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CAUSE NO. 2015-69681

EVELYN KELLY, INDIVIDUALLY, AND ON BEHALF OF THE ESTATE OF DAVID CHRISTOPHER DUNN	§	IN THE DISTRICT COURT OF
v.	§	HARRIS COUNTY, TEXAS
HOUSTON METHODIST HOSPITAL	§	189th JUDICIAL DISTRICT

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

To the Honorable Court:

Now comes Plaintiff, Evelyn Kelly, individually and on behalf of the Estate of David Christopher Dunn, and files this motion for summary judgment against Defendant, Houston Methodist Hospital ("Methodist") and as grounds thereof will show the Court the following:

I. FACTS AND PROCEDURAL BACKGROUND

David Christopher Dunn was admitted as a patient of Methodist on October 12, 2015. On or about November 11, 2015, Methodist provided Evelyn Kelly with a letter (Exhibit A) informing Ms. Kelly that Methodist intended to terminate the life-sustaining treatment of her son, Chris Dunn, and that a meeting of the hospital's ethics committee would take place to discuss removing Mr. Dunn's treatment. The letter by Methodist was sent pursuant to Texas Health and Safety Code § 166.046.

In response to receiving the letter, Ms. Kelly obtained a temporary restraining order on November 20, 2015. Methodist subsequently agreed to continue life-sustaining treatment pursuant to that order until Mr. Dunn's natural death. Mr. Dunn died on December 23, 2015.

II. ARGUMENT

a. Texas Health & Safety Code § 166.046 violates procedural due process.

Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation, of life, liberty, or property. *County of Dallas v. Wiland*, 216 S.W.3d 344 (Tex. 2007)(citing *Carey v. Piphus*, 435 U.S. 247, 259 (1978)). In legislating the delegation of decision-making authority to hospital systems in Texas, the state has authorized the deprivation of life to Texas patients. In such, Methodist was acting under color of state law, therefore, the incumbency is upon the state to temper the risk of an erroneous deprivation. Here, the procedures outlined in Section 166.046 do not protect patients from a mistaken or unjustified deprivation of life, and unlike liberty or property, an unjustified deprivation of life cannot be corrected.

Before life, liberty, or property is deprived, procedural due process requires a fair and impartial trial before a competent tribunal. To achieve a fair and impartial trial, three protections are required: 1) an opportunity to be heard; 2) a reasonable opportunity to prepare for the hearing; and 3) reasonable notice of the claim or charge against an individual so as to advise him or her of the nature of the charge and relief sought. *In re R.M.T.,* 352 S.W.3d 12 (Tex. App. Texarkana 2011); *Pickett v. Texas Mut. Ins. Co.,* 239 S.W.3d 826 (Tex. App. Austin 2007). To constitute a competent trial, the trial (hearing) must be conducted before an unbiased judge. *Johnson v. Mississippi*, 403 U.S. 212, 91 S. Ct. 1778, (1971); *Martinez v. Texas State Bd. of Medical Examiners*, 476 S.W.2d 400 (Tex. Civ. App. San Antonio 1972), writ refused n.r.e., (May 17, 1972). The relevant statute is attached as Exhibit B.

Section 166.046 of the Texas Health and Safety Code fails to provide a patient or their surrogate decision-maker an opportunity to be heard, a reasonable opportunity to prepare for a

hearing, reasonable notice of the reasons why removal of life-sustaining treatment is to occur, and failure for a decision to be reached through an impartial tribunal. Thus, Section 166.046 is unconstitutional

i. Section 166.046 provides no opportunity to be heard.

A fundamental requirement of due process is "the opportunity to be heard." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)(citing *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)). In fact, due process at a minimum requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *Univ. of Texas Med. Sch. at Houston v. Than*, 901 S.W.2d 926, 930 (Tex. 1995); *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 902 (1976). While Section 166.046(b)(4) makes clear that a patient or surrogate decision-maker is entitled to attend the committee meeting and receive the patient's medical record, diagnostic results, and a written explanation of the committee's decision, the statute does not entitle the patient or surrogate decision-maker to address the committee, to offer evidence, or utilize counsel. *Tex. Health & Safety Code Ann.* § 166.046(b)(4). In providing the patient the right to be present and to receive records that are rightfully and intrinsically his, the constitutional right to be heard is noticeably absent in the statute.

Furthermore, with an absence of uniform statutory guidance, the ability of a patient or surrogate decision-maker to address an ethics committee in effect depends upon the internal policies of individual hospitals and largely upon any individual in charge of that hospital's ethics committee. Consequently, a patient’s ability to advocate before the body determining whether to continue his life depends on which hospital he finds himself in. This lack of uniformity creates different due process availability to similarly-situated patients. Failing to provide patients with a constitutionally- required opportunity to be heard renders Section 166.046 unconstitutional.

ii. Section 166.046 does not provide a reasonable opportunity to prepare for a hearing.

"Due process of law ordinarily includes: (a) hearing before condemnation; (b) accordance of reasonable opportunity to prepare for the hearing. Mandate of reasonableness of opportunity may not be attenuated to mere formal observance by judicial action." *Ex parte Davis*, 344 S.W.2d 153, 157 (Tex. 1961)(citing *Ex parte Hejda*, 13 S.W.2d 57, 58 (Tex. Comm'n App. 1929). Moreover, the Texas Supreme Court refers to the United States Supreme Court decision *In re Gault* to state that "notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must 'set forth the alleged misconduct with particularity.'" *L.G.R. v. State*, 724 S.W.2d 775, 776 (Tex. 1987)(citing *In re Gault*, 387 U.S. 1, 33 (1967). Under the statute, a hospital is required to merely provide 48-hours' notice to a patient or their surrogate decision-maker.

This brief statutory notice period does not afford patients or their surrogate decision-makers with adequate opportunity to prepare for a meeting where removal of life-sustaining treatment will be decided on the patient's behalf. In this short time frame, families must at a minimum come to understand what is at stake (their loved one's life), determine what options, if any, are available, determine whether there are persons or entities willing to assist, gather needed medical records, seek and secure counsel, appear and advocate. Often times, the surrogate decision-maker is served with the 48-hour notice on a Friday afternoon near close of business, at which time administrative offices of hospitals and lawyers' offices are closed, making any meaningful preparation or search for helpful assistance within those two days impossible.

Similarly, patients and their family are not afforded any understanding on how to prepare adequately for an impending ethics committee hearing. Unpublished and unknown guidelines,

criteria, or medical information leave patients and their families guessing at what or how to advocate to save the patient's life. Ultimately, Section 166.046 fails to provide patients with a reasonable opportunity to prepare for the crucial hearing where deprivation of life is being determined.

iii. Section 166.046 does not provide a patient reasonable notice of the claims against him.

Section 166.046 imposes no requirement on Texas hospitals to explain to a patient or his surrogate decision-maker why the hospital seeks to terminate life-sustaining treatment prior to a hearing. To comport with due process, a person facing deprivation of life, liberty, or property must be confronted with reasonable notice of the claims against him so as to be able to mount a proper defense. *In re R.M.T.*, 352 S.W.3d 12 (Tex. App. Texarkana 2011); *Pickett v. Texas Mut. Ins. Co.*, 239 S.W.3d 826 (Tex. App. Austin 2007). Here, Section 166.046 does not require the patient to be apprised of why an ethics committee seeks to withdraw life-sustaining treatment under the statute. Instead, Section 166.046 lacks any criteria or benchmarks for which patients are susceptible to the Section 166.046 process, and thus does not mandate providing a patient with such information prior to a deprivation.

Without notice of why a hospital seeks to remove life-sustaining treatment, the patient or their surrogate decision-maker is at a total loss on how to appropriately prepare for the ethics committee meeting. The situation created under Section 166.046 allows patients, under color of state law, to be arbitrarily denied life-sustaining treatment without reasonable notice of claims against him or her.

iv. Section 166.046 lacks an impartial tribunal.

At the core of affording sufficient due process lies the opportunity to be heard in front of an impartial tribunal. *Johnson v. Mississippi*, 403 U.S. 212, 91 S. Ct. 1778, (1971). Under Tex.

Health & Safety Code § 166.046, a fair and impartial tribunal did not and could not hear Dunn's case. "Ethics committee" members who are employed by the treating hospital cannot be fair and impartial, when the propriety of giving Dunn's expensive life-sustaining treatment must be weighed against a potential economic loss to the very entity which provides those members of the "ethics committee" with privileges and a source of income.

Aside from hospital employees, the hospital itself has an inherent conflict of interest when acting as arbiter – treating *any* patient requires a financial burden upon the entity. Members of a fair and impartial tribunal should not only avoid a conflict of interest, they should avoid even the appearance of a conflict of interest, especially when a patient's life is at stake. That does not occur, when a hospital "ethics committee" hears a case under Texas Health & Safety Code § 166.046 for a patient within its own walls. The objectivity and impartiality essential to due process are nonexistent in such a hearing. Section 166.046 provides no mechanism whereby guaranteeing a patient's case will be heard and decided by an impartial tribunal, and as such, fails to comport with adequate due process requirements.

b. Texas Health & Safety Code § 166.046 violates substantive due process.

Like the federal Due Process Clause, the "due course of law" provision of the Texas Constitution contains a substantive as well as a procedural component. *Abbott v. G.G.E*, 463 S.W.3d 633, 649 (Tex. App. 2015), review denied; *Texas Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 525 (Tex. 1995). Though the Texas due course of law clause is textually different from the federal clause, "we generally construe the due course clause in the same way as its federal counterpart." *Id*, at 658. Therefore, a substantive due process violation occurs when the government deprives individuals of constitutionally protected rights by an arbitrary use of its

power. *Byers v. Patterson,* 219 S.W.3d 514, 525 (Tex.App.—Tyler 2007, no pet.) (citing *Simi Inv. Co. v. Harris Cnty.,* 236 F.3d 240, 249 (5th Cir.2000))

i. The state cannot deprive a patient or his surrogate of the right to make life-related medical decisions.

It is unquestioned that a competent individual has a substantive privacy right to make his or her own medical decisions. "Before the turn of the century, this Court observed that 'no right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.'" *Cruzan v. Director,* Missouri Dep't of Health, 497 U.S. 261, 269 (1990) (quoting *Union Pacific R. Co. v. Botsford,* 141 U.S. 250, 251 (1891)). "It cannot be disputed that the Due Process Clause protects an interest in life." *Cruzan,* 497 U.S. at 281. This notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment.

In *Cruzan,* the Court noted that the Constitution requires that the State not allow anyone "but the patient" to make decisions regarding the cessation of life-sustaining treatment. *Id*. at 286. The Court went on to note that the state could properly require a "clear and convincing evidence" standard to prove the patient's wishes. *Id*. at 280. In this case, there is no evidentiary standard imposed by Section 166.046. An attending physician and hospital ethics committee are given complete autonomy in rendering a decision that further medical treatment is "inappropriate" for a person with an irreversible or terminal condition. This is an alarming delegation of power by the state law. A final decision rendered behind closed doors, without an opportunity to challenge the evidence or present testimony or contrary evidence is a far cry from the due process intended

to protect the first liberty mentioned in Article 1, Section 19 of the Texas Constitution and that of the Fourteenth Amendment.

ii. A state cannot arbitrarily deprive a patient of his constitutional right to life.

The State of Texas does not own the decision, and thus lacks the authority, to end a patient's life by taking away life-sustaining treatment. As such, the State of Texas does not have any authority to delegate such a decision to any actor, private or public. The situation facing patients in hospitals like Methodist is distinctly different than the institution of the death penalty for convicted felons. By the enactment of § 166.046**,** the State of Texas has created a scheme whereby patients in Texas hospitals have their life extinguished, being found guilty of nothing except that of being ill. The State of Texas simply does not have the authority to sentence ill people to premature death.

c. Texas Health and Safety Code § 166.046 allows hospitals to act under color of state law.

Conduct or action under color of state law requires that a defendant exercise power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law. *See Georgia v. McCollum*, 505 U.S. 42, 51 (1992) (quoting *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 939 (1982)); see also *Mitchell v. Amarillo Hosp. Dist.*, 855 S.W.2d 857, 864 (Tex.App.—Amarillo 1993, cert. denied). Pursuant to the Texas Health & Safety Code, the Hospital exercised statutory authority evocative of a government function in the following ways:

- Provided approximately two days' formal notice[1], that Dunn's life-sustaining could be removed;

[1] *See* Tex. Health & Safety Code § 166.046(a)(2).

- Held a hearing regarding whether Dunn's life-sustaining treatment should be removed[2];

- Came to a determination that Dunn's request to continue life-sustaining treatment should not be honored[3];

- Came to a determination that Dunn's life-sustaining treatment should be removed[4];

- Gave written notice that Dunn's life-sustaining treatment could be removed on or about November 24, 2015, as it can do under the Act[5].

Section 166.046 gives hospitals the power to decide a patient is no longer worthy of life-sustaining treatment. This grant of authority indicates even a private hospital, when taking action under the statute, is performing a State function. In general, the ability to take action which will result in death is not available to the public. [6] In making this decision, the statute allows a hospital ethics committee to sit as both judge and jury of a physician's recommendation to take action which will result in premature death. This judicial function of the "ethics committee" is similarly evocative of action.

Private entities have been held to be acting under color of State law for performing traditionally government functions/heavily regulated government functions as follows:

- *Marsh v. State of Ala.*, 326 U.S. 501 (1946) (company owned town);

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[2] *See* Tex. Health & Safety Code § 166.046 (a).
[3] *See* Tex. Health & Safety Code § 166.046 (a).
[4] *See* Tex. Health & Safety Code § 166.046 (a).
[5] *See* Tex. Health & Safety Code § 166.046(e) ("The physician and health care facility are not obligated to provide life-sustaining treatment after the 10th day after the written decisions required under Subsection (b) s provided to the patient or the person responsible for the health care decisions of the patient [.]").
6 Compare *Lindsey v. Detroit Entertainment*, LLC, 484 F.3d 824, 828–31 (6th Cir. 2007) (casino security personnel were not engaged in state action when they detained a patron and thus owner could not be held liable for an unlawful seizure under § 1983, because security personnel are not licensed under state law to have misdemeanor arrest authority; although private security guards who are endowed by law with plenary police power may qualify as state actors, plaintiffs could not point to any powers beyond those possessed by ordinary citizens that the state delegated to unlicensed security personnel, and thus they could not show that defendant engaged in any action attributable to the state); see also *Johnson v.* , 372 F.3d 894, 896-898, (7th Cir. 2004) *Children's Hosp.LaRabida* (delegation of a public function to a private entity triggers state action and a privately employed "special officer" who possesses full police power pursuant to city ordinance will be treated the same as a regular Chicago police officer.

- *Smith v. Allwright*, 321 U.S. 649 (1944) (primary election);

- *Watchtower Bible and Tract Society of New York, Inc. v. Sagardia De Jesus*, 634 F.3d 3, 10 (1st Cir. 2011), cert. denied, 132 S. Ct. 549, 181 L. Ed. 2d 396 (2011) (public streets within "urbanizations," which are neighborhood homeowners' associations authorized by city to control vehicular and pedestrian access, remain public property despite their enclosure, and regulating access to and controlling the behavior on public property is a traditional, classic government function; thus, urbanizations were state actors for purposes of § 1983 action challenging closure of access to public streets);

- *Romanski v. Detroit Entertainment, L.L.C.*, 428 F.3d 629, 636-40 (6th Cir. 2005) (although private security guards who exercise some police-like powers may not always be viewed as state actors, where guards are endowed by state law with plenary police powers, they qualify as state actors under the public function test; casino's private security police officers were licensed by the state and had the authority to make arrests and thus were afforded power traditionally reserved to the state alone such that guard's conduct on duty on the casino's premises would be considered state action);

- *Belbachir v. County of McHenry*, 726 F.3d 975, 978 (7th Cir. 2013) (although employees of private firm hired to provide medical services at jail were not public employees, they were performing a public function and thus were acting under color of state law);

- *Lee v. Katz*, 276 F.3d 550, 554-557 (9th Cir. 2002) (under *Brentwood*, it suffices that a nominally private party satisfy a single state action test and here private lessee of public outdoor area owned by city performed a traditional sovereign function when it sought to regulate free speech activity on city-owned land; although not everyone who leases or obtains a permit to use a state-owned public forum will necessarily become a state actor, here the city retained little, if any, power over the private entity and thus its policing of free speech in the public forum was a traditional and exclusive function of government);

- *Duke v. Massey*, 87 F.3d 1226, 1231 (11th Cir. 1996) (decision of presidential candidate selection committee for state Republican Party to exclude candidate from primary ballot pursuant to authority granted under state law constitutes state action for purposes of candidate's federal civil rights action despite argument that committee members made decision in their capacity as representatives of Republican Party); and

- *Duke v. Smith*, 13 F.3d 388, 393 (11th Cir. 1994), writ denied, 513 U.S. 867 (1994) (because bipartisan state-created committees are inextricably intertwined with the process of placing candidates' names on the ballot and it is the state-created procedures and not the political parties that make the final determination as to who will appear on the ballot, the power exercised is directly attributable to the state).

The Texas Health and Safety Code clearly permits Texas hospitals and their "ethics committees" to take action (such to hear and determine whether a recommendation to withhold life-sustaining treatment against a patient's wishes is appropriate, and then exercise said removal 10 days after providing written notice) normally only held in the hands of State officials such as police officers and executioners who can take a person's life against that person's wishes with immunity. *See, e.g. Cornish v. Correctional Services Corp.*, 402 F.3d 545, 550-51 (5th Cir. 2005) (private corporation delegated authority to operate juvenile correctional facility fell within public function test as far as its provision of juvenile correctional services to the county). Thus, the Hospital acted, is acting, and will act, under color of State law, and the first element to a Section 1983 claim is met.

III. CAPABLE OF REPETITION, YET EVADING REVIEW

The death of Chris Dunn does not render this case moot. The Supreme Court of Texas has recognized two exceptions to the mootness doctrine: (1) the capability of repetition yet evading review exception, and (2) the collateral consequences exception. *State v. Lodge*, 608 S.W.2d 910, 912 (Tex. 1980). "The 'capable of repetition yet evading review' exception is

applied where the challenged act is of such short duration that the appellant cannot obtain review before the issue becomes moot." *Spring Branch I.S.D. v. Reynolds,* 764 S.W.2d 16, 18 (Tex. App.—Houston [1st Dist.] 1988, no writ). The 'collateral consequences' exception has been applied when Texas courts have recognized that prejudicial events have occurred "whose effects continued to stigmatize helpless or hated individuals long after the unconstitutional judgment had ceased to operate. Such effects were not absolved by mere dismissal of the cause as moot." *Id.* at 19.

The matter should not be rendered moot because application of Section 166.046 of the Texas Health and Safety Code is capable of repetition while evading review. Defendant's own citation, *Lee v. Valdez* states:

> [T]here may be rare instances where a court holds that a case involving a ***deceased*** prisoner is not moot, either because it is a class action or because it is capable of repetition yet evading review[.]

Lee v. Valdez, 2009 WL 1406244, *14 (N.D. Tex. May 20, 2009) (C.J. Fitzwater) (emphasis added) (citing *Kremens v. Bartley*, 431 U.S. 119, 133 (1977) (indicating that courts do not require or always anticipate that the repetition will occur to the same plaintiff in all circumstances – certainly, in the case of a deceased prisoner, the same deceased prisoner cannot die multiple times). Evelyn Kelly does allege that in the case of this deceased patient, the matter is certainly capable of repetition while evading review.

a. Application of Section 166.046 designed for repetition.

Specifically, Section 166.046, on its face, applies to all persons for whom life-sustaining treatment is being utilized to sustain their life in all Texas hospitals. Certainly, application of the Statute is capable of repetition. Repeatedly, in Texas, patients who are on life-sustaining treatment are only afforded 48 hours' notice that a nameless, faceless panel of persons of unknown qualifications will decide whether to terminate life-sustaining treatment. The patient

will have no right to speak, no right to counsel, and no advance knowledge of the rules the ethics committee follows in its hearings. The Statute applies equally to all patients receiving life-sustaining treatment in all Texas hospitals for whom a physician has recommended removal of life sustaining treatment. This denial of due process is, without question, subject to repetition.

b. Application of Section 166.046 is designed to evade review.

Section 166.046 allows 48 hours' notice of the ethics committee meeting, and then life-sustaining treatment may be removed in 10 days, presumably resulting in death. *See* Tex. Health & Safety Code § 166.046. As the statutory answer period for a lawsuit is at least 20 days following date of service, it is practically impossible for a patient bound to life-sustaining treatment, let alone any person, to retain counsel and complete a lawsuit in less than two weeks. *See* Tex. R. Civ. P. 99(b) ("The citation shall direct the defendant to file a written answer to the plaintiff's petition on or before 10:00 a.m. on the Monday next after the expiration of twenty days after the date of service thereof."). Unquestionably, the application of Section 166.046 is capable of evading review.

Because application of Texas Health and Safety Code Section 166.046 is capable of repetition while evading review, the exception to the mootness doctrine should apply here, and the matter should not be dismissed for lack of jurisdiction.

IV. PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff Evelyn Kelly prays that the Court grant this motion for summary judgment and rule Section 166.046 as unconstitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded to all counsel of record listed below in accordance Texas Rules of Civil Procedure 21a on October 7th, 2016, via E-Filing and Serve system via email to:

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