BILL ANALYSIS

Senate Research Center
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C.S.S.B. 303
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Health & Human Services
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Committee Report (Substituted)

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Since 1999, Texas law has set out a process for cases in which there is no advance directive and there is disagreement between a physician and a patient's family as to whether to continue life-sustaining treatment (Chapter 166 (Advance Directives), Health and Safety Code). Legislation has been filed since the 80th Legislature, Regular Session, 2007, to address this process to balance the rights and needs of families with the best medical judgment of physicians.

C.S.S.B. 303 amends current law relating to advance directives and health care and treatment decisions.

[**Note:** While the statutory reference in this bill is to Texas Department of Health (TDH), the following amendments affect the Department of State Health Services (DSHS), as the successor agency to TDH.]

RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to the Texas Department of Health in SECTION 9 (Section 166.054, Health and Safety Code) of this bill.

Rulemaking authority is expressly granted to the executive commissioner of the Health and Human Services Commission in SECTION 12 of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 166.002, Health and Safety Code, by amending Subdivisions (2) and (10) and adding Subdivision (16), as follows:

(2) Defines "artificially administered nutrition and hydration," rather than "artificial nutrition and hydration."

(10) Redefines "life-sustaining treatment."

(16) Defines "surrogate."

SECTION 2. Amends Subchapter A, Chapter 166, Health and Safety Code, by adding Section 166.012, as follows:

Sec. 166.012. STATEMENT RELATING TO DO-NOT-ATTEMPT-RESUSCITATION ORDERS. (a) Defines "do-not-attempt-resuscitation order" or "DNAR order" in this section.

(b) Requires a health care facility, upon admission, to provide a patient or surrogate written notice of the facility's policies regarding the rights of the patient or surrogate under this section.

(c) Requires the physician or the facility's personnel, before placing a do-not-attempt-resuscitation (DNAR) order in a patient's medical record, to inform the patient or, if the patient is incompetent, to make a reasonably diligent effort to

contact or cause to be contacted the surrogate. Requires the facility to establish a policy regarding the notification required under this section. Requires that the policy authorize the notification to be given verbally by a physician or facility personnel.

(d) Provides that the DNAR order takes effect at the time it is written in the patient's chart or otherwise placed in the patient's medical record.

(e) Authorizes the patient or surrogate, if the patient or surrogate disagrees with the DNAR order being placed in or removed from the medical record, to request in writing and is entitled to a consultation or a review of the disagreement by the ethics or medical committee in the manner described by Section 166.046, with the patient or surrogate afforded all rights provided to the surrogate under that section, and with the physician afford all protections from liability provided under Section 166.045(d) (relating to the liability, review, or disciplinary action faced by a physician, health professional acting under the direction of a physician, or health care facility). Authorizes the patient or surrogate to discontinue the process initiated under Section 166.046 by providing written notice to the ethics or medical committee.

(f) Requires that a DNAR order in the patient's medical record at the time a consultation or review is requested under Subsection (e) be removed from the patient's medical record at that time. Prohibits a DNAR order from being placed in the patient's medical record until the process initiated under Section 166.046 is concluded or discontinued at the request of the patient or surrogate.

(g) Provides that Subsection (c) does not apply to a DNAR order placed in the medical record of a patient:

(1) whose death, based on reasonable medical judgment, is imminent despite attempted resuscitation;

(2) for whom, based on reasonable medical judgment, resuscitation would be medically ineffective and there is insufficient time to contact the surrogate; or

(3) for whom the DNAR order is consistent with a patient's or surrogate's request or a patient's advance directive to not attempt resuscitation.

(h) Provides that Subsection (e) does not apply to a DNAR order placed in the medical record of a patient with respect to whom, based on reasonable medical judgment, death is imminent and resuscitation would be medically ineffective.

(i) Provides that this section does not create a cause of action or liability against a physician, health professional acting under the direction of a physician, or health care facility.

(j) 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 appropriate licensing authority if the actor has complied with the procedures under this section and Section 166.046.

(k) Provides that this section does not affect the immunity from liability under Section 74.151 (Liability for Emergency Care), Civil Practice and Remedies Code.

(l) Provides that this section does not apply to an assisted living facility licensed under Chapter 247 (Assisted Living Facilities).

SECTION 3. Amends Section 166.033, Health and Safety Code, to set forth the language authorized to be used in the form of the written directive.

SECTION 4. Amends Section 166.039, Health and Safety Code, by adding Subsections (a-1) and (b-1) and amending Subsections (e) and (f), as follows:

(a-1) Authorizes the attending physician, in making the decision described by Subsection (a) (relating to authorizing an attending physician and the patient's legal guardian or an agent under a medical power of attorney to make a certain treatment decision if an adult qualified patient has not executed or issued a directive and is incompetent or otherwise mentally or physically incapable of communication), to consult with a physician who previously treated the patient if the previous physician:

(1) is known and available, regardless of whether the previous physician has discontinued providing care for the patient or does not have privileges at the treating facility;

(2) had a conversation with the patient on end-of-life issues at a time when the patient was competent and capable of communication; and

(3) documented the conversation described by Subdivision (2) in the patient's medical record.

(b-1) Requires the attending physician and the health care facility's personnel to make a reasonably diligent effort to contact or cause to be contacted the persons listed in Subsection (b) in the order of priority under Subsection (b) until one of the persons is contacted or the list is exhausted regarding making a healthcare or treatment decision for the patient.

(e) Requires that a health care or treatment decision made under Subsection (b) be concurred with by another physician who is not involved in the treatment of the patient or who is a representative of an ethics or medical committee of the health care facility in which the person is a patient if the patient does not have a legal guardian or agent under a medical power of attorney. Makes a nonsubstantive change.

(f) Provides that the fact that an adult patient has not executed or issued a directive does not create a presumption regarding the provision, withholding, or withdrawal of life-sustaining treatment, rather than the fact that an adult qualified patient has not executed or issued a directive does not create a presumption that the patient does not want a treatment decision to be made to withhold or withdraw life-sustaining treatment.

SECTION 5. Amends Section 166.045(c), Health and Safety Code, as follows:

(c) Requires that life-sustaining treatment be provided to the patient, if an attending physician disagrees with and refuses to comply with a patient's directive or a health care or treatment decision of a patient or of a surrogate made on behalf of an incompetent patient, and the attending physician does not wish to follow the procedure established under Section 166.046, 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 health care, rather than directive, or treatment decision.

SECTION 6. Amends the heading to Section 166.046, Health and Safety Code, to read as follows:

Sec. 166.046. PROCEDURE IF PHYSICIAN DISAGREES WITH AND REFUSES TO COMPLY WITH HEALTH CARE OR TREATMENT DECISION.

SECTION 7. Amends Section 166.046, Health and Safety Code, by amending Subsections (a), (b), (c), (d), (e), (e-1), (g), and (h) and adding Subsections (a-1), (a-2), (a-3), (a-4), (a-5), (a-6), (a-7), (a-8), and (b-1), as follows:

(a) Requires that a disagreement and the physician's refusal, if an attending physician disagrees with and refuses to comply with a patient's advance directive or a health care or treatment decision of a patient or of a surrogate made on behalf of an incompetent patient, be reviewed by an ethics or medical committee under this section, rather than requires that a physician's refusal, if an attending physician refuses to honor a patient's advance directive or a health care or treatment decision made by or on behalf of a patient, be reviewed by an ethics or medical committee. Prohibits the ethics or medical committee of a facility other than a nursing home licensed under Chapter 242 (Convalescent and Nursing Homes and Related Institutions) from including any health care provider involved in the direct care of a patient whose treatment the committee reviews or a subcommittee of such an ethics or medical committee.

(a-1) Requires the ethics or medical committee, if the patient has been diagnosed with a terminal condition, to determine if, based on reasonable medical judgment, the treatment requested by the patient or, if the patient is incompetent, by the surrogate would hasten the patient's death, seriously exacerbate other major medical problems not outweighed by the benefit of the provision of the treatment, result in substantial irremediable physical pain or discomfort not outweighed by the benefit of the provision of the treatment, or be medically ineffective in prolonging the patient's life.

(a-2) Authorizes the ethics or medical committee, if the patient has been diagnosed with an irreversible nonterminal condition, to sustain the decision to withdraw life-sustaining treatment requested by the patient or, if the patient is incompetent, by the surrogate only if, based on reasonable medical judgment, the treatment would threaten the patient's life, seriously exacerbate other major medical problems not outweighed by the benefit of the provision of the treatment, result in substantial irremediable physical pain or discomfort not outweighed by the benefit of the provision of the treatment, or be medically ineffective in prolonging the patient's life.

(a-3) Requires the ethics or medical committee, in all deliberations under this section, to strive to honor the values of each unique patient. Provides that all patients will be treated equally without regard to permanent physical or mental disabilities, age, gender, religion, ethnic background, or financial or insurance status. Requires the committee to make the decision about whether or not a requested treatment is medically appropriate for individuals with or without a permanent disability, advanced age, gender, religious or cultural differences, or financial circumstances.

(a-4) Provides that the fact that life-sustaining treatment is delivered in an intensive care unit is not itself sufficient to justify the refusal to provide that treatment. Provides that this section does not authorize withholding or withdrawing pain management medication, medical procedures considered necessary to provide comfort care, or any other medical care provided to alleviate a patient's pain.

(a-5) Requires the patient to be given life-sustaining treatment pending the ethics or medical committee's review, rather than requires the patient to be given life-sustaining treatment during the review. Deletes existing text prohibiting the attending physician from being a member of the ethics or medical committee.

(a-6) Requires the ethics or medical committee, when an ethics or medical committee review has been initiated under this chapter (Advance Directives), to:

> (1) inform the patient or surrogate that the patient or surrogate is authorized to discontinue the process under this section by providing written notice to the ethics or medical committee;
>
> (2) appoint a patient liaison familiar with end-of-life issues and hospice care options to assist the patient or surrogate through the process described by this section; and

(3) appoint one or more representatives of the ethics or medical committee to conduct an advisory ethics consultation with the patient or surrogate, the outcome of which is required to be documented in the patient's medical record by a representative of the committee.

(a-7) Requires the ethics or medical committee, if a disagreement over a health care or treatment decision persists following the consultation described in Subsection (a-6)(3), to hold a meeting to review the disagreement.

(a-8) Requires the ethics or medical committee in holding a review required under this section, including a review following a consultation described by Subsection (a-6)(3), to advise the patient or surrogate that the patient's attending physician may present medical facts at the meeting. Authorizes the patient's attending physician to attend and present facts but prohibits the attending physician from participating as a member of the committee in the case being evaluated.

(b) Provides that when a meeting of the ethics or medical committee is required under this section:

(1) not later than the seventh calendar day before the scheduled date of the meeting required under this section, unless the time period is waived by mutual agreement, the committee is required to provide to the patient or surrogate:

(A) a written description of the ethics or medical committee review process and any other policies and procedures related to this section adopted by the health care facility;

(B) notice that the patient or surrogate is entitled to receive the continued assistance of a patient liaison to assist the patient or surrogate through the process described in this section;

(C) notice that the patient or surrogate may seek a second opinion at the patient's or surrogate's expense from other medical professionals regarding the patient's medical status and treatment requirements and communicate the resulting information to the members of the committee for consideration before the meeting;

(D) a copy of the appropriate statement set forth in Section 166.052 (Statements Explaining Patient's Right to Transfer); and

(E) a copy of the registry list of health care providers, health care facilities, and referral groups that, in compliance with any state laws prohibiting barratry, have volunteered their readiness to consider accepting transfer or to assist in locating a provider willing to accept transfer that is posted on the website maintained by the Texas Department of Health (TDH), rather than the Texas Health Care Information Council, under Section 166.053 (Registry to Assist Transfers); and

(2) if requested in writing, the patient or surrogate is entitled to receive from the facility:

(A) not later than 72 hours after the request is made, a free copy of the portion of the patient's medical record related to the current admission to the facility or the treatment received by the patient during the preceding 30 calendar days in the facility, whichever is shorter, together with any reasonably available diagnostic results and reports; and

(B) not later than the fifth calendar day after the date of the request or at another time specified by mutual agreement, a free copy of the remainder

of the patient's medical record, if any, related to the current admission to the facility.

Deletes text of existing Subsection (b) providing that the patient or the person responsible for the health care decisions of the individual who has made the decision regarding the directive or treatment decision: may be given a written description of the ethics or medical committee review process and any other policies and procedures related to this section adopted by the health care facility; 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; at the time of being so informed, is required to be provided certain information; and is entitled to attend the meeting and receive a written explanation of the decision reached during the review process.

(b-1) Creates this subsection from existing text. Entitles the patient or surrogate to:

(1) attend and participate in the meeting of the ethics or medical committee, excluding the committee's deliberations;

(2) be accompanied at the meeting by up to five persons, or more persons at the committee's discretion, for support, subject to the facility's reasonable written attendance policy as necessary to facilitate information sharing and discussion of the patient's medical status and treatment requirements and preserve the order and decorum of the meeting; and

(3) receive a written explanation of the decision reached during the review process.

(c) Requires that the written explanation required by Subsection (b-1)(3), rather than (b)(2)(B), be included in the patient's medical record.

(d) Requires the physician and the facility, if the attending physician, the patient, or the surrogate does not agree with the decision reached during the review process, to make a reasonably diligent effort to transfer the patient to a physician of the patient's or surrogate's choice who is willing to accept the patient. Requires the facility's personnel to assist the physician in arranging the patient's transfer to another physician, an alternative care setting within that facility, or another facility. Deletes existing text requiring the physician, if the attending physician, the patient, or the person responsible for the health care decisions of the individual does not agree with the decision reached during the review process under Subsection (b), to make a reasonable effort to transfer the patient to a physician who is willing to comply with the directive. Deletes existing text requiring the facility's personnel to assist the physician in arranging the patient's transfer to another physician, an alternative care setting within that facility, or another facility if the patient is a patient in a health care facility.

(e) Requires the patient, if the patient or surrogate, rather than the person responsible for the health care decisions of the patient, is requesting life-sustaining treatment that the attending physician has decided and the ethics or medical committee, rather than the review process, has affirmed is medically inappropriate treatment, to be given available life-sustaining treatment pending transfer under Subsection (d). Provides that this subsection does not authorize withholding or withdrawing pain management medication, medical procedures considered necessary to provide comfort care, or any other medical care provided to alleviate a patient's pain. Provides that the attending physician, any other physician responsible for the care of the patient, and the health care facility are not obligated to provide life-sustaining treatment after the 21st calendar day, rather than the 10th day, after the written decision required under Subsection (b-1), rather than Subsection (b), is provided to the patient or the surrogate unless ordered to do so under Subsection (g), except that artificially administered nutrition and hydration must be provided unless, based on reasonable medical judgment, providing artificially administered nutrition and hydration would hasten the patient's death, seriously

exacerbate other major medical problems not outweighed by the benefit of the provision of the treatment, result in substantial irremediable physical pain or discomfort not outweighed by the benefit of the provision of the treatment, or be medically ineffective in prolonging the patient's life. Makes conforming changes.

(e-1) Provides that, if during a previous admission to a facility the attending physician and the ethics or medical committee determined that life-sustaining treatment is inappropriate, a subsequent committee review is not required if the patient is readmitted to the same facility for the same condition within six months from the date of the previous decision, provided that the attending physician and a consulting physician who is a member of the ethics or medical committee of the facility document on the patient's readmission that the patient's condition has deteriorated since the previous review was conducted. Deletes existing text providing that, if during a previous admission to a facility a patient's attending physician and the review process under Subsection (b) have determined that life-sustaining treatment is inappropriate, and the patient is readmitted to the same facility within six months from the date of the decision reached during the review process conducted upon the previous admission, Subsections (b) through (e) need not be followed if the patient's attending physician and a consulting physician who is a member of the ethics or medical committee of the facility document on the patient's readmission that the patient's condition either has not improved or has deteriorated since the review process was conducted.

(g) Requires the appropriate district or county court, on motion of the patient or surrogate, 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 the patient or surrogate may find a physician or health care facility that will honor the patient's or surrogate's health care or treatment decision if the time extension is granted. Deletes existing text 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 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.

(h) Prohibits this section from being construed to impose an obligation on a facility or a home and community support services agency licensed under Chapter 142 (Home and Community Support Services), an assisted living facility licensed under Chapter 247, or a similar organization that is beyond the scope of the services or resources of the facility, agency, or organization. Provides that this section does not apply to hospice services provided by a home and community support services agency licensed under Chapter 142 or services provided by an assisted living facility licensed under Chapter 247.

SECTION 8. Amends Sections 166.052(a) and (b), Health and Safety Code, as follows:

(a) Sets forth the language for the statement required by Section 166.046(b)(1)(D) in cases in which the attending physician disagrees with and refuses to comply with a health care or treatment decision requesting the provision of life-sustaining treatment, rather than sets forth the language for the statement required by Section 166.046(b)(2)(A) in cases in which the attending physician refuses to honor an advance directive or treatment decision requesting the provision of life-sustaining treatment.

(b) Sets forth the language for the statement required by Section 166.046(b)(1)(D) in cases in which the attending physician disagrees with and refuses to comply with a health care or treatment decision requesting the withholding or withdrawal of life-sustaining treatment, rather than sets forth the language for the statement required by Section 166.046(b)(3)(A) in cases in which the attending physician refuses to comply with an advance directive or treatment decision requesting the withholding or withdrawal of life-sustaining treatment.

SECTION 9. Amends Subchapter B, Chapter 166, Health and Safety Code, by adding Section 166.054, as follows:

Sec. 166.054. REPORTING REQUIREMENTS REGARDING ETHICS OR MEDICAL COMMITTEE PROCESSES. (a) Requires a facility in which one or more meetings of an ethics or medical committee are held under this chapter, on submission of a health care facility's application to renew its license, to file a report with TDH that contains aggregate information regarding the number of cases initiated by an ethics or medical committee under Section 166.046 and the disposition of those cases by the facility.

(b) Authorizes the aggregate data submitted to TDH under this section to include only the following:

(1) the total number of patients for whom a review by the ethics or medical committee was initiated under Section 166.046(b);

(2) the number of patients under Subdivision (1) who were transferred to another physician within the same facility or a different facility;

(3) the number of patients under Subdivision (1) who were discharged to home;

(4) the number of patients under Subdivision (1) for whom treatment was withheld or withdrawn pursuant to surrogate consent before the decision was rendered following a review under Section 166.046(b), after the decision was rendered following a review under Section 166.046(b), or during or after the 21-day period described by 166.046(e);

(5) the average length of stay before a review meeting is held under Section 166.046(b); and

(6) the number of patients under Subdivision (1) who died while still receiving life-sustaining treatment before the review meeting under Section 166.056(b), during the 21-day period, or during extension of the 21-day period, if any.

(c) Prohibits the report required by this section from containing any data specific to an individual patient or physician.

(d) Requires TDH to adopt rules to establish a standard form for the reporting requirements of this section and post on TDH's Internet website the data submitted under Subsection (b) in the format provided by rule.

(e) Provides that data collected as required by, or submitted to TDH under, this section is not admissible in a civil or criminal proceeding in which a physician, health care professional acting under the direction of a physician, or health care facility is a defendant and is prohibited from being used in relation to any disciplinary action by a licensing board or other body with professional or administrative oversight over a physician, health care professional acting under the direction of a physician, or health care facility.

SECTION 10. Amends Sections 166.082(a) and (c), Health and Safety Code, as follows:

(a) Authorizes a competent adult, rather than competent person, at any time to execute a written out-of-hospital DNR order directing health care professionals acting in an out-of-hospital setting to withhold cardiopulmonary resuscitation and certain other life-sustaining treatment designated by the Texas Board of Health.

(c) Authorizes the physician, if the person is incompetent but previously executed or issued a directive to physicians in accordance with Subchapter B (Directive to Physicians) requesting that all treatment, other than treatment necessary for keeping the person comfortable, be discontinued or withheld, to rely on the directive as the person's

instructions to issue an out-of-hospital DNR order, and requires the physician to place a copy of the directive in the person's medical record.

SECTION 11. Amends Section 166.152(d), Health and Safety Code, to require the principal's attending physician to 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 or treatment decision, rather than an agent's advance directive.

SECTION 12. Requires the executive commissioner of the Health and Human Services Commission, not later than March 1, 2014, to adopt the rules necessary to implement the changes in law made by this Act to Chapter 166, Health and Safety Code.

SECTION 13. Provides that the change in law made by this Act applies only to a review, consultation, disagreement, or other action relating to a health care or treatment decision made on or after April 1, 2014. Provides that a review, consultation, disagreement, or other action relating to a health care or treatment decision made before April 1, 2014, is governed by the law in effect immediately before the effective date of this Act, and the former law is continued in effect for that purpose.

SECTION 14. Effective date: September 1, 2013.