

**CAUSE NO. 2015-69681**

**EVELYN KELLY, INDIVIDUALLY, AND ON § IN THE DISTRICT COURT OF**  
**BEHALF OF THE ESTATE OF DAVID §**  
**CHRISTOPHER DUNN, §**  
**PLAINTIFF, §**  
**V. § HARRIS COUNTY, TEXAS**  
**THE METHODIST HOSPITAL, §**  
**DEFENDANT. § 189TH JUDICIAL DISTRICT**

**PLAINTIFFS' FIRST AMENDED PETITION**

TO THE HONORABLE COURT:

Evelyn Kelly, Individually and on behalf of the Estate of David Christopher Dunn (“the Estate”) (“Plaintiffs”) file this First Amended Petition as follows:

**I.**  
**Discovery-Control Plan**

1. Plaintiffs request that a “Level 3” discovery plan be adopted and affirmatively pleads that it seeks injunctive relief. Rule 190.4, Texas Rules of Civil Procedure.

**II.**  
**Background Facts and Relief Requested**

2. Evelyn Kelly is the mother of David Christopher Dunn. David Christopher Dunn (“Dunn”) was a Texas resident who was receiving life sustaining treatment<sup>1</sup> at The Methodist Hospital to treat an unidentified mass on his pancreas which caused damage to other organs. Dunn faced immediate irreparable harm of death if the life sustaining treatment discontinued.

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<sup>1</sup> "Life-sustaining treatment" means treatment that, based on reasonable medical judgment, sustains the life of a patient and without which the patient will die. The term includes both life-sustaining medications and artificial life support, such as mechanical breathing machines, kidney dialysis treatment, and artificial nutrition and hydration. The term does not include the administration of pain management medication or the performance of a medical procedure considered to be necessary to provide comfort care, or any other medical care provided to alleviate a patient's pain. Tex. Health & Safety Code § 166.052.

On November 10, 2015 The Methodist Hospital informed Ms. Evelyn Kelly and Dunn that it sought to discontinue Dunn's treatment, and that a committee meeting would be held on November 13, 2015 to make such a decision. At the committee meeting, Dunn had neither legal counsel nor the ability to provide rebuttal evidence pursuant to Texas Health and Safety Code §166.046, The Methodist Hospital found that it would discontinue life sustaining treatment on or about Monday, November 23, 2015. Plaintiffs assert the Texas Constitution and the U.S. Constitution guaranteed Dunn a representative to advocate for his life and opportunity to be heard when life sustaining treatment is being removed. Dunn sought and obtained a temporary restraining order preserving the status quo of his treatment. Thereafter, an order of abatement, to which the parties were agreed as to form, was entered, and required The Methodist Hospital to provide life sustaining treatment to Dunn until the time of his natural death on December 23, 2015.

3. Plaintiffs continue to seek a declaration that Texas Health and Safety Code Section 166.046 violated David Christopher Dunn's due process rights under the Texas Constitution and the U.S. Constitution. This case is brought to protect the constitutional right of Dunn, a man who faced certain death at the hands of Defendant acting under color of state law.

4. Section 166.046 of the Texas Health & Safety Code allows doctors and hospitals the absolute authority and unfettered discretion to terminate life-sustaining treatment of any patient, despite the existence of an advanced directive, valid medical power of attorney, medical decision determined by a surrogate as outlined in Texas Health & Safety Code § 166.039, or expressed patient decision to the contrary. The defendant hospital, given its lack of full statutory compliance, prematurely applied the procedures outlined in Section 166.046 to withdraw life sustaining treatment from Dunn. This implementation of Section 166.046 resulted in the

Defendant hospital scheduling: (1) Dunn's life sustaining treatment be discontinued on Monday, November 24, 2015, and (2) administration, via injection, of a combination of drugs which would end Dunn's life almost immediately.

5. Section 166.046 violates Dunn's right to due process of law guaranteed him by the Fourteenth Amended of the United States Constitution and Article I, Section 19, of the Texas Constitution.

### **III. Parties**

6. Plaintiff, Evelyn Kelly, Individually and on behalf of the Estate of David Christopher Dunn, is an individual who resides in Harris County, Texas.

7. Defendant, The Methodist Hospital, formerly known as Houston Methodist Hospital, is a domestic nonprofit corporation with its principle place of business in Harris County, Texas. Defendant has been served with process.

### **IV. Jurisdiction and Venue**

8. This Court has jurisdiction over this cause under § 24.007 of the Texas Government Code and Article 5, Section 8 of the Texas Constitution. Venue is proper in this County under Texas Civil Practices & Remedies Code § 15.002(a)(2) and Texas Civil Practices & Remedies Code § 15.005. The amount in controversy is within the jurisdictional limits of the court.

### **V. Conditions Precedent**

9. All conditions precedent to Plaintiffs' claim for relief have been performed or have occurred.

**VI.**  
**Causes of Action**

10. As a direct result of the actions of the Defendant described above, Plaintiff individually and on behalf of the Estate has sustained injury, and brings the following claim for permanent relief:

**1. Declaratory judgment regarding violation of due process.**

11. Plaintiff, Individually and on behalf of the Estate petition this Court for a declaratory judgment pursuant to Chapter 37 of the Texas Civil Practice & Remedies Code declaring that, pursuant to Amendment 14 to the United States Constitution and Article I, Section 19, of the Texas Constitution, Defendant's actions in furtherance of coming to its decision to discontinue life sustaining treatment under the Texas Health & Safety Code infringed the due process right of Plaintiffs.

12. Texas Health & Safety Code § 166.046 indicates that if an attending physician refuses to honor a patient's treatment decision, such as continuing life sustaining treatment, the physician's refusal shall be reviewed by an "ethics committee". Tex. Health & Safety Code § 166.046(a).

13. There are no specific restrictions under the act regarding the qualifications of the persons serving on the committee, though the attending physician may not be a member of that committee. *Id.* The statute does not provide adequate safeguards to protect against the conflict of interest inherently present when the treating physician's decision is reviewed by the hospital "ethics committee" to whom the physician has direct financial ties.

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

14. Texas Health & Safety Code § 166.046 violates Plaintiffs' right to procedural due process by failing to provide an adequate venue for Plaintiffs and those similarly situated to be

heard in this critical life-ending decision. The law also fails to impose adequate evidentiary safeguards against hospitals and doctors by allowing them to make the decision to terminate life-sustaining treatment in their own unfettered discretion. Finally, the law does not provide a reasonable time or process for a patient to be transferred.

15. Due process at a minimum requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950). Procedural due process involves the preservation of both the appearance and reality of fairness so that “no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed against him.” *Marsahll v. Jerrico, Inc.*, 446 U.S. 238 (1980). Under traditional notions of Due Process, the fourteenth amendment was “intended to secure the individual from the arbitrary exercise of the powers of government” which resulted in “grievous losses” for the individual. *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454 (1989).

16. Procedural due process expresses the fundamental idea that people, as opposed to things, at least are entitled to be consulted about what is done to them. *See* Laurence H. Tribe, *American Constitutional Law* § 10-7, at 666 (2d ed. 1988). Modern procedural due-process analysis begins with determining whether the government’s deprivation of a person interest warrants procedural due-process protection. This interest may be either a so-called “core” interest, i.e., a life, liberty, or vested property interest, or an interest that stems from independent sources, such as state law. *See Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972). Procedural due-process analysis next determines what process is due, with courts looking almost exclusively to the Constitution for guidance. *Cleveland Bd. of Education v. Lourdermill*, 470 U.S. 532 (1985). What process is due is

measured by a flexible standard that depends on the practical requirements of the circumstances. *Mathews*, 424 U.S. at 334. This flexible standard includes three factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews*, 424 U.S. at 335.

17. In this case, Plaintiffs did not receive due process. Section 166.046 contemplates that those for whom life sustaining treatment is being provided may not be able to read letters, receive notice, attend the ethics committee meeting, etc. Therefore, the Statute specifically applies to not only the individual receiving treatment, but the person "responsible for the healthcare decisions of the individual." Dunn lived with his mother at the time of the occurrence, as he had for years, had no spouse or children. Therefore, Kelly assisted Dunn throughout the process. But, Kelly received both little and inadequate notice that the relevant committee of The Methodist Hospital would be hearing, on Friday, November 13, 2015, a recommendation to discontinue Dunn's life sustaining treatment. *See* Tex. Health & Safety Code 166.046(b) (the statute applies to not only the individual receiving treatment, but the person "responsible for healthcare decisions of the individual"). She did not have the right to speak at the meeting, present evidence, or otherwise seek adequate review. *See* Tex. Health & Safety Code 166.046(b). Thus, as a person to whom the statute applied, the statute only permits Kelly to sit and watch as an ethics committee determines it is appropriate to remove the life sustaining treatment of her son; as such, Kelly's right to due process was violated. *See, e.g., Planned Parenthood of Cent. Mo.*, 428 U.S. 52, 62 (1976) (physicians found to have standing

when seeking declaratory relief challenging the constitutionality of the Missouri abortion statute which placed an additional burden on a woman's right to abortion).

18. Under Tex. Health & Safety Code § 166.046, a fair and impartial tribunal did not and could not hear Dunn's case. "Ethics committee" members from 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. 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.

19. Finally, Texas Health & Safety Code § 166.046 is so lacking in specificity that no meaningful due process can be fashioned from it and, as a result, it is unconstitutional. For example, it does not contain or suggest any ascertainable standard for determining the propriety of continuing Dunn's life-sustaining treatment or the propriety of the attending physician's refusal to honor Dunn's health care decisions. Thus the statute is vague, ambiguous, and overbroad and should be declared unconstitutional.

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

20. 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 (U.S. 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.

21. In this case, there is no evidentiary standard imposed by Section 166.046. The doctor and 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. When the final decision is rendered behind closed doors, and the Plaintiffs are not allowed to challenge the evidence or present his own testimony or medical evidence, this does not reassemble a hearing with due process protecting the first liberty mentioned in Article I, Section 19 of the Texas Constitution or the Fourteenth Amendment.

**2. Defendant violated Plaintiffs’ Civil Rights.**

22. Section 1983 of Chapter 42 of the United States Code guarantees that every person who “under color of any statute...subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any right ... secured by the Constitution...shall be liable to the party in an action[.]” *See* 42 U.S.C. § 1983. Based on the foregoing facts and allegations, a Section 1983 matter clearly lies in this case.



23. Private actors are subject to regulation under the United States Bill of Rights, including the First, Fifth, and Fourteenth Amendments, which prohibit the federal and state governments from violating certain rights and freedoms when taking state action. Because the Defendants utilize Texas Health & Safety Code § 166.046 to protect their decision to remove life sustaining treatment, they are taking state action and are subject to Constitutional regulation. *See Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

24. The Supreme Court has set forth a two-pronged inquiry for determining when a private party will be held to be a state actor. First, the Court considers whether the claimed constitutional deprivation has resulted from the exercise of a right or privilege having its source in state authority. *Georgia v. McCollum*, 505 U.S. 42, 51 (1992) (quoting *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 939 (1982)). Second, the Court considers several factors relevant to determining whether the private party charged with the deprivation is a person who can, in fairness, be said to be a state actor. *Lugar*, 457 U.S. at 937.

25. Private conduct pursuant to statutory or judicial authority is sufficient to establish the first prong. Thus, the Court has held this prong satisfied by a creditor who sought the assistance of state authorities in attaching a debtor's property in a statutorily created pre-judgment attachment procedure, *Lugar*, 457 U.S. at 941-42, and by the racially discriminatory use of peremptory challenges to potential jurors in civil and criminal trials. *See Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 615 (1991); *Georgia v. McCollum*, 505 U.S. 42, 51-52 (1992). In each case the Court emphasized that the private party was using a state-created statutory procedure, and was reaping a privilege through the use of the statutorily prescribed procedure. Similarly, doctors and ethics committees empowered by the state to cloak their denial

of life sustaining medical treatment with absolute immunity by acting pursuant to the procedures of section 166.046 are exercising a right or privilege having its source in state authority.

26. The hospital committee's action also satisfies the second prong of the Supreme Court's state-actor test. The Court has laid out three factors that must be considered in answering the question of whether the person charged with a deprivation may be fairly considered to be a state act: (1) the extent to which the actor relies on governmental assistance and benefits, (2) whether the actor is performing a traditional governmental function and (3) whether the injury caused is aggravated in a unique way by the incidents of governmental authority. *See Lugar*, 457 U.S. at 942. Each of these factors weighs in support of the conclusion that the hospital committee should be held to be a state actor. The committees rely extensively on the state benefit of absolute immunity in determining whether a patient will receive life sustain medical treatment; the committee exercises the traditionally exclusive state function of a court when it issues final determinations of legal rights and duties with respect to life sustaining medical treatment, which cannot be reviewed under any circumstance; and the patient's injury is aggravated by incidents of state authority because the state allows the ethics review committee to bind the hands of state authorities with respect to societal protections that would otherwise be available to the patient.

27. Though The Methodist Hospital's decision permitted Plaintiffs to seek healthcare treatment for Dunn elsewhere, Dunn was unable to find treatment elsewhere, due in part to the stigma which attaches to a patient who a hospital has determined is no longer recommended for life sustaining treatment. Other hospitals sought after for transfer by Dunn's mother either failed to respond, or refused to receive him likely on the basis that The Methodist Hospital had deemed him a futile case unworthy of continued life sustaining treatment. As of November 13, 2015 (the

date of the “ethics committee meeting”) neither Dunn’s attending physician, Dr. Sanchez, nor Dunn’s case worker, Roslyn Reed, had spoken with any potential receiving physician to review and determine whether or nor any other physicians would accept the transfer of Dunn as required by Texas Health & Safety Code § 166.046(d). Moreover, Dunn and Kelly never received definitive responses from the five local major healthcare facilities equipped and capable of treating Dunn and honoring his medical decision regarding basic life-sustaining treatment.

28. Further, transfer to another facility was likely to result in repeated application of Section 166.046 of the Texas Health and Safety Code, while evading the opportunity for adequate review. Plaintiffs further submit that the death of David Christopher Dunn should not absolve or otherwise excuse the violation of his constitutional rights. A finding otherwise would simply permit hospitals to ‘wait out’ lawsuits involving the terminally ill.

**3. Defendant intentionally inflicted emotional distress on Plaintiff Kelly, Individually.**

29. On November 10, 2015 The Methodist Hospital informed Ms. Kelly that it would hold a committee meeting on November 13, 2015 to determine whether the life-sustaining treatment of her son, who was alert and communicating, should be removed. Without the life-sustaining treatment, her son’s death was imminent and certain. Directly after the committee meeting, on November 13, 2015, Ms. Kelly was informed by The Methodist Hospital that the committee had decided that The Methodist Hospital would withdraw her son’s life-sustaining treatment, resulting in certain death, unless Ms. Kelly found a hospital willing to accept transfer of her son. Ms. Kelly suffered severe emotional distress, which was the expected risk of informing her that the hospital had decided to remove Mr. Dunn’s treatment against Mr. Dunn’s wishes. Ms. Dunn seeks a ruling by the court that use of Texas Health & Safety Code Section 166.046 is unconstitutional for reasons stated *supra*, and therefore the severe emotional distress

stemming from its intentional or reckless unlawful application is actionable. Ms. Dunn has other children, and fears that without a declaration of unconstitutionality, this situation may repeat itself, while evading review.

**VII.  
Attorney Fees and Costs**

30. Plaintiffs are entitled to its reasonable attorney fees and costs incurred in pursuit of this action under the common law, and Texas Civil Practice and Remedies Code § 37.009.

**VIII.  
Conclusion and Prayer**

31. In conclusion, Plaintiffs seek a declaration that application of Section 166.046 of the Texas Health and Safety Code violated the constitutional rights and liberties of David Christopher Dunn, and Plaintiffs seek such other and further relief, both general and special, at law or in equity, to which Plaintiffs may show itself to be justly entitled.

Respectfully submitted,

**BEIRNE, MAYNARD & PARSONS, L.L.P.**

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**CERTIFICATE OF SERVICE**

On February 2, 2016 the foregoing document was served on counsel for The Methodist Hospital in accordance with Texas Rules of Civil Procedure via the Court's E-file and Serve system via email to:

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