

Legislative Analysis



PATIENT SURROGATE FOR HEALTH CARE

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House Bill 5833 as introduced

Sponsor: Rep. Kelly Breen

Committee: Families, Children and Seniors

Complete to 12-2-24

Analysis available at
<http://www.legislature.mi.gov>

SUMMARY:

House Bill 5833 would amend the Estates and Protected Individuals Code (EPIC) by adding Part 6 (Surrogate Decisionmakers for Health Care) to Article V of the code to authorize *surrogates* to make *health care decisions* for certain patients under certain circumstances.

Surrogate would mean an individual, other than a patient advocate or guardian, authorized under EPIC to make a health care decision for the patient.

Health care decision would mean a decision made by an individual or an individual's surrogate regarding the individual's health care, including at least any of the following:

- Selection and discharge of health care providers and a health facility or agency.
- Approval or disapproval of diagnostic tests.
- Directions to provide or withhold all forms of *health care* except those that would have required the patient to have expressed the patient's wishes in a clear and convincing manner under the standard of section 5509 of the code (which governs patient advocates)¹ or unless the surrogate is acting as a patient surrogate under Part 56A of the Public Health Code.

Health care would mean any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect an individual's physical or mental health.

Surrogate designation

Under the bill, an adult or an emancipated minor who is not incapacitated could designate an individual to act as a surrogate by personally informing the attending health professional by any means of communication. Designation of a surrogate would not preclude the subsequent designation of a patient advocate. The attending health professional would have to promptly record a designation in the patient's medical record. In the absence of a designation, a patient advocate designation, or an out-of-state equivalent of a patient advocate designation, or if the designee is not *reasonably available*, any member of the following classes who is reasonably available, in the following order of priority, could act as surrogate:

- An agent under a validly executed out-of-state designation of patient advocate or equivalent, including health care powers of attorney, advance directives, and living wills.
- The spouse, unless there is a pending action for divorce, separate maintenance, or annulment or the spouse has been absent from the adult for one year or more before making the health care decision.

¹ <https://www.legislature.mi.gov/Laws/MCL?objectName=MCL-700-5509>

- An adult child.
- A parent.
- An adult sibling.

Reasonably available would mean readily able to be contacted without undue effort and willing and able to act in a timely manner considering the urgency of the patient's health care needs. An individual would be considered reasonably available if available in person, by phone, by videoconferencing, or by other means that allow for adequate communication.

If none of the individuals eligible to act as surrogate are reasonably available, an adult who has exhibited special care and concern for the patient, who is familiar with the patient's personal values, and who is reasonably available could act as surrogate.

If an individual of a higher priority to the surrogate becomes available and is willing to be surrogate, they would be considered the surrogate.

Surrogate authority

Under the bill and under certain conditions, a surrogate would be allowed to make health care decisions for an adult or an emancipated minor who is incapable of making such decisions if both of the following conditions are met:

- The patient is unable to participate in a health care decision as determined under the same standard as provided in section 5508 of the code (which governs a patient advocate's authority to act).²
- The patient does not have a patient advocate designation, out-of-state equivalent of a patient advocate designation, or a guardian, or the patient advocate or guardian is not reasonably available.

A surrogate's authority to make health care decisions would be suspended if the patient regains the ability to participate in decisions.

Surrogate acceptance of authority

A surrogate would have to sign an acceptance of authority that would have to be added to the patient's medical record and include substantially the following statements:

- A surrogate cannot exercise powers concerning the patient's care, custody, and medical or mental health treatment that the patient, if they were able to participate in the decision, could not have exercised on their own behalf.
- A surrogate has no authority to make a medical treatment decision to withhold or withdraw treatment that would result in a patient's death.
- A surrogate cannot receive compensation for the performance of their authority, rights, and responsibilities, but could be reimbursed for actual and necessary expenses incurred in doing so.
- A surrogate must act in accordance with the standards of care applicable to fiduciaries when acting for the patient and consistently with the patient's best interests. The known desires of the patient expressed or evidenced while able to participate in medical or

² <https://www.legislature.mi.gov/Laws/MCL?objectName=mcl-700-5508>

mental health treatment decisions would be presumed to be in the patient's best interests.

- A surrogate could revoke their acceptance of the role of surrogate at any time and in any manner sufficient to communicate an intent to revoke.
- A patient admitted to a health facility or agency has the same rights listed under section 20201 of the Public Health Code.³

A surrogate would have to communicate their assumption of authority as soon as practicable to the members of the patient's family who can be readily contacted. The surrogate would also need to act in accordance with the standards of care applicable to fiduciaries when acting on behalf of the patient and act consistent with the patient's best interest. The known treatment preferences expressed or evidenced while the patient was able to participate in medical or mental health treatment would be presumed to be in the patient's best interest.

A surrogate would have the same authority, rights, responsibilities, and limitations applicable to a patient advocate. Surrogates and health care providers would be bound by the same restrictions applicable to a patient advocate.

Unless otherwise specified in a patient advocate designation, a person authorized to make health care decisions for a patient would have the same rights as the patient to request, receive, examine, copy, and consent to the disclosure of medical or any other health care information.

Surrogate notice of continued authority

If a surrogate continues to act for more than seven days after assuming authority, they would need to provide written notice to all persons (having priority in the patient's member class) in the patient's members class, who can be readily contacted. The notice would have to include all of the following:

- The surrogate's name, address, phone number, and email address, if available.
- The date the surrogate began acting.
- The current location of the patient.

If there is more than one reasonably available member of a class having priority, members of the class would have to select a single surrogate from the class by majority vote. A health care facility or agency or health care provider would not have to affirmatively seek out all members of a class.

Dispute regarding selection of surrogate

If there is a dispute regarding the selection of the surrogate, any person interested in the welfare of the individual could file a petition in the court for an order appointing a surrogate. The court would have to appoint the individual having the highest priority who is suitable and willing to serve. If selecting between individuals who share the same priority, the court would have to consider the individuals' familiarity with the patient's health and values and the individuals' availability.

Surrogate ineligibility or disqualification

A person who is the subject of a personal protection order or other court order directing that person to avoid contact with the patient, or who has a pending criminal action for vulnerable adult abuse, exploitation, or domestic violence with the patient, could not act as a surrogate.

³ <https://www.legislature.mi.gov/Laws/MCL?objectName=MCL-333-20201>

A patient, at any time, could disqualify an individual from acting as surrogate. The disqualification could be communicated in a record signed by the patient or by verbal or nonverbal communication to the individual being disqualified, another individual, or a responsible health care provider. Disqualification would be effective even if made by an individual who has been found to lack capacity.

An individual would be disqualified from acting as a surrogate for the patient if a court finds, by preponderance of the evidence, that the potential surrogate possess a danger to the patient.

Surrogate prohibitions

A surrogate would be prohibited from binding the patient to an arbitration agreement without specific authorization from the patient or court order. A surrogate would also be prohibited from moving a patient out of state without court order, unless the patient is a resident of the state they will be moved to.

Unless related to the patient by blood, marriage, or adoption, a surrogate could not be an owner, operator, or employee of a health care facility where the patient is receiving care or be the patient's attending health professional, unless no other potential surrogate is readily available.

Surrogate revocation of acceptance

A surrogate could revoke acceptance of the role of surrogate at any time and in any manner sufficient to communicate an intent to revoke.

Health care professional responsibilities

Before implementing a health care decision made by a surrogate, an attending health professional, where possible, would have to promptly communicate to the patient the decision made and the identity of the person making the decision. A health care decision made by a surrogate for a patient would be effective without judicial approval.

In addition, an attending health professional who knows of the existence of a patient advocate designation, revocation or designation or disqualification of a surrogate, would have to promptly record its existence in the patient's health care record. If the document is in writing, an attending health professional would have to request a copy and, if one is furnished, arrange for its maintenance in the health care record.

A physician who determines or is informed that a patient lacks capacity, has recovered capacity, or another condition exists that affects an individual instruction or the authority of a patient advocate, guardian, or surrogate, would have to promptly record the determination in the patient's health care record and communicate it to the patient, if possible, and to any person authorized to make health care decisions for the patient.

Good faith immunity

A health care provider, facility, or agency acting in good faith and in accordance with generally applicable and accepted health care standards would not be subject to civil or criminal liability or to discipline for unprofessional conduct for any of the following:

- Complying with a health care decision of a person apparently having authority to make a health care decision for a patient.

- Declining to comply with a health care decision of a person based on a belief that the person lacked authority.
- Complying with a designation of patient advocate and assuming the designation of patient advocate was valid when made and has not been revoked or terminated.

An individual acting as patient advocate, guardian, or surrogate would not be subject to civil or criminal liability or to discipline for unprofessional conduct for health care decisions made in good faith.

Penalties, damages, and attorney fees

A health care provider, facility, or agency that intentionally violates the bill would be subject to liability to the aggrieved individual for damages of \$1,000 or actual damages resulting from this violation, whichever is greater, plus reasonable attorney fees.

A person who intentionally falsifies, forges, conceals, defaces, or obliterates an individual's designation of patient advocate or a revocation of a designation of patient advocate without consent, or who fraudulently induces an individual to give, revoke, or not give an advance health care directive, would be subject to liability to that individual for damages of \$2,500 or actual damages resulting from the action, whichever is greater, plus reasonable attorney fees.

Repealer

The bill would repeal section 66h of the Social Welfare Act.⁴

MCL 700.5601 et seg. and MCL 400.66h (repealed)

FISCAL IMPACT:

House Bill 5833 would have an indeterminate fiscal impact on local court funding units. Costs would be incurred by local court funding units depending on the number of additional court proceedings that are required to occur due to the following: surrogates needing to be appointed; health care providers, facilities, or agencies violating provisions of the bill; persons intentionally falsifying, forging, concealing, defacing, or obliterating individuals' designations of patient advocates; persons revoking designations of patient advocates without individuals' consent; or persons fraudulently inducing individuals to give, revoke, or not give advance health care directives. It is difficult to project the actual fiscal impact to courts due to variables such as judicial discretion, case types, and complexity of cases.

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations and does not constitute an official statement of legislative intent.

⁴ <https://www.legislature.mi.gov/Laws/MCL?objectName=MCL-400-66H>