogates to make reasonable efforts to reach
95 a consensus as to their decision on behalf of the patient regarding the forgoing of life-sustaining

96 treatment. If 2 or more surrogates who are in the same category and have equal priority indicate
97 to the attending physician that they disagree about the health care matter at issue, a majority of
98 the available persons in that category (or the parent with custodial rights) shall control, unless the
99 minority (or the parent without custodial rights) initiates guardianship proceedings in accordance
100 with Section 5-303 under this Chapter. No health care provider or other person is required to
101 seek appointment of a guardian.

102 b. After a surrogate has been identified, the name, address, telephone number, and
103 relationship of that person to the patient shall be recorded in the patient's medical record.

104 c. Any surrogate who becomes unavailable for any reason may be replaced by
105 applying the provisions of Section 5-302 in the same manner as for the initial choice of
106 surrogate.

107 d. In the event an individual of a higher priority to an identified surrogate becomes
108 available and willing to be the surrogate, the individual with higher priority may be identified as
109 the surrogate.

110 e. The surrogate decision maker shall have the same right as the patient to receive
111 medical information and medical records and to consent to disclosure.

112 f. Any surrogate shall have the authority to make decisions for the patient until
113 removed by the incapacitated patient, appointment of a guardian of the person, or the patient's
114 death.

115 (8) Every health care provider and other person (a "reliant") shall have the right to
116 rely on any decision or direction by the surrogate decision maker (the "surrogate") that is not

117 clearly contrary to this Chapter, to the same extent and with the same effect as though the
118 decision or direction had been made or given by a patient with decisional capacity. Any person
119 dealing with the surrogate may presume in the absence of actual knowledge to the contrary that
120 the acts of the surrogate conform to the provisions of this Act. A reliant will not be protected
121 who has actual knowledge that the surrogate is not entitled to act or that any particular action or
122 inaction is contrary to the provisions of this Act.

123 a. A health care provider (a "provider") who relies on and carries out a surrogate's
124 directions and who acts with due care and in accordance with this Act shall not be subject to any
125 claim based on lack of patient consent or to criminal prosecution or discipline for unprofessional
126 conduct. Nothing in this Act shall be deemed to protect a provider from liability for the
127 provider's own negligence in the performance of the provider's duties in carrying out any
128 instructions of the surrogate, and nothing in this Act shall be deemed to alter the law of
129 negligence as it applies to the acts of any surrogate or provider.

130 b. A surrogate who acts or fails to act with due care and in accordance with the
131 provisions of this Act shall not be subject to criminal prosecution or any claim based upon lack
132 of surrogate authority or failure to act. The surrogate shall not be liable merely because the
133 surrogate may benefit from the act, has individual or conflicting interests in relation to the care
134 and affairs of the patient, or acts in a different manner with respect to the patient and the
135 surrogate's own care or interests.