

Texas Legislature Is Reviewing Advance Directives Act

By Ronald L. Scott, J.D., LL.M.

rscott@central.uh.edu

On October 19, 2005, Speaker Tom Craddick released interim charges for Texas House Committees. Charge number four directed the House Committee on Public Health to “[r]eview issues relating to Chapter 166.046 of the Texas Health & Safety Code, and assess if patients and/or their loved ones have a sufficient opportunity to obtain transfer to an alternate facility and subsequent care in end-of-life situations.¹ The Texas Advance Directives Act² establishes the procedure to be followed when a physician refuses to honor a patient’s treatment decision.

From the physician’s perspective, patients with an untreatable condition (or their families) may sometimes have unrealistic hopes or expectations of a “miracle cure” that physicians simply cannot deliver. When patients demand treatment that a physician deems futile, the physician and hospital are placed in a difficult position. One approach to deal with these difficult issues is through a hospital futility policy.³ In a sense, Texas has adopted a statutory futility policy.

When an attending physician refuses to honor a patient’s decision to continue life-sustaining treatment that the physician believes is futile, an ethics committee must review the physician’s decision, and life-sustaining treatment may not be withdrawn during such review.⁴ The patient or the patient’s representative must be advised about the ethics committee review process at least 48 hours before the committee meets to consider the case.⁵ The patient or the representative is entitled to attend the meeting⁶ and receive a written explanation of the ethics committee’s decision.⁷

The patient must also be provided “a copy of the registry list of health care providers and referral groups that have volunteered their readiness to consider accepting transfer or to assist in locating a provider willing to accept transfer.”⁸ The *Registry of Health Care Providers and Referral Groups* is available on the Texas Department of Health Services website.⁹ This registry lists “providers and groups that have indicated . . . their interest in

¹ Tom Craddick, *Interim Study Charges* at 32 (Oct. 19, 2005), available at <http://www.house.state.tx.us/committees/charges/79interim/79thinterimcharges.pdf> (last visited Mar. 9, 2006).

² TEX. HEALTH & SAFETY CODE §§ 166.001 *et seq.* (2006).

³ John Hardwig, *Families and Futility: Forestalling Demands for Futile Treatment*, 16 J. CLINICAL ETHICS 335, 356 (2005).

⁴ TEX. HEALTH & SAFETY CODE § 166.046 (a) (2006).

⁵ *Id.* § 166.046(b)(2).

⁶ *Id.* § 166.046(b)(4)(A).

⁷ *Id.* § 166.046(b)(4)(B).

⁸ *Id.* § 166.046(b)(3).

⁹ Tex. Dept. of State Health Services, *Registry of Health Care Providers and Referral Groups* (updated Dec. 22, 2005), available at <http://www.dshs.state.tx.us/THCIC/Registry.shtm> (last visited Mar. 9, 2006).

assisting the transfer of patients in the circumstances described.”¹⁰ Those registering may indicate an interest in one or both of two categories. The first category is for those “willing to accept or assist transfer of patients on whose behalf life-sustaining treatment is being sought”¹¹ or alternatively cases “where withholding or withdrawal of life-sustaining treatment is being sought.”¹² There are no entries in this second category, and the registry has only three entries in the first category. One is a physician, another is an attorney, and the third is the Texas Right to Life organization.¹³

If the patient or the patient’s representative requests life-sustaining treatment deemed inappropriate by the attending physician and ethics committee, the physician and health care facility must attempt to transfer the patient to a physician and/or facility that is willing to comply with the patient’s wishes.¹⁴ The patient must be provided life-sustaining treatment for a period of 10 days pending transfer to another physician or facility.¹⁵

Absent court intervention, the physician and the health care facility are not obligated to provide life-sustaining treatment after 10 days from the time the patient or patient’s representative is provided the ethics committee’s written decision, assuming the ethics decision supports the physician and facility.¹⁶ A district or county court may extend the 10-day period at the request of the patient or the patient’s representative “only if the court finds, by a preponderance of the evidence, that there is a reasonable expectation that a physician or health care facility that will honor the patient’s directive will be found if the time extension is granted.”¹⁷ The Texas law thus succeeds in “placing limits on families and surrogates who request therapies that the profession considers futile,”¹⁸ but does not allow withdrawal of treatment where surrogates are able to find another physician or institution to provide the requested care.¹⁹

The Texas Legislature may wish to consider extending the 10-day notice period in the statute or changing the 10 days from “calendar” days, as is currently the case, to “business” days. This would allow families more time to locate an alternate health care facility and/or to retain legal counsel. However, it must be recognized that any such extension of time could arguably prolong needless suffering for the patient.²⁰ Some bioethicists believe the “greatest significance of the law is how it changes the nature of conversations between providers and patients’ families . . . by providing conceptual and

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ TEX. HEALTH & SAFETY CODE § 166.046 (d) (2006).

¹⁵ *Id.* § 166.046 (e).

¹⁶ *Id.* § 166.046 (e).

¹⁷ *Id.* § 166.046 (g).

¹⁸ Robert L. Fine & Thomas Wm. Mayo, *Resolution of Futility by Due Process: Early Experience with the Texas Advance Directives Act*, 138 ANN. INTERN. MED. 743, 746 (2003).

¹⁹ *Id.*

²⁰ See Leigh Hopper, *Ruling Keeps Baby on Life Support/Mom Given Time to Find Alternative after Hospital Says Case is Hopeless*, HOUS. CHRON., Jan. 26, 2005, at A1.

temporal boundaries.”²¹ The conceptual boundary “places limits on families and surrogates who request therapies that the profession considers futile.”²² However, it also forces health care professionals to carefully consider the concept of “futility” because care may not be withdrawn if another facility is willing to accept the patient.²³ The statute “also provides temporal boundaries ... for resolving disagreements over futile treatment.”²⁴ Temporal boundaries may be necessary to avoid needless suffering by some patients.

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²¹ Robert L. Fine & Thomas Wm. Mayo, *supra* note 18 at 748.

²² *Id.*

²³ *Id.*

²⁴ *Id.*