

BILL ANALYSIS

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S.B. 2129
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AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

If a doctor or hospital decides not to honor a patient's advance directive, current Texas law, under Chapter 166.046 of the Health and Safety Code, lays out a process which a physician may follow in order to withdraw life-sustaining treatment (e.g. a ventilator). Families are subject to this unfamiliar, bureaucratic, and unbalanced process, which results in the physician and a hospital committee deciding that the requested treatment is inappropriate. At the end of the process the doctor can remove the treatment and the patient dies.

The legal process leading up to removing treatment has been criticized by legal experts, bioethicists, physicians, and families as being unfair and slanted towards the physician and hospital. The Texas attorney general has even filed a brief against the law in a court case challenging the constitutionality of the law because it does not protect the substantial due process rights of patients. S.B. 2129 makes numerous reforms to the conflict resolution process to protect the patient's right to due process and make the TADA procedures more fair, including:

- 1) clarifying that the ethics committee may not discriminate against patients because of a disability;
- 2) clarifying that the ethics committee must explain why they think the requested treatment will be physiologically futile in providing the intended benefit desired by the patient;
- 3) ensuring that the ethics committee's decision may be appealed and reviewed by a court;
- 4) requiring seven day notice of an ethics committee meeting, giving the family time to find and meet with legal counsel;
- 5) requiring that the patient or surrogate receive details like time and location in writing before the meeting, ensuring they do not miss the meeting;
- 6) clarifying the membership of the ethics committee;
- 7) clarifying that the patient or surrogate has the right to attend the entire meeting, speak at the meeting, and address comments from the hospital staff. Some hospitals have told families they may attend the meeting but may not speak; and
- 8) clarifying that the patient has the right to bring an attorney and patient advocate to the meeting, who are also allowed to speak. Some hospitals have only allowed one of the patient's surrogates to attend.
- 9) Requires health care facilities to report annually on the use of the process (in Section 166.046) and details of those cases. There is currently no data collected.

As proposed, S.B. 2129 amends current law relating to advance directives and health care and treatment decisions.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 166.002, Health and Safety Code, to define "reasonable medical judgment" for purposes of this chapter (Advance Directives).

SECTION 2. Amends Sections 166.045(c) and (d), Health and Safety Code, as follows:

(c) Requires life-sustaining treatment, if an attending physician refuses to comply with a directive or treatment decision for a reason permitted by Section 166.046(a-1) and not prohibited by Section 166.0455, to be provided to the patient, but only until a reasonable opportunity has been afforded for the transfer of the patient to another physician or health care facility willing to comply with the directive or treatment decision in accordance with Section 166.046 (Procedure if Not Effectuating a Directive or Treatment Decision), rather than requiring life-sustaining treatment, if an attending physician refuses to comply with a directive or treatment decision and does not wish to follow the procedure established under Section 166.046, to be provided to the patient, but only until a reasonable opportunity has been afforded for the transfer of the patient to another physician or health care facility willing to comply with the directive or treatment decision.

(d) Provides that a physician, health professional acting under the direction of a physician, or health care facility is not civilly or criminally liable or subject to review or disciplinary action by the person's appropriate licensing board if the person has complied with the procedures and limitations outlined in Sections 166.0455 and 166.046, rather than the procedures outlined in Section 166.046.

SECTION 3. Amends Subchapter B, Chapter 166, Health and Safety Code, by adding Section 166.0455, as follows:

Sec. 166.0455. LIMITATION ON REFUSAL TO EFFECTUATE CERTAIN ADVANCE DIRECTIVES OR TREATMENT DECISIONS. Prohibits a physician or other health care professional, a health care facility, or an ethics or medical committee from overriding or refusing to honor and comply with a patient's advance directive or a health care or treatment decision made by or on behalf of a patient that directs the provision of life-sustaining treatment and prohibits the physician, professional, facility, or committee from considering life-sustaining treatment to be inappropriate treatment under Section 166.046 based on:

(1) the lesser value the physician or professional, facility, or committee places on sustaining the life of an elderly, disabled, or terminally ill patient compared to the value of sustaining the life of a patient who is younger, not disabled, or not terminally ill; or

(2) a disagreement between the physician or professional, facility, or committee and the patient, or the person authorized to make a treatment decision for the patient under Section 166.039 (Procedure When Person Has Not Executed or Issued a Directive and is Incompetent or Incapable of Communication), over the greater weight the patient or person places on sustaining the patient's life than the risk of disability.

SECTION 4. Amends Section 166.046, Health and Safety Code, by amending Subsections (a), (b), (c), and (g) and adding Subsections (a-1), (a-2), (c-1), and (d-1), as follows:

(a) Requires the physician's refusal, if an attending physician refuses to honor or comply with a patient's advance directive or a health care or treatment decision made by or on

behalf of a patient for a reason permitted by Subsection (a-1) and not prohibited by Section 166.0455, to be reviewed by an ethics or medical committee. Prohibits a person from coercing or attempting to coerce a physician not to comply with a patient's advance directive or a health care or treatment decision made by or on behalf of a patient by threatening or implementing adverse employment decisions or professional discipline.

(a-1) Prohibits the ethics or medical committee reviewing the physician's refusal under Subsection (a) from considering life-sustaining treatment inappropriate unless, based on reasonable medical judgment, the life-sustaining treatment requested by or on behalf of the patient is:

- (1) futile because the treatment is physiologically ineffective in achieving the specific intended benefit to the patient as intended by or on behalf of the patient; or
- (2) medically inappropriate because providing the treatment to the patient would clearly create a substantially greater risk of causing or hastening the death of the patient than would withholding or withdrawing the treatment.

(a-2) Requires an ethics or medical committee to record a meeting held under this section. Requires the recording to include audio and be on a tangible medium, including a disc, tape, wire, film, or electronic storage drive.

(b) Provides that the patient, the patient's attorney, the patient's advocate, or the person responsible for the health care decisions of the individual who has made the decision regarding the directive or treatment decision:

- (1) makes no changes to this subdivision;
- (2) unless the patient or person responsible for the health care decisions of the patient requests an earlier meeting, is required to be informed in writing not less than seven days before the meeting called to discuss the patient's directive of, rather than is required to be informed of the committee review process not less than 48 hours before the meeting called to discuss the patient's directive unless the time period is waived by mutual agreement:
 - (A) the committee review process;
 - (B) the right to representation by an attorney and patient advocate present at the committee review meeting;
 - (C) the date, time, and location of the meeting; and
 - (D) the name and title of each of the individuals on the ethics or medical committee;
- (3) makes no changes to this subdivision; and
- (4) is entitled to:
 - (A) attend and participate in the entire meeting, rather than attend the meeting;
 - (B) makes no changes to this paragraph;
 - (C)-(D) makes nonsubstantive changes to these paragraphs;
 - (E) during the committee review meeting, have an opportunity to:

- (i) explain the justification for the treatment decision made by or on behalf of the patient;
- (ii) if applicable, receive a written explanation of the manner in which the attending physician's and ethics or medical committee's decision to refuse to honor or comply with the treatment decision made by or on behalf of the patient complies with Section 166.0455; and
- (iii) respond to the attending physician's or ethics or medical committee's description, prognosis, or assessment of the patient, treatment decision, and compliance with this section and Section 166.0455; and

(F) after the ethics or medical committee has rendered a decision:

- (i) receive a written explanation of the ethics or medical committee's decision; and
- (ii) receive an audio recording of the committee review meeting.

(c) Requires the written explanation required by Subsections (b)(4)(B), (E), and (F), rather than by Subsection (b)(4)(B), to be included in the patient's medical record.

(c-1) Prohibits the ethics or medical committee from approving withdrawing or withholding life-sustaining treatment if the ethics or medical committee determines during the review described by Subsection (a) that the physician refused to honor a patient's advance directive or a health care or treatment decision made by or on behalf of the patient for a reason prohibited by Section 166.0455.

(d-1) Authorizes the attending physician to comply with Subsection (d) by:

(1) providing to the patient or person responsible for the health care decisions of the patient:

- (A) a list of at least 10 facilities able to provide the level of care requested;
- (B) a written explanation of whether the patient could be discharged to the patient's home and the health care services required to provide the requested treatment; and
- (C) the explanations and recommendations described by Subdivision (3), if applicable;

(2) contacting the appropriate administrators and physicians at the facilities on the list described by Subdivision (1) to initiate a transfer;

(3) if all of the facilities on the list described by Subdivision (1) refuse the transfer, for each facility:

(A) requesting a written explanation of the facility's reasons for refusal; and

(B) developing a written recommendation that includes:

(i) the reason for the facility's refusal;

(ii) the actions the physician, facility, and patient or person responsible for the health care decisions of the patient are authorized to take to transfer to the facility; and

- (iii) the name of any administrator and physician contacted by the attending physician under Paragraph (A); and
 - (4) facilitating the transfer of the patient to any appropriate facility willing to accept the patient.
- (g) Requires the appropriate court, at the request of the patient or the person responsible for the health care decisions of the patient, to extend the time period provided under Subsection (e) 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, rather than requiring the appropriate district or county court, at the request of the patient or the person responsible for the health care decisions of the patient, to extend the time period provided under Subsection (e) only if the court finds, by a preponderance of 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.

SECTION 5. Amends Subchapter B, Chapter 166, Health and Safety Code, by adding Sections 166.0463 and 166.0465, as follows:

Sec. 166.0463. ETHICS OR MEDICAL COMMITTEE MEMBERS. (a) Prohibits an individual from being a member of an ethics or medical committee of a health care facility if the individual or individual's spouse:

- (1) is employed by or participates in the management of the facility or another affiliated facility;
- (2) owns or controls, directly or indirectly, an interest in the facility or another affiliated facility; or
- (3) uses or receives a substantial amount of tangible goods, services, or money from the facility or another affiliated facility.

(b) Requires an ethics or medical committee to include as members:

- (1) a chaplain, spiritual advisor, or spiritual care professional of that religious organization, if the patient is an adherent or member of a recognized religious organization;
- (2) an individual with experience as an advocate for patients and patients' family caregivers; and
- (3) a representative of an established patient advocacy organization.

Sec. 166.0465. COURT PROCEEDINGS; APPEAL; FILING FEE AND COURT COSTS. (a) Authorizes a patient, the person responsible for the patient's health care decisions, or the person who has made the decision regarding the advance directive or treatment decision to file a motion for injunctive relief in any county court at law, court having probate jurisdiction, or district court, including a family district court, based on:

- (1) a request for extension of time to effect a patient transfer for relief under Section 166.046(g); or
- (2) an allegation that a physician or other health care professional, health care facility, or ethics or medical committee is violating or threatening to violate this chapter.

- (b) Requires the person filing a motion under Subsection (a) to immediately serve a copy of the motion on the defendant.
- (c) Requires the court to promptly set a time for a hearing on a motion filed under Subsection (a) and to keep a record of all testimony and other oral proceedings in the action. Requires the court to rule on the motion and issue written findings of fact and conclusions of law not later than the fifth business day after the date the motion is filed with the court.
- (d) Provides that the time for the hearing and the date by which the court is required to rule on the motion under Subsection (c) is authorized to be extended, for good cause shown, by the court.
- (e) Authorizes any party to appeal the decision of the court under Subsection (c) to the court of appeals having jurisdiction over civil matters in the county in which the motion was filed by filing a notice of appeal with the clerk of the court that ruled on the motion not later than the first business day after the date the decision of the court was issued.
- (f) Requires the clerk of the court that ruled on the motion, on receipt of a notice of appeal under Subsection (e), to deliver a copy of the notice of appeal and record on appeal to the clerk of the court of appeals. Requires the clerk of the court of appeals, on receipt of the notice and record, to place the appeal on the docket of the court, and requires the court of appeals to promptly issue an expedited briefing schedule and set a time for a hearing.
- (g) Requires the court of appeals to rule on an appeal under Subsection (f) not later than the fifth business day after the date the notice of appeal is filed with the court that ruled on the motion.
- (h) Authorizes the times for the filing of briefs, the hearing, and the date by which the court of appeals is required to rule on the appeal under Subsection (g) to be extended, for good cause shown, by the court of appeals.
- (i) Authorizes any party to file a petition for review of the decision of the court of appeals under Subsection (g) with the clerk of the Supreme Court of Texas (supreme court) not later than the third business day after the date the decision of the court of appeals was issued. Authorizes other parties to file responses not later than the third business day after the date the petition for review was filed. Requires the supreme court to grant, deny, refuse, or dismiss the petition, without regard to whether a reply to any response has been filed, not later than the third business day after the date the response was due. Requires the supreme court, if the court grants the petition for review, to exercise the court's sound discretion in determining how expeditiously to hear and decide the case.
- (j) Requires life-sustaining treatment, if a motion is filed under Subsection (a) and the dispute concerns whether life-sustaining treatment should be provided to the patient, to be provided through midnight of the day by which a notice of appeal is required to be filed unless the court directs that the life-sustaining treatment be provided for a longer period. Requires life-sustaining treatment, if a notice of appeal under Subsection (e) is filed, to be provided through midnight of the day by which a petition for review to the supreme court is required to be filed, unless the court of appeals directs that the life-sustaining treatment be provided for a longer period. Requires life-sustaining treatment, if a petition for review to the supreme court is filed under Subsection (i), to be provided through midnight of the

day on which the supreme court denies, refuses, or dismisses the petition or issues a ruling on the merits, unless the supreme court directs that the life-sustaining treatment be provided for a longer period.

(k) Prohibits a filing fee or court cost from being assessed for any proceeding in a trial or appellate court under this section.

SECTION 6. Amends Section 166.051, Health and Safety Code, as follows:

Sec. 166.051. LEGAL RIGHT OR RESPONSIBILITY NOT AFFECTED. Provides that this subchapter does not impair or supersede any legal right or responsibility a person may have to effect the withholding or withdrawal of life-sustaining treatment in a lawful manner, provided that if an attending physician or health care facility is unwilling to honor and comply with a patient's advance directive or a treatment decision to provide life-sustaining treatment for a reason permitted by Section 166.046(a-1) and not prohibited by Section 166.0455, life-sustaining treatment is required to be provided the patient, but only until a reasonable opportunity has been afforded for transfer of the patient to another physician or health care facility willing to comply with the advance directive or treatment decision in accordance with Section 166.046.

SECTION 7. Amends Sections 166.052(a) and (b), Health and Safety Code, as required:

(a) Requires the statement required by Section 166.056(b)(3)(A) in cases which the attending physician refuses to honor an advance directive or health care or treatment decision requesting the provision of life-sustaining treatment to be substantially in a certain form and sets forth required language for the statement.

(b) Requires the statement required by Section 166.046(b)(3)(A) in cases in which the attending physician refuses to honor an advance directive or health care or treatment decision requesting the withholding or withdrawal of life-sustaining treatment to be substantially in a certain form and sets forth required language for the statement.

SECTION 8. Amends Subchapter B, Chapter 166, Health and Safety Code, by adding Section 166.054, follows:

Sec. 166.054. REPORTING REQUIREMENTS REGARDING ETHICS OR MEDICAL COMMITTEE. (a) Requires a health care facility to complete and submit an annual report to the Health and Human Services Commission (HHSC), in the form and manner prescribed by HHSC rule, of all meetings of an ethics or medical committee held under Section 166.046 during the preceding year.

(b) Requires the report required by Subsection (a) to include:

(1) whether the health care facility held any ethics or medical committee meetings during the preceding year; and

(2) for each meeting held during the preceding year:

(A) the patient's age, sex, race, and state and county of residence;

(B) the patient's type of health benefit plan, if applicable;

(C) the date of the meeting;

(D) whether the patient was transferred to another physician in the same facility;

(E) whether the patient was transferred to another facility;

(F) whether the patient was discharged to the patient's home;

- (G) whether treatment was withheld or withdrawn without the consent of the patient or person authorized to make treatment decisions on behalf of the patient after the meeting;
- (H) whether treatment was withheld or withdrawn with the consent of the patient or the person authorized to make treatment decisions on behalf of the patient after the meeting; and
- (I) whether the patient died while receiving life-sustaining treatment at the facility.
- (c) Requires HHSC to publish on its Internet website an annual report compiled by HHSC containing aggregate data of the information in each report submitted under Subsection (a), including:
- (1) the total number of patients for whom a review by the ethics or medical committee is held under Section 166.046 in the reported year;
 - (2) de-identified demographic data of patients, including age, sex, and state and county of residence, and health benefit plan status;
 - (3) de-identified data on facilities that initiated the ethics or medical committee meeting, including:
 - (A) the county in which the facilities are located;
 - (B) the type of facilities; and
 - (C) whether the facilities are nonprofit, for-profit, or a public hospital;
 - (4) the decisions of the ethics or medical committee;
 - (5) the total number of patients transferred to another physician in the same facility;
 - (6) the total number of patients transferred to another facility;
 - (7) the total number of patients discharged to the patient's home;
 - (8) the total number of patients for whom treatment was withheld or withdrawn without the consent of the patient or person authorized to make treatment decisions on behalf of the patient after the ethics or medical committee meeting;
 - (9) the total number of patients for whom treatment was withheld or withdrawn with the consent of the patient or person authorized to make treatment decisions on behalf of the patient after the ethics or medical committee meeting;
 - (10) the total number of patients who died while receiving life-sustaining treatment at the facility;
 - (11) the total number of facilities reporting no ethics or medical committee meetings during the reported year; and
 - (12) the total number of facilities reporting ethics or medical committee meetings during the reported year.

(d) Prohibits the report required by Subsection (c) from containing any identifying data of a patient, facility, or physician.

SECTION 9. Amends Section 166.158(c), Health and Safety Code, as follows:

(c) Requires a principal's health or residential care provider who finds it impossible to follow a directive by the agent because of a conflict with this subchapter (Medical Power of Attorney) or the medical power of attorney to inform the agent as soon as is reasonably possible. Authorizes the agent to select another attending physician. Provides that the procedures and limitations established under Sections 166.045, 166.0455, and 166.046, rather than the procedures established under Sections 166.045 and 166.046, apply if the agent's directive concerns providing, withholding, or withdrawing life-sustaining treatment.

SECTION 10. Amends Section 166.166, Health and Safety Code, as follows:

Sec. 166.166. OTHER RIGHTS OR RESPONSIBILITIES NOT AFFECTED. Provides that this subchapter does not limit or impair any legal right or responsibility that any person, including a physician or health or residential care provider, may have to make or implement health care decisions on behalf of a person, provided that if an attending physician or health care facility is unwilling to honor and comply with a patient's advance directive or a treatment decision to provide life-sustaining treatment for a reason permitted by Section 166.046(a-1) and not prohibited by Section 166.0455, life-sustaining treatment is required to be provided the patient, but only until a reasonable opportunity has been afforded for transfer of the patient to another physician or health care facility willing to comply with the advance directive or treatment decision in accordance with Section 166.046.

SECTION 11. Requires the supreme court, not later than December 1, 2019, to issue the rules and prescribe the forms necessary for the process established by Section 166.0465, Health and Safety Code, as added by this Act. Requires the rules to prescribe the method of service of the application under Section 166.0465, Health and Safety Code, and authorizes the form to require filing and service of notices, petitions, and briefs electronically to the extent the supreme court considers appropriate.

SECTION 12. Makes application of this Act prospective.

SECTION 13. Effective date: upon passage or September 1, 2019.