

## Texas Legislature Should Address Procedural Inadequacies in Advance Directives Act

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The case of Spiro Nikolouzos identified procedural inadequacies in the Texas Advance Directives Act<sup>1</sup> that should be addressed by the Texas Legislature.<sup>2</sup> If a patient or his representative requests life-sustaining treatment deemed inappropriate by the attending physician and ethics committee, the statute provides that 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.<sup>3</sup> The patient must be provided life-sustaining treatment for a period of 10 days pending transfer to another physician or facility.<sup>4</sup> A court may extend the 10 day period at the request of the patient or his representative if the court finds 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."<sup>5</sup>

Spiro Nikolouzos was a retired engineer who sustained brain damage more than 10 years ago in a motor vehicle accident and "[was] in a persistent vegetative state since at least 2001, unable to think, communicate, move or eat."<sup>6</sup> A St Luke's physician described his condition as a "worst-case vegetative state" of 10 on a scale of 1 to 10.<sup>7</sup> He had been an invalid since 2001 due to internal bleeding related to his brain shunt.<sup>8</sup> His wife, Jannette, took care of him at their Friendswood home.<sup>9</sup> He was fed through a feeding tube inserted into his stomach, and the area around the tube started bleeding on February 10, 2005 when he was admitted to the emergency room at St Luke's Episcopal Hospital.<sup>10</sup> His condition continued to worsen and he was placed on a ventilator at 3 a.m. the next morning.<sup>11</sup> On March 1, St Luke's provided Jannette Nikolouzos with the statutory 10 days notice advising her that St. Luke's ethics committee had determined that continued care would be futile and inhumane.<sup>12</sup>

Mario Caballero, the attorney for Nikolouzos, sought an injunction and temporary restraining order to prevent St. Luke's from removing life support while the family

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<sup>1</sup> TEX. HEALTH & SAFETY CODE §§ 166.001– 166.166. (2006).

<sup>2</sup> See Ronald L. Scott, *Texas Legislature is Reviewing Advance Directives Act*, HEALTH LAW PERSPECTIVES (May 2006), [http://www.law.uh.edu/healthlaw/perspectives/2006/\(RS\)TexasAdvanceDirectivesFinal.pdf](http://www.law.uh.edu/healthlaw/perspectives/2006/(RS)TexasAdvanceDirectivesFinal.pdf).

<sup>3</sup> TEX. HEALTH & SAFETY CODE § 166.046 (d).

<sup>4</sup> *Id.* § 166.046 (e).

<sup>5</sup> *Id.* § 166.046 (g).

<sup>6</sup> Todd Ackerman, *Hospital To End Life Support/Houston Woman Faces Second Fight In 2 Months Over Husband's Care*, HOUS. CHRON., Apr. 28, 2005, at B5.

<sup>7</sup> *Id.*

<sup>8</sup> Todd Ackerman, *Life Support Removal Blocked/Appellate Court Grants Temporary Injunction to the Family of Man at St. Luke's Hospital*, HOUS. CHRON., Mar. 13, 2005, at B6.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

attempted to find another facility who would accept the patient.<sup>13</sup> The injunction was denied, and Caballero filed an emergency appeal.<sup>14</sup> The notice of appeal was filed directly with the Houston First District Court of Appeals on a Saturday, because an emergency existed.<sup>15</sup>

The First Court of Appeals initially granted a temporary injunction three hours before St Luke's was to remove the ventilator.<sup>16</sup> However, the court's action needs to be understood in context. In Houston, the trial court will ordinarily randomly assign an appeal to either the First or Fourteenth Court of Appeals, but waiting for this assignment could have made the appeal moot since Mr. Nikolouzos could have been removed from life support and died before the assignment occurred. Therefore, the First Court of Appeals issued a writ of injunction. However, on Monday, the trial court clerk randomly assigned the appeal to the Fourteenth Court of Appeals. The Fourteenth Court of Appeals held it lacked jurisdiction to hear an appeal from the denial of a temporary restraining order in the absence of express statutory authority and therefore dismissed the appeal.<sup>17</sup>

In a concurring opinion, Justice Wanda McKee Fowler noted that she believed the court's decision was correct and that the Nikolouzos would likely not have prevailed on the merits even if the court had jurisdiction.<sup>18</sup> However, Justice Fowler also addressed what she called "procedural problems inherent in the statute, making it an ineffectual tool for both families of patients and health care providers."<sup>19</sup> She identified three areas where the statute should be amended.

First, "the statute should state specifically in which court a family or trustee must file the action" rather than simply providing that the action should be filed in "the appropriate district or county court."<sup>20</sup> Justice Fowler noted that the Nikolouzos initially filed in the district court, and that St. Luke's moved for a dismissal claiming that the Harris County probate court had exclusive jurisdiction.<sup>21</sup> By contrast, the parental notification statute is much clearer, providing that a request may be "filed in any county court at law,

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<sup>13</sup> *Id.*

<sup>14</sup> *In re Nikolouzos ex rel. Nikolouzos*, 179 S.W.3d 581 (Tex. App. 2005).

<sup>15</sup> *Id.*

<sup>16</sup> Todd Ackerman, *supra* n. 8.

<sup>17</sup> *Nikolouzos v. St. Luke's Episcopal Hosp.*, 162 S.W.3d 678 (Tex. App. 2005). Ultimately, Nikolouzos' family was able to find a facility willing to accept Mr. Nikolouzos as a patient, and on March 20, 2005, he was transferred to Avalon Place, a long-term care facility in San Antonio. The transfer occurred 19 days after St Luke's advised he was to be removed from life support. About two weeks later, he developed pneumonia and was admitted to Southeast Baptist hospital in San Antonio. He developed problems with his feeding tube which was then removed. For a time he received nutrition intravenously, but physicians recommended discontinuing treatment. On April 20, 2005 the hospital's ethics committee agreed that further care would be futile, and advised they planned to stop intravenous feeding and turn off his ventilator May 3. See Todd Ackerman, *supra* n. 6. He was then transferred back to Avalon Place and died May 30, 2005. See Associated Press, *Man In Center Of Life-Support Debate Dies In San Antonio*, HOUS. CHRON., June 1, 2005, at B5.

<sup>18</sup> *Nikolouzos*, 162 S.W.3d at 683.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 684 (citing TEX. HEALTH & SAFETY CODE § 166.046(g)).

<sup>21</sup> *Id.*

court having probate jurisdiction, or district court, including a family district court, in this state.”<sup>22</sup>

Also, “the statute should direct a family what to call their action, specify the steps a family must take to have its complaint heard, and include timetables within which the parties and the court must act.”<sup>23</sup> Justice Fowler said that the “the statute gives no direction on these issues.”<sup>24</sup> Nikolouzos filed for both a temporary restraining order and injunctive relief in order to obtain a timely hearing.<sup>25</sup> Justice Fowler suggests that a better alternative would again be the example found in the parental notification law, where the minor files an “application” referring to the statute which “enables a court and its personnel to know immediately that they are dealing with a very specific type of case with its own unique accelerated procedures.”<sup>26</sup>

Finally, “the statute should state if the family or hospital has the right of appeal from a ruling on a request for an extension of time under section 166.046(g).”<sup>27</sup> Justice Fowler points out that the statute is silent on this issue.<sup>28</sup> She contrasts this silence with the parental notification statute which explicitly addresses the right to appeal.<sup>29</sup> Justice Fowler concludes:

In short, in its current form, the statute creates confusion where there should be clarity. This confusion not only is a disservice to both families and health care providers, but also ironically increases litigation when it should lessen it. I respectfully urge the legislature to revisit section 166.046 and to clarify the procedures a family must follow to secure alternate care for their loved one. The legislature has already seen the importance of clarity at the inception of life; clarity is no less important at the end of life.<sup>30</sup>

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<sup>22</sup> *Id.* (citing TEX. FAM. CODE § 33.003(b)).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* (citing TEX. HEALTH & SAFETY CODE § 166.046)).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* (citing TEX. FAM. CODE § 33.003(a)).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* (citing TEX. HEALTH & SAFETY CODE § 166.046)).

<sup>29</sup> *Id.* (citing TEX. FAM. CODE § 33.004)).

<sup>30</sup> *Id.*.