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NEW LAWS CREATE POTENTIAL LOOPHOLES IN TEXAS ADVANCE DIRECTIVES FOR PREGNANT WOMEN

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During a special session of the 85th Texas Legislature, the Senate voted and approved Senate Bill 11 (SB 11) that adds requirements and procedures for In-Hospital Do-Not-Resuscitate Orders (DNR) which takes effect in April of 2018. Before this bill, the Texas Advance Directives Act only had three types of advance directives—Medical Power of Attorney, Out-of-Hospital DNR, and a Written Directive (Living Will). The reason for the passage of SB 11, as stated by the authors' intent, is because "current Texas law is silent on requirements for the authorization, execution, or revocation of a DNR order in a hospital setting."[1] What is remarkable about this new law is that, unlike the other three advance directives, SB 11 does not have a provision that makes this type of DNR void if the patient is a pregnant woman.

A BRIEF HISTORY OF ADVANCE DIRECTIVES

The Texas Advance Directive Act took effect in 1999[2] and was in response to the United States Supreme Court's ruling in *Cruzan v. Director, Missouri Department of Health*.[3] The Cruzan case established four points:

1 SENATE RESEARCH CTR., BILL ANALYSIS, S.B. 11, 85th Leg., R.S. (2017), http://www.capitol.state.tx.us/tlodocs/851/analysis/pdf/SB00011I.pdf#navpanes=0.

2 TEX. HEALTH & SAFETY CODE ANN. § 166.001.

3 *See* Cruzan by Cruzan v. Dir., Missouri Dep't of Health, 497 U.S. 261 (1990).

1. The right to die was not a right guaranteed by the Constitution.

2. The rules required for a third party to refuse treatment on behalf of an incompetent person.

3. The state's interests in preserving life outweigh the individual's rights to refuse treatment absent a living will or clear and convincing evidence of what the incompetent person would have wanted.

4. Rather than creating a uniform national standard, the states are to determine their own right-to-die standards.

In Texas, these right-to-die standards are outlined in the Advance Directive Act and exclude pregnant women. Specifically, for Living Wills and Out-of-Hospital DNRs, there are provisions that respectively state, "A person may not withdraw or withhold life-sustaining treatment under this subchapter from a pregnant patient,"[4] and "A person may not withhold cardiopulmonary resuscitation or certain other life-sustaining treatment designated by department rule under this subchapter from a person known by the responding health care professionals to be pregnant."[5] For Medical Power of Attorneys, the disclosures states, "Your agent may not consent to voluntary inpatient mental health services, convulsive treatment, psychosurgery, or abortion."[6] The effects of these provisions are to clearly remove the autonomy from the pregnant patient and her agents, and although it is not expressly stated, this is the State imposing its legitimate interest in preserving the life of the unborn child.

SB 11'S IN-HOSPITAL DNR

SB 11 created subchapter E in Chapter 166 of the Texas Health and Safety Code and states, "This subchapter applies to a DNR order issued in a health care facility or hospital."[7] The legislation for the In-Hospital DNR lays out the four ways for it to be validly created:

1. *Consistent with a Directive*: The attending physician may issue a DNR order in compliance with any dated, written directive or oral

4 TEX. HEALTH & SAFETY CODE ANN. § 166.049.

5 TEX. HEALTH & SAFETY CODE ANN. § 166.098.

6 TEX. HEALTH & SAFETY CODE ANN. § 166.163.

7 Tex. S.B. 11, 85th Leg., R.S. (2017).

directive (living will). If oral, the directive must be delivered to, or observed by, two competent adult witnesses, at least one of whom cannot be an employee of the attending physician or employee of the facility who is providing direct care to the patient or an officer, director, partner, or business office employee of the facility

2. *Through a Medical Power of Attorney (MPOA) Agent or Guardian:* The attending physician may issue a DNR order in compliance with the direction of the patient's agent or legal guardian under a MPOA;

3. *At the Request of a Qualified Individual:* Absent a legal guardian or agent under a MPOA, the attending physician may issue a DNR order for a patient with the consent of a person from the following categories listed in order of priority—the patient's spouse, reasonably available adult children, parents, or nearest living relative*; or*

4. *By Decision of Attending Physician:* The attending physician may issue a DNR order if it is not contrary to the instructions of a patient who was competent at the time of issuing them and:

i. In the reasonable judgment of the physician:

1. Death is imminent, regardless of CPR; and
2. The DNR order is medically appropriate.[8]

POTENTIAL LOOPHOLES CREATED FOR A VALID ADVANCE DIRECTIVE FOR PREGNANT WOMEN

Examining the new provisions on how to create a valid In-Hospital DNR, it is obvious that if the patient is pregnant, then the living will and qualified individual will be covered by the existing laws and a DNR would not be valid. However, it is less clear whether it would be valid if it were created by the agent or guardian under a valid medical power of attorney or by the decision of the attending physician.

Medical Power of Attorney Agent or Guardian

If it were not for Senate Bill 8 Pre-Born Protection and Dignity Act (SB8), which went into effect in September of 2017, uniformly changing the definition of "abortion" in the Texas Health and Safety Code, then it would be clear that the disclosure provisions for Medical Power of

[8] *Id.*

Attorneys would prevent an agent or guardian from creating a valid In-Hospital DNR. However, the statutory language muddies the waters.

Under SB 8, "abortion" is defined as "the act of using or prescribing an instrument, a drug, a medicine, or any other substance, device, or means with the intent to cause the death of an unborn child of a woman known to be pregnant."[9] Looking at the language, it is not clear that withholding life saving or extending measure would qualify as an abortion, especially considering that the intent of withholding these measures is to allow the pregnant woman to refuse life extending treatment. The disclosure under a Medical Power of Attorney states that the agent or guardian cannot make decisions regarding abortions, but it says nothing about their inability to make decisions regarding refusing life saving or extending treatment for a pregnant woman.

By Decision of Attending Physician

This loophole is arguably the most nebulous. Based on the provisions, a case can be made that as long as the physician follows the statute, then a valid In-Hospital DNR can be made for a pregnant woman. Essentially, all a physician would need to do, should the appropriate situation arise for a pregnant woman, is to ensure that the directive is not contrary to the patient's desires and then it is left up to the physician's medical judgment.

CONCLUSION

Without a clear provision in the new law exempting pregnant women, like the other three advance directives explicitly do, SB 11 creates potential loopholes that can be used to create In-Hospital DNRs that are within the confines of the law and respect the patient's autonomy. It is yet to be seen whether this will make a difference or not in the policies and procedures of hospitals. However, it can be safely assumed that even though these loopholes exist, physicians will not be eager to use them and hospital legal counsel will likely advise physicians to operate under the assumption that the loopholes exclude

[9] Tex. S.B. 8, 85th Leg., R.S. (2017), http://www.capitol.state.tx.us/tlodocs/85R/billtext/html/SB00008F.htm.

pregnant women. What can also be assumed is that unless the Texas Legislature adds an amendment to SB 11 strictly excluding pregnant women, the only way to have a clear answer is for a physician to be the first to try.