

**SUBJECT:** Advance directives and health care and treatment decisions

**COMMITTEE:** Public Health — committee substitute recommended

**VOTE:** 9 ayes — Delisi, Laubenberg, Jackson, Cohen, Coleman, Gonzales, S. King, Olivo, Truitt

0 nays

**SENATE VOTE:** On final passage, May 14 — 30-0

**WITNESSES:** *(On House companion bill, HB 1094 by Hughes: )*  
For — *(Registered, but did not testify: Cathie Adams, Texas Eagle Forum; Burke J. Balch, Robert Powell Center for Medical Ethics, National Right to Life Committee, Texas Right to Life Committee; Robert D. Bennett, family of Josh Hightower, Ruthie Webster; Adam Black, Texas Right to Life; Dennis Borel, Coalition of Texans with Disabilities; April Brown, Texas Conservative Coalition; Melissa M. Castillo, Texas Right to Life; Tommie Cosby, Concerned Women for America; Lanore Dixon, family of Andrea Clark; Julie Drenner, Texans for Family Values; Stacey Emick, Texas Right to Life; Jeff Garrison-Tate, The Disability Policy Consortium Chairperson; Benny Hernandez, American Civil Liberties Union of Texas; Ann Hettinger, Concerned Women for America; Jean Langendorf, United Cerebral Palsy of Texas and The Disability Policy Consortium; Jennifer McPhail and Albert Metz, ADAPT of Texas; Amy Mizcles, The Arc of Texas; Jonathan Saenz, Free Market Foundation; Jerri Lynn Ward, Texas Attorneys for Advance Directives; Lacresia Webster, Ruthie Webster; Kyleen Wright, Texans for Life; Elizabeth Graham, Texas Right to Life; Ron Cranston; and 10 others)*

Against — Ed Berger, SETON Family of Hospitals; Sarah Brandoff, Texas Children’s Hospital; Mark Casanova and Dennis S. Pacl, Texas Medical Association; Jennifer Cutrer, Parkland Health and Hospital System; Ginny Gremillion, Memorial Hermann Hospital; Paula Hagan, Presbyterian Hospital of Dallas Bioethics Committee; Heather Long; Marisa Martin, Scott and White Center for Healthcare Policy; Frank Mazza, SETON Family of Hospitals; Gabriela Moreno, CHRISTUS Health; Michele O’Brien, CHRISTUS Santa Rosa Healthcare; Joe Pojman, Texas Alliance for Life, Inc.; Michael Regier and Suzanne

Shepherd, SETON Family of Hospitals; Denise Rose, Texas Children's Hospital; Elizabeth Sjoberg, Texas Hospital Association; Brenda A. Trolin, Catholic Health Association of Texas; Richard Woodley)

**BACKGROUND:** In 1977, the 65th Legislature enacted the Natural Death Act, which became the first statutory directive involving end-of-life care decisions and advance medical directives. The 76th Legislature in 1999 enacted the Advance Directives Act (Health and Safety Code, ch. 166), which amended provisions of the Natural Death Act. Among other provisions, the bill established the order of priority for persons qualified to serve as a surrogate health care decision maker and provided that life-sustaining procedures that were deemed medically inappropriate could be stopped following 10-days notice.

**DIGEST:** CSSB 439 would amend Health and Safety Code, sec. 166.002 to define "surrogate" to mean a legal guardian, an agent under medical power of attorney, or a person authorized under sec. 166.039(b) to make a health care decision or treatment decision for an incompetent patient.

The bill would specify in sec. 166.045(c) that if an attending physician disagreed with a health care or treatment decision of a surrogate made on behalf of an incompetent patient who had been diagnosed with a terminal condition that had been certified in writing by the attending physician — and the attending physician did not wish to follow the procedure established under sec. 166.046 — life-sustaining treatment would be provided to the patient, but only until a reasonable opportunity for the transfer of the patient to another physician or health care facility willing to comply with the decision.

**Physician disagreement with health care or treatment decision.** CSSB 439 would amend sec. 166.046 to establish that if an attending physician disagreed with the health care or treatment decision a surrogate made on behalf of an incompetent patient who had been diagnosed with a terminal condition that had been certified in writing by the attending physician, or permanently required an intensive care unit and one or more of the following therapies in order to keep the patient alive for more than six months — mechanical ventilation, dialysis, blood pressure maintenance drugs, or blood pressure maintenance devices — the attending physician would request a consultation with an ethics or medical committee. The patient would be given life-sustaining treatment during the process.

If artificial nutrition and hydration were the only life-sustaining treatment provided to a patient with a terminal condition, the process under sec. 166.046 could not be invoked unless reasonable medical evidence indicated that artificial nutrition and hydration could hasten the patient's death or seriously exacerbate other major medical problems and the risk of serious medical pain or discomfort outweighed the benefit of continued artificial nutrition and hydration.

If an attending physician requested a consultation with an ethics or medical committee, the committee would:

- appoint a patient liaison familiar with end-of-life issues and hospice care options to assist the patient's surrogate throughout the process; and
- appoint one or more representatives of the ethics or medical committee to conduct an advisory ethics consultation with the surrogate, which would have to be documented in the patient's medical record.

If a disagreement over a health care or treatment decision persisted following an advisory ethics consultation, the attending physician could request a meeting with the ethics or medical committee and would advise the surrogate that the attending physician would initiate the review process and present medical facts at the meeting. The attending physician could not participate as a member of the committee in the case being evaluated.

On receipt of a request for a meeting of the ethics or medical committee, not later than a week before the meeting, unless the time period was waived by mutual agreement, the surrogate would:

- be offered a written description of the ethics or medical committee review process and any other possible policies and procedures adopted by the health care facility;
- receive information that the surrogate was entitled to receive the continued assistance of a patient liaison to assist the surrogate throughout the process;
- receive information that the surrogate could seek a second opinion from other medical professionals regarding the patient's medical status and treatment requirements and communicate the resulting information to the members of the ethics or medical committee for consideration;

- receive a copy of the appropriate statement regarding a patient's right to transfer set forth in sec. 166.052; and
- receive a copy of the registry list of health care providers, health care facilities, and referral groups that had volunteered readiness to consider accepting transfer or to assist in locating a provider willing to accept transfer that was posted on DSHS's web site.

In addition, if the surrogate submitted a written request, he or she also would be entitled to receive:

- not later than 72 hours after making the request, a free copy of the portion of the patient's medical record related to the current admission or the treatment received by the patient during the preceding month in the facility, whichever was shorter, together with requested diagnostic results and reports reasonably requested by the surrogate; and
- not later than five days after making the request, a free copy of the remainder of the patient's medical record, if any, related to current admission.

Under CSSB 439, the surrogate would be entitled to:

- attend and participate in the meeting, excluding the committee's deliberations;
- be accompanied at the meeting at the surrogate's discretion by five or more persons for support to facilitate information sharing and discussion of the patient's medical status and treatment requirements and to preserve the order and decorum of the meeting; and
- receive a written explanation of the decision, included in the patient's medical records, reached during the review process.

If the attending physician or the surrogate did not agree with the decision reached during the review process, the physician would make a reasonable effort to transfer the patient to a physician who was willing to comply with the surrogate's health care or treatment decision. The facility personnel would assist the physician in arranging the patient's transfer to another physician, an alternative care setting within the facility, or another facility.

If the surrogate was requesting life-sustaining treatment that the attending physician had decided — and the ethics or medical committee had

affirmed — was medically inappropriate treatment, the patient would be given available life-sustaining treatment pending transfer. The bill would establish that the patient would receive treatment to enhance pain relief and minimize suffering, which would include the provision of artificial nutrition and hydration. The patient would be responsible for any costs incurred in transferring to another facility. The attending physician, any other physician responsible for the care of the patient, and the health care facility would not be obligated to provide life-sustaining treatment, except for the provision of artificial nutrition and hydration, unless providing such would hasten death or seriously exacerbate other major medical conditions, after the 21st calendar day after the required written decision was provided to the surrogate.

At the request of the patient or the surrogate, the appropriate district or county court would extend the time period only if the court found, by preponderance of evidence, that there was a reasonable expectation that a physician or health care facility that would honor the surrogate's health care or treatment decision would be found if the time extension were granted.

**Court order for life-sustaining treatment.** Under the bill, a patient's surrogate could submit a motion for extension of time to effect a patient transfer for relief in any county court at law, court with probate jurisdiction, or district court, including a family district court, and serve a copy on the health care facility.

The court would set a time for a hearing on a motion and would keep a record of all testimony. The court would 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 was filed with the court. The time for the hearing and the date by which the court would have to rule on the motion could be extended by stipulation of the parties, with the court's approval.

**Appeals process.** Any party could appeal the decision of the court to the court of appeals having jurisdiction by filing a notice not later than the first business day after the day on which the decision was issued. On receipt of notice of appeal, the clerk would deliver a copy of the notice and record to the clerk of the court of appeals. The court of appeals promptly would issue an expedited briefing schedule and set a time for a hearing.

The court of appeals would rule on an appeal no later than five business days after the date the notice of appeal was filed. The times for filing briefs, the hearing, and the date by which the court of appeals would have to rule on the appeal could be extended by stipulation of the parties, with the approval of the court of appeals.

CSSB 439 would allow any party to file a petition for review of the court of appeals decision no later than three business days after the appeals decision was issued. Other parties could file responses within three business days after the day on which the petition for review was filed. The Supreme Court would rule on the petition for review within three business days after the day on which the response was due. If the Supreme Court granted review, it would exercise its sound discretion in determining how expeditiously to hear and decide the case.

If a motion was filed requesting a court extension for life-sustaining treatment, such treatment would be provided through midnight of the day by which a notice of appeal would be filed unless the court directed that it be provided for a longer period. If a notice of appeal was filed, life-sustaining treatment would be provided through midnight of the day by which a petition for review to the Supreme Court would need to be filed, unless the court of appeals directed that it be provided for a longer period. If a petition for review to the Supreme Court was filed, life-sustaining treatment would be provided through midnight of the day on which the Supreme Court ruled on the merits, unless the court directed that it be provided for a longer period.

The bill would not authorize a fee for any proceeding in a trial or appellate court.

**Disagreement about medical treatment.** The bill would detail a form setting forth language for when a physician recommended against certain life-sustaining treatment that a surrogate wished to continue. The language would specify that the attending physician believed that the treatment was not medically appropriate.

Under the bill, the surrogate would receive notice that an ethical or medical committee would appoint a patient liaison to assist with the process and outline the committee process. Also, the notice would specify what information the surrogate was entitled to upon written request. Notice would state that the surrogate was free to seek a second opinion

from other medical professionals regarding the patient's medical status and treatment requirements and to communicate the resulting information to the committee. The notice would contain language informing the surrogate that the patient would continue to be given life-sustaining treatment and treatment to enhance pain management and reduce suffering, including artificial nutrition and hydration for up to 21 calendar days from the time the surrogate received the committee's written decision that life-sustaining treatment was not medically appropriate. If a provider could not be found to give the requested treatment within 21 calendar days, rather than 10 days, life-sustaining treatment could be withdrawn unless a court of law had granted an extension. The notice would have information regarding a judicial extension of the 21-day period.

The notice would define "life-sustaining treatment" to mean treatment that, based on reasonable medical judgment, sustained the life of a patient and without which the patient would die. The term would include both life-sustaining medications and artificial life support, such as mechanical nutrition and hydration. The term would not include the administration of pain management medication or the performance of a medical procedure considered to be necessary to provide comfort care or any other medical care provided to alleviate a patient's pain.

The bill would contain notice to surrogates for cases in which the attending physician disagreed with a health care or treatment decision requesting the withholding or withdrawal of life-sustaining treatment. The bill would set out form language for when a physician recommended life-sustaining treatment that a surrogate wished to stop. The form notice would be similar to the notice mentioned above when a surrogate disagreed with an attending physician's assessment that life-sustaining treatment was not medically appropriate.

**Reporting requirements regarding ethics or medical committee.** On submission of a health care facility's application to renew its license, a facility in which one or more meetings of an ethics or medical committee was held would file a report with the Department of State Health Services (DSHS) that contained aggregate information regarding the number of cases considered by the committee relating to a physician's disagreement with health care under sec. 166.046(a-2) and the disposition of those cases by the facility.

Aggregate data submitted to DSHS could include only the following:

- the total number of patients for whom the review process was initiated;
- the number of patients who were transferred to another physician within the same facility or a different facility;
- the number of patients who were discharged home;
- the number of patients for whom treatment was withheld or withdrawn pursuant to surrogate consent before the review consultation, after the consultation, or during or after the 21-day period for life-sustaining treatment;
- the number of patients for whom treatment was withheld or withdrawn without surrogate consent before expiration of the 21-day period or after the period's expiration;
- the number of patients who died while still receiving life-sustaining treatment before consultation, during the 21-day period, or during extension of the 21-day period, if any; and
- the average length of stay before a review consultation.

The bill would establish that the report could not contain any data specific to an individual patient.

DSHS would adopt rules to establish a standardized form for the reporting requirements and post on its web site the data submitted in the format provided by rule.

The bill would maintain that if a person was incompetent but previously executed or issued a directive to physicians requesting that all treatment, other than treatment necessary for keeping the person comfortable, be discontinued or withheld, the physician could rely on the directive as the person's instructions to issue an out-of-hospital DNR (do-not-resuscitate) order and would place a copy of the directive in the person's medical record.

The bill would amend sec. 166.152 to establish that the principal's attending physician would make reasonable efforts to inform the principal of any proposed treatment or of any proposal to withdraw or withhold treatment before implementing an agent's health care decision.

Not later than November 1, 2007, the Supreme Court would issue rules and prescribe forms necessary for the process established by sec. 166.0465

as added by the bill. The rules would prescribe the method of service of the application and could require filing and service of notices, petitions, and briefs electronically to the extent the Supreme Court of Texas considered appropriate.

Not later than March 1, 2008, the executive commissioner of the Health and Human Services Commission would adopt rules necessary to implement the changes in ch. 166 made by the bill.

The bill would take effect September 1, 2007.

**SUPPORTERS  
SAY:**

CSSB 439 would revise the current Texas Advance Directives Act to give additional direction for dealing with patients who are in such a state that their physician, hospital, or family no longer believe that they should be treated. Since 1999, Texas law has held that a hospital wishing to withhold treatment must notify a family that a committee meeting to consider cutting off support would be held within as little as 48 hours. Following that meeting, treatment could be stopped after 10 days unless another hospital or medical facility could be found to take the patient. This system is not working. Families often are not ready to make such a decision — often the hardest of their lives — in such a short amount of time. Finding a place to transfer a patient in this time period frequently is difficult as well.

CSSB would give families more time to make these painful decisions by increasing from 10 days to 21 days the length of time that a family had to find a place to transfer a dying loved one. In addition, the minimum notification time that a family would receive before the hospital ethics or medical committee met would be extended from two days to seven days to allow the family to prepare themselves. Hospitals would be required to provide relevant medical records within 72 hours of a family member's request, and the hospital would appoint a liaison to further assist the family. Finally, the procedures that a hospital would follow in cases involving life-sustaining treatment and transfer decisions and the new judicial processes would help families in times of great difficulty.

**OPPONENTS  
SAY:**

CSSB 439 would thwart doctors' promise to take care of their patients to the best of their abilities. The bill's provision to extend life-sustaining treatment considered medically inappropriate from 10 days, under current law, to 21 days unnecessarily would prolong suffering for the irreversibly ill. With added delays from court procedures, a person could be made to experience pain and suffering for an indefinite period. It is important to

acknowledge that medical treatment has limits and not stretch out a loving family member's efforts to maintain expensive care that serves no medical purpose.

**NOTES:**

The companion bill, HB 1094 by Hughes, was heard in the House Public Health Committee April 25 and left pending. A related bill, HB 3473 by Delisi, also was considered in the Public Health Committee on April 25.