Cause No. 323-112330-19

TINSLEE LEWIS, A MINOR AND MOTHER, TRINITY LEWIS, ON HER BEHALF	§	IN THE DISTRICT
	§	COURT OF
PLAINTIFFS,	§	
V.	§	TARRANT COUNTY, TEXAS
COOK CHILDREN'S MEDICAL CENTER,	§	
DEFENDANT.	§	323RD JUDICIAL DISTRICT

PLAINTIFF'S FIRST AMENDED VERIFIED PETITION AND APPLICATION FOR INJUNCTIVE RELIEF

TO THE HONORABLE COURT:

Tinslee Lewis ("Tinslee"), and mother, Trinity Lewis ("Trinity"), on her behalf, files this Original Petition and Application for Injunctive Relief, seeking injunctive relief and damages against defendants Cook Children's Medical Center ("Cook") as follows:

I.
Discovery-Control Plan

Plaintiff requests that a "Level 3" discovery plan be adopted and affirmatively pleads that it seeks injunctive relief. Tex. R. Civ. P. 190.4.

II.
Background Facts and Relief Requested

Tinslee Lewis is a 10 month old African-American baby girl currently receiving medical treatment and assistance breathing via a ventilator at Cook Children's Medical Center in Fort Worth, TX. Trinity Lewis is the mother of Tinslee and her surrogate medical decision-maker. Tinslee is awake and conscious; Tinslee can move her arms and respond to touch and her family's

presence. Tinslee is not in a coma nor has received a diagnosis of brain death. It is believed that Tinslee has congenital heart disease and chronic lung disease, which is causing pulmonary hypertension. Even though Tinslee has been at Cook hospital since birth, she has only been receiving breathing assistance via ventilator since the end of August 2019, after her last surgery. There is no allegation that Tinslee only has a certain amount of time to live even with the assistance of life-sustaining treatment. Rather, a note in Tinslee's medical records noted "speech therapy" would be appropriate due to feeding issues, signaling a belief that this 10 month old baby girl would live long enough to begin speaking (*See Exhibit A*).

On Thursday, October 31, 2019 at11:45 p.m., Trinity Lewis was given notice that the hospital intended to remove Tinslee's life-sustaining treatment pursuant to Chapter 166.046 of the Texas Health and Safety Code. *See Exhibit B.* Ventilator assistance is considered life-sustaining treatment[1] under the Texas Health and Safety Code. As such, Tinslee's ten day time frame was set to expire on November 10, 2019, meaning her ventilator was expected to be removed by hospital personnel against the wishes of her mother. The premature removal of Tinslee's life-sustaining treatment will most certainly cause her death.

Trinity, on behalf of Tinslee, obtained a temporary restraining order against Cook on November 10, 2019. As a result of that temporary restraining order, Tinslee has continued to live and life sustaining treatment has been provided to her.

Tinslee Lewis faces immediate irreparable harm of death if her life sustaining treatment is discontinued prematurely. Trinity Lewis seeks a temporary injunction to prevent Cook from

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[1] "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.

removing her daughter's life-sustaining treatment. Trinity Lewis also seeks a declaration and injunction that Texas Health and Safety Code § 166.046 ("§166.046") violates Tinslee's due process rights under both the Fourteenth Amendment of the United States Constitution and Article I, Section 19 of the Texas Constitution. The statute also violates Trinity's due process rights as decision maker for Tinslee under the United States Constitution and the Texas Constitution. Trinity also asserts Cook's action and §166.046 ultimately results in an inappropriate interference with her parent-child relationship, stripping her of medical decision making for her child - a parental right - without adjudication in front of a neutral and unbiased judicial body. Accordingly, Trinity also seeks an injunction against Cook form utilizing §166.046 to terminate life-sustaining treatment for Tinslee.

Section 166.046 allows doctors and hospitals the absolute authority and unfettered discretion to terminate life-sustaining treatment of any patient, despite the existence of an advance 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. This alleged implementation of section §166.046 has resulted in the defendant hospital scheduling the discontinuation of Tinslee's life-sustaining treatment over the objection of her mother.

III.
Parties

Plaintiffs, Tinslee Lewis and her mother Trinity Lewis, are individuals who reside in Tarrant County, Texas.

Cook Children's Medical Center, is a non-profit corporation with its principal place of business in Tarrant County, Texas who has appeared in this case. Cook may be served by

serving its counsel of record, Geoffrey Scott Harper of Winston and Strawn, LLP, 2121 North Pearl Street, Suite 900 Dallas, TX 75201.

IV.
Jurisdiction and Venue

This Court has jurisdiction over this cause under section 24.007 of the Texas Government Code and Article V, 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.

V.
Conditions Precedent

All conditions precedent to Tinslee's claim for relief have been performed or have occurred, including notification of the Attorney General of Texas, Ken Paxton, of this suit. Attorney General Paxton has appeared and filed an amicus brief denouncing the application of §166.046.

VI.
Injunctive Relief

The purpose of a temporary restraining order is to preserve the status quo of the subject matter of the litigation until a preliminary hearing can be held on an application for a temporary injunction. *Cannan v. Green Oaks Apts., Ltd.*, 758 S.W.2d 753, 755 (Tex. 1988) (per curiam). The purpose of a temporary injunction is to preserve the status quo of the subject matter of the litigation until a final hearing can be held on the merits of the case. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). The status quo is defined as "the last, actual, peaceable, noncontested status which preceded the pending controversy." *In re Newton*, 146 S.W.3d 648, 651 (Tex. 2004)

(quoting *Janus Films, Inc. v. City of Fort Worth*, 358 S.W.2d 589 (Tex. 1962) (per curiam)) (internal quotations omitted).

Whether to grant or deny a temporary injunction is within the trial court's sound discretion. *Walling v. Metcalfe*, 863 S.W.2d 56, 58 (Tex. 1993); *State v. Walker*, 679 S.W.2d 484, 485 (Tex. 1984). A reviewing court should reverse an order granting injunctive relief only if the trial court abused that discretion. *Walling*, 863 S.W.2d at 58; *Walker*, 679 S.W.2d at 485.

In order to obtain a temporary restraining order and a temporary injunction, an applicant must show: 1) a cause of action; (2) a probable right to the relief requested; and (3) imminent irreparable harm in the interim. *Bell v. Texas Workers Comp. Comm'n*, 102 S.W.3d 299, 302 (Tex. App.—Austin 2003, no pet.) (citing *Butnaru*, 84 S.W.3d at 204). [Plaintiff] is able to establish each of these elements, and is therefore entitled to injunctive relief.

VII.
Causes of Action and Probable Right to Relief

As a direct result of the actions of Cook described above, Tinslee has sustained injury. She and her mother, Trinity, brings the following claim for permanent relief on her behalf:

A. Declaratory judgment regarding violation of due process

Tinslee and Trinity petition this Court for a declaratory judgment pursuant to Chapter 37 of the Texas Civil Practice & Remedies Code declaring that, pursuant to the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the Texas Constitution, Cook's actions and planned discontinuance of Tinslee's life-sustaining treatment under the Texas Health & Safety Code infringes upon her right to due process.

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).

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 due process safeguards or protects 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.

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

Texas Health & Safety Code § 166.046 violates Tinslee's right to procedural due process by failing to provide an adequate venue for her 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 and without a record, an opportunity to be heard or a right of appeal. Finally, the law does not provide a reasonable time or process for a patient to be transferred.

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." *Marshall 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. *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454 (1989).

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's 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 Educ. v. Loudermill*, 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. *Id.* at 335.

In this case, Tinslee has not received due process. Tinslee's private interest affected is quite literally the most important interest there is - her life. The risk of an erroneous deprivation- death against her wishes and through Cook's actions - demands the greatest procedural safeguards. Surely, a quick "committee" meeting where participation is suspect and headed by those with a conflict of interest does not pass constitutional muster.

Under Texas Health & Safety Code § 166.046, a fair and impartial tribunal did not and could not hear Tinslee's case. "Ethics committee" members from the treating hospital cannot be fair and impartial when the propriety of giving Tinslee life-sustaining treatment must be weighed a potential economic loss to the very entity which provides those "ethics committee" members with privileges and a source of income. Members of 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 under section 166.046 when a hospital "ethics committee" hears the case of a patient within its own walls. The objectivity and impartiality essential to due process are nonexistent in such a hearing.

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 in this case and every case. For example, it does not contain or suggest any ascertainable standard for determining the propriety of continuing Tinslee's life-sustaining treatment or the propriety of the attending physician's refusal to honor Trinity's health-care decisions on behalf of her daughter. Thus, the statute is vague, ambiguous, and overbroad and should be declared unconstitutional.

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

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, the 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, Mo. Dep't of Health*, 497 U.S. 261, 269 (1990) (quoting *Union Pac. R.R. Co. v. Botsford*, 141 U.S. 250, 251 (1891)). "It cannot be disputed that the Due Process Clause protects an interest in life[.]" *Id.* 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 decision 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.

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 state law. When the final decision is rendered behind closed doors without a record or required evidentiary standards, and the Plaintiff is not allowed to challenge the evidence or present his or her 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.

3. Defendant has violated Tinslee's Civil Rights.

Section 1983 of Title 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.

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).

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 a 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 (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.

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); *McCollum*, 505 U.S. at 51-52. 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.

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

actor: (1) the extent to which the actor relies on governmental assistance or 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 "ethics committee" should be held to be a state actor: (1) The committees rely extensively on the state benefit of absolute immunity in determining whether a patient will receive life-sustaining medical treatment; (2) 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 (3) the patient's injury is aggravated by incidents of state authority because the state allows the committee to bind the hands of state authorities with respect to societal protections that would otherwise be available to the patient.

4. Injunctive Relief

The foregoing facts and authorities establish the imminent and irreparable injury that Cook's conduct poses and Tinslee's probable right to relief. For these reasons, Tinslee and her mother also request a temporary and permanent injunction, enjoining Cook from withdrawing life-sustaining treatment pursuant to Texas Health & Safety Code § 166.046.

VIII.
Probable Injury

Cook's action of discontinuing Tinslee's life-sustaining treatment makes it highly probable that she will die, resulting in imminent, irreparable harm to Tinslee for which there is no adequate remedy at law.

A. Imminent Harm

On October 31, 2019 at 11:45 p.m., Cook Children's Medical Center determined that Tinslee's medical treatment should be discontinued over the objection of her mother, after a period of ten days. Death to Tinslee is a certain consequence of that decision.

B. Irreparable Injury for which there is no adequate remedy at law.

If Cook is allowed to discontinue Tinslee's treatment, she will suffer the irreparable injury of almost certain death. Tinslee has no adequate remedy at law because damages cannot adequately compensate her or her mother for the loss of her life. *See Butnaru*, 84 S.W.3d at 204 ("An injury is irreparable if the injured party cannot be adequately compensated in damages or if the damages cannot be measured by any certain pecuniary standard."), citing *Canteen Corp. v. Republic of Tex. Props., Inc.*, 773 S.W.2d 398, 401 (Tex. App.—Dallas 1989, no writ).

IX.
Damages

Plaintiffs have suffered a denial of due process rights proximately causing actual and nominal damages, for which they sue Cook. In the alternative, plaintiffs pray for relief under section (g) of §166.046.

X.
Attorney Fees and Costs

Tinslee and her mother are entitled to their reasonable attorneys' fees and costs incurred in pursuit of this action under the common law and Texas Civil Practice and Remedies Code § 37.009 and 42 U.S.C. § 1988.

XI.
Conclusion and Prayer

In conclusion, in order to maintain the status quo of the subject matter of the litigation, until a hearing can be held on a temporary injunction—and subsequently, until a final hearing can be held on the merits of the case—Tinslee and her mother seek a temporary injunction, prohibiting Cook from any further actions toward discontinuing Tinslee's life-sustaining treatment.

Accordingly, Tinslee and her mother asks that this Court (a) set a date and time for a hearing on Tinslee's request for injunctive relief and order Cook to appear and show cause why an injunction should not issue as requested; (b) upon the conclusion of that hearing, convert the temporary restraining order into an injunction enjoining Cook from the activities listed above and setting a trial date; (c) issue a judgment declaring that Texas Health and Safety Code §166.046 is a violation of the due process requirements of the United States Constitution and the Texas Constitution; (d) awarding actual and nominal damages and attorneys' fees for violation of Tinslee's due process rights; and (e) grant Tinslee such other and further relief, both general and special, at law or in equity, to which she may show herself to be justly entitled.

Respectfully submitted,

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DECLARATION OF TRINITY LEWIS
UNDER PENALTY OF PERJURY

Pursuant to 28 U.S.C. § 1746 and Texas Civil Practice & Remedies Code §132.001, I hereby declare as follows:

1. My name is Trinity Lewis. I am over twenty (20) years of age. My date of birth is April 20, 1999 and my address is 4212 Little John Avenue Fort Worth, TX 76105, in the United States of America. I am of sound mind and fully competent to make this Declaration.

2. I am the mother of Tinslee Lewis and I have personal knowledge of the facts stated herein, and they are true and correct.

3. I have read the foregoing First Amended Petition and Request for Injunctive Relief. The facts, stated therein are within my personal knowledge and are true and correct.

4. I declare under penalty of perjury that the foregoing is true and correct.

Executed in Tarrant County, State of Texas, on the 10th day of December, 2019.

Trinity Lewis

Trinity Lewis

Certificate of Service

I hereby certify that a true and correct copy of the foregoing pleading has been served on all counsel of record or unrepresented parties, in accordance with Rule 21a of the Texas Rules of Civil Procedure, by email and express mail delivery.

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