The Texas Futility Law: Hospitals Are Quietly Eliminating the Barriers to Legalized Euthanasia Under the Guise of Bioethics

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Since 1999, the State of Texas, through the Texas Advanced Directives Act (“The Futility Law”), has authorized and empowered hospitals and physicians to terminate the lives of critical care patients they deem unsuitable for continued life, without any consideration for the patients’ constitutionally protected right to life or liberty, or the equal protection of the laws. Through the Futility Law, the State of Texas denies patients and their representatives due process while it protects hospitals and their physicians with absolute immunity. The Futility Law’s procedures are designed to eliminate any legal challenges, overwhelm patients and their representatives into submission, and legitimize unilateral decisions to withdraw life sustaining treatment without which the patient will die. To further legitimize their conduct, hospitals and physicians have relied upon bioethics, an expansive definition of the Hippocratic Oath, and the argument that they are best and exclusively suited to make these decisions. In the next legislative session, Texas legislators have an opportunity to correct the constitutional flaws in the Futility Law, restore the balance between patient rights and the medical profession, and reaffirm the prohibition against euthanasia. This article will highlight some constitutional flaws in the Futility Law and make some initial recommendations to correct these flaws.

The Fourteenth Amendment of the United States Constitution prohibits states from depriving any person of life or liberty without due process of the law, or denying to any person equal protection of the laws.\(^1\) The State’s Futility Law authorizes physicians and hospitals to withdraw life sustaining treatment (“LST”) against the patient’s or, far more commonly, the patient’s representative’s stated desires.\(^2\) If the patient or representative objects to the decision, the hospital’s ethics or medical committee (“Committee”) must review the decision. The hospital must give the patient or his or her representative at least 48 hours’ notice before the Committee meets to review the decision.\(^3\) The patient and his or her representative are entitled to attend the meeting and receive a written explanation of the decision. If the committee affirms the physician’s decision and finds that LST is “inappropriate,” the physician and hospital are authorized to withdraw LST after the tenth

\(^1\) U.S. Const. amend. XIV, § 1.

\(^2\) See generally Tex. Health & Safety Code § 166.046 (West 2006). “Life sustaining treatment” as treatment that, based on reasonable medical judgment, sustains the life of a patient and without which the patient will die. Excluding pain management, the term includes both life-sustaining medications and artificial life support, such as mechanical breathing machines, kidney dialysis treatment, and artificial nutrition and hydration.

day from the written decision. The physician and hospital must make a “reasonable effort” to transfer the patient to another physician, alternate care setting, or facility, which is willing to provide LST. As the only recourse provided to the patient, the patient or his or her representative may ask a district or county court to extend the ten day period. The court must extend the period if it finds by a preponderance of the evidence that there is a reasonable expectation that another physician or health care facility will provide LST within the time extension. Finally, physicians and hospitals are immune from civil or criminal liability or subject to discipline by the State for their decisions.

The Futility Law’s procedures for challenging the decision to withdraw LST fail to provide patients with adequate due process in protecting their right to life or liberty to make medical decisions. First, 48 hours is insufficient time for patients or representatives to prepare, much less present, any meaningful rebuttal. For example, a notice on a Friday afternoon with a hearing on the following Monday afternoon provides insufficient time to obtain a second opinion by another physician or retain legal counsel; it would be extremely difficult to reach anyone over the weekend for assistance. Additionally, there is no automatic provision to provide a copy of the medical records with written expert opinions to the patient prior to the meeting. Second, there is no provision for presenting rebuttal evidence, including expert testimony, and cross-examination of the hospital’s experts at the meeting. Because of these shortcomings in the law, the patient or representative is effectively prevented from raising any doubt in the physician or hospital’s decision. Third, inherent conflicts of interest deny the patient or representative an impartial review. The hospital staffs and funds the committee that sits in judgment. The hospital employs or otherwise credentials the attending physicians that make the decisions. There is no provision for the selection, composition (except for the prohibition of the attending physician), qualifications, and duties of the committee. Hospitals are free to stack the committee with hospital attorneys, physicians, and sympathetic employees.

These problems are enough to counsel significant changes when the Texas Legislature reconsiders the Futility Law in the coming session. However, even further problems exist. Physicians and hospitals exert great influence on patients and representatives. Intimidated and overwhelmed physically and emotionally, patients or representatives are unlikely to challenge the decision. Additionally, hospitals regulate its own decisions regarding the withdrawal of LST. Courts are only permitted to grant an extension of time to allow for a transfer of the patient to another facility. The courts cannot review the substantive decision to withdraw LST. Patients or representatives only have ten days to arrange a transfer to another facility or obtain an extension from the court. As with the committee meeting, patients or representatives may have insufficient time to develop

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4. *TEX. HEALTH & SAFETY CODE § 166.046(e)* (West 2006). There is no definition for the term “inappropriate treatment.”

5. *TEX. HEALTH & SAFETY CODE § 166.046(d)* (West 2006).

6. *TEX. HEALTH & SAFETY CODE § 166.046(g)* (West 2006).

7. *TEX. HEALTH & SAFETY CODE § 166.045 (d)* (West 2006).
enough evidence to support an extension. Even with a court ordered extension, other hospitals might not step forward and offer their services to the patient. In light of this obstacle, patients and their representatives may find it very difficult to obtain a transfer during a court ordered extension. As a further matter, physicians and hospitals have absolute discretion to make highly subjective decisions to withdraw LST. To buoy this autonomy, physicians and hospitals have sought support from bioethics and an interpretation of the Hippocratic Oath that holds that physicians should abstain from providing medical treatment that fails to bring a desirable outcome for the patient, based solely on the physician’s professional opinion. The original version of the Hippocratic Oath stated that physicians must first, do no harm; the withdrawal of LST may be considered the ultimate harm to patients. Aside from the physiological aspect of a patient’s medical condition, physicians are not necessarily the best suited to determine the value of living with LST. Like anyone else, physicians are shaped by their personal values (e.g. religion) and human frailties. In the absence of an established standard of care, physicians can differ on highly subjective decisions to withdraw LST. The physicians’ subjective values could lead to the unequal application of the Futility Law to the detriment of vulnerable patients, such as children, the elderly, and the disabled. Likewise, hospitals faced with paying the increased costs of LST, may seek to terminate LST from impoverished patients with the least means to pay for the LST. As a result, the State must hold physicians and hospitals accountable for decisions to withdraw LST. The State must take back the physicians and hospitals’ blanket authority to terminate life and balance their medical judgment with significant due process protections. A criminal defendant faced with life imprisonment or the death penalty is afforded significant due process. In this case, patients deserve no less protection against the loss of life.

As a starting point, I recommend the following changes to the Futility Law: 1) Provide for 21 day notice (rather than the present two day minimum) of the informal hearing before the hospital committee, 2) at the time of notice, require the hospital to provide a copy of the medical record, a written opinion of the attending physician and identification of any other experts to be relied upon by the hospital to support its action, 3) allow for a continuance of the informal hearing for an additional 14 days for good cause, 4) allow the patient to be examined independently, 5) require the hospital to disclose the names of the committee members and any relationship with the hospital, 6) require the hospital to publish its policy and procedures regarding LST on its public internet website, and in print at the hospital made available to the public, 7) require the hospital to create a

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8 As a practical matter, patients or representatives will find it very difficult to have another facility accept a patient without the financial resources to pay for the services (where the patient lacks Medicare, Medicaid, or private insurance coverage, among others). Consider that health insurance uses a prospective payment system that caps the coverage for medical treatment regardless of the length of treatment. As a professional courtesy, hospitals may respect the decision of another hospital’s committee, expecting the same in return.

9 “I will prescribe regimens for the good of my patients according to my ability and my judgment and never do harm to anyone. To please no one will I prescribe a deadly drug nor give advice which may cause his death.” (emphasis added) A translation of the original oath from Greek obtained from Wikipedia, at http://en.wikipedia.org/wiki/Hippocratic_Oath (last visited on Dec. 5, 2006).
committee that complies with the membership requirements for an institutional review board, 8) allow the patient to present evidence including expert testimony and reports at the informal hearing before the committee, 9) provide for the right to arbitrate the dispute before an arbitrator subject to the federal arbitration laws and approved by the State to perform these arbitrations, 10) provide the right for judicial review of the arbitration results in district court, 11) provide for appellate review of the district court’s decision, 12) do not provide immunity for criminal acts or intentional torts 13) develop a narrow definition for “inappropriate treatment” with an acceptable medical standard of care, 14) develop regulations similar to EMTALA that would prohibit health care facilities from arbitrarily rejecting or dumping these patients, 15) create a public fund to help defray the cost for patients or their representatives in challenging a proposed withdrawal of LST, and 16) encourage the health care industry to develop long term care facilities that can efficiently care for these patients at the most reasonable cost with out compromising their care.

While there is no absolute right to life, patients right to life must be protected with rigorous due process rights that offer similar protections as those offered to the criminally accused who face a possible death sentence or life in prison without parole. Physicians and hospitals should be held to a very high standard, much like prosecutors who seek the death penalty. This protects us and the most vulnerable members of our society from indiscriminate medical death sentences. We should settle for nothing less.

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