

## **Texas Added More Due Process Protections in 2023 Legislative Session for End-of-Life Care**

End-of-life care and the Texas Advance Directives Act have long been contentious. Doctors and patient surrogates have sometimes disagreed about whether an intervention is helpful or harmful, transformative or cruel, medically, ethically, or morally appropriate.

Families are facing deep personal loss with understandable emotion while physicians try to balance complicated medical care with their ethical and moral duty to do no harm, including prolonging a life that might include pain and suffering but no hope of recovery.

Stakeholders in these issues finally reached a workable compromise in the 2023 Legislative Session with the passage of HB 3162, an agreed bill that was two decades in the making. HB 3162 is the fourth iteration of the Texas Advance Directives Act, initially passed in 1999.

As Baylor Law School Professor Stephanie Tang notes, HB 3162 amended the Texas Advance Directives Act “with the goal of increasing procedural due process protections with a focus on the patient’s well-being.” The Texas Alliance for Patient Access has written several amicus briefs regarding end-of-life matters and, in 2019 and 2021, testified against proposed legislation that included a treatment until transfer provision, which was effectively an indefinite treatment requirement regardless of a patient’s prognosis.

In 2021, TAPA urged the Senate Committee on Health & Human Services not to invalidate the current process but, instead, to convene a working group to hammer out differences that achieve an appropriate balance. The Committee agreed with that recommendation and stakeholders ultimately reached a compromise two years later.

### **Agreed Legislation**

The agreed legislation:

- Increases the number of days’ notice provided to patients before any ethics committee meeting.
- Clarifies patient and surrogate representation and participation at ethics committee meetings.
- Better defines the role and composition of ethics committees.
- Explains the processes around attempted transfers of patients, and
- Clarifies that the current process only applies to incompetent patients who cannot speak for themselves.

Professor Tang delved into the historic and legal ramifications of the Texas Advance Directives statute in a lengthy scholarly piece she wrote in the Fall 2023 Houston Law Review. The article was entitled “When Providers and Families Cannot Agree: A New Look at Due Process for End-of-Life Care Disputes.” She noted that HB 3162 introduced a list of five factors that hospital ethics committees are required to consider when determining whether the continuation of life-sustaining medical treatment would be medically appropriate, namely:

Whether the provision of life-sustaining medical treatment:

- Will prolong the natural process of dying or hasten the patient's death.
- Will result in substantial, irremediable, and objectively measurable physical pain that is not outweighed by the benefit of providing the treatment.
- Is medically contraindicated such that the provision of the treatment seriously exacerbated life-threatening medical problems not outweighed by the benefit of providing the treatment.
- Is consistent with the prevailing standard of care, or
- It is contrary to the patient's clearly documented desires.

### **Resolving Intractable Differences**

Professor Tang concluded that the recently amended Texas Advance Directives Act “takes a large step towards resolving intractable differences while ensuring due process protection to future patients and their surrogate decision-makers.”

The process, she said, encourages consideration of myriad relevant factors, including the patient's imminent death, the futility of recovery, the existence of a DNR (Do Not Resuscitate), the patient's and surrogate's wishes, and whether those conflict; whether the interventions requested by the family harm rather than help the patient, recognize the dignity of the patient, and the moral conscience objections held by the treating doctors and nurses.

Notably, HB 3162 preserves a doctor's conscientious right to refuse treatment that violates his or her medical ethics. It also spurs doctors and patient surrogates to have difficult but necessary conversations about what is best for a patient at the end of life.

### **Not State Actors**

Tang noted that private hospitals and private doctors and nurses receive civil immunity when abiding by the Texas Advance Directives Act. However, merely honoring those provisions does not automatically make a private party and state actor.

Professor Tang concluded that Texas has the most detailed dispute resolution process for medical futility disputes compared to any other state.

She recommended that other states consider the Texas model but also add a court process specifying the adoption of clear and convincing evidence standards, the appointment of a guardian ad litem for minor patients, and an expedited judicial process for ethics committee review hearings.

Houston Law Review: [“When Providers and Families Cannot Agree: A New Look at Due Process for End-of-Life Care Disputes”](#), by Stephanie L. Tang