

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

AB 2338 (Gipson)
Version: June 20, 2022
Hearing Date: June 28, 2022
Fiscal: No
Urgency: No
AWM

SUBJECT

Health care decisions: decisionmakers and surrogates

DIGEST

This bill codifies a hierarchy of persons to be contacted for the purpose of making medical decisions for a person who lacks capacity to make health care decisions for themselves.

EXECUTIVE SUMMARY

In a perfect world, a patient would always have the capacity to make their own medical decisions and direct their own care. This is not that world. A person may be temporarily incapacitated, such as by a stroke or a bad accident, or more permanently incapacitated by dementia or other conditions. The law provides individuals with multiple options for deciding, before disaster strikes, how health care decisions should be made if they become incapacitated, such as through an advance health care directive, a power of attorney for health care, or the designation, whether in writing or orally, of a surrogate to make health care decisions for the patient during the period of treatment. Unfortunately, many individuals do not provide in advance for their care in case of incapacitation. Current law does not provide guidance to a hospital or other facility regarding whom should be contacted in such circumstances.

This bill is intended to provide such guidance. As set forth in the bill, the patient's pre-incapacity provisions for care, if any, take precedence; the bill also sets forward the order of priority among pre-existing instructions. For circumstances where the patient did not provide advance instructions, the bill provides a list of individuals from which the health care provider may select to be a surrogate, as long as that individual has demonstrated special care and concern for the patient, is familiar with the patient's values and beliefs to the extent known, and is reasonably available and willing to serve.

This bill is sponsored by the California Senior Legislature and is supported by California Advocates for Nursing Home Reform and the California Association of Long Term Care Medicine. There is no known opposition.

PROPOSED CHANGES TO THE LAW

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.

COMMENTS

1. Author's statement

According to the author:

AB 2338 gives guidance and peace to families who are in need of making hard decisions by putting the right people at the table. If there is no health care power of attorney document in place and no court-appointed guardian with authority to make health care decisions, most states provide for a default surrogate decision maker in their state laws. Adding "next of kin" will bring California into alignment with other states.

If a person is unable to make decisions about personal health care, some other person or people must provide direction in decision making. The general term for such person is surrogate decision maker.

Patient oriented care is recognizing that not all families come in one size or flavor. Our healthcare system needs to reflect that even in times of crisis. Next of kin is not always next of kin

2. This bill establishes, for a patient who lacks capacity to make health care decisions, a default order of priority for legally recognized decisionmakers and required criteria for who may act as a surrogate when the patient has not designated one

Current law provides several mechanisms by which a person who currently has medical decisionmaking capacity can make decisions for themselves in the event they lose that capacity. Options include a surrogate, who is authorized by the patient to make health care decisions for the duration of a course of treatment or stay at a medical facility, unless otherwise specified;¹ a power of attorney for health care, which allows the person to designate another adult to make health care decisions for them, generally in accordance with preferences made known to the agent;² and an advance health care directive, which allows a person to set forth specific medical preferences to be followed in the event they become incapacitated.³ State law also authorizes the appointment of a guardian or conservator for a person who lacks capacity to make decisions; the scope of the guardian or conservator's authority may include the ability to make health care decisions on behalf of their ward or conservatee.⁴

¹ Prob. Code, §§ 4711, 4714.

² *Id.*, §§ 4671-4672, 4682, 4684.

³ *Id.*, §§ 4670, 4672. Other options include a "do not resuscitate" form and a POLST, which set forth certain preferences relating to life-sustaining treatment. (*Id.*, §§ 4780, 4781.2, 4781.4.)

⁴ Prob. Code, div. 4, §§ 1400 et seq.

Despite the wealth of options for asserting health care preferences in advance, many patients who are incapable of making health care decisions for themselves will not have exercised any of them. In these situations, a hospital is required to make “reasonable efforts” to contact the agent, surrogate, family member, or other person the hospital reasonably believes has the authority to make health care decisions on behalf of a patient who is unconscious or incapable of communication within 24 hours of the patient’s arrival at an emergency room.⁵ The law defines what constitutes a reasonable effort and excuses the effort in cases of specified disasters.⁶ The law does not, however, provide direction on whom the hospital should rely on for instruction, or whom the hospital shall try to contact first. Most states have some form of default surrogate priority list for determining who should make health care decisions for a patient who lacks capacity to make those decisions themselves.⁷

This bill takes a two-pronged approach to codifying who may make medical decisions for a patient who suddenly loses capacity. For patients who have taken steps in advance to provide for who will make their health care decisions, the bill clarifies the order of priority among those different mechanisms. In such a case, the patient’s health care decisions would be made by, in descending order of priority:

1. The patient’s surrogate to make health care decisions, if any;
2. The patient’s agent pursuant to an advance health care directive or a power of attorney for health care, if any;
3. The conservator or guardian of the patient having the authority to make health care decisions, if any.

These provisions largely echo existing statutes regarding order of priority – e.g., confirming that a surrogate designated for a particular procedure takes precedence over an agent under a power of attorney for health care⁸ – and places the list of different decisionmaking surrogates in a single, easy-to-understand order.

Next, the bill provides a list of persons who may serve as a surrogate to make health care decisions for a patient who lacks capacity when there is no pre-designated individual. These persons are not listed in order of priority; the health care provider or designee may opt from anyone on the list as long as that 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:

1. The patient’s spouse or domestic partner;

⁵ *Id.*, § 4717.

⁶ *Ibid.*

⁷ Shana Wynn, *Decisions by Surrogates: An Overview of Surrogate Consent Laws in the United States*, 1 Bifocal 36 (America Bar Association, Oct. 1, 2014). California does have a decisionmaking surrogate priority statute for medical research, but that will not apply in the vast majority of emergency situations. (*See* Health & Saf. Code, § 24718.)

⁸ *See* Prob. Code, § 4711(d).

2. An adult child of the patient;
3. A parent of the patient;
4. An adult sibling of the patient;
5. An adult grandchild of the patient; or
6. A relative or a close personal friend.

Earlier versions of the bill followed the path of many states and set forth an explicit order of priority; the order of priority could be circumvented if the health care provider believed someone else had demonstrated special care and concern for the patient and was familiar with the patient's values. In response to stakeholder concerns, the author removed the priority language, so the bill now allows the health care provider to choose from any adult on the list provided that they demonstrate the requisite care, concern, and respect for the patient's values.

3. 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."

SUPPORT

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

OPPOSITION

None known⁹

RELATED LEGISLATION

Pending Legislation:

SB 1338 (Umberg, 2022) establishes the Community Assistance, Recovery, and Empowerment (CARE) Act, which establishes the CARE Court system for persons

⁹ Groups that had opposed prior versions of the bill removed their opposition following the June 20, 2022, amendments.

suffering from severe mental illnesses and, among other things, contemplates individuals establishing psychiatric advance directives as part of their treatment and graduation plans. SB 1338 is pending before the Assembly Health Committee.

AB 2830 (Bloom, 2022) is identical to SB 1338 (Umberg, 2022) and establishes the Community Assistance, Recovery, and Empowerment (CARE) Act, which establishes the CARE Court system for persons suffering from severe mental illnesses and, among other things, contemplates individuals establishing psychiatric advance directives as part of their treatment and graduation plans. AB 2830 is pending before the Assembly Judiciary Committee.

AB 2288 (Choi, 2022) clarifies that advance health care directives include mental health and treatment, modifies the statutory advanced health care directive form accordingly, and makes more prominent the requirement that the advanced health care directive be either notarized or witnessed by two qualified individuals. AB 2288 has been passed by the Legislature and is awaiting the Governor's signature.

Prior Legislation:

AB 1234 (Arambula, 2021) would have required the California Health and Human Services Agency to develop a registry system for Physician Orders for Life Sustaining Treatment forms, a health care professional-directed advance health care directive. AB 1234 died in the Assembly Health Committee.

AB 891 (Alquist, Ch. 658, Stats. 1999) repealed existing provisions relating to durable powers of attorney for health care and enacted the HCDL, which provided for the creation, form, and revocation of advance health care directives and for the manner of making health care decisions for patients without surrogates.

PRIOR VOTES:

Assembly Floor (Ayes 63, Noes 0)

Assembly Health Committee (Ayes 11, Noes 1)

Assembly Judiciary Committee (Ayes 9, Noes 0)
