

**Assembly Bill No. 1423**

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Passed the Assembly May 22, 2015

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*Chief Clerk of the Assembly*

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Passed the Senate September 2, 2015

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*Secretary of the Senate*

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This bill was received by the Governor this \_\_\_\_\_ day  
of \_\_\_\_\_, 2015, at \_\_\_\_\_ o'clock \_\_\_\_M.

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*Private Secretary of the Governor*

## CHAPTER \_\_\_\_\_

An act to add Section 2604 to the Penal Code, relating to medical treatment of prisoners.

## LEGISLATIVE COUNSEL'S DIGEST

AB 1423, Mark Stone. Prisoners: medical treatment.

Existing law provides for the designation and selection of health care surrogates, and for the manner of making health care decisions for patients without surrogates.

Existing law prohibits the administration of psychiatric medication to an inmate in state prison on a nonemergency basis without the inmate's informed consent, unless certain conditions are satisfied, including, among other things, that a psychiatrist determines that the inmate is gravely disabled and does not have the capacity to refuse treatment with psychiatric medication. Existing law authorizes a physician to administer psychiatric medication to a prison inmate in specified emergency situations.

This bill would, except as provided, establish a process for a licensed physician or dentist to file a petition with the Office of Administrative Hearings to request that an administrative law judge make a determination as to a patient's capacity to give informed consent or make a health care decision, and request appointment of a surrogate decisionmaker, if the patient is an adult housed in state prison, the physician or dentist is unable to obtain informed consent from the inmate patient because the physician or dentist determines that the inmate patient appears to lack capacity to provide informed consent or make a health care decision, and there is no person with legal authority to provide informed consent for, or make decisions concerning the health care of, the inmate patient. The bill would require the petition to contain specified information, including, among other things, the inmate patient's current physical condition and a description of the health care conditions currently afflicting the inmate patient.

This bill would require that the petition be served on the inmate patient and his or her counsel, and filed with the office, as provided. The bill would also require that the inmate patient be provided with counsel and a written notice advising him or her of, among

other things, the inmate patient's right to be present at the hearing. Except as specified, the bill would require that the inmate patient be provided with a hearing before an administrative law judge within 30 days of the date of filing the petition. In case of an emergency, as defined, the bill would authorize the inmate patient's physician or dentist to administer a medical intervention that requires informed consent prior to the date of the administrative hearing and would require that counsel for the inmate patient be notified by the physician or dentist. The bill would require the administrative law judge to determine and provide a written order and findings setting forth whether there has been clear and convincing evidence that, among other things, the inmate patient lacks capacity to give informed consent or make a health care decision. If the findings required by these provisions are made, the bill would require the administrative law judge to appoint a surrogate decisionmaker for health care for the inmate patient, as provided, which would be valid for one year and would be valid at any state correctional facility within California. The bill would also provide for a process to renew the appointment of the surrogate decisionmaker. The bill would authorize the Secretary of the Department of Corrections and Rehabilitation to adopt regulations as necessary to carry out these provisions.

*The people of the State of California do enact as follows:*

SECTION 1. The Legislature finds and declares all of the following:

(a) In recognition of the dignity and privacy a person has a right to expect, the law recognizes that adults housed in state prison have the fundamental right to control decisions relating to their own health care, including the decision to have life-sustaining treatment withheld or withdrawn.

(b) The determination of capacity for informed consent for adults housed in state prison is more appropriately conducted at the institution where the patient is housed and can attend, if he or she desires.

(c) Because of the confinement of these adults and their frequent movement between institutions, existing protections for patients regarding health care decisionmaking are inadequate.

(d) Existing statutory schemes centered on life-threatening emergent illness and court-ordered decisionmakers do not adequately address the needs of adults housed in state prison to have their capacity issues addressed and adjudicated by a neutral third party, even in the absence of a serious or life-threatening medical emergency.

SEC. 2. Section 2604 is added to the Penal Code, to read:

2604. (a) Except as provided in subdivision (b), an adult housed in state prison is presumed to have the capacity to give informed consent and make a health care decision, to give or revoke an advance health care directive, and to designate or disqualify a surrogate. This presumption is a presumption affecting the burden of proof.

(b) (1) Except as provided in Section 2602, a licensed physician or dentist may file a petition with the Office of Administrative Hearings to request that an administrative law judge make a determination as to a patient's capacity to give informed consent or make a health care decision, and request appointment of a surrogate decisionmaker, if all of the following conditions are satisfied:

(A) The licensed physician or dentist is treating a patient who is an adult housed in state prison.

(B) The licensed physician or dentist is unable to obtain informed consent from the inmate patient because the physician or dentist determines that the inmate patient appears to lack capacity to give informed consent or make a health care decision.

(C) There is no person with legal authority to provide informed consent for, or make decisions concerning the health care of, the inmate patient.

(2) Preference shall be given to the next of kin or a family member as a surrogate decisionmaker over other potential surrogate decisionmakers unless those individuals are unsuitable or unable to serve.

(c) The petition required by subdivision (b) shall allege all of the following:

(1) The inmate patient's current physical condition, describing the health care conditions currently afflicting the inmate patient.

(2) The inmate patient's current mental health condition resulting in the inmate patient's inability to understand the nature and

consequences of his or her need for care such that there is a lack of capacity to give informed consent or make a health care decision.

(3) The deficit or deficits in the inmate patient's mental functions as listed in subdivision (a) of Section 811 of the Probate Code.

(4) An identification of a link, if any, between the deficits identified pursuant to paragraph (3) and an explanation of how the deficits identified pursuant to that paragraph result in the inmate patient's inability to participate in a decision about his or her health care either knowingly and intelligently or by means of a rational thought process.

(5) A discussion of whether the deficits identified pursuant to paragraph (3) are transient, fixed, or likely to change during the proposed year-long duration of the court order.

(6) The efforts made to obtain informed consent or refusal from the inmate patient and the results of those efforts.

(7) The efforts made to locate next of kin who could act as a surrogate decisionmaker for the inmate patient. If those individuals are located, all of the following shall also be included, so far as the information is known:

(A) The names and addresses of the individuals.

(B) Whether any information exists to suggest that any of those individuals would not act in the inmate patient's best interests.

(C) Whether any of those individuals are otherwise suitable to make health care decisions for the inmate patient.

(8) The probable impact on the inmate patient with, or without, the appointment of a surrogate decisionmaker.

(9) A discussion of the inmate patient's desires, if known, and whether there is an advance health care directive, Physicians Orders for Life Sustaining Treatment (POLST), or other documented indication of the inmate patient's directives or desires and how those indications might influence the decision to issue an order. Additionally, any known POLST or Advanced Health Care Directives executed while the inmate patient had capacity shall be disclosed.

(10) The petitioner's recommendation specifying a qualified and willing surrogate decisionmaker as described in subdivision (q), and the reasons for that recommendation.

(d) The petition shall be served on the inmate patient and his or her counsel, and filed with the Office of Administrative Hearings

on the same day as it was served. The Office of Administrative Hearings shall issue a notice appointing counsel.

(e) (1) At the time the initial petition is filed, the inmate patient shall be provided with counsel and a written notice advising him or her of all of the following:

(A) His or her right to be present at the hearing.

(B) His or her right to be represented by counsel at all stages of the proceedings.

(C) His or her right to present evidence.

(D) His or her right to cross-examine witnesses.

(E) The right of either party to seek one reconsideration of the administrative law judge's decision per calendar year.

(F) His or her right to file a petition for writ of administrative mandamus in superior court pursuant to Section 1094.5 of the Code of Civil Procedure.

(G) His or her right to file a petition for writ of habeas corpus in superior court with respect to any decision.

(2) Counsel for the inmate patient shall have access to all relevant medical and central file records for the inmate patient, but shall not have access to materials unrelated to medical treatment located in the confidential section of the inmate patient's central file. Counsel shall also have access to all health care appeals filed by the inmate patient and responses to those appeals, and, to the extent available, any habeas corpus petitions or health care related litigation filed by, or on behalf of, the inmate patient.

(f) The inmate patient shall be provided with a hearing before an administrative law judge within 30 days of the date of filing the petition, unless counsel for the inmate patient agrees to extend the date of the hearing.

(g) The inmate patient, or his or her counsel, shall have 14 days from the date of filing of any petition to file a response to the petition, unless a shorter time for the hearing is sought by the licensed physician or dentist and ordered by the administrative law judge, in which case the judge shall set the time for filing a response. The response shall be served to all parties who were served with the initial petition and the attorney for the petitioner.

(h) In case of an emergency, as described in Section 3351 of Title 15 of the California Code of Regulations, the inmate patient's physician or dentist may administer a medical intervention that requires informed consent prior to the date of the administrative

hearing. Counsel for the inmate patient shall be notified by the physician or dentist.

(i) In either an initial or renewal proceeding, the inmate patient has the right to contest the finding of an administrative law judge authorizing a surrogate decisionmaker by filing a petition for writ of administrative mandamus pursuant to Section 1094.5 of the Code of Civil Procedure.

(j) In either an initial or renewal proceeding, either party is entitled to file one motion for reconsideration per calendar year in front of the administrative law judge following a determination as to an inmate patient's capacity to give informed consent or make a health care decision. The motion may seek to review the decision for the necessity of a surrogate decisionmaker, the individual appointed under the order, or both. The motion for reconsideration shall not require a formal rehearing unless ordered by the administrative law judge following submission of the motion, or upon the granting of a request for formal rehearing by any party to the action based on a showing of good cause.

(k) (1) To renew an existing order appointing a surrogate decisionmaker, the current physician or dentist, or a previously appointed surrogate decisionmaker shall file a renewal petition. The renewal shall be for an additional year at a time. The renewal hearing on any order issued under this section shall be conducted prior to the expiration of the current order, but not sooner than 10 days after the petition is filed, at which time the inmate patient shall be brought before an administrative law judge for a review of his or her current medical and mental health condition.

(2) A renewal petition shall be served on the inmate patient and his or her counsel, and filed with the Office of Administrative Hearings on the same day as it was served. The Office of Administrative Hearings shall issue a written order appointing counsel.

(3) (A) The renewal hearing shall be held in accordance with subdivisions (d) to (g), inclusive.

(B) (i) At the time the renewal petition is filed, the inmate patient shall be provided with counsel and a written notice advising him or her of all of the following:

(I) His or her right to be present at the hearing.

(II) His or her right to be represented by counsel at all stages of the proceedings.

(III) His or her right to present evidence.

(IV) His or her right to cross-examine witnesses.

(V) The right of either party to seek one reconsideration of the administrative law judge's decision per calendar year.

(VI) His or her right to file a petition for writ of administrative mandamus in superior court pursuant to Section 1094.5 of the Code of Civil Procedure.

(VII) His or her right to file a petition for writ of habeas corpus in superior court with respect to any decision.

(ii) Counsel for the inmate patient shall have access to all relevant medical and central file records for the inmate patient, but shall not have access to materials unrelated to medical treatment located in the confidential section of the inmate patient's central file. Counsel shall also have access to all health care appeals filed by the inmate patient and responses to those appeals, and, to the extent available, any habeas corpus petitions or health care related litigation filed by, or on behalf of, the inmate patient.

(4) The renewal petition shall request the matter be reviewed by an administrative law judge, and allege all of the following:

(A) The current status of each of the elements set forth in paragraphs (1) to (8), inclusive, of subdivision (c).

(B) Whether the inmate patient still requires a surrogate decisionmaker.

(C) Whether the inmate patient continues to lack capacity to give informed consent or make a health care decision.

(l) A licensed physician or dentist who submits a petition pursuant to this section shall not be required to obtain a court order pursuant to Section 3201 of the Probate Code prior to administering care that requires informed consent.

(m) This section does not affect the right of an inmate patient who has been determined to lack capacity to give informed consent or make a health care decision and for whom a surrogate decisionmaker has been appointed to do either of the following:

(1) Seek appropriate judicial relief to review the determination or appointment by filing a petition for writ of administrative mandamus pursuant to Section 1094.5 of the Code of Civil Procedure.

(2) File a petition for writ of habeas corpus in superior court regarding the determination or appointment, or any treatment decision by the surrogate decisionmaker.

(n) A licensed physician or other health care provider whose actions under this section are in accordance with reasonable health care standards, a surrogate decisionmaker appointed pursuant to this section, and an administrative law judge shall not be liable for monetary damages or administrative sanctions for his or her decisions or actions consistent with this section and the known and documented desires of the inmate patient, or if unknown, the best interests of the inmate patient.

(o) The determinations required to be made pursuant to subdivisions (c) and (k), and the basis for those determinations, shall be documented in the inmate patient's medical record.

(p) (1) With regard to any petition filed pursuant to subdivision (c) or (k), the administrative law judge shall determine and provide a written order and findings setting forth whether there has been clear and convincing evidence that all of the following occurred:

(A) Adequate notice and an opportunity to be heard has been given to the inmate patient and his or her counsel.

(B) Reasonable efforts have been made to obtain informed consent from the inmate patient.

(C) As a result of one or more deficits in his or her mental functions, the inmate patient lacks capacity to give informed consent or make a health care decision and is unlikely to regain that capacity over the next year.

(D) Reasonable efforts have been made to identify family members or relatives who could serve as a surrogate decisionmaker for the inmate patient.

(2) The written decision shall also specify and describe any advance health care directives, POLST, or other documented indication of the inmate patient's directives or desires regarding health care that were created and validly executed while the inmate patient had capacity.

(q) (1) If all findings required by subdivision (p) are made, the administrative law judge shall appoint a surrogate decisionmaker for health care for the inmate patient. In doing so, the administrative law judge shall consider all reasonable options presented, including those identified in the petition, and weigh how the proposed surrogate decisionmaker would represent the best interests of the inmate patient, the efficacy of achieving timely surrogate decisions, and the urgency of the situation. Family members or relatives of the inmate patient should be appointed

when possible if such an individual is available and the administrative law judge determines the family member or relative will act in the inmate patient's best interests.

(2) An employee of the Department of Corrections and Rehabilitation, or other peace officer, shall not be appointed surrogate decisionmaker for health care for any inmate patient under this section, unless either of the following conditions apply:

(A) The individual is a family member or relative of the inmate patient and will, as determined by the administrative law judge, act in the inmate patient's best interests and consider the inmate patient's personal values and other wishes to the extent those values and wishes are known.

(B) The individual is a health care staff member in a managerial position and does not provide direct care to the inmate patient. A surrogate decisionmaker appointed under this subparagraph may be specified by his or her functional role at the institution, such as "Chief Physician and Surgeon" or "Chief Medical Executive" to provide clarity as to the active decisionmaker at the institution where the inmate patient is housed, and to anticipate potential personnel changes. When the surrogate decisionmaker is specified by position, rather than by name, the person occupying that specified role at the institution at which the inmate patient is currently housed shall be considered and act as the appointed surrogate decisionmaker.

(3) The order appointing the surrogate decisionmaker shall be written and state the basis for the decision by reference to the particular mandates of this subdivision. The order shall also state that the surrogate decisionmaker shall honor and follow any advance health care directive, POLST, or other documented indication of the inmate patient's directives or desires, and specify any such directive, order, or documented desire.

(4) The surrogate decisionmaker shall follow the inmate patient's personal values and other wishes to the extent those values and wishes are known.

(r) The administrative law judge's written decision and order appointing a surrogate decisionmaker shall be placed in the inmate patient's Department of Corrections and Rehabilitation health care record.

(s) An order entered under this section is valid for one year and the expiration date shall be written on the order. The order shall

be valid at any state correctional facility within California. If the inmate patient is moved, the sending institution shall inform the receiving institution of the existence of an order entered under this section.

(t) (1) This section applies only to orders appointing a surrogate decisionmaker with authority to make a health care decision for an inmate patient who lacks capacity to give informed consent or make a health care decision.

(2) This section does not apply to existing law regarding health care to be provided in an emergency or existing law governing health care for unemancipated minors. This section shall not be used for the purposes of determining or directing an inmate patient's control over finances, marital status, or for convulsive treatment, as described in Section 5325 of the Welfare and Institutions Code, psychosurgery, as defined in Section 5325 of the Welfare and Institutions Code, sterilization, abortion, or involuntary administration of psychiatric medication, as described in Section 2602.

(u) The Secretary of the Department of Corrections and Rehabilitation may adopt regulations as necessary to carry out the purposes of this section.









Approved \_\_\_\_\_, 2015

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*Governor*