

## ASSEMBLY THIRD READING

AB 2338 (Gipson)

As Amended April 28, 2022

Majority vote

**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.

**Major Provisions**

- 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.
  - g) A close, personal friend.
- 3) Notwithstanding 2), above, including the prioritization, allows a person, who has demonstrated special care and concern for the patient, is familiar with the patient's personal values and beliefs to the extent known, and is reasonably available and willing to serve, to take precedence in making health care decisions on the patient's behalf.

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

## 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 are 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. (Physicians Orders For Life-Sustaining Treatment (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. A person who has demonstrated special care and concern for the patient may take precedence, as provided.

### According to the Author

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 professionals 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.

**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."

**Arguments in Opposition**

A coalition of hospital groups, who were opposed unless amended to the previous version of the bill, writes:

Every day, California hospitals care for patients who are unable to make their own health care decisions, due to unconsciousness or another medical condition. Some patients have planned for this eventuality and have completed an advance directive, designating another person to make their medical decisions. If a patient has not completed an advance directive, doctors and nurses strive to contact a family member or other loved one who has demonstrated special care and concern for the patient and is familiar with their values and beliefs to make those decisions on behalf of the patient.

[AB] 2338 (Gipson), however, would remove this very personal option and instead require health care providers to strictly follow the laws of intestate succession when determining who will make medical decisions for an incapacitated patient. Because human relationships often do not align with the laws of intestate succession, the California Hospital Association (CHA) must oppose AB 2338 unless amended.

**FISCAL COMMENTS**

None

**VOTES****ASM JUDICIARY: 9-0-1**

**YES:** Stone, Davies, Holden, Kalra, Kiley, Maienschein, Reyes, Friedman, Wicks

**ABS, ABST OR NV:** Cunningham

**ASM HEALTH: 11-1-3**

**YES:** Wood, Aguiar-Curry, Arambula, Carrillo, Maienschein, Mayes, McCarty, Nazarian, Rodriguez, Santiago, Cristina Garcia

**NO:** Bigelow

**ABS, ABST OR NV:** Waldron, Flora, Luz Rivas

**UPDATED**

VERSION: April 28, 2022

CONSULTANT: Leora Gershenzon / JUD. / (916) 319-2334

FN: 0002315