

MEDICAL FUTILITY STATUTES: CAN THEY BE RESUSCITATED?

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Recently enacted statutes in a majority of states expressly permit a health care provider to decline a surrogate's request for life-sustaining medical treatment that the provider considers medically inappropriate. But these statutory "safe harbors" permit the provider to unilaterally stop LSMT only where it would not provide "significant benefit" or would be contrary to "generally accepted health care standards." Because these standards are vague and imprecise, health care providers have been reluctant to rely upon them.

Instead, health care providers in many states have been advocating for the legislative adoption of a conflict resolution mechanism like that now used in Texas. Rather than specifying substantive standards, the Texas statute is purely process-based. As long as: (i) the family is given notice of the ethics committee meeting, (ii) the ethics committee agrees with the treating physician's decision to withdraw LSMT, and (iii) the family is given ten days to attempt transfer to another facility; then the provider may stop treatment with legal immunity.

Experience with futility statutes in Virginia, California, and other states demonstrates the same thing that we have learned from experience with the Uniform Anatomical Gift Act and other "safe harbor" health statutes. Only clear and concrete safe harbors work. Since consensus on precise, legislatable measures of medical inappropriateness has proven unachievable, it seems that only a purely process-based approach like Texas' can be effective in inducing the conduct that the futility statutes intended.

But the Texas approach is seriously flawed. Among other problems, the Texas statute demands judicial deference to the decisions of institutional ethics committees that are often uninformed, under-informed, or biased due to financial and other conflicts of interest. Such concerns are important, yet under-addressed, even where ethics committees serve a facilitative mediation role. They are eminently grave where ethics committees serve an adjudicative role.

At the conclusion of this activity, participants will be able to:

1. Describe the three primary legislative approaches to authorizing health care providers to override surrogate requests for life-sustaining treatment.
2. Identify the state and federal legal risks to providers who make unilateral decisions to stop LSMT.
3. Articulate health care providers' need for clear and concrete safe harbors.
4. Discuss three ethical and legal concerns with the Texas futility statute.