Medical Futility: Recent Statutory and Judicial Developments

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## Legal History of Medical Futility

<table>
<thead>
<tr>
<th>Year Range</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pre-1990</td>
<td>Before futility</td>
</tr>
<tr>
<td>1990 - 1995</td>
<td>Early futility cases</td>
</tr>
<tr>
<td>1995 - 2005</td>
<td>Unilateral decision legislation</td>
</tr>
<tr>
<td>2006</td>
<td>Effect of the UD legislation</td>
</tr>
<tr>
<td>2006</td>
<td>Texas HCDA</td>
</tr>
</tbody>
</table>
Pre-1990: Before Futility

- Provider-driven over-treatment driven largely by liability concerns
- Providers now withdraw *with* consent of patient, surrogate, agent, guardian, conservator
1990 – 1995: Early Futility Cases

- Failed attempts to replace the decision maker

- Civil and criminal liability
  - Informed consent
  - Medical malpractice
  - Wrongful death
  - Abandonment
  - NIED, IIED
  - Homicide

- Narrow statute states
- Uniform Health Care Decisions Act
- GAHCS states
2006: Effect of the UD Laws

- Facilitates informal resolution of disputes
- No unilateral overriding
  - In irreconcilable disputes (5-10% of all disputes), providers accede to family wishes
2006: Effect of the UD Laws

- Fear of bad PR
- Fear of litigation
  - Immunity from liability, not suit
  - Vague standards
  - Preemption
Texas HCDA

- Process-based
- Providers make unilateral decisions
- But perhaps *too* readily
  - Judicial developments
  - Legislative amendments
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