FILED
TARRANT COUNTY
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THOMAS A. WILDER
DISTRICT CLERK

CAUSE NO. 096-270080-14

ERICK MUNOZ, AN INDIVIDUAL AND HUSBAND, NEXT FRIEND, OF MARLISE MUNOZ, DECEASED	§	IN THE DISTRICT COURT
v.	§	96thTH JUDICIAL DISTRICT
JOHN PETER SMITH HOSPITAL, AND DOES 1 THROUGH 10, INCLUSIVE	§	TARRANT COUNTY, TEXAS

DEFENDANT'S BRIEF IN RESPONSE TO PLAINTIFF'S MOTION TO COMPEL

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Tarrant County Hospital District and files its Response to Plaintiff's Motion to Compel and will show the Court the following:

I.

SUMMARY OF THE FACTS

On November 26, 2013, Ms. Munoz stopped breathing at home for reasons unknown at this time. Mr. Munoz, her husband, resuscitated her. He called 911. An ambulance brought Ms. Munoz to John Peter Smith Hospital (JPS). Upon arrival, she was alive. JPS, therefore, began life sustaining treatment. Ms. Munoz did not have a written advanced directive and was incapable of communication. Ms. Munoz was pregnant at 14 weeks gestation at that time. The unborn child will, at the time of the hearing, be at 22 weeks and 5 days. Despite such treatment, Ms. Munoz met the clinical criteria for brain death on November 28, 2013. Mr. Munoz requested the withdrawal of life sustaining treatment. Such withdrawal would cause the death of the unborn child. JPS

refused, citing the Advanced Directive Act's prohibition from withdrawing life sustaining treatment from a pregnant woman. Mr. Munoz brought suit requesting the court to order JPS to withdraw life sustaining treatment from Ms. Munoz.

II.

ISSUES

The issues in contest in this matter are:

1. Does Health & Safety Code §166.049 continue to apply after the death of Ms. Munoz? and

2. If so, is §166.049 constitutional?

III.

ARGUMENT AND AUTHORITIES

A.

HEALTH & SAFETY CODE §166.049 CONTINUES TO APPLY AFTER THE DEATH OF MS. MUNOZ

The Advanced Directives Act (the Act) is located in Chapter 166 of the Health & Safety Code. The Act provides procedures and forms to communicate a patient's desire to receive or refuse life sustaining treatment in the event of a terminal condition. Section 166.039 of the Act applies in the situation where the patient has no advanced directive and is incapable of communication. It provides that an attending physician and the spouse of the patient can make the decision to withdraw life sustaining treatment from the patient. Texas Health & Safety Code §166.039 (b)(1). Limiting the applicability of this section, though, is section 166.049.

Health & Safety Code section 166.049 states "A person may not withdraw or withhold life-sustaining treatment under this subchapter from a pregnant patient". There is no case law interpreting this section. Since the Act allows withdrawal of life sustaining treatment from a patient who is not pregnant, the reasonable inference is that section 166.049 was enacted to protect the unborn child against the wishes of a decision maker who would terminate the child's life along with the mother's. The Act gives no further instruction as to when life sustaining treatment may be withdrawn from a pregnant woman.

Mr. Munoz maintains that, since his wife is now dead, section 166.049 no longer applies. His argument is that a dead person cannot receive life sustaining treatment. (Plaintiff's Original Petition, p. 4) His position, however, ignores consideration of the unborn child. Section 166.049 must convey legislative intent to protect the unborn child, otherwise the legislature would have simply allowed a pregnant patient to decide to let her life, and the life of her unborn child, end. Instead, the State acted to maintain the life of the unborn child by prohibiting the withdrawal of life sustaining treatment.

Further, if the legislature intended for life sustaining treatment to be withdrawn, allowing the unborn child to die, it could have expressed this intent by adding a second sentence to section 166.049 to the effect that, upon the mother's death, the healthcare providers must withdraw life sustaining treatment and let the unborn child die. It did not so provide.

To interpret the statute so that life sustaining treatment is withdrawn, causing the death of the unborn child, would also be contrary to this state's

expressed commitment to the life and health of unborn children. The Texas Legislature has strongly demonstrated its commitment to protect unborn children. The Texas Penal Code, for example, defines an individual as a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth. Texas Penal Code § 1.07 (a) (26). This means one may commit the offense of criminal homicide by causing the death of an unborn child. Texas Penal Code §19.01(a).

The Texas Legislature further demonstrated its commitment to protect unborn children by recently enacting the Woman's Right To Know Act. (Acts 2013, 83rd Leg., ch. 1 (H.B. 2), codified in Health & Safety Code chapter 171). Section 1(a) of the bill states:

"The findings indicate that:

(1) substantial medical evidence recognizes that an unborn child is capable of experiencing pain by not later than 20 weeks after fertilization;

(2) the state has a compelling state interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that these children are capable of feeling pain;"

The Legislature asserted a compelling state interest in protecting unborn children from experiencing pain from the time of 20 weeks after fertilization. The unborn child of Ms. Munoz, then, is a subject of this compelling interest.

Given the strong interest of the Texas Legislature in protecting the life of unborn children, it is unlikely the Legislature contemplated only the welfare of the mother when enacting this statute. Since the statute protects the life of the

unborn child, and the State has clearly expressed its desire to protect the life of unborn children, it is unreasonable to argue that the State intended to forgo its interest in the life and welfare of the unborn child upon the death of the mother. If this were the case, the Legislature would not have provided that life sustaining treatment must continue for the pregnant woman or would have provided for withdrawal of treatment upon the death of the mother.

B.

Mr. Munoz's Constitutional Claim Is Not Ripe For Determination

Mr. Munoz complains that Section 166.049 is unconstitutional. However, his claim is not ripe for determination because Texas Government Code §402.010(b) provides that the Court "may not enter a final judgment holding a statute of this state unconstitutional before the 45th day after the date notice is served on the attorney general." The District Clerk notified the Texas Attorney General of this suit on January 14, 2014. The 45th day after January 14th will be February 28, 2014. Accordingly, if the Court should not reach the alternatively plead constitutionality issues.

C.

HEALTH & SAFETY CODE §166.049 is CONSTITUTIONAL

In the alternative, the Tarrant County Hospital District asserts that Section 166.049 is constitutional because it properly balances the interest of the state in protecting the life of the unborn child against the right of Ms. Munoz to have life sustaining treatment withdrawn.

The statute is presumed to be constitutionally valid as a matter of law. Sax v. Votteler, 648 S.W.2d 661, 664 (Tex.1983). Mr. Munoz bears the burden to establish its unconstitutionality. Tex. Pub. Bldg. Auth. v. Mattox, 686 S.W.2d 924, 927 (Tex.1985) (orig. proceeding).

Mr. Munoz first pleads that section 166.049 is an unconstitutional infringement on Ms. Munoz's right to privacy pursuant to the Fourteenth Amendment to the United States Constitution. (Plaintiff's Original Petition, p.6; Plaintiff's Motion To Compel, p.5) .

The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The United States Supreme Court has found a right of privacy in the liberty provision of the amendment. Roe v. Wade, 410 U.S. 155, 153(1973). The right of privacy is not absolute, however. It must be balanced against important state interests. Roe at 154. The Roe case concerned a woman's right to an abortion and the court held that the right was not unqualified. The state's interest must, however, be compelling. Roe at 155. Those interests include protection of health, medical standards and pre-natal life. Roe at 155.

The Supreme Court subsequently found a liberty interest in the right to refuse medical treatment. Cruzan v. Director, Missouri Department of Health, 497 U.S. 261, 279 (1990). Ms. Cruzan was injured in an accident, found unconscious, and taken to the hospital. She declined into a persistent vegetative state where she was alive, but unconscious. Cruzan at 266. Her parents requested withdrawal of life sustaining treatment. Cruzan at 267. The parents maintained

that Cruzan once told a friend she would not want to have life sustaining treatment if she could not recover. Cruzan at 268. The Missouri statute required clear and convincing evidence of the patient's desire to terminate treatment. Cruzan at 268. The Missouri Supreme Court held such evidence did not exist and refused to order the withdrawal of treatment. Cruzan at 269.

On appeal, the United States Supreme Court considered whether Cruzan had a constitutional right to have medical treatment withdrawn. Cruzan at 269. The actual question decided was whether the United States Constitution prohibited the State of Missouri from making the rule of decision it made, that is, the standard of proof. Cruzan at 277. The Supreme Court noted the existence of a liberty interest in the refusal of medical care. Cruzan at 278. However, the Court stated that its inquiry did not end there. Rather, the Court must determine if Cruzan's constitutional rights were violated by balancing the liberty interest with the interests of the state. Cruzan at 279. The Court found that the state could impose its clear and convincing standard without violating Cruzan's liberty interests. Cruzan at 284. In other words, the State's interests outweighed the liberty interests of Ms. Cruzan. The result of the Court's decision was to require Cruzan to remain on life sustaining treatment.

In the case at bar, the State's interest in protecting life must be balanced against the liberty interest of Ms. Munoz. As noted above, the State of Texas has asserted a compelling interest in preserving the life of an unborn child. In the Cruzan case, the question was the right to die. Here, however, Ms. Munoz has died, so that interest is not implicated. The interest of Mr. and Ms. Munoz is to

cease treatment that keeps the unborn child alive in order to proceed to bury Ms. Munoz. That interest, balanced against the State's interest in preserving the life of the child may reasonably be determined in favor of the State, even if that is not the decision one would personally make.

Mr. Munoz has also asserted that section 166.049 violates a violation of the plaintiff's right to equal protection (Plaintiff's Original Petition, p.7). However, he notes that unlike cases may be treated unlike. Plaintiff's Original Petition, p.4., Plyer v. Doe, 457 U.S. 202, 216, cited in Washinton v. Glucksberg, 521 U.S. 702. In this case, the statute treats a pregnant person differently than a person who is not pregnant. Since the State has asserted an interest in preserving life, the question is whether the legislative classification has rational relationship to the legitimate interest in preserving life.

The State has an unqualified interest in the preservation of human life. Cruzan, 497 U.S. at 282. Given that interest, it is reasonable to distinguish between a pregnant patient and a patient who is not pregnant. The Equal Protection Clause is not violated by the treating two different classes of terminally ill patients differently. Washington at 731.

WHEREFORE, PREMISES CONSIDERED, Tarrant County Hospital District prays that the Court find that it has properly interpreted Health & Safety Code §166.049, that the Plaintiff's constitutional claim is not ripe for determination, or in the alternative, that the statute is constitutional, and rule accordingly.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this date a true and correct copy of the foregoing Brief in Response to Plaintiff's Motion to Compel has been forwarded to all attorneys of record in the above and foregoing cause in accordance with the Texas Rules of Civil Procedure.

Date: January 23, 2014

s/ Larry M. Thompson
LARRY M. THOMPSON