
THIRD READING

Bill No: AB 2338
Author: Gipson (D)
Amended: 6/20/22 in Senate
Vote: 21

SENATE JUDICIARY COMMITTEE: 10-0, 6/28/22
AYES: Umberg, Caballero, Cortese, Durazo, Hertzberg, Jones, McGuire, Stern,
Wieckowski, Wiener
NO VOTE RECORDED: Borgeas

ASSEMBLY FLOOR: 63-0, 5/23/22 - See last page for vote

SUBJECT: Health care decisions: decisionmakers and surrogates

SOURCE: California Senior Legislature

DIGEST: This bill clarifies the order of priority of who may make a medical decision for a person who lacks capacity when the person has multiple pre-incapacity instructions (e.g., an advance health care directive and a power of attorney); and sets forth a list of persons who may be contacted for the purpose of making medical decisions for a person who lacks capacity when the person has not set forth instructions or preferences beforehand, provided that the person selected demonstrated special care and concern for the patient and is familiar with the patient's values, to the extent known.

ANALYSIS:

Existing law:

- 1) Establishes the Health Care Decisions Law (HCDL), which governs a number of procedures by which a person may make advanced plans for health care decisions. (Prob. Code, div. 4.7, §§ 4600 et seq.)
- 2) Defines the following relevant terms for purposes of the HCDL:

- a) An “advanced health care directive” or an “advanced directive” is either an individual health care instruction or a power of attorney for health care. (Prob. Code, § 4605.)
 - b) “Capacity” is a person’s ability to understand the nature and consequences of a decision and to make and communicate a decision, and includes in the case of proposed health care, the ability to understand its significant benefits, risks, and alternatives. (Prob. Code, § 4609.)
 - c) “Health care” is any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect a patient’s physical or mental condition. (Prob. Code, § 4615.)
 - d) A “health care decision” is a decision made by a patient or the patient’s agent, conservator, or surrogate regarding the patient’s health care. (Prob. Code, § 4617.)
 - e) An “individual healthcare instruction” or “individual instruction” is a patient’s written or oral direction concerning a health care decision for the patient. (Prob. Code, § 4623.)
 - f) A “surrogate” is an adult, other than a patient’s agent or conservator, authorized to make a health care decision for the patient. (Prob. Code, § 4643.)
- 3) Permits an adult having capacity to give an individual health care instruction, which may be oral or written and may be limited to take effect only if a specified condition arises. (Prob. Code, § 4670.)
 - 4) Permits any adult having capacity to execute a power of attorney for health care and provides that the power of attorney for health care may authorize the agent to make health care decisions and may include individual health care instructions. (Prob. Code, § 4671(a).)
 - 5) Provides that the principal in a power of attorney for health care may grant authority to make decisions relating to the personal care of the principal, including, but not limited to, determining where the principal will live, providing meals, hiring household employees, providing transportation, handling mail, and arranging recreation and entertainment. (Prob. Code, § 4671(b).)
 - 6) 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. (Prob. Code, § 4682.)
- 7) Requires an agent under a power of attorney for health care 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. (Prob. Code, § 4684.)
 - 8) Provides that, unless the power of attorney states otherwise, the agent designated therein who is known to the health care provider to be reasonably available and willing to make health care decisions has priority over any other person making health care decisions for the patient. (Prob. Code, § 4685.)
 - 9) Authorizes a person to designate an adult as a surrogate to make health care decisions by personally informing the supervising health care provider.
 - a) The designation must be promptly recorded in the patient's health care record.
 - b) Unless the patient specifies a shorter period, is effective for the shorter of the course of treatment or illness or stay at the institution where the designation was made, or 60 days.
 - c) The expiration of a surrogacy period does not affect the designated person's right to make health care decisions for the person under other law or standard of practice. (Prob. Code, § 4711(a)-(c).)
 - 10) Provides that, if a patient has designated a power of attorney for health care and a surrogate, the surrogate takes precedence over the agent holding the power of attorney for the period of the designated surrogacy. (Prob. Code, § 4711(d).)
 - 11) Requires a surrogate designated in 6) to make health care decisions in accordance with the patient's individual health care instructions, if any, and any other wishes known to the surrogate. Otherwise, the surrogate shall make decisions in accordance with the surrogate's determination of the patient's best interest, including a consideration of the patient's personal values to the extent known by the surrogate. (Prob. Code, § 4714.)
 - 12) Provides that a patient having capacity at any time may disqualify 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. (Prob. Code, § 4715.)
- 13) Requires, within 24 hours of the arrival in the emergency department of a general acute care hospital of a patient who is unconscious or otherwise incapable of communication, the hospital 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 a patient. (Prob. Code, § 4717.)
 - 14) Defines "request regarding resuscitative measures" as a written document, signed by either an individual with capacity or a legally recognized health care decision maker and the individual's physician, that directs a health care provider regarding resuscitative measures. It may include one, or both, of the following:
 - a) A prehospital "do not resuscitate" form, as specified.
 - b) A Physician Orders for Life Sustaining Treatment (POLST), as specified. (Prob. Code, § 4780.)
 - 15) Requires a health care provider to treat an individual subject with their POLST form, subject to specified exceptions including an individual with capacity requesting alternative treatment to that ordered on the form. (Prob. Code, § 4781.2.)
 - 16) Provides that, if an order in an individual's request regarding resuscitative measures directly conflict with their individual health care instruction, the most recent order or instruction governs. (Prob. Code, § 4781.4.)
 - 17) Requires a health care provider or health care institution to comply with an individual health care instruction of the patient and with a reasonable interpretation of that instruction made by a person authorized to make health care decisions for the patient; and to comply with a health care decision for the patient made by a person 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. (Prob. Code, § 4733.)
 - 18) Authorizes the establishment of a conservatorship or guardianship for persons lacking capacity to make decisions, including health care decisions. (Prob. Code, div. 4, §§ 1400 et seq.)

- 19) Requires a general acute hospital to make reasonable efforts to accommodate religious and culture practices and concerns, if the patient's existing legally recognized health care decisionmaker, family, or next of kin voices any special religious or cultural practices and concerns with the facility's policies regarding death by irreversible cessation of all functions of the entire brain. (Health & Saf. Code, § 1254.4 (c)(2).)
- 20) Establishes the California Senior Legislature to, among other things, provide model legislation for older citizens and advocate for the needs of seniors, and gives the California Senior Legislature the full authority to define its program and utilize its funds in any way to carry out its duties. (Welf. & Inst. Code, div. 8.5, ch. 4, §§ 9300 et seq.)

This bill:

- 1) Clarifies that a patient may designate an adult as a surrogate to make health care decisions by personally informing the supervising health care provide or a designee of the health care facility of the designation.
- 2) Provides that, if a patient has designated an agent under a power attorney for healthcare, the surrogate takes precedence over the agent notwithstanding the order in 3).
- 3) Provides that, where a patient lacks capacity to make a health care decision, the following legally recognized decisionmakers may make health care decisions on the patient's behalf in the following descending order of priority:
 - a) The patient's surrogate to make health care decisions.
 - 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.
- 4) Provides that, if a patient lacks capacity to make health care decisions but does not have a legally recognized health care decisionmaker, a surrogate may be chosen from any of the following persons, provided that the person is an adult 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:
 - a) The spouse or domestic partner of the patient.

- b) An adult child of the patient.
- c) A parent of the patient.
- d) An adult sibling of the patient.
- e) An adult grandchild of the patient.
- f) An adult relative or a close personal friend.

FISCAL EFFECT: Appropriation: No Fiscal Com.: No Local: No

SUPPORT: (Verified 6/30/22)

California Senior Legislature (source)
California Advocates for Nursing Home Reform
California Association of Long Term Care Medicine

OPPOSITION: (Verified 6/30/22)

None received

ARGUMENTS IN SUPPORT: According to the sponsor of the bill, the California Senior Legislature:

Existing law requires a patient [to] “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 [California] into alignment with 46 other states that have statutes prioritizing “next of kin.”

ASSEMBLY FLOOR: 63-0, 5/23/22

AYES: Aguiar-Curry, Arambula, Bauer-Kahan, Bennett, Bigelow, Bloom, Boerner Horvath, Bryan, Calderon, Carrillo, Cervantes, Cooley, Cooper, Cunningham, Daly, Davies, Flora, Mike Fong, Friedman, Gabriel, Gallagher, Cristina Garcia, Eduardo Garcia, Gipson, Gray, Grayson, Haney, Holden, Irwin, Jones-Sawyer, Kalra, Kiley, Lee, Levine, Low, Maienschein, Mayes, McCarty, Medina, Mullin, Muratsuchi, Nazarian, Petrie-Norris, Quirk, Quirk-Silva, Ramos, Reyes, Luz Rivas, Robert Rivas, Rodriguez, Salas, Santiago, Seyarto, Stone, Ting, Valladares, Villapudua, Ward, Akilah Weber, Wicks, Wilson, Wood, Rendon

NO VOTE RECORDED: Berman, Mia Bonta, Chen, Choi, Megan Dahle, Fong,
Lackey, Mathis, Nguyen, O'Donnell, Patterson, Blanca Rubio, Smith, Voepel,
Waldron

Prepared by: Allison Meredith / JUD. / (916) 651-4113
7/28/22 10:38:29

**** **END** ****