Date of Hearing: March 29, 2022

ASSEMBLY COMMITTEE ON JUDICIARY
Mark Stone, Chair
AB 2338 (Gipson) – As Amended March 23, 2022

SUBJECT: HEALTH CARE DECISIONS: SURROGATES

KEY ISSUE: SHOULD A HIERARCHY OF RELATIVES WHO CAN MAKE MEDICAL DECISIONS BE ESTABLISHED IN STATUTE FOR AN ADULT WHO LACKS CAPACITY TO MAKE HEALTH CARE DECISIONS FOR THEMSELVES AND WHO HAS NOT ALREADY CHOSEN SOMEONE TO ACT FOR THEM?

SYNOPSIS

In a perfect world, patients have the capacity to make their own medical decisions, so that they can be provided with the care and treatment that they want. Unfortunately, patients do not always have the capacity to make those determinations. Patients may be temporarily incapacitated, for example by temporary unconsciousness after a stroke, or more permanently incapacitated, for example by dementia. To help ensure that a person's health care wishes are carried out, even if they unable to make medical decisions at that time, the person can, in advance of requiring health care, create an advance health care directive, or a power of attorney for health care, that can spring into existence when the patient lacks capacity. (POLST forms can do the same thing, but they do not require that the patient initiate them or even consent to them.) Alternatively, a patient with capacity about to undergo treatment may designate, whether in writing or orally, a surrogate to make health care decisions for the patient during the period of treatment. That surrogate has priority over all other agents given that generally, the most recent oral or written authority to make health care decisions takes precedence. Finally, if the patient has a conservator of the person, a court may grant the conservator the power to make health care decisions, but an advance health care directive, or appointment of a surrogate, made while the patient had capacity, would take precedence.

Questions about who can make health care decisions for a patient arise when a patient who now lacks capacity has not executed an advance health care directive or has not named a surrogate. This bill, sponsored by the California Senior Legislature, seeks to provide, in statute, a priority list of relatives of the patient who can make health care decisions for a patient in the absence of their having a surrogate, an agent, or a conservator with the power to make health care decisions. This is not meant to replace the patient's choice – the patient's choice is always the best. However, if the patient has not made that choice and has not designated anyone to make their health care decisions, this bill attempts to provide a priority list that the patient would want. It is similar to intestacy succession – if a decedent does not specify through a will or trust who inherits the decedent's property, the Probate Code assumes who the decedent is likely to have wanted to inherit their property and those people inherit the property. Under the bill, closest relatives have priority above those who are more distantly related, and if more than one relative is in the same priority level and they disagree on treatment, priority is given to the relative with whom the patient lives, if any.

While the bill has no official opposition, hospitals and doctors have raised concerns that the bill's strict hierarchical list could result in the wrong person being chosen to make health care decisions in some cases and could require doctors to spend significant time tracking down

possible surrogates. They request more flexibility in choosing the decisionmaker that the patient would most want. The author and sponsor are engaged in discussions about how to provide some degree of flexibility in the hierarchical list.

SUMMARY: Creates a hierarchy of relatives who can make medical decisions for an incapacitated adult who does not otherwise have a legally recognized health care decisionmaker. Specifically, **this bill**:

1) Clarifies that if an adult patient lacks the capacity to make health care decisions, the following legally recognized health care decisionmakers may make health care decisions on the patient's behalf, in the following descending order of priority:

    a) The patient's surrogate chosen by the patient as provided.

    b) The patient's agent pursuant to an advance health care directive or a power of attorney for health care.

    c) The conservator or guardian of the patient having the authority to make health care decisions for the patient.

2) If an adult patient lacks the capacity to make a health care decision, but does not have a legally recognized health care decisionmaker, allows a surrogate to be chosen from any of the following persons, in the following descending order of priority:

    a) The spouse or domestic partner of the patient.

    b) An adult child of the patient, with priority given to a child with whom the patient lives, if any.

    c) A parent of the patient, with priority given to a parent with whom the patient lives, if any.

    d) An adult sibling of the patient, with priority given to an adult sibling with whom the patient lives, if any.

    e) An adult grandchild of the patient, with priority given to an adult grandchild with whom the patient lives, if any.

    f) An available adult relative with the closest degree of kinship to the patient, with priority given to the relative with whom the patient lives, if any.

3) Consistent with existing law, allows a patient who has capacity at the time to specifically disqualify anyone under 2) from making health care decisions on their behalf by a signed writing or personally informing the supervising health care provider of the disqualification.

EXISTING LAW:

1) Defines an "advance health care directive" or an "advance directive" as either an individual health care instruction or a power of attorney for health care. (Probate Code Section 4605. Unless stated otherwise, all further statutory citations are to the Probate Code.)

2) Defines “health care” broadly as any care, treatment, services, or procedure to maintain, diagnose, or otherwise affect a patient's physical or mental condition. (Section 4615.)

3) Defines “agent” as an individual designated in a power of attorney for health care to make a health care decision for the principal, regardless of whether the person is known as an agent or attorney-of-fact, or by some other term, and includes a successor or alternate agent. (Section 4607.)

4) Defines “individual health care instruction” or “individual instruction” as a patient’s written or oral direction concerning a health care decision for the patient. (Section 4623.)

5) Defines “health care decision” as a decision made by an patient, or a patient’s agent, conservator, or surrogate, regarding the patient’s health care, including:

   a) Selection and discharge of health care providers and institutions;

   b) Approval or disapproval of diagnostic tests, surgical procedures, and programs of medication; and

   c) Directions to provide, withhold, or withdraw artificial nutrition and hydration and all other forms of health care, including cardiopulmonary resuscitation. (Section 4617.)

6) Provides that an adult having capacity may execute a power of attorney for health care, which may authorize the agent to make health care decisions and which can include individual instructions. Sets forth the powers of a principal in a power of attorney for health care. (Section 4671.)

7) Provides that the authority of an agent under a power of attorney for health care becomes effective only on a determination that the principal lacks capacity, and ceases to be effective on a determination that the principal has recovered capacity, unless provided otherwise. (Section 4682.)

8) Institutes specified requirements for the legal sufficiency of a written advance health care directive, which can be electronic, including that the advance directive is either acknowledged before a notary public or signed by at least two witnesses who satisfy specified requirements. (Section 4673 (a).)

9) Creates a statutory advance health care directive form that includes instructions for completion, allowing an individual to choose an agent with power of attorney for health care, provide instructions for end-of-life decisions, and specify preferences related to donations of organs at death. (Section 4701.)

10) Requires an agent to make health care decisions in accordance with the patient’s individual health care instructions, and other wishes to the extent known to the agent, or otherwise to make a decision in accordance with the agent’s determination of the patient’s best interest, which must consider the patient’s personal values to the extent known by the agent. (Section 4684.)

11) Unless provided otherwise in the power of attorney for health care, requires the agent designated in a power of attorney, who is known to the health care provider and is reasonably

available and willing to make health care decisions, to be given priority over any other person in making health care decisions for the principal. (Section 4685.)

12) Defines "surrogate" as an adult, other than a patient's agent or conservator, authorized to make a health care decision for the patient. (Section 4643.)

13) Provides that a patient may designate an adult as a surrogate to make health care decisions by personally informing the supervising health care provider, and that designation shall be promptly recorded in the patient's health care record. Provides that the designation only lasts during the course of treatment or 60 days, whichever is shorter, unless the patient specifies a shorter period. If the patient has designated an agent under a power of attorney for health care, provides that the surrogate has priority over the agent for the effective period of the surrogate designation. (Section 4711.)

14) Requires a surrogate to make health care decisions in accordance with the patient's individual health care instructions, and other wishes to the extent known to the surrogate, or otherwise make decisions in accordance with the surrogate's determination of the patient's best interest, which must consider the patient's personal values to the extent known by the surrogate. (Section 4714.)

15) Allows a patient having capacity to disqualify, at any time, another person, including a member of the patient's family, from acting as the patient's surrogate by a signed writing or by personally informing the supervising health care provider of the disqualification. (Section 4715.)

16) Defines "request regarding resuscitative measures" to mean a written document, signed by both an individual with capacity, or a legally recognized health care decisionmaker (LRHCDM), and the individual's physician, that directs a health care provider regarding resuscitative measures. Provides that a request regarding resuscitative measures is not an advance health care directive. Provides that a "request regarding resuscitative measures" includes one, or both of, the following:

    a) A pre-hospital "do not resuscitate" form as developed by the Emergency Medical Services Authority (EMSA) or other substantially similar form.
    b) A Physician Orders for Life Sustaining Treatment (POLST) form, as approved by the EMSA, which directs a health care provider regarding the resuscitative and life-sustaining measures. (Section 4780 *et seq.*)

17) Requires a health care provider to treat an individual in accordance with a POLST form, which directs a health care provider regarding resuscitative and life-sustaining measures. (Section 4781.2.)

18) Requires that if the POLST or pre-hospital resuscitation orders in an individual's request regarding resuscitative measures directly conflict with their individual health care instruction, then, to the extent of the conflict, the most recent order or instruction is effective. (Section 4781.4.)

19) Except as provided, requires a health care provider or health care institution providing care to (a) comply with an individual health care instruction of the patient and with a reasonable interpretation of that instruction made by a person then authorized to make health care

decisions for the patient; and (b) comply with a health care decision for the patient made by a person then authorized to make health care decisions for the patient to the same extent as if the decision had been made by the patient while having capacity. (Section 4733.)

20) Requires a hospital, within 24 hours of the arrival of a patient in the emergency department who is unconscious or otherwise incapable of communication, to make reasonable efforts to contact the patient's agent, surrogate, or a family member or other person the hospital reasonably believes has the authority to make health care decisions on behalf of the patient. Sets forth activities deemed to be reasonable efforts on the hospital's part. (Section 4717.)

21) Allows for a statutorily prescribed surrogate to make decisions with respect to medical experiments if the person to be experimented on is unable to consent and does not express dissent or resistance to participation. The list of surrogates, in order of priority, is: the person's agent, conservator, spouse, domestic partner, adult child, custodial parent, adult sibling, adult grandchild, or adult relative with the closest degree of kinship. (Health and Safety Code Section 24178.)

22) Requires a hospital to make reasonable efforts to accommodate religious and culture practices and concerns, if the patient's LRHCDM, family, or next of kin voices any special religious or cultural practices and concerns. (Health and Safety Code Section 1254.4 (c)(2).)

23) Establishes the California Senior Legislature in statute and gives the California Senior Legislature the power to define its program and utilize its funds. (Welfare & Institutions Code Sections 9300-05.)

FISCAL EFFECT: As currently in print this bill is keyed non-fiscal.

COMMENTS: In a perfect world, patients have the capacity to make their own medical decisions, so that they can be provided with the care and treatment that they want. Unfortunately, patients do not always have the capacity to make those determinations. Patients may be temporarily incapacitated, for example by temporary unconsciousness after a stroke, or more permanently incapacitated, for example by dementia. To help ensure that a person's health care wishes are carried out, even if they unable to make medical decisions at that time, the person can, in advance of requiring health care, create an advance health care directive, or a power of attorney for health care, that can spring into existence when the patient lacks capacity. (POLST forms can do the same thing, but they do not require that the patient initiate them or at least consent to them.) Alternatively, a patient with capacity about to undergo treatment may designate, whether in writing or orally, a surrogate to make health care decisions for the patient during the period of treatment. That surrogate has priority over all other agents, as, generally, the most recent oral or written authority to make health care decisions takes precedence. Finally, if the patient has a conservator of the person, a court may grant the conservator the power to make health care decisions, but an advance health care directive, or appointment of a surrogate, made while the patient had capacity, would take precedence.

Questions about who can make health care decisions for a patient arise if a patient who now lacks capacity has not executed an advance health care directive or has not named a surrogate. This bill seeks to provide, in statute, a priority list of relatives of the patient who can make health care decisions for a patient in the absence of their having a surrogate, an agent or a conservator with the power to make health care decisions. This is not meant to replace the patient's choice – the patient's choice is always the best. However, if the patient has not made that choice and has

not designated anyone to make their health care decisions, this bill attempts to provide a priority list that the patient would want. It is similar to intestacy succession – if a decedent does not specify through a will or trust who inherits the decedent's property, the Probate Code assumes who the decedent is likely to have wanted to inherit their property and those people inherit the property. Under the bill, closest relatives have priority above those more distantly related, and if more than one relative is in the same priority level and they disagree on treatment, priority is given to the relative with whom the patient lives, if any.

In support of the bill, the author writes:

> This bill seeks to prevent one of the biggest threats to patients. This threat is how present law allows other entities to control medical decision-making.
>
> Since only 30% of the population presently have an Advanced Directive, there will be many ill patients susceptible to decision-making not made by "next of kin" or family members. This threatens the family and loved ones of patients who might be seriously ill.
>
> Most citizens and even healthcare professional believe "next of kin" is part of the decision-making dynamics. This is not true in California. AB-2338 aligns our state with others to preserve and protect a patient's healthcare.

Who can make health care decisions on behalf of an incapacitated adult? When an adult is incapacitated, a third party may make health care decisions on that individual's behalf. The third party may include a court-appointed conservator or a person specifically designated by the individual through an advance health care directive (AHCD), a power of attorney for health care, or a written or oral designation, including a designation as a surrogate. These designees are commonly referred to as legally recognized health care decisionmakers, though that term is not well defined in statute. (*See* Health and Safety Code Section 443.2 (c), which circularly recognizes a LRHCDM to be a surrogate, agent, conservator or guardian, or other LRHCDM.)

Surrogate. A surrogate is an adult, other than an individual's agent or conservator, authorized to make health care decisions for the individual. (Section 4643.) An individual designates a surrogate to make health care decisions by personally informing a supervising health care provider of the surrogate. (Section 4711 (a).) A surrogate designation is only effective for the course of treatment or illness or during the stay at a health care institution when the individual designated the surrogate, or for a period of 60 days, whichever is shorter. (Section 4711 (b).) During that time, a surrogate has authority over *all* other decisionmakers designated by the patient while making health care decisions for the patient, including an agent under a power of attorney for health care. (Section 4711 (d).) A surrogate is limited in health care decisionmaking in that any health care decision must be made in accordance with the individual's health care instruction to the extent known to the surrogate. (Section 4714.) In absence of that health care instruction, the surrogate is required to make health care decisions in accordance with the best interest of the individual, which must include consideration of the individual's personal values to the extent known. (Section 4714.)

Agent under an advance health care directive or power of attorney for health care. An agent is a person designated in a power of attorney for health care or an advance health care directive to make health care decisions for the principal (the individual who executes the directive), regardless of whether the person is known as an agent or attorney in fact, or by some other term. (Section 4607.) The agent effectively makes health care decisions with the same authority as the

individual when the individual becomes incapacitated, unless otherwise specified. (Section 4678.) Identical to the limitations on health care decisionmaking by a surrogate, an agent must make health care decisions in accordance with the individual's health care instructions and other wishes to the extent known by the agent. Otherwise, the agent is to make health care decisions in accordance with the individual's best interests in mind, which must include consideration of the individual's personal values to the extent known by the agent. (Section 4684.) An agent's authority in health care decisionmaking has priority over any other person making health care decisions for the patient, though a surrogate has priority over an agent during the surrogate's period of authority. (Sections 4685, 4711.) This is basically because whichever instruction is most recent in time controls. (Section 4781.4.)

To make things easier for individuals to state their health care wishes while they have capacity, the Legislature has created a statutory form advance health care directive for individuals to give instructions for their health care decisions. (Section 4670 *et seq.*) The AHCD form, created by AB 891 (Alquist), Chap. 658, Stats. 1991, allows an individual, with capacity to make health care decisions, to select an agent to make those decisions if the individual is not able to do so. The directive also allows the individual to make end-of-life health care choices, including the choice to prolong, or not prolong, life and to seek relief from pain.

A surrogate and an agent act on behalf of a patient based on the patient's action of appointing them. As a result, there is little controversy about having them make health care decisions for the patient when the patient is incapacitated. Likewise, if a conservator is authorized by a court to make health care decisions on behalf of their conservatee because the court has determined that the conservatee lacks the capacity to give informed consent to medical treatment (Section 2354, 2355), authority to make health care decisions is clear. The surrogate, agent, and conservator are all considered LRHCDMs.

Legally recognized health care decisionmakers under a POLST. A POLST form, which is supposed to complement an AHCD, is different in that it is generally filled out (or at least signed) by a health care provider, often near the end of a person's life, and is usually used to guide actions by emergency medical personnel or other health care providers near the end of the patient's life. POLST forms indicate the patient's preferences for end-of-life care, including resuscitative measures and other life-sustaining treatment. It is signed by the health care provider and either the patient or a LRHCDM. Thus, unlike a designated surrogate or an agent under an AHCD or a power of attorney, a POLST can be established without the consent and agreement of the patient.

POLST forms are bright pink -- thus easy to locate in a medical file or in an individual's home -- and since they are completed by heath care professionals, they are generally available when health care decisions need to be made. POLST forms have been an effective tool in guiding health care providers, particularly emergency medical personnel, when rendering services.

A surrogate, agent, and conservator have statutory authority to be a LRHCDM on behalf of an individual. A POLST form, however, is more expansive and additionally allows a spouse, registered domestic partner, closest available relative, or person whom the patient's medical professional signing the order believes best knows what is in the patient's best interest and will make decisions in accordance with the patient's expressed wishes and values to the extent known, to serve as a LRHCDM. The broader group of LRHCDMs recognized by the POLST

form has the same ability as the statutorily designated LRHCDMs to make potentially life altering health care decisions on behalf of an incapacitated individual.

What happens today if an incapacitated adult has not designated a LRHCDM to make health care decisions on their behalf? Today, despite all of the above-described options, many patients who are incapable of making health care decisions for themselves, will not have designated someone to make those decisions for them, not have a conservator, and not have a POLST. In these situations, 24 hours after the arrival at an emergency room of an unconscious patient or one incapable of communication, the hospital is required to make "reasonable efforts" to contact the patient's agent, surrogate, family member, or other person the hospital reasonably believes has the authority to make health care decisions on behalf of the patient. (Section 4717.) That code section sets forth activities deemed to be reasonable efforts on the hospital's part and suspends the requirement during disasters. But that still does not provide direction on who the hospital should rely on for instruction. The one default surrogate consent statute that California has today applies only to medical research. (Health and Safety Code Section 24178.)

This bill creates default surrogate consent statute by creating a hierarchy of possible surrogates who have not been legally sanctioned by the patient. When there is no LRHCDM to make an incapacitated patient's health care decisions, almost all states today have some form of default surrogate statute that sets forth who can make health care decisions for the patient. (Shana Wynn, *Decisions by Surrogates: An Overview of Surrogate Consent Laws in the United States,* 1 Bifocal 36 (America Bar Association, Oct. 1, 2014.) The one default surrogate consent statute that California has today, which is in order of priority, applies only to medical research. (Health and Safety Code Section 24178.)

This bill seeks to create a default surrogate priority list for all health care decisions for patients who lack capacity to make health care decisions and do not otherwise have a LRHCDM. First the bill clarifies that if the patient has a surrogate, an agent under an AHCD or a power of attorney for health care, or a conservator or guardian, that person – in that order of priority – may make health care decisions for the patient.

If neither the patient nor the court has selected a health care decisionmaker, this bill creates a statutory list of those who can make those decisions, in priority order. The list is:

- The spouse or domestic partner of the patient.
- An adult child of the patient, with priority given to a child with whom the patient lives, if any.
- A parent of the patient, with priority given to a parent with whom the patient lives, if any.
- An adult sibling of the patient, with priority given to an adult sibling with whom the patient lives, if any.
- An adult grandchild of the patient, with priority given to an adult grandchild with whom the patient lives, if any.
- An available adult relative with the closest degree of kinship to the patient, with priority given to the relative with whom the patient lives, if any.

Consistent with existing law, the patient can, while they have capacity, disqualify anyone on the list from being able to make their health care decisions by a signed writing or by personally informing the supervising health care provider of the disqualification. (Section 4715.)

This bill is not meant to replace the patient's choice – the patient's choice is always best. However, if the patient has not made that choice and has not designated anyone to make their health care decisions, the bill attempts to provide a priority list that the patient would want. It is similar to intestacy succession – if a decedent does not specify through a will or trust who inherits the decedent's property, the Probate Code assumes who the decedent is likely to have wanted to inherit their property and those people inherit. As in intestacy, this list provides that closest relatives have priority above those more distantly related, and if more than one relative is in the same priority level and they disagree on treatment, priority is given to the relative with whom the patient lives, if any.

This list will not work perfectly in every situation, because every person is unique and their health care choices and family situations are unique. But in the absence of an incapacitated patient having previously personally chosen their health care decisionmaker, this bill may be the closest way to honor the patient's wishes.

Concerns raised about use of a strict hierarchical list. While the bill has no formal opposition at this time, hospitals and doctors have raised concerns that the bill's strict hierarchical list could result in the wrong person being chosen to make health care decisions in some cases and could require doctors to spend significant time tracking down possible surrogates. They request more flexibility in choosing the decisionmaker that the patient would most want. The author and sponsor are engaged in discussions about how to provide some degree of flexibility in the hierarchical list so that, say a patient who is estranged from their family and is brought into the hospital by their closest friend, can have a health care decisionmaker that they would want, but still provide significantly greater guidance on who should make health care decisions for the patient, which, in most cases, should be the person the patient would have chosen.

ARGUMENTS IN SUPPORT*:* The sponsor, the California Senior Legislature, writes in support:

> Existing law requires a patient must "only orally" designate a surrogate. Should a patient be mentally incapacitated and unable to orally make a surrogate decision, and does not have legal documentation designating a surrogate, healthcare professionals lack adequate direction in the medical care of the patient.
>
> This legislation will bring the State of CA into alignment with 46 other states that have statutes prioritizing "next of kin."

REGISTERED SUPPORT / OPPOSITION:

Support

California Senior Legislature (sponsor)

Opposition

None on file

Analysis Prepared by: Leora Gershenzon / JUD. / (916) 319-2334