

**TESTIMONY IN SUPPORT OF H.1489, H.1664 AND S.928,
AN ACT IMPROVING MEDICAL DECISION MAKING
BEFORE THE JOINT COMMITTEE ON THE JUDICIARY**

October 31, 2023

The Massachusetts Medical Society (MMS) wishes to be recorded in strong support of House bills 1489 and 1664 alongside Senate bill 928, *An Act improving medical decision making*.

The MMS is a professional association of over 25,000 physicians, fellows, residents, and medical students across all clinical disciplines, organizations, and practice settings. The Medical Society is committed to advocating on behalf of patients, to provide them a better health care system, and on behalf of physicians, to help them produce the best care possible. Physicians aim to deliver the best health care for each individual patient and this goal of individualized care requires respect for patient autonomy, but in times where patients cannot voice their own desires directly, it is necessary to ensure that patient decision making continues in a way that is both representative of the patient's wishes and clinically efficient. For those reasons, the Medical Society strongly supports H.1489/H.1664/S.928, *An Act improving medical decision making*, which would establish a default surrogate hierarchy for certain patients deemed to be incapacitated.

Patients have a fundamental right to make decisions regarding their medical treatment. This right survives a patient's loss of decisional capacity. Accordingly, our laws provide important mechanisms for medical decision making for incapacitated patients. In Massachusetts, the gold standard for this decision-making process is to utilize a health care proxy, which provides a patient's agent with full medical decision-making authority for the patient's medical care, subject to important patient protections.

In 2009, Massachusetts adopted the guardianship portion of the Uniform Probate Code. The result of that action is a process by which providers treating incapacitated patients without a health care proxy are required to seek judicial appointment of a medical guardian for ordinary care decisions. Furthermore, approvals of certain subsequent medical decisions, such as transfers to nursing homes, require additional involvement by the judiciary, which again delays patient care. This process is cumbersome, expensive, and lengthy, as it often involves going to court for appointment of a medical guardian by the judiciary. In such cases, care is delayed—

sometimes for weeks—before the courts affirm a medical guardian. In the meantime, requisite medical resources are allocated inefficiently, resulting in unnecessary health care expense and mismatched medical care.

This bill seeks to improve the medical decision-making process for incapacitated patients by creating guidelines whereby attending physicians could appoint surrogate decision makers for non-extraordinary medical decisions for patients lacking a health care proxy or a MOLST form. Nothing in this bill would change the process for any patient with a health care proxy or a MOLST form. This decision-making process would be an alternative option for certain cases headed down the path toward judicial appointment of a medical guardian. If, for example, a patient presents to a local hospital incapacitated due to an illness such as COVID-19, and that patient has not identified a health care proxy, an attending physician could simply appoint a family member or close friend as the surrogate decision maker—according to the criteria laid forth in the statute—to make most medical decisions for the patient. These decisions would be limited by the patient protections that are also provided by this bill, but they would allow those closest to the patient to help guide the patient’s care while the process for appointing a judicially approved guardian unfolds.

Importantly, this bill provides numerous patient protections. Specifically, it makes clear that the authority of a duly appointed surrogate decision maker would include the ability to make decisions related to admissions to nursing facilities, but it would not provide the surrogate with the ability to make decisions related to transfers to inpatient mental health facilities. This bill also prohibits the surrogate decision-makers from making “extraordinary decisions” which are those interpreted by Massachusetts law to be of the highest severity. In those cases, judicial appointment of a medical guardian would remain the required process. It further includes procedural safeguards for patients who actively refuse care while lacking decisional capacity.

We now have growing evidence that this bill will work as intended. Two major academic teaching hospitals have looked at this bill and reviewed medical charts in situations where they had to seek judicial appointment of medical guardians. This chart review showed that when hospitals had to go through judicial guardianship appointments, half of the guardians who were appointed by the court matched the criteria provided by the proposed statute. These findings demonstrate that this bill will eliminate unnecessary judicial bureaucracy and significantly reduce the use of valuable time and resources of the courts, while obtaining the same positive results in the hundreds of cases of patients requiring guardianship at Massachusetts hospitals every year.

Specifically, this bill would reduce the significant delay that takes place when hospital attorneys need to seek judicial appointment of medical guardians. In the instance of patients ready to move to skilled nursing facilities, for example, keeping them unnecessarily in a hospital bed wastes money, and it keeps the patient in an acute care hospital, where the team that will provide subsequent rehabilitation will not have access to the patient and where hospital resources may more appropriately be devoted elsewhere. Throughout the COVID-19 pandemic, we saw younger and younger patients presenting to the hospital unexpectedly and without a health care proxy. In the worst cases, these patients become incapacitated during times when hospital resources are scarce. This bill would help patients and health care teams navigate their care in an efficient and respectful manner, saving critical time and resources for all.

Currently, only four other states in the entire country do not have a default surrogate consent statute for incapacitated patients without a health care proxy. We believe that this bill is an important step toward promoting safe, prompt, and efficient authorization of proper medical care for patients who lack capacity.

Accordingly, the Massachusetts Medical Society strongly urges your support of this bill, which we believe will significantly improve the medical decision-making procedures for patients without a health care proxy, saving valuable time and considerable expense in the process.