

BILL ANALYSIS

C.S.H.B. 2585
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Judiciary & Civil Jurisprudence
Committee Report (Substituted)

BACKGROUND AND PURPOSE

Advance medical directives (AMDs) include directives to physicians, living wills, or medical powers of attorney that allow an individual to appoint a person to make medical treatment decisions if the individual is incapacitated. Current Texas law requires manual signatures for an AMD to be considered valid and enforceable, and witness signatures are the only means of validating the authenticity of an individual's signature on an AMD. The law does not elaborate on whether electronic or digital signatures suffice to validate an AMD in Texas.

Certain provisions deal with electronic signatures relating to transactions that are defined as "an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or government affairs" but specifically state that such provisions do not apply to the creation and execution of wills, codicils, or testamentary trusts. Although AMDs are not expressly referenced, they are closer to wills, codicils, and testamentary trusts than they are to contracts. Consequently, one might conclude that a handwritten signature, using pen and ink or signing on some sort of signature pad, is still required in Texas. In reality, ink to paper signatures on such documents are almost never used—at most, an image of the signature is used, such as a photocopy or a faxed document. Consequently, under current law, medical care providers could arguably refuse to honor or follow an AMD in any instance where a handwritten signature is not available.

Most AMDs are stored in an electronic format and can even be created electronically using special application software. However, when it comes time to execute the AMD, Texas law requires the individual to print the document and physically sign it. This decreases the likelihood an individual will use an AMD. It also creates inefficiency in the health care system because an AMD must be transmitted in hard copy, or stored in hard copy.

C.S.H.B. 2585 authorizes a declarant, witness, or notary public, for an advance directive in which a signature by a declarant, witness, or notary public is required or used, to sign the directive or a written revocation of the directive using a qualified digital or electronic signature.

RULEMAKING AUTHORITY

It is the committee's opinion that rulemaking authority is expressly granted to the executive commissioner of the Health and Human Services Commission in SECTIONS 2 and 9 of this bill.

ANALYSIS

C.S.H.B. 2585 amends the Health and Safety Code to authorize, for an advance directive in which a signature by a declarant, witness, or notary public is required or used, a declarant, witness, or notary public to sign the directive or a written revocation of the directive using a digital signature that uses an algorithm approved by the Department of State Health Services, which can consider an algorithm approved by the National Institute of Standards and Technology; is unique to the person using it; is capable of verification; is under the sole control of the person using it; is linked to data in a manner that invalidates the digital signature if the

data is changed; persists with the document and not by association in separate files; and is bound to a digital certificate. The bill authorizes such a declarant, witness, or notary public to sign the directive or a written revocation of the directive using an electronic signature that is capable of verification; is under the sole control of the person using it; is linked to data in a manner that invalidates the electronic signature if the data is changed; and persists with the document and not by association in separate files. The bill requires the executive commissioner of the Health and Human Services Commission by rule to modify the advance directive forms as necessary to provide for the use of a digital or electronic signature that complies with these requirements.

C.S.H.B. 2585 authorizes a declarant, in lieu of signing in the presence of witnesses, to sign the directive and have the signature acknowledged before a notary public. The bill authorizes a declarant, in lieu of signing in the presence of witnesses, to sign an out-of-hospital DNR order and have the signature acknowledged before a notary public. The bill authorizes a doctor to use a digital or electronic signature to sign a DNR order under certain circumstances. The bill includes in the information contained in the standard form of an out-of-hospital DNR order places for the notary public's acknowledgement and for the printed name and signature of a person's attending physician. The bill includes a digital or electronic signature in the information used by responding health care professionals to determine that the out-of-hospital DNR order form appears to be valid. The bill authorizes a principal, in lieu of signing in the presence of the witnesses, to sign the medical power of attorney and have the signature acknowledged before a notary public. The bill authorizes a person, at the express direction of the principal if the principal is physically unable to sign, to use a digital or electronic signature to sign the medical power of attorney.

C.S.H.B. 2585 defines "digital signature" to mean an electronic identifier intended by the person using it to have the same force and effect as the use of a manual signature. The bill defines "electronic signature" to mean a facsimile, scan, uploaded image, computer-generated image, or other electronic representation of a manual signature that is intended by the person using it to have the same force and effect of law as a manual signature.

C.S.H.B. 2585 requires the executive commissioner of the Health and Human Services Commission, not later than December 1, 2009, to adopt rules and modify forms as necessary to comply with the changes in law made by this bill.

EFFECTIVE DATE

September 1, 2009.

COMPARISON OF ORIGINAL AND SUBSTITUTE

C.S.H.B. 2585 differs from the original by making changes to the caption.