SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair
2015 - 2016 Regular

Bill No:	AB 1423	**Hearing Date:**	July 7, 2015
Author:	Mark Stone		
Version:	April 20, 2015		
Urgency:	No	**Fiscal:**	Yes
Consultant:	JRD		

Subject: ***Prisoners: Medical Treatment***

HISTORY

Source: Author

Prior Legislation: SB 1412 (Nielsen) – Chapter 759, Statutes of 2014
AB 1907 (Lowenthal) – Chapter 814, Statutes of 2012
AB 1114 (Lowenthal) – Chapter 665, Statutes of 2011

Support: California Association of Public Administrators, Public Guardians, and Public Conservators; California Correctional Health Care Services; California Public Defenders Association; Prison Law Office

Opposition: None known

Assembly Floor Vote: 74 - 0

PURPOSE

The purpose of this legislation is to create a new process for appointing a person to make medical care decisions on behalf of a prison inmate who is not competent to make such decisions, as specified.

Existing law specifies that a petition may be filed to determine that a patient has the capacity to make a healthcare decision concerning an existing or continuing condition. A petition may also be filed to determine that a patient lacks the capacity to make a healthcare decision concerning specified treatment for an existing or continuing condition, and further for an order authorizing a designated person to make a healthcare decision on behalf of the patient. (Probate Code § 3201.)

Existing law provides that a petition to determine capacity to make healthcare decisions may be filed in the superior court of any of the following counties:

- The county in which the patient resides;
- The county in which the patient is temporarily living; or
- Any other county as may be in the best interests of the patient.

(Probate Code § 3202.)

Existing law specifies the person who may file a petition to determine whether a patient has capacity to make healthcare decisions as any of the following:

- The patient;
- The patient's spouse;
- A relative or friend of the patient, or other interested person, including the patient's agent under a power of attorney for healthcare;
- The patient's physician;
- A person acting on behalf of the healthcare institution in which the patient is located if the patient is in a healthcare institution; or
- The public guardian or other county officer designated by the board of supervisors of the county in which the patient is located or resides or is temporarily living.

(Probate Code § 3203.)

Existing law specifies that the contents of the petition should state or set forth, by a medical declaration attached to the petition, the following:

- The condition of the patient's health that requires treatment;
- The recommended healthcare that is considered to be medically appropriate;
- The threat to the patient's condition if authorization for the recommended healthcare is delayed or denied by the court;
- The predictable or probable outcome of the recommended healthcare;
- The medically available alternatives, if any, to the recommended healthcare;
- The efforts made to obtain consent from the patient;
- If the petition is filed by a person on behalf of a healthcare institution, the name of the person to be designated to give consent to the recommended healthcare on behalf of the patient;
- The deficit or deficits in the patient's mental functions that are impaired, and an identification of a link between the deficit or deficits and the patient's inability to respond knowingly and intelligently to queries about the recommended healthcare or inability to participate in a decision about the recommended healthcare by means of a rational thought process; and
- The names and addresses, so far as they are known to the petitioner, of the persons specified.

(Probate Code § 3204.)

Existing law provides, upon the filing of the petition, the court shall determine the name of the attorney the patient has retained to represent the patient in the proceeding under this part or the name of the attorney the patient plans to retain for that purpose. If the patient has not retained an attorney and does not plan to retain one, the court shall appoint the public defender or private counsel to consult with and represent the patient at the hearing on the petition and, if such appointment is made. (Probate Code § 3205.)

Existing law provides specified notification procedures for a hearing on capacity to make healthcare decisions. (Probate Code § 3206.)

Existing law states that, except as specified, the court may issue an order authorizing the recommended healthcare for the patient, and designating a person to give consent to the recommended healthcare on behalf of the patient, if the court determines from the evidence:

- The existing or continuing condition of the patient's health requires the recommended healthcare;
- If untreated, there is a probability that the condition will become life-endangering or result in a serious threat to the physical or mental health of the patient;
- The patient is unable to consent to the recommended healthcare;
- In determining whether the patient's mental functioning is so severely impaired that the patient lacks the capacity to make any healthcare decision, the court may take into consideration the frequency, severity, and duration of periods of impairment;
- The court may make an order authorizing withholding or withdrawing artificial nutrition and hydration, and all other forms of healthcare, and designating a person to give or withhold consent to the recommended healthcare on behalf of the patient, if the court determines from the evidence all of the following:

    - The recommended healthcare is in accordance with the patient's best interest, taking into consideration the patient's personal values to the extent known to the petitioner.

    - The patient is unable to consent to the recommended healthcare.

This bill establishes a presumption that unless otherwise specified, 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 bill permits a licensed physician or dentist to file a petition with the Office of Administrative Hearings (OAH) to request that an administrative law judge (ALJ) make a determination as to an inmate patient's capacity to give informed consent or make a health care decision, and request appointment of a surrogate decision maker, if all of the following conditions are satisfied:

- The licensed physician or dentist is treating a patient who is an adult housed in state prison;
- 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; and
- There is no person with legal authority to provide informed consent for, or make decisions concerning the health care of, the inmate patient.

This bill requires the next of kin or a family member to be given preference as a surrogate decision maker over other potential surrogate decision makers unless those individuals are unsuitable or unable to serve.

This bill specifies the requirements of the petition filed by a licensed physician or dentist, must include:

- The inmate patient's current physical and health care condition;
- 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;
- The deficit or deficits in the inmate patient's mental functions that establish them as unable to give informed consent or make a health care decision;
- An identification of a link, if any, between the deficits in the inmate's mental functions and how the deficits identified 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;
- A discussion of whether the deficits identified are transient, fixed, or likely to change during the proposed year-long duration of the court order;
- The efforts made to obtain informed consent or refusal from the inmate patient and the results of those efforts;
- The efforts made to locate next of kin who could act as a surrogate decision maker for the inmate patient;
- The probable impact on the inmate patient with, or without, the appointment of a surrogate decision maker;
- 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;
- Requires any known POLST or Advanced Health Care Directives executed while the inmate patient had capacity to be disclosed; and
- The petitioner's recommendation specifying a qualified and willing surrogate decision maker, if such an individual exists, and the reasons for that recommendation.

This bill requires the petition to be served on the inmate patient and his or her counsel, and filed with the OAH on the same day as it was served.

This bill requires the OAH to issue a notice appointing counsel.

This bill requires, at the time the initial petition is filed, the inmate patient to be provided with counsel and a written notice advising him or her of all of the following:

- His or her right to be present at the hearing;
- His or her right to be represented by counsel at all stages of the proceedings;
- His or her right to present evidence;
- His or her right to cross-examine witnesses;
- The right of either party to seek one reconsideration of the ALJ's decision per calendar year;
- His or her right to file a petition for writ of administrative mandamus in superior court; and
- His or her right to file a petition for writ of habeas corpus in superior court with respect to any decision.

This bill requires counsel for the inmate patient to have access to all relevant medical and central file records for the inmate patient.

This bill prohibits counsel for the inmate patient from having access to materials unrelated to medical treatment located in the confidential section of the inmate patient's central file.

This bill requires counsel for the inmate patient to 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.

This bill requires the inmate patient to be provided with a hearing before an ALJ within 30 days of the date of filing the petition, unless counsel for the inmate patient agrees to extend the date of the hearing.

This bill requires the inmate patient, or his or her counsel, to be given 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 ALJ, in which case the judge shall set the time for filing a response.

This bill requires the response to be served to all parties who were served with the initial petition and the attorney for the petitioner.

This bill permits the inmate patient's physician or dentist to administer a medical intervention that requires informed consent prior to the date of the administrative hearing, in the event of a health care emergency.

This bill specifies that, in either an initial or renewal proceeding, the inmate patient has the right to contest the finding of an ALJ authorizing a surrogate decision maker by filing a petition for writ of administrative mandamus.

This bill permits, in either an initial or renewal proceeding, either party to file one motion for reconsideration per calendar year in front of the ALJ 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 decision maker, the individual appointed under the order, or both. And, prohibits the motion for reconsideration from requiring formal rehearing unless ordered by the ALJ 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.

This bill permits annual renewals of existing orders appointing a surrogate decision maker, as specified.

This bill requires the current physician, dentist, or previous surrogate decision maker to file a renewal petition in order to renew an existing order appointing a surrogate decision maker.

This bill requires a renewal hearing to 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 ALJ for a review of his or her current medical and mental health condition.

This bill requires a renewal petition to be served on the inmate patient and his or her counsel, and filed with the OAH on the same day as it was served. The OAH is required to issue a written order appointing counsel.

This bill requires the renewal petition to be reviewed by an ALJ, and to include whether the inmate patient still requires a surrogate decision maker and whether the inmate patient continues to lack capacity to give informed consent or make a health care decision.

This bill specifies that a licensed physician or dentist who submits a renewal petition is not required to obtain a court order prior to administering care that requires informed consent.

This bill specifies that 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 decision maker has been appointed still has the right to seek appropriate judicial relief to review the determination or appointment by filing a petition for writ of administrative mandamus and file a petition for writ of habeas corpus in superior court regarding the determination or appointment, or any treatment decision by the surrogate decision maker.

This bill absolves a licensed physician or other health care provider whose actions are in accordance with reasonable health care standards, a surrogate decision maker, and an ALJ from liability for monetary damages or administrative sanctions for his or her decisions or actions consistent with the known and documented desires of the inmate patient, or if unknown, the best interests of the inmate patient.

This bill permits, if all of the following findings are made, the ALJ to appoint a surrogate decision maker for health care for the inmate patient:

- Adequate notice and an opportunity to be heard has been given to the inmate patient and his or her counsel;
- Reasonable efforts have been made to obtain informed consent from the inmate patient;
- 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; and
- Reasonable efforts have been made to identify family members or relatives who could serve as a surrogate decision maker for the inmate patient.

This bill prohibits an employee or contract staff of California Department of Corrections and Rehabilitation (CDCR) or other peace officer, from being appointed surrogate decision maker for health care for any inmate patient unless either of the following conditions apply:

- The individual is a family member or relative of the inmate patient and will, as determined by the ALJ, act in the inmate patient's best interests.

- The individual is a health care staff member in a managerial position and does not provide direct care to the inmate patient, as specified.

This bill requires the ALJ's written decision and order appointing a surrogate decision maker to be placed in the inmate patient's health care record.

This bill specifies that an order appointing a surrogate decision maker be entered under this section is valid for one year and requires that the expiration date be written on the order.

This bill specifies that the order appointing a surrogate decision maker is valid at any state correctional facility within California.

This bill requires that, if the inmate patient is moved, the sending institution inform the receiving institution of the existence of an order appointing a surrogate decision maker.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past eight years, this Committee has scrutinized legislation referred to its jurisdiction for any potential impact on prison overcrowding. Mindful of the United States Supreme Court ruling and federal court orders relating to the state's ability to provide a constitutional level of health care to its inmate population and the related issue of prison overcrowding, this Committee has applied its "ROCA" policy as a content-neutral, provisional measure necessary to ensure that the Legislature does not erode progress in reducing prison overcrowding.

On February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows:

- 143% of design bed capacity by June 30, 2014;
- 141.5% of design bed capacity by February 28, 2015; and,
- 137.5% of design bed capacity by February 28, 2016.

In February of this year the administration reported that as "of February 11, 2015, 112,993 inmates were housed in the State's 34 adult institutions, which amounts to 136.6% of design bed capacity, and 8,828 inmates were housed in out-of-state facilities. This current population is now below the court-ordered reduction to 137.5% of design bed capacity." (Defendants' February 2015 Status Report In Response To February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).

While significant gains have been made in reducing the prison population, the state now must stabilize these advances and demonstrate to the federal court that California has in place the "durable solution" to prison overcrowding "consistently demanded" by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants' Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (2-10-14). The Committee's consideration of bills that may impact the prison population therefore will be informed by the following questions:

- Whether a proposal erodes a measure which has contributed to reducing the prison population;
- Whether a proposal addresses a major area of public safety or criminal activity for which there is no other reasonable, appropriate remedy;
- Whether a proposal addresses a crime which is directly dangerous to the physical safety of others for which there is no other reasonably appropriate sanction;
- Whether a proposal corrects a constitutional problem or legislative drafting error; and
- Whether a proposal proposes penalties which are proportionate, and cannot be achieved through any other reasonably appropriate remedy.

COMMENTS

1. Need for This Bill

According to the author:

> The California Department of Corrections and Rehabilitation (CDCR) has a growing population of elderly inmates, a complex population that has increasingly complicated and acute medical conditions. When an inmate suffers a stroke or develops dementia during a prison term, existing legal avenues under the Probate Code for obtaining consent to release information to relatives or to obtain consent for a proposed course of treatment do not work well in a correctional setting. A readily available process is required to ensure that an appropriate, qualified person is designated to act on behalf of a medically or mentally compromised inmate-patient.
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> This bill establishes a streamlined process for obtaining consent to release information to relatives or to obtain consent for a proposed course of treatment for inmate-patients suffering from a debilitating medical condition that is not life threatening, but renders them unable to give consent. This protocol solicits assistance from the Office of Administrative Hearings to obtain consent through a process similar to the procedure for administrating psychiatric medication to inmates, which establishes due process through required participation from Administrative Law Judges and inmate counsel. If the ALJ determines that the inmate patient-lacks capacity, the ALJ may appoint a surrogate decision maker that would be required to make decisions in the best interests of the inmate-patient. Whenever possible, a family member or a relative of the inmate-patient would be appointed as the surrogate decision-maker.

2. Effect of Legislation

CDCR prison census data indicates there is a growing population of elderly inmates, a population that, as the author notes, has increasingly complicated and acute medical conditions.

Prisoner's Age

Year	50-54	55-59	60+
1998	5,081	2,292	1,868
2013	12,724	7,665	7,191

The existing conservatorship process presents a number of hurdles for prison medical staff attempting to conserve inmates. This process requires that staff go through the superior court of the county in which the inmate is housed whenever a medical emergency arises, or an episodic injury occurs that incapacitates an inmate. Going through this process takes six weeks to six months. During that period, while the inmate is incapacitated, prison officials are unable to update the inmate's family members as to his or her condition because of the federal Health Insurance Portability and Accountability Act (HIPAA). HIPAA protects patient confidentiality through strict restrictions on dissemination of information. Due to the fact that these patients

often do not have advanced healthcare directives, healthcare information cannot be dissemination until a court issues an order.

This bill creates a new process with existing procedures in the prison system. That is, under existing practices administrative law judges already hold hearings in California State Prisons, called *Keyea* hearings. Permitting healthcare decisions to be heard at these administrative proceedings would arguably shorten the existing wait times, which will benefit inmate-patients and their families.

3. Argument in Support

According to California Correctional Health Care Services (CCHCS):

> Currently state prisoners over the age of 50 are the fastest growing segment of the prison population. As these prisoners age, many lose the capacity to make medical determinations on their own, due to dementia, strokes, and other debilitating medical conditions. Under existing law, prison officials are required to go through the process under Probate Code Section 3200, which requires a Superior court hearing to appoint an individual responsible for making medical determinations for the prisoner.
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> The bill is a common sense measure that will provide added benefit to the inmate population by speeding up the process for obtaining the necessary authority to provide treatment services in cases where the inmate lacks decision making capability.

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