

## **BILL ANALYSIS**

Senate Research Center  
76R6188 CMR-F

S.B. 1260  
By: Moncrief  
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### **DIGEST**

Currently, a person may execute an out-of-hospital do not resuscitate (DNR) order, or advance directive. The regulations governing the execution of a DNR order are spread across Chapters 672 and 674, Health and Safety Code, and Chapter 135, Civil Practice and Remedies Code. Although these three chapters use the same terminology and have repetitive provisions, they maintain inconsistencies that confuse individuals who want to develop advance directives and confuse providers who must carry out the directives. Consolidating the chapters would reduce the confusion while setting forth uniform provisions governing the execution of an advance directive. S.B. 1260 would amend law regarding an advance directive for medical treatment and provide for administrative penalties.

### **PURPOSE**

As proposed, S.B. 1260 amends law regarding an advance directive for medical treatment and provides administrative penalties.

### **RULEMAKING AUTHORITY**

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

### **SECTION BY SECTION ANALYSIS**

SECTION 1.01. Amends Title 2H, Health and Safety Code, by adding a chapter heading to Chapter 166, as follows:

#### **CHAPTER 166. ADVANCE DIRECTIVES**

SECTION 1.02. Amends Title 2H, Health and Safety Code, by adding Chapter 166A, as follows:

#### **SUBCHAPTER A. GENERAL DIRECTIONS**

Sec. 166.001. **SHORT TITLE:** Advance Directives Act.

Sec. 166.002. **DEFINITIONS.** Defines “advance directive,” “attending physician,” “competent,” “declarant,” “durable power of attorney for health care,” “incompetent,” “life-sustaining procedure,” “physician,” and “terminal condition.”

Sec. 166.003. **WITNESSES.** Provides that in any circumstance in which this chapter requires the execution of an advance director or a nonwritten advance directive to be witnessed, at least one of the witnesses must be a person who is not certain designated persons.

Sec. 166.004. **STATEMENT RELATING TO ADVANCE DIRECTIVE.** Defines “health care provider.” Requires a health care provider to maintain written policies containing clear and precise statements of any procedure the provider is unwilling or unable to withhold in accordance with an advance directive. Requires the provider to provide written notice of the policies to an individual. Sets forth times when the notice must be provided. Sets forth an order of preference for providing the notice if the individual is incompetent or incapacitated. Provides that the provider is not required to provide the notice if after a diligent search the provider is unable to locate a preferred individual. Requires the provider to provide the notice to the incompetent or incapacitated person if the person becomes able to receive the notice. Provides that this section does not apply to outpatient hospital services, including emergency services.

Sec. 166.005. ENFORCEABILITY OF ADVANCE DIRECTIVES EXECUTED IN ANOTHER JURISDICTION. Requires an advance directive or similar instrument validly executed in another state or jurisdiction to be given the same effect as an advance directive validly executed under the law of this state. Provides that this section does not authorize the administration, withholding, or withdrawal of health care otherwise prohibited by the state.

Sec. 166.006. EFFECT OF ADVANCE DIRECTIVE ON INSURANCE POLICY AND PREMIUMS. Provides that the fact that a person executed or issued an advance directive does not hinder or modify a life insurance policy. Provides that if a life-sustaining procedure is withheld or withdrawn from an insured qualified patient does not legally impair or invalidate the person's life insurance policy. Prohibits the consideration of whether or not a person has executed or issued an advance directive from being considered in establishing insurance premiums.

Sec. 166.007. EXECUTION OF ADVANCE DIRECTIVE MAY NOT BE REQUIRED. Prohibits a physician, a health facility, health care provider, insurer, or health care service plan from requiring a person to execute or issue an advance directive as a condition for obtaining insurance for health care services or receiving health care services.

Sec. 166.008. CONFLICT BETWEEN ADVANCE DIRECTIVES. Provides that a treatment decision made or instrument executed later in time controls when a decision or a directive conflicts with another decision or directive.

SECTION 1.03. Redesignates Chapter 672, Health and Safety Code, as Chapter 166B, Title 2H, Health and Safety Code, as follows:

#### SUBCHAPTER B. DIRECTIVE TO PHYSICIAN.

Sec. 166.031. DEFINITIONS. Redefines "directive" and "qualified patient." Deletes the definitions of "attending physician," "competent," "declarant," "incompetent," "life-sustaining procedure" "physician," and "terminal condition."

Sec. 166.032. WRITTEN DIRECTIVE BY COMPETENT ADULT; NOTICE TO PHYSICIAN. Requires a declarant to sign the directive in the presence of two witnesses, at least one of whom must qualify under Section 166.003. Deletes text prohibiting certain persons from being a witness. Deletes comatose from the conditions that allows a declarant to execute a certain treatment decision and require a declarant to notify the attending physician of the directive. Makes conforming changes

Sec. 166.033. FORM OF WRITTEN DIRECTIVE. Suggests a form that may be used for a written directive. Changes language in the form to require only one physician, instead of two physicians, to certify a terminal condition.

Sec. 166.034. ISSUANCE OF NONWRITTEN DIRECTIVE BY COMPETENT ADULT QUALIFIED PATIENT. Requires the declarant to issue a nonwritten directive in the presence of an attending physician and two witnesses, at least one of whom must be a witness who qualifies under Section 166.003, rather than Section 672.003(c). Requires the names of the witnesses to be entered in the medical record, rather than signed in the record. Makes conforming changes.

Sec. 166.035. EXECUTION OF DIRECTIVE ON BEHALF OF PATIENT YOUNGER THAN 18 YEARS OF AGE. Makes a conforming change.

Sec. 166.036. NOTARIZED DOCUMENT NOT REQUIRED; REQUIREMENT OF SPECIFIC FORM PROHIBITED. Provides that a written directive executed under Section 166.033 or 166.035 is effective without notarization, and a physician, health care facility, or health care professional may not require a directive to be notarized or a person to use a form provided by the health professionals.

Sec. 166.037. PATIENT DESIRE SUPERSEDES DIRECTIVE. Makes conforming changes.

Sec. 166.038. PROCEDURE WHEN DECLARANT IS INCOMPETENT OR INCAPABLE OF COMMUNICATION. Deletes comatose from the provision that makes this section apply to

certain incompetent or incapacitated adults. Makes conforming changes.

Sec. 166.039. PROCEDURE WHEN PERSON HAS NOT EXECUTED OR ISSUED A DIRECTIVE AND IS INCOMPETENT OR INCAPABLE OF COMMUNICATION. Authorizes a physician, designated person, or an agent under a durable power of attorney for health care to make a decision to withhold or withdraw a life-sustaining procedure, if a patient is incompetent or incapable to communicate. Permits an authorized physician and certain individuals to make a treatment decision, if the patient does not have a legal guardian or an agent under a durable power of attorney for health care. Requires certain treatment decisions to be concurred in, rather than witnessed, by another physician who is not involved in the treatment or who is an authorized representative of the ethics committee of the health care facility in which the person is a patient. Requires a person listed in Subsection (b) who wishes to challenge a treatment decision to apply for temporary guardianship under Section 875, Texas Probate Code. Authorizes the court to waive applicable fees. Deletes text requiring the majority of the patient's reasonably available adult children to make a treatment decision. Makes conforming changes.

Sec. 166.040. PATIENT CERTIFICATION AND PREREQUISITES FOR COMPLYING WITH DIRECTIVE. Requires steps, policies, and other procedures to be made in accord with this subchapter, rather than chapter. Deletes text that requires a physician to make certain determinations prior to withholding life-sustaining procedures. Makes conforming changes.

Sec. 166.041. DURATION OF DIRECTIVE. Makes conforming changes.

Sec. 166.042. REVOCATION OF DIRECTIVE. Makes conforming changes.

Sec. 166.043. REEXECUTION OF DIRECTIVE. Deletes existing Section 672.043 regarding effect of directive on insurance policy and premiums. Makes conforming changes.

Sec. 166.044. LIMITATION OF LIABILITY FOR WITHHOLDING OR WITHDRAWING LIFE-SUSTAINING PROCEDURES. Provides that a health professional or health care facility is not civilly liable for certain actions taken unless the physician or health care facility fails to exercise reasonable care when applying the patient's advance directive, rather than liable unless negligent. Requires the standard of care to be what certain other health professionals would similarly exercise under ordinary prudence and skill. Makes conforming changes.

Sec. 166.045. LIMITATION OF LIABILITY FOR FAILURE TO EFFECTUATE DIRECTIVE. Provides that certain health professionals are subject to review and disciplinary action by the appropriate licensing board, rather than providing that they are not civilly or criminally liable for certain reasons, for certain violations. Provides that this subchapter does not limit other remedies.

Sec. 166.046. HONORING DIRECTIVE DOES NOT CONSTITUTE OFFENSE OF AIDING SUICIDE. Makes conforming changes.

Sec. 166.047. CRIMINAL PENALTY; PROSECUTION. Makes a conforming change.

Sec. 166.048. PREGNANT PATIENTS. Makes conforming changes.

Sec. 166.049. MERCY KILLING NOT CONDONED. Makes conforming changes.

Sec. 166.050. LEGAL RIGHT OR RESPONSIBILITY NOT AFFECTED. Makes conforming changes.

SECTION 1.04. Redesignates Chapter 674, Health and Safety Code, as Chapter 166C, Title 2H, Health and Safety Code, as follows:

New heading: SUBCHAPTER C. OUT-OF-HOSPITAL DO-NOT-RESUSCITATE ORDERS

Sec. 166.081. DEFINITIONS. Redefines "DNR identification device," "out-of-hospital DNR order," "proxy," "qualified relatives," and "statewide out-of-hospital DNR protocol." Deletes definitions for "attending physician," "board," "competent," "declarant," "department," "durable

power of attorney for health care,” “incompetent,” “life sustaining procedure,” “physician,” and “terminal condition.” Makes conforming changes.

Sec. 166.082. OUT-OF-HOSPITAL DNR ORDER; DIRECTIVE TO PHYSICIANS. Requires a declarant to sign an out-of-hospital do not resuscitate (DNR) order in the presence of two witnesses, at least one of whom must be a witness who qualifies under Section 166.003. Authorizes a proxy to make a decision, if an incompetent person previously executed a directive to physicians in accordance with Subchapter B, rather than Chapter 672. Deletes a reference to Chapter 135, Civil Practices and Remedies Code, in a provision requiring an agent to make a decision regarding an incompetent person who executed a durable power of attorney for health care. Deletes a requirement that a witness must have the same qualifications under Section 672.003(c). Deletes a provision qualifying a competent person as a person who has been diagnosed by a physician as having a terminal illness. Makes conforming changes.

Sec. 166.083. FORM OF OUT-OF-HOSPITAL DNR ORDER. Requires a form to include certain physicians, a separate section for execution of the document by at least one, rather than two, qualified relatives, and a statement that allows certain persons to make certain decisions. Authorizes a photocopy of the DNR order to be used for the same purpose as the original DNR order. Deletes text regarding a physician’s diagnosis on the form required for an out-of-hospital DNR order. Makes conforming and nonsubstantive changes.

Sec. 166.084. ISSUANCE OF OUT-OF-HOSPITAL DNR ORDER BY NONWRITTEN COMMUNICATION. Requires a witness in certain DNR orders to be made in the presence of an attending physician and two witnesses, at least one of whom must be a qualified witness under Section 166.003. Deletes text that requires the witness to have certain qualifications. Makes conforming changes.

Sec. 166.085. EXECUTION OF OUT-OF-HOSPITAL DNR ORDER ON BEHALF OF A MINOR. Makes a conforming change.

Sec. 166.086. DESIRE OF PERSON SUPERSEDES OUT-OF-HOSPITAL DNR ORDER. Makes a conforming change.

Sec. 166.087. PROCEDURE WHEN DECLARANT IS INCOMPETENT OR INCAPABLE OF COMMUNICATION. Makes conforming changes.

Sec. 166.088. PROCEDURE WHEN PERSON HAS NOT EXECUTED OR ISSUED OUT-OF-HOSPITAL DNR ORDER AND IS INCOMPETENT OR INCAPABLE OF COMMUNICATION. Authorizes an attending physician and at least one, rather than two, qualified relatives to execute a DNR order, if a person does not have a durable power of attorney for health care. Requires a person who wishes to challenge the decision to apply for temporary guardianship. Makes conforming changes.

Sec. 166.089. COMPLIANCE WITH OUT-OF-HOSPITAL DNR ORDER. Requires the DNR form or a copy of the form to accompany the person during transport. Makes conforming changes.

Sec. 166.090. DNR IDENTIFICATION DEVICE. Makes conforming changes.

Sec. 166.091. DURATION OF OUT-OF-HOSPITAL ORDER. Makes conforming changes.

Sec. 166.092. REVOCATION OF OUT-OF-HOSPITAL ORDER. Makes conforming changes.

Sec. 166.093. REEXECUTION OF OUT-OF-HOSPITAL DNR ORDER. Makes conforming changes. Deletes existing Section 674.014 regarding conflict with natural death act or durable power of attorney for health care; and Section 674.015 regarding effect of out of hospital DNR order on insurance policy and premiums. Makes conforming changes.

Sec. 166.094. LIMITATION ON LIABILITY FOR WITHHOLDING CARDIOPULMONARY RESUSCITATION AND CERTAIN OTHER LIFE-SUSTAINING PROCEDURES. Makes conforming changes.

Sec. 166.095. LIMITATION ON LIABILITY FOR FAILURE TO EFFECTUATE OUT-OF-HOSPITAL DNR ORDER. Makes health professionals, health care facilities, and other entities subject to review and disciplinary action by the appropriate licensing board, rather than not civilly or criminally liable. Provides that this section does not limit remedies available under other laws. Makes a conforming change.

Sec. 166.096. HONORING OUT-OF-HOSPITAL DNR ORDER DOES NOT CONSTITUTE OFFENSE OF AIDING SUICIDE. Makes conforming changes.

Sec. 166.097. CRIMINAL PENALTY; PROSECUTION. Makes conforming changes.

Sec. 166.098. PREGNANT PERSONS. Makes conforming changes.

Sec. 166.099. MERCY KILLING NOT CONDONED. Makes conforming changes.

Sec. 166.100. LEGAL RIGHT OR RESPONSIBILITY NOT AFFECTED. Makes conforming changes.

Sec. 166.101. DUTIES OF DEPARTMENT AND BOARD. Deletes existing Section 674.024 regarding recognition of an out-of-hospital DNR order executed or issued in other state. Makes conforming changes.

SECTION 1.05. Redesignates Chapter 135, Civil Practice and Remedies Code, as Chapter 166D, Title 2H, Health and Safety Code, as follows:

SUBCHAPTER D. New heading: DURABLE POWER OF ATTORNEY FOR HEALTH CARE

Sec. 166.151. DEFINITIONS. Deletes definitions for “attending physician,” “capacity to make health care decisions,” durable power of attorney for health care,” “health care decision,” and “physician.” Makes conforming changes.

Sec. 166.152. SCOPE AND DURATION OF AUTHORITY. Authorizes certain agents to make certain decisions on behalf of a principal if the principal were competent, rather than make a decision on behalf of the principal who could make the decision but for the principal’s lack of capacity to make health care decisions. Makes conforming changes.

Sec. 166.153. PERSONS WHO MAY NOT EXERCISE AUTHORITY OF AGENT. Makes a conforming change.

Sec. 166.154. EXECUTION AND WITNESSES. Requires a witness to sign the document. Deletes text prohibiting and requiring the witness to take certain actions regarding the document. Makes conforming changes.

Sec. 166.155. REVOCATION. Provides that durable power of attorney by a health care provider is revoked by oral or written notification at any time by the principal to the agent, regardless of whether the principal is competent or the principal’s mental state, rather than regardless of competency or capacity to make health care decisions. Provides that the power of attorney is revoked by the divorce of the principal and spouse, if the spouse is the principal’s agent, unless the durable power of attorney provides otherwise. Makes a conforming change.

Sec. 166.156. APPOINTMENT OF GUARDIAN. Makes a conforming change.

Sec. 166.157. DISCLOSURE OF MEDICAL INFORMATION. Makes a conforming change.

Sec. 166.158. DUTY OF HEALTH OR RESIDENTIAL CARE PROVIDER. Makes conforming changes.

Sec. 166.159. DISCRIMINATION RELATING TO EXECUTION OF DURABLE POWER OF ATTORNEY FOR HEALTH CARE. Makes a conforming change.

Sec. 166.160. LIMITATION ON LIABILITY. Requires the standard of care to be what certain

other health professionals would similarly exercise under ordinary prudence and skill. Makes conforming changes.

Sec. 166.161. LIABILITY FOR HEALTH CARE COSTS. Deletes existing Section 135.012 regarding a natural death act and Section 135.103 regarding enforceability of durable power of attorney executed in another jurisdiction. Makes a conforming change.

Sec. 166.162. DISCLOSURE STATEMENT. Makes a conforming change.

Sec. 166.163. FORM OF DISCLOSURE STATEMENT. Provides that the power of attorney is not valid unless it is signed in the presence of two qualified witnesses, rather than two or more qualified witnesses. Provides that certain people may not act as one of the witnesses, including a person related by blood or marriage, a person entitled to any part of the estate after death, attending physician, an employee of the attending physician, an employee of certain health care facilities, and a person who has a claim against the estate. Deletes individuals disqualified from being a witness, including the health or residential care provider or an employee of the provider, the spouse, lawful heirs or beneficiaries named in the will, and creditors or persons who have a claim.

Sec. 166.164. FORM OF DURABLE POWER OF ATTORNEY. Sets forth a statement required from the first witness. Deletes text regarding the statement of witnesses. Makes nonsubstantive and conforming changes.

Sec. 166.165. CIVIL ACTION. Makes conforming changes.

Sec. 166.166. OTHER RIGHTS OR RESPONSIBILITIES NOT AFFECTED. Makes conforming changes.

## ARTICLE 2. CONFORMING AMENDMENTS

SECTION 2.01. Amends Section 313.003(a), Health and Safety Code, to make conforming changes.

SECTION 2.02. Amends Chapter 142A, Health and Safety Code, by adding Section 142.0145, as follows:

Sec. 142.0145. VIOLATION OF LAW RELATING TO ADVANCE DIRECTIVES. Requires the Texas Department of Health (TDH) to assess an administrative penalty against a home and community support agency that violates Section 166.004. Requires the penalty to be \$500 and to be assessed in accordance with TDH rules that provide for notice and an opportunity for hearing.

SECTION 2.03. Amends Subsections (a) and (c), Section 241.059, Health and Safety Code, to require the commissioner of health to assess an administrative penalty against a hospital that violates Section 166.004. Requires the penalty for a violation of Sections 166.004 to be \$500. Authorizes each day of a continuing violation, other than a Section 166.004 violation, to be considered a separate violation.

SECTION 2.04. Amends Chapter 242C, Health and Safety Code, by adding Section 242.0663, as follows:

Sec. 242.0663. VIOLATION OF LAW RELATING TO ADVANCE DIRECTIVES. Requires TDH to assess an administrative penalty under this subchapter against an institution that violates Section 166.004. Requires the penalty to be \$500, but not assessed for a separate day of a continuing violation. Provides that Section 242.0665 does not apply to a penalty assessed in accordance with this section.

SECTION 2.05. Amends Chapter 247C, Health and Safety Code, by adding Section 247.0455, as follows:

Sec. 247.0455. VIOLATION OF LAW RELATING TO ADVANCE DIRECTIVES. Makes conforming changes.

SECTION 2.06. Amends Chapter 248C, Health and Safety Code, by adding Section 248.0545, as follows:

Sec. 248.0545. VIOLATION OF LAW RELATING TO ADVANCE DIRECTIVES. Makes conforming changes.

ARTICLE 3. TRANSITION AND EMERGENCY CLAUSE

SECTION 3.01. Effective date: January 1, 2000.

SECTIONS 3.02-3.03. Makes application of this Act prospective.

SECTION 3.04. Emergency clause.